NO. 27802

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,
v.
ELSIE T. PALAFOX, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 05-1-0280)

SUMMARY DISPOSITION ORDER
(By: Watanabe, Presiding Judge, Foley, and Nakamura, JJ.)

Defendant-Appellant Elsie T. Palafox (Palafox) appeals from the Judgment filed on February 1, 2006, in the Circuit Court of the First Circuit (circuit court).[1] Plaintiff-Appellee State of Hawaiʻi (the State) charged Palafox by indictment with one count of unauthorized entry into a motor vehicle (UEMV), in violation of Hawaii Revised Statutes (HRS) Section 708-836.5 (Supp. 1996).[2] The charge arose out of a parking lot dispute at Costco on October 28, 2004, during which Palafox allegedly attempted to punch the complainant, Sharie Tokumoto, through the driver's window of the complainant's car. After a jury-waived bench trial, Palafox was found guilty as charged. The circuit court sentenced Palafox to five years of probation and ordered her to pay a $105 Crime Victim Compensation Fee.

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[1] The Honorable Michael D. Wilson presided.

[2] At the time of the alleged offense, Hawaii Revised Statutes (HRS) Section 708-836.5 (Supp. 1996) provided in relevant part as follows:

> (1) A person commits the offense of unauthorized entry into motor vehicle if the person intentionally or knowingly enters or remains unlawfully in a motor vehicle with the intent to commit a crime against a person or against property rights.

On appeal, Palafox argues that:

1) the circuit court erred in denying her motions for judgment of acquittal because HRS § 708-836.5, which sets for the UEMV offense, does not apply to Palafox's alleged conduct of entering the complainant's car with the intent to assault or terrorize the complainant;

2) there was insufficient evidence to prove that Palafox entered or remained unlawfully in the complainant's vehicle because the complainant "invited" Palafox to enter the vehicle by provoking Palafox;

3) the circuit court committed plain error by permitting the prosecutor to: ask irrelevant, leading, and argumentative questions; adduce inadmissible hearsay evidence; and misstate facts that were not in evidence;

4) the circuit court erred when it permitted Officer Tiwanak to provide inadmissible hearsay that the complainant told him "that a female tried to punch [the complainant] through [the complainant's] open driver's window;"

5) the prosecutor engaged in misconduct by asking irrelevant, leading, and argumentative questions; adducing inadmissible hearsay evidence; and misstating facts that were not in evidence;

6) Palafox's trial counsel provided ineffective assistance by failing to: a) object to the prosecutor's irrelevant, leading, and argumentative questions, object to inadmissible hearsay evidence, and correct the prosecutor's misstatement of facts not in evidence; b) file a motion to suppress Palafox's statement to Officer Tsue that "[i]f [the complainant is] saying I threatened her, yes, I did;" and c) file a motion to dismiss the charge in the indictment as a *de minimus* infraction under HRS § 702-236 (1993); and

7) the cumulative effect of the alleged errors violated her right to a fair trial.

I.

After a careful review of the record and the briefs filed by the parties, we affirm. We resolve the arguments raised by Palafox on appeal as follows:

1) We reject Palafox's claim that HRS § 708-836.5 does not apply to conduct that consists of entering into a motor vehicle with the intent to assault or terrorize its occupant. In State v. Lagat, 97 Hawai'i 492, 40 P.3d 894 (2002), the Hawai'i Supreme Court held that the precise claim raised by Palafox was without merit. Id. at 498-500, 40 P.3d at 900-02 (holding that HRS § 708-836.5 unambiguously applied to the defendant's conduct of intentionally entering a motor vehicle with intent to assault one of its occupants).

2) We conclude that, when viewed in the light most favorable to the prosecution, State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996), there was sufficient evidence to support Palafox's conviction. This includes substantial evidence to show that Palafox intentionally entered the complainant's vehicle unlawfully and that Palafox's entry had not been invited.

3) Palafox contends that the circuit court committed plain error by permitting the prosecutor to: ask irrelevant, leading, and argumentative questions; adduce inadmissible hearsay evidence; and misstate facts that were not in evidence. We disagree. As a general rule, "evidence to which no objection has been made may properly be considered by the trier of fact and its admission will not constitute ground for reversal." State v. Naeole, 62 Haw. 563, 570, 617 P.2d 820, 826 (1980). Accordingly, an appellant is usually prohibited "from complaining for the first time on appeal of error to which he [or she] has acquiesced or to which he [or she] failed to object." Price v. AIG Hawai'i Ins. Co., 107 Hawai'i 106, 111, 111 P.3d 1, 6 (2005).

> There are sound reasons for the rule. It is unfair to the trial court to reverse on a ground that no one even suggested might be error. It is unfair to the opposing party, who might have met the argument not made below. Finally, it does not comport with the

> concept of an orderly and efficient method of administration of justice.

Id. In addition, in a bench trial, "it is presumed that the presiding judge will have disregarded the incompetent evidence and relied upon that which was competent." State v. Antone, 62 Haw. 346, 355, 615 P.2d 101, 108 (1980).

Based on a review of the record, we conclude that the prosecutor's questions, comments, and elicitation of evidence of which Palafox complains were either unobjectionable or, if improper, did not affect Palafox's substantial rights. Thus, these matters did not constitute plain error. See State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999) (stating that the appellate court's "power to deal with plain error is one to be exercised sparingly and with caution . . .").[3]

4) Palafox argues that the circuit court erred in permitting inadmissible hearsay when the court overruled her objection and allowed Officer Tiwanak to testify that the complainant told him "that a female tried to punch [the complainant] through [the complainant's] open driver's window." Officer Tiwanak's testimony was cumulative of the complainant's own testimony at trial that Palafox attempted to punch the complainant in the head through the window. We conclude, especially in the context of a bench trial, see Antone, 62 Haw. at 355, 615 P.2d at 108, that any error in admitting Officer Tiwanak's testimony was harmless beyond a reasonable doubt. See State v. Crisostomo, 94 Hawai'i 282, 290, 12 P.3d 873, 881 (2000) (holding that the improper admission of hearsay evidence, which was cumulative of other evidence properly admitted at trial, was harmless).

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[3] We note that Defendant-Appellant Elsie T. Palafox (Palafox) includes two 911 calls made by the complainant as part of the "inadmissible hearsay evidence" Palafox claims the trial court committed plain error in admitting. Palafox, however, stipulated to the admission of the two 911 calls. She thus waived the right to challenge this evidence on appeal, even on the basis of plain error review. See People v. One 1999 Lexus, 855 N.E.2d 194, 200 (Ill. App. Ct. 2006).

5) To support her prosecutorial misconduct and ineffective assistance of counsel claims, Palafox relies on the same matters she cited to support her contention that the circuit court erred in permitting the prosecutor to ask irrelevant, leading, and argumentative questions, to adduce inadmissible hearsay, and to misstate facts. She claims that the prosecutor engaged in misconduct by asking objectionable questions, adducing inadmissible evidence, and making improper remarks, and that her counsel was ineffective for failing to object to these actions. We have already determined that these matters either did not involve error or were harmless beyond a reasonable doubt. Thus, Palafox is not entitled to any relief on her claims of prosecutorial misconduct or ineffective assistance of counsel that are based on these same matters.

6) As additional grounds for her claim of ineffective assistance of counsel, Palafox argues that her trial counsel provided ineffective assistance by: 1) stipulating to the admission of the complainant's two 911 calls; 2) failing to file a motion to suppress Palafox's statement to Officer Tsue that "[i]f [the complainant is] saying I threatened her, yes, I did;" and 3) failing to file a motion to dismiss the charge in the indictment as a *de minimus* infraction under HRS § 702-236.

The State argues that the complainant's two 911 calls would have been admissible as excited utterances under Hawaii Rules of Evidence Rule 803(b)(2) (1993), and Palafox provides no explanation of why the 911 calls would not have been admissible on this basis. Palafox's claim that the admission of the complainant's 911 calls violated Palafox's confrontation rights is without merit as the complainant testified at trial and Palafox was afforded a meaningful opportunity to cross-examine the complainant about the calls. State v. Fields, 115 Hawai'i 503, 517, 528, 168 P.3d 955, 969, 980 (2007). As to Palafox's statement to Officer Tsue, there is no showing that Palafox's statement was the product of a custodial interrogation or that the statement was suppressible. Moreover, Palafox did not

dispute that she and the complainant were involved in a heated argument and indeed testified that she challenged the complainant to a fight. As to her *de minimus* infraction argument, Palafox fails to cite any convincing authority to show that she would likely have prevailed on a motion to dismiss the charge in the indictment as a *de minimus* infraction. We conclude that Palafox has failed to meet her burden of showing that she was denied the effective assistance of counsel. See Antone, 62 Haw. at 348-49, 615 P.2d at 104.

7. We reject as without merit Palafox's claim that the cumulative effect of the alleged errors violated her right to a fair trial.

II.

We affirm the February 1, 2006, Judgment of the circuit court.

DATED: Honolulu, Hawai'i, at November 29, 2007.

On the briefs:

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for Defendant-Appellant

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City and County of Honolulu
for Plaintiff-Appellee

Corinne K.A. Watanabe
Presiding Judge

Daniel R. Foley
Associate Judge

Craig H. Nakamura
Associate Judge