

NO. 29023

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
HONG VAN HO, Defendant-Appellant

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 06-1-1179)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Acting C.J., Nakamura and Fujise, JJ.)

Defendant-Appellant Hong Van Ho (Ho) appeals from the January 22, 2008 Judgment of Conviction and Sentence of the Circuit Court of the Third Circuit (circuit court)¹ for attempted murder in the second degree in violation of Hawaii Revised Statutes (HRS) § 707-701.5 and § 705-500 (1993).

Ho argues that the prosecution erred in presenting argument on the law of self-induced intoxication (SII) to the jury because it could have led the jury to believe that evidence of SII could not be considered in the defense of extreme mental or emotional disturbance (EMED). Ho raises three instances where this error occurred and was preserved: (1) the use by the prosecution of a PowerPoint slide (slide) that contained the alleged error; (2) the prosecution's argument on SII during closing argument; and (3) the circuit court's denial of Ho's motion for new trial on the same grounds.

After a careful review of the issues raised, arguments advanced, applicable law, and the record in the instant case, we resolve Ho's appeal as follows:

¹ The Honorable Virginia Lea Crandall presided.

Ho does not challenge the circuit court's instructions to the jury on SII or EMED. Assuming, *arguendo*,² that the prosecution's slide and corresponding argument was an incorrect statement of the law, the error was harmless.

First, the circuit court issued appropriate curative instructions. During the reading of jury instructions, the court told the jurors that they must follow the law in arriving at their verdict, and that "[y]ou should consider [counsel's] arguments to you but you are not bound by their recollections or interpretations of the evidence." During closing argument, the circuit court admonished the jury to "follow the law as instructed to them by the court," rather than the argument of counsel. "[E]ven though a prosecutor's remarks may have been improper, any harm that might have been caused can be cured by the court's instructions to the jury. In such cases we have applied[] . . . the ordinary presumption that the jury abided by the court's admonition to disregard the statement." State v. Kahalewai, 55 Haw. 127, 129, 516 P.2d 336, 338 (1973); see also State v. Mara, 98 Hawai'i 1, 17, 41 P.3d 157, 173 (2002). Thus, any error in the prosecution's argument was cured by these instructions.

Moreover, both parties were able to present their arguments regarding the use of SII to the jury. A significant portion of the prosecution's argument concerned how the jury should treat evidence of Ho's intoxication in the context of the EMED defense. Although the prosecution did at times state that SII is not a defense or an excuse and reinforced this argument by using the slide, she also argued why Ho's reasons for stabbing his wife, including his SII, failed to constitute EMED. Thus, to the extent the prosecution presented an analysis of the SII

² We note that, subsequent to the trial in this case, we decided State v. Pavich, 119 Hawai'i 74, 193 P.3d 1274 (App. 2008) and held that the defendant there could not rely on a self-induced mental disturbance in asserting an extreme mental or emotional disturbance under HRS § 702-230. However, in light of the facts of this case we need not decide whether a defendant may rely on SII in asserting an EMED defense.

evidence in the context of EMED, the prosecution's argument did not lead the jury to believe that it could not consider evidence of Ho's SII in deciding whether Ho proved the EMED defense.

Ho's counsel also presented his position regarding the use of the evidence of SII in considering the EMED defense. Thus, the prosecution's argument was not left unanswered.

Finally, the prosecution's evidence was strong. The complaining witness, Ho's wife, testified at trial. Her daughter, also a percipient witness, testified as well. Both told the jury that Ho said he would kill the complaining witness then took a knife from the kitchen and repeatedly stabbed the complaining witness. The treating physician testified to the multiple stab wounds to both shoulders and down her arms, a single, five-centimeter stab wound to the chest penetrating the left lung, and at least eight lacerations to the face of the complaining witness. The doctor also testified that there was a "significant blood loss" and that the chest wound "didn't look like a straight forward [sic] stab wound[.] . . . It was probably more. It's possible it was twisting of the knife or the force upon the knife."

By contrast, Ho testified that during an argument with his wife, he placed a kitchen knife in front of her, daring her to kill him and was surprised that she picked it up. Because he was stressed by the bad day he had at work, supervising the making of spam musubis, sleepy because he had been drinking beer, irritated because his wife prevented him from sleeping, and angered when she insulted him and his family, he took the knife away from his wife, cutting himself in the process, but did not remember what occurred thereafter.

In light of the nature of the challenged argument, the curative instruction, the full argument presented by both parties

and the strength of the evidence against Ho, we conclude the error complained of was harmless.

Accordingly, we affirm the January 22, 2008 Judgment of Conviction and Sentence filed in the Circuit Court of the Third Circuit.

DATED: Honolulu, Hawai'i, June 26, 2009.

On the briefs:

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for Defendant-Appellant.

Corinne K.A. Watanabe
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Craig W. Nakamura
Associate Judge

Auna D. Suji
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