

NO. 29170

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JOSEPH MATTSON, III, Defendant-Appellant

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STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 07-1-1984)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Joseph Mattson, III (Mattson) appeals from the judgment entered by the Circuit Court of the First Circuit (circuit court)¹ on April 22, 2008, convicting and sentencing him for terroristic threatening in the first degree in violation of Hawaii Revised Statutes (HRS) § 707-716(1)(e) (Supp. 2008).²

¹ The Honorable Randal K. O. Lee presided.

² HRS § 707-716(1)(e) currently provides, as it did at the time Mattson violated the statute, in relevant part, as follows:

Terroristic threatening in the first degree. (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:

. . . .

(e) With the use of a dangerous instrument.

(2) Terroristic threatening in the first degree is a class C felony.

Pursuant to HRS § 707-715 (1993), the term "[t]erroristic threatening" is defined as follows:

Terroristic threatening, defined. A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony:

(1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person; or

(continued...)

Mattson contends that (1) the circuit court erred in allowing the prosecutor to comment during closing argument that Mattson's presence during trial enabled him to tailor his testimony to match the evidence; (2) the prosecutor's improper argument amounted to prosecutorial misconduct and deprived him of his right to due process and a fair trial, in violation of article I, sections 5 and 14 of the Hawai'i Constitution, and the fifth and fourteenth amendments to the U.S. Constitution; and (3) the circuit court plainly erred in failing to instruct the jury that Mattson had a constitutional right to be present throughout trial and the jury must not draw any unfavorable inference regarding Mattson's credibility simply on the basis of his presence at trial.

After carefully reviewing the record and the briefs submitted by the parties and upon duly considering the arguments advanced, the issues raised, and the applicable case law and statutes relevant to the arguments advanced, we disagree with Mattson and hold as follows:

(1) The United States Supreme Court's decision in Portuondo v. Agard, 529 U.S. 61 (2000), forecloses Mattson's claim that the prosecutor's argument violated his rights under the U.S. Constitution.

(2) The prosecutor's argument in this case was not improper under the Hawai'i Constitution. See State v. Apilando, 79 Hawai'i 128, 142, 900 P.2d 135, 149 (1995) (holding that "when a defendant takes the stand to testify, his or her credibility can be tested in the same manner as any other witness," and therefore, it was not improper for the prosecutor to comment that "because [the defendant] had the highest stake in the outcome of the case, he had the greatest motive to lie").

²(...continued)

(2) With intent to cause, or in reckless disregard of the risk of causing evacuation of a building, place of assembly, or facility of public transportation.

(3) We decline to conclude that the circuit court committed plain error in failing to instruct the jury, *sua sponte*, that Mattson had a constitutional right to be present throughout trial and the jury must not draw any unfavorable inference regarding Mattson's credibility simply on the basis of his presence at trial.

The judgment is affirmed.

DATED: Honolulu, Hawai'i, May 21, 2009.

On the briefs:

James S. Tabe,
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State of Hawai'i,
for Defendant-Appellant.

Corinne K. A. Watanabe

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Anne K. Clarkin,
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Auna O'Su Fujino