

*** NOT FOR PUBLICATION ***

NO. 25374

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

NORMA T. YARA
CLERK APPELLATE COURTS
STATE OF HAWAII

2005 DEC 20 AM 10:37

FILED

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

MARK WADE DUNSE, Defendant-Appellant

APPEAL FROM THE THIRD CIRCUIT COURT
(CR. NO. 96-162K)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant-appellant Mark Wade Dunse (Dunse) appeals from the September 4, 2002 final judgment of the third circuit court, the Honorable Ronald Ibarra presiding, convicting Dunse of murder in the second degree in violation of Hawai'i Revised Statutes (HRS) § 707-701.5 (1993)¹ and sentencing him to life imprisonment without possibility of parole pursuant to HRS § 706-657 (1993).² On appeal, Dunse contends that (1) HRS § 706-657 as interpreted by this court is unconstitutional insofar as

¹ HRS § 707-701.5 provides:

Murder in the second degree. (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person. (2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656.

² HRS § 706-657 provides in relevant part:

The court may sentence a person who has been convicted of murder in the second degree to life imprisonment without possibility of parole under section 706-656 if the court finds that the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. As used in this section, the phrase especially heinous, atrocious, or cruel, manifesting exceptional depravity means a conscienceless or pitiless crime which is unnecessarily torturous to a victim.

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it has denied Dunse his rights to (a) due process; (b) a jury trial; (c) a republican form of government; and (d) to be free from ex post facto laws. Dunse further contends that (2) due to prosecutorial misconduct, i.e., the prosecution's destruction of and failure to preserve and produce both exculpatory evidence and expert opinion evidence it intended to introduce at trial, Dunse's sentence should be amended to life with parole; (3) the trial court erred in (a) failing to perform a de novo review of the jury's findings and (b) improperly refusing to instruct the jury on the element of "consciousness of the victim"; and (4) that there was insufficient evidence presented at either his 1997 trial or 2002 sentencing proceeding to support a finding that the victim suffered unnecessary torture and that the defendant intentionally or knowingly inflicted unnecessary torture on the victim.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we affirm the judgment and sentence of the circuit court pursuant to our holding in State v. Young, 93 Hawai'i 224, 999 P.2d 230 (2000). Dunse's constitutional arguments are without merit. The alleged prosecutorial misconduct was harmless beyond a reasonable doubt. The trial court did not err either in its instructions to the jury or in its review of the jury's findings. Considering the evidence presented to the trier of fact regarding the amount and types of injuries sustained by the victim and the reasonable inferences that the jury could draw therefrom, the prosecution presented credible evidence of sufficient quality and probative

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value in both the 1997 and 2002 proceedings to allow triers of fact of reasonable caution to support the conclusion that the murder was especially heinous, atrocious, or cruel. Therefore,

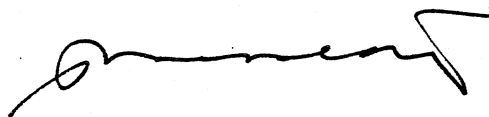
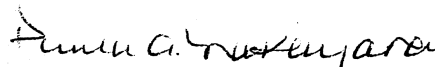

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, December 20, 2005.

On the briefs:

David Glenn Bettencourt for
the defendant-appellant
Mark Wade Dunse

Dale Yamada Ross, Deputy
Prosecuting Attorney, for
the plaintiff-appellee
State of Hawai'i



Samoa E. Duffy, Jr.