

NO. 22972

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
NATHAN ORTIZ, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 99-0071)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Foley, JJ.)

Defendant-Appellant Nathan Ortiz (Ortiz) appeals the November 15, 1999, judgment of the circuit court. Ortiz was found guilty of:

Unlawful Imprisonment in the Second Degree,<sup>1</sup> in violation of Hawaii Revised Statutes (HRS) § 707-722 (1993) (Count 1);

Terroristic Threatening in the Second Degree,<sup>2</sup> in violation of HRS § 707-717 (1993) (Count 2);

Theft in the Second Degree, in violation of HRS § 708-831(1)(a) (Supp. 2000) (Count 3); and

Attempted Assault in the Second Degree,<sup>3</sup> in violation of HRS § 707-711 (1993) (Count 4).

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<sup>1</sup> Ortiz was charged with Kidnapping (HRS § 707-720(1)(e) (1993)), but found guilty of the included offense.

<sup>2</sup> Ortiz was charged with Terroristic Threatening in the First Degree (HRS § 707-716(1)(d) (1993)), but found guilty of the included offense.

<sup>3</sup> Ortiz was charged with Attempted Assault in the First Degree (HRS §§ 705-500 & 707-710 (1993)), but found guilty of the included offense.

On Counts 1 and 2, Ortiz was sentenced to a one-year term of imprisonment for each count; on Counts 3 and 4, he was sentenced to a ten-year term of imprisonment for each count. All sentences were to run concurrently. Ortiz was also ordered to pay \$192.32 in restitution.

Ortiz contends that the circuit court erred in not dismissing the indictment<sup>4</sup> because the state judiciary personnel<sup>5</sup> failed to comply with HRS Chapter 612 (which governs jury selection) or, in the alternative, that his trial counsel was ineffective. Ortiz further contends the circuit court erred in ruling that a district court judge had jurisdiction and authority to preside over his felony jury trial and erred in refusing to compel discovery of a prosecution recording and a victim counselor's notes. We disagree with Ortiz's contentions and affirm the November 15, 1999, circuit court judgment.

#### **I. BACKGROUND**

Son Kyu Pak (Pak) testified that she met Ortiz at hair design school in 1997 and that they dated for about six months in 1998. Pak was scheduled to testify for Ortiz in his trial in an unrelated case on January 5, 1999. She did not go to court that

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<sup>4</sup> Although Ortiz argues that his indictment should have been dismissed, Ortiz was charged by complaint, not indictment (there was no grand jury).

<sup>5</sup> In arguing a violation of HRS Chapter 612, Ortiz uses the words "State" and "judiciary" to mean the same entity. To avoid confusion, we will use "judiciary personnel" throughout.

day because Ortiz's attorney had called and told her she did not have to appear. Later the same day, Ortiz called Pak and asked her to meet him at Restaurant Row. Pak testified that when she met with Ortiz he was "kinda angry" because she had not come to court. After drinking at Restaurant Row, Ortiz wanted to go drink some more. Ortiz drove Pak in her car to another bar, had a drink, and then drove her to where his car was parked. Ortiz wanted to continue drinking, but Pak said no. Ortiz then took off in Pak's car and left Pak to follow him in his car to the Wisteria restaurant.

Pak testified that at Wisteria, Ortiz parked Pak's car, walked over to his car, and wanted Pak to go drink with him. Pak said no and tried to leave the car. Ortiz pushed Pak back into his car, got in, and drove off towards the North Shore. Pak told Ortiz she needed to use the restroom, thinking that she could use the opportunity to escape. Ortiz pulled over at Kenny's restaurant. He took Pak's purse, locked it in his car trunk, followed Pak to the restaurant, and waited outside so she could not escape. When Pak came out and asked for her purse back, Ortiz said no and became angry.

Pak testified that after Ortiz pushed her back in the car, he began hitting her and pulling her hair as he drove the car up Likelike Highway to the mountains. Ortiz's car began to have problems, and he pulled off the road. Pak tried to run

away, but Ortiz put her back in the car and hit her, choked her, and pulled her hair. Ortiz turned the car around and headed toward Wahiawa. Ortiz's car was still having problems so he pulled over at his son's apartment in Wahiawa, where Pak again tried to make a second escape. Ortiz chased after Pak, pushed her back in the car, hit her, and slammed the car door on her right ankle. Pak was screaming and crying. Ortiz then took Pak out of the car, hit her in the back, and forced her to walk to into his son's apartment. Once in the apartment, Ortiz pushed Pak into the bathroom and continued to hit her, grabbed her hair, threw her to the floor, threatened to kill her, bit her face and nose, urinated on her head and face, and put a knife up to her face. Eventually Ortiz passed out and Pak finally escaped.

Ortiz was arrested and charged with Kidnapping (HRS § 707-720(1)(e)) (Count 1), Terroristic Threatening in the First Degree (HRS § 707-716(1)(d)) (Count 2), Theft in the Second Degree (HRS § 708-831(1)(a)) (Count 3), and Attempted Assault in the First Degree (HRS §§ 705-500 and 707-710) (Count 4).

On August 9, 1999, at 8:47 a.m., prior to the start of Ortiz's jury trial, the circuit court heard motions in limine, including Ortiz's objection to the assignment of a district court judge presiding over his felony trial. Ortiz unsuccessfully argued he had a constitutional and statutory right to have a circuit court judge preside over his felony trial.

The jury's voir dire oath was administered at 9:50 a.m. At 11:07 a.m., after jury selection had started, Ortiz filed a Motion in Limine to Dismiss Indictment with Prejudice Because of Substantial Failure to Comply with Chapter 612, Hawai'i Revised Statutes. After the noon recess, the court noted at 1:30 p.m. that it had received Ortiz's motion to dismiss after jury selection had started. The court ruled it would not hear the motion because "it [was] extremely untimely." Ortiz's counsel argued that the basis for the motion only arose after he had looked at the jury venire questionnaire and then had a question as to "whether or not [the jury venire] really [was] a cross-section." The court reiterated it would not hear the motion. At 3:37 p.m., the trial oath was administered to the selected trial jurors.

The trial proceeded on August 10, 12, 13, and 16, 1999. During cross-examination, Pak testified that she had met with a prosecutor and Cindy Keller (Keller) (a victim counselor from the prosecutor's office), who interviewed Pak about what had happened in this case. Keller was taking notes as Pak spoke. Pak believed a tape recording was made of this interview.

When asked by Ortiz's counsel if she had reviewed her statement made to the prosecutor and Keller, Pak answered yes. Ortiz's counsel then moved for the production of Pak's interview with the prosecutor and Keller pursuant to Hawai'i Rules of Penal

Procedure (HRPP) Rule 16. The State responded that the taped conversation with Pak was a "prosecutorial work product." The State added that the taped interview was never transcribed and Pak never listened to the tape recording. The State argued that Pak misunderstood Ortiz's counsel's question. The only transcript available and provided to Pak was her preliminary hearing transcript. Pak was also provided statements she gave to Detective Woo and Officer Cagulada. Pak was never provided with her recorded interview with the prosecutor and Keller. The circuit court denied Ortiz's counsel's request to listen to the taped interview or have the court review the tape in camera. The State rested after Pak's testimony, and the court denied Ortiz's motion for judgment of acquittal.

## **II. STANDARDS OF REVIEW**

### **A. Questions of Law**

The determination as to whether a district court judge was authorized to sit as a circuit court judge at a felony trial is a question of law which we review de novo under the right/wrong standard. State v. Wilson, 92 Hawai'i 45, 48, 987 P.2d 268, 271 (1999).

### **B. Questions of Fact**

The findings of fact in the circuit court's pretrial rulings (denying Ortiz's motions to dismiss and compel evidence) are reviewed according to the clearly erroneous standard.

A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made.

Id. (quoting State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995)).

### **C. Ineffective Assistance**

We review Ortiz's claim that his trial counsel was ineffective using the following analysis:

When an ineffective assistance of counsel claim is raised, the question is: "When viewed as a whole, was the assistance provided to the defendant 'within the range of competence demanded of attorneys in criminal cases?'" Additionally,

the defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.

State v. Janto, 92 Hawai'i 19, 31, 986 P.2d 306, 318 (1999)

(quoting State v. Edwards, 81 Hawai'i 293, 300, 916 P.2d 703, 710 (1996)).

### **D. Harmless Error**

Errors made by the trial court are reviewed under a "harmless beyond a reasonable doubt" analysis. State v. Chun, 93 Hawai'i 389, 393, 4 P.3d 523, 527 (2000). "In applying the 'harmless beyond a reasonable doubt' standard, the court is required to examine the record and determine whether there is a reasonable possibility that the error complained of might have

contributed to the conviction." Id. (brackets omitted) (quoting State v. Malufau, 80 Hawai'i 126, 131, 906 P.2d 612, 617 (1995)).

### III. DISCUSSION

#### A. The Circuit Court Did Not Err in Refusing to Dismiss Charges Against Ortiz.

The circuit court refused to hear Ortiz's motion to dismiss charges against him because the motion was "extremely untimely." Ortiz contends the circuit court erred in not hearing his motion because it involved substantial constitutional issues regarding a fair and impartial jury composed of a "cross-section" of the community. In his motion, Ortiz challenged the authority of the persons compiling and the methods used in compiling the master list and/or master jury wheel, and the authority of the persons and methods used to select jurors from those lists.

The Hawai'i Supreme Court has held:

The selection of a jury from a representative cross-section of the community is an essential component of the right to an impartial jury guaranteed by the sixth amendment to the United States Constitution[.]

In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

State v. Richie, 88 Hawai'i 19, 41, 960 P.2d 1227, 1249 (1998) (citations omitted) (quoting Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 668, (1979)).



Hawai'i Revised Statutes § 612-23 (1993) ("Challenging compliance with selection procedures") provides "the exclusive means by which a person accused of a crime . . . may challenge a jury on the ground that the jury was not selected in conformity with [Chapter 612]." HRS § 612-23(c). To obtain relief under HRS § 612-23, the moving party must show substantial failure to comply with the law and resulting prejudice. State v. Villeza, 85 Haw. 258, 265, 942 P.2d 522, 529 (1997).

A motion to challenge the composition of a trial jury under Chapter 612 must be made "before the trial jury is sworn to try the case." HRS § 612-23(a). It must be made "[p]romptly after the moving party discovered or by the exercise of diligence could have discovered the grounds therefor." Id. Ortiz filed his motion at 11:07 a.m. on August 9, 1999. The jury pool's voir dire oath was administered that day at 9:50 a.m., and the selected jurors' trial oath was administered the same day at 3:37 p.m. Ortiz's motion appears to have been timely and should have been heard by the circuit court.

However, Ortiz's motion made no showing of prejudice resulting from the alleged substantial failure of judiciary personnel to comply with HRS Chapter 612. (See discussion infra.) Therefore, the circuit court's refusal to hear Ortiz's motion was harmless error. Chun, 93 Hawai'i at 393, 4 P.3d at 527.

Ortiz argues that there was an improper delegation of the duty to compile the "master list" pursuant to HRS § 612-11. Hawai'i Revised Statutes § 612-11 (1993) states in relevant part:

**§612-11 Master list.** (a) Each year the clerk for each circuit shall compile a master list. The master list shall consist of all voter registration lists for the circuit, which shall be supplemented with names from other lists of persons resident therein such as lists of taxpayers and drivers' licenses. . . . Each person's name shall appear only once on the master list. [Emphasis added.]

Frieda Baker (Baker), the supervisor of the jury pool office (JPO) and a clerk for the First Circuit Court, testified in an unrelated matter<sup>6</sup> that a master wheel is created by using driver license, voter registration, and taxpayer lists that are compiled "from the various departments" and then submitted to the Judiciary's telecommunications department (T.I.S.D.), part of the Judiciary's Administrative Director's Office. T.I.S.D. eliminates duplicate names. The delegation by Baker of part of her duty to T.I.S.D. is not a "substantial failure to comply" with HRS § 612-23(b) and does not result in the systematic exclusion of a distinctive group that would lead to selection of a jury that was comprised of an unfair or unreasonable cross-section of the community.

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<sup>6</sup> Frieda Baker testified in a separate circuit court case, State v. Tyni, Cr. No 97-1789. The transcripts of her testimony regarding Chapter 612 became part of the record below because Ortiz's trial counsel attached them to the memorandum in support of the motion to dismiss for substantial failure to comply with Chapter 612. The State cites to the transcripts, noting that "[a]lthough these transcripts from February and March 1998 were never admitted into evidence, for the sake of argument they will be treated as offers of proof. RA at 219, [253]."

Ortiz argues that the voter lists from the state Office of Hawaiian Affairs (OHA) were not included in the master list for jury selection, allegedly violating HRS § 612-11. Ortiz claims this violation involves "substantial issues of a fair and impartial jury pool from which the jury in this case was chosen."

Hawai'i Revised Statutes § 13D-3 ("Qualifications of voters; registration"), pertaining to the Office of Hawaiian Affairs, was amended in 1985 to add subsection (e). Hawai'i Revised Statutes § 13D-3(e) (1993) expressly provides:

**§13D-3 Qualifications of voters; registration.**

. . . .  
(e) The clerk of each county shall amend the general county register to include therein any person, who on November 6, 1984, was registered to vote only for members of the board of trustees, to hereinafter be registered to vote in all elections held in the State.

The 1985 amendment addressed the omission of a small group of OHA registered voters from the general voter registration list:

Section 13D-3. The proposed amendment seeks to "grandfather" into the general county register those persons registered to vote only for the Office of Hawaii [Hawai'i] Affairs ("OHA") and who are not currently registered to vote for other state offices. After the inception of OHA, separate voter registration affidavits were required: one for the regular elections and one for OHA. However, before the 1982 elections, the law was changed requiring any registration or re-registration of OHA voters to be reflected in the general county register. In other words, the OHA-only category was eliminated for the 1982 elections.

However, there are still some 600 OHA-only voters statewide. Your Committee is in accord with the consolidation of this group into the general register and the elimination of this category.

Sen. Stand. Comm. Rep. No. 820, in 1985 Senate Journal, at 1240.

"This modification [adding section (e)] would facilitate the record-keeping and the general administration of elections by

eliminating this category of voters." Hse. Stand. Comm. Rep. No. 435 ¶(9), in 1985 House Journal, at 1191.

All names appearing on the OHA list were included on the general voter registration list and, therefore, on the "master list" for the jury pool at the time Ortiz's jury was selected in 1999. Ortiz's argument ignores HRS § 13D-3.

Ortiz makes other claims of substantial noncompliance with HRS Chapter 612: improperly delegating duties, failing to obtain court orders authorizing such delegations, failing randomization processes, failing to summon jurors through the Chief of Police or bailiff, and defectively excusing or deferring jurors without delivering such requests to the proper judge. Despite these claims, Ortiz makes no showing that these claimed acts of non-compliance resulted in the exclusion of a distinct group of people from the jury pool or that any of his claims, if true, would result in "the representation of [a] group in venires from which juries are selected [that] is not fair and reasonable in relation to the number of such persons in the community[,] and . . . that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." Ortiz fails to show any resulting prejudice from his claims of substantial noncompliance. Because Ortiz's motion to dismiss the charges against him failed to offer proof of any resulting

prejudice, the circuit court's refusal to hear the motion was harmless error. State v. Chun, supra.

**B. Ortiz's Trial Counsel Was Not Ineffective.**

When an ineffective assistance of counsel claim is made, the defendant has the burden of establishing "that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and . . . that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Janto, 92 Hawai'i at 31, 986 P.2d at 318. Ortiz contends that if his trial counsel did not file the motion to dismiss the charges against him in a timely manner, his counsel was ineffective. We conclude that Ortiz's trial counsel timely filed the motion to dismiss (see discussion p. 9, supra).

**C. The District Court Judge Properly Presided over Ortiz's Circuit Court Criminal Proceeding.**

Article VI, section 2 of the Hawai'i Constitution provides that "[t]he supreme court shall consist of a chief justice and four associate justices. The chief justice may assign a judge or judges of the . . . district court to serve temporarily on the circuit court." On October 29, 1996, the Chief Justice of the Hawai'i Supreme Court issued the following order entitled "Assignment of District and District Family Court Judges":

Pursuant to article VI, §§ 2 and 6 of the Constitution of the State of Hawai'i, I, Ronald T. Y. Moon, Chief Justice of the Supreme Court of the State of Hawai'i, do hereby assign the several district judges, including the several district family judges, of the First, Second, Third, and Fifth Judicial Circuits to temporarily preside in the circuit courts of their respective circuits, on an as needed basis, to hear such circuit court matters as shall be assigned by the appropriate Administrative Judge of the Circuit Court of that circuit, who shall coordinate such assignments with the Administrative Judge of the District Court or the Senior Family Judge of that circuit, as applicable; . . . This order shall be effective upon filing and shall remain in effect until otherwise ordered.

This order shall also apply to any judge who may hereinafter be appointed and qualified as a district or district family judge of the First, Second, Third, or Fifth Judicial Circuit and shall be effective immediately upon his or her signing of the oath of office. [Emphasis added.]

By this order, the Chief Justice assigned all district court judges of the First Circuit to serve temporarily, as needed, as circuit court judges when so assigned. Judge Fong was so assigned on July 27, 1999. Judge Fong properly presided over this case as an acting circuit court judge.

**D. The Prosecutor's Recorded Statement from Pak and the Victim Counselor's Notes Were Not Discoverable.**

Hawai'i Rules of Penal Procedure, Rule 16(b) provides in relevant part:

**Rule 16. DISCOVERY.**

. . . .

**(b) Disclosure by the Prosecution.**

(1) Disclosure of Matters Within Prosecution's Possession. The prosecutor shall disclose to the defendant or the defendant's attorney the following material and information within the prosecutor's possession or control:

(i) the names and last known addresses of persons whom the prosecutor intends to call as witnesses in the presentation of the evidence in chief, together with any relevant written or recorded statements, provided that statements recorded by the prosecutor shall not be subject to disclosure[.]

. . . .

(3) Definition. The term "statement" as used in subsection (b)(1)(i) and (c)(2)(i) of this rule means:

(i) a written statement made by the witness and signed or otherwise adopted or approved by the witness; or  
(ii) a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement. [Emphasis added.]

As a recording made by the prosecutor, Pak's interview with the victim counselor from the prosecutor's office (Keller) would be immune from discovery pursuant to HRPP Rules 16(b)(1)(i) and 16(b)(3)(ii). See also State v. Rapozo, 2 Haw. App. 587, 591 n.6, 637 P.2d 786, 789 n.6 (1981) (oral statement of witness recorded by prosecutor does not have to be disclosed).

Because Keller was not a witness in this case, her notes were not discoverable. HRPP 16(b)(1)(i).

The circuit court did not err in denying Ortiz's motion to compel discovery of Pak's recorded interview and Keller's notes of the same.

#### IV. CONCLUSION

The November 15, 1999, judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, April 11, 2001.

On the briefs:

David J. Gierlach  
for defendant-appellant.

Chief Judge

Bryan K. Sano,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for plaintiff-appellee.

Associate Judge

Associate Judge