

NOT FOR PUBLICATION

NO. 24091

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JOHN SING, Defendant-Appellant,
and MANUEL POCHE, also known as "Joe",
and DARRELL JACKSON, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 00-1-0247)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant John Sing (Sing) appeals from the January 18, 2001 Judgment entered in the Circuit Court of the First Circuit¹ convicting him of (1) Robbery in the Second Degree, as prohibited by Hawaii Revised Statutes (HRS) § 708-841 (1993), and (2) Assault in the Second Degree, as prohibited by HRS § 707-711 (1993), and sentencing him as follows: (1) incarceration for ten years, with a mandatory minimum of three years and four months, for Robbery in the Second Degree; (2) incarceration for five years, with a mandatory minimum of one year and eight months, for Assault in the Second Degree; and (3) to make payment of \$1,127.25 in restitution to the State of Hawai'i Department of Human Services. The terms of incarceration run concurrently. This appeal was assigned to this court on April 30, 2004.

¹

The Honorable Dan T. Kochi presided.

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Count III of the February 8, 2000 Complaint charged Sing with Robbery in the Second Degree of Danny Thompson (Thompson), HRS § 708-841(1)(a). Count VI charged Sing with Assault in the Second Degree of Koki Osaki (Osaki), HRS § 707-711(1)(d). The complaint also charged co-defendants Darrell Jackson (Jackson) and Manuel Poche (Poche) with the same offenses.² The complaint stemmed from incidents that occurred during the late evening of January 29, 2000 and the early morning of January 30, 2000. Prior to trial, Poche entered a plea of no contest. The jury trial of Sing and Jackson commenced on October 30, 2000.

1. Sing contends that the court erred by not allowing him to call Honolulu Police Department (HPD) Sergeant Gary Sunada and HPD Officer Doris Rohlf as defense witnesses. The record, however, shows that the testimony that Sing sought to elicit from Sergeant Sunada was not relevant, and the testimony that Sing sought to elicit from Officer Rohlf was inadmissible hearsay. Further, contrary to implications made by Sing, a severance of Sing's trial from Jackson's trial would not have changed these conclusions.

2. Sing contends that the court erred in granting the State's motion in limine to bar evidence of Thompson's prior theft convictions. The record, however, fails to reveal any

² Co-defendants Darrell Jackson and Manuel Poche are not parties to this appeal.

evidence that Thompson's prior theft convictions are admissible under the exception to Rule 609(a), Hawaii Rules of Evidence, Chapter 626, Hawaii Revised Statutes (1993).

3. Sing contends that the court erred in allowing photographs of Thompson's injuries to be introduced into evidence.

One of the elements of the offense of Robbery in the Second Degree is that the defendant "uses force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance[.]" HRS § 708-841(a). The photographs depicting Thompson's injuries, demonstrated the use of such force. Sing has failed to specify, and we are unable to discern, what, if any, unfairly prejudicial effect these photographs might have had. The circuit court's determination that the probative value of the photographs was not "substantially outweighed by the danger of unfair prejudice" was not an abuse of its discretion.

4. Sing contends that, when instructing the jury on the robbery count, the court erred by not providing instruction as to Assault in the Third and Fourth Degrees, and Theft in the Second Degree. We disagree. Assault is not a lesser included offense of robbery. State v. Arlt, 9 Haw. App. 263, 268, 833 P.2d 902, 905 (1992); State v. Doi, 6 Haw. App. 115, 116, 711 P.2d 736, 737 (1985). During the settlement of jury

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instructions, the following was stated:

[PROSECUTOR]: We discussed . . . the Court's decision not to give a lesser offense to Robbery in the Second Degree. My understanding is that the Court found that a rational jury could not acquit of the Robbery in the Second Degree and convict of any of the lesser theft offenses based on the evidence

THE COURT: That's correct.

The court's decision was right and defense counsel for both Sing and Jackson agreed with it.

5. Although he did not file a Hawai'i Rules of Penal Procedure Rule 29 motion for a judgment of acquittal, Sing contends that the court erred in convicting him of Robbery in the Second Degree of Thompson and Osaki³ because

there is conclusive evidence that nothing was taken from either Danny Thompson or Koki Osaki. Hence, the case for robbery must rest upon evidence beyond of [sic] reasonable doubt of attempted robbery. Not just assault. Given the fact that Koki Osaki had money on him and it was not searched for, demanded or taken, there is insufficient evidence of even attempted robbery. And his shirt would have come undone during the tussle. But it was not taken.

In the case of Danny Thompson, he admitted he had no money and the bag, which only he saw was empty. What Robbery. There is only evidence, ample evidence of assault in the 3rd or maybe 2nd degree here[.]

When a defendant fails to file a motion for judgment of acquittal within the prescribed time limits or fails to renew a motion for judgment of acquittal, the appellate court will review the sufficiency of the evidence under the plain error standard of

³ Notwithstanding the fact that Defendant-Appellant John Sing (Sing) was convicted of Assault in the Second Degree of Koki Osaki (Osaki), Sing argues at length that there was insufficient evidence to support a conviction of Robbery in the Second Degree of Osaki. Notwithstanding the fact that Sing was convicted of Robbery in the Second Degree of Thompson and Assault in the Second Degree of Osaki, Sing argues that the court erred in finding Sing guilty of both robbery and assault because "[t]he Assault is an essential element of Robbery, hence it is duplicitous to convict Defendant Sing of both Robbery 2nd and Assault 2nd on the same set of facts."

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review. State v. Chen, 77 Hawai'i 329, 333, 884 P.2d 392, 396 (App.), cert. denied, 77 Hawai'i 489, 889 P.2d 66 (1994). In this instance, we conclude that no error occurred.

HRS § 708-841(a) specifies that a person commits the offense of Robbery in the Second Degree if, in the course of committing theft, the person "uses force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance[.]" The record contains substantial evidence that Sing, Jackson, and Poche used physical force to overcome Thompson's physical resistance in an attempt to take money from him. The fact that Thompson had no money to take is irrelevant. HRS § 708-842 specifies that an act is considered to be "in the course of committing a theft" when it occurs "in an attempt to commit theft[.]"

Therefore, in accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

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IT IS HEREBY ORDERED that the January 18, 2001 Judgment is affirmed.

DATED: Honolulu, Hawai'i, January 13, 2005.

On the briefs:

Mark Yuen,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee

Chief Judge

Associate Judge

Andre` S. Wooten
for Defendant-Appellant

Associate Judge