

NO. 26503

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

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E.N. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

STATE OF HAWAI'I, Plaintiff-Appellee, v.
EVAN KAKUGAWA, Defendant-Appellant,
and

JASON YOSHIMURA, BRANDEN KAKUGAWA, DON CABINIAN, and
LAMAAR RICHARDSON, also known as Lamaar Silva, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-2624)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Evan Kakugawa (Kakugawa) appeals from the Judgment filed on March 9, 2004 in the Circuit Court of the First Circuit (circuit court). After a jury-waived trial, the Honorable Marie N. Milks presiding (Judge Milks), the circuit court found Kakugawa guilty of:

Count I: Murder in the Second Degree, in violation of Hawaii Revised Statutes (HRS) §§ 707-701.5 (1993) and 706-656 (1993 & Supp. 2005); and

Count II: Attempted Murder in the Second Degree, in violation of HRS §§ 705-500 (1993), 707-701.5, and 706-656.

The circuit court sentenced Kakugawa to life imprisonment with the possibility of parole on each of Counts I and II, said terms to run concurrently. The circuit court also ordered Kakugawa to pay a free-standing order of restitution in the amount of

\$10,869.05 on Count I, jointly and severally with his co-defendants, and waived its ordered \$1,000 Crime Victim Compensation Fee due to Kakugawa's inability to pay.

On appeal, Kakugawa argues:

(1) His right to confrontation was violated when the circuit court relied upon the testimony of Brandie Gouveia (Gouveia), who did not testify at Kakugawa's trial.

(2) The circuit court erred by using incorrect criteria to determine the state of mind for murder. In its oral ruling, Kakugawa notes, the circuit court found that "any reasonable person knows that a kick to the head of a person can result in death." However, he maintains, the court was referring to the mens rea for a reckless or negligent state of mind, not the intentional or knowing states of mind that are required for murder and attempted murder.

(3) There was a lack of substantial evidence that he had the requisite intent for accomplice liability.

(4) The circuit court erred in denying his motion for new trial because based on the statement made by Judge Milks that the case "didn't sound like murder to me," Kakugawa's attorney, Richard Hoke (Hoke), advised Kakugawa to waive and he did waive his right to jury trial.

(5) Judge Milks erred in failing to sua sponte recuse herself. He asserts that when Judge Milks said during a pretrial conference that the case "didn't sound like murder to me," she

had clearly formed an opinion on the case and lacked impartiality.

(6) He was denied the right to effective assistance of counsel because Hoke: (a) failed to fully investigate the case and cross-examine witnesses; (b) induced Kakugawa to give up his right to confront witnesses; (c) should never have advised Kakugawa to waive his right to jury trial based on a single remark by Judge Milks that the case "didn't sound like murder to me"; and (d) should have moved for recusal of Judge Milks prior to trial.

Upon careful review of the record and briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we conclude:

1. The circuit court erred in attributing the stipulated testimony of Shannon Souza to his girlfriend, Gouveia, who did not testify at Kakugawa's trial. However, this error was harmless in that there is not a reasonable possibility that this error contributed to Kakugawa's conviction. State v. Pauline, 100 Hawai'i 356, 378, 60 P.3d 306, 328 (2002).

2. The circuit court did not err by using incorrect criteria to determine the state of mind for Murder in the Second Degree ("intentionally or knowingly causes the death of another person"). HRS §§ 707-701.5, 702-206(1) and (2). The circuit court's comment that "any reasonable person knows that a kick to the head of a person can result in death" was part of the court's

summary of its findings and not the court's conclusion of law as to the mens rea for second degree murder.

3. There was substantial evidence that Kakugawa had the requisite state of mind, the intent "to promote or facilitate" the commission of second degree murder. State v. Keawe, 107 Hawai'i 1, 4, 108 P.3d 304, 307 (2005); State v. Brantley, 84 Hawai'i 112, 121, 929 P.2d 1362, 1371 (App. 1996).

4. The circuit court did not err in denying Kakugawa's Motion for a New Trial. The record demonstrates a voluntary waiver by Kakugawa of his right to a jury trial. State v. Friedman, 93 Hawai'i 63, 69, 996 P.2d 268, 274 (2000).

5. Judge Milks did not err in not sua sponte recusing herself for comments she made during the pretrial conference. Judge Milks appropriately participated in plea discussions pursuant to Hawai'i Rules of Penal Procedure Rule 11(e). Kakugawa has failed to show there was judicial misconduct or bias that deprived him of the impartiality to which he was entitled or that his trial was unfair. State v. Hauge, 103 Hawai'i 38, 48, 79 P.3d 131, 141 (2003).

6. The record is insufficient on appeal to demonstrate ineffectiveness of counsel as claimed by Kakugawa. State v. Silva, 75 Haw. 419, 439, 864 P.2d 583, 592-93 (1993). It is not clear whether Kakugawa's trial counsel conducted "careful factual and legal investigations and inquiries." State v. Aplaca, 74 Haw. 54, 70, 837 P.2d 1298, 1307 (1992). Trial counsel must be given an opportunity "to explain his side of the

story" in response Kakugawa's ineffectiveness of counsel claims.

Matsuo v. State, 70 Haw. 573, 578, 778 P.2d 332, 335 (1989).

Trial counsel's statements in support of Kakugawa's Motion for a New Trial were not such an opportunity.

Therefore,

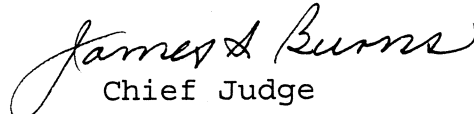
The Judgment filed on March 9, 2004 in the Circuit Court of the First Circuit is affirmed without prejudice to Kakugawa's filing a petition pursuant to Hawai'i Rules of Penal Procedure Rule 40 on his ineffectiveness of counsel claims. Kakugawa will have the burden "to demonstrate actual, not speculative, prejudice." Matsuo, 70 Haw. at 578, 778 P.2d at 335 (quoting Stough v. State, 62 Haw. 620, 623, 618 P.2d 301, 304 (1980) (per curiam)).

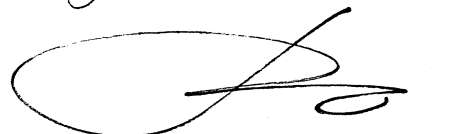
DATED: Honolulu, Hawai'i, April 17, 2006.

On the briefs:

Dwight C.H. Lum
for Defendant-Appellant.

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge