

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27339

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
CHRISTOPHER M. CAMPBELL, Defendant-Appellant

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

2007 FEB 23 AM 9:41

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-2845)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Foley, and Nakamura, JJ.)

Defendant-Appellant Christopher M. Campbell (Campbell) appeals from the Judgment entered on May 11, 2005, by the Circuit Court of the First Circuit (circuit court).¹ Campbell was charged by complaint with first degree robbery, in violation of Hawaii Revised Statutes (HRS) Section 708-840(1)(b)(ii) (Supp. 2002).²

The complaining witness (CW) was a female bank customer who was in the process of obtaining money from the bank's

¹ The Honorable Michael D. Wilson presided.

² At the time of the charged offense, Hawaii Revised Statutes (HRS) Section 708-840(1)(b)(ii) (Supp. 2002) provided:

(1) A person commits the offense of robbery in the first degree if, in the course of committing theft:

(b) The person is armed with a dangerous instrument and:

(ii) The person threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property.

automatic teller machine (ATM) when Campbell approached her. Campbell displayed an Exacto knife and told the CW to "[g]ive me your money, your PIN [(personal identification number)] and your [ATM] card." The CW backed away and fled, leaving behind a \$20 bill and her ATM card in the ATM.

Campbell's first trial commenced on March 24, 2003. The jury found Campbell guilty as charged of first degree robbery, and he was sentenced to incarceration for twenty years. The Hawai'i Supreme Court vacated Campbell's conviction and remanded for a new trial, concluding that the trial court had committed plain error in failing to establish through an on-the-record colloquy directly with Campbell that Campbell knowingly and voluntarily waived his constitutional right to testify. State v. Campbell, No. 25938, 2004 WL 1168022 (Haw. May 21, 2004). On retrial, another jury found Campbell guilty as charged of first degree robbery, and the circuit court imposed the same sentence of twenty years' incarceration.

On appeal, Campbell argues that the circuit court erred in: 1) admitting evidence of his attempted robbery of a second female ATM customer on the day after the charged incident; 2) rejecting Campbell's proffered jury instruction on first degree robbery and instead giving the Hawaii Standard Jury Instruction-Criminal (HAWJIC) instruction for the charged offense; 3) denying Campbell's motion for mistrial after the Deputy Prosecuting Attorney (DPA), in closing argument, drew an analogy between Campbell's Exacto knife and the box cutters used by the 9/11

terrorists; and 4) overruling Campbell's objection to the prosecutor's misstatement of the law regarding the elements of the lesser included offense of fourth degree theft.

After a careful review of the record and the briefs submitted by the parties, we affirm the Judgment. We resolve Campbell's arguments on appeal as follows:

1. The circuit court did not err in admitting, pursuant to Hawaii Rules of Evidence (HRE) Rule 404(b) (Supp. 2006), evidence that Campbell attempted to rob a second ATM customer at the same ATM on the morning after he allegedly robbed the CW. To prove the charged offense, Plaintiff-Appellee State of Hawai'i (the State) was required to prove that Campbell "threaten[ed] the imminent use of force against [the CW] . . . with intent to compel acquiescence to the taking of . . . the property." Campbell denied that he possessed the Exacto knife with the intent to threaten the CW or to compel her to comply with his demands. In support of his defense, Campbell elicited testimony from the CW that although Campbell held an Exacto knife with the blade exposed during their encounter, Campbell did not lunge, point, waive, or gesture at her with the Exacto knife.

The evidence of the subsequent attempted robbery of the second ATM customer (hereinafter "the attempted robbery") was directly relevant to a key disputed issue at trial -- Campbell's intent in possessing the Exacto knife during his encounter with the CW. Evidence of the attempted robbery revealed that Campbell concealed the Exacto knife in his palm and removed a cap covering

the blade before approaching the second ATM customer. When Campbell was apprehended by the police after the attempted robbery, an Exacto knife with its blade covered with a clear plastic cap was found in his pants pocket. Campbell's carrying of the Exacto knife during the attempted robbery showed that his possession of the knife during his encounter with the CW was deliberate and not the result of mistake or accident. Evidence that Campbell removed the cap from the Exacto knife before approaching the second ATM customer and then covered the blade with the cap before being apprehended by the police was also directly probative of Campbell's intent in possessing the knife during his encounter with the CW. Based on such evidence, the jury could reasonably infer that Campbell had intentionally taken the cap off the Exacto knife to expose its blade before approaching the CW, which in turn would indicate that Campbell intended to use the knife in a threatening manner to compel the CW to comply with his demands.

We conclude that the evidence of the attempted robbery was offered for a permissible purpose under HRE Rule 404(b) and was relevant to a fact of consequence. See State v. Clark, 83 Hawai'i 289, 300-02, 926 P.2d 194, 205-07 (1996). We further conclude that the circuit court did not abuse its discretion in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See Id. at 300, 302-03, 926 P.2d at 205, 207-08; State v. Robinson, 79 Hawai'i 468, 471-72, 903 P.2d 1289, 1292-93 (1995). The

circuit court did not err in admitting evidence of the attempted robbery.

2. The circuit court did not err in giving an instruction for first degree robbery that tracked the language of HAWJIC 10.28 (1996)³ instead of the instruction requested by Campbell. The instruction given by the court correctly and adequately stated the law. Therefore, the court was not required to give the alternative instruction requested by Campbell. See State v. Bush, 58 Haw. 340, 342, 569 P.2d 349, 350 (1977) ("[W]here a given proposition of law is requested to be given in an instruction, the instruction may properly be refused where the same proposition is adequately covered in another instruction that is given.").

3. The circuit court did not abuse its discretion in denying Campbell's motion for mistrial based on the analogy drawn by the DPA between Campbell's Exacto knife and the box cutters used by the 9/11 terrorists. The DPA did not attempt to paint Campbell as a terrorist, but rather the DPA referred to the box cutters used by the terrorists to support his argument that the Exacto knife could be used as a dangerous instrument even though its blade was short. The DPA's remarks were in response to the attempt by Campbell's counsel to minimize the dangerousness of the Exacto knife by referring to it as a "little Exacto tool" and

³ Hawaii Standard Jury Instruction-Criminal (HAWJIC) 10.28 (1996) is the HAWJIC instruction for the offense of first degree robbery in violation of HRS § 708-840(1)(b)(ii). With the exception of some minor, immaterial differences, the instruction given by the trial court was identical to HAWJIC 10.28.

a "little art knife." While the DPA could have chosen a better way to illustrate his point, we conclude that the DPA's argument did not amount to prosecutorial misconduct. Alternatively, assuming, *arguendo*, that the prosecutor's remarks were improper, we hold that the remarks were harmless beyond a reasonable doubt and did not prejudice Campbell's right to a fair trial. State v. Klinge, 92 Hawai'i 577, 584, 994 P.2d 509, 516 (2000); State v. McGriff, 76 Hawai'i 148, 158, 871 P.2d 782, 792 (1994).

4. The circuit court erred in overruling Campbell's objection to the DPA's misstatement of the law regarding the elements of the lesser included offense of fourth degree theft, but the court's error was harmless beyond a reasonable doubt. The State concedes that the DPA misstated the elements of fourth degree theft. The DPA's misstatement was apparently based on the circuit court's instruction on fourth degree theft, which was likewise erroneous. The jury, however, found Campbell guilty of the charged offense of first degree robbery and not the lesser included offense of fourth degree theft. The jury was instructed to consider the lesser included offenses "if and only if" the jury found Campbell not guilty of first degree robbery or could not reach a unanimous verdict as to that offense. The jury is presumed to have followed this instruction. State v. Haanio, 94 Hawai'i 405, 415-16, 16 P.3d 246, 256-57 (2001). Accordingly, neither the circuit court's error in overruling Campbell's objection to the DPA's misstatement of the law nor the court's error in giving an erroneous instruction on the lesser included

offense of fourth degree theft contributed to Campbell's conviction. Id.; State v. Holbron, 80 Hawai'i 27, 47, 904 P.2d 912, 932 (1995). The jury's unanimous guilty verdict on the charged offense of first degree robbery rendered the circuit court's errors relating to the lesser included offense of fourth degree theft harmless beyond a reasonable doubt. Haanio, 94 Hawai'i at 415-16, 16 P.3d at 256-57; Holbron, 80 Hawai'i at 47, 904 P.2d at 932 (1995).

IT IS HEREBY ORDERED that the May 11, 2005, Judgment entered by the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, February 23, 2007.

On the briefs:

Clifford Hunt
for Defendant-Appellant

Daniel H. Shimizu
Deputy Prosecuting Attorney
City & County of Honolulu
for Plaintiff-Appellee

Brunne K. A. Wataalele
Presiding Judge

Daniel R. Foley
Associate Judge

Craig H. Nakamura
Associate Judge