

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27917

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
RANDAL MICHITO YAMAGUCHI, Defendant-Appellee

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CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 05-1-0263)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Foley and Nakamura, JJ.)

Defendant-Appellant Randal Michito Yamaguchi (Yamaguchi) appeals from the Judgment of Conviction and Sentence entered on April 19, 2006 in the Circuit Court of the First Circuit (circuit court).^{1/} A jury convicted Yamaguchi of one count of Burglary in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 708-810(1)(c) (1993). On appeal, Yamaguchi asserts the following points of error:

(1) He received ineffective assistance of counsel as a result of his attorney's failure to (a) "conduct careful factual and legal investigation and inquiries with a view to developing matters of defense in order that counsel may make informed decisions on his client's behalf," (b) "investigate and subpoena material defense witnesses," and (c) "allow client to testify in his own defense."

(2) The evidence was insufficient to convict him of Burglary in the First Degree.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Yamaguchi's points of error as follows:

^{1/} The Honorable Richard W. Pollack presided.

(1) Yamaguchi did not receive ineffective assistance of counsel.

(a) Yamaguchi fails to identify any causal relationship between the alleged failure to conduct additional discovery review and the impairment or withdrawal of any meritorious defense. Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994). Yamaguchi states that "his attorney did not allow him to review the police reports, witness statements, photographs, missing property report, and other discovery sufficiently." Yamaguchi claims that "adequate time to review the discovery" would have allowed him to inform his counsel that (i) "[a] teak table listed as stolen was . . . still in the home"; (ii) "[a] 10 foot aluminum ladder that was listed as stolen, but later found and more importantly was not even owned by Tomoe Yamaguchi" (Tomoe); (iii) "[a]lthough clothing was reported to be all over the residence, none was listed as missing nor owned by [Mr. Yamaguchi (Michio)] or [Tomoe]"; and (iv) the "signature on the property report was not [Tomoe's] signature."

These claims uniformly lack merit. Tomoe never testified that the teak table referred to was stolen; she testified that the table had been moved and she located it in the living room. Nor did Tomoe testify that the aluminum ladder in question was stolen; she testified that she initially reported it missing, but later found it in the garage. Yamaguchi's assertion that the signature on the missing property report was not Tomoe's amounts to speculation. Tomoe testified that various items were taken from the house, including a koa bowl, laundry soap, a dresser drawer filled with jewelry and jewelry-making tools, semi-precious stones, a digital camera, and a futon. Further, Yamaguchi's claim that "he could have assisted his attorney with cross-examination of witnesses" had he and his attorney met more often amounts to mere speculation and, thus, is insufficient to

demonstrate ineffective assistance of counsel. State v. Reed, 77 Hawai'i 72, 84, 881 P.2d 1218, 1230 (1994).

(b) Yamaguchi's claims that his counsel had insufficient contact with him prior to trial and that increased understanding of the Yamaguchi family dynamic would have aided in his defense amount to mere speculation and therefore cannot support a claim of ineffective assistance of counsel. Reed, 77 Hawai'i at 84, 881 P.2d at 1230. Yamaguchi fails to offer any basis upon which we could conclude that a potentially meritorious defense had been substantially impaired or withdrawn as a result of counsel's failure to have that increased understanding.

(c) Yamaguchi's claims that "[c]ounsel failed to call material defense witnesses" and "a competent attorney would have investigated occurrence witnesses that were with [Yamaguchi] on January 3, 2005" again falls short of identifying any potentially meritorious defense that was substantially impaired or withdrawn as a result of these alleged failures. "[T]he decision of whether or not to call a witness in a criminal trial is normally a matter within the judgment of counsel and, accordingly, will rarely be second-guessed by judicial hindsight." State v. McNulty, 60 Haw. 259, 270, 588 P.2d 438, 446 (1978), cert. denied, 441 U.S. 961, 99 S. Ct. 2406 (1979). Moreover, Yamaguchi fails to offer anything other than bare speculation as to how his suggested witnesses would have testified. Such speculation cannot sustain a claim of ineffective assistance of counsel. Reed, 77 Hawai'i at 84, 881 P.2d at 1230.

(d) Yamaguchi's claim that trial counsel should have employed an alibi defense (pursuant to Hawai'i Rules of Penal Procedure Rule 12.1(a)) and offered what Yamaguchi describes as

Hawaii Rules of Evidence Rule 404(b) (Supp. 2006)^{2/} evidence relating to his lack of motive to steal amounts to an attack on the trial strategy employed by his counsel in the circuit court.^{3/} Based on our review of the record, defense counsel could have reasonably concluded that these approaches would have been ineffective and/or otherwise had potential negative consequences for the defense. Such "matters presumably within the judgment of counsel, like trial strategy, will rarely be second-guessed by judicial hindsight." State v. Richie, 88 Hawai'i 19, 39-40, 960 P.2d 1227, 1247-48 (1998).

(e) Yamaguchi's claim that "[c]ounsel did not allow [him] to testify on his own behalf" runs counter to his in-court statements and provides no basis for a claim of ineffective assistance of counsel.^{4/} Yamaguchi informed the circuit court of his decision not to testify in the following colloquy:

[THE COURT]: Mr. Yamaguchi, as I discussed with you before the start of trial, you have a constitutional right

^{2/} Hawaii Rules of Evidence Rule 404(b) (Supp. 2006) provides:

Rule 404 Character evidence not admissible to prove conduct; exceptions; other crimes. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the actions, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this section shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

^{3/} Yamaguchi suggests that the "burglary occurred sometime after his arrest on January 3, 2005 and before January 7, 2005" and also that he "had no reason to steal money from his family as he is entitled to a portion of the income the [family] business continues to generate."

^{4/} Yamaguchi states in his brief that he "informed counsel that he wanted to tell his story and explain what he was doing at his mother's house. However, his attorney told him that if he were to testify, [his attorney] would withdraw from representing him."

to testify in your own defense. Although you should consult with your lawyer regarding the decision to testify, it is your decision, and no one can prevent you from testifying, should you choose to do so. If you decide to testify, the prosecutor will be allowed to cross-examine you.

You also have a constitutional right not to testify and to remain silent. If you choose not to testify, the jury will be instructed that it cannot hold your silence against you in deciding your case.

It is the understanding of the Court that you do not intend to testify. Is it your decision not to testify?

[Yamaguchi]: It is my decision not to testify.

THE COURT: Do you have any questions about that?

[Yamaguchi]: No, I don't. Thank you.

The colloquy between the circuit court and Yamaguchi satisfies the requirement set forth in Tachibana v. State, 79 Hawai'i 226, 236, 900 P.2d 1293, 1303 (1995) ("to protect the right to testify under the Hawai'i Constitution, trial courts must advise criminal defendants of their right to testify and must obtain an on-the-record waiver of that right in every case in which the defendant does not testify"). Yamaguchi concedes this.

(2) Yamaguchi's conviction was supported by sufficient evidence. "It is an elementary principle of law that intent may be proved by circumstantial evidence; that the element of intent can rarely be shown by direct evidence; and it may be shown by reasonable inference arising from the circumstances surrounding the act." State v. Silva, 67 Haw. 581, 587, 698 P.2d 293, 297 (1985) (quoting State v. Yabusaki, 58 Haw. 404, 409, 570 P.2d 844, 847 (1977)). Guilt in a criminal case may be proved beyond a reasonable doubt on the basis of reasonable inferences drawn from circumstantial evidence. State v. Murphy, 59 Haw. 1, 19, 575 P.2d 448, 460 (1978). Furthermore, no greater degree of certainty is required where a conviction is based solely on

circumstantial evidence rather than on direct evidence. State v. Smith, 63 Haw. 51, 54, 621 P.2d 343, 345 (1980).

Yamaguchi's alleged deficiencies in the evidence fall far short of demonstrating insufficient evidence for conviction.^{5/} Katherine Kealoha (Kealoha), Tomoe's attorney, testified that the house was immaculate on December 29, 2004, when she accompanied Tomoe and her husband out of the house to a hotel. Kealoha stated that she checked the house daily thereafter. Kealoha testified that on January 3, 2005, she observed Yamaguchi's car in the driveway of the house and saw Yamaguchi and two women removing approximately ten or eleven plastic bags full of items from the house into the car. Afterwards, Kealoha entered the house and observed a state of messiness and disarray. Officer Thornton testified that when he arrested Yamaguchi on January 3, 2005, he found Yamaguchi inside the house on a couch. The direct testimony of Kealoha as to the condition of the house and her observations of Yamaguchi removing items from the house, coupled with Thornton's arrest of Yamaguchi inside the premises, are more than sufficient evidence of guilt.

As to the issue of consent to be in the house, Tomoe testified unequivocally that Yamaguchi was not welcome inside the family home and he was allowed only in the garage and then only during certain hours. She testified that when Yamaguchi came to the house in the morning hours of December 21, 2004, she told Yamaguchi again that he was not welcome in the house. She further testified that Yamaguchi did not return to the house between December 22 and December 28, 2004.

^{5/} Yamaguchi argues that the State failed to prove when the burglary occurred. Yamaguchi claims the condition of the residence changed dramatically during the time he was held in custody (January 3-6, 2005), thus demonstrating that the burglary occurred then and could not have been committed by him. He also argues that the State failed to prove he intended to commit a crime against person or property. Finally, Yamaguchi claims "it is not clear" whether Michio withdrew consent for Yamaguchi to be in the home.

Therefore,

The Judgment of Conviction and Sentence entered on April 19, 2006 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, June 25, 2007.

On the briefs:

Michael J. Park
for Defendant-Appellant.

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



Chief Judge



Associate Judge



Associate Judge