

NO. 23067

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee

vs.

GARY V. UNGARO, III, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-0960)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama,
Ramil, and Acoba, JJ.)

The defendant-appellant Gary V. Ungaro, III appeals from the first circuit court's judgment of conviction of and sentence for two counts of assault in the second degree, in violation of Hawai'i Revised Statutes (HRS) § 707-711(1)(d) (1993), filed on December 27, 1999. On appeal, Ungaro asserts that the circuit court: (1) erroneously (a) received Ungaro's statement to Honolulu Police Department (HPD) Detective Lowen Young into evidence without first determining whether he had made the statement voluntarily, and (b) permitted the prosecution to adduce alleged hearsay testimony from police officers regarding (i) Charles Machado's identification of Ungaro during a field lineup and (ii) statements made by Veronica Ahuna -- Ungaro's girlfriend's cousin -- to police officers when they solicited her consent to search her van and apartment; and (2) plainly erred in instructing the jury as to both of the charged offenses because the offenses merged, inasmuch as his assault of Kekoa was a continuous offense supporting but a single charge and warranting

but one conviction. Ungaro also contends that he was deprived of a fair trial due to prosecutorial misconduct, as well as the cumulative effect of the foregoing errors.

Upon carefully reviewing 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 hold as follows:

First, inasmuch as Ungaro conceded at a pretrial hearing that his statement to HPD Detective Young was voluntarily given, the circuit court did not err in receiving the statement into evidence during Ungaro's trial. See HRS § 621-26 (1993).

Second, inasmuch as the testimony of police officers regarding both Machado's identification of Ungaro during a field lineup procedure and Ahuna's statements to them when they obtained her consent to search her house and van were not admitted for the truth of the matters asserted but, rather, to explain the officers' subsequent conduct in recovering evidence, apprehending Ungaro, and placing him in the lineup (all of which were foundational to his arrest), the circuit court did not err in allowing the officers' testimony for that limited purpose. See State v. Perez, 64 Haw. 232, 233-34, 638 P.2d 335, 336-37 (1981); State v. Sugimoto, 62 Haw. 259, 614 P.2d 386 (1980); State v. Kapela, 82 Hawai'i 381, 386, 922 P.2d 994, 999 (App. 1996); State v. Mason, 79 Hawai'i 175, 180-81, 900 P.2d 172, 177-78 (App. 1995); State v. Feliciano, 2 Haw. App. 633, 636-37, 638 P.2d 866, 869-70 (1982).

Third, inasmuch as the evidence adduced at trial would warrant a reasonable juror to conclude that Ungaro bore two distinct intents, one to inflict bodily injury with a hammer and the other to inflict bodily injury with a knife, the two charged offenses did not merge into a continuous offense and, therefore, the circuit court did not plainly err in submitting both offenses to the jury. See State v. Castro, 69 Haw. 633, 653, 756 P.2d

1033, 1047 (1988).

Fourth, Ungaro alleges that several of the prosecutor's statements constituted prosecutorial misconduct, warranting reversal. We recognize that the prosecutor's comments may have "lacked the professionalism and decorum required of attorneys who practice before the bar of the courts of Hawai'i[.]" State v. Pulse, 83 Hawai'i 229, 244, 925 P.2d 797, 812 (1996). However, given the substantial evidence against Ungaro and Ungaro's failure to object to the allegedly improper statements at trial, as well as considering the context of the prosecutor's statements, these statements, evaluated individually or with regard to their cumulative effect, do not "affirmatively appear to be of such a nature that [Ungaro's] substantial rights . . . were prejudicially affected[.]" Pulse, 83 Hawai'i at 241-42, 925 P.2d at 808-09 (citations and internal quotation marks omitted); see also State v. Amarin, 58 Haw. 623, 631-32, 574 P.2d 895, 900-01 (1978). Therefore, we decline to reverse Ungaro's convictions based on prosecutorial misconduct. Accordingly,

IT IS HEREBY ORDERED that the first circuit court's judgment of conviction and sentence, filed on December 27, 1999, from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, October 27, 2000.

On the briefs:

Linda C.R. Jameson (Deputy
Public Defender), for the
defendant-appellant,
Gary V. Ungaro, III

Caroline M. Mee (Deputy
Prosecuting Attorney), for
the plaintiff-appellee,
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