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NO. 24549

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
JASON K. SANTOS, Defendant-Appellant,  
and OLIVER L. WHITE, Defendant

APPEAL FROM THE THIRD CIRCUIT COURT  
(CR. NO. 00-1-262)

MEMORANDUM OPINION

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

Defendant-Appellant Jason K. Santos (Santos) appeals from the Judgment filed on August 29, 2001 in the Circuit Court of the Third Circuit (circuit court).<sup>1</sup>

Santos was charged with and convicted of:

Count I: Murder in the Second Degree in violation of Hawaii Revised Statutes (HRS) §§ 702-222(1)(b) (1993)<sup>2</sup> and 707-701.5(1) (1993)<sup>3</sup>; and

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<sup>1/</sup> The Honorable Riki May Amano presided.

<sup>2/</sup> Hawaii Revised Statutes (HRS) § 702-222(1)(b) (1993) provides:

**§702-222 Liability for conduct of another; complicity.** A person is an accomplice of another person in the commission of an offense if:

(1) With the intention of promoting or facilitating the commission of the offense, the person:

. . . .

(b) Aids or agrees or attempts to aid the other person in planning or committing it[.]

<sup>3/</sup> HRS § 707-701.5 (1993) provides:

**§707-701.5 Murder in the second degree.** (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.

(continued...)

Count II: Robbery in the First Degree in violation of HRS §§ 702-222(1)(b) and 708-840(1)(b)(i) (1993).<sup>4</sup>

Santos was sentenced to life imprisonment with the possibility of parole on each count, the sentences to run consecutively.

Santos argues that (1) the murder and robbery were one continuous act precluding separate convictions for murder and robbery; (2) there was insufficient evidence to convict him of Murder in the Second Degree and Robbery in the First Degree; and (3) the circuit court abused its discretion by sentencing Santos to extended terms of imprisonment on Counts I and II.<sup>5</sup>

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<sup>3/</sup>(...continued)

(2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656.

<sup>4/</sup> HRS § 708-840 (1993) provides in relevant part:

**§708-840 Robbery in the first degree.** (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:
- (i) The person uses force against the person of anyone present with intent to overcome that person's physical resistance or physical power of resistance[.]

. . . .

(2) As used in this section, "dangerous instrument" means any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or threatened to be used is capable of producing death or serious bodily injury.

(3) Robbery in the first degree is a class A felony.

<sup>5/</sup> This court notes that Santos's pleadings in this appeal have an incorrect lower court criminal number on the flysheets of the pleadings as a result of an incorrect lower court number on the record on appeal flysheet.

**I. FACTS**

On the morning of September 30, 1994, Oliver White (Oliver) drove himself and Santos in Oliver's Chevrolet station wagon to pick up Vernon Souza, Jr. (Souza) at the Hilo airport. Oliver dropped off Santos at the HPM store and then picked up Souza and Mike Suenaga (Suenaga) around 9:15 a.m. at the airport. Oliver was driving, Souza sat in the front passenger seat, and Suenaga sat in the back passenger seat behind Souza. Oliver drove back to the HPM store and picked up Santos, who sat in the back seat behind Oliver. Suenaga was then dropped off at the Aloha Airlines freight office.

At trial, various witnesses, including Santos, gave conflicting testimony about who murdered Souza and how the murder was committed.

Santos testified that after dropping Suenaga off, Oliver, Santos and Souza drove up Saddle Road. Oliver and Souza were arguing over money. Oliver drove onto a side road and said they had to meet someone. Oliver pulled off into a grassy area near the road, and Santos heard Souza cry out "Oh, you fucka." Santos testified that he looked over the front and saw Souza scrunched with his head between his legs as he held Oliver's right arm. Oliver hit Souza on the head twice with a hammer, and Santos tried to stop Oliver from striking Souza a third time. Santos testified that Oliver got out of the car, pulled Souza out

of the car, and yelled at him to help drag Souza's body. Oliver and Santos carried the body to some head-high bushes. Santos testified that Oliver left the bushes the same way they had come in. Santos left the bushes and returned to the car, but Oliver was not at the car. After several minutes, Oliver came out of the bushes, walked up to Santos, asked Santos to hold something, and dropped a knife. Oliver picked up the knife, wiped it off, and threw it into the bushes, which were on fire. Oliver and Santos drove away in a hurry.

Jonnise Nakamura (Nakamura), Santos's ex-girlfriend, testified that on September 28, 1994, Santos told her that he and Oliver were going to pick up a guy at the airport and he and Oliver were going to kill the guy and take his money. Two weeks later, Nakamura and Santos moved to the mainland. Nakamura testified that, during a fight on the mainland, Santos told her that "he could get rid of me like how he did to the guy."

Deanna Deleon (Deleon), Nakamura's sister, testified that a week prior to September 30, 1994, Santos offered to pay for a trip for herself and Nakamura to Maui if they would fly with tickets in Oliver's and Santos's names. Deleon testified that when she asked Santos how he would get the money to pay for the trip, "he laughed and said, 'I'm gonna kill somebody.'"

Shay Van Zandt, Oliver's girlfriend, testified that prior to September 30, 1994, she overheard Santos tell Oliver

that Santos wanted to go with Oliver on a drug deal. She testified that Santos said "if he [a third party] might try something," then Santos would "whack him and die."

Serena Augustine, a friend of Nakamura, testified that early in the morning on September 30, 1994, Santos had walked from his house to where she was living with her ex-boyfriend's parents in Waimea to borrow gas cans because he said his car had run out of gas.

Dr. Kanthi Von Guenther (Dr. Guenther), the Chief Medical Examiner for the City and County of Honolulu and consultant forensic pathologist for the County of Hilo, conducted the autopsy on Souza's body. Dr. Von Guenther testified that Souza's body had been burnt after death. Souza's body had stab and incised wounds from a sharp object like a knife and extensive fractures of the skull and severe injuries to the brain consistent with having been inflicted by a blunt object. Dr. Von Guenther testified there were two fatal wounds made by a sharp cutting instrument to Souza's neck. One of wounds, made from left to right, was under his jaw. In the other wound, the sharp instrument was used from left to right, cutting Souza's major blood vessel on the right side of his neck, his larynx right underneath his voice box, and the muscles on both sides of his neck. She testified that Souza bled into his windpipe and aspirated blood into his lungs, leading her to conclude that

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Souza was taking breaths at the time his throat was cut. Dr. Von Guenther also testified that, by the way the larynx was cut, Souza's head must have been pulled back. Dr. Von Guenther opined from the way the windpipe was slashed from left to right, multiple stab wounds on the right forehead and behind the right ear, and the slash to the throat from left to right that the injuries were inflicted by someone behind Souza.

Bradley Palecek (Palecek) testified that sometime in 1997, Santos told him that Santos was present when someone committed a murder. Palecek stated that Santos told him the victim was sitting in the passenger seat of a station wagon and Santos was sitting in the back seat. Santos told Palecek that, while driving up in the hills, Santos thought he saw the murder's arm come across and stab or cut the victim's throat with a knife. Santos also told Palecek that the driver then pulled the car over and told Santos to get out and help the driver drag the body.

Alfred Nobriga, Jr. (Nobriga) testified that a few days after September 30, 1994, Santos came to his house and told him that Santos had to get rid of "t'ings that belonged to Vernon [Souza]." Nobriga saw a wallet and saw Santos take Souza's license with Souza's picture and name on it from the wallet. Nobriga also saw some bloody clothes, which Santos said "dey had on when dey . . . killed dat Vernon." Santos burned the clothes and Souza's things. Nobriga testified that Santos told him

Oliver stabbed Souza and yelled for Santos to hit Souza on the head with a hammer and Santos did hit Souza with a hammer.

Nobriga stated that Oliver was driving, Souza was sitting in the front passenger seat, and Santos was sitting in the back.

On June 21, 2001, a jury found Santos guilty of Murder in the Second Degree and Robbery in the First Degree.

## II. DISCUSSION

### A. **No Ah Choy Instruction Was Given on Second Degree Murder and First Degree Robbery Offenses.**

Santos contends the murder and robbery offenses were one continuous act precluding separate convictions for both murder and robbery. In State v. Ah Choy, 70 Haw. 618, 780 P.2d 1097 (1989), the Hawai'i Supreme Court held that a defendant could not be convicted of both Robbery in the First Degree and its component offense of Attempted Murder "in the absence of evidence that the defendant committed both offenses separately in time." Id. at 622, 780 P.2d at 1100. See also HRS § 701-109(1)(e) (1993) ("The defendant may not . . . be convicted of more than one offense if . . . [t]he offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of conduct constitute separate offenses.") The supreme court held in Ah Choy:

[I]t was plain error for the trial court to fail to instruct the jury of [its] duty to find [the defendant] guilty of only the attempted murder count if [it] determined that [the

defendant] committed the offense concurrently with the commission of robbery in the first degree. The instructions should have been framed so that once the jury determined that [the defendant] was guilty of attempted murder [it] need not go any further with respect to the robbery count."

70 Haw. at 623, 780 P.2d at 1101.

In State v. Cordeiro, 99 Hawai'i 390, 409, 56 P.3d 692, 711, reconsideration denied, 100 Hawai'i 14, 58 P.3d 72 (2002), the Hawai'i Supreme Court held the defendant was entitled to an Ah Choy instruction where the jury could have found that the "use of force" (a gunshot wound) that was an element of the second degree murder count was also an element of the first degree robbery count. The court in Cordeiro concluded that failure to give the Ah Choy instruction was plain error that was not harmless beyond a reasonable doubt. The court concluded there was a reasonable possibility that the lack of an Ah Choy instruction contributed to the defendant's first degree robbery conviction. The court, accordingly, vacated the robbery conviction.

Cordeiro governs the disposition of Santos's merger point in this case. Whether or not Santos's murder and robbery convictions merged as one continuous act cannot be determined because the circuit court plainly erred in not giving an Ah Choy instruction as to the second degree murder and first degree robbery counts. This error was not harmless beyond a reasonable doubt. Accordingly, Santos's conviction and sentence as to Count II, Robbery in the First Degree, is vacated.



**B. Sufficient Evidence**

**1. There was sufficient evidence adduced at trial for the trier of fact to conclude that Santos was guilty of Murder in the Second Degree.**

We review the sufficiency of evidence on appeal as follows:

[E]vidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

State v. Quitog, 85 Hawai'i 128, 145, 938 P.2d 559, 576 (1997) (quoting State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996)) (emphasis omitted). "'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Eastman, 81 Hawai'i at 135, 913 P.2d at 61.

State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998).

Santos contends there was insufficient evidence to convict him of Murder in the Second Degree. Santos admitted he was present when Souza was murdered, but claims he was not the one who caused Souza's death.

Nakamura (Santos's ex-girlfriend) was called as a witness for the State. She testified, in part, as follows:

Q. [Prosecutor] Now during the last week of September, 1994, do you recall Jason telling you about a dope deal?

A. [Nakamura] Yes. It was, um, probably about two days prior to the incident that he came up to me and told me that there was a drug deal that was gonna go on. And he said that him and Oliver was gonna go pick up this guy from

the airport. He was -- they were gonna kill the guy and take his money.

Q. When was this conversation made now again?

A. Approximately about two days prior to the incident.

. . . .

Q. While at the police station did Jason tell you anything?

A. He said that he wants to come out and be with me so that he can show his face so that nobody knows that it was him.

. . . .

Q. Do you recall what he was saying to Shay Van Zandt?

A. Told Shay to -- to tell Oliver that if the police calls to tell Oliver this is what had happened. Then [Santos] said that they picked up the guy from the airport. They dropped Jason off at a hardware store, and Oliver and the guy left. When the -- when Oliver came back the guy was gone.

. . . .

Q. Did Jason tell you why he was going to the Nobriga's house?

A. He said he had to get rid of the personal items.

Q. Of who?

A. Of the guy's.

. . . .

Q. Now while on the mainland did Jason make any reference to the murder of Vernon Souza, Jr.?

A. Yes, he did. We were in an argument and things got out of hand and he told me that he could get rid of me like how he did to the guy.

. . . .

Q. Now did he mention anything while you were on the mainland about any statute of limitations?

A. (No verbal response.)

Q. What did he say?

A. He said that if they don't catch me within seven years he's a free man.

Deleon, Nakamura's sister, testified as follows:

Q. [Prosecutor] Now, going back to that -- the week prior to September 30th, 1994, do you recall any conversations with Jason [Santos] concerning your trip?

A. [Deleon] Yeah.

Q. What did he ask you?

A. If my sister and I could take a trip to Maui, an all-expense paid trip, but that we would have to fly with tickets in Jason [Santos] and Ollie's [Oliver] names.

Q. And when he told you that, what did you tell him?

A. How would he afford it? It was like, "Yeah. Right. How are you gonna afford something like that?"

Q. And what did he tell you?

A. He said he was gonna come into some money.

Q. And what else?

A. And then I would joke around and say, you know, like, "How you gonna come -- come up with this money?" You know, with his bull riding? And he said, "No." As a joke, I mean, he chuckled, "Ha, ha." He laughed and said, "I'm gonna kill somebody," and then I just took it as a joke. I didn't think anything of it.

Shay Van Zandt (Oliver's girlfriend) testified as follows:

Q. [Prosecutor] Now, I'd like to direct your attention to the last week of September 1994. During this period of time, did you go to the Big Island?

A. [Van Zandt] Yes, I did.

. . . .

Q. Now, during this period of time in the last week of September 1994, did you hear any discussions between Oliver and Jason involving a drug transaction?

A. Yes. Oliver and Jason were discussing where Oliver had said that he wanted to go and do the drug deal alone and, uh, Jason wanted to go with him; and, uh, Oliver, he said that he wanted to go; and Jason said what if, uh, he might try something; and then Jason said that he would whack

him and die; and Oliver said -- uh, they just started laughing up to that point.

Q. Jason said he would whack him?

A. Whack him. Oliver said he's not gonna. Vernon is not like that. Nothing will happen. Nothing is gonna go down like that. He said he would whack him.

Q. So Jason [Santos] was insisting on going with Oliver and Oliver wanted -

A. -- Oliver wanted to go by himself.

Dr. Von Guenther testified as follows:

Q. [Prosecutor] Doctor, when you conducted this autopsy on Vernon Souza, Jr., could you tell us what you observed.

A. [Von Guenther] On the general examination, that examination consisted of a person who was partially burned who was a normally developed adult male, and the burns were postmortem. In other words, they -- the burns were consistent with after-death burns than before death.

. . . .

Q. Doctor, based on your autopsy of Vernon Souza, Jr., could you describe for us, using those photographs, specifically the type of injuries that Mr. Souza had.

A. He had two different types of injuries to his body. He had injuries that were made by a sharp cutting instrument, like a knife, and of those wounds, he had stab wounds and incised wound. . . . He also, in addition, had blunt force injuries to his scalp. And those were consistent with having been inflicted by a heavy, blunt object.

. . . .

Q. Using State's Exhibit 143, could you describe for us what's in that photo.

A. . . . And in his neck were two fatal wounds, which were incised wounds made by a sharp cutting instrument which went from his left to his right. And you can see one here underneath the jaw.

So this was one wound, and underneath that was another long incised wound, the one here, again from his left neck going towards his right.

. . . It cut one of the veins, which is the blood vessel which brings blood from the brain to the heart. It cut his larynx, which is the windpipe, right underneath the

voice box, all the way up here, completely transected, means completely cut.

As a result, he not only bled outside, he bled into his windpipe, which was then aspirated into his lungs. That means he was taking breaths at the time.

. . . .

Q. Doctor, let me ask you this: What significance is it that it was shallow on the left side and deeper on the right side?

A. [T]his is from my knowledge and experience based upon my training -- when there are incised wounds to the neck, the depth which is shallower is where the wound starts, and it goes into the other area, where the depth is much longer -- I mean much more deeper. So the wound started from the left, went to his right.

Another significant finding there was the fact that his entire larynx up above, not down below, was completely cut. And that indicates that his head would have had to be pulled back[.]

. . . .

Q. Doctor, based on your experience as a forensic pathologist, could you explain to us the significance of the defendant or the victim's neck or head being tilted back and the cut being from left to right?

A. [I]t's my opinion that those came from his behind.

On cross-examination, Dr. Von Guenther testified as

follows:

Q. [Santos's Counsel] But is it not true, Doctor, that in this particular case, the pattern of the wounds is consistent with a person who is attacking Mr. Souza being on Mr. Souza's left side?

A. [Von Guenther] The wounds? Are you referring to the -

Q. No. I'm talking about the position of the attacker now, not the position of the wounds.

A. No, not in my opinion.

Palecek, a friend of Santos, testified as follows:

Q. [Prosecutor] Did he [Santos] say whether or not, excuse me, how the murder was committed? Any type of weapon?

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A. [Palecek] I -- he told me that when he was sitting back there also he'd seen the guy's arm come across and supposedly he had stabbed him or something or cut his throat with a knife he thought.

Nobriga (nicknamed Poch), a friend of Santos, testified as follows:

A. [Nobriga] Um, uh, his aunty and his girlfriend asked to use the bathroom, and, um, I was outside talking with him. And he said, uh -

Q. [Prosecutor] With who?

A Talking with Jason [Santos].

. . . .

Q. Okay. So after he told you he had to drop off some tack, what else did he do or tell you?

A. Um, he told me he had to get rid of some -- some t'ings.

Q. What kind of t'ings did he tell you that he had to get rid of?

A. Um, said he had to get rid of, um, some rope or some ropes from one bag and, uh, some t'ings that belonged to Vernon.

Q. What kind of things that you saw that he had to get rid of?

A. Um, wallet with, um, papers and cards. Never really take notice what -- what -

Q. Okay.

A. -- what it was.

. . . .

Q. Now, was there any clothes you saw?

A. Yes.

Q. Can you describe what the clothes looked like?

A. I no remembah da colors of the clothes, but I know there was blood on 'em.

Q. There was blood on 'em. Did Jason [Santos] tell you anything about 'em?

A. Yes.

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Q. What did he tell you?

A. He tol' me as da clothes that, um, dey had on when dey - when dey was -- when dey killed dat Vernon.

. . . .

Q. Did he [Santos] tell you something that wen happened?

A. Yeah. He -- he kinda told me what happened.

Q. What did he tell you?

A. He told me that -- he tol' me Ollie -- "Oliver is nuts," he said. "Oliver is crazy." And I said, "Whatchu mean 'crazy'?"

He said he started - he started going crazy, um, stab -- stabbing -- stabbing Vernon, and Oliver started to yell -- yell at Jason [Santos] to, um, to, "Hit 'em. Hit 'em. Hit 'em on the head with the hammer," or whatever they use.

And Jason was telling Ollie, "Oh, what you doin'?" What you doin'?" And Ollie just kept yelling at Jason to hit 'em so -- and as about all what he tol' me.

. . . .

Q. What did he tell you Ol - he did after Ollie told him to hit him with a hammer?

A. Um, so he said he started hitting 'em with the hammer.

Q. Jason [Santos] said he started hitting 'em with the hammer?

A. Yeah.

Q. And who was driving?

A. Ollie. Oliver.

Q. And who was in the front passenger seat?

A. I nevah hear that one.

Q. Oh, who was sitting in the front? Where was Vernon sitting?

A. Was sitting in the passenger.

Q. The front?

A. The front.

Q. And where was Jason [Santos] at the time?

A. Um, in the back.

Santos testified as follows:

Q. [Santos's Counsel] Now I'm going to direct your attention to the incident that is the subject of this trial, the death of Vernon Souza on September 30, 1994. Do you recall that day?

A. [Santos] Yes, I do.

. . . .

Q. After getting up, what did you do?

A. Um, I waited for Oliver to get out of the shower. When he got out, I went and took a shower.

Q. And then what happened?

A. Uh, we got ready to come to Hilo. Uh, Oliver was supposed to pick Vernon Souza up at the airport at, um, in the morning, and I was supposed to take a urine analysis that day.

. . . .

Q. How did you get from Waimea to Hilo?

A. Oliver, in his white station wagon.

. . . .

Q. Then what happened?

A. Then we -- I needed to pick up a few things to -- for my house, so Oliver dropped my off at HPM, and I went in and bought a few things. At that time, he went to the airport and pick -- picked up Vernon.

. . . .

Q. And how long were you in the store?

A. Uh, I really can't say. When -- when Oliver had come back, I was just coming out of the store, right -- he was already parked in the -- in front of the old HPM. . . . Oliver was already parked in front with the -- Vernon and a guy Mike Suenaga, whatever his name is, when I came out.

Q. Okay, and what did you do next?

A. I jumped in the car. . . . And Oliver said something about drop -- having to drop off Mike Suenaga, and he was dropped off.

. . . .



Q. And what happened next?

A. Oliver and, well, we -- we took off. . . . We ended up going up some road, which now I know is Saddle Road.

. . . .

Q. And then what happened?

A. As he pulled -- pulled into the -- that grass off road, I -- I heard Vernon cry out. . . . I would say cry out in like a struggling manner. I heard him -- I don't know if I can say it the way it was said.

Q. What did Vernon Souza say?

A. It got loud, and he said, "Oh, you fucka," and in a real struggling way. At that point I looked over the front, and Vernon was scrunched, head between his legs. He had Oliver by Oliver's right arm, with his left arm holding like that (indicating), and Oliver was kind of turned sideways. And he -- he hit Vernon over the head with a hammer twice. And the third time he swung the hammer, I tried to stop it. I reached over the front -- the back of the front seat, and the hammer caught me across the wrist right here. (Indicating.)

. . . Oliver walked away from -- he -- he went around the passenger side, opened the door, and pulled the guy out. Started trying to drag him. And he yelled out help him. And at that time, I -- I didn't know what I was doing, I reacted, and I just went and helped him carry the body to the bushes.

Q. Could you determine whether or not Vernon Souza was alive or dead at that time?

A. To me he was dead. Uh, I'm -- I'm.

Q. What did Oliver do next?

A. Uh, when we carried him to the bushes, Oliver asked me to go grab the sledge ham -- the little sledge or a pair of alligator clinchers, which is used for horseshoeing.

When I finally left the bushes, um, there was several different -- the brush was like head high, I would assume. And the way we went into the bushes, Oliver left that way. And when I finally came out of the bushes, I went back to the car, and Oliver wasn't at the car. I -- I don't know how he went in, He must have went in a different way.

But several different minutes later, he came out of the bushes. I was standing at the car and he walked up to me and he asked me to hold something, you know. I didn't know what it was when he -- he had his hand out and went to

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drop something, and when he dropped it, it was a knife. The bushes were on fire, and he was like in a panic.

On cross-examination, Santos testified as follows:

Q. [Prosecutor] And you heard her [Dr. Von Guenther] testimony that the person that -- that -- was behind Vernon Souza when he was cut, is that right?

A. [Santos] Yes.

Q. It was a left to right injury, yes?

A. Yes.

Q. It had to be a right-handed person, correct?

A. Yes.

Q. And you're right handed, right?

A. Yes.

. . . .

Q. So your answer is yes, you use a knife with your right hand?

A. Yeah.

. . . .

Q. Okay, thank you. Now, Oliver is driving, right? When they come back to HPM to pick you up?

A. Yes.

Q. Vernon is in the front seat, passenger seat, right?

A. Yes.

Q. Mike Suenaga is in the back seat, right?

A. Yes.

Q. And you're in the back right, right?

A. Yes.

Q. In the inside of the car, there's a lot of tools, right?

A. In the back, a bunch of boxes. I would imagine.

Q. Clothing?

A. All kinds of stuff.

Q. Oliver kind of lives out of there, right?

A. Yeah.

Q. So you have clothes, tools, everything in the back seat, right?

A. Whatever was in there, yeah.

Nakamura testified that Santos told her he intended to kill the man Oliver and he were picking up at the airport. Deleon testified that Santos told her he intended to kill someone in order to pay for an all-expense paid trip to Maui for herself and Nakamura if they traveled under the names of Santos and Oliver. Shay Van Zandt testified Santos told her he intended to "whack him" if he [Souza] tried something. There is evidence of sufficient quality and probative value to enable a person of reasonable caution to support the conclusion that Santos intended to kill Souza.

Dr. Von Guenther testified that the injuries to Souza's neck were only consistent with someone cutting his throat from behind him. She also testified that Souza's head must have been pulled back when his throat was cut and that Souza was still breathing because he aspirated blood into his lungs. Nakamura testified that Santos told her "he could get rid of me like how he did to the guy." Palecek testified that Santos told him Oliver committed the murder by stabbing Souza and cutting his throat. Nobriga testified Santos told him that Oliver hit Souza with a hammer and Santos also hit Souza with a hammer on the

head, but Santos did not mention cutting Souza's throat. Santos testified that Oliver had hit Souza on the head and Santos had tried to stop Oliver. Santos testified that Souza appeared dead and that he helped Oliver drag Souza's body out of the car and behind some bushes. Santos inferred that Oliver had cut Souza's throat after Souza was dead, but Santos did not actually see Oliver because Oliver was behind some bushes. Santos admitted that Oliver was in the driver's seat, Souza was in the front passenger seat, and he was in the back seat of the vehicle when the murder occurred. There is evidence of sufficient quality and probative value to enable a person of reasonable caution to support the conclusion that Santos killed Souza.

The testimony of Santos that Souza was dead when his throat was cut is not consistent with Dr. Von Guenther's testimony that Souza was still breathing after his throat was cut. Santos's testimony that Oliver, sitting to Souza's left, attacked Souza is not consistent with Dr. Von Guenther's testimony that Souza was attacked from behind and not from the left. Santos's testimony is also inconsistent with Dr. Von Guenther's testimony and Palecek's testimony in that Santos said Souza shouted "Oh, you fucka" as he struggled with Oliver. The jury need not believe Santos's version of the murder: that Souza shouted out by forcing air through his completely severed windpipe, over his vocal cords, and out his mouth after his

throat was cut underneath his voice box. There is sufficient evidence for the jury to conclude that it was Santos who killed Souza.

**2. There was sufficient evidence adduced at trial for the trier of fact to conclude that Santos was guilty of Robbery in the First Degree.**

Santos contends there was insufficient evidence to convict him of Robbery in the First Degree.

Santos testified on cross-examination as follows:

Q. [Prosecutor] Showing you in evidence number 419. Do you recall -- do you know what that is?

A. [Santos] It is a roping bag.

Q. Do you recall seeing it that night -- that date? Excuse me.

A. Uh, at my house. It was left at my house. Yes. Oliver had took it out of -- out of his station wagon when he dropped it off across of Parker Ranch Arena when Jonnise came to meet us, uh, at Waikii.

Q. He didn't take it out at the Nobriga Ranch?

A. No.

Q. He dropped it off where?

A. It -- he brought it out of the car along with a black bag which belonged to Vernon [Souza].

. . . .

Q. He left Vernon's wallet with you too, right?

A. The wallet was in the black bag.

Q. And that was to be burnt, right?

A. Everything was burnt.

Q. And when Alfred Nobriga, Jr. testified that he saw Vernon's picture in the wallet, he was telling the truth, right?

A. You know what? I don't -- I don't think the license came out of -- of the wallet. To be honest with

you, I really don't think I had mentioned to Poch [Nobriga] that Vernon Souza was picked up and I -- I seen him, what had happened to him get done to him. But that -- that's how Poch had -- had known that was Vernon Souza's stuff. I told him the day that we went up to, uh -- oh, I -- I didn't tell him that day. I -- I told him that that same day that I burnt the stuff. I -- I had, when we first got there, I had mentioned to him that I had all this stuff that was left back, and I needed to get rid of it. I didn't know what to do with it.

Santos admitted that he knew he had burned the property of Souza. There was evidence of sufficient quality and probative value to enable a person of reasonable caution to support the conclusion that Santos committed theft by obtaining unauthorized control over the property of Souza. There was also sufficient evidence to show Santos intended to deprive Souza of his property when he knowingly burned Souza's property. Therefore, the only question remaining in order to convict Santos of Robbery in the First Degree is if Santos was armed with a dangerous instrument and used force against Souza with intent to overcome Souza's physical resistance or physical power of resistance. Because the jury found the evidence showed that Santos had murdered Souza by using a sharp object to cut Souza's throat and a blunt object to hit his head, there was evidence of sufficient quality and probative value to enable a person of reasonable caution to support the conclusion that Santos was armed with a sharp object, capable of producing death, and used force against Souza with intent to overcome Souza's physical resistance or physical power of resistance.

**C. Extended Sentence.**

Santos contends that an extended sentence may not be imposed for his conviction of Murder in the Second Degree and Robbery in the First Degree. Santos's point on his sentence for Robbery in the First Degree is moot since his robbery conviction and sentence are vacated.

Under HRS § 707-701.5(2), Murder in the Second Degree is a felony for which the defendant shall be sentenced to imprisonment as provided in HRS § 706-656. Persons convicted of second degree murder shall be sentenced to life imprisonment with possibility of parole. HRS § 706-656(2) (1993).<sup>6</sup> Santos was sentenced to life with the possibility of parole for Murder in

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<sup>6</sup>HRS § 706-656(2) (1993) provides:

**§706-656 Terms of imprisonment for first and second degree murder and attempted first and second degree murder.**

. . . .  
(2) Persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with possibility of parole. The minimum length of imprisonment shall be determined by the Hawaii paroling authority; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment; and provided further that in any cases designated in section 706-657, the person may be sentenced to life imprisonment without possibility of parole.

If the court imposes a sentence of life imprisonment without possibility of parole, as part of such sentence the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

the Second Degree. In State v. Tyquiengco, 6 Haw. App. 409, 723 P.2d 186 (1986), this court stated that the sentence of life imprisonment with the possibility of parole for a conviction of murder was not an extended term, but was an ordinary term of imprisonment under HRS § 706-606(b) (Supp. 1984). 6 Haw. App. at 413, 723 P.2d at 189. Act 314, §§ 15 & 39, passed in 1986, removed the sentencing language for murder from HRS § 706-606 and created HRS § 706-656 (which had essentially the same language as HRS § 706-606(b), except that "all other cases [of murder]" were further defined as murder in the second degree). Santos's sentence of life imprisonment with the possibility of parole for Murder in the Second Degree is not an extended sentence.

**D. Consecutive Sentences.**

Santos contends the circuit court abused its discretion by sentencing him to consecutive terms of life imprisonment with the possibility of parole. Because we vacate Santos's conviction and sentence for Robbery in the First Degree, this point is moot.

**III. CONCLUSION**

The Judgment filed on August 29, 2001 is affirmed as to Count I, Murder in the Second Degree, and vacated as to Count II, Robbery in the First Degree. This case is remanded to the



**NOT FOR PUBLICATION**

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Circuit Court of the First Circuit for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, April 14, 2004.

On the briefs:

Harry Eliason  
for defendant-appellant.

Chief Judge

Darren W.K. Ching and  
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Associate Judge

Associate Judge