

NOT FOR PUBLICATION

NO. 26443

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
FLORENCIO GARPERIO, Defendant-Appellant

K. HAMAKA'DU
CLERK, INTERMEDIATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-2233)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Florencio Garperio (Garperio) appeals from the Amended Judgment entered on March 4, 2004 in the Circuit Court of the First Circuit (circuit court).^{1/} On appeal, Garperio argues that his conviction was the result of the ineffective assistance of his trial counsel. Specifically, Garperio argues that his trial counsel failed to: (1) use an interpreter during pretrial consultations with Garperio; (2) object during trial to irrelevant, prejudicial evidence, which created an atmosphere of sympathy for the decedent; and (3) object to prejudicial evidence, which discredited the extreme mental or emotional disturbance (EMED) defense.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to

^{1/} The Honorable Richard K. Perkins presided.

the arguments advanced and the issues as raised by the parties, we conclude:

(1) The circuit court did not err in finding that Garperio was not denied effective assistance of counsel. State v. Samuel, 74 Haw. 141, 158, 838 P.2d 1374, 1382 (1992); State v. Antone, 62 Haw 346, 348-49 & 352, 615 P.2d 101, 104-05 (1980); State v. Pacheco, 96 Hawai'i 83, 94, 26 P.3d 572, 583 (2001); and State v. Kahalewa[i], 54 Haw. 28, 30, 501 P.2d 977, 979 (1972).

(2) Garperio did not demonstrate that he received ineffective assistance of counsel because his trial counsel did not have an interpreter present during their pre-trial meetings. Samuel, 74 Haw. at 158, 838 P.2d at 1382; see State v. Faafiti, 54 Haw. 637, 638-39, 513 P.2d 697, 699 (1973); Hawai'i Rules of Penal Procedure (HRPP) Rule 28(b).

(3) Garperio did not demonstrate that his trial counsel was ineffective for not objecting to the opinion testimonies of Rommer Garperio (Rommer) and Luisito Rigor (Rigor), whose testimonies were relevant, rationally based on their personal perception, and helpful to determine a fact in issue. Hawaii Rules of Evidence (HRE) Rule 403; State v. Brantley, 84 Hawai'i 112, 118, 929 P.2d 1362, 1368 (App. 1996); HRE Rule 701; State v. Nishi, 9 Haw. App. 516, 521-22, 852 P.2d 476, 479 (1993); State v. Toyomura, 80 Hawai'i 8, 23-24, 904 P.2d 893, 908-09 (1995).

(4) Garperio did not demonstrate that his trial counsel was ineffective for not objecting to the admission into evidence of the photograph of Rommer. State v. Apao, 59 Haw. 625, 639, 586 P.2d 250, 260 (1978); Brantley, 84 Hawai'i at 118, 929 P.2d at 1368.

(5) Although Mercy Garperio's and Rommer's statements constituted inadmissible hearsay for which there was no exception and Rigor's funeral-planning testimony was not relevant, the admission of this evidence did not unfairly prejudice the jury in light of the overwhelming amount of evidence that the circuit court admitted in total. This court cannot say that a reasonable probability exists that were it not for Garperio's counsel's failure to object to this hearsay evidence and testimony, the result of the trial would have been different. Samuel, 74 Haw. at 158, 838 P.2d at 1382.

(6) Garperio's trial counsel's decision as to how to conduct cross-examination constituted trial strategy, and as such "will rarely be second-guessed by judicial hindsight." State v. Richie, 88 Hawai'i 19, 39-40, 960 P.2d 1227, 1247-48 (1998) (internal quotation marks and citation omitted).

(7) There is no merit to Garperio's contention that his counsel was ineffective for failing to object to the deputy prosecutor's rebuttal closing argument that the defense presented no evidence to establish that Mercy Garperio was having an affair

or was pregnant. Garperio testified on his own behalf. He explained why he thought Mercy was having an affair and why he thought she was pregnant with someone else's child. Closing argument is not considered evidence, the judge so instructed the jury, and the jury is presumed to follow the court's instructions. State v. Knight, 80 Hawai'i 318, 327, 909 P.2d 1133, 1142 (1996). Garperio's argument that he was prejudiced by the State's closing argument is without merit.

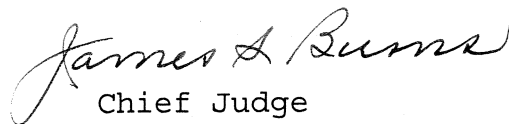
(8) The State's reference in front of the jury to Garperio's being in custody resulted in little if any harm to him.

IT IS HEREBY ORDERED that the Amended Judgment entered on March 4, 2004 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, April 27, 2006.

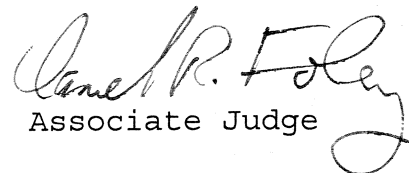
On the briefs:

Joyce K. Matsumori-Hoshijo,
Deputy Public Defender,
for Defendant-Appellant.


Chief Judge

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Associate Judge


Associate Judge