

NO. 23604

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

KENNETH DUCKWORTH, also known as John Dumbar
and Willie Newsome, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-1582)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Kenneth Duckworth (Defendant) appeals from a July 18, 2000 judgment and sentence of the Honorable Marie N. Milks on the charge of robbery in the second degree, HRS § 708-841(1)(a) (1993). Such an offense is committed where "in the course of committing theft . . . [t]he [defendant] uses force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance."

Defendant alleges that he was deprived of his constitutional right to effective assistance of counsel when the trial court prevented his attorney from arguing to the jury as an inference from the facts in evidence, that the security guard who attempted to arrest him for theft observed Defendant by camera surveillance rather than in person, as the guard had testified.

Defendant reasons that by discrediting such testimony, the guard's assertion that Defendant had used force in commission of that theft would also be discredited, leading to a reasonable doubt that force, a required element for second degree robbery, was used.

Assuming there was any error in the preclusion of such argument, the error was not attorney error. Because defense counsel vigorously asserted the inference there was no specific error or omission that would constitute ineffective assistance of counsel. See State v. Janto, 92 Hawai'i 19, 31, 986 P.2d 306, 318 (1999) (citations omitted). If error were committed it would have been court error. However, we conclude that there was no error committed by the court.

The trial court has broad discretion in controlling the scope of closing argument. "[C]losing argument affords the prosecution (as well as the defense) the opportunity to persuade the jury that its theory of the case is valid, based upon the evidence adduced and all reasonable inferences that can be drawn therefrom." State v. Klinge, 92 Hawai'i 577, 592, 994 P.2d 509, 524, reconsideration denied, 92 Hawai'i 577, 994 P.2d 509 (2000). "[A]n inference is . . . a logical and reasonable conclusion of the existence of a fact . . . from the establishment of other facts[,] from which, by the process of logic and reason, and based upon human experience, the existence of the assumed fact

may be concluded by the trier of fact." State v. Tabigne, 88 Hawai'i 296, 305, 966 P.2d 608, 617 (1998) (citations and quotation marks omitted).

The inference to be argued by defense counsel was not a logical and reasonable conclusion to be drawn from the evidence. Defendant presented no direct evidence that he was observed on the security cameras. The guard testified that he had personally witnessed the Defendant's theft and that the incident had not been observed on camera. The guard never testified he was in or near the security office. The guard's testimony that the security office was on the same floor as the alleged incident and that the office contained video surveillance equipment were not sufficient facts that would reasonably lead to the existence of the inference sought to be asserted.

The inference advocated was also logically remote from evidence of Defendant's use of force. The use of force was substantiated by the guard's own testimony, at a prior hearing and at trial, and by the investigating police officer, who reported the guard's post-incident statement regarding Defendant's use of force.

Furthermore, substantial evidence existed from which the jury could reasonably conclude, beyond a reasonable doubt, that the required elements for robbery in the second degree were proven under HRS §708-841(1)(a). Substantial evidence is

"credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion." State v. West, 95 Hawai'i 22, 25, 18 P.3d 884, 887 (2001) (internal citations and quotation marks omitted).

Defendant admitted on the stand that he intended to commit and did, in fact, commit theft. Defendant denied using force. However, as indicated, supra, Defendant's use of force was testified to by the guard, and the guard's after-the-incident statement regarding force was corroborated by the investigating police officer. Any conflict between the guard's testimony and Defendant's testimony with respect to the use of force was a matter of credibility for the jury to resolve. See State v. Elmaleh, 7 Haw. App. 488, 495, 782 P.2d 886, 890, cert. denied, 70 Haw. 666, 796 P.2d 502 (1989) (citing State v. Bogdanoff, 59 Haw. 603, 608, 585 P.2d 602, 606 (1978)) (holding that inconsistent accounts with respect to the nature and extent of force used in commission of a theft, "are merely reflective of the overall credibility of [the complaining witness'] testimony, and the determination of witness credibility is strictly within the province of the jury.") The jury heard Defendant's testimony and observed his demeanor and apparently did not believe him.

Accordingly, Defendant's July 18, 2000 judgment and sentence for robbery in the second degree is affirmed.

DATED: Honolulu, Hawai'i, June 5, 2001.

On the briefs:

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