

NO. 22589

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

RUSSELL MASCOTO, Defendant-Appellant.

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APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 97-3116)

SUMMARY DISPOSITION ORDER

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

Defendant-appellant Russell Mascoto appeals the First Circuit Court's April 22, 1999 judgment of conviction and sentence for the offense of unauthorized entry into motor vehicle (UEMV),<sup>1</sup> in violation of Hawai'i Revised Statutes (HRS) § 708-836.5 (Supp. 1996). 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 resolve each of Mascoto's contentions as follows:

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<sup>1</sup> Hon. Frances Q.F. Wong presided over the pretrial motion to dismiss, Hon. Herbert K. Shimabukuro presided over the trial, and Hon. Reynaldo D. Gaulty entered final judgment in this case.

(1) Mascoto argues that the motions court erred in denying his pretrial motion to dismiss because the UEMV statute is void for vagueness and violates due process. We hold that the motions court did not err in denying Mascoto's pretrial motion to dismiss because (a) the statute is not vague in that it clearly identifies the requisite mental states corresponding to each element of the offense such that it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provides explicit standards for those who apply the statute, see State v. Kaakimaka, 84 Hawai'i 280, 290, 933 P.2d 617, 627 (1997), and (b) unlike in State v. O.C., 748 So. 2d 945 (Fla. 1999), upon which Mascoto relies, where the statute was unconstitutional because of the lack of a nexus between membership in a gang and criminal activity, HRS § 708-836.5 is premised upon the unlawful entry into, or remainder in, a motor vehicle for the purpose of committing a crime.

(2) Mascoto contends that the trial court erred in refusing to admit evidence that would have demonstrated the bias of prosecution witnesses. Of the eighteen distinct points of error raised by Mascoto, all but three are irrelevant to his contention or are patently without merit. With respect to the three remaining points, we hold that the trial court did not err when it refused to permit: (a) Mascoto to ask Honolulu Police Department Sergeant Lee whether he had initiated lie detector

testing for Mascoto because "the refusal or willingness of a defendant to submit to a lie detector test are matters that may not be brought out in the trial of a criminal case[,]” State v. Chang, 46 Haw. 22, 33, 374 P.2d 5, 12 (1962); (b) the proffered testimony of Sam Gomes and Chad Thompson that may have impeached the credibility of Angie Ibera because her testimony was marginally relevant inasmuch as the case primarily rested on the credibility of the complainant, Edgar Ibera (Edgar), and the primary evidence supporting Edgar’s testimony was derived from other sources; and (c) statements made by Edgar to Curtis Yoshikawa during a conversation that may have been relevant to demonstrate Edgar’s anger towards Mascoto or to impeach Edgar’s credibility because their probative value was substantially outweighed by “considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Hawai’i Rules of Evidence Rule 403.

(3) Mascoto contends that the trial court erred by failing to sua sponte instruct the jury on self defense. Inasmuch as Mascoto testified that he never approached Edgar’s vehicle and Edgar testified that Mascoto was the first aggressor, we hold that the trial court did not err in failing to provide a self defense instruction because there was no evidence that it was immediately necessary for Mascoto to enter Edgar’s vehicle

and strike Edgar in order to protect himself against the unlawful use of force. See HRS § 703-304 (1993).

(4) Mascoto contends that the prosecutor committed reversible misconduct. We hold that all of Mascoto's prosecutorial misconduct allegations are waived because either he did not object at trial, see State v. Hoglund, 71 Haw. 147, 150, 785 P.2d 1311, 1313 (1990) ("Generally, the failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal."), or he does not argue them on appeal. See Hawai'i Rules of Appellate Procedure Rule 28(b)(7) ("Points not argued may be deemed waived."). Accordingly,

IT IS HEREBY ORDERED that the judgment of conviction and sentence from which this appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, October 30, 2001.

On the briefs:

Arthur E. Ross, for  
defendant-appellant

Bryan K. Sano,  
Deputy Prosecuting Attorney,  
for plaintiff-appellee