
NO. 25246

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

ANTHONY WILL, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 02-1-0190)

SUMMARY DISPOSITION ORDER

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

Defendant-appellant Anthony Will appeals from the judgment of conviction and sentence entered on July 24, 2002 by the Circuit Court of the First Circuit, the Honorable Michael D. Wilson presiding, for robbery in the second degree, in violation of Hawai'i Revised Statutes (HRS) § 708-841 (1993).¹

On appeal, Will contends that the trial court:

(1) plainly erred by allowing defense counsel to waive Will's presence during the settling of jury instructions without

¹ HRS § 708-841 provides in relevant part:

- (1) A person commits the offense of robbery in the second degree if, in the course of committing theft:
- (a) The person uses force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance;
 - (b) The person threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property; or
 - (c) The person recklessly inflicts serious bodily injury upon another.

affording him an on-the-record colloquy; (2) erred by refusing certain jury instructions proffered by Will; (3) erred by denying Will's motion for mistrial after the complaining witness, Jack Chan Song, improperly raised the issue of Will's alleged drug use; and (4) erred by excluding evidence of Song's prior conviction of assault in the third degree.

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 the issues raised on appeal as follows. First, we hold that the trial court did not plainly err in allowing defense counsel to waive Will's presence at the settling of jury instructions without an on-the-record colloquy because: (1) an on-the-record colloquy is only required to protect constitutional or statutory rights, See Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995); (2) a defendant's presence at the settling of jury instructions is not a constitutional or statutory right, See State v. Samuel, 74 Haw. 141, 155, 838 P.2d 1374, 1381 (1992) ("a defendant does not have a constitutional or statutory right to attend a conference determining the legal instructions with which the trial court will charge the jury") (citations omitted); and (3) defense counsel requested that Will's presence be waived.

Second, the evidence indicates that the defense of self-protection under HRS § 703-304 (1993),² as to which the jury was properly instructed, applied to this case. We, therefore, hold that the trial court did not err in refusing to instruct the jury on the "choice of evils" defense, under HRS § 703-302 (1993),³ and the "mistake of fact" defense, under HRS § 702-218 (1993).⁴ See State v. Smith, 91 Hawai'i 450, 463, 984 P.2d 1276,

² HRS § 703-304 states in relevant part:

(1) Subject to the provisions of this section and of section 703-308, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.

³ The choice of evils defense falls under HRS § 703-302 (1993), which states in relevant part:

(1) Conduct which the actor believes to be necessary to avoid an imminent harm or evil to the actor or to another is justifiable provided that:

- (a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
- (b) Neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
- (c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for the actor's conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

⁴ The mistake of fact defense falls under HRS § 702-218 (1993), which states in relevant part:

In any prosecution for an offense, it is a defense that the accused engaged in the prohibited conduct under ignorance or mistake of fact if:

- (1) The ignorance or mistake negatives the state of mind required to establish an element of the

(continued...)

1289 (App. 1999) (holding that the choice of evils defense and mistake of fact did not apply to the case because the defense of self-protection justification applied).

Third, we conclude that, because (1) the nature of Song's remark regarding Will's alleged drug use⁵ was isolated, (2) the trial court immediately gave a curative instruction to the jury to disregard the stricken remark, and (3) there was sufficient evidence in the record to support the conviction, Song's remark, albeit improper, was harmless beyond a reasonable doubt, and there is no reasonable possibility that the remark contributed to Will's conviction. See Samuel, 74 Haw. at 148, 838 P.2d at 1378 (whether a witness's improper remarks constitute reversible error requires consideration of three factors: (1) the nature of the misconduct; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant) (citations omitted). Therefore, we hold that the trial court did not abuse its discretion in denying Will's motion for mistrial.

Finally, based upon a review of the record, we cannot conclude that the trial court clearly exceeded the bounds of

⁴(...continued)

- offense; or
(2) The law defining the offense or a law related thereto provides that the state of mind established by such ignorance or mistake constitutes a defense.

⁵ In response to the defense counsel's question, "Were you asking anybody at the corner [for drugs][,]" Song stated, "Yeah, maybe I can tell he was on drugs. Yeah, I can see his eyes."

reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant in determining that the admission of Song's conviction of assault in the third degree was more prejudicial than probative. Here, the trial court concluded that there was a colorable issue of "first aggressor" and that the evidence of a prior conviction of assault in the third degree was relevant; however, the prior conviction does not automatically become admissible because the trial court must still, under Hawai'i Rules of Evidence (HRE) Rule 403 (1993),⁶ balance the probative value against the prejudicial effect of admitting prior bad act evidence. Therefore, we hold that the trial court did not abuse its discretion in excluding evidence of Song's prior conviction. Accordingly,

IT IS HEREBY ORDERED that the trial court's July 24, 2002 judgment of conviction and sentence is affirmed.

DATED: Honolulu, Hawai'i, July 14, 2003.

On the briefs:

Michael G. M. Ostendorp
and Shawn A. Luiz,
for defendant-appellant

Mark Yuen,
Deputy Prosecuting Attorney,
for plaintiff-appellee

⁶ HRE Rule 403 (1993) states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.