

\*\*\* NOT FOR PUBLICATION \*\*\*

NO. 24339

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

BRIAN JESS, Defendant-Appellant.

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 00-1-0422)

SUMMARY DISPOSITION ORDER

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

The defendant-appellant Brian Jess appeals from the judgment of the first circuit court, the Honorable Victoria S. Marks presiding, filed on May 7, 2000, convicting him of and sentencing him for the offenses of robbery in the first degree, in violation of Hawai'i Revised Statutes (HRS) § 708-840(1)(b)(ii) (1993 & Supp. 2000), and unauthorized control of propelled vehicle, in violation of HRS § 708-836 (Supp. 2000). On appeal, Jess contends that: (1) the circuit court abused its discretion in denying his motion to suppress identification; (2) the circuit court erred in permitting the plaintiff-appellee State of Hawai'i [hereinafter, "the prosecution"] to argue that the circuit court had the "last word" on the propriety of the Honolulu Police Department's (HPD's) identification procedures; and (3) HRS § 706-662 (Supp. 2000), Hawaii's extended term sentencing statute, is unconstitutional in light of the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000).

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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 affirm the judgment of the circuit court and hold that: (1) because the record supports the circuit court's findings that, under the totality of the circumstances, the pretrial identifications were "sufficiently reliable" to be "worthy of presentation to and consideration by the jury," see State v. Okumura, 78 Hawai'i 383, 391-92, 894 P.2d 80, 88-89 (1995); State v. DeCenso, 5 Haw. App. 127, 131, 681 P.2d 573, 577-78 (1984), the circuit court did not err in denying Jess's motion to suppress identification; (2) although the deputy prosecuting attorney's (DPA's) statement, "the Court has the last word" regarding the suggestiveness and reliability of a witness's identification constituted prosecutorial misconduct, such misconduct was harmless beyond a reasonable doubt, inasmuch as (a) there is no basis in the record to suggest that the jury inferred from the DPA's statement that it was the province of the court to determine Jess's identity, (b) the circuit court expressly instructed the jury regarding the jury's role as the trier of fact, and (c) the prosecution adduced substantial evidence that Jess was, in fact, the person who committed the charged offenses, see State v. St. Clair, 101 Hawai'i 280, 286-87, 67 P.3d 779, 785-86, reconsideration denied, 101 Hawai'i 420, 70 P.3d 646 (2003); State v. Rogan, 91 Hawai'i 405, 412, 984 P.2d 1231, 1238 (1999); and (3) pursuant to this court's decision in State v. Kaua, 102 Hawai'i 1, 12-13, 72 P.3d 473, 484-85 (2003), HRS §§ 706-662(1) and (4) are not unconstitutional. Therefore,

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IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, September 26, 2003.

On the briefs:

Emlyn H. Higa, for the  
defendant-appellant  
Brian Jess

Mangmang Qiu Brown, deputy  
prosecuting attorney, for  
the plaintiff-appellee  
State of Hawai'i