NO. 24582

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,

vs.

JOEL KEONI BRUNSON, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-1-1460)

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

Following a jury trial in the Circuit Court of the First Circuit, the Honorable Michael A. Town presiding, defendant-appellant Joel K. Brunson appeals from his August 31, 2001 judgment of conviction for murder in the second degree, in violation of Hawaiʻi Revised Statutes (HRS) § 707-701.5 (1993), place to keep a firearm, in violation of HRS § 134-6(c) (Supp. 1999), carrying, using, or threatening to use a firearm in the commission of a separate felony, in violation of HRS §§ 134-6(a) and (e), and terroristic threatening in the first degree, in violation of HRS § 707-716(1)(d) (1993). On appeal, Brunson initially argues that (1) the family court erred in waiving its jurisdiction over the case. Brunson further contends that the trial court erred in: (2) denying his motion for new trial as untimely; (3) convicting him of both murder in the second degree and carrying, using, or threatening to use a firearm in the

commission of a separate felony; (4) ordering him to pay restitution; (5) admitting evidence regarding gangs; (6) refusing to voir dire individual jurors after the publication of two news articles; and (7) issuing allegedly erroneous jury instructions. Lastly, Brunson contends that (8) his trial counsel provided ineffective assistance and (9) the prosecutor committed prosecutorial misconduct.

Upon carefully reviewing the record and the briefs submitted and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Brunson's contentions as follows.

(1) With respect to the family court's waiver of jurisdiction, the family court's failure to set forth specific findings in its waiver order pursuant to Hawaiʻi Family Court Rules Rule 129, assuming arguendo that Rule 129, as amended, requires the entry of written findings, was harmless inasmuch as Brunson's right to a "full investigation and hearing" under HRS § 571-22 (1999) was not violated. The family court considered the requisite factors for waiving jurisdiction under HRS § 571-22(a) and (d) and, therefore, we uphold the family court's waiver of jurisdiction.

(2) With respect to the timing of Brunson's motion for new trial, "time limitations in filing a motion for new trial have been considered by courts to be jurisdictional and must be strictly complied with." State v. Meafou, 67 Haw. 41, 44-45, 677 P.2d 459, 462 (1984). Because Brunson filed his motion after the

trial court's extended deadline had expired, the trial court properly refrained from addressing its merits. Moreover, we reject Brunson's contention that the trial court should have issued an order nunc pro tunc extending the filing deadline, thereby making his motion for new trial timely. Such an order would have been improper. See DuPonte v. DuPonte, 53 Haw. 123, 126, 488 P.2d 537, 540 (1971) (stating nunc pro tunc orders are "limited . . . to those cases where through no fault of the complaining party a [document] entitled to be entered was not entered or was incorrectly entered").

(3) Relying on State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998), Brunson argues that the trial court erred in convicting him of both murder in the second degree and carrying, using, or threatening to use a firearm in the commission of a separate felony. However, Brunson concedes in his reply brief "that State v. Brantley, 99 Hawai'i 463, 56 P.3d 1252 (2002)[,] overruled [Jumila] on the issue." In Brantley, this court held that "a defendant can be convicted of both HRS § 134-6(a) [(use of firearm in a separate felony)] and the separate felony." 99 Hawai'i at 465, 56 P.3d at 1254. Accordingly, Brunson's convictions for murder in the second degree and use of firearm in the commission of a separate felony were not improper.

(4) With respect to the trial court's order of restitution, the trial court expressly found and concluded that the amount ordered was "a reasonable amount that [Brunson] can

afford to pay." Accordingly, the trial court did not err. <u>See</u> HRS § 706-603(1)(d) (Supp. 1999).

(5) With respect to the admitted gang evidence, it is well-settled that evidence of other crimes, wrongs, or acts is admissible if "probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident." Hawai'i Rules of Evidence (HRE) Rule 404(b) (Supp. 1994). The aforementioned listing in HRE Rule 404(b), however, "is not intended to be exhaustive." <u>State v. Clark</u>, 83 Hawai'i 289, 300, 926 P.2d 194, 205 (1996). HRE Rule 403 (1993) provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Inasmuch as the trial court admitted evidence regarding gangs solely for the limited purposes of Brunson's motive and/or relationships with witnesses and the trial court issued the requisite limiting jury instruction, the trial court did not abuse its discretion.

(6) With respect to the trial court's refusal to voir dire the jurors, a trial court is under no duty to voir dire the jury if a news article is not substantially prejudicial. <u>State v. Keliiholokai</u>, 58 Haw. 356, 358, 360, 569 P.2d 891, 894, 895 (1977). Inasmuch as the news articles did not substantially prejudice Brunson's right to a fair trial, the trial court was under no obligation to voir dire the jurors.

(7) We resolve Brunson's contentions regarding the trial court's jury instructions and special verdict interrogatories as follows:

(a) Brunson first contends that the trial court's jury instructions pertaining to second degree murder were erroneous because the instructions failed to separate the "conduct" and "result" elements and require the jury to find that the requisite state of mind applied to all elements of the offense as required by State v. Aganon, 97 Hawai'i 299, 36 P.3d 1269 (2001). In that case, we determined, as we do here, that "the jury instructions were substantively, if not technically, correct." Aganon, 97 Hawai'i at 301, 36 P.2d at 1273.

(b) With respect to the place to keep a firearm jury instructions, the trial court should have instructed that, to be found guilty, the defendant must have (1) "knowingly" procured or received an object while (2) possessing the object in "reckless" disregard of the substantial and unjustifiable risk that the object is in fact a firearm. State v. Jenkins, 93 Hawai'i 87, 111, 997 P.2d 13, 37 (2000); State v. Kupihea, 98 Hawai'i 196, 202, 46 P.3d 498, 504 (2002). Although the trial court's jury instructions did not comport with Jenkins and were therefore erroneous, under the facts adduced at trial, the error was harmless.

(c) With respect to the terroristic threatening jury instructions, State v. Chung, 75 Haw. 398, 862 P.2d 1063 (1993), and State v. Valdivia, 95 Hawai'i 465, 24 P.3d 661 (2001), read

together, require trial courts to instruct juries that the threat for terroristic threatening in the first degree must be a true threat ("so unequivocal, unconditional, immediate and specific as to the person threatened") that is imminent ("gravity of purpose" and "imminent prospect of execution"). Although the trial court erred by not instructing the jury on "true threats" or "imminency," under the facts adduced at trial, the error was harmless.

(d) Inasmuch as the special verdict interrogatories were necessary to establish "aggravating circumstances," which must be determined by the trier of fact, justifying the imposition of mandatory minimum sentences, see State v. Vanstory, 91 Hawai'i 33, 46, 979 P.2d 1059, 1072 (1999), and the instructions regarding the underlying offenses clearly instructed on the state of mind requirements, the special verdict interrogatories were not prejudicial.

(8) Brunson asserts he was denied effective assistance of counsel because his trial counsel failed to timely file the motion for new trial. Even assuming arguendo that an untimely motion for new trial evinced counsel's "lack of skill, judgment, or diligence," State v. Reed, 77 Hawai'i 72, 83, 881 P.2d 1218, 1229 (1994), Brunson fails to show that the failure to timely file the motion "resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Id. Accordingly, we hold that Brunson was not denied effective assistance of counsel.

(9) Brunson contends that the prosecutor committed prosecutorial misconduct by: (a) mentioning the "O.J. Simpson defense" during closing argument; (b) using leading questions excessively; (c) using the words "we" and "myself" repeatedly during questioning; (d) telling a witness, "if you only could hear the tape"; (e) asking a question during cross-examination about evidence barred by a motion in limine; (f) shoving papers at defense counsel during trial; (g) making a "facial taunt or gesture" during trial; (h) asking a witness about her testimony from the prior day of trial; (i) using sarcasm during cross-examination; and (j) laughing at sentencing, the cumulative effect of which Brunson claims deprived him of a fair trial.

(a) With respect to the O.J. Simpson comment, the record reflects that the trial court struck the prosecutor's comment and immediately instructed the jury to disregard and not consider it in any way. Because the jury is presumed to have adhered to the trial court's prompt curative instruction, see State v. Kupihea, 80 Hawai'i 307, 317-18, 909 P.2d 1122, 1132-33 (1996), and the prosecutor's comment simply analogized O.J. Simpson's defense strategy to that of Brunson's, see United States v. Papajohn, 212 F.3d 1112, 1121 (8th Cir. 2000) (simply comparing the defendant's defense to that of O.J. Simpson's did not require a mistrial), we cannot say that the prosecutor committed reversible error.

(b) With respect to the use of leading questions, HRE Rule 611(c) (1993) generally prohibits the use of leading

questions during direct-examination, unless a party calls (1) a hostile witness, (2) an adverse party, or (3) a witness identified with an adverse party. Inasmuch as the trial court issued immediate curative instructions following the leading questions, the prosecutor did not commit prosecutorial misconduct.

(c) With respect to the prosecutor's use of "we" and "myself" during questioning, "[i]t is generally recognized under Hawai'i case law that prosecutors are bound to refrain from expressing their personal views as to a defendant's guilt or the credibility of witnesses." Clark, 83 Hawai'i at 304, 926 P.2d at 209. Inasmuch as the prosecutor's use of "we" and "myself" did not comment on Brunson's guilt or witness credibility, the prosecutor did not commit prosecutorial misconduct.

(d) With respect to the prosecutor's statement, "if you only could hear the tape[,]" we hold that, although the prosecutor acted improperly by making the statement, any error was harmless.

We decline to address Brunson's remaining allegations of prosecutorial misconduct (see ¶ 9(e) through (j) above) because he failed to present argument on these issues in his opening brief and has, therefore, waived them on appeal. See In re Hawaiian Flour Mills, Inc., 76 Hawai'i 1, 14 n.5, 868 P.2d 419, 432 n.5 (1994) (stating that failure to present argument on an issue in an opening brief precludes consideration of that issue).

Finally, we hold that the record does not indicate that the cumulative effect of the prosecutor's alleged misconduct was so prejudicial as to deny Brunson a fair trial. State v. Klinge, 92 Hawai‘i 577, 596, 994 P.2d 509, 528 (2000) (quoting State v. Pulse, 83 Hawai‘i 229, 244, 925 P.2d 797, 812 (1996)). Accordingly,

IT IS HEREBY ORDERED that Brunson's August 31, 2001 judgment of conviction is affirmed.

DATED: Honolulu, Hawai‘i, December 15, 2003.

On the briefs:

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for defendant-appellant

Mangmang Qiu Brown,
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