

*** NOT FOR PUBLICATION ***

NO. 24925

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

NORBERT LEE ALCAIDE, Defendant-Appellant

APPEAL FROM THE THIRD CIRCUIT COURT
(CR. NO. 00-1-115K)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, JJ.
and Circuit Judge Wilson, assigned by reason of vacancy)

Defendant-appellant Norbert Lee Alcaide (Alcaide) appeals from the February 13, 2002 judgment of the circuit court of the third circuit, the Honorable Ronald Ibarra presiding, convicting him of and sentencing him for: (1) unauthorized entry into motor vehicle, in violation of Hawai'i Revised Statutes (HRS) § 708-836.5 (Supp. 2003)¹ (Count I); burglary in the first degree, in violation of HRS § 708-810(1)(c) (1993)² (Count II); terroristic threatening in the first degree, in violation of HRS

¹ HRS § 708-836.5 provides, in pertinent part: "A person commits the offense of unauthorized entry into motor vehicle if the person intentionally or knowingly enters or remains unlawfully in a motor vehicle with the intent to commit a crime against a person or against property rights."

² HRS § 708-810(1)(c) provides: "A person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and . . . [t]he person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling."

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§ 707-715(1) (1993)³ and § 707-716(1) (d) (1993)⁴ (Count IV); kidnapping, in violation of HRS §§ 707-720(1) (c), (d), and (e) (1993)⁵ (Count V); sexual assault in the third degree, in violation of HRS § 707-732(1) (e) (1993)⁶ (Counts VI – IX); and attempted murder in the second degree, in violation of HRS § 705-500(1) (b) (1993)⁷ and § 707-701.5(1) (1993)⁸ (Count X).

On appeal, Alcaide contends that the circuit court erred in: (1) denying his motion to dismiss the charge of assault in the first degree, in violation of HRS § 707-710(1)

³ HRS § 707-715(1) provides: "A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony . . . [w]ith the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person[.]"

⁴ HRS § 707-716(1) (d) provides: "A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening . . . [w]ith the use of a dangerous instrument."

⁵ HRS § 707-720(1) provides, in pertinent part: "A person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to . . . (c) [f]acilitate the commission of a felony or flight thereafter; (d) [i]nfllict bodily injury upon that person or subject that person to a sexual offense; [or] (e) [t]errorize that person or a third person[.]"

⁶ The applicable version of HRS § 707-732(1) (e) provided, in pertinent part: "A person commits the offense of sexual assault in the third degree if . . . [t]he person knowingly, by strong compulsion, has sexual contact with another person or causes another person to have sexual contact with the actor[.]"

⁷ HRS § 705-500(1) (b) provides: "A person is guilty of an attempt to commit a crime if the person . . . [i]ntentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime."

⁸ HRS § 707-701.5(1) provides: "Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person."

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(1993)⁹ (Count III), inasmuch as the district court considered inadmissible hearsay evidence in finding that probable cause supported the charge; (2) admitting his inculpatory statement to police, inasmuch as the statement was involuntary and the product of custodial interrogation; and (3) denying his motions for mistrial, inasmuch as prosecutorial misconduct prejudiced his right to a fair trial. Alcaide further contends that the sentencing court erred in: (1) denying his motion to strike expert testimony at his sentencing hearing, inasmuch as the expert was without authority to either (a) conduct the psychological assessment upon which the expert testimony was based, or (b) testify at the sentencing hearing; and (2) sentencing Alcaide to consecutive terms of imprisonment, inasmuch as the sentence imposed was unconstitutionally cruel and unusual.

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, we hold that: (1) inasmuch as Alcaide was never convicted of Count III, any procedural error in the district court's probable cause determination with respect to that Count was moot; (2) Alcaide's inculpatory statement was admissible, inasmuch as the circuit court did not clearly err in finding that the statement did not

⁹ HRS § 707-710(1) provides: "A person commits the offense of assault in the first degree if the person intentionally or knowingly causes serious bodily injury to another person."

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stem from police questioning so as to be the product of custodial interrogation, see State v. Naititi, 104 Hawai'i 224, 87 P.3d 893 (2004); (3) the circuit court did not abuse its discretion in denying Alcaide's motions for mistrial, inasmuch as the challenged prosecutorial misconduct was harmless beyond a reasonable doubt, see State v. Klinge, 92 Hawai'i 577, 994 P.2d 509 (2000); (4) the sentencing court did not plainly err in admitting expert testimony at the sentencing hearing, see generally State v. Jenkins, 93 Hawai'i 87, 997 P.2d 13 (2000); Hawai'i Rules of Penal Procedure Rule 52(b); and (5) the sentence did not constitute cruel and unusual punishment, see Jenkins, supra, or a plain and manifest abuse of discretion, see State v. Kumukau, 71 Haw. 218, 787 P.2d 682 (1990). Therefore,

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

DATED: Honolulu, Hawai'i, December 3, 2004.

On the briefs:

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for the defendant-appellant
Norbert Lee Alcaide

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State of Hawai'i