

*** NOT FOR PUBLICATION ***

NO. 26458

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

JOSEPH DOMINGO, Defendant-Appellant.

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STATE OF HAWAII

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 02-1-1834)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, and Nakayama, JJ., with Duffy, J., concurring separately and dissenting, in which Acoba, J., joins)

The defendant-appellant Joseph Domingo appeals from the judgment of the circuit court of the first circuit, the Honorable Sandra A. Simms presiding, convicting him of and sentencing him for five counts of sexual assault in the third degree, in violation of HRS § 707-732(1)(b) (1993 & Supp. 2001). On appeal, Domingo argues (1) that the circuit court erred in refusing to instruct the jury pursuant to his proposed supplemental specific unanimity instruction, in violation of State v. Arceo, 84 Hawai'i 1, 928 P.2d 843 (1996), (2) that the circuit court's responses to jury communications were impermissible pursuant to this court's decision in State v. Fajardo, 67 Haw. 593, 699 P.2d 20 (1985), and (3) that the circuit court erred in imposing concurrent ten-year extended terms of imprisonment in violation of his constitutional right to a jury trial under the sixth amendment to the United States Constitution and article I, section 14 of the Hawai'i Constitution (1978).

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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, we affirm the judgment and sentence of the circuit court and hold as follows.

(1) The circuit court complied with this court's decision in Arceo, 84 Hawai'i 1, 928 P.2d 843, by giving the jury one specific unanimity instruction, stating, inter alia, "that all twelve jurors must unanimously agree that the same act has been proven beyond a reasonable doubt." Inasmuch as Arceo does not preclude a single specific unanimity instruction expressly applicable to all relevant counts, the circuit court did not err in refusing to give Domingo's proposed supplemental specific unanimity instructions tailored to each count.

(2) The circuit court's responses to the jury's communications were not erroneous, nor did they mirror the instruction allowed in Allen v. United States, 164 U.S. 492 (1896), but rejected as improper by this court in Fajardo, 67 Haw. 593, 699 P.2d 20, and State v. Villeza, 72 Haw. 327, 334-35, 817 P.2d 1054, 1058 (1991). The circuit court's instruction to the jury to continue deliberating by explaining that "[t]he law requires a unanimous decision in criminal cases. Please continue your deliberations with a view to reaching an agreement if you can do so without violating your individual judgment" did not have the effect of "blasting" a verdict out of a deadlocked jury. Fajardo, 67 Haw. at 597, 699 P.2d at 22 (citation omitted). "[W]hen read and considered as a whole, the instructions given" were not "prejudicially insufficient, erroneous, inconsistent, or

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misleading," State v. Kinnane, 79 Hawai'i 46, 49, 897 P.2d 973, 976 (1995), and the circuit court did not err in instructing the jury. See also State v. Hoey, 77 Hawai'i 17, 38, 881 P.2d 504, 525 (1994).

(3) Domingo's arguments against his extended terms of imprisonment have been foreclosed by this court's decision in State v. Rivera, 106 Hawai'i 146, 150, 102 P.3d 1044, 1048 (2004), which held that Hawai'i's extended term sentencing scheme is not incompatible with the United States Supreme Court's decision in Blakely v. Washington, 124 S.Ct. 2531 (2004). See also State v. Kaua, 102 Hawai'i 1, 72 P.3d 473 (2003); State v. Hauge, 103 Hawai'i 38, 79 P.3d 131 (2003). Therefore,

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

DATED: Honolulu, Hawai'i, June 14, 2005.

On the briefs:

Stephen K. Tsushima,
deputy prosecuting attorney,
for the plaintiff-appellee
State of Hawai'i

Todd Eddins,
for the defendant-appellant
Joseph Domingo

