

NO. CAAP-13-0003756

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
KEITH C. GISHI, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CRIMINAL NO. 12-1-0393)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., Foley and Reifurth, JJ.)

Defendant-Appellant Keith C. Gishi (**Gishi**) appeals from the Judgment of Conviction and Sentence, entered on September 4, 2013 in the Circuit Court of the First Circuit¹ (**circuit court**). Gishi was convicted of assault in the second degree, in violation of Hawaii Revised Statutes (**HRS**) § 707-711(1)(a) (2014 Repl.).²

On appeal, Gishi contends the circuit court erred:

(1) when it granted the November 20, 2012 Motion to Consolidate Cases for Trial filed by Plaintiff-Appellee State of Hawai'i (**State**);

(2) on February 28, 2013 and March 1, 2013 when it "provid[ed] the legal basis behind the State's objections during cross-examination of its witnesses";

¹ The Honorable Randal K.O. Lee presided.

² HRS § 707-711 provides, in relevant part:

§707-711 Assault in the second degree. (1) A person commits the offense of assault in the second degree if:

(a) The person intentionally or knowingly causes substantial bodily injury to another[.]

(3) when it "denied to admit into evidence the HPD-252 Statement of Chirstina [sic] Nakamoto-Putt [(**Nakamoto-Putt**)]";

(4) when it denied Gishi's February 28, 2013 oral motion for mistrial;

(5) when it raised Gishi's bail, post-conviction; and

(6) in depriving Gishi of the right of adequate representation at trial due to his counsel's joint representation of Gishi and Gishi's son (**Son**), despite the filed written waiver of conflict of interest.

Upon careful review of 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, as well as the relevant statutory and case law, we conclude Gishi's appeal is without merit.

- (1) The circuit court did not abuse its discretion in granting the State's Motion to Consolidate Cases for Trial.

Gishi argues that "[h]aving a consolidated trial instead of two separate trials [for Gishi and his Son] was improper and prejudiced Gishi by preventing him from having a fair trial." Gishi contends that "[t]he offenses [Gishi and his Son] were charged with could not be joined in one charge under [Hawaii Rules of Penal Procedure (**HRPP**)] Rule 8(a), Joinder of Offenses, because the physical altercation that [Son] and Gishi had with [Shiloh Putt (**Putt**)] were separate, not simultaneous[,] and also argues that HRPP Rule 8(b)(3)(i) or (ii) do not apply to the instant case because "it is clear that Gishi and [his Son] were appropriately charged separately and that they could have not been joined in the same charge."

In support, Gishi cites State v. Matias, 57 Haw. 96, 98, 550 P.2d 900, 902 (1976), and State v. Miyazaki, 64 Haw. 611, 622, 645 P.2d 1340, 1349 (1982), for the proposition that the trial court must "balance possible prejudice to the defendant from joinder with the public interest in efficient use of judicial time through joint trial of defendants and offenses which are connected."

We review the trial court's decision to join defendants in a single trial for an abuse of discretion. State v. Renon, 73 Haw. 23, 31, 828 P.2d 1266, 1270 (1992) (citing Miyazaki, 64 Haw. at 622-23, 645 P.2d at 1349).

Gishi's argument is unpersuasive. The circuit court, pursuant to the State's motion to consolidate, joined Gishi and his Son, who were each charged with a single count of assault, as defendants under HRPP Rule 8(b).³ The State contended the offenses in both cases "ar[ose] out of the same episode, involve[d] the same complaining witness, . . . and charge[d] both Defendants with similar offenses." The State added that it "intend[ed] to call essentially the same witnesses in both cases."⁴

Gishi and his Son were both charged with assault in connection with the same March 7, 2012 incident. The alleged crimes by Gishi and his Son "were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others." HRPP

³ HRPP Rule 8(b) provides:

Rule 8. JOINDER OF OFFENSES AND DEFENDANTS.

. . . .

(b) Joinder of Defendants. Two or more defendants may be joined in the same charge:

(1) when each of the defendants is charged with accountability for each offense included in the charge;

(2) when each of the defendants is charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy; or

(3) when, even if conspiracy is not charged and all of the defendants are not charged in each count, the several offenses charged:

(i) were part of a common scheme or plan; or

(ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

⁴ Gishi argues that HRPP 13(b)(1) did not apply because the rule requires HRPP Rule 8(c) to be met before it can be applied. This argument lacks merit, as the language of HRPP Rule 13(b)(1) indicates that related offenses are similarly defined for the purposes of both HRPP Rules 13 and 8(c), not that one rule is required for the other to operate.

Rule 8(b)(3)(ii). In its ruling, the circuit court stated that both cases "ar[ose] out of the same incident." See In Interest of Doe, 79 Hawai'i 265, 274, 900 P.2d 1332, 1341 (App. 1995) (holding that "[T]he efficient administration of justice was served by the consolidated trials, because the charges involved the same complaining witness and the same incident."). Judicial administration was served by having each of the witnesses testify once. See id. ("By consolidating the trials, Witness and the other witnesses testified once, rather than twice, to the same events."). The circuit court did not abuse its discretion in granting the Motion to Consolidate Cases for Trial.

- (2) The circuit court did not abuse its discretion in making its rulings on the State's objections.

Gishi argues that the circuit court erred because it provided "assistance in providing the legal basis behind the State's objections during cross-examination of its witnesses [which] resulted in bias against Gishi and prevented him from having a fair trial." Under the Hawaii Rules of Evidence (**HRE**), the circuit court may clarify the nature of an objection for the record.

Gishi does not present any evidence of personal bias, but only makes his uncorroborated assertions that prejudice was created by the rulings on the objections. Furthermore, the record shows that the circuit court acted in a similar manner during the defense's objections to the State's questioning. Gishi fails to establish any bias or prejudice. See State v. Yip, 92 Hawai'i 98, 106, 987 P.2d 996, 1004 (App. 1999) (holding that appellant's argument "must fail" because appellant "advance[d] no other evidence or basis for his allegation of bias, other than . . . alleg[ing] trial errors[,] [and] . . . fail[ing] to explain why the judge was biased against him[,] and the record revealed no bias).

- (3) The circuit court did not abuse its discretion in excluding the statement of Nakamoto-Putt.

Gishi contends the circuit court "could have admitted either documents [sic] under HRE [Rule 613(b) (1993)] as inconsistent statements instead of refusing to admit under HRE

[Rule 613(c) (1993)] as a consistent statements [sic]" Gishi offered Exhibits K-1 and N-1 pursuant to HRE Rule 613(c) as a consistent statement. Consistent statements are admissible if they are used "to support the witness' credibility" See HRE Rule 613(c). Gishi did not offer Exhibits K-1 and N-1 to support Nakamoto-Putt's credibility, which had not been attacked by the prosecution. The circuit court did not abuse its discretion in declining to admit the evidence as a consistent statement.⁵

(4) Denial of Motion for Mistrial

Gishi argues that the circuit court erred when it denied his February 28, 2013 oral motion for mistrial, contending that "the prosecution's failure to properly question [Putt] prejudiced [his . . .] right to a fair trial." Gishi argues that the prosecutor continued to ask leading questions of Putt on direct examination despite objections by defense counsel.

Gishi fails to identify the portions of, or questions within, the direct examination that defense counsel objected to. In light of the evidence presented, Gishi has not shown that the conduct of the prosecutor prejudiced any of his substantial rights as a defendant and denied him a fair trial. See State v. Agrabante, 73 Haw. 179, 199, 830 P.2d 492, 503 (1992).

(5) The circuit court did not abuse its discretion when it increased Gishi's bail after conviction.

Gishi contends the circuit court lacked statutory authority to increase his bail from \$25,000 to \$50,000. Quoting HRS § 804-4(a) (2014 Repl.), Gishi argues that "release on bail may continue, in the discretion of the court, after conviction of a felony . . . [,]" but states the statute is "silent or whether or not bail can be increased." Gishi also argues that although he eventually posted another bail bond, he "none the less [sic] was prejudiced because he had to come up with more money to be able to return to the community pending sentencing and was in custody longer than he should have been."

⁵ Gishi did not confront Nakamoto-Putt with the circumstances relating to her use of the word "tracking" in her prior statement. Contrary to Gishi's contention, Nakamoto-Putt's prior use of that word was not admissible as a prior inconsistent statement under HRE Rule 613(b).

HRS chapter 804 ("Bail; Bond to Keep the Peace") clearly outlines the court's ability to raise a defendant's bail pending appeal. See HRS § 804-9 (2014 Repl.) ("The amount of bail rests in the discretion of the justice or judge").

HRS § 804-9 provides that bail, while in the discretion of the judge, "should be so determined as not to suffer the wealthy to escape by the payment of a pecuniary penalty, nor to render the privilege useless to the poor." The officer responsible for bail "should consider the punishment to be inflicted on conviction, and the pecuniary circumstances of the party accused." Id.

The circuit court considered both Gishi's financial circumstances and the nature of his offense and explained that it raised Gishi's bail because of the "egregious nature of his offense" and found that Gishi "not only poses a flight risk but he poses more so a danger to the community" The circuit court raised Gishi's bail after the jury had found him guilty of felony assault based on the evidence presented at trial and while Gishi was pending sentencing. In considering the factors under HRS § 804-9, the circuit court did not abuse its discretion when it increased Gishi's bail.

- (6) Gishi does not establish that his defense counsel provided inadequate representation due to conflict of interest.

Gishi argues that his defense counsel did not adequately represent him because the joint representation of Gishi and Son created a conflict of interest. Gishi also argues that his counsel provided inadequate representation when he advised Gishi not to testify despite stating earlier in Gishi's opening statement that there are "two sides to every story" Gishi contends that his choice to testify despite his counsel's advice against doing so "suggest[s] that there was already some tension between them" Gishi argues that his counsel's questioning of Gishi and his Son negatively differed, in that "[t]his different treatment of Gishi and [his Son] were observed by the jury and Gishi believes that this tainted his credibility with them and was a direct result of how [his counsel] interacted with him during the course of the trial."

Gishi has failed to meet his burden of establishing "(1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Aplaca, 74 Haw. 54, 67, 837 P.2d 1298, 1305 (1992).

Therefore,

IT IS HEREBY ORDERED that the Judgment of Conviction and Sentence, filed on September 4, 2013 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, March 31, 2016.

On the briefs:

Daisy Lynn B. Hartsfield
for Defendant-Appellant.

Chief Judge

Sonja P. McCullen
Deputy Prosecuting Attorney
City and County of Honolulu
for Plaintiff-Appellee.

Associate Judge

Associate Judge