

NO. 22865

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
LAWRENCE E. KEY, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-0882)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Lawrence E. Key (Key) appeals the August 30, 1999, judgment of the Circuit Court of the First Circuit, which found Key guilty of:

Count I, Theft in the Second Degree, in violation of Hawai'i Revised Statutes (HRS) § 708-831¹ (1993), and

Counts II to IV, Forgery in the Second Degree, in violation of HRS § 708-852 (Supp. 1997).

The court sentenced Key to concurrent terms of five years imprisonment as to each count. Key contends the trial court erred when it denied his motions for judgment of acquittal, abused its discretion by denying his motion for a new trial, and committed plain error by truncating the presumption of innocence in its jury instructions. We disagree with Key and affirm.

¹ Key was charged with and convicted of violating HRS § 708-831(1)(b), but the August 30, 1999, judgment omits the subsection.

I. BACKGROUND

In 1996 Key placed various ads selling international driver's licenses or permits (IDP's) in the Pennysaver, a classified newspaper distributed free of charge throughout Hawai'i. These ads promoted international motorist qualification licenses (IMQ's): "Legally accepted IMQ international drivers [sic] license. Valid 2 years for 95 dollars U.S." Another ad stated:

Has your drivers [sic] license been revoked or suspended?
You can use your IDP to rent cars and cash checks. As seen on TV. Get an international driving permit. Recognized in over 2 hundred, 200 countries. Valid four years for \$185 dollars. Police officers will be less likely to ticket you after they find out you're not in their jurisdiction.

In June of 1996 Lieutenant Daniel Hanagami (Hanagami) of the Honolulu Police Department's (HPD) white-collar crime unit was "requested to investigate the sale of license[s] and registration[s] allegedly from Turks & Caicos Islands." Hanagami assigned Detective Connie Shaw-Fujii (Shaw-Fujii) and HPD auditor Win Kee Wong (Wong) to do an undercover investigation of the sale of IMQ's. The two posed as prospective customers.

Shaw-Fujii phoned Key and was told by Key that he could get her an IDP or IMQ and that she should turn in her Hawai'i state driver's license to the department of licensing with a letter of relinquishment. Shaw-Fujii arranged a meeting with Key for July 5, 1996, at Kinko's Copies. She was told by Key to

bring \$95.00 for the license and extra money to get "passport photos." Hanagami gave Shaw-Fujii two checks from the HPD "Cropdust" checking account to pay for the IMQ's to be purchased from Key.

On July 5, 1996, Shaw-Fujii and Wong showed up for the meeting with Key at Kinko's, filled out applications, and gave Key two checks for \$95.00 each to purchase two IMQ's that Key claimed would enable the two women to drive on Hawai'i's roads. Key gave the two women "blank applications" to pass out to others who might be interested in buying the IMQ's and offshore vehicle registration documents he was selling. Shaw-Fujii was told by Key that if she referred other people to purchase the IMQ's, Key would give her \$10 for each referral, and if she referred other people to purchase registrations and license plates, he would give her a \$25 referral fee.

On July 9, 1996, Shaw-Fujii received a package of information from Key that included materials on "Operation Exposure" and "starter information . . . for . . . some kind of sovereign type group." This package had more information about the IMQ's Shaw-Fujii and Wong had purchased and a letter dated 7/6/96 that described the following:

[An] offshore registration process done through Grand T & C, an English Common Law Trust that was created in 1970 on the Isle of Man in the British West Indies [BWI]. The process places your vehicle into the trust and provides you with

foreign registration, title papers, various trust documentation and BWI license plate [offshore vehicle registration documents]. This procedure insulates you from all of the 50 states compulsory insurance laws, licensing and registration requirements, emissions testing, safety inspection and more. Since Grand T & C's name appears on all registration documentation, the states cannot make you submit to their regulatory processes."

In this package was an application form to fill out to obtain the offshore vehicle registration documents. Shaw-Fujii called Key on July 10, 1996, to tell him she had filled out the form and asked if she should send him the form and the check for \$249.00. Key told her no, that he would rather meet her that day. They arranged to meet that day at Kinko's Copies. Hanagami gave Shaw-Fujii a check for \$249.00, and Shaw-Fujii gave the application form and the \$249.00 check to Key to purchase the offshore vehicle registration documents. Through the mail, Shaw-Fujii received a package containing the following offshore vehicle registration documents: a document entitled "Instructions for Traveling the BWI Way,"² one license plate, two original Certificates of Identification and Authorization, one lease agreement, and one absolute conveyance.

Hanagami testified that all three HPD checks, two for \$95.00 and one for \$249.00 (totaling \$439.00), were made payable to Larry Key and were negotiated by him.

² The Instructions for Traveling the BWI Way explained that the Certificates of Identification & Authorization were the "registration papers" and would provide "proof of registration for [the] vehicle" if it were ever stopped by a law officer.

Hanagami forwarded copies of the IMQ and offshore vehicle registration documents purchased from Key to the authorities in the Turks and Caicos Islands to determine whether they were legitimate. Hanagami received confirmation that the items were "fakes." At trial, Key did not contest the fact that the IMQ's were fraudulent.

Key was indicted on the following charges: Count I charged Key with obtaining or exerting:

[C]ontrol over the property of another, to wit, money, the value of which exceeds Three Hundred Dollars (\$300.00), by deception, with intent to deprive that person of the property, thereby committing the offense of Theft in the Second Degree, in violation of Section 708-831(1)(b) of the Hawaii [Hawai'i] Revised Statutes.

Counts II-III charged Key with:

[I]ntent to defraud, falsely make, complete, endorse, or alter a written instrument or utter a forged instrument, to wit, a British West Indies International Motorist Qualification [IMQ] card . . .,³ which is or purports to be or which is calculated to become or to represent if completed a deed, contract, assignment, commercial instrument or other instrument, which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status, thereby committing the offense of Forgery in the Second Degree, in violation of Section 708-852 of the Hawaii [Hawai'i] Revised Statutes.

Count IV charged Key with:

[I]ntent to defraud, falsely make, complete, endorse, or alter a written instrument or utter a forged instrument, to wit, a British West Indies Certificate of Identification & Authorization [part of the offshore vehicle registration documents]⁴, which is or purports to be or which is

³ Count II related to the card purchased for \$95.00 by Wong and Count III to the card purchased for \$95.00 by Shaw-Fujii.

⁴ Count IV related to the offshore vehicle registration documents purchased for \$249.00 by Shaw-Fujii.

calculated to become or to represent if completed a deed, contract, assignment, commercial instrument or other instrument, which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status, thereby committing the offense of Forgery in the Second Degree, in violation of Section 708-852 of the Hawaii [Hawai'i] Revised Statutes.

Key was convicted as charged pursuant to a jury trial and filed this timely appeal.

II. STANDARDS OF REVIEW

A. Denial of Motion for Judgment of Acquittal

We review a motion for judgment of acquittal based on whether:

[T]he evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier of fact . . . is sufficient to support a prima facie case so that a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Sufficient evidence to support a prima facie case requires substantial evidence as to every material element of the offense charged. Substantial evidence as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. Under such a review, we give full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact.

State v. Timoteo, 87 Hawai'i 108, 112-13, 952 P.2d 865, 869-70 (1997) (internal quotation marks omitted).

B. Motion for a New Trial

"[T]he denial of a motion for new trial is within the trial court's discretion, and we will not reverse that decision absent a clear abuse of discretion." Kawamata Farms, Inc. v.

United Agri Products, 86 Hawai'i 214, 251, 948 P.2d 1055, 1092 (1997) (internal quotation marks omitted).

C. Jury Instructions

"When jury instructions . . . are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading," State v. Kinnane, 79 Hawai'i 46, 49, 897 P.2d 973, 976 (1995) (internal quotation marks and emphasis omitted), "unless it affirmatively appears from the record as a whole that the error was not prejudicial." State v. Pinero, 70 Haw. 509, 527, 778 P.2d 704, 716 (1989) (internal quotation marks omitted).

III. DISCUSSION

A. Key's Motions for Judgment of Acquittal Were Properly Denied.

Key asserts that his motions for acquittal should have been granted because there was not substantial evidence of intent as to Theft in the Second Degree (Count I) and Forgery in the Second Degree (Counts II-IV); there was not substantial evidence that Key obtained or controlled the property of another (Count I); Key's belief that the services he rendered were less than the statutory amount (\$300) is controlling and thus Key was improperly indicted as to Count I; and the transactions in

question were improperly aggregated to exceed the statutory limit for Theft in the Second Degree (Count I).

1. There was substantial evidence of intent.

Key was charged in Count I (Theft in the Second Degree) with obtaining or exerting control over the property of another, by deception, with intent to deprive that person of the property.⁵ Hawai'i Revised Statutes, § 708-800 (1993), defines "deception" as occurring when a person knowingly "[c]reates or confirms another's impression which is false and which the defendant does not believe to be true."⁶

⁵ HRS § 708-830 (1993) defines Theft, in relevant part, as:

§ 708-830 Theft. A person commits theft if the person does any of the following:
.
.
.
(2) Property obtained or control exerted through deception. A person obtains, or exerts control over, the property of another by deception with intent to deprive the other of the property.

HRS § 708-831(1)(b) (1993) defines Theft in the Second Degree as:

§ 708-831 Theft in the second degree. (1) A person commits the offense of theft in the second degree if the person commits theft:
.
.
.
(b) Of property or services the value of which exceeds \$300[.]

⁶ It is Key's intent to deceive that is relevant in the instant case, not whether the HPD undercover officers involved were deceived.

[To hold otherwise] would come near to a rule that the use of undercover agents in any manner is virtually [impermissible]. Such a rule would, for example, severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest. A prime example is provided by the narcotics traffic.

Key was charged in Counts II-IV with Forgery in the Second Degree,⁷ which requires an intent to defraud, falsely make, complete, endorse, or alter a written instrument or utter a forged instrument.

It was not necessary to prove Key's intent by direct evidence. "Given the difficulty of proving the requisite state of mind by direct evidence in criminal cases, proof by circumstantial evidence and reasonable inferences arising from circumstances surrounding the defendant's conduct is sufficient." State v. Eastman, 81 Hawai'i 131, 141, 913 P.2d 57, 67 (1996).

Key does not contest the fact that the documents he sold were fraudulent. Key admits that he made no effort to verify the legality of the documents he sold. Key admits he never contacted anyone in the British West Indies and he did not know who created the plates and documents in the West Indies. Key admits that he never looked at the Hawai'i Revised Statutes

State v Roy, 54 Haw. 513, 517-18, 510 P.2d 1066, 1069 (1973) (internal quotation marks omitted).

⁷ HRS § 708-852(1) (Supp. 1997) defines Forgery in the Second Degree, in relevant part, as:

§ 708-852 Forgery in the second degree. (1) A person commits the offense of forgery in the second degree if, with intent to defraud, the person falsely makes, completes, endorses, or alters a written instrument, or utters a forged instrument, . . . which is or purports to be, or which is calculated to become or to represent if completed, a deed, will, codicil, contract, assignment, commercial instrument, or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status.

on licensing, registration, insurance, no-fault, or safety check. Key's counsel conceded that "we're not contesting the fact that they are fraudulent and they weren't authorized in our state." Key acknowledged that his "action helped complete the forged document[s]." During closing argument, Key's attorney made the following statements:

Yeah, he -- he exaggerated, he may have made some deceptive -- I don't know [sic] deny that. I never did, from the outset, say that I contest. You didn't hear me object to almost any of the evidence in this case. I had no reason to, because all these facts happened. I can't refute that.

. . . .

I'm not saying these statements weren't deceptive, don't get me wrong, they may have been, and they may have been exaggerated, I don't doubt that[.]

Key created the false impression that the documents he sold were legal, and there was substantial evidence for a jury to infer Key did not believe his statements regarding the legality of such documents to be true. There was thus substantial evidence, in the form of checks from Shaw-Fujii totaling \$439.00, of Key's intent to obtain control of the property of another through deception (Count I). There was also substantial evidence of Key's intent to utter forged instruments in the form of British West Indies' IMQ's and Certificates of Identification & Authorization (part of the offshore vehicle registration documents) (Counts II-IV).

2. There was substantial evidence that Key obtained or controlled the property of another.

Key asserts that his motions for judgment of acquittal under Count I should have been granted because he did not obtain or control the property of another. Hawai'i Revised Statutes § 708-800 (1993) defines "property of another", in relevant part, as "property which any person, other than the defendant, has possession of or any other interest in, even though that possession or interest is unlawful." Key contends a police officer is not a "person" under the statute, but is a governmental entity. Key additionally asserts that because his case involved a governmental sting operation, no one obtained a possessory interest in any property of another and no one was deprived of funds. Key's argument is without merit. Shaw-Fujii was in possession of the checks that are the subject of the theft charged in Count I. Shaw-Fujii is a person other than the defendant. Key obtained three checks totaling \$439.00 made payable to himself from Shaw-Fujii, all of which Key negotiated. See Background, section I, supra. There is substantial evidence that Key obtained or controlled the property of another.

3. There was substantial evidence to establish that Key obtained the property of another, the value of which exceeded \$300.00.

Key sold two IMQ's at \$95.00 each and offshore vehicle registration documents at \$249.99, totaling \$429.00, to Shaw-Fujii and Wong. Key argues he allegedly believed⁸ the service he rendered was less than \$300.00 (the statutory threshold for Theft in the Second Degree) and therefore his motions for judgment of acquittal should have been granted as to Count I.

Key procured the two IMQ's and offshore vehicle registration documents for Shaw-Fujii and Wong. For this service, he obtained property in the form of checks totaling \$439.00. The checks he obtained were made payable to himself and were negotiated by him. There is sufficient evidence Key obtained property of another in the amount of \$439.00 -- in excess of the \$300.00 statutory threshold for Theft in the Second Degree.

⁸ HRS § 708-801(5) (1993) sets forth a defense to the valuation of property as follows:

§708-801 Valuation of property.

. . . .

- (5) When acting intentionally or knowingly with respect to the value of property or services is required to establish an element of an offense, it is a defense, which reduces the class or grade of the offense to a class or grade of offense consistent with the defendant's state of mind, that the defendant believed the valuation of the property or services to be less.

4. The transactions were not improperly aggregated.

Key asserts that his motions for judgment of acquittal as to Count I should have been granted because the value of the IMQ's and offshore vehicle registration documents were improperly aggregated to reach an amount exceeding the statutory threshold for Theft in the Second Degree.

Hawai'i Revised Statutes § 708-801(6) (1993) states:

§708-801 Valuation of property.

-
- (6) Amounts involved in thefts committed pursuant to one scheme or course of conduct, whether the property damaged be of one person or several persons, may be aggregated in determining the class or grade of the offense. Amounts involved in offenses of criminal property damage committed pursuant to one scheme or course of conduct, whether the property damaged be of one person or several persons, may be aggregated in determining the class or grade of the offense.

The "Traveling the BWI Way" materials Key provided Shaw-Fujii explained the importance of obtaining both the offshore vehicle registration documents and the IMQ to fully insulate oneself from state regulations and traffic citations. There is substantial evidence that Key sold the IMQ's and offshore vehicle registration documents as part of one scheme or course of conduct.

B. Denial of Motion for New Trial Was Not An Abuse of Discretion.

Key asserts that the trial court abused its discretion when it denied his Motion for New Trial. Key's assertion was based on his representation that a witness whose location was

previously unknown had become known to Key after trial. Key asserts that:

Terry Robinson's [sic] was the source of information which led [Key] to his initial involvement with Robinson's Operation Exposure, and the source of the fraudulent documents acquired by [Key]. His testimony could have helped to establish [Key's] lack of knowledge of the fraudulent scheme involving the sale of IMQ's and registration/trust documents, which bore directly on [the] question of [Key's] intent to commit the offenses alleged[.]

A new trial based on newly discovered evidence can be granted, provided the evidence meets the following requirements:

(1) [I]t must be previously undiscovered even though due diligence was exercised; (2) it must be admissible and credible; [and] (3) it must be of such a material and controlling nature as will probably change the outcome and not merely cumulative or tending only to impeach or contradict a witness.

Kawamata Farms, Inc., 86 Haw. at 259, 948 P.2d at 1100 (internal quotation marks and emphasis omitted).

Key's counsel asserted that the location of the potential witness, Mr. Robinson, was new and that Mr. Robinson's testimony would add to Key's defense as to lack of intent. The trial court judge denied the motion for a new trial, stating:

[T]he Court sat through the trial. Mr. Key had the full play of defense and Mr. Robinson would have been one of his witnesses, but it appears to the Court that the basic information that defense seeks, whatever it might be, was brought forth in the trial.

This is not new evidence. [Key] was permitted to bring this, that he had correspondence with Mr. Robinson, depended on what Mr. Robinson said, and the items that were requested were shipped from Colorado, from, at least it was not Mr. Key, but from outside. So the evidence was there, that which Mr. Key wishes to say is new evidence or what Mr. Robinson might say.

. . . [T]he Court feels that the matter has been fully explored, and at this point coming in and saying to the Court, not

knowing what Mr. Robinson might say, if anything, the Court feels is not relevant to the matter at hand. Because [Key] has had his day, had his defenses, and I don't believe Mr. Robinson would add anything to that which went before the Court.

The trial court's denial of Key's motion for a new trial was not an abuse of discretion.

C. The Trial Court's Unanimity Instruction Did Not Give Rise to Reversible Error.

Key asserts that “[t]he trial court committed plain error when it gave jury instructions which improperly truncated the presumption of innocence.” The question on appeal is whether the jury instructions, “when read and considered as a whole . . . are prejudicially insufficient, erroneous, inconsistent, or misleading.” Kinnane, 79 Hawai‘i at 49, 897 P.2d at 976 (internal quotation marks and emphasis omitted).

Without objection from Key, the trial court gave the following jury instruction:

As to Counts 2, 3, and 4 of the indictment, if you find [Key] guilty of any of these counts, you must agree unanimously that the State has proven beyond a reasonable doubt that [Key] committed one or both of the following acts:

- A. Complete a written instrument, you have a yes or no there; and
- B. Utter a forged instrument, you have yes and no.

Key argues this instruction “failed to maintain [his] presumption of innocence during jury consideration of the unanimity requirement, since the instruction directed the jury to consider the unanimity question if it first found [him] guilty.”

The jury's responses to the trial court's verdict form indicated the jury agreed unanimously that Key was guilty as to Counts II, III, and IV. Like the Hawai'i Supreme Court found in State v. Jenkins:

Inasmuch as we know, conclusively, that the jury's verdict regarding [Counts I through IV] was in fact unanimous, we cannot hold that [Key's] right to a unanimous verdict was violated or that the circuit court's specific unanimity instruction was prejudicially misleading.

State v. Jenkins, 93 Hawai'i 87, 113-14, 997 P.2d 13, 39-40 (2000).

IV. CONCLUSION

The August 30, 1999, judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, January 31, 2001.

On the briefs:

Glenn D. Choy
for Defendant-Appellant.

Chief Judge

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge