NO. 24172

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
ABEL SIMEONA LUI, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
(KA'U DIVISION)
(POLICE RPT. NO. G-42902)

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

Abel Simeona Lui (Lui) appeals the February 14, 2001 judgment of the district court of the third circuit, the Honorable Victor M. Cox, judge presiding, that convicted him of the offense of criminal trespass in the second degree, in violation of Hawaii Revised Statutes (HRS) § 708-814(1)(a) (1993 & Supp. 2002),[1] and sentenced him to thirty days in jail.

[1] Hawaii Revised Statutes (HRS) § 708-814(1)(a) (1993 & Supp. 2002) provides that "[a] person commits the offense of criminal trespass in the second degree if: (a) The person knowingly enters or remains unlawfully in or upon premises which are enclosed in a manner designed to exclude intruders or are fenced[.]"

HRS § 708-800 (1993) defines "enter or remain unlawfully" as follows: "A person 'enters or remains unlawfully' in or upon premises when the person is not licensed, invited, or otherwise privileged to do so. A person who, regardless of the person's intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless the person defies a lawful order not to enter or remain, personally communicated to the person by the owner of the premises or some other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to the person by the owner of the land or some other authorized person, or unless notice is given by posting in a

Execution of sentence was stayed pending appeal. Lui attacks the judgment on three fronts:

> A. The trial court erred in convicting Lui of [criminal trespass in the second degree] where there was insufficient evidence to prove that Lui knowingly entered or remained unlawfully upon premises designed to exclude intruders or are [(sic)] fenced.
>
> B. Whether the trial court erroneously considered inadmissible prejudicial evidence and violated [Hawai'i Rules of Evidence (HRE)] Rule 404(b) and Lui's right to have a fair trial on the merits of the case.
>
> C. Whether the trial court erroneously failed to admit relevant evidence regarding prior court cases that had a tendency to determine the extent of the ownership of the subject property.

Opening Brief at 11. We disagree and affirm.

I. Sufficiency of the Evidence.

In considering whether evidence adduced at trial is sufficient to support a conviction, we are guided by the following principles:

> On appeal, the test for a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact. State v. Ildefonso, 72 Haw. 573, 576, 827 P.2d 648, 651 (1992); State v. Tamura, 63 Haw. 636, 637, 633 P.2d 1115, 1117 (1981). "'It matters not if a conviction under the evidence as so considered might be deemed to be against the weight of the evidence so long as there is substantial evidence tending to support the requisite findings for the conviction.'" Ildefonso, 72 Haw. at 576-77, 827 P.2d at 651 (quoting Tamura, 63 Haw. at 637, 633 P.2d at 1117). "'Substantial evidence' . . . is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion." See id. at 577, 827 P.2d at 651 (quoting State v. Naeole, 62 Haw. 563, 565, 617 P.2d 820, 823 (1980)).

State v. Matias, 74 Haw. 197, 207, 840 P.2d 374, 379 (1992) (ellipsis in the original). "Furthermore, it is well-settled

---

conspicuous manner.

HRS § 708-800 defines "premises" as follows: "'Premises' includes any building and any real property."

that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence." Tachibana v. State, 79 Hawai‘i 226, 239, 900 P.2d 1293, 1306 (1995) (brackets, internal quotation marks and citation omitted).

At the bench trial, the State introduced testimonial and documentary evidence that the complaining witness, Thomas M. Okuna (Okuna), holds title to certain real property located in Ka‘u. Okuna acquired title by way of a quiet title action and subsequent deeds. Okuna testified that the property is "fenced on the highway." When asked whether the property is fenced "[i]n a manner of some kind to exclude intruders[,]" Okuna responded, "Yes."

Okuna remembered that on September 22, 2000, he saw Lui residing on the property without permission, gave Lui a trespass warning and demanded that he leave the property. Okuna tried to give Lui a written trespass warning, but Lui refused to take it, so Okuna left it there at the premises. The written trespass warning was signed by Okuna, and by a police officer who apparently had witnessed the trespass warning procedure. Despite all of this, Lui was still on Okuna's property on September 25, 2000.

Proceeding *pro se* in his defense below, Lui presented the testimony of three witnesses who disputed Okuna's claim to ownership of the real property. The first, Samuel Kaluna, Jr.

(Kaluna), claimed that his family has "an interest in that land[,]" and that his family "gave Lui permission to stay on that land." Kaluna also mentioned several other families who "have interest in the land over there[.]" With respect to Okuna's claim to ownership of the land, Kaluna informed the court that, "As far as I'm concerned, Mr. Okuna do not have anything." Kaluna did not offer any documentary evidence to support his assertions. The second of the three witnesses, Raymond Kay Akuemoku Dedman (Dedman), testified, in essence, that "there's a whole bunch of family" -- including his own family, -- "that all connected still has a piece of that land." Dedman maintained that Okuna could not, for various reasons, have any cognizable interest in the land. Like Kaluna, Dedman did not proffer any documents to back up his testimony. The last of Lui's witnesses, Simbralynn Kanakaole-Esperon (Kanakaole-Esperon), also claimed, without documentary support, that her family has an interest in the subject real property, and that Okuna does not.

A. Ownership of the Premises.

On appeal, Lui first argues that

> the State failed to show that Lui knowingly entered or remained unlawfully upon the property of Okuna. Based upon the evidence provided at trial, the ownership of the subject property was contested. Three defense witnesses testified that Okuna was not the sole owner of the property, but several families including the Kaluna's; the Puhi's and the Keawe's [(sic)] owned an interest in the subject property. According to Kaluna, the Kaluna family permitted Lui to live on the property. Based on the Kaluna's (sic) invitation and permission for Lui to reside on the property and Lui's family ownership in the property, Lui believed and in fact was privileged to enter and remain lawfully upon the subject property.

Opening Brief at 12-13. We disagree. As was its exclusive province to do, Tachibana, supra, the court credited the State's evidence and did not credit Lui's witnesses. In the course of rendering its verdict, the court remarked:

> And the evidence shows beyond a reasonable doubt that the families that you have mentioned as being owners of this property, their interests were decided by a court action and were decided to be owned by a Mr. Ulrich and Mr. Okuna. And thereafter, Mr. Ulrich deeded his interest to Mr. Okuna to the subject property.
> . . . .
> And on the face of this document, there being no other convincing evidence that this document is not valid and was not properly entered by a court and not properly authenticated by a court and that that court didn't properly address the interests of all the defendants in that case and all the other parties claiming an interest in that property and came to a final judgment awarding the property to Mr. Ulrich and Mr. Okuna, then I'm bound by that document.

And it was the court's kuleana to disbelieve Lui's implicit assertion that he believed, by reason of ownership and permission, that he was privileged to enter and remain on the property. Id.

B. Evidence of Exclusion.

Lui next argues, for the first time on appeal,[2] that

> the State failed to prove that Okuna's property was fenced to exclude intruders. The evidence provided that Okuna's property was fenced on

---

[2] "This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system -- that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes." State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993) (citation omitted). "This court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999) (brackets, citation and internal quotation marks omitted). Hawai'i Rules of Penal Procedure (HRPP) Rule 52(a) (2001) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." HRPP Rule 52(b) (2001) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

> the highway, but failed to provide whether the entire property was fenced or whether the highway surrounds the entire property. The record is unclear as to the length, size or height of the fence. Without knowing the extent of the positioning of the fence, one cannot reasonably infer that the fence was placed to exclude intruders. Arguably because the fence was only fenced on the side fronting the highway, it may have been placed to protect the property from possible car accidents occurring on the highway. Therefore, the conviction for the offense of criminal trespass in the second degree should be reversed.

Opening Brief at 13. Again, we disagree. The Hawai‘i Supreme Court has held:

> As noted earlier, HRS § 708-814(1) states that "a person commits the offense of criminal trespass in the second degree if . . . [t]he person knowingly enters or remains unlawfully in or upon premises which are enclosed in a manner designed to exclude intruders or are fenced[.]" The facts in this case reveal that: (1) Galiher's property was fenced in a manner to exclude intruders; (2) Hanapi knowingly entered Galiher's property on the date of his arrest; and (3) when Galiher's foreman, Demello, ordered Hanapi off the property, he refused to leave. Based on these facts, the judge, as the trier of fact, had sufficient evidence to conclude that Hanapi was unlawfully on Galiher's property, in violation of HRS § 708-814(1).

State v. Hanapi, 89 Hawai‘i 177, 187-88, 970 P.2d 485, 495-96 (1998) (brackets and ellipsis in the original). The testimony of Okuna, unchallenged and undisputed below, that the property is "fenced on the highway . . . . [i]n a manner of some kind to exclude intruders[,]" taken in the light most favorable to the State, was substantial evidence sufficient to support conviction of the charged offense. Id. See also Matias, 74 Haw. at 207, 840 P.2d at 379.

II. Evidentiary Issues.

"We apply two different standards of review in addressing evidentiary issues. Evidentiary rulings are reviewed for abuse of discretion, unless application of the rule admits of only one correct result, in which case review is under the

right/wrong standard." State v. Ortiz, 91 Hawai'i 181, 189, 981 P.2d 1127, 1135 (1999) (internal quotation marks and citations omitted). "An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party-litigant." State v. Jackson, 81 Hawai'i 39, 47, 912 P.2d 71, 79 (1996) (internal quotation marks and citation omitted).

A. Evidence of Lui's Prior Conviction for Trespassing.

Lui contends the court erred in allowing Okuna to testify regarding Lui's prior conviction for trespassing. At the bench trial, the State attempted to present documentary evidence of Lui's 1991 conviction for trespassing "on the same property that's in question today[.]" Apparently, the State did not give Lui prior notice of its proffer. The deputy prosecuting attorney (DPA) asked Okuna to identify Exhibit 4. Okuna replied, "Yes. This was a partition done. The document's dated 5/29/91. Abel Lui was convicted of trespassing." The DPA then moved to admit Exhibit 4 into evidence. When the court started to ask whether Exhibit 4 was certified, the DPA asked the court to "take judicial notice of the record of this Court." The court ultimately refused to admit Exhibit 4 into evidence and declined to take judicial notice as requested.

Lui argues that the court violated HRE Rule 404(b) in allowing Lui's statement, both as a matter of substance and as a

matter of notice. HRE Rule 404(b) (Supp. 2002) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is 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. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

On this point of error, we first note that Okuna's testimony about Lui's 1991 conviction for trespassing on the same property was "probative of another fact that [was] of consequence to the determination of the action, . . . proof of . . . knowledge," HRE Rule 404(b); in other words, proof of Lui's knowledge that he was "enter[ing] or remain[ing] unlawfully in or upon premises[,]" HRS § 708-814(1)(a), premises he had trespassed upon before.

We recall, in any event, anent a bench trial, that "it is well established that a judge is presumed not to be influenced by incompetent evidence." State v. Vliet, 91 Hawai'i 288, 298, 983 P.2d 189, 199 (1999) (brackets, internal quotation marks and citations omitted)). In this connection, we observe that Okuna's testimony was given while the DPA was attempting to lay a foundation for the admission of documentary evidence that the court ultimately excluded. Furthermore, nothing in the record indicates the court was influenced by the testimony in rendering its verdict. We also observe that in closing argument, Lui

stated:

> I have lived here for twelve years on top of that land, and for twelve years Thomas Okuna couldn't get me off of that land.
>
> I got arrested over twenty-something times, your Honor, for simple trespassing, for criminal trespassing. And I am still there. What I am saying is this: That I'm saying that I have the right to be there.

On balance, we conclude that Okuna's testimony in this respect, erroneously admitted *vel non*, was harmless beyond a reasonable doubt. Cf. id. at 298, 983 P.2d 189, 199 (in a case in which a police officer offered a legal conclusion during his testimony, holding that, "[g]iven the absence of a jury in the case at bar, and in light of the substantial evidence contained in the record, . . . we are convinced that there is no reasonable possibility that error might have contributed to conviction" (internal quotation marks and citations omitted)).

B. Exclusion of Evidence.

For his final point of error on appeal, Lui complains that

> the court excluded evidence regarding three separate court cases that may have raised reasonable doubt as to Okuna's title to the property: (1) a trespassing case involving Kaluna and Okuna and the subject property; (2) a trespassing case entitled Okuna v. Baba[;] and (3) a court case involving Okuna and Kanakaole-Esperon's husband regarding Okuna's closing of the easements on the property.

Opening Brief at 16 (citation to the record omitted). The enumerated instances occurred during the testimonies of Kaluna, Dedman and Kanakaole-Esperon, respectively.

To be clear, with respect to the first instance, and contrary to Lui's contention on appeal, the court ultimately did allow Kaluna to testify extensively about the purportedly

unsuccessful trespassing case brought against him by Okuna, despite Okuna's contrary testimony that a different parcel of property was involved.

In each of the other instances, Lui failed to make a clear and specific offer of proof of what the testimony about the court case referred to was proffered to prove in this case. And in each instance, Lui failed to tell the court why the testimony was admissible under the HRE. Consequently, on appeal on this record, the most specific argument Lui can advance in this respect is that "[t]he evidence was relevant to the issue of ownership and title to the subject property. The inquiry into these prior court cases involving Okuna and the subject property had the tendency to prove or disprove ownership of the subject property." Opening Brief at 16. This situation illustrates why the supreme court has held that, "[i]n the absence of an offer of proof, the trial court committed no reversible error." State v. Kelekolio, 74 Haw. 470, 523, 849 P.2d 58, 78 (1993). In so holding, the Kelekolio court noted:

> HRE [Rule] 103(a) provides in relevant part:
>
> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected, and:
>
> . . . .
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> "The offer should incorporate a coherent theory of admissibility, grounded in a designated rule or rules, together with case law and other authority as appropriate, plus a proffer covering the nature and substance of the evidence." [A. Bowman,]Hawaii Rules of Evidence Manual § 103-3A, at 13 [(1990)].

Kelekolio, 74 Haw. at 523 n.21, 849 P.2d at 78 n.21. Kelekolio

bears directly on the point here. We conclude the court did not err in excluding the testimonies about the other two court cases.

We note, at any rate, that the excluded testimonies -- about out-of-court statements clearly "offered in evidence to prove the truth of the matter[s] asserted[,]" HRE Rule 801((3) (1993) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.") -- were inadmissible hearsay. HRE Rule 802 (1993) ("Hearsay is not admissible except as provided by these rules, or by other rules prescribed by the Hawaii supreme court, or by statute."). The record shows that Lui did not proffer any documentary evidence of the court cases, and was in fact not prepared to do so.

III. Conclusion.

The February 14, 2001 judgment of the court is affirmed.

DATED: Honolulu, Hawaii, February 7, 2003.

On the briefs:

Michelle L. Agsalda,
Deputy Public Defender,
State of Hawai'i,
for defendant-appellant.

Acting Chief Judge

Associate Judge

Frederick Giannini,
Deputy Prosecuting Attorney,
County of Hawai'i,
for plaintiff-appellee.

Associate Judge