NOT FOR PUBLICATION

NO. 24331

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
RANDOLPH LEIALOHA HATORI, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-1-2613)

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

Randolph Leialoha Hatori (Hatori) appeals the May 14, 2001 judgment of the circuit court of the first circuit[1/] that convicted him, upon a jury's verdict, of the felony offense of theft in the second degree, a violation of Hawaii Revised Statutes (HRS) § 708-831(1)(b) (Supp. 2002).[2/] We affirm.

[1/] The Honorable Bode A. Uale presided over all pertinent circuit court proceedings.

[2/] Hawaii Revised Statutes (HRS) § 708-831(1)(b) (Supp. 2002) provides that, "A person commits the offense of theft in the second degree if the person commits theft: . . . . Of property or services the value of which exceeds $300[.]" HRS § 708-830(2) (1993) provides that, "A person commits theft if the person . . . . obtains, or exerts control over, the property of another by deception with intent to deprive the other of the property." HRS § 708-800 (1993) provides, in pertinent part, that

> "Deception" occurs when a person knowingly:
> (1) Creates or confirms another's impression which is false and which the defendant does not believe to be true;
> (2) Fails to correct a false impression which the person previously has created or confirmed;
> (3) Prevents another from acquiring information pertinent to the disposition of the property involved;

I. Background.

At the beginning of Hatori's December 18, 2000 preliminary hearing, the deputy prosecuting attorney (DPA) informed the district court[3/] that federal Drug Enforcement Administration (DEA) agent Dennis John (Agent John) was "unavailable." "I'll be proceeding by unavailability on him." Honolulu police detective Kongton Sitachitta (Detective Sitachitta) was called to the witness stand. Detective Sitachitta testified that Agent John had been working undercover on the case, but was not available to testify at the preliminary hearing because he had been called back to the mainland for special assignment. Apparently, Agent John had to take all of his DEA equipment back with him for the new assignment and hence, had to leave the day before the preliminary hearing on the military flight that had been scheduled to carry the equipment.

---

(4) Sells or otherwise transfers or encumbers property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether that impediment is or is not valid, or is or is not a matter of official record; or

(5) Promises performance which the person does not intend to perform or knows will not be performed, but a person's intention not to perform a promise shall not be inferred from the fact alone that the person did not subsequently perform the promise.

The term "deception" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or services in communications addressed to the public or to a class or group.

[3/] The Honorable Russel S. Nagata, judge presiding.

On *voir dire*, Detective Sitachitta acknowledged that he had informed Agent John that the preliminary hearing was set for the day after his scheduled departure. Detective Sitachitta did not know if any military flight was scheduled for "this afternoon or tomorrow[.]" Thereupon, defense counsel objected that Agent John "intentionally made himself unavailable based upon the facts that he knew of this hearing and he could have left sometime after today. And that, there was no real hardship or inconvenience."

The district court decided: "under [Hawai'i Rules of Penal Procedure] Rule 5,[4/] the Court will declare the witness to be unavailable and, therefore, I'm going to allow hearsay." (Footnote supplied.) Detective Sitachitta remembered that he conducted an audiotaped interview of Hatori on December 12, 2000, in connection with an offense occurring on October 11, 2000. Agent John sat in on the interview. Before the interview, Detective Sitachitta informed Hatori of his Miranda rights, utilizing Honolulu Police Department (HPD) Form 81. Then Hatori told Detective Sitachitta what happened on October 11, 2000:

> A He said he did pick up some weed, some grass, and packaged it himself. And, he sell it as marijuana and hoped that he would get away with it. And, . . .
> Q When you say he, was there an arrangement between the defendant, Mr. Hatori, and DEA Agent Johns (sic) to sell a certain item?

[4/] Hawai'i Rules of Penal Procedure Rule 5(c)(6) (West 2000) provides, in relevant part, that, "The finding of probable cause [at the preliminary hearing] may be based in whole or in part upon hearsay evidence when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge."

A Yes, sir.
Q What was that?
A The arrangement was the DEA was -- Mr. Hatori give the DEA his phone number.
Q Okay.
A And, DEA called him and make arrangement.
Q But, what was the agreement? To buy what?
A To buy approximately one ounce of marijuana . . .
Q Of marijuana.
A . . . for $400.00 (four hundred dollars).
Q And, did the defendant tell you that he met with DEA Agent John?
A Yes.
Q When they met, did the defendant sell marijuana to Agent John?
A He sold green vegetable and hoping that DEA would buy it as marijuana.
Q Okay. Was what the defendant sold actually marijuana?
A No, sir.
Q That's what the defendant told you?
A Yes.
Q Where -- did the defendant tell you where he got the green vegetable matter that he sold?
A He said this green vegetable he can pick it up from the yard. He picked 'em up and put in a plastic bag.
Q And, how much was the transaction? How much did Mr. Hatori, the defendant, sell the green vegetable matter from his yard to the DEA agent for?
A Four hundred U.S. dollars.
Q Okay. Did you ask the defendant whether he knew that that vegetable matter he sold was not marijuana?
A Yes, sir.
Q And, what did the defendant say?
A He said he knew, but he needed the money.
. . . .
Q Now, did you review Agent John's report or his [HPD Form] 252 statement in connection with this case?
A Yes, sir.
Q And, did DEA Agent John . . .
[DEFENSE COUNSEL]: We're gonna' object to the 252 statement, Your Honor. We don't have a copy of it. One wasn't provided.
[DPA]: Your Honor, this is part of the unavailability.
THE COURT: I'm gonna' overrule the objection.
Q (By the [DPA]): Did DEA John -- Johns (sic) state that he gave $400.00 to the defendant in exchange for a package of greefy -- green leafy substance?
A Yes, sir.
Q And, did the DEA give permission for Mr. Hatori to take and use and keep that money, the $400.00?
A For the exchange of the marijuana.
Q But to keep it?
A Yes.
Q Not in exchange for the green leafy substance?
A Right.
Q Okay. That's not marijuana?
A Right.

At the conclusion of the preliminary hearing, the district court

ruled:

> Mr. Hatori, [the] Court finds from the evidence presented there is probable cause to believe that the crime of Theft in the Second Degree has been committed. Court finds probable cause to believe you have committed this crime. Committing your case to circuit court.

The State filed a complaint on December 21, 2000, charging Hatori with theft in the second degree, by deception:

> On or about the 11th day of October, 2000, in the City and County of Honolulu, State of Hawaii, RANDOLPH HATORI, did obtain or exert control over the property of Drug Enforcement Administration, the value of which exceeds Three Hundred Dollars ($300.00), by deception, with intent to deprive Drug Enforcement Administration of the property, thereby committing the offense of Theft in the Second Degree, in violation of Section 708-831(1)(b) of the Hawaii Revised Statutes.

On January 30, 2001, Hatori moved to dismiss -- "because of outrageous government conduct and entrapment" -- based upon his allegation that Agent John approached him on the street, and asked him, "where can I get some weeds?" Hatori implied in his motion that he understood Agent John to mean the kind of undesirable but innocuous greenery one might find in one's backyard.

Hatori called Agent John to testify at the March 15, 2001 hearing on the motion to dismiss. Defense counsel asked Agent John, "And in your enforcement activities do you approach people and try to buy drugs from them?" Agent John responded, "Sometimes we do that." Agent John testified, however, that as he was walking to lunch in Waikiki on October 8, 2000, his day off, Hatori approached him, and "offered to sell me some weed, street term for marijuana." Agent John told Hatori that he was not interested that day, but that he might be interested later.

Hatori gave Agent John his telephone number, which Agent John later used to set up the buy that led to Hatori's arrest.

Defense counsel argued on the motion that

> Mr. Hatori was talking about weeds and that is what was actually sold, and [Agent] John thought it meant something else. [Agent] John never tried to return any of the items or anything like that.
> . . . . What has been shown is that the DEA agent asked for weeds and that's what they got.

The court denied the motion, finding that

> the evidence before the Court is that [Agent] John was . . . approached by Mr. Hatori.
> . . . .
> I don't see any government misconduct. Mr. Hatori provided his phone number, Agent John called him up. And, unfortunately, as far as this Court is concerned the credible evidence today tells me that it was pretty clear in everybody's mind what kind of weeds we're talking about over here, and we're not talking about the kind that . . . grows in my backyard, we're talking about marijuana.

On February 8, 2001, the State moved for a determination of the voluntariness of Hatori's December 12, 2000 statement to Detective Sitachitta. The court heard this motion on March 15, 2001, along with Hatori's motion to dismiss.

Detective Sitachitta testified that the interview was audiotaped, and that Hatori was made aware of it before the tape recorder was turned on. At the beginning of the interview, Detective Sitachitta established that Hatori was forty-nine years old; had a high school diploma; could read, write and understand English; and was not under a doctor's care or under the influence of alcohol or drugs. Hatori acknowledged that he had not been forced or promised favors to make a statement, and that his statement was being made voluntarily.

As Detective Sitachitta started to advise Hatori of his constitutional rights, Hatori asked for his glasses -- "everything blurry." The interview was stopped so that Hatori's glasses could be brought to the interview room. When the interview resumed, Detective Sitachitta read Hatori his Miranda rights from HPD Form 81, while Hatori read along silently on the form. Detective Sitachitta remembered that Hatori initialed the form after his rights were read to him: "Do you understand what I have told you? He initialed yes. Do you want an attorney now? His initial no. Would you like to tell me what happened? He initial yes."

Detective Sitachitta then identified a transcript of the audiotaped interview as a "fair[] and accurate[] represent[ation]" of his December 12, 2000 interview of Hatori. When the DPA attempted to move the transcript into evidence, defense counsel took Detective Sitachitta on *voir dire* in order to have him confirm that the transcript contained "(inaudible)" designations on "virtually every page[.]" Detective Sitachitta also confirmed that the transcriber of the audiotape was not present during the interview, and that he did not supervise the transcriber as she prepared the transcript. Thereupon, defense counsel objected to admission of the transcript: "We believe the tape is the best evidence of the conversation and that the

transcript is not." The objection was overruled and the transcript admitted into evidence on the motion.

In argument on the motion, defense counsel alluded to Hatori's complaint about his vision, and suggested that it somehow derogated Hatori's waiver of his constitutional rights. Defense counsel also repeated his misgivings about the transcript of the audiotape based on the number of "(inaudible)" designations and the "best evidence rule." The court rejected these arguments and found that Hatori had made a properly informed waiver of his constitutional rights and a voluntary statement to Detective Sitachitta. As for the transcript, the court found that it was an "accurate transcript of what had transpired in the interview[.]" The court reminded Hatori that he could introduce the audiotape of the interview into evidence at trial, should he choose to do so.

Hatori's jury trial started on March 16, 2001. In his opening statement, defense counsel previewed Hatori's basic approach to the trial:

> So also there's an agreement. Randolph [Hatori] agrees to sell weeds, the DEA agent agrees to buy weeds. The DEA agent knows that he wants to buy marijuana. There's evidence that Randolph Hatori never intended to sell marijuana or that Randolph Hatori knew [(sic)] that the DEA agent wanted to buy marijuana. That's what the evidence is going to show.

Agent John testified first for the State. He described being solicited in Waikiki by Hatori on October 8, 2000, testimony that essentially reiterated his testimony at the March 15, 2001 hearing on Hatori's motion to dismiss. A sting

operation ensued. On October 10, 2000, Agent John called Hatori at the telephone number Hatori gave him on October 8 and asked, "you think you can get me an ounce?" Agent John mentioned that he could come up with about four hundred dollars. Hatori offered to sell Agent John an ounce of marijuana and a little extra for the four hundred dollars, and the deal was made. The buy was set for 3:00 p.m. the next day, October 11, 2000. On October 11, at about 1:00 p.m., Agent John called Hatori again to confirm that the buy was still on. Agent John met Hatori at the pay phones in front of the Safeway supermarket in the Waipahu Town Center, where he gave Hatori the money in exchange for the product.[5/] During the exchange, Hatori told Agent John that he was going to give him his new telephone number. The new number, which turned out to be a wrong number, was written on a piece of paper slipped under the wrist of a glove Hatori was wearing. Hatori instructed Agent John to retrieve it, and Agent John did as instructed. Agent John submitted the vegetation he got from Hatori for analysis. The HPD criminalist concluded that it was not marijuana.

Detective Sitachitta also testified for the State at trial. He essentially repeated the testimonies he gave at the December 18, 2000 preliminary hearing and the March 15, 2001

[5/] Drug Enforcement Administration agent Dennis John tape-recorded the October 10 and 11, 2000 telephone conversations and the October 11, 2000 exchange. The tape recordings, along with transcripts thereof, were admitted into evidence at trial.

voluntariness hearing. The transcript of the December 12, 2000 statement Hatori gave to Detective Sitachitta -- which Detective Sitachitta again agreed "fairly and accurately represent[ed] the conversation" -- was admitted into evidence, over defense counsel's objections on best evidence and hearsay grounds. The DPA laid a foundation for admission of the tape recording of the interview as well, but reserved proffer because references on the tape to Hatori's probation officer and unrelated jail time had yet to be redacted. Ultimately, neither party proffered the tape. In his statement, Hatori summarized,

> -- that's what it basically was. The -- my -- my presentation towards [Agent John] was like -- man, you wanna score some weed, and he just trusted me -- I mean -- you know, he just hooked up with me and figure I can get weed so -- I mean, I can -- I can get the good stuff, but -- you know -- I mean, it's [(weeds)] every where out there . . . . but I did that cause I wanted the money.

Hatori did not present witnesses or testify in his defense. The jury retired to its deliberations at about 11:30 a.m. on March 22, 2001. That afternoon, at about 2:30 p.m., the jury notified the court that it had reached a verdict. jury found Hatori guilty. On May 14, 2001, the court entered a judgment of conviction and sentence of five years of probation, upon terms and conditions including six months of imprisonment. Hatori filed a timely notice of this appeal on June 5, 2001.

II. Discussion.

Hatori asserts that the court erred by allowing the State to charge him with the felony offense of theft in the

second degree, instead of the misdemeanor offense of distribution of an imitation controlled substance under HRS § 329C-2(a) (1993).[6/] In this respect, Hatori relies on the Modica rule:

> Thus, where the same act committed under the same circumstances is punishable either as a felony or as a misdemeanor, under either of two statutory provisions, and the elements of proof essential to either conviction are exactly the same, a conviction under the felony statute would constitute a violation of the defendant's rights to due process and the equal protection of the laws.

State v. Modica, 58 Haw. 249, 251, 567 P.2d 420, 422 (1977) (citations omitted). Hatori's assertion has no merit, for the offenses of theft in the second degree and distribution of an imitation controlled substance do not share exactly the same elements of proof. Id. Under our circumstances, Modica counsels an affirmance:

> Statutes may on occasion overlap, depending on the facts of a particular case, but it is generally no defense to an indictment under one statute that the accused might have been charged under another. Under those circumstances, the matter is necessarily and traditionally subject to the prosecuting attorney's discretion.
>
> Affirmed.

Id. at 251-52, 567 P.2d at 422 (citations omitted).

Hatori also argues that the court erred in not instructing the jury that he could be convicted only of the petty misdemeanor theft in the fourth degree,[7/] because Agent John

---

[6/] HRS § 329C-2(a) (1993) provides that, "[n]o person shall manufacture, distribute, or possess with intent to distribute, an imitation controlled substance. Any person who violates this subsection shall be guilty of a misdemeanor."

[7/] HRS § 708-833 (1993) provides:

> (1) A person commits the offense of theft in the fourth degree if the person commits theft of property or services of any value not in excess of $100.
>
> (2) Theft in the fourth degree is a petty misdemeanor.

engaged in sentencing entrapment. Relatedly, Hatori urges that the court erred by rejecting his jury instructions on simple entrapment[8/] (nos. VIII, IX & X). Hatori's argument in this respect is worth quoting:

> The testimony of DEA [A]gent John explicitly admitted that it was he, John, who came up with the $400 amount exchanged with Hatori for Hatori's fake marijuana. Thus, while Hatori did offer to sell the fake marijuana to John, it was John who determined how much money would be exchanged.
>
> When John made this determination, he, in effect, bootstrapped any conviction Hatori would face up in grade from Theft Fourth, a petty misdemeanor, to Theft Second, a Class C felony. That is, John's behavior of setting the sale price effectively encouraged Hatori to commit a Class C felony where John's purpose was to obtain evidence for a theft conviction at this heightened grade of offense.
>
> Further, by offering Hatori $400, John effectively created the substantial risk that Hatori would commit a Class C felony rather than the petty misdemeanor which Hatori's initial conduct was designed to result in.

Opening Brief at 14-15. We disagree. First, no Hawai'i court has recognized the mitigating defense of sentencing entrapment. State v. Yip, 92 Hawai'i 98, 112, 987 P.2d 996, 1010 (App. 1999). Second, taking the evidence in the light most favorable to Hatori, State v. O'Daniel, 62 Haw. 518, 528, 616 P.2d 1383, 1390-91 (1980) ("We must construe the evidence in the case in a light most favorable to the appellant in determining whether or not the instruction should be given." (Citations omitted.)), Hatori was

---

[8/] HRS § 702-237(1) (1993) provides:

> (1) In any prosecution, it is an affirmative defense that the defendant engaged in the prohibited conduct or caused the prohibited result because the defendant was induced or encouraged to do so by a law enforcement officer, or by a person acting in cooperation with a law enforcement officer, who, for the purpose of obtaining evidence of the commission of an offense, either:
>
> (a) Knowingly made false representations designed to induce the belief that such conduct or result was not prohibited; or
>
> (b) Employed methods of persuasion or inducement which created a substantial risk that the offense would be committed by persons other than those who are ready to commit it.

simply not entrapped. Agent John attempted to induce Hatori into selling him marijuana. Instead, Hatori sold Agent John garden-variety weeds. This is not entrapment of any stripe. Third, even if we assume, *arguendo*, that an entrapment defense was viable here as a matter of law, the undisputed evidence is that Hatori approached Agent John, offered to sell him "weed" and gave him a telephone number to use to set up the buy. Agent John's followup offer to buy marijuana from Hatori, in and of itself, was not entrapment. State v. Timas, 82 Hawai'i 499, 509-510, 923 P.2d 916, 926-927 (App. 1996). Nor was it the "outrageous official conduct" requisite to the defense of entrapment. Yip, 92 Hawai'i at 112, 987 P.2d at 1010 (citation and internal quotation marks omitted). Bottom line, what Agent John did is not a mitigating defense for what Hatori did. Cf. Timas, 82 Hawai'i at 514, 923 P.2d at 931 ("we reject the suggestion that the courts should bar the police, when conducting sting operations, from purchasing class A felony quantities of drugs from addicts").

Hatori next contends the court erred in refusing his jury instruction XXXI. This was not error. The court had a duty to instruct the jury on the law. State v. Feliciano, 62 Haw. 637, 643, 618 P.2d 306, 310 (1980) ("It is well settled that the trial court must correctly instruct the jury on the law." (Citations omitted.)). But this was not a matter of law. As

Hatori acknowledged, his jury instruction XXXI was merely a copy of the entry in the American Heritage Dictionary of the English Language for the word "weed," which included the meanings marijuana, and noxious plant. Besides, as quoted above, defense counsel outlined this theory of the case in opening statement. And, during his cross-examination of Agent John, defense counsel obtained an acknowledgment of the common knowledge that "weed" can have innocuous as well as sinister meaning. Presumably, defense counsel also hammered home Hatori's theory of the case in his closing argument, but this cannot be confirmed, as Hatori saw fit to expressly forego transcription of the closing arguments for purposes of appeal. Suffice it to say, the difference between the two meanings of "weed" was made sufficiently salient for the jury, even without the court reading a dictionary definition of the word to the jury.

Next, Hatori avers that the district court erred during the preliminary hearing because it did not require the State to give defense counsel a copy of Agent John's HPD Form 252 statement, thus hampering his ability to effectively cross-examine Detective Sitachitta, whose testimony was based in part upon the statement. Essentially, this point of error attacks the determination of probable cause made by the district court at the preliminary hearing. Hence, we will not review it, the point being moot. In re Does, Nos. 24036 & 24042, slip op. at 5-6 (Haw. July 11, 2003) ("absent unusual circumstances, any defects

in a pretrial determination of probable cause are rendered moot, or are without any effective remedy, which is much the same thing, by a subsequent conviction" (footnote and citations omitted)).

Last, Hatori asserts that the court erred during the voluntariness hearing, by relying upon a transcript of Hatori's statement to Detective Sitachitta that was rendered questionably accurate by "(inaudible)" designations on virtually every page. We disagree. Detective Sitachitta testified that the transcript was a fair and accurate representation of the statement Hatori made to him on December 12, 2000. Hatori nowhere disputed this assertion with specific instances of inaccuracy. Presumably, Hatori would have been aware of any inaccuracies, given that it was his own statement and he had access to the audiotape of it. In this respect, Hatori references, in passing and without argument, the complaint Hatori made during the interview about his blurry vision. The record is clear, however, that as soon as the complaint was made, Detective Sitachitta recessed the interview in order to retrieve Hatori's glasses. Hatori also mentions, again in passing and without argument, the "best evidence rule." However, the rule is inapposite here, for it requires proffer of the original writing, recording or photograph to prove the content thereof, and Hatori never raised the issue of original versus duplicate. Hawaii Rules of Evidence (HRE) Rule 1002 (1993) ("To prove the content of a writing, recording,

or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute."); Rule 1002 Commentary ("Rule 1002 states the so-called 'best evidence rule,' requiring the production of the original document whenever the proponent seeks to prove the document's contents." (Citation omitted.)). There was, in any event, never a genuine question as to the authenticity, as opposed to the accuracy, of the original. HRE Rule 1003 (1993) ("A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.").

III. Conclusion.

Based on the foregoing, we affirm the May 14, 2001 judgment of the court.

DATED: Honolulu, Hawaii, August 29, 2003.

On the briefs:

T. Stephen Leong,
Brian B. Custer (of counsel),
for defendant-appellant.

Chief Judge

Donn Fudo,
Deputy Prosecuting Attorney,
City & County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge