

NOT FOR PUBLICATION

NO. 24343

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
DARRYL DINH LABRADOR, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-1-2129)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Darryl Dinh Labrador (Labrador) appeals from the Judgment filed May 14, 2001 in the Circuit Court of the First Circuit (circuit court).¹

Labrador was charged with:

Count I: possession of any of the substances listed in Hawaii Revised Statutes (HRS) § 329-61, "to wit, acetone, pseudoephedrine, and toluene with intent to illegally manufacture any controlled substance, thereby committing the offense of Prohibited Acts Related to Precursors to the Manufacture of Controlled Substances" in violation of HRS § 329-65(d) (Supp. 2002).²

¹The Honorable Victoria S. Marks presided.

²HRS § 329-65(d) (Supp. 2002) provides:

§329-65 Penalty.

. . . .
(d) Any manufacturer, wholesaler, retailer, or other person who possesses any of the substances listed in section 329-61 with the intent to illegally manufacture any controlled substance shall be fined not more than \$100,000, or imprisoned not more than 10 years, or both.

Count II: knowing possession of the drug methamphetamine, thereby committing the offense of Promoting a Dangerous Drug in the Third Degree, in violation of HRS § 712-1243 (1993).³

Count III: use or possession with intent to use drug paraphernalia in violation of HRS § 329-43.5(a) (1993).⁴

Labrador was acquitted as to Count I and convicted of Counts II and III.

On appeal, Labrador argues (1) the circuit court abused its discretion by admitting into evidence Labrador's prior conviction and drug use because they were irrelevant or unfairly prejudicial, requiring exclusion under Hawaii Rules of Evidence (HRE) Rule 403; (2) the circuit court erred when it instructed the jury that prior convictions and prior drug use may be considered to show intent and motive; (3) the circuit court did

³ HRS § 712-1243 (1993) provides:

§712-1243 Promoting a dangerous drug in the third degree.

(1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.

(2) Promoting a dangerous drug in the third degree is a class C felony.

⁴ HRS § 329-43.5(a) (1993) provides:

§329-43.5(a) Prohibited acts related to drug paraphernalia.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. Any person who violates this section is guilty of a class C felony and upon conviction may be imprisoned pursuant to section 706-660 and, if appropriate as provided in section 706-641, fined pursuant to section 706-640.

not timely provide to the jury a limiting instruction as to the proper use of Labrador's prior conviction and drug use; (4) the circuit court committed plain error by admitting a document into evidence without proper foundation; (5) Labrador received ineffective assistance of counsel in violation of his constitutional rights; and (6) the Deputy Prosecuting Attorney committed prosecutorial misconduct during his opening statement and closing argument. Labrador contends any or all of the points of error deprived him of a fair trial. We disagree with Labrador's contentions and affirm the May 14, 2001 Judgment of the circuit court.

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, we resolve Labrador's points of error as follows:

(1) Labrador contends the circuit court abused its discretion by admitting his prior conviction and drug use into evidence. Labrador contends this evidence was irrelevant and unfairly prejudicial. The circuit court did not abuse its discretion by admitting into evidence Labrador's prior conviction and drug use because it was used to show intent and knowledge on the part of Labrador. HRE Rules 403 and 404(b); State v. Kealoha, 95 Hawai'i 365, 380, 22 P.3d 1012, 1027 (App. 2000). The probative value of this evidence was not substantially

outweighed by the danger of unfair prejudice. HRE Rule 403; State v. Castro, 69 Haw. 633, 643-44, 756 P.2d 1033, 1041 (1988).

(2) Labrador contends the circuit court erred by instructing the jury that it could consider Labrador's prior conviction and drug use. The circuit court did not err in so instructing the jury because Labrador's prior conviction and drug use was relevant and admissible. The circuit court gave the appropriate cautionary instruction. HRE Rule 404(b).

(3) Labrador contends the circuit court did not provide to the jury a limiting instruction as to the proper use of Labrador's prior conviction for drug use. Labrador did not request a limiting instruction, nor object to the lack of a limiting instruction, after his prior conviction was introduced as evidence. HRE Rule 105. The appropriate limiting instruction was given to the jury at the conclusion of the trial. "The trial judge must consider on a case-by-case basis whether to issue a limiting instruction when HRE Rule 404(b) evidence is introduced and/or at the conclusion of the trial. There is no bright line rule." State v. Cordeiro, 99 Hawai'i 390, 418-19, 56 P.3d 692, 720-21, reconsideration denied, 100 Hawai'i 14, 58 P.3d 72 (2002).

(4) Labrador contends it was error to admit a copy of his federal conviction into evidence without proper foundation. Any error was waived because there was no objection by Labrador.

HRE Rule 103. Furthermore, Labrador testified he had been convicted of the federal offense.

(5) Labrador contends that he was denied effective assistance of counsel because (a) defense counsel failed to object to testimony, to the introduction of a prior conviction and prior drug use, to the opening and closing statements by the Deputy Prosecuting Attorney, and to the introduction of evidence without a proper foundation, and (b) defense counsel opened the door to damaging allegation of other bad acts. Labrador has not shown that defense counsel's failure to object to the enumerated evidence resulted in the "withdrawal or substantial impairment of a potentially meritorious defense." Barnett v. State, 91 Hawai'i 20, 27, 979 P.2d 1046, 1053 (1999) (quoting State v. Fukusaku, 85 Hawai'i 462, 480, 946 P.2d 32, 50 (1997)). As a defense to the manufacturing charge, Labrador, as a trial tactic, admitted his prior bad acts of selling drugs, but denied ever manufacturing drugs. Labrador was acquitted of the manufacturing charge. "Defense counsel's tactical decisions at trial generally will not be questioned by a reviewing court." State v. Antone, 62 Haw. 346, 352, 615 P.2d 101, 106 (1980).

(6) Labrador contends the Deputy Prosecuting Attorney committed prosecutorial misconduct during his opening statement by inferring that Labrador was linked to gang activity and during his closing argument by misstating evidence. Labrador has not

NOT FOR PUBLICATION

shown that these statements of the prosecutor prejudiced his right to a fair trial. State v. McGriff, 76 Hawai'i 148, 158, 871 P.2d 782, 792 (1994).

Therefore,

IT IS HEREBY ORDERED that the May 14, 2001 Judgment of the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, October 10, 2003.

On the briefs:

Linda C.R. Jameson,
Deputy Public Defender,
for defendant-appellant.

Chief Judge

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge