

NOT FOR PUBLICATION

NO. 25423

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
SHARON C. ELLEY also known as SHARON BLACK, Defendant-Appellant

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STATE OF HAWAI'I

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APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 99-0059(1))

MEMORANDUM OPINION

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

Defendant-Appellant Sharon C. Elley (Elley) appeals from the Judgment filed on September 27, 2002, in the Circuit Court of the Second Circuit (circuit court).¹ The State of Hawai'i (the State) charged Elley with Theft in the First Degree (Theft I), in violation of Hawaii Revised Statutes (HRS) § 708-830.5 (1993), for theft by deception of property having a value exceeding \$20,000. A jury found Elley guilty as charged. Elley was sentenced to five years' probation and ordered to pay restitution of \$17,500 and perform 200 hours of community service. Restitution was ordered at a rate of not less than \$500 per month.

Elley argues that 1) there was insufficient evidence to support her conviction; 2) the trial court committed plain error

¹ The Honorable Reinetta W. Cooper presided over the trial of Defendant-Appellant Sharon C. Elley (Elley) and the Honorable Joel E. August presided over Elley's sentencing.

in instructing on the state of mind required as to the value of the stolen items; and 3) the sentencing court erred in ordering \$17,500 in restitution.

BACKGROUND

James Miller (James) and Jeanette Henry (Henry) were co-owners of Parrots International (Parrots), a business primarily devoted to selling parrots and parrot accessories. Henry hatched and raised parrots on the Big Island and sent them to James on Maui for sale at the Parrots store, which was located at the Wharf Cinema Center in Lahaina. James was responsible for the day-to-day operations of the store while Henry maintained Parrots' business records and handled the bookkeeping.

In February of 1998, James married Elizabeth Miller (Elizabeth) in Indonesia. During that trip, James purchased 3,000 sarongs for \$5 to \$6 apiece and had them shipped to Maui. James later also imported handbags and quilts from Indonesia and sold them at the Parrots store. In March of 1998, Elizabeth joined James on Maui and assisted him in running the store. Elizabeth's responsibilities included tracking the inventory of sarongs, handbags, quilts, and other merchandise.

Elley first met James in June or July of 1998 when she came to the Parrots store. Elley asked if she could sell some of the items in the store. James eventually agreed that Elley could sell sarongs for James on a wholesale basis at \$10 apiece in

NOT FOR PUBLICATION

return for a 20 percent commission. James was selling the sarongs in his store for a retail price of \$20. Elley asked James if she could also sell handbags and quilts, but James refused to give her authorization to sell those items. James later drafted a document incorporating the basic terms of his agreement with Elley, which they both signed.

James understood his agreement with Elley to mean that she would take samples of the sarongs and try to obtain orders from potential customers. If she obtained an order, she would return to the Parrots store to pick up the sarongs to fill the order. Elley was to obtain a check from the customer payable to James, and James would pay Elley her commission in cash immediately after the check cleared. During July and August of 1998, Elley sold sarongs for James in accordance with their agreement to several Maui merchants.

James and Elizabeth were in Indonesia for most of September 1998 for their wedding reception. Elizabeth left Maui for Indonesia on August 14, 1998, and James on September 2, 1998, with both returning to Maui on about September 28, 1998. No one kept track of the inventory while Elizabeth was gone. James told Elley that she could continue to sell sarongs under their agreement while James and his wife were in Indonesia. Elley was still required to have customers make their checks payable to James, and James made arrangements to have his co-owner's husband

issue commission checks to Elley. James left Connie Smith (Smith) in charge of running the Parrots store.

While James and Elizabeth were in Indonesia, Elley began removing large quantities of sarongs as well as handbags and quilts from the Parrots store. Elley did not submit any payments to Smith for the merchandise Elley had taken. Smith became concerned and pressed Elley for an accounting, but Elley did not provide one.

By September 28, 1998, when James and Elizabeth returned from Indonesia, most of the store's inventory of sarongs, handbags, and quilts had been depleted. James called the police and reported the thefts. Elizabeth provided the police with a list of missing items by taking an inventory of the store's remaining merchandise and comparing it with the running inventory she had maintained prior to leaving for Indonesia. At trial, Elizabeth admitted that she took the initial, post-trip inventory quickly, which led to her overstating the number of missing sarongs by 172 and erroneously including 40 hand-painted eggs, which had been consigned to another person, on the list of missing items. She later made a more careful count and determined that 1,049 sarongs, 98 handbags, and 45 quilts were missing. The running inventory on which Elizabeth based her calculation of the missing items was introduced in evidence at trial. Elley never paid James for the missing items.

NOT FOR PUBLICATION

James testified that he bought the sarongs for \$5 to \$6 apiece, that Elley was selling the sarongs at a wholesale price of \$10, and that he sold them at a retail price of \$20. James bought the handbags for \$6 and retailed them for \$20, and he bought the quilts for \$50 and retailed them for \$150.

Leola Vierra (Vierra) owned a retail store in Lahaina. In July and August of 1998, Vierra purchased sarongs from Elley and paid by checks made payable to James. In September of 1998, Elley sold Vierra a total of 36 handbags from the Parrots store at \$10 apiece. Vierra paid for the handbags by two checks made payable to Elley, rather than to James. The first check, dated September 10, 1998, was for \$70 and the second check, dated September 12, 1998, was for \$290. Regarding the \$290 check, Vierra testified that Elley asked that the check be made payable to Elley. Sometime after September 10, 1998, Elley also sold Vierra five quilts from the Parrots store for a total of \$250. Vierra testified that she thought she sold the sarongs at her store for \$20 and the quilts for \$100. The police later recovered from Vierra's store some of the handbags and quilts Vierra had purchased from Elley. Photographs of the recovered items were introduced in evidence.

Eric Peterson (Peterson) was Elley's friend for several weeks in about November of 1998 and admitted that they "fooled around a couple of times" during this period. Peterson testified

that in November of 1998, he saw approximately 40 boxes and also bags which contained sarongs and blankets in Elley's residence. Elley asked Peterson to loan her \$10,000 and later \$5,000 so that Elley could open up a retail outlet to sell these goods. Peterson declined to loan her the money.

The only witness called by the defense at trial was Clifford Chung (Chung). Chung testified that he lived in the same house as Elley from June or July of 1998 until he moved to Oahu on about October 28, 1998. During that time, Chung occupied the upstairs master bedroom while Elley rented a room downstairs. Chung recalled Peterson riding his bike to the house and asking for Elley in about July of 1998. Chung did not see Elley storing boxes in the house. Chung testified that because he was moving to Oahu, he had about 40 of his own boxes in the house, which he took when he moved.

DISCUSSION

I. There Was Sufficient Evidence to Support Elley's Theft I Conviction

A.

Elley was charged with and convicted of Theft I for obtaining or exerting control over property belonging to James Miller, the value of which exceeded \$20,000, by deception with the intent to deprive the other of the property. The statutes relevant to this charge, HRS §708-830 (1993 and Supp. 2004) and HRS §708-830.5, provide in pertinent part:

NOT FOR PUBLICATION

§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.

§708-830.5 Theft in the first degree. (1) A person commits the offense of theft in the first degree if the person commits theft:

- (a) Of property or services, the value of which exceeds \$20,000[.]

With respect to the \$20,000 threshold value for Theft I, the prosecution must not only prove that the value of the property taken in fact exceeded \$20,000, but that the defendant intended to steal property valued in excess of \$20,000. State v. Cabrera, 90 Hawai'i 359, 366-69, 978 P.2d 797, 804-07 (1999). The threshold value of \$20,000 is an attendant circumstance of the Theft I offense. Id. at 368; 978 P.2d at 806. Under HRS §702-206(1)(b) (1993), "[a] person acts intentionally with respect to attendant circumstances when he is aware of the existence of such circumstances or believes or hopes that they exist." Thus, with respect to Elley's state of mind regarding valuation, the State was required to prove that Elley was aware, believed, or hoped that the value of the property she stole exceeded \$20,000.

On appeal, Elley contends that there was insufficient evidence for her conviction because the State failed to present substantial evidence 1) of the number of items missing from the Parrots store's inventory; 2) that Elley was responsible for all

the missing items; 3) that the value of the items Elley allegedly took exceeded \$20,000; and 4) that Elley acted with the intent that the value of the items she took exceeded \$20,000. We disagree.

In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution. State v. Tamura, 63 Haw. 636, 637, 633 P.2d 1115, 1117 (1981). "The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact." State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998) (quoting State v. Quitog, 85 Hawai'i 128, 145, 938 P.2d 559, 576 (1997)). Even if it could be said that the conviction is against the weight of the evidence, the conviction will nevertheless be affirmed as long as there is substantial evidence to support it. 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 person of reasonable caution to support a conclusion." Richie, 88 Hawai'i at 33, 960 P.2d at 1241 (quoting State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996)). It is the province of the jury, not the appellate courts, to determine the credibility of witnesses and the weight of the evidence. Tamura, 63 Haw. at 637-38, 633 P.2d at 1117; State v. Aki, 102 Hawai'i 457, 460,

464, 77 P.3d 948, 951, 955 (App.), cert. denied, 102 Hawai'i 526, 78 P.3d 339 (2003).

B.

Elley argues that there was insufficient evidence to establish the number of items missing from the store's inventory and that she was the person responsible for taking all the missing items. The State's proof of the number of missing items was based on the inventory records kept by Elizabeth and Elizabeth's testimony. Elizabeth testified that in March of 1998, she became responsible for tracking the inventory of the Parrots store's merchandise. A document which reflected Elizabeth's efforts to track the store's inventory was introduced at trial. This document showed running totals of the store's inventory of certain merchandise, including sarongs, handbags, and quilts, starting from May 25, 1998.

According to Elizabeth, she established a beginning inventory by counting the merchandise. She then kept track of the daily sales and used the sales figures to regularly update her running inventory by subtracting the number of items sold from the existing inventory. Prior to leaving for Indonesia, Elizabeth periodically checked the accuracy of her running inventory by physically counting the merchandise in the store. Her physical count always matched the figures on her running inventory.

No one kept inventory while Elizabeth was in Indonesia between August 13 and September 28, 1998. Upon her return, Elizabeth updated her running inventory based on the sales information provided by James, Smith, and another salesperson. Elizabeth also conducted a physical count of the number of sarongs, handbags, and quilts remaining in the store. The difference between the totals on Elizabeth's running inventory and the number of items left in the store formed the basis for the State's claim that Elley had stolen 1,049 sarongs, 98 handbags, and 45 quilts.

Elley does not challenge the admissibility of Elizabeth's running inventory on appeal. She nevertheless contends that Elizabeth's running inventory was unreliable and therefore did not provide substantial evidence of the number of missing items. Elley argues that certain sarong sales, as evidenced by checks payable to James, were not reflected in Elizabeth's running inventory and resulted in Elizabeth overstating the number of missing sarongs. The State maintains that Elizabeth's running inventory was accurate and explains the alleged discrepancies by noting that the date of delivery did not always coincide with the date of payment.

There was no paper trail of sales invoices or receipts to support the entries on Elizabeth's running inventory. At trial, Elley vigorously attacked Elizabeth's credibility and the

reliability of her running inventory. The State, however, laid a proper foundation for the admission of the running inventory. Elizabeth authenticated the running inventory, explained how it was prepared, and vouched for its accuracy. The credibility of witnesses and the weight of the evidence is for the jury to decide, not the appellate courts. Tamura, 63 Haw. at 637-38, 633 P.2d at 1117; Aki, 102 Hawai'i at 460, 464, 77 P.3d at 951, 955. The running inventory and Elizabeth's testimony provided substantial evidence to support Elizabeth's calculation of the number of missing items.

Elley does not dispute that there was considerable evidence showing that she took, without authorization, large quantities of merchandise from the Parrots store while James and Elizabeth were in Indonesia. Elley, however, claims that there was insufficient evidence to show that she took all the missing items. In particular, Elley argues that there was no procedure to account for sarong samples taken from the store or for sarongs taken by Elley or others to fill bulk purchase orders. Elley's argument fails because it relates to the weight that should be given to the trial evidence, which was for the jury to decide. There was substantial evidence to support a finding that Elley took all the missing items.

C.

Elley argues that there was insufficient evidence that the value of the items she was accused of taking exceeded the \$20,000 threshold for Theft I and that she acted with the intent that the value of these items exceeded \$20,000. The court, without objection, gave the jury the following instruction, which was based on the statutory definition of "value" set forth HRS § 708-801 (Supp. 2004):

Value means [the] market value of the property or services at the time and place of the offense, or the replacement cost if the market value of the property or services cannot be determined.

The critical question was the value of the missing sarongs rather than the value of the missing handbags or quilts. This is because the \$20,000 threshold for Theft I could only be reached if the jury based the sarongs' value on their retail price. The evidence gave the jury several options to choose from in determining the value of the missing sarongs, including James's acquisition cost of \$5 or \$6 apiece, the wholesale price of \$10, or the retail price of \$20. Both James and Vierra sold the sarongs in their stores for \$20 apiece. While James had agreed to permit Elley to sell sarongs at the wholesale price of \$10, the evidence showed that Elley did not acquire the missing sarongs pursuant to their agreement, but rather had stolen the sarongs. We conclude that there was sufficient evidence for the jury to base the sarongs' market value on their retail price.

We also reject Elley's claim that there was insufficient evidence that she acted intentionally with respect to the valuation of the missing sarongs. HRS §702-206(1)(b) provides that "[a] person acts intentionally with respect to attendant circumstances when he is aware of the existence of such circumstances or believes or hopes that they exist." There was compelling evidence that Elley was aware of the retail price of the sarongs and thus acted intentionally with respect to that value.

Elley was in the business of selling sarongs. She sold sarongs on a commission basis for James and was frequently in his store. Elley also sold substantial quantities of sarongs to Vierra and other Maui merchants, and Elley even told Peterson that she wanted to open her own retail outlet to sell sarongs. It strains credulity to suggest that Elley was not aware of the \$20 retail price being charged by her supplier, James, or her significant customer, Vierra.

Moreover, HRS § 708-801(4) (Supp. 2004) provides in relevant part:

When acting intentionally or knowingly with respect to the value of property or services is required to establish an element of an offense, the value of property or services shall be prima facie evidence that the defendant believed or knew the property or services to be of that value.

Our conclusion that there was substantial evidence that the value of the property stolen by Elley exceeded \$20,000 necessarily

NOT FOR PUBLICATION

establishes that there was substantial evidence that Elley acted intentionally with respect to the property's value.

II. The Erroneous Jury Instruction Did Not Affect
Elley's Substantial Rights

In instructing the jury on Theft I, the trial court described the material elements of the offense as follows:

These five elements are:

1. That on or about the period of September 3, 1998, through September 27, 1998, in the County of Maui, State of Hawaii, the defendant, Sharon Elley, also known as Sharon Black, did obtain or exert control over the property of another;
2. That the defendant did so by deception;
3. That the defendant did so with the intent to deprive;
4. That the value of the property is exceeding² \$20,000.00; and
5. That the defendant intended to obtain or exert control over the property, the value of which exceeded \$20,000.00.

Elley agreed with the court's Theft I instruction.

On appeal, Elley argues that the trial court's instruction on Theft I was erroneous because it failed to require the jury to find that Elley intended that the value of the property she allegedly stole exceeded \$20,000. Because Elley did not object to the Theft I instruction, and, indeed, agreed to it below, we review for plain error.

This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents

² In the written instructions supplied to the jury, material element number 4 provided: "4. That the value of the property exceeded \$20,000.00." (Emphasis added).

NOT FOR PUBLICATION

a departure from a presupposition of the adversary system--that a party must look to his or her own counsel for protection and bear the cost of counsel's mistakes.

.
When jury instructions or the omission thereof 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.

.
Erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.

.
Furthermore, error is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error may have contributed to conviction. If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.

State v. Vanstory, 91 Hawai'i 33, 42-43, 979 P.2d 1059, 1068-69

(1999) (internal citations and brackets omitted; block quote format changed).

In State v. Cabrera, 90 Hawai'i at 359, 978 P.2d at 797, the Hawai'i Supreme Court construed the analogous charge of Theft in the Second Degree (Theft II) for shoplifting, a violation of HRS § 708-830(8)(a) (1993) and HRS § 708-831(1)(b) (1993 and Supp. 1998). The court concluded that the intentional state of mind for the Theft II offense extends to the offense's attendant circumstance that the value of the stolen property exceeds \$300. Cabrera, 90 Hawai'i at 366-69, 978 P.2d at 804-

NOT FOR PUBLICATION

07.³ The court held that "in order to convict a defendant of theft in the second degree [for shoplifting], the prosecution must prove beyond a reasonable doubt that the accused intended to steal property or services valued in excess of \$300.00." Id. at 369, 978 P.2d at 807.

The State asserts that Elley's Theft I instruction required the jury to find that Elley intended that the value of the property she stole exceeded \$20,000 and therefore the instruction was valid under Cabrera. We disagree.

The instruction given in Elley's case was strikingly similar to the instruction the Hawai'i Supreme Court found deficient in Cabrera. The relevant portion of Elley's Theft I instruction required the State to prove:

4. That the value of the property is exceeding \$20,000.00; and

5. That the defendant intended to obtain or exert control over the property, the value of which exceeded \$20,000.00.

(Emphasis added). The instruction in Cabrera required the State to prove:

1. That . . . the Defendant concealed or took possession of the goods or merchandise, the value of which exceeds \$300.00, of J.C. Penney Co., Inc; and

³ In reaching this conclusion, the Hawai'i Supreme Court adopted this court's analysis in State v. Mitchell, 88 Hawai'i 216, 222-23, 965 P.2d 149, 155-56 (App. 1998).

NOT FOR PUBLICATION

2. That the Defendant did so with intent to defraud J.C. Penney Co. of the goods or merchandise.

Id. at 363-64, 978 P.2d at 801-02 (emphasis added).

There is no significant distinction between the instruction given in Cabrera and the instruction given in Elley's case. The Hawai'i Supreme Court held that the instruction given in Cabrera was deficient because it "may well have misled the jury into believing that the prosecution was not required to prove the [intentional] state of mind with respect to the value of the stolen property." Id. at 369, 978 P.2d at 807. Based on Cabrera, we conclude that the Theft I instruction in this case was erroneous.

We further conclude, however, that the erroneous Theft I jury instruction did not adversely affect Elley's substantial rights because it was harmless beyond a reasonable doubt. As noted, Elley acted with an intentional state of mind as to valuation as long as she was aware, believed, or hoped that the items she stole exceeded \$20,000 in value. HRS § 702-206(1)(b).⁴ The undisputed evidence established that Elley was in the business of selling sarongs and that both her sarong supplier and significant customer were selling sarongs for \$20

⁴ The jury was instructed on the definition of the "intentionally" state of mind as set forth in Hawaii Revised Statutes (HRS) § 702-206(1)(1993), including the meaning of "act[ing] intentionally with respect to attendant circumstances" set forth in HRS § 702-206(1)(b).

NOT FOR PUBLICATION

apiece.⁵ In convicting Elley, the jury necessarily found that the value of the stolen sarongs was their retail price of \$20 apiece. We conclude beyond a reasonable doubt that the jury would also have found that Elley was aware of the sarongs' \$20 retail price. Accordingly, there was no reasonable possibility that the erroneous instruction may have contributed to Elley's conviction. State v. Vanstory, 91 Hawai'i at 43, 979 P.2d at 1069; see Neder v. United States, 527 U.S. 1, 8-20 (1999) (affirming a conviction under the harmless beyond a reasonable doubt standard where a jury instruction erroneously omitted an essential element of the offense).⁶

⁵ In contrast, the defendant in State v. Cabrera, 90 Hawai'i 359, 362-63, 978 P.2d 797, 800-01 (1999), testified that he did not look inside the bag that his friend directed him to shoplift. In Cabrera, the defendant's awareness of the value of the items he stole was hotly contested and accordingly, the erroneous instruction was harmful.

⁶ We also reject Elley's claim that the trial court committed plain error by unnecessarily instructing on the definition of "knowingly" pursuant to HRS § 702-206(2) (1993). The instruction on the conduct element of Theft in the First Degree (Theft I) made clear that "intentionally" rather than "knowingly" was the required state of mind. With respect to the attendant circumstance of the value of the property taken, the "intentionally" and "knowingly" states of mind are essentially the same. For attendant circumstances, the "intentionally" state of mind is established when the defendant "is aware of the existence of such circumstances," HRS § 702-206(1)(b), and the "knowingly" state of mind is established when the defendant "is aware that such circumstances exist." HRS § 702-206(2)(b). When considered as a whole, the unnecessary instruction on the definition of "knowingly" did not render the instructions prejudicially insufficient, erroneous, inconsistent, or misleading. State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999).

NOT FOR PUBLICATION

III. The Record Is Not Sufficient to Permit a
 Determination of Whether the Circuit Court's
 Calculation of Restitution Was Reasonable

Elley contends that the sentencing judge, who did not preside over the trial, erred in imposing restitution of \$17,500. Elley claims that the court based its award of restitution on unreliable information in a letter which conflicted with the trial evidence. She also claims that the court failed to make sufficient findings on her ability to pay.

We conclude that the record is not sufficient for us to determine whether the circuit court's calculation of restitution was reasonable. Accordingly, we remand the case for further proceedings with respect to restitution. The circuit court's comments at sentencing indicate that it intended to impose restitution based on James's out-of-pocket costs for the stolen items, excluding the costs of James's travel to Indonesia to purchase the merchandise.⁷ The record indicates that in imposing \$17,500 in restitution, the circuit court relied on information contained in a letter James sent to the prosecutor's office,

⁷ We note that HRS § 706-646(3) (Supp. 2004) provides in relevant part:

- (3) Restitution shall be a dollar amount that is sufficient to reimburse any victim fully for losses including but not limited to:
 - (a) Full value of stolen or damaged property, as determined by replacement costs of like property, or the actual or estimated cost of repair, if repair is possible[.]

(Emphasis added). Thus, the trial court in imposing restitution is not limited to the victim's cost in purchasing the stolen items.

NOT FOR PUBLICATION

which purportedly estimated James's costs for the stolen items, exclusive of his travel, to be \$17,500. The letter, however, was not admitted in evidence or made part of the record. Moreover, as Elley correctly notes, the \$17,500 figure conflicts with the evidence at trial, which showed that James at most paid \$9,132 for the stolen items.⁸

Under these circumstances, we are unable to determine whether the court's award of \$17,500 in restitution was proper. The circuit court is free on remand to consider additional evidence and argument regarding the appropriate amount of restitution. Besides noting the limitation on resentencing set forth in HRS § 706-609 (1993), we express no view on what the appropriate amount of restitution should be.

We disagree with Elley's argument that the circuit court failed to make sufficient findings on her ability to pay. The court established through its colloquy with Elley that she had made \$24,000 in the previous five months and was making at least \$6,000 per month. In imposing restitution of \$17,500 with monthly payments of at least \$500, the court stated, "I think it

⁸ At trial, Elizabeth Miller testified that 1,049 sarongs, 98 handbags, and 45 quilts were missing from inventory. James testified that he bought the sarongs for \$5 to \$6, the handbags for \$6, and the quilts for \$50. Using the higher \$6 figure for the sarongs, the amount James paid for the stolen merchandise, based on the trial evidence, was $(1,049 \times \$6) + (98 \times \$6) + (45 \times \$50) = \$9,132$.

NOT FOR PUBLICATION

is fortunate that the defendant happens to be employed at the present time in something which sounds quite remunerative, and I would like to utilize that for the benefit of the victim in this case. . . ." Although we conclude that the circuit court's findings on ability to pay were sufficient, we suggest that on remand, the court may wish to provide more specific findings on this issue.

CONCLUSION

We affirm the portion of the September 27, 2002, Judgment filed by the Circuit Court of the Second Circuit that convicted Elley of Theft in the First Degree, vacate the portion of the Judgment relating to restitution, and remand for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, September 30, 2005.

On the briefs:

Phyllis J. Hironaka,
Deputy Public Defender,
for Defendant-Appellant.

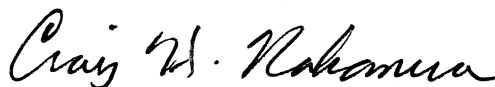


Acting Chief Judge

Arleen Y. Watanabe,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.



Associate Judge



Associate Judge