

NOT FOR PUBLICATION

NO. 26306

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JAMES BOLOSAN, aka "Pops", Defendant-Appellant
and
MARIA TEMPLO, Defendant

NORMA T. YARRA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-1751)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant James Bolosan (Bolosan) appeals from the Judgment filed on December 17, 2003, in the Circuit Court of the First Circuit (the circuit court).¹ A jury found Bolosan guilty of manufacturing methamphetamine, in violation of Hawaii Revised Statutes (HRS) § 712-1241(1)(d) (Supp. 2002)² (Count I); possessing methamphetamine, in violation of HRS § 712-1243 (1993)³ (Count II); possessing with intent to use drug

¹ The Honorable Hilary B. Gangnes presided.

² Hawaii Revised Statutes (HRS) § 712-1241(1)(d) (Supp. 2002) provides in relevant part:

(1) A person commits the offense of promoting a dangerous drug in the first degree if the person knowingly:

(d) Manufactures a dangerous drug in any amount

³ HRS § 712-1243 (1993) provides in relevant part:

(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.

paraphernalia, in violation of HRS § 329-43.5(a) (1993)⁴ (Count IV); and possessing marijuana, in violation of HRS § 712-1249 (1993)⁵ (Count V). The circuit court sentenced Bolosan to twenty years' imprisonment with a ten-year mandatory minimum term on Count I, five years' imprisonment on each of Counts II and IV with a 30-day mandatory minimum term on Count II, and 30 days' imprisonment on Count V, all terms to be served concurrently.

On appeal, Bolosan claims that the circuit court erred in: 1) permitting an expert chemist to testify about the results of his drug analyses without the State of Hawai'i (the State) laying a proper foundation that the instruments he used were in proper working order; 2) failing to allow Bolosan's counsel to examine notes the expert used to refresh his recollection while testifying; and 3) denying Bolosan's motion for judgment of acquittal. After a careful review of the record and the briefs submitted by the parties, we affirm.

⁴ HRS § 329-43.5(a) (1993) provides in relevant part:

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to . . . 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.

⁵ HRS § 712-1249 (1993) provides in relevant part:

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

I.

On August 6, 2002, at approximately 6:00 a.m., members the Honolulu Police Department (HPD) executed a search warrant on Bolosan's residence. Bolosan and Maria Templo (Templo) were found in a bedroom designated as Bedroom Number 2 in a diagram of the residence admitted at trial.⁶ On a metal stand in Bedroom Number 2, the police recovered a can of acetone, a can of denatured alcohol solvent, a vial containing a brown liquid, a glass plate with residue, a glass bowl with residue, and a cut plastic straw with residue. In the closet of Bedroom Number 2, the police found approximately 25 packets containing white crystalline residue, two glass pipes with residue, a cylindrical glass piece with burnt residue, two plastic gram scales, one with residue on it, a digital scale with Bolosan's name on it, a torch lighter engraved with "Maria T," a cut plastic straw, a thin piece of metal with a cap on one end, and documents containing names and numbers. A box containing another gram scale was found underneath the bed. The brown liquid in the vial and each of the items with residue recovered from Bedroom Number 2 were submitted for chemical analysis. The brown liquid and the residue on each of the items were determined to contain methamphetamine.

⁶ The complaint filed by the State of Hawai'i (the State) jointly charged Defendant-Appellant James Bolosan (Bolosan) and Maria Templo (Templo) with manufacturing methamphetamine in Count I and with unlawful possession or use of drug paraphernalia in Count IV. In addition, Templo was separately charged in Count III with possessing methamphetamine. Templo, however, jumped bail and became a fugitive, and Bolosan proceeded to trial alone.

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The police found additional evidence in Bedroom Number 2 that linked Bolosan to that bedroom, including an unopened letter addressed to Bolosan from a pension trust fund and Bolosan's State of Hawai'i identification card. The police also recovered evidence indicating that Templo occupied Bedroom Number 2. On the wall above the bed, there was a a paper with "Maria" written on it. A bag next to the bed contained Templo's Medicaid identification card, another identification card bearing Templo's name and the subject address, and three clear Ziploc bags with crystalline residue.

HPD Officer Steven Erler (Officer Erler) was qualified as an expert on clandestine drug laboratories. Officer Erler testified that after examining the items recovered from Bedroom Number 2, it was his expert opinion that there was a "methamphetamine conversion lab" present at Bolosan's residence on August 6, 2002.

On the shelf of a computer desk located in the kitchen area, the police recovered a packet containing a crystalline substance and a packet containing green leafy material. The packets were discovered next to a Hawaiian Electric Company billing statement addressed to Bolosan. The crystalline substance was later determined to be methamphetamine and the green leafy material to be marijuana. The police did not recover

fingerprints from any of the items seized during the search of Bolosan's residence.

II.

A.

Bolosan argues that the expert testimony of HPD Criminalist Hassan Mohamed (Mohamed) regarding his drug analyses was inadmissible because the State failed to lay a proper foundation that the equipment Mohamed used was in proper working order. We disagree.

Mohamed used a Fourier Transform Infrared Spectrometer (FTIR) in determining that the packet recovered from the computer desk contained methamphetamine. He used a gas chromatograph mass spectrometer (GCMS) to analyze all the remaining items submitted to him in this case. He determined that the brown liquid in the vial and the residue on each of the other items from Bedroom Number 2 contained methamphetamine and that the leafy material from the computer desk was marijuana.

Mohamed testified from personal knowledge that he and the other chemists in the HPD clinical analysis unit followed an established protocol to ensure that the GCMS and FTIR machines they used were in proper working order. The protocol required that every day, prior to being used, the GCMS and FTIR machines would be "tuned" by one of the chemists to ensure that the machines were accurate and reliable. The chemist who performed

the tune would record the results in a document kept in the laboratory. Mohamed testified that the GCMS and FTIR machines he used to conduct his analyses in this case had been tuned by himself or another chemist in the morning prior to being used. Mohamed would not have used the machines unless he had tuned the machines himself or verified through laboratory records that the machines had been properly tuned.

Mohamed took additional steps to ensure that the GCMS machine he used was functioning properly. Mohamed testified that prior to using the GCMS machine to analyze the evidence for methamphetamine, he ran a known blank sample and a known standard of methamphetamine through the machine. The GCMS machine accurately analyzed the blank sample as containing "nothing" and the known methamphetamine standard as containing methamphetamine.⁷

We conclude that the State laid a sufficient foundation that the GCMS and FTIR machines Mohamed used in conducting his drug analyses were in proper working order. State v. Wallace, 80 Hawai'i 382, 407, 910 P.2d 695, 720 (1996); Hawaii Rules of Evidence (HRE) Rule 703 ("The facts or data . . . upon which an expert bases an opinion or inference may be those . . . made known to the expert If of a type reasonably relied upon

⁷ Criminalist Hassan Mohamed (Mohamed) testified that a similar procedure was used in analyzing the leafy material for marijuana and the cans of acetone and denatured alcohol solvent to verify their contents.

by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."); People v. Raney, 756 N.E.2d 338, 342 (Ill. App. Ct. 2001) (indicating that a sufficient foundation for the reliability of a GCMS machine may be established through evidence of policies or procedures used by a crime laboratory to ensure that the machine was properly maintained and in good working order). The circuit court did not err in permitting Mohamed to testify as an expert about his drug analyses.

We also disagree with Bolosan that the State failed to lay a sufficient foundation regarding the accuracy of the instruments Mohamed used to measure the volume and weight of the substances he analyzed. Mohamed testified that to measure the volume of the brown liquid, he used calibrated glassware obtained from a scientific glassware supplier, a measuring device generally accepted as reliable by drug identification experts. For the other evidence, Mohamed testified that he used an analytical balance (a type of scale) to determine the weight of the substances. Mohamed testified that in addition to the balance being calibrated twice a year by a manufacturer's representative, Mohamed personally checked the balance for accuracy once a month by using a standard weight set. Mohamed testified that based on his check of the balance at the end of July, 2002, the balance was accurate when he used it on August 6,

2002. We conclude that the State laid a sufficient foundation that the measuring devices Mohamed used were accurate.

Even assuming arguendo that an adequate foundation for the accuracy of the measuring devices was lacking, any error in allowing Mohamed to testify about the volume and weight of the substances he analyzed was harmless beyond a reasonable doubt. Bolosan was charged with offenses that did not require proof of a drug quantity, but only that Bolosan manufactured methamphetamine in any amount or possessed methamphetamine or marijuana in any amount. HRS §§ 712-1241(1)(d), 712-1243(1), 712-1249(1). Thus a precise measurement of the quantity of the methamphetamine and marijuana recovered from Bolosan's residence was not necessary.

B.

The circuit court erred in refusing to allow Bolosan's counsel to review the notes Mohamed used to refresh his recollection while testifying. HRE Rule 612. We conclude, however, that the court's error was harmless beyond a reasonable doubt.⁸ See State v. White, 92 Hawai'i 192, 205, 990 P.2d 90, 103 (1999).

The only time the defense specifically asked to see Mohamed's notes was when Mohamed referred to his notes in responding to defense counsel's question about which of the four

⁸ We observe that the notes in question were not made part of the record on appeal. The availability of the notes would have enhanced our ability to review Bolosan's claim.

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GCMS machines Mohamed used in conducting his analyses.⁹ After referring to his notes, Mohamed replied that he used machine "3A." The identity of the particular machine Mohamed used was of no significance. Mohamed's testimony that the GCMS machine he used was in proper working order did not turn on which of the laboratory's four GCMS machines he used. Accordingly, the error in not permitting Bolosan's counsel to see the portion of the notes Mohamed used to refresh his recollection on which GCMS machine he used could not have affected the outcome of the case.

In his reply brief, Bolosan refers to another instance in which Mohamed looked at his notes. In this instance, Mohamed used his notes to refresh his recollection on which test he used to analyze Exhibit 23, the crystalline substance in the packet found on the computer desk. After viewing his notes, Mohamed testified that he used the FTIR machine rather than the GCMS machine. Bolosan's counsel, however, did not ask to see Mohamed's notes on this occasion and thus waived any claim of error. See State v. Matias, 57 Haw. 96, 100-01, 550 P.2d 900, 903-04 (1976); State v. Samuel, 74 Haw. 141, 147, 838 P.2d 1374, 1378 (1992). Moreover, any error in not allowing defense counsel to see the notes Mohamed reviewed on this occasion was harmless beyond a reasonable doubt because: 1) Exhibit 23 was only one of

⁹ In denying the request of Bolosan's counsel to see the notes, the trial court stated, "The court doesn't find that necessary at this time." (Emphasis added.)

a number of exhibits found to contain methamphetamine and 2) Mohamed's testimony established that both the FTIR and GCMS machines he used were in proper working order.

C.

We reject Bolosan's argument that the circuit court erred in denying his motion for judgment of acquittal. Bolosan's argument is based on his claim that the court should have excluded Mohamed's drug-analyses testimony. Bolosan contends that without Mohamed's drug-analyses testimony, there was insufficient evidence to support Bolosan's convictions. Bolosan's argument fails given our conclusion that the circuit court properly admitted Mohamed's testimony. We conclude that there was sufficient evidence to support Bolosan's convictions and that the circuit court properly denied his motion for judgment of acquittal. State v. Keawe, 107 Hawai'i 1, 4, 108 P.3d 304, 307 (2005).

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III.

IT IS HEREBY ORDERED that the Judgment filed on December 17, 2003, in the Circuit Court of the First Circuit is affirmed.

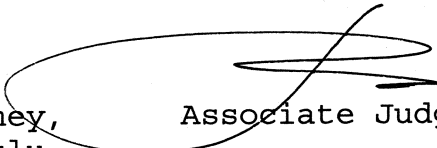
DATED: Honolulu, Hawai'i, February 8, 2006.

On the briefs:

James A. DeLacy,
(of Costa & DeLacy, LLC)
for Defendant-Appellant.


Chief Judge

Ryan Yeh,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Defendant-Appellee.


Associate Judge


Associate Judge