

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27584

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
CHARLES TEMO, Defendant-Appellant

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STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 04-1-0589(1))

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Nakamura, and Fujise, JJ.)

Defendant-Appellant Charles Temo (Temo) appeals from the Judgment filed on October 7, 2005, in the Circuit Court of the Second Circuit (circuit court).¹ Temo was charged by complaint, "as a principal and/or an accomplice," with second degree robbery, in violation of Hawaii Revised Statutes (HRS) Section 708-841(1)(a) (1993)² (Count 1), and unauthorized entry into motor vehicle (UEMV), in violation of HRS Section 708-836.5

¹ The Honorable Joel E. August presided.

² At the time of the alleged offense, Hawaii Revised Statutes (HRS) Section 708-841(1)(a) (1993) provided in relevant part as follows:

§ 708-841 Robbery in the second degree. (1) A person commits the offense of robbery in the second degree if, in the course of committing theft:

(a) The person uses force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance[.]

(Supp. 2004)³ (Count 2). After a jury trial, Temo was found guilty as charged on both counts. The circuit court sentenced Temo to concurrent terms of imprisonment of ten years on Count 1 and five years on Count 2.

I.

On October 31, 2004, the complaining witness (CW) was working as a taxi driver in Lahaina. At approximately 4:35 a.m., he pulled into an empty parking lot at the Pu'ukoli'i Sugar Cane Train Station to rest and wait for customer calls. After a couple of minutes, a car and truck entered the parking lot. The CW moved from the driver's seat to the middle row of his van to avoid being disturbed. The car parked directly behind the CW's van and the truck parked near the van's hood. Five men climbed out of the two vehicles and surrounded the CW. Two men approached his front passenger window, a third man opened the passenger-side sliding door and sat down on the middle seat next to the CW, and two others opened his trunk. The opening of the sliding door caused the van's front interior dome light to turn on, illuminating the face of one of the two men standing by the front passenger window. That man asked the CW through the open window if the CW was having car trouble.

The man seated next to the CW in the van started asking questions about the CW's stereo system, which was kept in the trunk. When the CW realized that his stereo was no longer working, he checked his trunk and discovered that all of his stereo equipment was missing. The CW asked the men to return his belongings, but they denied responsibility, so the CW picked up his cell phone to dial 911. Three of the men started toward the CW, and he turned and ran. The three men caught the CW. Someone

³ At the time of the alleged offense, HRS Section 708-836.5 (Supp. 2004) provided in relevant part as follows:

§ 708-836.5 Unauthorized entry into motor vehicle. (1) A person commits the offense of unauthorized entry into motor vehicle if the person intentionally or knowingly enters or remains unlawfully in a motor vehicle with the intent to commit a crime against a person or against property rights.

hit the CW on the neck with a blunt object and the CW fell down. The CW saw two more men join the first three, and all five kicked and punched the CW.

The men took the CW's cell phone and between \$150 and \$200 from his chest pocket. Two men remained and held the CW down for a few more minutes while the others fled. When the two men released the CW, he followed them as they ran back to their vehicles and watched them drive away. Upon returning to his van, the CW discovered that the doors were open, the inside was messy, and two amplifiers were missing from the back seat. He did not give any of the men permission to enter his van or take his property.

The CW's native language is Vietnamese. When the CW met with members of the Maui Police Department (MPD), he was unable to provide a specific description of any of the perpetrators and only described them as five local males between the heights of five feet five inches and five feet ten inches. Both Officer Liberato Casio (Officer Casio) and Detective Arthur Dadez (Detective Dadez) surmised that a language barrier prevented the CW from articulating physical descriptions that were more detailed, and no Vietnamese interpreter was available. Therefore, rather than attempting to sketch the perpetrators, Detective Dadez instructed the CW to keep an eye out around town for the perpetrators and to contact the police if the CW should see any of them.

On November 20, 2004, at 1:50 a.m., the CW was driving his taxi van in Lahaina and stopped at an intersection lit by street lights. He recognized an individual in the back of a passing white truck as the same person who had spoken to him through the open passenger window of his van on the day he was robbed. The CW followed the truck for several minutes and called the police with the description of the person he recognized. Based on the information provided by the CW, Officer Casio located a group of eight to ten people. Officer Casio had the group, which included Temo, line up and face forward. Officer

Casio called the CW to view the lineup and asked the CW to pick out the person from the truck whom the CW recognized as one of the perpetrators. The CW identified Temo.

Three days later, on November 23, 2004, the CW was in court for about 15 minutes for Temo's preliminary hearing. The CW saw Temo sitting next to his lawyer in a well-lit courtroom. On May 12, 2005, the CW met with Detective Dadez, who had compiled a photographic array that contained photographs of Temo and five other similar looking men. The CW identified Temo from the photographic array as the person who came to the CW's passenger window and asked if the CW had car trouble on October 31, 2004, the day the CW was robbed. During trial, the CW also identified Temo in court as that individual.

II.

On appeal, Temo argues that the circuit court abused its discretion by admitting the photographic array as evidence that the CW identified Temo as one of the perpetrators. Temo further argues that the circuit court reversibly erred by denying Temo's motions for judgment of acquittal because there was insufficient evidence to show that: a) Temo had been accurately identified; and b) even if Temo had been accurately identified, that he was guilty as either a principal or an accomplice of the charged offenses.

After a careful review of the record and the briefs submitted by the parties, we disagree with Temo's arguments and affirm the Judgment. We resolve Temo's arguments on appeal as follows:

1. The circuit court did not abuse its discretion by admitting the photographic array as evidence of the CW's identification of Temo. Evidence relating to the photographic array was probative of whether the CW accurately identified Temo as one of the perpetrators, the main issue at trial. The CW's identification of Temo from the photographic array tended to show that the CW remained certain of Temo's involvement in the incident even after six months had passed. It therefore

bolstered the State's claim that the CW's identification was reliable.

Temo argues that the evidence relating to the CW's identification from the photographic array was misleading and prejudicial because of the substantial delay in presenting the array to the CW. Temo contends that as a result of the delay, it is possible that the CW selected Temo's photograph based on his recollection of Temo's face from the preliminary hearing or the field lineup rather than based on the CW's independent recollection of Temo from the robbery incident. Temo, however, had the opportunity to introduce evidence of the circumstances surrounding the presentation of the array to the CW that Temo believed cast doubt on the validity of the CW's identification. The circuit court also provided the jury with a detailed instruction on the relevant factors to consider in evaluating identification testimony. The jury was capable of judging for itself whether the CW's identification of Temo from the photographic array was reliable.

"Probative evidence always 'prejudices' the party against whom it is offered since it tends to prove the case against that person." State v. Klaufa, 73 Haw. 109, 115, 831 P.2d 512, 516 (1992). HRE Rule 403 (1993), however, is only directed at protecting against the admission of evidence that is unfairly prejudicial. State v. Konohia, 106 Hawai'i 517, 525, 107 P.3d 1190, 1198 (App. 2005).

The prejudice against which the law guards is unfair prejudice -- prejudice of the sort which clouds impartial scrutiny and reasoned evaluation of the facts, which inhibits neutral application of principles of law to the facts as found. Prejudice does not simply mean damage to the opponent's cause. If it did, most relevant evidence would be deemed prejudicial."

Ansell v. Green Acres Contracting Co., Inc., 347 F.3d 515, 525 (3rd Cir. 2003) (brackets and ellipses omitted). Evidence of the CW's identification of Temo from the photographic array was not unfairly prejudicial or misleading because Temo was free to reveal to the jury the circumstances he claimed rendered the identification unreliable.

In addition, Temo does not contest the reliability of the CW's prior identifications at the field lineup and the preliminary hearing. He does not cite any authority for the proposition that a photographic identification made subsequent to other permissible identifications is inadmissible. See, e.g., Jones v. State, 902 So.2d 593, 599 (Miss. Ct. App. 2004) (rejecting defendant's attempt to suppress a witness's in-court identification where defendant failed to present any evidence of an improperly suggestive pre-trial identification by the witness that would taint any subsequent trial identification). We reject Temo's claim that the circuit court erred in admitting the photographic array as evidence of the CW's identification of Temo.

2. The circuit court properly denied Temo's motions for judgment of acquittal. See State v. Davalos, 113 Hawai'i 385, 389, 153 P.3d 456, 460 (2007).

There was sufficient evidence for the jury to conclude that the CW correctly identified Temo as one of perpetrators in the October 31, 2004, incident. The prosecution presented evidence that the CW was able to see Temo's face through an open window with the assistance of the illuminated interior dome light of the CW's vehicle. Several weeks later, the CW saw Temo riding in a truck on a Lahaina street. The CW picked Temo out of a lineup, picked Temo out of a photographic array, and identified him in court at trial. Together, this constitutes substantial evidence that the CW correctly identified Temo as the perpetrator who stood outside the CW's front passenger window and asked if the CW was having car trouble. State v. Grace, 107 Hawai'i 133, 139, 111 P.3d 28, 34 (App. 2005).

There was also sufficient evidence for the jury to conclude that Temo was guilty of both charged offenses as either a principal and/or an accomplice. When viewed in the light most favorable to the prosecution, the evidence showed that Temo was one of a group of five men who worked together to unlawfully enter the CW's van and to rob him. The men parked their cars so

as to box in the CW van and prevent any route of escape. Three of them, including Temo, worked to distract the CW by speaking with him, while the other two men opened the trunk of the CW's van and removed his stereo equipment. When the CW protested, the five men took part in physically assaulting the CW, with members of the group taking the CW's cell phone and money from his pocket, then returning to his van and removing the remaining stereo equipment. Temo's convictions were supported by substantial evidence.

III.

IT IS HEREBY ORDERED that the October 7, 2005, Judgment entered by the circuit court is affirmed.

DATED: Honolulu, Hawai'i, August 29, 2007.

On the briefs:

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Deputy Public Defender
for Defendant-Appellant

Brandon L.K. Paredes
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County of Maui
for Plaintiff-Appellee

Corinne K.A. Watanebe
Presiding Judge

Craig H. Nakamura
Associate Judge

Aunwa Osh Fujim
Associate Judge