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NO. 25052

IN THE SUPREME COURT OF THE STATE OF HAWAII

EUGENE L. SABADO  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

2005 AUG 16 PM 2:34

FILED

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

ROMAN MAAVE, Defendant-Appellant,

and

IMELDA KWAN, Defendant.

APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 01-1-1887)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant-appellant Roman Maave (Maave) appeals from the March 18, 2002 judgment of the circuit court of the first circuit, the Honorable Karen S.S. Ahn presiding, convicting Maave of and sentencing him for promoting a dangerous drug in the second degree, in violation of Hawai'i Revised Statutes (HRS) § 712-1242(1)(c) (1993)<sup>1</sup> (Counts I and II).

On appeal, Maave argues that: (1) the circuit court lacked subject matter jurisdiction over the proceeding because (a) the complaint failed to charge him as an accomplice and was therefore insufficient, and (b) the evidence adduced at the preliminary hearing did not establish probable cause to commit the case for trial; (2) the circuit court plainly erred in instructing the jury, inasmuch as the jury instructions (a) failed to specify that Maave's liability as an accomplice was predicated upon the jury's determination that Maave's principal

<sup>1</sup> HRS § 712-1242(1)(c) provides: "A person commits the offense of promoting a dangerous drug in the second degree if the person knowingly . . . [d]istributes any dangerous drug in any amount."

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had committed the offenses for which Maave was derivatively liable, (b) failed to provide the jury with a legal definition of the term "intention" when instructing them on the requisite state of mind to establish accomplice liability, (c) did not specify the requisite state of mind to establish each "element" of accomplice liability, and (d) instructed the jury that Maave could be convicted as a principal absent any evidence that he committed the charged offenses in that capacity; (3) the circuit court plainly erred in permitting a prosecution witness to testify to events recorded on a videotape subsequently shown to the jury, inasmuch as the witness's testimony (a) was inadmissible "opinion" evidence, (b) violated the "best evidence" rule, and (c) was unfairly prejudicial; (4) substantial evidence did not support Maave's convictions; and (5) the circuit court abused its discretion in denying Maave's motion for mistrial because (a) the testimony of a prosecution witness referenced inadmissible evidence, (b) the prosecutor's cross-examination of Maave purposefully elicited excluded evidence of prior conduct, and (c) the prosecutor engaged in multiple instances of prosecutorial misconduct.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised, we hold that: (1) the circuit court had subject matter jurisdiction over the proceeding because (a) Maave need not have been charged as an accomplice for the complaint to be sufficient, see State v. Fukusaku, 85 Hawai'i 462, 486, 946 P.2d 32, 56 (1997), and (b) whether the district court abused its discretion in committing the case to circuit court was moot in light of Maave's

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valid convictions, see In re Does, 102 Hawai'i 75, 78, 73 P.3d 29, 32 (2003); (2) the circuit court did not plainly err in instructing the jury, inasmuch as (a) the accomplice liability instruction should have informed the jury that it was required to find that Kwan had committed the offenses for which Maave was derivatively liable, see Fukusaku, 85 Hawai'i at 488, 946 P.2d at 58; State v. Yip, 92 Hawai'i 98, 113, 987 P.2d 996, 1011 (App. 1999), but the error was not plain because the evidence that Kwan was Maave's principal was overwhelming and uncontroverted, see Johnson v. United States, 520 U.S. 461, 469-470 (1997), (b) the circuit court did not plainly err in failing to define the term "intent" in the accomplice liability instruction, as the ordinary understanding of the term, in the context of the instruction at issue, did not differ substantially from the statutory definition of "intent," see HRS § 702-206(1) (1993), such that omitting the statutory definition from the jury's instructions could not have affected their deliberations,<sup>2</sup>

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<sup>2</sup> In this regard, we note that the following proposed instruction was withdrawn by mutual agreement:

COURT'S INSTRUCTION NO. 22

A person acts intentionally with respect to his conduct when it is his conscious object to engage in such conduct.

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.

A person acts intentionally with respect to a result of his conduct when it is his conscious object to cause such a result.

It should further be noted that defense counsel's discussion of accomplice liability during closing arguments crystalized, rather than obfuscated, the correct meaning of "intent" as used in the jury's instructions. As defense counsel noted:

Now, the law in this case -- and the Judge has gone over the law and you have a copy of it, and as the State has admitted, that Mr. Maave was not the principal. He was not  
(continued...)

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see, e.g., Griego v. People, 19 P.3d 1, 9-10 (Colo. 2001) (en banc); State v. Sinclair, 500 A.2d 539, 543-544 (Conn. 1985);

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<sup>2</sup>(...continued)

the person who actually sold the drugs. He was not the person who distributed drugs, the State is going under an accomplice liability theory.

What is accomplice liability? The Court told you that mere presence at the scene of an offense or knowledge that an offense is being committed is not enough. That's true. Just because Mr. Maave is there in Chinatown standing next to Imelda Kwan, that's not enough. Just because he knew that she was selling drugs, that's not enough. There has to be more. And, members of the jury, accomplice liability has to be proof beyond a reasonable doubt.

What the State has to show you is that Roman planned or participated in the commission of the offense . . . with the intent to promote or facilitate the offense. He would be an accomplice in that case. What are the important words here? "Plans or participates." And in this case, the charge is distribution.

Is there any evidence of a plan? Did anybody hear anything about conspiracy? Did anybody hear anything about a conversation between Mr. Maave and Ms. Kwan that he was planning distribution of the drugs? Is there any evidence of a plan? None whatsoever. So, guess what? No plan.

How about participation? Now, the participation has to be in distribution, because that's what the offense is, distribution of drugs. . . .

. . . .  
Do you have any evidence that Mr. Maave sold any drugs? No, none. Did he ever talk to the police officers? No. Did he ever hand the police officers anything? No.

How about transfer? Did he ever have his hands on those drugs? Did [he] ever give those drugs to the police officer? Did any of the officers testify that he had the drugs in his hands? No, no transfer.

Prescribe, that's simple. Nobody was prescribing, no one's a doctor here, no one's writing prescriptions. Nope.

Did he give anything to the police officers? No. Did he deliver the drug to the police officers, did he have his hands on those drugs? No.

Was it Mr. Maave on that videotape placing the drugs down on the ground for the officer to come and get it? Was it Mr. Maave leaving the drugs for the police officer? No, it was Ms. Kwan.

Was it Mr. Maave bartering with these police officers as they came down and made eye-contact with -- at least, remember? . . . . It was Ms. Kwan, not Mr. Maave. So who made the bartering or exchange? All of this was Ms. Kwan, not Mr. Maave. Did he offer or agree to do the same with any of these people? No.

Participation and distribution? No. Mere presence at the scene of an offense or knowledge that an offense is being committed is not enough without the planning and the participation, and the proof of that beyond a reasonable doubt.

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(c) the court did not err in identifying the state of mind component requisite to accomplice liability, see State v. Soares, 72 Haw. 278, 282, 815 P.2d 428, 430 (1991); and (d) while the principal liability instructions were unwarranted by the evidence, cf. State v. Haanio, 94 Hawai'i 405, 407, 16 P.3d 246, 248 (2001); State v. Timoteo, 87 Hawai'i 108, 117, 952 P.2d 865, 874 (1997); State v. Palisbo, 93 Hawai'i 344, 355, 3 P.3d 510, 521 (App. 2000), the court's error was not plain because the conceptual basis for Maave's liability was never disputed;

(3) the circuit court did not err in permitting a prosecution witness to testify to events recorded on a videotape subsequently shown to the jury, inasmuch as (a) the testimony was based on the witness's contemporaneous observation of the recorded events and was therefore admissible as a lay witness's opinion, see Hawai'i Rules of Evidence (HRE) Rule 701 (1993); State v. Jenkins, 93 Hawai'i 87, 105, 997 P.2d 13, 31 (2000); (b) the "best evidence" rule was not applicable because the testimony was not admitted to prove the videotape's contents, see HRE Rule 1002 & cmt. (1993), and (c) the circuit court did not abuse its discretion in balancing the testimony's probative value and prejudicial effect, see HRE Rule 403 (1993); State v. Haili, 103 Hawai'i 89, 101, 79 P.3d 1263, 1275 (2003); (4) substantial evidence supported Maave's convictions, see State v. Martinez, 101 Hawai'i 332, 338-339, 68 P.3d 606, 612-613 (2003); and (5) the circuit court did not abuse its discretion in denying Maave's motion for mistrial, inasmuch as the incidents Maave complains of were either not prosecutorial misconduct or were otherwise harmless beyond a reasonable doubt, see State v. Hauge, 103 Hawai'i 38, 47, 79 P.3d 131, 140 (2003); State v. Cordeiro, 99 Hawai'i 390, 425-426, 56

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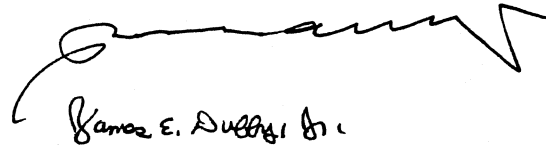
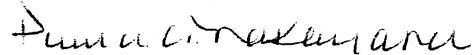
P.3d 692, 727-728 (2002); State v. Klinge, 92 Hawai'i 577, 592-593, 994 P.2d 509, 524-525 (2000); State v. Loa, 83 Hawai'i 335, 353, 926 P.2d 1258, 1276 (1996); State v. Kahinu, 53 Haw. 536, 548-550, 498 P.2d 635, 643-644 (1972). Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, August 16, 2005.

On the briefs:  
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