

NO. 22021

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
RICHARD DAVIS, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 97-1028)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Richard Davis (Defendant) appeals from the October 1, 1998 judgment which convicted him of two counts of robbery in the first degree, in violation of Hawai'i Revised Statutes (HRS) § 708-840(1)(b)(ii) (Counts I and II), one count of possession of a firearm by a convicted felon, in violation of HRS § 134-7(b) and (h) (Count III), one count of possession of ammunition by a convicted felon, in violation of HRS § 134-7(b) and (h) (Count IV), and one count of place to keep firearm or ammunition, in violation of HRS § 134-6(c) and (e) (Count V).

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 Defendant's points of error as follows:

(1) Defendant argues that the motions court erred in denying his motion to suppress statements, evidence and identification. We conclude that, inasmuch as the motions court's findings of fact were not clearly erroneous and its conclusions of law were either correct or, if erroneous, harmless beyond a reasonable doubt, the motions court did not err. State v. Balberdi, 90 Hawai'i 16, 20-21, 975 P.2d 773, 777-78 (App. 1999); State v. Suka, 79 Hawai'i 293, 298, 901 P.2d 1272, 1277 (App. 1995) (citing Chapman v. California, 386 U.S. 18, 24 (1967)) (overruled on other grounds by State v. Holbron, 80 Hawai'i 27, 32, 904 P.2d 912, 917 (1995)).

(2) Defendant argues that the trial court abused its discretion in admitting 38 exhibits into evidence because they were irrelevant, needlessly cumulative, unduly prejudicial and/or lacked the proper foundation. We conclude that all of the exhibits were relevant, that none of them were needlessly cumulative, that none of them were unduly prejudicial and that all of them were supported by the proper foundation. Hence, the trial court did not err in this respect. State v. Joseph, 77 Hawai'i 235, 239, 883 P.2d 657, 661 (App. 1994).

(3) Defendant argues that the trial court abused its discretion when it refused to instruct the jury on the included offense of robbery in the second degree. We conclude that, inasmuch as Defendant's only defense throughout the proceedings below was mistaken identity, the trial court was not obliged to

instruct the jury on the included offense because there was no rational basis in the evidence to acquit him of the charged offense of armed robbery and instead convict him of the included offense. State v. Kinnane, 79 Hawai'i 46, 49, 987 P.2d 973, 976 (1995).

(4) Defendant argues that the trial court abused its discretion when it refused his jury instructions on identification. We conclude that the trial court properly exercised its discretion in refusing to provide the requested instructions, inasmuch as the instructions Defendant proffered were adequately covered by other instructions the trial court gave the jury. State v. Okumura, 78 Hawai'i 383, 405, 894 P.2d 80, 102 (1995); State v. Nakamura, 65 Haw. 74, 79, 648 P.2d 183, 187 (1982).

(5) Defendant argues that the State failed to adduce sufficient evidence to support any of the five convictions. We conclude that the State adduced substantial evidence to support a conviction under each count. State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998).

(6) Defendant argues that the trial court abused its discretion when it denied his motion for a new trial. We conclude that, inasmuch as the alleged errors complained of in the motion for a new trial were not errors, the trial court properly exercised its discretion in denying his motion. State v. Matyas, 10 Haw. App. 31, 40, 859 P.2d 1380, 1385 (1993).

(7) Defendant argues that the holding of State v. Auwae, 89 Hawai'i 59, 968 P.2d 1070 (App. 1998), applies in this case and requires reversal of the judgment insofar as it convicts him of the offense of possession of ammunition by a convicted felon under Count IV. Id. at 70, 968 P.2d at 1081. We conclude that, inasmuch as Auwae held that a defendant convicted of possession of a firearm under HRS § 134-7(b) and (h) may not be convicted under the same statute for possession of the ammunition loaded into the firearm, which we must assume was the case here, the judgment of conviction under Count IV must be reversed.

(8) Finally, because the trial court instructed the jury that the required *mens rea* for all elements of the offenses under HRS §§ 134-7(b) and 134-6(e) was intentional, knowing or reckless, and because the required *mens rea* for the conduct element of these offenses is at least knowing, according to State v. Jenkins, 93 Hawai'i 87, 997 P.2d 13 (2000), we *sua sponte* conclude that the trial court erred in so instructing the jury. We also conclude, however, that the error was harmless beyond a reasonable doubt because Defendant's only defense, mistaken identity, implicitly conceded that the person who committed the armed robberies intended to use and therefore possess the gun. State v. Suka, 79 Hawai'i 293, 298, 901 P.2d 1272, 1277 (App. 1995) (citing Chapman v. California, 386 U.S. 18, 24 (1967))

(overruled on other grounds by State v. Holbron, 80 Hawai'i 27, 32, 904 P.2d 912, 917 (1995)).

Therefore,

IT IS HEREBY ORDERED that the October 1, 1998 judgment is reversed as to Count IV, possession of ammunition by a convicted felon; the judgment is otherwise affirmed.

DATED: Honolulu, Hawai'i, February 22, 2001.

On the briefs:

Richard S. Kawana,  
for defendant-appellant.

Chief Judge

Donn Fudo,  
Deputy Prosecuting Attorney,  
for plaintiff-appellee.

Associate Judge

Associate Judge