

NO. 25049

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JOHN POOMAIHEALANI, Defendant-Appellant,
and
JOSEPH POOMAIHEALANI and BRANDON LIZARDO, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-1-1714)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant John Poomaihealani (Poomaihealani) appeals from the March 13, 2002 Judgment of the Circuit Court of the First Circuit¹ (circuit court). Poomaihealani was convicted of the following:

Count V: Possession Prohibited of Any Firearm by a Person Convicted of Certain Crimes, in violation of Hawaii Revised Statutes (HRS) § 134-7(b) & (h) (Supp. 2003);²

^{1/} The Honorable Wilfred K. Watanabe presided.

^{2/} Hawaii Revised Statutes (HRS) § 134-7(b) and (h) (Supp. 2003) provides:

§134-7 Ownership or possession prohibited, when; penalty.

. . . .

(b) No person who is under indictment for, or has waived indictment for, or has been bound over to the circuit court for, or has been convicted in this State or elsewhere of having committed a felony, or any crime of violence, or an illegal sale of any drug shall own, possess, or control any firearm or ammunition therefor.

. . . .

(h) Any person violating subsection (a) or (b) shall be guilty of a class C felony; provided that any felon violating

(continued...)

Count VI: Assault in the Second Degree,³ in violation of HRS § 707-711 (1993);⁴ and

^{2/}(...continued)

subsection (b) shall be guilty of a class B felony. Any person violating subsection (c), (d), (e), (f), or (g) shall be guilty of a misdemeanor.

^{3/} Poomaihealani was originally charged with Assault in the First Degree in violation of HRS § 707-710; however, the jury acquitted Poomaihealani of first degree assault and convicted him of the included offense of second degree assault.

^{4/} HRS § 707-711 (1993) provides:

§707-711 Assault in the second degree. (1) A person commits the offense of assault in the second degree if:

- (a) The person intentionally or knowingly causes substantial bodily injury to another;
 - (b) The person recklessly causes serious bodily injury to another person;
 - (c) The person intentionally or knowingly causes bodily injury to a correctional worker, as defined in section 710-1031(2), who is engaged in the performance of duty or who is within a correctional facility;
 - (d) The person intentionally or knowingly causes bodily injury to another person with a dangerous instrument; or
 - (e) The person intentionally or knowingly causes bodily injury to an educational worker who is engaged in the performance of duty or who is within an educational facility. For the purposes of this section, "educational worker" means any administrator, specialist, counselor, teacher, or employee of the department of education, or a person who is a volunteer in a school program, activity, or function that is established, sanctioned, or approved by the department of education or a person hired by the department of education on a contractual basis and engaged in carrying out an educational function.
- (2) Assault in the second degree is a class C felony.

Count VII: Terroristic Threatening in the First Degree, in violation of HRS § 707-716(1)(d) (1993).⁵

On appeal Poomaihealani contends the circuit court erred by:

- (1) permitting the State to adduce evidence of a witness's out-of-court and in-court identifications of Poomaihealani as the defendant who had confronted the witness with the firearm;
- (2) failing to acquit Poomaihealani as to Counts V and VII because the evidence was insufficient to support the convictions;
- (3) failing to instruct the jury on applicable principles of accomplice liability in the court's responses to Jury Communications Nos. 4 and 6;
- (4) providing an erroneous response to Jury Communication No. 7;
- (5) failing to limit the jury's consideration of accomplice liability, as it could apply to the charges against Poomaihealani, to only Count VI;
- (6) providing the jury with erroneous instructions regarding first degree terroristic threatening; and
- (7) failing to contemporaneously admonish the jury to disregard the prosecutor's improper remarks that constituted prejudicial misconduct.

^{5/} HRS § 707-716 (1993) provides in relevant part:

§707-716 Terroristic threatening in the first degree. (1)
A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:

 (d) With the use of a dangerous instrument.

(2) Terroristic threatening in the first degree is a class C felony.

We disagree with Poomaihealani's contentions and affirm the Judgment.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and law relevant to the issues raised, we resolve Poomaihealani's points of error as follows:

(1) The witness's identification of Poomaihealani was not error because the identification procedure was not impermissibly suggestive and the identification was reliable. State v. Mitake, 64 Haw. 217, 221-22, 638 P.2d 324, 327-28 (1981).

(2) There was substantial evidence (credible evidence of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion) to support Poomaihealani's conviction on Counts V and VII. State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998).

(3) The jury instructions and jury communications were not prejudicially insufficient, erroneous, inconsistent, or misleading. State v. Vanstory, 91 Hawai'i 33, 42-43, 979 P.2d 1059, 1068-69 (1999); State v. Miyashiro, 90 Hawai'i 489, 492, 979 P.2d 85, 88 (App. 1999).

(4) The arguments of the prosecutor did not constitute conduct that would warrant a new trial or the setting aside of a guilty verdict, as such could not have caused prejudice to

Poomaihealani's right to a fair trial. State v. McGriff, 76 Hawai'i 148, 158, 871 P.2d 782, 792 (1994).

Accordingly, we affirm the March 13, 2002 Judgment of the Circuit Court of the First Circuit.

DATED: Honolulu, Hawai'i, July 28, 2004.

On the briefs:

James S. Gifford,
Deputy Public Defender,
for defendant-appellant.

Chief Judge

Mark Yuen,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge