

NOT FOR PUBLICATION

NO. 26446

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
MICHAEL TOLENTINO, Defendant-Appellant

and

STATE OF HAWAI'I, Plaintiff, v.
FLORDELINO DELOS SANTOS, Defendant.

EM. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NOS. 02-1-2816 and 02-1-2817)

MEMORANDUM OPINION

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

Defendant-Appellant Michael Tolentino (Tolentino) appeals from the Judgment filed on March 2, 2004, in the Circuit Court of the First Circuit (circuit court).¹ Tolentino and Flordelino Delos Santos (Delos Santos) were charged in separate complaints with Robbery in the Second Degree (Robbery II), in violation of Hawaii Revised Statutes (HRS) § 708-841(1)(a) (1993),² for robbing an elderly woman. Tolentino was additionally charged with Resisting Arrest, in violation of HRS

¹ The Honorable Marie N. Milks presided.

² Hawaii Revised Statute (HRS) § 708-841(a) (1993) provides:

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[.]

§ 710-1026(1) (a) (1993 & Supp. 2005).³ The circuit court consolidated the Tolentino and Delos Santos cases for trial, but Delos Santos pleaded no contest to his Robbery II charge and Tolentino proceeded to trial alone. A jury found Tolentino guilty as charged of Robbery II and Resisting Arrest.

The circuit court sentenced Tolentino to an extended term of twenty years' imprisonment on his Robbery II conviction and imposed mandatory minimum terms of 40 months and 20 months to run concurrent with each other. The court also sentenced Tolentino to imprisonment for one year on his Resisting Arrest conviction. The court ran the sentences on the Robbery II and Resisting Arrest convictions concurrent to each other but consecutive to other sentences Tolentino was serving.⁴

On appeal, Tolentino argues that: 1) his trial counsel provided ineffective assistance in failing to move to a) suppress evidence of a witness's identification of Tolentino at a pre-trial "showup"⁵ as impermissibly suggestive and b) exclude

³ HRS § 710-1026(1) (a) (1993 & Supp. 2005) provides:

A person commits the offense of resisting arrest if the person intentionally prevents a law enforcement officer acting under color of the law enforcement officer's official authority from effecting an arrest by:

- (a) Using or threatening to use physical force against the law enforcement officer or another[.]

⁴ On April 10, 2003, the Circuit Court of the First Circuit (circuit court) revoked the probationary sentences Defendant-Appellant Michael Tolentino (Tolentino) had received on his convictions for Unauthorized Control of a Propelled Vehicle and Unauthorized Entry into a Motor Vehicle, and the circuit court resented Tolentino to concurrent five-year terms of imprisonment on each conviction.

⁵ A showup is an identification procedure in which only one person is presented to the witness.

in-court identifications by two witnesses, who had been exposed to the showup, as unreliable; 2) the circuit court erred in allowing Delos Santos's written statement to the police that implicated Tolentino in the robbery to be read to the jury as a past recollection recorded; and 3) the circuit court erred in imposing an extended term of imprisonment on Tolentino's Robbery II conviction.

We vacate Tolentino's Robbery II conviction because we conclude that the circuit court harmfully erred in permitting Delos Santos's written statement to be read to the jury as a past recollection recorded. We affirm Tolentino's Resisting Arrest conviction and sentence.

BACKGROUND

At about 8:30 in the morning on December 10, 2002, Wo Su Cho (Cho), also known as Agatha Cho, was walking home from church. She was 91 years old. As Cho waited for the traffic light to turn, she was struck on the head from behind with sufficient force to cause extensive bleeding. Cho fell to the ground and felt someone grabbing her black purse from her left arm. She heard two male voices and recalled the words "hurry, hurry up." Cho experienced prolonged health problems, including dizziness, from the injuries she sustained in the robbery. Prior to the robbery, she could walk without a cane, but she used a wheelchair when testifying a year after the robbery. Cho did not see who hit her and was not asked to identify anyone in court.

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When the robbery occurred, Kawika Keola (Keola) and his girlfriend Shanel Inay (Inay) were stopped in their car at a traffic light at the intersection of Ala Ilima and Ala Lilikoi Streets in Salt Lake. Inay was driving and Keola was in the front passenger seat. Keola saw a male who was running, carrying something "football style," jump into a Nissan pickup truck. Keola thought something "never look right" so he took down the truck's license plate number. Keola called 911 after Inay parked the car and found an injured lady down on the sidewalk. Keola reported the apparent robbery, provided a description and the license plate number of the pickup truck, and indicated that there were two "local guys" in the truck.

The Honolulu Police Department (HPD) issued an all points bulletin (APB) for the pickup truck. A short time after receiving the APB, HPD officer Kaloheaulani Kawaa (Officer Kawaa) saw a Nissan pickup truck matching the APB description parked in a driveway on Kalihi Street. As Officer Kawaa drove past the driveway, he saw Tolentino, alone in the truck, sitting on the passenger side. Officer Kawaa made a U-turn and pulled into the driveway, blocking the truck. Tolentino, by this time, had moved to the driver's seat and was leaning forward in a position to start the truck.

Officer Kawaa, who was in uniform, approached the truck. Tolentino exited from the driver's door. Officer Kawaa directed Tolentino to sit down and Tolentino eventually complied. While frisking Tolentino, Officer Kawaa removed a pocket knife

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from Tolentino's right front pocket. As Officer Kawaa attempted to complete the frisk, Tolentino stood up and placed his hands in his pockets, ignoring Officer Kawaa's commands that Tolentino stay seated and show his hands. Tolentino began backing away and Officer Kawaa grabbed Tolentino's shirt. Tolentino turned and ran, causing his shirt to tear completely off.

Officer Kawaa chased Tolentino and tackled him, but Tolentino kicked Officer Kawaa and broke free. The chase continued through various residential properties with Officer Kawaa repeatedly demanding that Tolentino "stop resisting." At one point, Officer Kawaa grabbed Tolentino's pants and hit Tolentino with a baton as Tolentino was climbing over a wall. Tolentino responded by kicking Officer Kawaa in the face, jaw, and shoulder. Tolentino escaped when his pants came off and he fled wearing only his boxer shorts. Officer Kawaa later discovered Tolentino hiding under bushes. Officer Kawaa grabbed Tolentino and sprayed him with pepper spray, but Tolentino again broke free.

Eventually, Officer Kawaa spotted Tolentino rinsing himself off with a water hose in a yard. With the assistance of Officer James Slayter (Officer Slayter), Officer Kawaa was able to handcuff Tolentino. Officer Kawaa estimated that ten to fifteen minutes had elapsed from the time he first encountered Tolentino until Tolentino was handcuffed. Officer Kawaa was treated at the emergency room for a back spasm and muscle strain he sustained in apprehending Tolentino.

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After being handcuffed, Tolentino told Officer Slayer that Tolentino was "not going down for this alone" and that the person the police wanted was in the house where the pickup truck was parked. Tolentino described that house as "the guy's aunt's house." Tolentino later yelled out toward the house, "Fuck you, pussy. I'm not going down for this alone." Tolentino told Officer Slayer that "Fernando Delos Santos" was "the one that did the robberies." The Nissan pickup truck in which Tolentino had been seated was searched. A black purse containing a senior citizen bus pass in the name of "Wol Su Cho" was found on floorboard on the driver's side.

HPD officers conducted a field showup, driving Keola and Inay past Tolentino in separate cars. Prior to the showup, Keola had given a description to the police of the man he saw running to the truck. Keola described the man as being a Filipino Hawaiian mix, in his late 20's, about 5 feet 3 inches or 5 feet 4 inches tall, weighing 130 or 140 pounds, having shoulder length wavy hair with Jheri curls, and wearing a baseball cap, sunglasses, a black Members Only jacket, and blue jeans. Keola saw only the person who ran and got into the passenger side of the truck; he did not see the driver.

Keola's description of the man he saw running to the truck did not match Tolentino in several respects. At trial, Tolentino testified, without contradiction, that he was 5 feet 9 inches tall, weighed 215 pounds, and had short hair at the time of the robbery. A photograph taken at the time of Tolentino's

arrest showing him with short-cropped hair was also admitted in evidence. On the other hand, Delos Santos testified that at the time of the robbery, he was 5 feet 5 inches or 5 feet 6 inches tall. Delos Santos could not recall how much he weighed. Delos Santos had long hair when he testified at trial; he could not recall his hair style when the robbery occurred.

During the field showup, Keola was driven slowly past Tolentino. HPD Officer Charles Crowder, who drove Keola, testified that Keola identified Tolentino as the person Keola had seen running with the bag. According to Officer Crowder, Keola stated that he recognized Tolentino's face and that Keola was positive about the identification. Keola also identified the Nissan truck as the one Keola had previously seen at the scene of the robbery and a baseball cap inside the truck as the cap worn by "the suspect."

In testifying at trial, Keola acknowledged that he had identified the individual presented at the showup but expressed some uncertainty over how sure he had been about that identification. During questioning by the Deputy Prosecuting Attorney (DPA), Keola stated as follows:

KEOLA: When they took us to go identify that suspect, I mean it's totally different. The person was only wearing a pair of boxers. And he was all wet. Looked like he was wet or sweating or something.

DPA: And when you were -- so you say the police eventually took you to another location?

KEOLA: Yeah.

DPA: And did they show you one person or two persons?

KEOLA: Just one person.

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DPA: And when they showed you that one person, who did you identify that one person to be?

KEOLA: I said I think that's the guy that was -- that was the passenger. The guy that was -- I saw run. But it's hard because I mean he wasn't -- he didn't have nothing on. He only had a pair of boxers on. That's all. I mean he didn't have nothing else on that I saw the person that I described. Wasn't the same.

. . . .

DPA: So even though he was dressed differently, what is it that made you say -- what is it that made you think that it was the same person that was getting into the passenger side of the car?

KEOLA: I don't know. It was -- it all seemed different because the person I described was -- this guy looked taller. But this guy looked big when I saw him. But when I described the person I said that he was like running down, like downwards. But I say he was a little bit shorter. So I mean it was kind of confusing at the time right there.

At trial, the DPA pointed to Tolentino and asked Keola if he recognized Tolentino as "the passenger who got into that vehicle." After a prolonged pause, Keola answered, "Yes."

Inay did not identify the individual presented during the pre-trial showup but identified Tolentino in court as the person she had seen "jump into the truck." Inay explained her failure to identify Tolentino at the showup by stating that the police asked only if the person at the showup was the driver. Inay testified that she recognized the person at the showup as the passenger but did not say anything because the police had asked if he was the driver:

And they said if that was the driver. And I said no. Because he wasn't the driver. He wasn't the driver. He was actually the passenger. But I didn't care to say anything else more because I thought I was specifically there to just identify the driver. You know. And that's -- that was pretty much it.

Inay testified that on the day of the robbery, Tolentino wore a baseball cap, turned backwards, had a black and

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white windbreaker jacket, and was running like he was carrying something. She saw Tolentino get into the truck on the passenger side. Inay stated that from a distance, it looked like the passenger had long, wavy hair, but when the truck drove by, "it looked like he wasn't wearing a wig or anything. I just saw a cap, a baseball hat." Inay did not see the driver's face but described his hair as "dirty brown blonde, maybe kind of long."

Tolentino called Irene Cabang (Cabang), Delos Santos's cousin. Cabang testified that on the day of the robbery, she saw Tolentino driving a truck, with Delos Santos as a passenger, park in her driveway. She later saw a police officer park in her driveway and pat down and search Tolentino.

Tolentino testified in his own defense at trial. According to Tolentino, on the date of the robbery, he was driving his friend's truck with Delos Santos as a passenger. As they drove through Salt Lake, Delos Santos asked Tolentino to park near "Blockbusters" and Delos Santos got out of the truck. About ten to fifteen minutes later, Delos Santos returned to the truck and told Tolentino to drive to the house of Delos Santos's mother. Tolentino noticed that Delos Santos was rummaging through a purse. Tolentino asked Delos Santos what he had done, but Delos Santos replied, "Never mind, never mind." Tolentino stated that on that day, Delos Santos had long hair, down to his shoulders, and was wearing a black hooded sweater, a cap, and sunglasses.

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Tolentino denied seeing the victim, Ms. Cho, on the day of the robbery. He stated he had not discussed with Delos Santos what Delos Santos planned to do when they parked near Blockbusters. Tolentino testified that he had no idea what Delos Santos had done or how Delos Santos got the purse until they reached the house of Delos Santos's mother. Tolentino claimed he did not try to help Delos Santos and did not receive anything from the purse. Tolentino stated that he ran from Officer Kawaa because Tolentino was "scared" the officer was going to hit Tolentino and because Tolentino knew he had missed a court date for a "TRO" violation. Tolentino testified that Officer Kawaa yelled "you're under arrest" as the officer was chasing Tolentino.

DISCUSSION

I.

At the outset, we note that Tolentino does not argue that the issues he raises on appeal affect the validity of his conviction for Resisting Arrest. In addition, Tolentino did not dispute at trial the testimony of Officer Kawaa that Tolentino used physical force against Officer Kawaa in attempting to avoid apprehension. Accordingly, we affirm Tolentino's Resisting Arrest conviction and sentence.

II.

A.

The day after the robbery, Delos Santos made a written statement to the police implicating Tolentino in the robbery. At

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trial, the State of Hawai'i (the State) called Delos Santos, who had already pleaded no contest to Robbery II and been sentenced for his participation in the robbery. Delos Santos claimed he had no recollection of the robbery or the statement he made to the police because he had been high on drugs and because of other memory problems he attributed to prescribed medication. The DPA's questioning of Delos Santos was in relevant part as follows:

DPA: Mr. Delos Santos, taking you back to December 10th, 2002, and in the morning time, can you just tell us what happened?

DS: I don't know. I don't know at that time. I was -- I was under the influence of drugs and stuff like that. I don't remember.

DPA: You don't remember?

DS: No.

DPA: Do you remember anything?

DS: Nope. I don't know. I don't remember nothing.

DPA: So the entire day, the entire day you don't remember?

DS: No.

DPA: The next day, on December 11th, 2002, what happened on that day?

DS: December what?

DPA: The very next day, do you remember being driven to the police station?

DS: Yeah.

DPA: And what happened there at the police station?

DS: I don't know. Forget.

DPA: You forget?

DS: Yeah.

DPA: Do you remember anything about what happened at the police station?

DS: I was all messed up. My head was all -- I was all high and stuff like that. Plus too I get one medication problems, huh. I no can think good think that.

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DPA: What medication problems do you have?

DS: I got one kidney disease. Renal failure, and anemia. And caused my brain not to concentrate like that. I have a low blood count. So I forget things, huh.

. . . .

DPA: I'm going to show you what's been marked for identification as State's Exhibit No. 39. Can you look at this. And can you see -- can you see what -- can you remember what this is?

DS: Says here one statement.

DPA: Says it's a statement.

DS: I don't know. I forget if I wrote this.

DPA: Whose name is on the statement?

DS: Mine's.

DPA: Yours?

DS: Yeah.

DPA: And then at the -- in fact it says this statement is Flordelino Delos Santos, Junior. Is that your handwriting?

DS: I don't know. I was high at the time. I wasn't in the right state of mind at the time.

DPA: It says address is [a Kalihi Street address]. Is that your address or your family address?

DS: Family's. Family address.

DPA: And then it gives a date of birth of March 21st, 2002. Is your date of birth March 21st?

DS: Yeah. I think so.

DPA: And the age is 26. So you were 26 last year, right?

DS: Yeah.

DPA: And at the bottom of this page, what's that at the bottom left of the page?

DS: A signature.

DPA: And whose signature is it?

DS: Says mine's. But I don't remember that. I was high that day. I was under the influence of drugs. And I wasn't in the right state of mind at that time.

DPA: Is there a date at the bottom?

DS: Says 12/11.

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DPA: December 11th?

DS: (Nods head.)

DPA: What's the year?

DS: 2002.

DPA: And the time is at 4:10 p.m.; is that right?

DS: Yeah.

DPA: So having looked at this whole statement, does this refresh your memory, or do you still forget?

DS: Forget.

DPA: So you don't know if you wrote this statement or not?

DS: Yeah. I was high that day. And I wasn't in my right state of mind that time.

DPA: Do you remember anything about writing this statement?

DS: Nope.

DPA: That day? Okay. So what you do remember is on December 10th, 2002, you were high, right? Do you remember that?

DS: (Nods head.)

DPA: Is that a yes or no?

THE COURT: You have to answer out loud.

DS: I don't know at that time.

DPA: You don't know if you were high?

DS: High, yeah. I was high at that time.

DPA: So but you do remember on December 10th, 2002 that you were high; is that correct?

DS: I was high every day since then.

DPA: And then on December 11th, 2002 you do have knowledge that on that date you were high, right?

DS: Yeah.

DPA: And is it because you're high that that's why you can't remember what happened on December 10th and 11th?

DS: Yeah.

The State then called HPD Officer John Frierson (Officer Frierson) who took the written statement from Delos Santos. On the day after the robbery, Officer Frierson

approached Delos Santos and told him that the police had information Delos Santos had been involved in a purse snatching. Officer Frierson also told Delos Santos that the elderly victim "wasn't doing too well." Delos Santos eventually agreed to go to the Kalihi Police Station and provide a statement. Officer Frierson testified that he told Delos Santos to write in Delos Santos's own words what happened with respect to the robbery on HPD Form 252. Delos Santos appeared to understand the officer's instructions. Delos Santos prepared the statement on Form 252 in his own handwriting and Officer Frierson verified that Delos Santos had signed and dated the statement. Form 252 contains an acknowledgment section which includes the following language: "I attest that this statement is true and correct to the best of my knowledge, and that I gave this statement freely and voluntarily without coercion or promise of reward." Officer Frierson testified that Delos Santos had read or been instructed to read this acknowledgment before Delos Santos signed his Form 252 statement.

Based on the foundation laid by Officer Frierson and over Tolentino's objection, the circuit court permitted the DPA to read Delos Santos's Form 252 statement into evidence as a past recollection recorded. Delos Santos's statement, as read to the jury, provided in relevant part as follows:

On 12-10-02, early morning, I was with my friend, Michael Tolentino, roaming around Salt Lake area. We decided to get crazy. We didn't sleep almost five days, high on drugs. So things got worse. First we thought of jacking cars end up snatching purses. I was the driver in John Anchetta truck while the passenger was Michael Tolentino. I drove around Block Buster in Salt Lake while a old lady walking in the area. I park the

truck front of the Block Buster Video store while Michael T. walk around the area. All of a sudden Michael ran back to the truck and told me go no stop. And also the black bag. Was in his hands. I drove to my mom's house. I was shock and scared so I decided to run. I'm willing to testify.

B.

Tolentino argues that the circuit court erred in allowing Delos Santos's statement to be read to the jury as a past recollection recorded pursuant to Hawaii Rules of Evidence (HRE) Rule 802.1(4) (1993). In particular, Tolentino contends that the State failed to lay an adequate foundation to satisfy the requirements of HRE Rule 802.1(4). In response, the State argues that the foundational requirements for HRE Rule 802.1(4) were met and does not attempt to justify the admission of Delos Santos's statement on any other ground. We therefore limit our focus to whether an adequate foundation was laid for the admission of Delos Santos's statement under HRE Rule 802.1(4).

HRE Rule 802.1(4) sets forth the hearsay exception for past recollection recorded and provides as follows:

Rule 802.1 Hearsay exception; prior statements by witnesses. The following statements previously made by witnesses who testify at the trial or hearing are not excluded by the hearsay rule:

. . . .

- (4) Past recollection recorded. A memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(Emphasis added.) We apply the right/wrong standard of review to a trial court's decision to admit or exclude evidence based on

its application of the hearsay rule. State v. Moore, 82 Hawai'i 202, 217, 921 P.2d 122, 137 (1996).

We conclude that the State did not satisfy the foundational requirement under HRE Rule 802.1(4) that the recorded statement "reflect[ed] [the witness's] knowledge correctly." The traditional means of satisfying this foundational requirement is for the declarant witness, who now has insufficient recollection of the event, to testify either 1) that the witness presently recalls that his or her prior recorded statement, when made, was an accurate record of the event; or 2) that the witness would not have made or signed the statement without knowing it was correct. 2 John W. Strong et. al., McCormick on Evidence § 283, at 245-46 (5th ed. 1999); 3 John H. Wigmore, Wigmore on Evidence § 747, at 97-98 (1970); 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 803.07[3][c], at 803-52 (2d ed. 2006); see also State v. Sua, 92 Hawai'i 61, 74, 987 P.2d 959, 972 (1999) (upholding the admission of the victim witness's grand jury testimony under HRE Rule 802.1(4) where the witness testified that he was able to testify "fully and accurately" at the grand jury). Here, the State did not adduce any testimony from Delos Santos that his prior statement to the police was accurate. Delos Santos not only failed to vouch for the accuracy of his statement while testifying, but he claimed that he was "all messed up" and high on drugs at the time the statement was made.

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The circuit court apparently believed that the foundational requirement that Delos Santos's statement "reflect[ed] [his] knowledge correctly" was satisfied by Officer Frierson's testimony that Delos Santos, in signing the statement, had acknowledged that the statement was "true and correct to the best of [his] knowledge." Courts in other jurisdictions are divided over whether this foundational requirement can be satisfied only by the testimony of the declarant witness or whether it can also be satisfied by other means. Some courts have focused on the absence of testimony from the declarant witness indicating that the recorded statement was accurate in holding that the foundation laid was inadequate to justify the admission of the statement as a past recollection recorded. E.g., Ringgold v. State, 367 A.2d 35, 36-39 (Md. Ct. Spec. App. 1976) (holding that a witness's signed statement to the police could not be admitted as a past recollection recorded where the witness claimed to have no recollection of the statement or its accuracy); Kimbrough v. State, 846 So.2d 540, 542-54 (Fla. Dist. Ct. App. 2003) (holding that a co-defendant's taped statement implicating the defendant could not be admitted as a past recollection recorded where the co-defendant could not testify that the recorded statement was accurate); Lindley v State, 728 So.2d 1153, 1155 (Ala. 1998) (holding that a witness's signed statement to the police could not be admitted as a past recollection recorded where the witness claimed to have been

drunk for several days when the statement was made and could not remember anything about the events described in the statement).

Other courts, however, have concluded that the foundational requirement that the statement reflect the witness's knowledge correctly can be established by means other than the testimony of the declarant witness vouching for the statement's accuracy. E.g., United States v. Porter, 986 F.2d 1014, 1017 (6th Cir. 1993); State v. Alvarado, 949 P.2d 831, 551-52 (Wash. Ct. App. 1998); State v. Marcy, 680 A.2d 76, 79-80 (Vt. 1996) (plurality opinion). Porter, 986 F.2d at 1017, is perhaps the leading case adopting this view. In Porter, the court construed Federal Rules of Evidence (FRE) Rule 803(5), which is identical to HRE Rule 802.1(4). The court concluded that:

[FRE] Rule 803(5) does not specify any particular method of establishing the knowledge of the declarant nor the accuracy of the statement. It is not a sine qua non of admissibility that the witness actually vouch for the accuracy of the written memorandum. Admissibility is, instead, to be determined on a case-by-case basis upon a consideration, as was done by the district court in this case, of factors indicating trustworthiness, or the lack thereof.

Id. at 1017. The court upheld the admission of portions of a prior written statement made by the defendant's girlfriend as past recollection recorded even though the girlfriend never testified that the statement was accurate. Id. The court concluded that the requirement of FRE Rule 803(5) that the statement correctly reflected the girlfriend's knowledge was satisfied by other indicia of the statement's trustworthiness. Id.

In Tolentino's case, we need not choose between the competing views on whether testimony by the declarant witness vouching for the accuracy of the recorded statement is necessary to satisfy the foundational requirement that the statement reflect the witness's knowledge correctly. Even under the more flexible Porter approach, we conclude, under the particular facts of this case, that the State failed to establish by other means that Delos Santos's statement had sufficient indicia of trustworthiness to meet the foundational requirement.

Based on Delos Santos's no contest plea and his statement to the police, he was at minimum⁶ an accomplice to Tolentino in the robbery of Ms. Cho. The United States Supreme Court has held that an accomplice's confession which incriminates a criminal defendant is presumptively unreliable. Lee v. Illinois, 476 U.S. 530, 541 (1986). In Lee, the Court stated:

[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.

Id. (quoting Bruton v. United States, 391 U.S. 123, 141 (1968) (White, J., dissenting)) (quotation marks omitted). Accomplice statements which shift or spread the blame to a criminal defendant "ordinarily are untrustworthy" because they are not "adverse to the penal interests of the declarant, but instead are likely to be attempts to minimize the declarant's culpability."

⁶ According to Tolentino, Flordelino Delos Santos (Delo Santos) was the sole perpetrator of the robbery.

Lilly v. Virginia, 527 U.S. 116, 132 (1999) (plurality opinion) (internal quotation marks omitted).

At the time Delos Santos prepared the statement, he knew that he and Tolentino were suspected of committing the robbery and that the elderly victim "wasn't doing too well." Delos Santos therefore had a strong motive to minimize his involvement and place the blame on Tolentino, especially regarding who was responsible for injuring the victim. Delos Santos's written statement was not that of an ordinary witness, but was the statement of a person who admitted being an accomplice. Delos Santos's status as an admitted accomplice in the robbery is crucial to our analysis because it made his statement incriminating Tolentino presumptively unreliable.⁷

We conclude that this presumption was not rebutted by evidence that Delos Santos signed his statement with an attestation that it was "true and correct to the best of [his] knowledge" or by any other evidence the State produced. Under the particular facts of this case, the State failed to lay an adequate foundation that Delos Santos's statement reflected his knowledge correctly. Accordingly, we hold that the circuit court erred in allowing Delos Santos's statement to be read to the jury and considered as substantive evidence pursuant to HRE Rule 802.1(4).

⁷ We express no view on how we would have decided this case if the written statement in question had been made by a witness who was not an admitted accomplice in the robbery.

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The circuit court's error was not harmless beyond a reasonable doubt as to Tolentino's Robbery II conviction. The evidence that Tolentino had committed the robbery was not overwhelming. In particular, questions were raised about the validity of Keola's and Inay's identifications of Tolentino as the person they saw running to the truck. Tolentino also testified that he was the driver and was not involved in the robbery. There was a reasonable possibility that the circuit court's error might have contributed to Tolentino's Robbery II conviction. We therefore vacate Tolentino's Robbery II conviction and remand for a new trial on the Robbery II charge. Our determination that the circuit court harmfully erred in permitting Delos Santos's statement to be read to the jury makes it unnecessary for us to address the other issues Tolentino raises on appeal.

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CONCLUSION

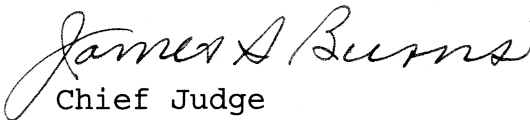
We affirm the March 2, 2004, Judgment of the Circuit Court of the First Circuit as to Tolentino's Count 2 conviction for Resisting Arrest. We vacate the Judgment as to Tolentino's Count 1 conviction for Robbery in the Second Degree and remand the case for a new trial on Count 1.

DATED: Honolulu, Hawai'i, April 20, 2006.

On the briefs:

Michael J. Park,
for Defendant-Appellant.

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge