NO. 27969

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
MARK K. LOPEZ, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 05-1-1244)

MEMORANDUM OPINION
(By: Recktenwald, C.J., Watanabe and Foley, JJ.)

Defendant-Appellant Mark K. Lopez (Lopez) appeals from the Judgment of Conviction and Sentence filed on May 9, 2006 in the Circuit Court of the First Court (circuit court).[1/] On appeal, Lopez argues that (1) the circuit court erred in denying his mistake-of-fact jury instruction and (2) the Deputy Prosecuting Attorney (Prosecutor) committed prosecutorial misconduct during closing and rebuttal arguments. We affirm.

I. BACKGROUND

On June 17, 2005, the State of Hawai'i (the State) charged Lopez via a Complaint with one count of Unauthorized Control of Propelled Vehicle (UCPV), in violation of Hawaii Revised Statutes (HRS) § 708-836 (Supp. 2006). The Complaint alleged that on or about June 8, 2005 Lopez did intentionally or knowingly exert unauthorized control over a propelled vehicle, by operating the vehicle without consent of the owners of the said vehicle.

At trial on February 1, 2006, Honolulu Police Department (HPD) Officer Hawkins testified that he was assigned to conduct traffic enforcement with a laser gun on the morning of

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[1/] The Honorable Karl K. Sakamoto presided.

June 8, 2005. Officer Hawkins observed a Honda vehicle, license plate number GTC 171, (Honda) traveling at a rate of 60 miles per hour (mph) in a 35 mph speed limit zone. Officer Hawkins pursued the Honda, and the driver of the Honda stopped the car. Officer Hawkins identified Lopez as the driver and sole occupant of the Honda. When prompted by Officer Hawkins to produce a driver's license, registration, and proof of insurance, Lopez was only able to produce his driver's license. Lopez told Officer Hawkins that the Honda belonged to a friend and he did not know where the paperwork was, but he did not say the friend's name or address or how he got the Honda from the friend. Officer Hawkins observed a large towel or t-shirt draped over the steering column. When he asked Lopez to turn off the Honda, Lopez took a key from his pocket, put his hands underneath the towel, and turned off the Honda (it took Lopez 15-20 seconds to turn off the Honda). At this point Officer Hawkins ran a check on the plate and discovered that the Honda was stolen. Officer Hawkins placed Lopez under arrest for driving a stolen vehicle and handcuffed him.

Once back-up officers arrived, Officer Hawkins removed the towel from the steering column and discovered that all the plastic was missing from around it and the interior operation of the steering column was visible. HPD Officer Visoria testified that the "steering column was completely torn off and the ignition was not intact, it was hanging." Officer Visoria also observed that the door locks were "punched" (broken).

Mona Gittens (Mona) testified that she and her husband were the registered owners of the Honda. Mona further testified that she did not know Lopez and at no time had she given Lopez permission to drive the Honda. Likewise, Mona's husband, Gregory S. Gittens (Gregory), testified that he too did not know Lopez and had not given Lopez permission to drive the Honda. They both

testified that the only person who had their permission to drive the Honda was their son, Brian Harris (Brian).

Brian testified that on May 31, 2005 he worked at a restaurant at the Pearlridge Mall. He arrived at work around 5:00 p.m. and parked and locked the Honda. When Brian left work around 9:00 p.m., he discovered the Honda was missing. He called the police and made a report. Brian testified that he did not know Lopez and had not given Lopez permission to drive the Honda.

Lopez testified that at the time of his arrest he was in Hawai'i on a two-week vacation from Seattle. Lopez borrowed the Honda from his friend, Greg Ramba (Ramba). Lopez remembered that when he first took possession of the Honda at Ramba's house, he noticed that the front was damaged and the interior of the car was "totally messed up, trashed," really dirty, and rubbish everywhere. Lopez also noticed the steering column was missing and the ignition seemed broken. However, none of this alarmed him, Lopez testified, because Ramba was a "broke mechanic," who went "to the junkyard and gets parts and whatnot[.]" It was normal for Ramba to have multiple vehicles in his yard because he worked on different vehicles at the same time. Lopez assumed the Honda could have been a vehicle that Ramba had retrieved from the junkyard.

On cross-examination, Lopez conceded he never saw any paperwork for the Honda, he never asked for any paperwork, and he never looked for any paperwork in the Honda. Lopez stated that he never noticed the door locks were broken because he never locked the doors during the two days he drove the Honda. He did not find it curious that he was not given a key to lock the doors, and he never asked for one. Lopez also did not find it odd that the key he used to start the Honda was not a regular Honda key, but more like a house key.

On February 1, 2006, the jury found Lopez guilty of the charged offense. The circuit court filed its Judgment on May 9, 2006. Lopez filed a Notice of Appeal on June 8, 2006.

II. DISCUSSION

A. The circuit court was not required to instruct the jury as to a mistake-of-fact defense, under HRS § 702-218, where no evidence was adduced at trial supporting or warranting such a defense.

Lopez argues on appeal that the circuit court erred in denying his requested jury instruction as to a mistake-of-fact defense. HRS § 702-218 (1993) provides:

> **§702-218 Ignorance or mistake as a defense.** In any prosecution for an offense, it is a defense that the accused engaged in the prohibited conduct under ignorance or mistake of fact if:
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> (1) The ignorance or mistake negatives the state of mind required to establish an element of the offense; or
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> (2) The law defining the offense or a law related thereto provides that the state of mind established by such ignorance or mistake constitutes a defense.

Hawai'i precedent has firmly established that "a defendant is entitled to an instruction on every defense or theory of defense having any support in the evidence, provided such evidence would support the consideration of that issue by the jury, no matter how weak, inconclusive, or unsatisfactory the evidence may be." State v. Maelega, 80 Hawai'i 172, 178-79, 907 P.2d 758, 764-65 (1995) (internal quotation marks, citation, and emphasis in original omitted). In addition,

> a defendant has the right to argue inconsistent defenses and he or she would be entitled to have the jury instructed on ostensibly inconsistent theories of defense if there is evidence supporting the theories. He or she would be entitled also to an instruction on a defense fairly raised by the evidence, though it may be inconsistent with the defense he advanced at trial.

State v. Ortiz, 93 Hawai'i 399, 404, 4 P.3d 533, 538 (App. 2000) (brackets in original omitted) (quoting State v. Ito, 85 Hawai'i 44, 46, 936 P.2d 1292, 1294 (App. 1997)).

However, HRS § 701-115(2) (1993) mandates that "[n]o defense may be considered by the trier of fact unless evidence of the specified fact or facts has been presented." Furthermore, "[i]t is error to instruct the jury on a state of facts not supported or warranted by the evidence adduced at trial." Loevsky v. Carter, 70 Haw. 419, 432, 773 P.2d 1120, 1128 (1989). In addressing the specific defense of ignorance or mistake of fact, the Hawai'i Supreme Court has opined:

> [W]here a defendant has adduced evidence at trial supporting an instruction on the statutory defense of ignorance or mistake of fact, the trial court must, at the defendant's request, separately instruct as to the defense, notwithstanding that the trial court has also instructed regarding the state of mind requisite to the charged offense.

State v. Locquiao, 100 Hawai'i 195, 208, 58 P.3d 1242, 1255 (2002). See State v. Eberly, 107 Hawai'i 239, 251, 112 P.3d 725, 737 (2005) ("[T]rial courts must specifically instruct juries, where the record so warrants, that the burden is upon the prosecution to prove beyond a reasonable doubt that the defendant was not ignorant or mistaken as to a fact that negates the state of mind required to establish an element of the charged offense or offenses."). The mistake-of-fact defense "is premised on the proposition that a factual mistake on the defendant's part negates the required state of mind under the statute and thus relieves the defendant of criminal liability." State v. Palisbo, 93 Hawai'i 344, 355, 3 P.3d 510, 521 (App. 2000) (footnote omitted).

In Palisbo, the mistake-of-fact defense was addressed by this court within the context of HRS § 708-836 (as amended in 1996 by the legislature).

In 1996, the legislature again amended HRS § 708-836, defining the term "owner"[FN9] and altering the affirmative defense provision. 1996 Haw. Sess. L. Act 195, § 1, at 447. The purpose of the amendments was to close "a large, unintended loophole for defendants who are able to avoid conviction by alleging that a 'friend' loaned the car to him [or] her. Senate Stand. Comm. Rep. No. 1659, in 1996 Senate Journal, at 841. The legislature believed that "even if the police arrest someone driving a stolen vehicle, that person may escape conviction by stating that he or she received permission to use the vehicle from another person and that he or she was unaware that the vehicle had been stolen." 1996 Haw. Sess. L. Act 195, § 1, at 447. Therefore, it found "under the current law, prosecution [wa]s ineffective because of the loophole in the . . . affirmative defense" and the interpretation of "owner." Senate Stand. Comm. Rep. No. 1659, in 1996 Senate Journal, at 841.

Prior to 1996, the term "owner" was not defined. The legislature, however, believed that "'[o]wner' . . . [had been] defined by the law as a person having possession of the property involved, even if that possession is unlawful[,]" House Stand. Comm. Rep. No. 1236-96, in 1996 House Journal, at 1522, allowing a "loophole" in the law for those claiming to have permission to use the vehicle and to not know the vehicle was stolen. 1996 Haw. Sess. L. Act 195, § 1, at 447. "Owner" was thus defined as "the registered owner of the propelled vehicle or the unrecorded owner of the vehicle pending transfer of ownership." 1996 Haw. Sess. L. Act 195, § 2, at 448.

The legislature also enacted a new affirmative defense provision which absolved a defendant of criminal liability only upon proof that the defendant "[r]eceived authorization to use the vehicle from an agent of the owner where the agent had actual or apparent authority to authorize such use[.]" *Id.* at 447-48; *see* HRS § 708-836 *supra* at 3. The agent affirmative defense was retained because

> it was not the intention of [the c]ommittee to make a felon out of a person who innocently accepts the word of an agent in lawful possession of a vehicle that the agent had the permission of the vehicle's owner to permit others to operate the vehicle, [therefore, the c]ommittee has included an affirmative defense to cover such a scenario.

House Stand. Comm. Rep. No. 1236-96, in 1996 House Journal, at 1522.

Hence, the effect of the most recent amendments to HRS § 708-836 is to place upon a non-owner driver of a vehicle the legal duty of obtaining consent to operate the vehicle directly from the registered owner[FN10]; the violation of such a duty will subject the non-owner to criminal liability unless he or she can prove by a preponderance of the evidence[FN11] that permission to use the vehicle was obtained

> from an agent who had actual or apparent authority to allow such use from the registered owner.
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> FN9 The legislative history indicates that the drafters believed they were "amending" the definition of "owner"; however, we note that "owner" had never been defined when the statute was first enacted in 1972, or when amended in 1974.
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> FN10 "Owner is also defined as "the unrecorded owner of the vehicle pending transfer of ownership." HRS § 708-836(4).
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> FN11 HRS § 701-115(2)(b) (1993) states in part that "[i]f the defense is an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence . . . proves by a preponderance of the evidence the specified fact or facts which negative penal liability."

Palisbo, 93 Hawai'i at 352-53, 3 P.3d at 518-19.

Pursuant to Palisbo, the only factual mistake that would absolve Lopez of liability for the offense charged would be a mistaken belief that the registered owners of the vehicle, the Gittens, had authorized Lopez's use of the Honda. Palisbo clearly mandates that to avail himself of such an instruction, Lopez must have put forth some scintilla of evidence that purported to demonstrate he ignorantly or mistakenly thought the Gittens had given him permission to drive the Honda. 93 Hawai'i at 355, 3 P.3d at 521. However, here no such mistaken belief is possible given the factual circumstances as presented by Lopez's testimony. Lopez proffered that because the Honda was parked in Ramba's driveway, Lopez assumed it belonged to Ramba. Lopez's mere assumption that the Honda belonged to Ramba simply because it was parked in Ramba's driveway is insufficient to warrant the mistake-of-fact instruction. Lopez did not see any paperwork nor did he ask Ramba for any paperwork regarding the Honda's registration and insurance. Additionally, Lopez made the following observations about the Honda: (1) the steering column and ignition were broken, (2) Ramba never gave him a key to lock/unlock the doors, and (3) the key to start the Honda was not a regular car key, but looked like a house key. These

observations would have alerted any reasonable person to inquire into the condition and ownership of the Honda. Lopez did not. Additionally, Mona, Gregory, and Brian (the true owners of the Honda) testified that they did not know Lopez and had not given Lopez permission to use the Honda.

B. The Prosecutor's closing and rebuttal statements disclosed that, viewed in context, the Prosecutor was legitimately commenting on the evidence and on reasonable inferences therefrom, and therefore the statements did not constitute prosecutorial misconduct.

Lopez argues that the Prosecutor committed two instances of prosecutorial misconduct during closing and rebuttal arguments: (1) the Prosecutor commented on Lopez's silence at the time of his arrest[2/] and (2) the Prosecutor commented on Lopez's failure to produce corroboration (Ramba).[3/]

[2/] During closing argument, the Prosecutor made the following comments:

> [PROSECUTOR:] Again, you consult your own reason and common sense about how people normally act. A person is stopped in a stolen car and he really is innocent, what's the first thing he's going to do? Hey, wait a minute, wait a minute --
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> [DEFENSE COUNSEL:] Your Honor, I'm sorry, I'm going to object commenting on the defendant's right to remain silent.
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> [PROSECUTOR:] It's in evidence, Your Honor.
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> THE COURT: Overruled. You may continue.
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> [PROSECUTOR:] Wait a minute, wait a minute, I got it from my friend Greg Ramba, he lives in Makakilo, he fixes cars, he told me I could drive it, wait, wait, wait. Again, think, you're all adults here, you know how people react to things. That's what an innocent person would do, he didn't do anything like that. He got cuffed, he got arrested, he got taken away. Why? Because he got caught red-handed and he knew it. That's why.

[3/] During rebuttal argument, the Prosecutor countered Lopez's argument that he had not provided the police officers with information about Ramba because the police officers never asked him:

> [PROSECUTOR:] Well, the officer didn't ask him, that's why he didn't say anything about the friends's name, where he could be

(continued...)

This court has held that "[p]rosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a fair trial." State v. Carvalho, 106 Hawai'i 13, 16 n.7, 100 P.3d 607, 610 n.7 (App. 2004) (internal quotation marks and citation omitted). "To determine whether reversal is required under [Hawai'i Rules of Penal Procedure (HRPP)] Rule 52(a) because of improper remarks by a prosecutor which could affect Defendant's right to a fair trial, we apply the harmless beyond a reasonable doubt standard of review." State v. Sanchez, 82 Hawai'i 517, 528, 923 P.2d 934, 945 (App. 1996) (internal quotation marks, citation, and brackets omitted). That standard of review requires "an examination of the record and a determination of whether there is a reasonable possibility that the error complained of might have contributed to the conviction." State v. Rogan, 91 Hawai'i 405, 412, 984 P.2d 1231, 1238 (1999) (internal quotation marks and citations omitted)

[3/](...continued)
found, the details of the car, et cetera. Again, use your common sense. The State's position is that the officer wouldn't need to ask, an innocent person would just start talking and try to convince the person arresting him that he didn't do it and here's why. I mean, don't you think a reasonable person would have said, the first thing that person would have said is I got it from my friend, Greg Ramba, brah, go talk to him, he'll tell you? Nothing like that.

. . . .

[DEFENSE COUNSEL:] Objection, Your Honor, again burden shifting.

THE COURT: Overruled.

[PROSECUTOR:] Wouldn't you have liked to have heard from Greg Ramba? He says he's a local boy, lives Makakilo with his family. You know, would it have been so hard to get him in here into court to tell you guys yeah, I lent him the car, I told him it was okay, and I [never] know it was stolen either?

Why didn't he do that? I suggest to you one of two possibilities: There is no Greg Ramba or Greg Ramba would have come in here if he called him and said something very different from what he would have wanted Greg to say.

(quoting State v. Sawyer, 88 Hawai'i 325, 329 n.6, 966 P.2d 637, 641 n.6 (1998)). In assessing whether prosecutorial misconduct warrants a new trial, the Hawai'i Supreme Court set forth three factors to consider: "(1) the nature of the prosecution's conduct, (2) the promptness of a curative instruction (if any) to the jury, and (3) the strength of the evidence against the defendant." State v. Pacheco, 96 Hawai'i 83, 95, 26 P.3d 572, 584 (2001). Prior to closing arguments, the circuit court instructed the jury that the closing arguments were not evidence. During closing arguments, a prosecutor is

> permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence. It is also within the bounds of legitimate argument for prosecutors to state, discuss, and comment on the evidence as well as to draw all reasonable inferences from the evidence. In other words, closing argument affords the prosecution (as well as the defense) the opportunity to persuade the jury that its theory of the case is valid, based upon the evidence adduced and all reasonable inferences that can be drawn therefrom.

Rogan, 91 Hawai'i at 412-13, 984 P.2d at 1238-39 (internal quotation marks and citations omitted). A review of the Prosecutor's closing and rebuttal arguments discloses that, viewed in context, the Prosecutor was legitimately commenting on the evidence and on reasonable inferences therefrom. Because there was no misconduct by the Prosecutor, this court need not decide whether the conduct was harmless beyond a reasonable doubt. State v. Valdivia, 95 Hawai'i 465, 482-83, 24 P.3d 661, 678-79 (2001) (holding that because the prosecutor's statements did not constitute prosecutorial misconduct in the first instance, the court need not reach the question whether it was harmless beyond a reasonable doubt).

III. CONCLUSION

The Judgment of Conviction and Sentence filed on May 9, 2006 in the Circuit Court of the First Court is affirmed.

DATED: Honolulu, Hawai'i, August 28, 2007.

On the briefs:

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Mark E. Recktenwald

Chief Judge

Corinne K.A. Watanabe

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