

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

WILFRED ENRIQUEZ, Defendant-Appellant.

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 98-0179(1))

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, and Nakayama, JJ.;
and Acoba, J., Concurring Separately, with
whom Ramil, J., joins)

Defendant-appellant Wilfred Enriquez appeals from the judgment of conviction and sentence of the Circuit Court of the Second Circuit, the Honorable Artemio C. Baxa presiding, adjudging him guilty of violating Hawai'i Revised Statutes (HRS) 708-830 (1993).¹ Enriquez alleges that the trial court erred in

¹ HRS § 708-830 provides in pertinent part:

A person commits theft if the person does any of the following:

- (1) Obtains or exerts unauthorized control over property. A person obtains, or exerts control over, the property of another with intent to deprive the other of the property.
- • •
- (3) Appropriation of property. A person obtains, or exerts control over, the property of another that the person knows to have been lost or mislaid or to have been delivered under a mistake as to the nature or amount of the property, the identity of the recipient, or other facts, and, with the intent to deprive the owner of the property, the person fails to take reasonable measures to discover and notify the owner.

denying his motions to arrest the judgment and to dismiss the indictment because: (1) the indictment failed to allege the essential elements of the offense charged; (2) the jury instruction outlining the elements of theft under HRS § 708-830(3) constructively amended the indictment; and (3) the indictment should have been dismissed with prejudice because the prosecution allegedly failed to disclose an inconsistent statement made by its witness, Kalepa. Enriquez also alleges that the court erred by: (1) refusing to grant an evidentiary hearing on his motion for a new trial; (2) denying his motion to examine juror Henry; (3) denying his request to communicate with the jurors; (4) quashing his subpoena duces tecum seeking an investigation file prepared by the county's investigator; and (5) denying him a new trial based upon the cumulative effect of the alleged errors.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced, the issues raised, and the controlling law, we hold that: (1) under the liberal construction standard articulated in State v. Motta, 66 Haw. 89, 91, 657 P.2d 1019, 1020 (1983), the indictment provided sufficient notice that Enriquez was charged with the "appropriation of property" mode of theft under HRS § 708-830(3); (2) as the indictment was sufficient to charge Enriquez with the offense of theft by

"appropriation of property" under HRS § 708-830(3), the court properly instructed the jury as to that offense; (3) the prosecution did not violate Hawai'i Rules of Penal Procedure (HRPP) Rule 16(b)(1)(vii) (1995)² because it did not possess or control the inconsistent statement of Kalepa; (4) based upon the record, the trial court did not abuse its discretion in denying the defense's motion for a new trial pursuant to HRPP Rule 33 (1995)³ without a hearing, see State v. Furutani, 76 Hawai'i 172, 178-79, 873 P.2d 51, 57-58 (1994); (5) none of the defense's allegations of juror misconduct amounted to "good cause," i.e., a substantial reason that affords a legal excuse, State v. Estencion, 63 Haw. 264, 267, 625 P.2d 1040, 1042 (1981), to allow communication with or examination of the jurors pursuant to Hawai'i Rules of Professional Conduct (HRPC) Rule 3.5(e)(4)(ii) (1997);⁴ (6) the subpoena duces tecum for the county's

² HRPP Rule 16(b)(1)(vii) requires the prosecutor to disclose to the defendant or the defendant's attorney "material and information within the prosecutor's possession or control," including "any material or information which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the defendant's punishment therefor." (Emphasis added.)

³ HRPP Rule 33 states in pertinent part that a court "on motion of a defendant may grant a new trial to him [or her] if required in the interest of justice."

⁴ HRPC Rule 3.5(e)(4)(ii) states in pertinent part:

A lawyer shall not . . . after dismissal of the jury in a case with which the lawyer is connected, communicate with a juror regarding the trial except that . . . upon leave of the court for good cause shown, a lawyer who believes there are grounds for legal challenge to a verdict may conduct an in-court examination of jurors or former jurors to determine whether the verdict is subject to challenge.

investigation file was overbroad and lacking in specificity, see State v. Pacarro, 61 Haw. 84, 595 P.2d 295 (1979); and (7) Enriquez fails to show cumulative error. See State v. Samuel, 74 Haw. 141, 159, 838 P.2d 1374, 1383 (1992). Therefore,

IT IS HEREBY ORDERED that the court's October 2, 1998 judgment of conviction and sentence from which this appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, December 20, 2002.

On the briefs:

Hayden Aluli and
Mimi Desjardins,
for defendant-appellant

Simone C. Polak,
Deputy Prosecuting Attorney,
for plaintiff-appellee