*** NOT FOR PUBLICATION ***

NO. 23486

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

RON ROUSH, Defendant-Appellant

and

KIRK OHIRA and DAVID KAPUA, JR., Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-2564)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, and Acoba, JJ.
and Circuit Judge Nakamura, assigned by reason of vacancy)

Defendant-appellant Ron J. Roush appeals from the May 2, 2000 judgment of the circuit court of the first circuit, the Honorable Wendell K. Huddy presiding, convicting Roush of two counts of promoting a dangerous drug in the second degree, in violation of Hawai'i Revised Statutes (HRS) § 712-1242(1)(c)(1993)[1] (Counts I and II), and one count of promoting a dangerous drug in the first degree, in violation of HRS § 712-1241(1)(b)(ii)(A)(1993)[2] (Count III). On appeal, Roush argues

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[1] HRS § 712-1242(1)(c) provides in relevant part that "[a] person commits the offense of promoting a dangerous drug in the second degree if the person knowingly . . . [d]istributes any dangerous drug in any amount."

[2] HRS § 712-1241(1)(b)(ii)(A) provides in relevant part:

> (1) A person commits the offense of promoting a dangerous drug in the first degree if the person knowingly:
> . . . .
> (b) Distributes:
> . . . .
> (ii) One or more preparations, compounds, mixtures, or substances of an aggregate weight of:

(continued...)

that the circuit court erred by: (1) refusing to give the jury instructions on the entrapment defense; (2) refusing to give the jury instructions on the procuring agent defense; and (3) admitting drug evidence where (a) there were "gaping holes" in the chain of custody, and (b), in the alternative, the drug evidence was irrelevant and prejudicial. The State of Hawai'i [hereinafter, "the prosecution"] concedes that the circuit court erred by refusing to give an instruction on the entrapment defense and contests Roush's remaining points of error.

We hold that: (1) the circuit court erred by refusing to give the jury instructions on the entrapment defense where Roush presented some evidence, no matter how weak, inconclusive or unsatisfactory, that he engaged in the drug transactions because he was induced or encouraged to do so by a law enforcement officer; (2) the circuit court did not err by refusing to give the jury instructions on the procuring agent defense where no reasonable juror could have found that Roush did not act on behalf of the seller; and (3) the circuit court erred by admitting drug evidence where the prosecution failed to establish the chain of custody. We, therefore, vacate the judgment of the circuit court and remand this case for a new trial.

I. BACKGROUND

A. Statement of Facts

Prior to September 4, 1998, Alii Wolverton contacted a uniformed officer in the Waikīkī area, who in turn contacted

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[2](...continued)

(A) One-eighth ounce or more, containing methamphetamine . . . .

Honolulu Police Department (HPD) Officer Philip Aguilar (Officer Aguilar). Wolverton told them that she knew of people selling drugs in Waikiki and that she did not want drugs in that area where she had a little girl living with her.

On September 4, 1998, Wolverton introduced Officer Aguilar, who was working in a plainclothes undercover capacity, to Roush. Wolverton was aware that Roush could obtain cocaine and methamphetamine [hereinafter, "crystal meth"]. Officer Aguilar told Roush that he wanted to purchase a quarter ounce of either rock cocaine or crystal meth. Roush made a phone call and told Officer Aguilar that his source only had three grams of rock cocaine for two hundred dollars. Officer Aguilar agreed to purchase the rock cocaine. Roush asked Officer Aguilar to give him fifty dollars at that time, and the remaining one hundred fifty dollars when he returned with the cocaine. Roush and Wolverton left the apartment and returned approximately ten minutes later. Officer Aguilar was given a cellophane piece of wrapper containing several pieces of rock cocaine. Officer Aguilar then gave Roush the remaining one hundred fifty dollars and a "tip" consisting of rock cocaine for his services. After leaving Roush, Officer Aguilar met with his back-up units and gave the cocaine to HPD Officer Jolene Draves (Officer Draves) for submission into police evidence.

A second deal was struck where Officer Aguilar asked Roush to pick up one-eighth ounce of crystal meth for him. Roush informed Officer Aguilar that the crystal meth would cost between eight hundred fifty and nine hundred dollars, with a one hundred dollar service fee for Roush. On September 11, 1998, Roush met with Officer Aguilar in Waikiki. Roush introduced

Officer Aguilar to "Stacey," who was later arrested and identified as Kirk Ohira. Roush told Officer Aguilar that Ohira did not have one-eighth ounce of crystal meth, that he only had one-sixteenth ounce, and that the price would be five hundred dollars. Officer Aguilar agreed to the purchase. Ohira handed Officer Aguilar the crystal meth, and Roush paid Ohira. Officer Aguilar gave Roush fifty dollars. Roush then asked Officer Aguilar if he was still interested in purchasing the one-eighth ounce of crystal meth for twelve hundred dollars. Officer Aguilar replied that he was. Roush told Officer Aguilar that he would have to come back as Roush needed to contact his sources. Officer Aguilar then met with Officer Draves and gave her the crystal meth for submission into police evidence.

Later that same evening, Roush met with Officer Aguilar. Officer Aguilar informed Roush that he could only obtain one thousand dollars. Roush told him not to worry about it, and they agreed to meet again later that night. When Officer Aguilar returned that night, Roush introduced him to "Taffey," later identified as David Kapua, Jr. Roush handed Officer Aguilar one-eighth once of crystal meth, and Officer Aguilar paid Kapua. Roush demanded his one hundred dollar service fee, and Officer Aguilar told Roush to call him later for it. Officer Aguilar then met with Officer Draves and gave her the crystal meth for submission into police evidence.

B. Procedural History

In December 1998, Roush was indicted on Counts I-III. Roush filed a motion to dismiss based on the procuring agent defense, arguing that he was not the seller, but was the "go-

between" of buyer and seller. Roush withdrew this motion after the circuit court indicated that it would deny the motion. On February 8, 2000, Roush filed an application to have Wolverton, the confidential informant, declared a material witness. Roush withdrew this motion on the day it was to be heard.

On February 11, 2000, Roush filed a motion in limine seeking, inter alia, to admit evidence supporting an entrapment defense. On February 14, 2000, just prior to the start of trial, the circuit court precluded the defense from alluding to an entrapment defense during opening statements but left open the possibility should the defense later adduce evidence sufficient to support an entrapment defense.[3]

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[3] The initial colloquy between the circuit court, defense counsel, and the prosecution was as follows:

The Court:	Oh. We only got down to -- Admit evidence supporting the entrapment defense. I can't preclude you from adducing facts to establish a defense in terms of entrapment.
Mr. Fernandez:	Yes, Your honor.
The Court:	Okay, But what are those facts?
Mr. Fernandez:	Just basically that there was a confidential informant. I believe her name was Ally Wolverton, and she basically offered and enticed Mr. Roush into becoming involved in this particular instance by offering him business deals, getting him involved in her business about a concession stand in front of the Hilton Hawaiian Village, getting him involved in that --about people living in Kahala, having boats, lots of money, and basically trying to speak to him about getting involved in this, even though he did not want to get involved, and thereby offering him money, job, financial benefits and the fact that he would be part of a concession stand or become involved in that particular business. So it was to further his personal gains in order to entice him and to get involved in drugs.
The Court:	And this was the undercover officer?
Mr. Fernandez:	Yes, the undercover informant.
The Court:	I can't preclude you from adducing some facts through cross examination or through the Defense

(continued...)

On February 16, 2000, Roush filed a motion to admit into evidence out-of-court statements made by Wolverton based on Hawai‘i Rules of Evidence (HRE) Rule 804(b)(3)[4] and HRE Rule 801(3).[5] Roush intended to show that Wolverton promised him a

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[3](...continued)

case.

Mr. Bakke: Procedural, Your Honor, is the problem. I agree with the Court. The problem is procedural. The confidential informant is not available and is not going to be called as a witness in this case. She surfaced at the time this case was charged. The name was given to the Defense counsel in original discovery. They never made any attempts to contact her. And actually, it's not Mr. Fernandez. He had another attorney prior to this.

After this initial discussion, the circuit court ruled as follows:

The Court: I will preclude the Defense from this opening statement suggesting to the trier of fact that there is an entrapment defense or that there were certain statements made by a confidential informant which supports an entrapment defense. And if the Defense wants to pursue the matter, then the Defense will request a hearing out of the presence of the jury. And at that point, what I would require of the Defense is a complete offer of proof, and then I'll listen to argument and make the ruling as to whether or not the Defense may adduce evidence of any such statements made by the confidential informant.

[4] HRE Rule 804(b)(3) provides in relevant part:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(3) Statement against interest. A statement which at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, so far tended to subject the declarant to criminal or civil liability, or to render invalid a claim by the declarant against another, that a reasonable man in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissable unless corroborating circumstances clearly indicate the trustworthiness of the statement.

[5] HRE Rule 801(3) provides in relevant part that "[h]earsay is a statement, other than one made by the declarant while testifying

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business partnership if he bought drugs for her. At trial, the court ruled that Roush could testify to statements made by Wolverton for state of mind purposes, but not to support the entrapment defense. After the presentation of evidence, Roush requested a jury instruction on the entrapment defense, which the circuit court refused. During deliberations, the jury communicated with the court, asking whether they were allowed to consider entrapment as a defense. The court responded "[n]o." The jury found Roush guilty on all counts.

II. STANDARD OF REVIEW

A. Jury Instructions

> We review the circuit court's jury instructions to determine whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent or misleading.
>
> [E]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.
>
> [E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error may have contributed to conviction. If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.

State v. Hironaka, 99 Hawai'i 198, 204, 53 P.3d 806, 812 (2002) (citations and internal quotation marks omitted).

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[5](...continued)
at the trial or hearing offered in evidence to prove the truth of the matter asserted."

B. Chain of Custody

"[O]n appeal, unless the decision to admit evidence over a chain-of-custody objection constitutes a clear abuse of discretion, it will not be overturned." State v. Nakamura, 65 Haw. 74, 81, 648 P.2d 183, 188 (1982) (citations, internal quotation marks, and brackets omitted).

III. DISCUSSION

A. The circuit court erred by refusing to give the jury instructions on the entrapment defense.

Roush argues that the circuit court erred by refusing to give the jury instructions on the entrapment defense where he presented evidence that Wolverton and Officer Aguilar enticed him into the drug transactions in exchange for some type of business partnership. The prosecution concedes that the circuit court should have given the requested instruction. As asserted by both parties, Roush presented some evidence supporting the entrapment defense. The circuit court, therefore, erred by refusing to give such instructions and this refusal was not harmless beyond a reasonable doubt.

1. Roush presented some evidence of government inducement.

A defendant in a criminal case "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. O'Daniel, 62 Haw. 518, 527-28, 616 P.2d 1383, 1390 (1980) (emphasis in original). Entrapment is an affirmative defense, where the defendant must prove by a preponderance of the evidence

> that the defendant engaged in the prohibited conduct or caused the prohibited result because the defendant was

> induced or encouraged to do so by a law enforcement officer, or by a person acting in cooperation with a law enforcement officer, who, for purposes of obtaining evidence of the commission of an offense . . . [e]mployed methods of persuasion or inducement which created a substantial risk that the offense would be committed by persons other than those who are ready to commit it.

HRS § 702-237 (1993). Where a defendant alleges entrapment, "the focus of inquiry is not on the predisposition of the defendant to commit the crime charged, but rather is on the conduct of the law enforcement officials." State v. Reed, 77 Hawai'i 72, 82, 881 P.2d 1218, 1228 (1994). Thus, "in order to be entitled to an entrapment instruction, defendant must produce evidence of government inducement." State v. Agrabante, 73 Haw. 179, 196, 830 P.2d 492, 501 (1992).

In the instant case, Roush produced some evidence of government inducement, entitling him to a jury instruction on the entrapment defense. Roush testified that he became involved in the drug transactions because Wolverton and Officer Aguilar promised to help him out with a business partnership.[6] No matter how weak, inconclusive, or unsatisfactory this testimony may have been, it was evidence of government inducement sufficient to support the entrapment defense. As such, the circuit court erred by refusing to give the jury instructions on the entrapment defense.

2. The omission of jury instructions was not harmless beyond a reasonable doubt.

"If there is such a reasonable possibility in a criminal case [that the omission of jury instructions contributed to the conviction], then the [omission] is not harmless beyond a

[6] Because Roush failed to have Wolverton declared a material witness, the only evidence presented was Roush's testimony.

reasonable doubt, and the judgment of conviction on which it may have been based must be set aside." State v. Holbron, 80 Hawai'i 27, 32, 904 P.2d 912, 917 (1995). Where a jury is not given the opportunity to expressly and separately consider a defense which was improperly omitted, there is a reasonable possibility that this omission contributed to the conviction. See State v. Locquiao, 100 Hawai'i 195, 208, 58 P.3d 1242, 1255 (2002).

In the instant case, the omission of jury instructions on the entrapment defense was not harmless beyond a reasonable doubt. As discussed above, Roush presented evidence that he entered into the drug transactions after Wolverton and Officer Aguilar promised assistance with a business partnership. During deliberations, the jury asked if it could consider the entrapment defense, to which the court replied, "No." Thereafter, the jury returned a verdict finding Roush guilty on all counts. Under these circumstances, there is a reasonable possibility that the omission contributed to Roush's conviction. Accordingly, the omission was not harmless beyond a reasonable doubt.

B. The trial court did not err by refusing to give the jury instructions on the procuring agent defense.

Roush argues that the circuit court erred by refusing to give the jury instructions on the procuring agent defense because there was evidence indicating that he was acting as an agent for the buyers and not the seller. To support this argument, Roush alleges that he did not "touch" the money or drugs and acted only in setting Officer Aguilar up with the seller. Contrary to what Roush alleges, the facts as presented in this case indicate that Roush did not act in merely setting Officer Aguilar up with the seller. Under these facts, no

reasonable juror could have concluded that Roush was not acting on behalf of the seller. Therefore, the circuit court did not err by refusing to give the jury instructions on the procuring agent defense.

"[W]here the evidence adduced at trial proves only a sale and a reasonable juror could find that the defendant did not act on the seller's behalf, the defendant is entitled to a jury instruction on the procuring agent defense." State v. Balanza, 93 Hawai'i 279, 288, 1 P.3d 281, 290 (2000). In Balanza, this court was faced with whether the jury should have been instructed on the procuring agent defense. Id. In that case, the evidence at trial proved only a sale and the defendant did not negotiate price or quantity and did not come into contact with the drugs or the money. Id. at 287-88, 1 P.3d at 289-90. Based on these facts, this court held that the trial court should have instructed the jury on the procuring agent defense. Id.

In the instant case, Roush was not entitled to instructions on the procuring agent defense. Unlike Balanza, there was evidence that Roush participated in the negotiation of the price and quantity of drugs. On two occasions, Roush came into contact with the money used to purchase the drugs by collecting it from Officer Aguilar and delivering it to the seller. During the last transaction, Roush was present when Officer Aguilar paid the seller. Roush also came into contact with the drugs, by delivering the drugs to Officer Aguilar, and was present when the seller gave Officer Aguilar the drugs. Based on the facts of this case, no reasonable juror could have concluded that Roush was not acting on behalf of the seller. Accordingly, the circuit court did not err by refusing to give

the jury instructions on the procuring agent defense.

C. The trial court erred by admitting drug evidence where the prosecution failed to establish the chain of custody.

Roush argues that the court erred by admitting drug evidence where the prosecution failed to establish the chain of custody. In the alternative, Roush argues that the drug evidence was inadmissible due to its irrelevant and prejudicial nature. Because the evidence was inadmissible, Roush claims that the circuit court should have granted his motion for judgment of acquittal. Inasmuch as the prosecution failed to present the testimony of Officer Draves, the drug evidence should not have been admitted.

1. The circuit court erred by admitting drug evidence where the prosecution failed to establish the chain of custody.

In State v. Schofill, 63 Haw. 77, 81, 621 P.2d 364, 368 (1980)(citations omitted), this court held that "the crime of promoting a dangerous drug by distributing the same is complete where, with the specific intent to sell, the accused has offered to sell the contraband. Actual delivery in such case would not be required, and neither, obviously would a chemical analysis of the substance." Id. (citations omitted). Thus, the prosecution may prove intent to sell without admitting the recovered drugs into evidence.

However, once the prosecution attempts to admit the recovered drugs into evidence, it must establish chain of custody from recovery to chemical analysis. See State v. Vance, 61 Haw. 291, 304, 602 P.2d 933, 942 (1979) (noting that "[e]stablishing the chain of custody is essential to show that the substance

analyzed was the substance seized from the defendant"). In the instant case, the prosecution failed to present the testimony of Officer Draves to establish that she received the recovered drugs from Officer Aguilar and submitted the recovered drugs to the police evidence custodian. Thus, the prosecution failed to establish the chain of custody from recovery of the drugs to chemical analysis of the drugs and the circuit court should not have admitted the recovered drugs into evidence.

2. Assuming, arguendo, that the chain of custody was established, the drug evidence was relevant and was not unfairly prejudicial.

HRE Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." HRE Rule 401. HRE Rule 401 Commentary[7] provides in relevant part that "[t]he concept of relevance, however, does not encompass standards of sufficiency." Commentary to HRE Rule 401 (citation omitted). In this case, the drug evidence admitted was relevant to show that the distribution of drugs was more probable.

In addition, HRE Rule 403 permits exclusion of evidence where the probative value is substantially outweighed by the

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[7] HRE Rule 401 Commentary provides in relevant part:

. . . .

The Court in Smith also relied upon the holding in State v. Irebaria, 55 H[aw.] 353, 356, 519 P.2d 1246, 1248-49 (1974) for the distinction between relevance and sufficiency of the evidence:

> The concept of relevance, however, does not encompass standards of sufficiency. Appellant's contention that evidence which, standing alone, is insufficient to establish a controverted fact, should be inadmissable is totally without basis in the law. It is often said that "[a] brick is not a wall."

danger of unfair prejudice.[8] The commentary for HRE Rule 403 states that "[i]t recognizes the necessity for discretionary qualification of the general admissibility rule, based on such factors such as potential for engendering juror prejudice, hostility, or sympathy . . . ." Commentary to HRE 403.[9] The commentary further states that unfair prejudice "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Id.[10]

In the instant case, there is nothing in the record to demonstrate unfair prejudice. The chemist's testimony regarding the type and quantity of drug involved did not rise to the level of creating juror hostility or prejudice, or other emotional response. Therefore, the probative value of the evidence was not substantially outweighed by unfair prejudice.

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[8] HRE Rule 403 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[9] HRE Rule 403 commentary provides in relevant part that "[t]his rule is identical with Fed.R.Evid. 403. It recognizes the necessity for discretionary qualification of the general admissibility rule, based on such factors such as potential for engendering juror prejudice, hostility, or sympathy; potential for confusion or distraction; and likelihood of undue waste of time."

[10] HRE Rule 403 commentary provides in relevant part that "'[u]nfair prejudice,' as the Advisory Committee's Note to Fed.R.Evid. 403 explains, 'means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'"

IV. CONCLUSION

Based on the foregoing, the circuit court's judgment is vacated and this case is remanded for further proceedings.

DATED: Honolulu, Hawai'i, October 2, 2003.

On the briefs:

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