

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

JOHN FAATEA, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 95-0120)

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

Following a first circuit court jury trial before the Honorable Sandra A. Simms, defendant-appellant John Faatea (Defendant) was convicted of burglary in the first degree, in violation of Hawai'i Revised Statutes (HRS) § 708-810(1)(c) (1993)¹ (Count I) and robbery in the first degree, in violation of HRS § 708-840(1)(a) (1993)² (Count II). Defendant timely appealed his convictions.

¹ HRS § 708-810(1)(c) provides that "[a] person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and . . . [t]he person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling." Burglary in the first degree is a class B felony. HRS § 708-810(3).

² HRS § 708-840(1)(a) provides that "[a] person commits the offense of robbery in the first degree if, in the course of committing theft . . . [t]he person attempts to kill another, or intentionally inflicts or attempts to inflict serious bodily injury upon another[.]" Robbery in the first degree is a class A felony. HRS § 708-840(3). HRS § 707-700 (1993) defines "serious bodily injury" as "bodily injury which creates a substantial risk of death or causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve each of Defendant's claims as follows:

First, Defendant contends that the trial court improperly responded to a potential juror's statement regarding bias during jury selection, thereby prejudicing his right to an impartial jury. Specifically, the potential juror stated that, "I don't know if I could be impartial or not, especially if [the defendant] does have a record." In response, the court stated, "You won't know that. That's not going to be the evidence." Thereafter, Defendant requested that the trial court promptly instruct the potential jurors that they must not assume that Defendant has a record. The trial court denied Defendant's request, which he now challenges as a point of error. We conclude that, the trial court's response was correct and appropriate and that, although the court did not immediately instruct the potential jurors as requested, the court properly instructed the jury at the beginning of trial that its decision "must be based exclusively and strictly on the evidence that you receive in this courtroom and on the Court's instructions and nothing else." The trial court also instructed the jurors prior to deliberations to "consider only the evidence which has been presented to you in this case[.]" Accordingly, we hold

that the trial court's response did not prejudice Defendant and that the trial court's denial of Defendant's request for an immediate jury instruction was not an abuse of discretion. See Hawai'i Rules of Penal Procedure (HRPP) Rule 24(a) (2000). See also State v. Webster, 94 Hawai'i 241, 248, 11 P.3d 466, 473 (2000) (a jury is presumed to follow the court's instructions).

Second, Defendant contends that, during jury selection, the trial court abused its discretion by allowing the prosecution to ask hypothetical questions regarding accomplice liability, over Defendant's objection, because the questions did not accurately state the law with regard to intent. Inasmuch as (1) the questions posed by the prosecution could not fairly be viewed as inducing the jurors to commit themselves to vote in a particular way in this case or as instructing the jurors in matters of law, and (2) the court correctly charged the jury regarding accomplice liability, we hold that the trial court did not abuse its discretion in permitting the prosecution to pose the hypothetical questions and that Defendant was not prejudiced by the trial court's ruling. See State v. Altergott, 57 Haw. 492, 499, 559 P.2d 728, 734 (1977) ("Absent abuse of [the judge's] broad discretion, and a showing that the rights of the accused have been substantially prejudiced thereby, the trial judge's rulings as to the scope and content of voir dire will not

be disturbed on appeal."); see also Webster, 94 Hawai'i at 248, 11 P.3d at 473.

Third, Defendant contends that the trial court erred by admitting a redacted transcript of prior testimony given by prosecution witness Senetenari Tuua and denying Defendant's request to redact other portions of the transcript. We agree with Defendant that the transcript was not admissible under the former testimony exception to the hearsay rule, Hawai'i Rules of Evidence (HRE) Rule 804(b)(1) (1993), because Tuua was not "unavailable as a witness" pursuant to HRE Rule 804(a)(3) (1993). However, the majority of the statements in the transcript were admissible as prior inconsistent statements pursuant to HRE Rules 802.1(1) and 613(b) (1993). Although some portions of the transcript were not specifically brought to Tuua's attention during trial and, thus, did not meet the requirements of HRE 613(b), we hold that the admission of these portions of the transcript was harmless error because the prosecution in this case did question Tuua regarding all of the "significant elements" of the transcript. See State v. Ortiz, 91 Hawai'i 181, 194, 981 P.2d 1127, 1140 (1999). Further, because Tuua was subject to cross-examination regarding the subject matter of his prior testimony and the jury was able to meaningfully compare Tuua's prior version of the event with the version recounted at trial, we hold that the admission of the transcript of Tuua's

former testimony did not violate article I, section 14 of the Hawai'i Constitution or the sixth amendment to the United States Constitution. See State v. Canady, 80 Hawai'i 469, 480-81, 911 P.2d 104, 115-16 (App. 1996) (citing, inter alia, United States v. Owens, 484 U.S. 554, 561 (1988)).

Fourth, Defendant contends that the trial court erred by prohibiting Tuua from offering, during direct examination, an explanation regarding an allegedly inconsistent statement. Inasmuch as Tuua was questioned extensively on cross-examination by defense counsel regarding inconsistencies in his statements and afforded an opportunity to explain these inconsistencies, we hold that the trial court did not err by limiting Tuua's testimony on direct examination. See HRE Rule 613(b) and Commentary (1993) (in order to admit extrinsic evidence of a witness's prior inconsistent statement, on direct or cross-examination, the circumstances of the statement must be brought to the attention of the witness and the witness must be asked whether he or she made the statement); see also HRE Rule 611 (1993) (the trial court has discretion in controlling the mode and order of interrogation).

Fifth, Defendant contends that the trial court erred by denying his request for a jury instruction regarding the limited purpose for which certain hearsay statements made by Honolulu Police Department Detective Slovak could be considered. Because

the trial court's contemporaneous limiting instruction that "the [Detective's] testimony is being offered, not to prove that what is being said is true, but as the basis for the . . . police officer's[] subsequent actions" adequately protected Defendant's rights, we hold that the trial court did not err by denying Defendant's request for a further limiting instruction prior to jury deliberations. See State v. Perez, 64 Haw. 232, 235, 638 P.2d 335, 337 (1981).

Sixth, Defendant contends that the trial court erred by allowing the prosecution, over Defendant's objections, to ask leading questions on direct examination and conduct improper cross-examination of witnesses Dorothy Rosa, Darilyn Botelho, Detective Slovak, and Tuua. Based on our review of the record, we hold that the trial court did not abuse its discretion in controlling the mode and order of the interrogation of witnesses and presentation of evidence. See HRE Rule 611.

Seventh, Defendant argues that, absent the evidence improperly admitted in the trial transcript of Tuua's prior testimony, there was insufficient evidence presented at trial to sustain a conviction. Disregarding the statements in the transcript for which a proper foundation was not laid, we hold that there was substantial admissible evidence from which the jury could find Defendant guilty of the charged offenses. See

State v. Wallace, 80 Hawai'i 382, 412, 910 P.2d 695, 726 (1996).

Thus, based on the foregoing,

IT IS HEREBY ORDERED that Defendant's convictions for burglary in the first degree and robbery in the first degree are affirmed. However, in light of this court's decision in State v. Tafoya, 91 Hawai'i 261, 982 P.2d 890 (1999), we recognize as plain error affecting Defendant's substantial rights that the predicate factual findings necessary to support the imposition of a mandatory minimum sentence under HRS § 706-660.2(1) (1993) -- that Dorothy Rosa was sixty years of age or older at the time of the attack and that Defendant knew or reasonably should have known that fact -- were made by the judge at the sentencing hearing, and not by the jury. See Tafoya, 91 Hawai'i at 275, 982 P.2d at 904 (holding that the requisite findings that (a) the victim was sixty years of age or older and (b) the defendant knew or reasonably should have known this fact necessary to support the imposition of an extended sentence were constitutionally required to be made by the jury). Thus, with respect to Defendant's sentencing, we hold that the court committed reversible error by granting the prosecution's motion for the imposition of mandatory minimum sentences for each offense. Moreover, because there was insufficient evidence presented at trial that Defendant knew or reasonably should have known that Rosa was sixty years of age or older, we also hold that the

prosecution is not entitled to a new hearing to determine the predicate factual findings for the imposition of a mandatory minimum sentence under HRS § 706-660.2(1). See State v. Peralto, 95 Hawai'i 1, 6 n.4, 18 P.3d 203, 208 n.4 (2000). Accordingly,

IT IS FURTHER ORDERED that Defendant's sentences are hereby vacated, and this case is remanded for resentencing without the imposition of mandatory minimum terms of imprisonment.

DATED: Honolulu, Hawai'i, August 22, 2001.

On the briefs:

Glenn D. Choy, for
defendant-appellant

James M. Anderson,
Deputy Prosecuting Attorney,
for plaintiff-appellee