

NO. 22979

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

ALLAN M. McCABE, also known as Edward
K. Angell, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-0403)

MEMORANDUM OPINION

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

Defendant-appellant Allan M. McCabe appeals the First Circuit Court's October 18, 1999 judgment of conviction and sentence for the offenses of terroristic threatening in the first degree, in violation of Hawai'i Revised Statutes (HRS) § 707-716(1)(d) (1993) (Count I), and promoting a harmful drug in the fourth degree, in violation of HRS § 712-1246.5(1) (1993) (Count IV). McCabe argues that: (1) the motions court erred in failing to suppress evidence of two codeine tablets found during a search of his backpack;¹ (2) the trial court erred in denying his motion in limine to exclude all references to his use of an

¹ Hon. Michael Town presided over the suppression hearing.

alias;² and (3) the trial court erred in instructing the jury concerning the offense of shoplifting. For the reasons discussed herein, we hold that the motions court erred in failing to suppress evidence of the codeine tablets. Accordingly, we reverse McCabe's conviction in connection with Count IV (promoting a harmful drug in the fourth degree). With regard to McCabe's other points of error, we affirm.

I. BACKGROUND

On March 9, 1999, McCabe was charged by complaint with Count I (the terroristic threatening charge), promoting a dangerous drug in the third degree, in violation of HRS § 712-1243(3) (Supp. 1999) (Count II), unlawful use of drug paraphernalia, in violation of HRS § 329-43.5(a) (1993) (Count III), and Count IV (the promoting a harmful drug charge). All of the charges arose from an incident that occurred outside of the Beretania Street Foodland supermarket in Honolulu on February 27, 1999, in which McCabe allegedly threatened a store security guard with a knife. As a result of the incident, McCabe was arrested. Pursuant to a valid warrant, his backpack was searched in an effort to locate the knife, which was seized during the search. In addition, the police seized illegal drugs and drug paraphernalia, leading to the charges in Counts II through IV.

² Hon. John Bryant presided over the motion in limine and trial.

As described below, the charges in Counts II and III were eventually dropped.

A. Suppression Hearing

Prior to trial, McCabe moved to have evidence of the drugs and drug paraphernalia suppressed on the ground that their seizure exceeded the scope of the search warrant. At the August 18, 1999 hearing on McCabe's motion, the following testimony was adduced.

Detective Alan Matsumura of the Honolulu Police Department (HPD) testified that he obtained a warrant to search McCabe's backpack for the utility knife based upon the statement by the Foodland security guard that McCabe had placed the utility knife into his backpack. The search warrant authorized a search of the backpack for "[o]ne (1) utility knife, unknown brand, gray in color. The utility knife is described as one commonly used to cut open boxes." The backpack had one main compartment, a second, mid-size compartment outside of the main compartment, and a third, small "flat" compartment or pocket.

Detective Matsumura stated that he started his search for the knife by checking the smallest pocket because the security guard said that McCabe had placed the knife in the "small pocket." Upon checking the pocket, he discovered a glass smoking pipe and two clear "zip-lock" packets, both of which contained a crystalline substance that were later identified as

methamphetamine. Matsumura testified that he did not have to unwrap anything to see these items.

Not finding the knife in the small pocket, Detective Matsumura testified that he next searched the mid-sized compartment. Therein, he found the gray utility knife. In addition, he found two more pipes, two white tablets later identified as codeine,³ and two seeds that he believed were marijuana seeds. Matsumura testified that the pipes were "amongst" tissue paper, that the tablets were loose in the compartment, and that he could not specifically remember where he had found the seeds.

On cross-examination, Detective Matsumura conceded that he could not clearly remember whether he found the tablets and the seeds before or after finding the knife. Defense counsel also pointed out that, contrary to Matsumura's testimony, the HPD evidence report stated that each pipe was found individually wrapped in white paper hand towels. In addition, although Matsumura testified that he had no recollection of finding a cigarette package during the search, defense counsel pointed to Matsumura's police report that indicated that a cigarette package had indeed been recovered from the backpack. Moreover, Matsumura acknowledged that he had not reviewed his report before

³ Codeine is a Schedule III drug. HRS § 712-1246.5(1) proscribes the possession of "any harmful drug in any amount." The term "harmful drug" includes, inter alia, Schedule III drugs. See HRS § 712-1240 (1993).

testifying and that his written report did not describe in detail the sequence in which the compartments of the pack were searched or the location where the items were found. Finally, in response to questioning by the motions court, Matsumura acknowledged that he did not have a "crystal clear" memory whether the methamphetamine was recovered from within the cigarette pack.

McCabe testified that the utility knife was not in the middle compartment, as Matsumura had stated, but in the small front pocket. He further testified that the pipes were in the middle compartment and were "totally wrapped" and that the methamphetamine and the two codeine tablets were in an empty cigarette packet in the middle compartment.

At the conclusion of the hearing, the motions court suppressed evidence concerning the pipes and the methamphetamine, but not the codeine tablets. In so doing, the following discussion ensued:

THE COURT: . . . I'm not suggesting in any way the officer was less than truthful in court. His police report is -- is not acceptable to this Court at this time.

I expect far more in conducting a search warrant. There -- either it should have been video taped or at least some discussion as to how -- as to where the different things came from. I'm going to -- and -- and he admits himself his memory is not crystal clear.

So I'm gonna strike the evidence suggested, that is the -- the three so-called bongs or pipes, the two crystal -- the two ziplock bags.

And is there anything else that's being --

[DEFENSE COUNSEL]: The two pills.

THE COURT: Now, the -- I don't know about the tablets. Is he charged with the tablets?

[DEPUTY PROSECUTOR]: Yes, that's Count 4.

[DEFENSE COUNSEL]: Yes.

[DEPUTY PROSECUTOR]: That's the codeine, --

. . . .

THE COURT: -- I'm gonna allow those in because I didn't hear testimony where they -- where they -- that they were inside of a plastic packet. Did I? They were loose.
[DEPUTY PROSECUTOR]: They were loose.
[DEFENSE COUNSEL]: Loose. Defendant testified they were --
Mr. MCCABE: In the --
[DEFENSE COUNSEL]: -- in the cigarette pack.
THE COURT: I'm gonna allow those in.

In light of the motions court's grant of the suppression motion, the prosecution did not pursue Counts II and III of the complaint (relating to the methamphetamine and drug paraphernalia), leaving only Counts I (terroristic threatening) and IV (promoting a harmful drug -- codeine).

B. Severance of Counts I and IV

Subsequent to the suppression hearing, the trial court, over the prosecution's objection, granted McCabe's motion to sever trial as to Counts I and IV and permitted him to stipulate to the fact that he knowingly possessed a harmful drug "in order to allow the [him] to challenge the suppression motion." Thereafter, the court convicted McCabe of Count IV in a bench trial, and the case proceeded to a jury trial on Count I (terroristic threatening).

C. Motion in limine to Suppress Reference to McCabe's Use of an Alias

At the beginning of the trial, the court read the complaint to the jury. The complaint referred to McCabe as "Allan M. McCabe, a/k/a Edward K. Angell[.]" After the court had read the complaint, defense counsel, out of the presence of the jury, sought a motion in limine to exclude any further reference

to "a/k/a's." Counsel pointed out that he had only recently been appointed to represent McCabe because a previous court-appointed attorney had withdrawn. As such, defense counsel explained that he did not have a complete file and did not have a copy of the complaint; therefore, he did not know the complaint contained a reference to an alias until it was read.⁴ Counsel argued that the reference was unfairly prejudicial because its only purpose was to suggest that McCabe was a criminal. The prosecution argued that the complaint was written this way because McCabe had told the police at the time of his arrest that his name was Edward Keith Angell and that his real name was ascertained after fingerprint comparison was done. The court denied McCabe's motion, ruling that:

This particular horse is way out of the barn already. The issue is whether it's unfairly prejudicial. If [McCabe] uttered those words, then I don't think it is unfairly prejudicial. There may be some explanation of it, but I am not aware of it.

D. Opening Statement

At the beginning and end of its opening statement, the prosecution referred to McCabe as "Allan McCabe a/k/a Edward [Keith] Angell[.]" In its opening statement, the defense stated, inter alia, that "the evidence will show" that Jason Kubo, the Foodland security guard who stopped McCabe outside of the store on the day of the incident, "knew he had no grounds to make any

⁴ The record reflects that McCabe's defense counsel had been appointed stand-by counsel on August 4, 1999, and trial counsel on August 17, 1999. Trial began on Monday, August 23, 1999.

arrest whatsoever." Counsel further stated that "the evidence will also show that Mr. Kubo attempted to force Mr. McCabe back into Foodland" in order to go through Foodland's procedures for a trespass warning, that McCabe was aware Kubo "had no legal right to arrest" him, and, therefore, refused to go with Kubo.

E. Trial Testimony

At trial, Foodland security guard Jason Kubo testified for the prosecution. Kubo testified that he observed McCabe pushing a shopping cart in the wine section of the store with his backpack in the cart. Kubo observed McCabe conceal two bottles of port wine in his backpack. According to Kubo, McCabe then looked around, and "I assume[] he had seen me" because McCabe then unzipped his backpack, removed the bottles of wine, and placed them back on the shelf. McCabe then took his backpack and exited the store.

Kubo testified that he then ran up to McCabe, who by now was just outside the store, identified himself as security, displayed his badge, and told McCabe that he wanted to initiate a trespass warning for attempted theft. Kubo stated that McCabe appeared agitated and replied, "Fuck you." Kubo then placed his hand on McCabe's shoulder, "trying to calm him down[,] " and explained to McCabe that "[y]ou are not arrested[,] " but that he wanted to initiate a trespass warning. McCabe responded by trying to punch Kubo in the face with a closed fist. Kubo then

stepped back and told McCabe, "Don't make things any worse." According to Kubo, McCabe then swore at him again, reached into the small pocket of his backpack, pulled out a "box cutter" utility knife, pointed it at Kubo, and stated, "Don't make me use this." Kubo testified that he was scared, took a few more steps back, and McCabe stated, "You want me to cut you?" McCabe then swore a few more times and left. Kubo witnessed McCabe place the knife back in his backpack; he called the police, and McCabe was apprehended a short distance from the scene.

On cross-examination, Kubo explained that, in a "trespass warning," an individual is warned that he or she may not enter the Foodland premises in the future and that, if the individual does so, he or she will be arrested for trespassing. Kubo acknowledged that it was sufficient to merely give a verbal warning at the scene, but that it was the preferred store policy to attempt to obtain documentation of the warning by photographing the individual and having the individual sign a written acknowledgment that he had received the warning. To carry out the store's preferred policy, McCabe would have had to accompany Kubo to the store's security office.

HPD Officer Alan Togami testified that he was dispatched to the scene on the day of the incident and subsequently apprehended the defendant. When he stopped the defendant, the defendant identified himself as Edward Keith

Angell. Officer Togami further identified McCabe in open court as the individual whom he had apprehended.

Detective Matsumura also testified for the prosecution.⁵ Matsumura testified that he was the lead investigator for the incident:

[DEPUTY PROSECUTOR]: . . . [W]ere you assigned to assist and lead the investigation of terroristic threatening in the first degree involving a suspect known as Allan M. McCabe a/k/a Edward Keith Angell and an alleged complaining witness identified as Jason Kubo?

[MATSUMURA]: Yes, I was.

[DEPUTY PROSECUTOR]: Pursuant to your investigation as the lead detective, sir, before today did you meet with Allan M. McCabe a/k/a Edward Keith Angell?

[MATSUMURA]: Yes, I did.

[DEPUTY PROSECUTOR]: If you were to see Allan McCabe again, would you be able to recognize and identify him?

[MATSUMURA]: Yes.

Matsumura then proceeded to visually identify McCabe in open court, after which he was asked:

[DEPUTY PROSECUTOR]: Detective Matsumura, pursuant to your investigation of this terroristic threatening in the first degree offense, did you through the identification section of the Honolulu Police Department, through fingerprint comparison, confirm that Allan M. McCabe and Edward Keith Angell are one and the same person?

[DETECTIVE MATSUMURA]: Yes, I did receive that notification and confirmed it, yes.

Matsumura further testified that he searched McCabe's backpack after obtaining a search warrant and that he found the knife in the small front pocket of the backpack.⁶

⁵ At the trial, Detective Matsumura actually testified first, followed by Officer Togami and then Kubo. Their testimony is presented in the sequence described above in order to facilitate the description of the events.

⁶ Detective Matsumura's trial testimony that he found the knife in the small front pocket of the backpack was inconsistent with his testimony at the suppression hearing that he found the knife in the second, middle-sized compartment. McCabe had the same counsel at both proceedings and counsel did not raise this inconsistency on cross-examination.

McCabe was the sole witness in his defense. He testified that, while in the store, he "[ran] across" a bottle of champagne with the intention of stealing it, but then noticed that Kubo was watching. Surmising that Kubo was a security guard, McCabe stated that he did not place the champagne in his backpack or in the shopping cart. Shortly thereafter, he left the store without purchasing anything. Outside the store, Kubo ran up to him, yelling. McCabe further testified that he was not sure what Kubo had said because Kubo "mumbled something."

According to McCabe, Kubo then grabbed him by the right shoulder and left arm, spun him around, and said, "Come back with me in the store." McCabe stated that Kubo was "knocking me around" and "pushing me toward the store." McCabe then got agitated, "hit [Kubo's] arm off of me[,] " and swore at him. Kubo eventually yanked the backpack off of McCabe, threw it into a nearby shopping cart, and began rummaging through it.

As Kubo was looking through the backpack, McCabe testified that he grabbed it back, said, "Man, if you wanted to look in my bag you should have asked me[,] " and proceeded to empty his bag for Kubo. When the bag was partially emptied, Kubo told McCabe that he did not want to see the contents of the bag, so McCabe started putting various items back into the bag. At this point, the utility knife was sticking out of the small pocket, "blocking the zipper." McCabe testified that, by now, "I

[was] kind of pissed off that he did this. I tell him, 'You lucky you never get cut,' meaning in my mind you lucky as you digging your hand in there you didn't get cut" McCabe then closed up his backpack and walked away. McCabe agreed with Kubo that, "pretty much from the start," Kubo had told him that he was not being arrested.

On cross-examination, McCabe acknowledged that he had given the arresting officers a false name and birth date.

F. Jury Instructions

During the settling of jury instructions, McCabe requested a self-defense instruction on the grounds that, if the jury partially believed Kubo that McCabe had threatened him, and partially believed McCabe that Kubo had used unlawful force in restraining him, the jury could infer that McCabe's threat was in self-defense. Over the objection of the prosecution, the court allowed the instruction.

The prosecution next requested an instruction on the definition of shoplifting. The requested instruction read in part:

A person commits theft by shoplifting if the person conceals or takes possession of the goods or merchandise of any store or retail establishment, with intent to defraud.

The prosecutor explained that the instruction was requested to counter the implication raised by the defense in its opening statement that "merely concealing" wine in a backpack is not an

offense, thereby suggesting that Kubo was wrong to stop McCabe.

The defense did not object.

G. Closing Arguments

In its opening argument, the prosecution pointed out that it

had to show that the person who allegedly committed the terroristic threatening incident was in fact this defendant, Allan M. McCabe. . . . No question that Allan M. McCabe is the person. Although he may have used a different name when arrested by the police, he is one and the same person.

In all of its other references to the defendant, the prosecution referred to McCabe as "McCabe."

In its closing argument, the defense referred to the court's shoplifting instruction to argue that Kubo was not a credible witness. The defense maintained that, if Kubo really saw McCabe conceal the wine bottles in the store, Kubo would have arrested McCabe at that time because, as the court's instructions would explain, "concealing" merchandise with intent to defraud constitutes shoplifting. Because Kubo made no such arrest, the defense argued that Kubo had not seen McCabe place the wine bottles in his backpack, but had only suspected that McCabe shoplifted. The defense also argued that Kubo only used the trespass warning as an excuse in order to stop McCabe, seize his backpack, and search it for stolen merchandise "in hopes of obtaining evidence sufficient to make an arrest." The defense maintained that, after grabbing McCabe, Kubo found himself in a "situation of a false arrest" and now had "every reason in the

world to stand up in front of you and tell as good a story as he can." The defense then returned to what it called "that first and central problem. If this private security guard saw Mr. McCabe shoplifting, why didn't he arrest him?"

In its rebuttal argument, in response to defense counsel's argument that Kubo was not a credible witness, the prosecution asserted that it was McCabe who was not credible, pointing out, inter alia, that McCabe had lied to the police about his identity when he was initially apprehended.

Subsequently, the jury returned a guilty verdict, and the court entered final judgment as to Counts I and IV on October 18, 1999. McCabe timely appealed.

II. STANDARDS OF REVIEW

A. Admissibility of Codeine Tablets

The determination whether the codeine tablets were lawfully seized is ultimately a question of law which this court reviews de novo. See State v. Wallace, 80 Hawai'i 382, 391, 910 P.2d 695, 704 (1996). To the extent that such determination involves the review of findings of fact made by the circuit court, those findings are reviewed under the clearly erroneous standard. See State v. Anderson, 84 Hawai'i 462, 466-67, 935 P.2d 1007, 1011-12 (1997).

A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made.

Id. (citing State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995)).

B. Denial of Motion in Limine to Exclude Reference to McCabe's Use of an Alias

A motion in limine is "a procedural device which requests a pretrial order enjoining opposing counsel from using certain prejudicial evidence in front of a jury[.]" State v. Miura, 6 Haw. App. 501, 504, 730 P.2d 917, 920 (1986) (quoting Rothblatt & Leroy, The Motion in Limine in Criminal Trials: A Technique for the Pretrial Exclusion of Prejudicial Evidence, 60 Ky. L.J. 611, 613 (1972)).

The standard on appeal for review of evidentiary rulings depends on the particular rule of evidence at issue. Kealoha v. County of [Hawai'i], 74 Haw. 308, 319, 844 P.2d 670, 676 (1993). Evidentiary rulings are reviewed for abuse of discretion, unless application of the rule admits of only one correct result, in which case review is under the right/wrong standard. Id.

State v. Baron, 80 Hawai'i 107, 113, 905 P.2d 613, 619 (1995).

The court's determination of relevancy is reviewed under the right/wrong standard. State v. Alston, 75 Haw. 517, 538, 865 P.2d 157, 168 (1994). The determination whether the probative value of relevant evidence is substantially outweighed by the danger of unfair prejudice is reviewed under the abuse of discretion standard. See State v. Austin, 70 Haw. 300, 308, 769 P.2d 1098, 1102-03 (1989). "The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the

substantial detriment of a party litigant.” State v. Kauhi, 86 Hawai‘i 195, 197, 948 P.2d 1036, 1038 (1997) (citing State v. Ganal, 81 Hawai‘i 358, 373, 917 P.2d 370, 385 (1996) (internal quotation marks omitted)).

C. Jury Instructions

“In reviewing jury instructions, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading.” State v. Horswill, 75 Haw. 152, 155, 857 P.2d 579, 581 (1993) (citing [State v.] Kelekolio, 74 Haw. [479,] 514-15, 849 P.2d [58,] 74 [(1993)]).

State v. Hoey, 77 Hawai‘i 17, 38, 881 P.2d 504, 525 (1994).

III. DISCUSSION

A. Admissibility of Codeine Tablets

1. **McCabe’s Stipulation That He Knowingly Possessed Codeine**

At the outset, we recognize the fact that McCabe stipulated to knowingly possessing codeine and proceeded to a bench trial, which resulted in his conviction as to Count IV. On appeal of that conviction, McCabe asserts that the motion to suppress was erroneously denied and seeks reversal of his conviction on that count. By stipulating to the knowing possession of the codeine tablets, however, McCabe has effectively foreclosed any chance of reversing his conviction on appeal. In other words, even if the motion to suppress was erroneously denied, the error was harmless because McCabe’s

stipulation alone is sufficient to support his conviction as to Count IV and, therefore, his conviction should be affirmed.

Notwithstanding the above, it is clear from a careful review of the transcript of the hearing involving McCabe's stipulation that McCabe believed that, by stipulating to the facts, he was preserving his right to appeal the suppression issue and that, if successful on appeal, his conviction would be reversed. In actuality, however, there were only two options available to McCabe at the time he entered into the stipulation that could have resulted in a reversal of his conviction on appeal: (1) move to enter a conditional plea; or (2) proceed to trial without putting on a defense. Defense counsel's decision to allow McCabe to stipulate to the fact that he knowingly possessed codeine -- in the absence of a conditional plea agreement -- reflects a lack of judgment and, potentially, a claim of ineffective assistance. Whether counsel was ineffective and whether such ineffectiveness resulted in the substantial impairment of a potentially meritorious defense is an issue that may, under certain circumstances, be reviewed on direct appeal. See State v. Silva, 75 Haw. 419, 438-40, 864 P.2d 583, 592-93 (1993) (stating that, "in some instances, the ineffective assistance of counsel may be so obvious from the record" that failing to deal with it on direct appeal "would serve no purpose except to delay the inevitable and expend resources

unnecessarily"). Because there was no discernable benefit to stipulating to the facts where the intention was to preserve the suppression issue for appeal with the hope of achieving a reversal, we are compelled to examine counsel's effectiveness or lack thereof on direct appeal.

Moreover, we may recognize counsel's ineffective assistance, even though it was not expressly called to our attention, where the substantial rights of the defendant have been affected. See Hawai'i Rules of Appellate Procedure Rule 28(b)(4) ("the appellate court, at its option, may recognize a plain error not presented"); Hawai'i Rules of Penal Procedure Rule 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); State v. Jenkins, 93 Hawai'i 87, 101, 997 P.2d 13, 27 (2000) ("We may recognize plain error when the error committed affects substantial rights of the defendant.") (internal quotations omitted).

In order to determine whether counsel rendered ineffective assistance by allowing McCabe to stipulate to the knowing possession of the codeine tablets and whether that decision resulted in the substantial impairment of a potentially meritorious defense, we examine the merits of the suppression issue.

2. **Suppression Motion**

McCabe argues that the motions court erred in not suppressing evidence of the codeine tablets seized by Detective Matsumura because the requirements of the "plain view" doctrine were not met. We agree that the requirements of the plain view doctrine were not met, although not for the reasons proffered by McCabe.

The fourth amendment to the United States Constitution and article I, section 7 of the Hawai'i Constitution protects citizens from unreasonable searches and seizures and unreasonable government intrusions into their legitimate expectations of privacy. See Wallace, 80 Hawai'i at 392, 910 P.2d at 705. A search or seizure conducted without a warrant is presumptively unreasonable unless the search or seizure falls within one of the legally recognized exceptions to the warrant requirement. See State v. Meyer, 78 Hawai'i 308, 312, 893 P.2d 159, 163 (1995). A warrant authorizing a search or seizure must describe with particularity the place to be searched or the item to be seized. See Haw. Const. art. I, § 7;⁷ State v. Woolsey, 71 Haw. 638, 640,

⁷ Article I, section 7 of the Constitution of the State of Hawai'i states:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

802 P.2d 478, 479 (1990). “[A] search must not be broader than what is absolutely necessary to accomplish the purposes for which such searches are permitted.” State v. Ching, 67 Haw. 107, 111, 678 P.2d 1088, 1092 (1984) (internal quotation marks and citations omitted). It follows that the seizure of items not described in a search warrant from a location in which an individual otherwise has a legitimate expectation of privacy is presumptively unreasonable. See, e.g., State v. Joyner, 66 Haw. 543, 544-46, 669 P.2d 152, 153-54 (1983) (where police had a warrant to search premises for gambling devices, seizure of marijuana and cocaine from a folded wallet found in a clutch purse located within defendant’s gym bag was unreasonable).

However, “where a governmental agent is engaged in a lawful intrusion and inadvertently observes evidence of a crime, the seizure of such evidence does not require any further constitutional protection.” Wallace, 80 Hawai’i at 398, 910 P.2d at 711 (citing Meyer, 78 Hawai’i at 312-14, 316-17, 893 P.2d at 163-65, 167-68). This scenario is known as the “plain view” doctrine. “[T]hree factors are required to merit a legitimate plain view observation: (1) prior justification for the intrusion; (2) inadvertent discovery; and (3) probable cause to believe the item is evidence of a crime or contraband.” State v. Dixon, 83 Hawai’i 13, 23, 924 P.2d 181, 191 (1996) (officers executing valid arrest warrant lawfully seized evidence of

criminal activity that was in plain view during arrest) (quoting Meyer, 78 Hawai'i at 314, 893 P.2d at 165). We, therefore, review each factor to determine whether the codeine tablets were legally in plain view when Detective Matsumura seized them.

Because the intrusion into McCabe's backpack that yielded the codeine tablets was made pursuant to the valid warrant to search for the utility knife, the parties do not dispute the fact that the first factor was present. However, the parties disagree as to whether the codeine tablets were discovered inadvertently during the search for the knife. McCabe contends that the codeine pills should have been suppressed along with the pipes and methamphetamine. McCabe argues that it is evident that the motions court suppressed the pipes and the methamphetamine because the prosecution had not met its burden of demonstrating that these items were discovered inadvertently during Detective Matsumura's search. Detective Matsumura did not clearly recall the details of the search, and written reports were inconsistent with key aspects of his testimony that the pipes and methamphetamine were not concealed within the backpack. Specifically, Detective Matsumura testified that the pipes were not wrapped, even though the HPD evidence report indicated that the pipes were wrapped. Moreover, the detective could not recall whether a cigarette package was recovered during the search, while his report indicated that one was. McCabe, on the other

hand, testified that the pipes were tightly wrapped in paper towels and the methamphetamine was inside a cigarette package. McCabe submits that the court's ruling, therefore, effectively amounts to a finding that the methamphetamine and pipes were not inadvertently discovered because they were concealed in locations that the detective would not be expected to observe in a reasonable search for the knife.

McCabe posits that "the [c]ourt was confused by the testimony and its finding that the pills were found in plain view is not supported by substantial evidence." We disagree. In ruling against suppressing the codeine pills, we recognize that the motions court initially believed, erroneously, that there was no testimony that the tablets were concealed:

THE COURT: -- I'm gonna allow those in because I didn't hear testimony where they -- where they -- that they were inside of a plastic packet. Did I? They were loose.

However, immediately following that erroneous statement, McCabe brought to the court's attention the fact that he had indeed testified that the pills were concealed within the cigarette package. Detective Matsumura, on the other hand, had testified that the pills were loose. Even after being reminded that the testimony conflicted, the motions court nevertheless expressly refused to suppress evidence of the tablets:

[DEPUTY PROSECUTOR]: They were loose.
[DEFENSE COUNSEL]: Loose. Defendant testified they were --
Mr. MCCABE: In the --
[DEFENSE COUNSEL]: -- in the cigarette pack.
THE COURT: I'm gonna allow those in.

In light of the conflicting testimony, we interpret the court's decision not to suppress the evidence of the tablets as a determination of the credibility of the witnesses' testimony. "[I]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence[.]" State v. Miller, 84 Hawai'i 269, 279, 933 P.2d 606, 616 (1997) (brackets in original) (citation omitted). Because Detective Matsumura's testimony constituted substantial evidence to support the court's finding, the finding is not clearly erroneous. The fact that the court chose to accept some portions of Detective Matsumura's testimony and not other portions is likewise an issue of credibility that properly rests with the court as fact-finder. Therefore, the tablets were inadvertently discovered, and the second requirement for a legitimate plain view observation was satisfied.

Finally, we examine the third factor: whether there was probable cause to believe that the inadvertently-discovered item evinces a crime or contraband. In our view, a police officer who searches a backpack and finds two pills in combination with several glass pipes and clear plastic bags containing a crystalline substance may indeed have probable cause to believe that the pills are unlawfully possessed controlled substances

because the pills are found in close proximity to what appears to be obvious illegal drugs and drug paraphernalia. However, the motions court ruled that the pipes and plastic bags were not in plain view, and the prosecution does not contest this ruling. Therefore, the existence of these items cannot be considered; the two tablets must be considered in isolation. In the absence of any other evidence suggesting that the officer reasonably believed the tablets were unlawful, the presence of two lone tablets found in a backpack is not sufficient to establish probable cause to believe that the tablets are unlawfully possessed controlled substances.

The fact that Detective Matsumura testified that he found what he suspected were two loose marijuana seeds is also insufficient to establish probable cause that the pills, if found in close proximity to the seeds, were illegal contraband. The testimony does not establish the basis for Detective Matsumura's belief that the two seeds he found were marijuana seeds. The presence of two small seeds and two tablets in a backpack does not by itself establish probable cause to believe that the backpack owner is illegally possessing Schedule III drugs.

Based on the foregoing, evidence of the codeine tablets should have been suppressed. As indicated at the outset, if allowing McCabe to stipulate to the knowing possession of the codeine tablets resulted in the substantial impairment of a

potentially meritorious defense, such a result would be determinative of whether counsel rendered ineffective assistance. Because the motions court erred in failing to suppress the evidence, we hold that McCabe's appeal of the suppression issue would have been meritorious had counsel not allowed him to stipulate to the facts. We, therefore, further hold that McCabe received ineffective assistance of counsel with respect to Count IV. Accordingly, we reverse McCabe's conviction of promoting a harmful drug in the fourth degree.

B. Denial of Motion in Limine to Exclude Reference to McCabe's Use of an Alias

McCabe contends that evidence of his use of an alias and evidence that his real name was discovered as a result of fingerprint comparisons are irrelevant. Further, McCabe contends that, even if relevant, such evidence was unfairly prejudicial. We disagree with both contentions.

1. **Relevance**

Relevant evidence is

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.

Hawai'i Rules of Evidence (HRE) Rule 401 (1993).

In seeking identification of the defendant from Detective Matsumura, the prosecutor's reference to McCabe as "Allan McCabe a/k/a Edward K. Angell" was clearly relevant because, once the complaint was read, the prosecutor, in order to

obtain a conviction, had to establish that Edward K. Angell and Allan McCabe were the same person and that the defendant was, in fact, that person. Moreover, the prosecutor's reference to the alias was relevant because the police officer who initially detained McCabe testified that he stopped a person who identified himself as Edward K. Angell. Both of these references made it more "probable that it would be without" these references, HRE Rule 401, that the defendant was the person listed in the complaint and, therefore, were relevant. Had McCabe wanted to object to the reference to an alias in the complaint, he should have done so before the complaint was read to the jury.⁸ Finally, the fact that McCabe initially identified himself to the investigating officers as Edward K. Angell is relevant to McCabe's credibility as a witness.⁹ With regard to the detective's mention of the fingerprint evidence, the fact that the police used fingerprint evidence to verify that Allan McCabe and Edward K. Angell were the same individual is relevant because, again, the evidence makes that fact more probable. See HRE Rule 401.

⁸ Although we recognize that McCabe's trial counsel had a short period of time in which to prepare for trial, see supra note 4, he had adequate time to obtain a copy of the complaint.

⁹ It was apparent from defense counsel's opening statement that McCabe would testify.

2. **Unfair Prejudice**

McCabe argues that the disputed evidence was unfairly prejudicial because his use of an alias and the fact that his fingerprints were on file with the HPD implied to the jury that he was a "criminal type."

HRE Rule 403 (1993) states:

Although 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.

First, the disputed evidence was highly probative because, as described above, it was critical to establish McCabe's identity as the person named in the complaint. Second, the probative value was not substantially outweighed by the danger of unfair prejudice. As the record demonstrates, the references to the term "a/k/a" made during Detective Matsumura's testimony were brief and were made early in the trial, before the extensive conflicting testimony of Kubo and McCabe. Any references to the alias in argument were also brief and were made solely to demonstrate that McCabe and Edward K. Angell were the same person, or to permissibly attack McCabe's credibility. Similarly, the mention of fingerprint evidence to establish that McCabe and Angell were the same person was brief, and its significance was not dwelt upon or emphasized, nor did the prosecutor refer to the fingerprint evidence in closing argument.

Simply put, McCabe has failed to convince us that the possibility of unfair prejudice due to the passing, necessary references to an alias or to the fingerprint evidence substantially outweighed their probative value. We do not believe that the trial court "exceeded the bounds of reason" in its decision to allow the evidence or that its decision resulted in "substantial detriment" to McCabe. Accordingly, we hold that the trial court did not err in allowing the evidence of McCabe's alias or fingerprint identification.¹⁰

C. Jury Instructions

McCabe contends that the trial court erred in giving the instruction on the definition of shoplifting because the instruction could have confused the jury into disregarding McCabe's legitimate self-defense claim. However, McCabe did not object to the instruction at trial. Hawai'i Rules of Penal Procedure (HRPP) Rule 30(f) (2000) states in relevant part:

No party may assign as error the giving or the refusal to give, or the modification of, an instruction . . . unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection.^[11]

¹⁰ We reject McCabe's argument that HRE Rule 404, dealing with character evidence in order to show action in conformity therewith, or evidence of other acts to prove the character of a person in order to show action in conformity therewith, is applicable to this case. The prosecution did not introduce evidence of McCabe's character and did not introduce evidence of other acts in order to prove that McCabe possessed a particular character trait.

¹¹ The above language was located within HRPP Rule 30(e) (1995) at the time of the proceedings in question. Except for alterations to make the language gender neutral, the language is the same.

Because McCabe failed to object to the instruction, we decline to consider this issue. See State v. Kupau, 76 Hawai'i 387, 393, 879 P.2d 492, 498 (1994) (stating that "an appellate court may presume that an instruction clearly stated the law if no objection to the allegedly erroneous instruction was made at trial") (citation omitted)).

Occasionally, as illustrated by our analysis in section III.A.1, supra, this court has acknowledged its discretionary ability to recognize plain error when the substantial rights of the defendant have been affected. Thus, if the instruction were erroneously given, we could consider this issue under the plain error doctrine. However, "[t]his court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system--that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes." State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993) (citing State v. Fox, 70 Haw. 46, 55-56, 760 P.2d 670, 675-76 (1988)).

During closing argument in this case, McCabe relied extensively on the shoplifting instruction to which he now objects. Referring to the instruction, McCabe argued that Kubo was not credible because, if Kubo were really telling the truth

about McCabe's concealment of the wine bottles in his backpack, he already had enough reason to arrest McCabe. After positing that Kubo had attempted to restrain him in a rogue effort to obtain evidence that he had shoplifted, McCabe returned to "that first and central problem. If this private security guard saw Mr. McCabe shoplifting, why didn't he arrest him?" Having taken advantage of the court's instruction, but failing nonetheless to convince the jury of his theory, McCabe now seeks a second chance with a different set of instructions. We see no reason to allow him a second bite at the apple. Cf. State v. Timoteo, 87 Hawai'i 108, 115, 952 P.2d 865, 872 (1997) ("After a guilty verdict has been returned based on the requested instruction, defense counsel cannot be allowed to change legal positions in midstream and seek a reversal based on that error. Principles of estoppel, waiver, and invited error, forestall the possible success of such a ruse.") (Citing Weber v. State, 602 So.2d 1316, 1319 (Fla. Dist. Ct. App. 1992.)). Accordingly, even assuming arguendo that the instruction was erroneously given, we would decline to recognize plain error under the circumstances of this case.

IV. CONCLUSION

Based on the foregoing, we reverse (1) the order denying McCabe's motion to suppress evidence of the codeine tablets and (2) McCabe's conviction of the offense of promoting a

harmful drug in the fourth degree. We affirm McCabe's conviction of and sentence for terroristic threatening in the first degree.

DATED: Honolulu, Hawai'i, August 9, 2001.

On the briefs:

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