

NO. 22799

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAII, Plaintiff-Appellee, v.  
BARIN VAN KRUGEL, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,  
HONOLULU DIVISION  
(D.C. NO. 99-4775)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Barin Van Krugel (Van Krugel) appeals the district court's August 2, 1999 judgment convicting him of Theft in the Fourth Degree, Hawai'i Revised Statutes (HRS) § 708-833(1) (1993) and sentencing him to six months of probation, ten hours of community service, and alcohol assessment and treatment, if needed. We affirm.

RELEVANT STATUTES

HRS § 708-830 (1993) states, in relevant part:

**Theft.** 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.  
. . . .
- (8) Shoplifting.
  - (a) A person conceals or takes possession of the goods or merchandise of any store or retail establishment, with intent to defraud.

HRS § 708-833(1) (1993) states, in relevant part, that "[a] person commits the offense of theft in the fourth degree if the person commits theft of property or services of any value not in excess of \$100."

HRS § 708-834(1) (b) (1993) states, in relevant part, as follows: "It is a defense to a prosecution for theft that the defendant: . . . [b]elieved that the defendant was entitled to the property or services under a claim of right or that the defendant was authorized, by the owner or by law, to obtain or exert control as the defendant did."

#### BACKGROUND

On August 2, 1999, Van Krugel was orally charged in the District Court of the First Circuit, Honolulu Division, as follows:

On or about April 6, 1999, in the City and County of Honolulu, State of Hawaii, you did obtain or exert unauthorized control over property of another with the intent to deprive the other of the property, said property or services having had a value not in excess of \$100, thereby committing the offense of Theft in the Fourth Degree in Violation of Section 708-830(1) as well as 708-833(1) of the Hawaii Revised Statutes.

Thus, Van Krugel was charged under HRS § 708-830(1) and not HRS § 708-830(8).

At a bench trial, Foodland Super Market (Foodland) employees Tammy Buan (Buan), Gary Yamashita (Yamashita), and Reginald Kealoha (Kealoha) testified for Plaintiff-Appellee State of Hawai'i (the State). Van Krugel testified on his own behalf.

Buan testified that she was a part-time cashier at the Beretania Street Foodland and that at about 8:45 p.m., on April 6, 1999, while she was bagging groceries, she saw Van Krugel standing by the liquor shelf in aisle 13 of the store. Her view was unobstructed and Van Krugel was approximately 20 feet away. Buan stated:

I saw him put his grocery [sic] down, walk over to aisle 13, grab a bottle [of] rum off the shelf, open it and drink it, turn around, another employee came from behind, confronted him, told him that you're not supposed to drink the bottle [of] rum, he put it down and walked over, grabbed his groceries and got back in line.

She stated that she went to inform Yamashita, the acting Store Manager, about what she had witnessed and then returned to work at the checkout counter. She saw Van Krugel walk up and say something to Yamashita then leave the store. She saw the bottle of rum in question left on the floor where Van Krugel placed it while she watched Van Krugel walk out of the store with various other groceries.

On cross examination, she testified:

Q So, you said you saw him pick up a bottle of rum, correct?

A Yes.

Q This was on the floor next to the display?

A Yes.

Q Okay, right?

A Yes.

Q That's what you say in your report, right?

A Yes, I did.

Q That you saw him drink a bottle of rum, Hana Bay brand, on the floor next to the display on aisle 13, right?

A Yes.

She furthered clarified:

Q . . . So, when you saw him drink the bottle of rum, you said it was on the floor next to the display aisle, right?

A Yes, that's where he left it.

Q That's what you wrote in your report?

A Yes, that's what he did. That's where he left it after he took it off the shelf, and opened it.

Q But you said on here --

A It's next --

Q Wait, hold on.

THE COURT: [Buan] wait, wait until she finishes.

[Counsel for Van Krugel] Sorry, Judge.

Q I saw a white male with a blue/brown long-sleeve plaid shirt drink a bottle of rum, Hana Bay brand, on the floor next to the display on aisle 13, the front end, right?

A Yes.

On redirect, Buan clarified that she saw Van Krugel remove the cap from the bottle and take a "big drink."

The State then called Yamashita to the stand.

Yamashita testified that he was the acting Store Manager of Foodland that night and stated that Van Krugel came up to Yamashita at the customer service counter and "told me he thought we were sampling alcohol, therefore it was okay for him to consume it." Yamashita stated that Van Krugel did not pay for the rum although Van Krugel was informed there were no free samples of alcohol being given on that night. Yamashita further testified that Van Krugel became loud and boisterous and created

a scene in the store. He then requested that Van Krugel leave the store. Yamashita admitted that the bottle of rum Van Krugel had taken a drink from was not run through a price check.

The third and final witness for the State was Kealoha, the Assistant Security Director for Foodland. He testified that it was normal procedure in shoplifting cases to run the item taken through the scanner; that it "would be a procedure, however[,] depending on a case-by-case incident"; and that "[a]t times it is not possible to do it that way."

The State then rested its case, and, after the court denied Van Krugel's motion for judgment of acquittal, Van Krugel took the stand in his own defense. Van Krugel testified that he was at Foodland to purchase ice cream and potatoes.

A I went and I looked at the potatoes cause they were on sale, you know, ten pounds for two dollars, dollar-99 for ten pounds, nice looking potatoes, and I went and got the ice cream, and as I'm walking back to the counter to pay for it, I see this bottle of rum on the floor open, so I thought, I stopped, I said, God, somebody's kidding me, this is a joke, right.

Q Okay, so you found a bottle of rum on the floor?

A Yeah.

Q And then what did you do?

A I told you, I talked to God about it -- this is a joke, right, somebody peed in the bottle, they know I'm here, they're out to get me.

Q Okay, so after you talked to God, what happened?

A I looked at it, I said, well, it looks like rum, and there's this big puddle of rum on the floor and the open bottle. Who knows where it came from, it could have come from Mars, I don't know. They could have beamed it down from the enterprise, but I go, so I take a sniff, it smells like rum. I was in a bad mood at the time kind of, and it was, a friend of mine had gotten a place to stay. He was homeless (indiscernible) slightly manic episode. You see, I'm bi-polar.

Q Okay. So, but you looked at the rum, correct, and ---

A I said, you gotta be kidding, you know, and I got this thing, so I smell it, yeah, sure.

Q So you tasted it?

A Yeah, I tasted it.

Van Krugel further stated that after he tasted the rum, he saw a store employee who he referred to as "Yat," and said to him:

A . . . eh, brah, you know, free samples of booze, but I mean, you should put it up higher and put some cups. It's not sanitary, you know, the kids, somebody could slip, mop this crap up. It wasn't paid, so put it back. This ticked me off . . .

Q So ---

A . . . in my corner store.

Q So, you gave it to Yat?

A Huh?

Q So, you gave it to this guy Yat Fai?

A Yeah, I put it back like he said.

Q So, you were ordered to put the bottle back?

A He told me put 'em back. So, I announced to everybody in the store, they're giving away free samples of run [sic] over there.

Van Krugel's basis for believing free rum was being sampled was that earlier in the day chicken nuggets were being offered, without a sign, in the deli area of the store "and I had picked chicken nuggets off the top, you know the Deli with no sign saying free chicken nuggets. It doesn't say it's free. You assume it's open so it's free, and I'm sticking to that story, I'm sticking to that story."

Van Krugel did pay for the items he intended to buy and then went over to tell Yamashita the store should not leave

alcohol on the floor like that. He further testified that he was never asked to pay for the alcohol and that he got the feeling they wanted him to leave the store. Finally, Van Krugel stated that he did not like rum and if he were to open a bottle, it would be a bottle of scotch. After he testified, Van Krugel rested his case. The trial court then ruled as follows:

The Court: Alright, [Van Krugel], please stand. Okay, [Van Krugel], basically this comes down to your testimony in this case versus that of [Buan] and [Yamashita], the people from Foodland. In this case, according to [Buan], she had a clear view of you from where she was helping bag the grocery, and she saw you remove the bottle, open it, and took [sic] a sip and put it back, and then put it down. And this is more or less corroborated by you when, by admitting in your own testimony, you said this was a bottle that was already open in a puddle of rum.

[Van Krugel]: It's sitting on the floor.

The Court: Hold it. But you know, that's -- but this comes down to the credibility of the people that have testified, and I find that [Buan's] more credible than you are [Van Krugel].

[Van Krugel]: I was closer to the bottle.

The Court: So, I find you guilty as charged of shoplifting, that's it.

#### POINT ON APPEAL

Van Krugel contends that there was insufficient evidence presented for the trial court to convict him of Theft in the Fourth Degree.<sup>1</sup>

---

<sup>1</sup> Defendant-Appellant Barin Van Krugel also asserted that the trial court reversibly erred when it denied his motion for judgment of acquittal at the close of the prosecution's case. However, a defendant who presents evidence after such motion by him was denied, waives any error in the denial of his motion. State v. Halemanu, 3 Haw. App. 300, 650 P.2d 587 (1982).

## STANDARD OF REVIEW

Regarding appellate review of the sufficiency of the evidence, the Hawai'i Supreme Court has repeatedly stated that:

[E]vidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

---

State v. Quitog, 85 Hawai'i 128, 145, 938 P.2d 559, 576 (1997) (quoting State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996)) (emphasis omitted). "'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Eastman, 81 Hawai'i at 135, 913 P.2d at 61.

State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998).

It was for the trial judge as factfinder in this case to assess the credibility of the witnesses, including the defendant's, and to resolve all questions of fact. The factfinder may accept or reject any witness' testimony in whole or part. And in reviewing the sufficiency of the evidence to support the conviction the appellate court 'must take that view of the evidence with inferences reasonably and justifiably to be drawn therefrom most favorable to the Government, without weighing the evidence or determining the credibility of the witnesses.' Where the verdict of the trial court is supported by substantial evidence, its ruling will not be disturbed on appeal.

State v. Cannon, 56 Haw. 161, 166, 532 P.2d 391, 395-96 (1975)

(citations omitted).

## DISCUSSION

### 1.

Van Krugel argues that "without scanning the bottle to be sure it was Foodland property, there was unsubstantiated evidence that this sip of rum was the property of another, required for any theft." We disagree. The evidence was



sufficient to support a finding that Foodland owned the bottle of rum.

2.

Van Krugel notes that Yamashita ordered him to leave the store without telling him that before he left he must pay for the rum he drank.<sup>2</sup> He argues that "[s]ince a theft does not occur until one exits a store, and [Van Krugel] was only accommodating [Yamashita's] request, his 'theft' was 'authorized' under HRS § 708-834."

Van Krugel's conclusion that "a theft does not occur until one exits a store" is wrong. As stated in HRS § 708 830(1), a theft occurs when: (1) possession or control is exerted; (2) over the property of another; and (3) with the intent to deprive. Van Krugel cannot obtain after-the-fact authorization for a crime he had already committed. Van Krugel's theft occurred no later than when he put down the groceries he was going to purchase, walked over to aisle 13, took the bottle of rum off the shelf, opened it, drank some of its contents, placed the bottle with its remaining contents on the floor, regained possession of his groceries, returned to the checkout line, and paid for his other items but not the bottle of rum.

---

<sup>2</sup> A person who opened a bottle and drank from the bottle would owe for the full bottle, not just for the portion he or she consumed.

3.

Van Krugel contends that his belief that he was partaking in a free sample of alcohol is contrary to the requirements for a conviction of Theft in the Fourth Degree and proves his HRS § 708-834(1)(b) authorization defense. Van Krugel argues that "the State failed to present sufficient credible evidence to rebut [Van Krugel's] belief that he was authorized to drink the rum in the first place, which is again proof of an HRS § 708-834 defense." We disagree. As noted above, credibility is an issue to be determined by the trial court, and the trial court believed the State's evidence and did not believe Van Krugel's testimony.

4.

Van Krugel points to parts of Buan's testimony which he says supports his testimony that he obtained the bottle of rum from the floor rather than the shelf. On cross-examination, Buan testified, in relevant part, as follows:

Q So, you said you saw him pick up a bottle of rum, correct?

A Yes.

Q This was on the floor next to the display?

A Yes.

Q Okay, right?

A Yes.

Q That's what you say in your report, right?

A Yes.

Q That you saw him drink a bottle of rum, Hana Bay brand, on the floor next to the display on aisle 13, correct?

A Yes.

Buan further testified on cross-examination, in relevant part, as follows:

Q Okay, just answer my question, thank you. So, when you saw him drink the bottle of rum, you said it was on the floor next to the display aisle, right.

A Yes, that's where he left it.

Q That's what you wrote in your report?

A Yes, that's what he did. That's where he had left it after he took it off the shelf, and opened it.

Q But you said on here --

A It's next --

Q Wait, hold on.

THE COURT: [Buan] wait, wait until she finishes.

[DEFENSE COUNSEL]: Sorry, Judge.

Q I saw a white male with a blue/brown long-sleeve plaid shirt drink a bottle of rum, Hana Bay brand, on the floor next to the display on aisle 13, the front end, right?

A Yes.

As noted above, appellate courts give "full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact." State v. Yabusaki, 58 Haw. 404, 411, 570 P.2d 844, 848 (1977). In other words, the trier of fact has the discretion to weigh any discrepancies in a witness' testimony when deciding whether the witness is to be believed and when deciding what part(s) of the witness' testimony it finds credible.

CONCLUSION

Accordingly, we affirm the district court's August 2, 1999 judgment convicting Van Krugel of Theft in the Fourth Degree, Hawai'i Revised Statutes § 708-833(1) (1993).

DATED: Honolulu, Hawai'i, January 31, 2001.

On the briefs:

Jack Schweigert  
for Defendant-Appellant.

Chief Judge

Caroline M. Mee,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Plaintiff-Appellee.

Associate Judge

Associate Judge