NO. 22966

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
GARY KOGA, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 98-0623(1))

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

Defendant-Appellant Gary Koga (Defendant) appeals the circuit court's October 27, 1999 judgment convicting him of Theft in the Second Degree, Hawaiʻi Revised Statutes (HRS) § 708-831(1)(b) (Supp. 2000). We affirm.

RELEVANT STATUTES

HRS § 708-831 (Supp. 2000) states, in relevant part:

> **Theft in the second degree**. (1) A person commits the offense of theft in the second degree if the person commits theft:
>
> . . . .
>
> (b) Of property or services the value of which exceeds $300;
>
> . . . .
>
> (2) Theft in the second degree is a class C felony. A person convicted of committing the offense of theft in the second degree under (c) and (d) shall be sentenced in accordance with chapter 706, except that for the first offense, the court may impose a minimum sentence of a fine of at least $1,000 or two-fold damages sustained by the victim, whichever is greater.

HRS § 708-830 (1993) states, in relevant part, as follows: "A person commits theft if the person does any of the

following: . . . (2) Property obtained or control exerted through deception. A person obtains, or exerts control over, the property of another by deception with intent to deprive the other of the property."

HRS § 708-800 (1993) states, in relevant part, as follows:

> **Definitions of terms in this chapter.** In this chapter, unless a different meaning plainly is required, the following definitions apply.
>
> . . . .
>
> "Deception" occurs when a person knowingly:
>
> (1) Creates or confirms another's impression which is false and which the defendant does not believe to be true;
>
> (2) Fails to correct a false impression which the person previously has created or confirmed;
>
> . . . .
>
> "Deprive" means:
>
> (1) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstance that a significant portion of its economic value, or of the use and benefit thereof, is lost to the person[.]

HRS § 702-206 (1993) states, in relevant part, as follows:

> **Definitions of states of mind.** (1) "Intentionally."
>
> (a) A person acts intentionally with respect to his conduct when it is his conscious object to engage in such conduct.
>
> (b) A person acts intentionally with respect to attendant circumstances when he is aware of the existence of such circumstances or believes or hopes that they exist.

(c) A person acts intentionally with respect to a result of his conduct when it is his conscious object to cause such a result.

(2) "Knowingly."

(a) A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature.

(b) A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist.

(c) A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

HRS § 701-109 (1993) states, in relevant part, as follows:

> **Method of prosecution when conduct establishes an element of more than one offense.** (1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:
>
> . . . .
>
> (d) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or
>
> (e) The offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of conduct constitute separate offenses.

BACKGROUND

On Thursday, January 1, 1998, Defendant went to his mother's house on Piihana Road in Happy Valley, Wailuku, Maui. To get there, he drove the 1997 Nissan Stanza (Nissan) owned by his girl friend, Nohea Puaa (Nohea). The Nissan was known to overheat and stall. Upon arriving at his mother's house,

Defendant was informed by his sister that his two-year-old nephew had been struck by a truck earlier in the afternoon and had been taken to the hospital.

Seeking to join his family at the hospital, Defendant drove the Nissan towards Market Street. Just past the Wakamatsu Fish Market, the Nissan overheated and "died out." Defendant saw "this one guy that I knew pass by" him on a moped, and "tried to wave him down." The person on the moped was Jason Inouye (Jason). Although Jason saw Defendant waving, he mistakenly thought Defendant's actions were directed towards another person and continued on his way to the Uptown Chevron Service station (Uptown Chevron) to buy cigarettes. Defendant returned to the Nissan, started it, and drove off to find a service station to put water in the car's radiator.

As Defendant drove, he again spotted Jason and his moped, this time, at the Uptown Chevron. Once again, the Nissan stalled. Defendant parked the Nissan in a public parking area in front of Bank of Hawaii on Church Street.

Defendant approached Jason and explained that the Nissan was broken. He then requested the use of Jason's moped, telling Jason that he needed to go to the hospital and would be back "real fast." Jason complied. At trial, Jason testified that he allowed Defendant to "borrow" the moped, in part, because

Jason recognized him as having a mutual acquaintance and, in part, because Defendant was leaving the Nissan. Jason testified that while Defendant did not threaten him, he was "a little" intimidated because Defendant was "bigger than" him, looked stressed out, and Jason "didn't want no trouble." Defendant then proceeded to the hospital on Jason's moped. Jason stayed near the Nissan.

Upon arriving at the hospital, Defendant learned that his nephew had not been seriously injured. Defendant informed his family members that the Nissan was broken and that he had arrived at the hospital on the "borrowed" moped. Before leaving the hospital, Defendant asked his sister, Molly Koga (Molly), to either check on, or pick up, the Nissan. At trial, neither Defendant nor Molly recalled exactly what was said. After staying at the hospital for approximately 15 to 20 minutes, Defendant left in search of a truck "to take [his] car home[.]"

Upon arriving at the Church Street location, Molly found the Nissan and Jason nearby. Molly and Jason were familiar with each other, having attended grade school and high school together. There is a disagreement as to whether Molly and Jason exchanged conversation at that point. Jason testified at trial that he inquired as to the location of Defendant and the moped, to which Molly responded that Defendant was following her and

would be along shortly. Molly, however, testified that while she did see Jason, she did not recall whether or not they had spoken. Molly, after substantial difficulty, started the Nissan and drove it to her mother's house on Piihana Road.

After some time, Jason telephoned his mother and reported that "somebody stole" the moped. He explained the sequence of events that led to his phone call. Jason's mother suggested that he call the police, and Jason ultimately followed her advice.

Police Officer Steven Orikasa (Officer Orikasa) was on duty on January 1, 1998. At about 6:00 p.m., he was assigned to respond to the Uptown Chevron in Wailuku. When he arrived at the service station at 6:30 p.m., he found Jason there alone. Officer Orikasa testified that Jason said he recognized the person who took the moped as the person who installed his car stereo system. He testified further that Jason did not tell him that he was threatened or intimidated by the person, nor did Jason tell him that he permitted the person to borrow the moped. However, Officer Orikasa also testified that Jason told him that "he didn't have much of a chance to say anything when [Defendant] came up."

Based on his interview with Jason, Officer Orikasa completed a police report for theft in the second degree. He

then "went to make checks for" Defendant. First, Officer Orikasa went to Piihana Road in Happy Valley. He met with Molly and explained to her that he was looking for Defendant in relation to a case of a stolen moped. Officer Orikasa told Molly that Defendant was the person who took the moped and that the police needed to speak with Defendant and "get the moped back." Molly told Officer Orikasa that she did not know where Defendant was.

Officer Orikasa next went to see Nohea at an address on Hookahi Street. Once there, he told Nohea that he needed to speak with Defendant about a stolen moped. He did not find Defendant there, so he compiled a police report. To his knowledge, the moped was never returned.

Defendant testified that while he was on his way to his sister's place in Paukū-kalo, the moped ran out of gas. Defendant pushed the moped to the home a family friend, Mrs. Balberdi. Leaving the moped with "Mrs. Balberdi and the two [adult] nephews or the two grandsons" after asking them if he could leave it there for a little while to look for a truck, Defendant took the moped keys and walked to Molly's place. No one was home, so Defendant waited for his "brother-in-law" (Molly's boyfriend). His brother-in-law returned and took Defendant to Hawaiian Homes to see if anyone else was home with a truck. It was dark by the time they arrived at Hawaiian Homes.

After waiting at Hawaiian Homes for a while, Defendant decided to return home. Before doing so, he telephoned ahead and was informed that the police were there making an accident report regarding the nephew's accident. Nohea then came looking for him to tell him about the visit by Officer Orikasa regarding the moped. Defendant had previously been informed that the police had a bench warrant for his arrest in an unrelated matter. In Defendant's words, "the timing was off because I had the moped, and I didn't have a truck. But I had a bench warrant[.] So I didn't want to do anything in the evening."

The next morning, Defendant returned to the Balberdi home to retrieve the moped. Although Defendant did not know Jason's name, address, or phone number, he testified that he intended to contact him once the moped was retrieved. However, upon arrival at the Balberdi home, he was informed that the moped was not there. The Balberdis insisted that Defendant himself had already picked up the moped the night before and they were ignorant as to its whereabouts. Defendant made no effort to contact Jason as he feared being turned in to the police. He did not offer to pay restitution as he believed such an act would implicate his guilt. He did not contact the police regarding the theft of the moped as he knew he had an outstanding bench warrant issued against him. It was Defendant's practice, in such

situations, to avoid contact with the police until such time as he could procure enough money to pay for the contempt that was the basis for the bench warrant.

On October 23, 1998, the Grand Jury indicted Defendant on charges of Theft in the Second Degree, HRS § 708-831(1)(b), and Unauthorized Control of a Propelled Vehicle, HRS § 708-836. Trial commenced on August 30, 1999.

In closing argument, the prosecutor told the jury, in relevant part, as follows:

> Think back when you were a little kid and you were going to school, and some kid brings to school their new favorite toy. . . .
>
> I remember back in my days it was like the kikaida (phonetic) action figure. Okay? And some poor kid brings their toy, and another savier, tougher kid, spots that toy. They decide they want that toy. Hey, I can borrow 'em real quick, real quick? I gonna bring 'em right back. I gonna bring 'em right back. I just gotta look at 'em. I just gotta look at 'em, and walks away, and the poor kid that brought his toy is, oh, okay, yeah, sure, no problem, because he's intimidated, you know. He -- doesn't want any problems.
>
> And then the bully who borrowed the toy doesn't bring it back, and then there is a problem. The parents sometimes are called, teachers are brought in; right? Okay. Come on, you gotta give him back the toy. Okay?
>
> In those kind of situations it's somewhat easier to get the thing back, because you know where the bully is. He sits third row, second -- right next to Jane; right? He's right there. Didn't you take the kikaida doll? Oh, yeah, yeah. I took 'em. Okay. Could you please give 'em back? O, yeah, yeah, yeah. Okay. Easy to find.
>
> This is a grown-up version.

The jury found Defendant guilty as charged on both counts. On September 9, 1999, Defendant moved pursuant to HRS §§ 701-109(1)(d) or (e) (1993) (where the same conduct may

establish an element of more than one offense) for an order dismissing Count One or Count Two. On October 7, 1999, the trial court ordered the dismissal of Count Two (Unauthorized Control of a Propelled Vehicle).

The trial court sentenced Defendant to an indeterminate term of imprisonment for five years, with a mandatory minimum term of imprisonment of one year and eight months, to be served concurrently with a sentence in another matter. The trial court also ordered Defendant to pay restitution to Jason in the amount of $1,869.85 and to pay a Criminal Injuries Compensation fee of $100.00.

POINTS ON APPEAL

In his opening brief, Defendant asserts the following two points on appeal:

1. There was insufficient evidence to sustain Defendant's conviction of the offense of Theft in the Second Degree. Specifically, the evidence is not sufficient to establish the elements of Defendant's "deception" or of Defendant's "intent" to deprive Jason of the moped.

2. The prosecutor committed prosecutorial misconduct in his closing arguments by depicting Defendant as a bully.

In his reply brief, Defendant asserts the following additional third point on appeal: Plain error occurred when the

trial court failed to instruct the jury as to the definition of "knowingly" in relation to the jury's determination of whether Defendant obtained or exerted control over the moped by "deception."

STANDARDS OF REVIEW

A.

Sufficiency of the Evidence

Regarding appellate review for insufficient evidence, the Hawai‘i Supreme Court has repeatedly stated:

> [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) (citations omitted).

B.

Prosecutorial Misconduct

For remarks by the prosecutor to be misconduct, "the remarks must be improper[.]" United States v. Gonzalez, 122 F.3d 1383, 1389 (11th Cir. 1997).

The question whether a prosecutor's misconduct requires

a new trial is "reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of 'whether there is a reasonable possibility that the error complained of might have contributed to the conviction.'" State v. Rogan, 91 Hawai‘i 405, 412, 984 P.2d 1231, 1238 (1999) (quoting State v. Balisbisana, 83 Hawai‘i 109, 114, 924 P.2d 1215, 1220 (1996) (quoting State v. Holbron, 80 Hawai‘i 27, 32, 904 P.2d 912, 917, *reconsideration denied*, 80 Hawai‘i 187, 907 P.2d 773 (1995)) (citations and internal quotation marks omitted). "Factors to consider are: (1) the nature of the conduct; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant." Id. (quoting State v. Samuel, 74 Haw. 141, 148, 838 P.2d 1374, 1378 (1992) (citation omitted).

C.

Jury Instructions

"When jury instructions or the omission thereof are at issue on appeal, 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. Ortiz, 91 Hawai‘i 181, 190, 981 P.2d 1127, 1136 (1999) (quoting State v. Kinnane, 79 Hawai‘i 46, 49, 897 P.2d 973, 976 (1995) (quoting State v. Kelekolio, 74 Haw. 479, 514-15, 849 P.2d 58, 74 (1993) (citations omitted)). *See also* State v. Hoey, 77 Hawai‘i 17, 38, 881 P.2d 504, 525 (1994). "Erroneous 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." State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998) (citing State v. Robinson, 82 Hawai'i 304, 922 P.2d 358 (1996)).

> [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 the conviction.

State v. Tabigne, 88 Hawai'i 296, 302, 966 P.2d 608, 614 (1998) (citations omitted).

DISCUSSION

A.

1. Insufficient Evidence

Defendant argues that the evidence presented at trial was insufficient to convict him of Theft in the Second Degree. As noted in HRS § 708-830 (1993), there are various ways to commit theft. Defendant was charged with the theft described in HRS § 708-830(2) which is "by deception with intent to deprive the other of the property." The specific question before us is whether the evidence was sufficient to establish Defendant's "deception with intent to deprive."

2. Deception

Taking "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[,]" State v. Cannon, 56 Haw. 161, 166, 532 P.2d 391, 396 (1975), there is ample evidence that Defendant acted "by deception" when he told Jason that he would be back real fast.

3. Intent to Deprive

Given the difficulty of proving the requisite state of mind by direct evidence in criminal cases, "[w]e have consistently held that . . . proof by circumstantial evidence and reasonable inferences arising from circumstances surrounding the [defendant's conduct] is sufficient . . . . Thus, the mind of an alleged offender may be read from his acts, conduct and inferences fairly drawn from all the circumstances." State v. Sadino, 64 Haw. 427, 430, 642 P.2d 534, 536-37 (1982). The evidence supports a finding that while Defendant led Jason to believe that he borrowed the moped for a specific purpose and limited period, he actually intended to keep the moped for additional purposes and for as long as he deemed necessary. Therefore, there was sufficient evidence to convict Defendant of the crime of Theft in the Second Degree.

B.

Prosecutorial Misconduct

Defendant argues that prosecutorial misconduct occurred during closing argument. Specifically, was it misconduct when the prosecutor characterized Defendant as a "grown-up version of a kiddie-school bully[?]" The answer is no.

A prosecutor is allowed, during closing argument, to state, discuss, and comment on the evidence as well as to draw all reasonable inferences from the evidence. State v. Clark, 83 Hawai‘i 289, 304, 926 P.2d 194, 209 (1996). Further, during closing argument, the prosecutor as well as defense counsel, has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference. Clark at 304-305, 926 P.2d at 209-210.

Here, Jason indicated that he relinquished control of the moped because Defendant was "bigger than" him, Defendant looked "stressed out," and Jason "didn't want no trouble." While the prosecutor did refer to Defendant as a "Bully," such was a reasonable inference drawn from Jason's testimony. Accordingly, the prosecutor's conduct was reasonably inferred from the evidence.

C.

Jury Instruction

Defendant argues that the circuit court committed plain error by failing to define the word "knowingly" to the jury. We disagree. There is no need for defining a word that is obvious. United States v. Chambers, 918 F.2d 1455, 1460 (9th Cir. 1990). "Knowingly" "is a common word which an average juror can understand and which the average juror could have applied to the facts of this case without difficulty." Id. Therefore, although we would have recommended that the jury be informed of the

statutory definition of the word "knowingly," we conclude that the court did not err when it did not do so in this case.

CONCLUSION

Accordingly, we affirm the October 27, 1999 judgment convicting Defendant-Appellant Gary Koga of Theft in the Second Degree, HRS § 708-831(1)(b) (Supp. 2000).

DATED: Honolulu, Hawai'i, March 19, 2001.

On the briefs:

Antonio V. Ramil
for Defendant-Appellant.

Chief Judge

Richard K. Minatoya,
Deputy Prosecuting Attorney,
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Associate Judge

Associate Judge