NO. 23383

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI I

STATE OF HAWAII, Plaintiff-Appellee, v.
STEPHEN FORMAN, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-1865)

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

Defendant-Appellant Stephen Forman (Forman) appeals the April 24, 2000 amended judgment[1] of the circuit court of the first circuit, the Honorable Reynaldo D. Graulty, judge presiding, that convicted him of theft in the second degree, in violation of Hawaii Revised Statutes (HRS) § 708-831(1)(b) (1993 & Supp. 2000).[2] Theft in the second degree is a class C felony

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[1/] On April 19, 2000, Forman appealed the judgment filed on April 13, 2000. However, on April 24, 2000, the circuit court filed an amended judgment that appears to be identical to the April 13, 2000 judgment except for the attachment of certificates of presentence detention. We deem Forman s appeal to be from the April 24, 2000 amended judgment. Cf. Hawai i Rules of Appellate Procedure Rule 4(b)(4) (2000) (A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be deemed to have been filed on the date such judgment or order is entered.).

[2/] Hawaii Revised Statutes (HRS) § 708-831(1)(b) (1993 & Supp. 2000) provides that [a] person commits the offense of theft in the second degree if the person commits theft . . . . [o]f property or services the value of which exceeds $300[.]

HRS § 708-830(1) (1993) provides, in relevant part, that [a] person commits theft if the person . . . . obtains, or exerts [unauthorized]

(continued...)

carrying an indeterminate term of imprisonment of five years. HRS § 708-831(2); HRS § 706-660 (1993). The court sentenced Forman to an extended term of imprisonment of ten years with a mandatory minimum term of imprisonment of five years,[3] the prison term to run concurrently with any other sentence being served.

On appeal, Forman contends that the court erred in (1) denying his motion for judgment of acquittal, and (2) imposing an extended term of imprisonment.

For the following reasons, we affirm.

I. Background.

On March 25, 1999, Nancy McDonald (McDonald) lived alone in an apartment on the seventh floor of a high-rise building. She had previously ordered a new entertainment center and planned to donate her old center to the Salvation Army. She had arranged for S&S Delivery Service (S&S) to deliver and install the new center and for the Salvation Army to remove the old center.

S&S arrived first. To make room for the new center, the three S&S men moved the old center into the floor lobby,

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[2/](...continued)
control over, the property of another with intent to deprive the other of the property.

[3/] Forman was sentenced to the mandatory minimum term of imprisonment as a repeat offender. HRS § 706-606.5(1)(c) (1993 & Supp. 2000).

outside of her apartment. McDonald stayed with the three men the entire time. She testified that none of them used her bathroom, that none of them asked to use her bathroom, and that no one else was present at the time.

About ten to twenty minutes after the arrival of the S&S men, a man, saying, I m here with the Salvation Army[,] appeared at her front door. The man, later identified as Forman, walked in and asked to use the bathroom. McDonald glanced at the man and led him to the bathroom. After she watched him enter the bathroom, McDonald returned to the living room to watch the S&S men finish the installation.

McDonald s bathroom has a toilet next to a sink. The sink is sunk in a counter top. Under the counter top are located a cupboard and four drawers.

About an hour-and-a-half before the S&S men arrived, McDonald had taken her jewelry, which she normally stores on her living room table beside a couch, and transferred it to a box that she placed in the top drawer in her bathroom. McDonald did so because I don t have people in my apartment very often and it just seemed to make sense to put my things that I valued away. The two significant pieces of jewelry she transferred were a 3-carat tanzanite stone set in an 18-karat gold ring, worth $5,300; and a green tourmaline ring with six diamonds set in it,

worth $700.[4] There is only one working bathroom in McDonald s apartment.[5]

While Forman was still in the bathroom, Benedict Remo (Remo), the second Salvation Army worker, arrived. After Remo took two steps into the apartment, McDonald informed him that his co-worker was using the bathroom. Remo then turned around and waited in the building hallway - outside of McDonald s apartment.

After about ten to fifteen minutes, or an abnormally long amount of time in the bathroom[,] Forman emerged from the bathroom.

The men then moved the old center from outside of McDonald s apartment to the elevator so that they could take it away. McDonald soon after checked her bathroom drawer for the rings and could not find them. She then went to the elevator area to get a good look at [Forman] to make sure I could identify him. Further searches of her bathroom did not turn up the rings.

On January 31, 2000, a jury found Forman guilty as charged of theft in the second degree. The State moved for an extended term of imprisonment and for a mandatory minimum term of

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4/ Both parties stipulated that the rings are each worth over $300.

5/ McDonald testified that she actually has two bathrooms in her apartment. However, the second bathroom was not working at the time of the incident, was used for storage, and was entirely blocked off from access and use. All references to a bathroom in this opinion refer to the working one.

imprisonment, and on April 13, 2000, the court granted the motions and sentenced Forman to an extended term of imprisonment of ten years with a mandatory minimum term of imprisonment of five years.

II. Issues Presented.

Forman now presents two points of error on appeal. He contends that the circuit court erred in (1) denying his motion for judgment of acquittal, and (2) imposing an extended term of imprisonment. We find no merit in either contention and thus affirm the judgment of the court.

III. Discussion.

A. Motion For Judgment of Acquittal.

Forman argues that the prosecution lacked evidence of sufficient quality and probative value to support a conclusion that [Forman] was the person who stole [McDonald s] rings. In support of this contention, Forman points out that McDonald did not call the police until a day after the incident, misidentified the color of the perpetrator s shirt, and did not clearly view the perpetrator s face when he walked into the bathroom.

Although these facts may have put the credibility of the complaining witness at issue,

> [w]hen reviewing a motion for judgment of acquittal, we employ the same standard that a trial court applies to such a motion, namely, whether, upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier

> of fact, the evidence is sufficient to support a prima facie case so that a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Sufficient evidence to support a prima facie case requires substantial evidence as to every material element of the offense charged. 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. Under such a review, we give full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact.

State v. Jhun, 83 Hawai i 472, 481, 927 P.2d 1355, 1364 (1996) (citations and internal quotation marks omitted). Furthermore,

[w]hen reviewing a jury trial, an appellate court will not pass upon the jury s decisions with respect to the credibility of witnesses and the weight of the evidence, because this is the province of the jury as the trier of fact. Id. at 483, 927 P.2d at 1366 (citation omitted). In addition, [i]t matters not if a conviction under the evidence as so considered might be deemed to be against the weight of the evidence so long as there is substantial evidence tending to support the requisite findings for the conviction. State v. Matias, 74 Haw. 197, 207, 840 P.2d 374, 379 (1992) (citation and internal quotation marks omitted).

Consequently, given that the jury s verdict showed that it believed the testimony of McDonald, we do not disturb its verdict on this point. In this respect, we observe that other witnesses corroborated McDonald s testimony.

Forman also argues that the evidence against him was insufficient because merely circumstantial. On this point, we

follow the Hawai i Supreme Court in State v. Bush, 58 Haw. 340, 343, 569 P.2d 349, 351 (1977) (citation and internal block quote format omitted):

> Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

Viewing the evidence in the light most favorable to the State, it appears that McDonald had recently placed her jewelry in a bathroom drawer; and that thereafter only one other person, Forman, had access to that drawer for a significant period of time; after which the jewelry disappeared. Upon this circumstantial evidence, it was well within the capacity of a person of reasonable caution to make the justifiable inference that Forman stole the jewelry.

B. Extended Term of Imprisonment.

Formans s second contention is that the circuit court erred in imposing an extended term of imprisonment of ten years. We review a trial court s imposition of an extended term of imprisonment for abuse of discretion. State v. Melear, 63 Haw. 488, 500, 630 P.2d 619, 628 (1981). 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. Furutani,

76 Hawai i 172, 179, 873 P.2d 51, 58 (1994) (citations and internal quotation marks omitted).

HRS § 706-662 (1993 & Supp. 2000) provides, in pertinent part:

> **Criteria for extended terms of imprisonment.** A convicted defendant may be subject to an extended term of imprisonment under section 706-661, if the convicted defendant satisfies one or more of the following criteria:
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> (1) The defendant is a persistent offender whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has previously been convicted of two felonies committed at different times when the defendant was eighteen years of age or older.
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> . . . .
>
> (4) The defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public. The court shall not make such a finding unless:
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> (a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony[.]

HRS § 706-661(3) (1993) provides:

> **Sentence of imprisonment for felony; extended terms.** In the cases designated in section 706-662, a person who has been convicted of a felony may be sentenced to an extended indeterminate term of imprisonment. When ordering such a sentence, the

> court shall impose the maximum length of imprisonment which shall be as follows:
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> . . . .
>
> (3) For a class C felony - ten years.

Application of these statutes requires a two-step process:

> The first step involves a finding by the court that the defendant is within the class of offenders to which the particular subsection applies. If the court so finds, it must then decide whether the defendant's commitment for an extended term is necessary for the public's protection (where the extended term is sought under subsections (1), (2), (3), and (5)) or that his criminality is so extensive that an extended term is warranted (where the extended term is sought under subsection (4)).[6]

State v. Morishige, 65 Haw. 354, 367, 652 P.2d 1119, 1128-29 (1982) (citation and internal quotation marks omitted; footnote added).

Forman did not dispute below and does not dispute on appeal the circuit court s first-step finding that he was within the class[es] of offenders to which the particular subsection[s] appl[y]. Id. The court found that Forman is a persistent offender under HRS § 706-662(1), as well as a multiple offender under HRS § 706-662(4)(a). In his opening brief, Forman states that he does not contest that he had been previously convicted of more than two felonies committed at

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[6/] The extended term sentencing issue is State v. Morishige, 65 Haw. 354, 652 P.2d 1119 (1982), was decided under HRS § 706-662 (1978). At the time, subsection (4) provided for extended term sentencing if [t]he defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted. Id. at 356 n.1, 652 P.2d at 1122 n.1. The same subsection now provides for extended term sentencing if [t]he defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public. HRS § 706-662(4) (1993 & Supp. 2000).

different times when he was 18 years old or older and was, at the time of the sentencing hearing, under sentence of imprisonment for a felony.

The disagreement rests in whether an extended term of imprisonment was necessary for protection of the public[,] HRS § 706-662(1), or whether Forman s criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public. HRS § 706-662(4).

Forman contends that, although he does have numerous previous convictions, those crimes do not establish that he poses a serious threat to the community or that giving him an extended sentence is necessary for the protection of the public. We disagree.

Forman s six previous felony convictions were as follows: On December 2, 1998, he was convicted of three counts of promoting a dangerous drug in the third degree, a class C felony, the offenses occurring on April 17, 1998 (Criminal No. 98-1019), April 28, 1998 (Criminal No. 98-1847), and August 15, 1998 (Criminal No. 98-2036). On December 2, 1998, in Criminal No. 98-1847, Forman was also convicted of unlawful use of drug paraphernalia, a class C felony. On April 28, 1999, he pled guilty to a theft in the second degree charge that occurred in September 1998 (Criminal No. 99-0182). On September 16, 1999, he was convicted of burglary in the first degree, a class B felony

(Criminal No. 99-0936). Forman had also been arrested and/or convicted for numerous petty misdemeanor offenses.

In addition, the following findings of the circuit court are amply supported by the record:

> 9. [Forman] was on probation . . . when he committed the instant offense.
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> . . . .
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> 11. [Forman s] criminality has continued despite his prior contacts with the criminal justice system.
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> 12. [Forman] has failed to benefit from the criminal justice system.
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> 13. [Forman] has demonstrated a total disregard for the rights of others and a poor attitude toward the law.
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> 14. [Forman] has demstrated [sic] a pattern of criminality which indicates that he is likely to be a recidivist in that he cannot conform his behavior to the requirements of the law.

By comparison, the Hawai i Supreme Court in Melear, supra, held that the trial court did not abuse its discretion in levying a twenty-year extended term of imprisonment upon a thirty-five-year-old defendant who had been previously found guilty on separate occasions of burglary in the first degree and burglary in the second degree. Melear, 63 Haw. at 500, 630 P.2d at 628. In another case, the supreme court observed that, although burglary can be a nonviolent crime, the defendant posed a treat to society because [t]he law has always been jealously solicitous of a person s place of habitation, and the sanctity of one s home is still one of the most cherished and strictly

protected rights of a citizen. State v. Freitas, 61 Haw. 262, 270, 602 P.2d 914, 921 (1979).

In this case, although McDonald allowed Forman to enter her home, he took her property without her permission, and thus violated the sanctity of her dwelling. Regardless of whether he committed the instant crime in a violent manner, that conduct and his extensive criminal history, including a burglary and five other previous felony convictions, makes him a threat to the public. We conclude that the circuit court did not abuse its discretion in sentencing Forman to the extended term of imprisonment.

We are is not alone in so concluding. The Supreme Court of Alaska affirmed an extended sentence imposed upon a twenty-four-year-old man for a burglary conviction, upon the trial court s finding that he was a dangerous criminal. Stobaugh v. State, 614 P.2d 767, 773-74 (Alaska 1980). In affirming, the Alaska court cited the defendant s probationary status at the time the incident occurred, his three previous misdemeanor convictions (contributing to the delinquency of a minor, forgery and malicious destruction of property), his prior felony burglary conviction, his heroin addiction since age sixteen, his failed attempts at drug rehabilitation, his sparse employment record, and his antisocial personality disorder. Id. Nothing in Stobaugh suggests that the defendant committed any violent crime against a person. The parallels with Forman s

profile are uncanny. In addition to Forman s similar - if not more extensive - criminal record, Forman is also twenty-four years old, was on probation when he committed the instant offense, has habitually used a pharmacopeia of illicit drugs since the age of twelve despite attempts at treatment, and has a history of only casual employment.

IV. Conclusion.

Based upon the foregoing, we affirm the April 24, 2000 judgment of the circuit court.

DATED: Honolulu, Hawaii, August 21, 2001.

On the briefs:

Michael G. M. Ostendorp,
for defendant-appellant.

Acting Chief Judge

Mangmang Qiu Brown,
Deputy Prosecuting Attorney,
for plaintiff-appellee.

Associate Judge

Associate Judge