

NO. 23619

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
CALVIN ELIZARES, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NOS. 98-0463(2) and 99-0076(2))

MEMORANDUM OPINION

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

I. BACKGROUND

On August 10, 1998, Defendant-Appellant Calvin Elizares (Elizares), a named co-defendant, and two unidentified co-defendants were charged by a grand jury under Cr. 98-0463(2) with the following:

Count One: Terroristic Threatening in the First Degree in violation of Hawaii Revised Statutes (HRS) §§ 707-716(1)(d) (1993);

Count Two: Felon in Possession of a Firearm in violation of HRS § 134-7(b) (Supp. 2001);

Count Three: Kidnapping (of Daniel Legsay) in violation of HRS § 707-720(1)(d) and/or (e) (1993);

Count Four: Kidnapping (of Maryann Basso) in violation of HRS § 707-720(1)(d) and/or (e) (1993);

Count Five: Terroristic Threatening in the First Degree (of Legsay) by use of a firearm in violation of HRS § 707-716(1)(d) (1993);

Count Six: Terroristic Threatening in the First Degree (of Basso) by use of a firearm in violation of HRS § 707-716(1)(d) (1993);

Count Seven: Robbery in the First Degree (of Legsay) in violation of HRS § 708-840(1)(b)(ii) (Supp. 2001);

Count Eight: Robbery in the First Degree (of Basso) in violation of HRS § 708-840(1)(b)(ii) (Supp. 2001);

Count Nine: Extortion in the First Degree in violation of HRS § 707-765(1)(b) (1993);

Count Ten: Carrying or Use of Firearm in the Commission of a Separate Felony in violation of HRS § 134-6(a) (Supp. 1998);

Count Eleven: Felon in Possession of a Firearm in violation of HRS § 134-7(b) (Supp. 2001); and

Count Twelve: Criminal Conspiracy to commit murder in the first degree in violation of HRS § 705-520 (1993).

Following the identification of the two unnamed defendants, these two defendants and Elizares were charged on February 19, 1999 under Cr. 99-0076(2) with the following:

Count One: Attempted Murder in the First Degree (of Legsay and Basso) in violation of HRS §§ 705-500 (1993) and 707-701(a) (Supp. 2000);

Count Two: Kidnapping (of Legsay) in violation of HRS § 707-720(1)(d) and/or (e) (1993);

Count Three: Kidnapping (of Basso) in violation of HRS § 707-720(1)(d) and/or (e) (1993);

Count Four: Terroristic Threatening in the First Degree (of Legsay) by use of a firearm in violation of HRS § 707-716(1)(d) (1993);

Count Five: Terroristic Threatening in the First Degree (of Basso) by use of a firearm in violation of HRS § 707-716(1)(d) (1993);

Count Six: Robbery in the First Degree (of Legsay) in violation of HRS § 708-840(1)(b)(ii) (Supp. 2001);

Count Seven: Robbery in the First Degree (of Basso) in violation of HRS § 708-840(1)(b)(ii) (Supp. 2001);

Count Eight: Carrying or Use of Firearm in the Commission of a Separate Felony in violation of HRS § 134-6(a) (Supp. 1998); and

Count Nine: Criminal Conspiracy to commit murder in the first degree in violation of HRS §§ 705-520 (1993) and 707-701(a) (Supp. 2000).

On March 1, 1999, Counts Three through Eight, Ten, and Twelve in Cr. No. 98-0463(2) were dismissed without prejudice because these counts were duplicated in the indictment filed in Cr. No. 99-0076(2). On July 15, 1999, Elizares' two cases were consolidated for trial.

A jury trial commenced on April 3, 2000 in the Circuit Court of the Second Circuit¹ (the circuit court). On April 19, 2000, Elizares and the State stipulated that (1) prior to July 26, 1998, Elizares had been convicted of committing a felony, and (2) prior to and on or about July 26, 1998 through and including on or about July 31, 1998, Elizares was aware that as a convicted felon he was prohibited from owning, possessing, or controlling any type of firearm.

On April 24, the jury returned a guilty verdict on Counts One (Terroristic Threatening), Two and Eleven (Felon in Possession), and Nine (Extortion) under Cr. No. 98-0463(2); and Counts One (Attempted Murder in the First Degree), Two and Three (Kidnapping), Four and Five (Terroristic Threatening), and Eight

¹The Honorable Shackley F. Raffetto presided.

(Carrying or Use of Firearm) under Cr. No. 99-0076(2). The Judgments were entered on June 28, 2000.

Elizares orally moved for a mistrial on April 27, 2000, following the circuit court's disclosure that a juror (subject juror) had received information regarding Elizares' prior murder conviction and had disclosed this information to another juror following the reading of the verdict.

Following a notice of appeal filed July 26, 2000, Elizares argues that the circuit court erred in denying his motion for a mistrial or a new trial. We disagree with Elizares' contentions and affirm the June 28, 2000 Judgments of the circuit court.

II. STANDARD OF REVIEW

Motion for a Mistrial

"The denial of a motion for mistrial is within the sound discretion of the trial court and will not be upset absent a clear abuse of discretion." State v. Lagat, 97 Hawai'i 492, 495, 40 P.3d 894, 897 (2002). An abuse of discretion occurs when a trial court "clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." Id. (internal quotation marks omitted).

III. DISCUSSION

Elizares contends that juror misconduct deprived him of a fair trial guaranteed by both the sixth amendment of the United

States Constitution² and article 1, section 14, of the Hawai'i Constitution³ and due process guarantees provided under both federal and state constitutions.

A fair trial by an impartial jury is guaranteed to the criminally accused by both the sixth amendment to the United States Constitution and article I, § 14 of the Hawai'i Constitution, as well as by principles of due process under both the state and federal constitutions. Because the right to an impartial jury in a criminal trial is so fundamental to our entire judicial system, it therefore follows that a criminal defendant is entitled to twelve impartial jurors. Thus, the trial court must grant a motion for new trial if any member (or members) of the jury was not impartial; failure to do so necessarily constitutes an abuse of discretion.

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

²The sixth amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].

³Article I, § 14 of the Hawai'i Constitution provides:

Section 14. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, or of such other district to which the prosecution may be removed with the consent of the accused; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against the accused; to have compulsory process for obtaining witnesses in the accused's favor; and to have the assistance of counsel for the accused's defense. Juries, where the crime charged is serious, shall consist of twelve persons. The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment.

In Furutani the Hawai'i Supreme Court set forth the analytical framework used in determining whether a defendant was denied a right to fair trial by an impartial jury.

[T]he initial step for the trial court to take . . . is to determine whether the nature of the alleged deprivation rises to the level of being substantially prejudicial. If it does not rise to such a level, the trial court is under no duty to interrogate the jury And whether it does rise to the level of substantial prejudice . . . is ordinarily a question committed to the trial court's discretion[.]

Id. at 180, 873 P.2d at 59 (brackets omitted; ellipses in original) (quoting State v. Keliioholokai, 58 Haw. 356, 359, 569 P.2d 891, 895 (1977)).

Where the trial court does determine that such alleged deprivation is of a nature which could substantially prejudice the defendant's right to a fair trial, a rebuttable presumption of prejudice is raised. The trial judge is then duty bound to further investigate the totality of circumstances surrounding the alleged deprivation to determine its impact on jury impartiality. The standard to be applied in overcoming such a presumption is that the alleged deprivation must be proved harmless beyond a reasonable doubt.

Furutani, 76 Hawai'i at 181, 873 P.2d at 60 (brackets omitted) (quoting State v. Williamson, 72 Haw. 97, 102, 807 P.2d 593, 596 (1991)).

Elizares contends that the subject juror's knowledge of a prior murder conviction and that juror's subsequent participation in jury deliberations tainted the entire jury. Once Elizares learned the subject juror had overheard a conversation in which Elizares was identified as a convicted murderer, he moved for a new trial. The circuit court then appropriately held an evidentiary hearing on May 10, 2000, where

the circuit court questioned the subject juror and two additional jurors (including the jury foreperson). The circuit court questioned the subject juror as follows:

The Court: [Subject juror], the reason why I wanted to have you come, do you remember at the end of the Elizares' trial the other day in which you were a juror?

The Witness: Yeah.

The Court: Somebody mentioned that you, and I may not be correct, that sometime during the trial or the deliberations you had learned something about the defendant having been previously convicted of murder. Is that true?

The Witness: Yeah, that's true.

The Court: Can you just tell me what it is you learned and when you learned it?

The Witness: Well, I was at work and we were doing lunchtime and there was two guys reading the newspaper. And then I guess they knew Mr. Elizares' younger brothers or something. And they said, "Hey, Calvin is in the newspaper."

So I doing my own business. And then one of the guys said, "Oh, yeah, I go to school with the younger brothers."

And they just talking among themselves. And they said, "Why, he was convicted for something before."

And the other guy said, I not sure, you know, the kind. And he said he was in murder.

So I don't know. So it was all speculation.

The Court: This was a conversation you were a part of or you were just overhearing?

The Witness: Yeah, I was overhearing. I was putting my food in the microwave.

The Court: Okay.

Now, did you -- did they address any of this to you?

The Witness: No. They then asked me, "I heard you still on jury duty on his trial."

And I said, you know, "I can't talk about the case."

They laughed.

The Court: And they just went on talking?

The Witness: Yeah.

The Court: Okay. Now, was that during the trial or during the jury deliberations?

The Witness: It was during the trial.

The Court: Okay. And did you tell that to any juror at any time?

The Witness: No.

The Court: Okay. But they knew it when I was standing there.

The Witness: Yeah, because when you came in and you said -- that you told us that he was convicted for murder, if you remember, Jennifer said, "Yeah, you know, and we just found out that brah knew something and he never told us the same thing." Kind of irritated me.

The Court: Yeah, I remember.

Okay. Now, do you remember I told you during the trial, instructed the jury that the decision in the case had to be made strictly based on the evidence that you heard in the courtroom and nothing that you might learn about the case outside of the courtroom?

The Witness: Yeah.

The Court: Did you follow that?

The Witness: That's right.

The Court: Did you take into consideration any of the information that you had heard about his prior conduct --

The Witness: No.

The Court: -- when you were making your decision and casting your vote?

The Witness: No.

The Court: So you are telling me you disregarded all of that?

The Witness: That's right.

The Court: Okay.

The circuit court questioned the jury foreperson as follows:

The Court: Good morning. Thank you for coming in. I know you have to go to something else.

The reason I want to talk to you is to follow-up on the information about how [subject juror] may or may not have said something about any knowledge about prior conviction of the defendant during the trial.

You remember at the end of the case in the jury room when I was in there talking to you folks that subject came up?

The Witness: Right.

The Court: First off, what is it that he told the jurors? Do you remember?

The Witness: I recall it was after we had rendered a verdict, and then he had mentioned that he had knowledge of the defendant having been previously convicted of murder. And so we just said -- he said, "But you know, that didn't affect my ability to judge this case." And so, that is -- but it was way after we had rendered a verdict.

The Court: Okay. Do you remember anything else about it?

The Witness: No, no. It was just like okay, you know, as long as he could make, you know, a fair judgment on this case alone. And we did. We all worked hard together when we were deliberating. And he had a lot of input too when we were making the decision. We were deciding the case together as a whole.

The Court: Did you ever get the impression during the deliberation that he might have information that the others didn't have, or anything like that?

The Witness: No, not at all.

The circuit court questioned a third juror as follows:

The Court: Have a seat. Thank you for coming down this morning.

The reason I asked to have you come down is I wanted to ask some questions about [subject juror] and his advising the jury that he knew something about the defendant's background.

The Witness: Uh-huh.

The Court: First off, can you tell me when that -- when you first learned anything from him about that subject and what you heard, as best as you can remember?

The Witness: After we came in here and the verdict was read, when we went back in there, we were, you know, we were kind of -- it was kind of a big thing for us, you know. It was kind of. And then we were all talking. And that's when it was said that he knew. So it was totally after.

The Court: Okay. What did he say? Do you remember?

The Witness: Not really. We were all kind of talking among each other.

The Court: But it was obviously he knew something about the background or the history of the defendant?

The Witness: Yeah. But it was not disclosed to us.

The Court: No. But when he did say it, I was just trying to get your best recollection as to what it was that he actually said?

The Witness: I really don't remember what exactly he said.

The Court: Well, the gist of it.

The Witness: We were talking about how we came about the verdict, you know, that we worked really hard on it, that, you know, we just -- you know, we just wanted to know maybe what he would be sentenced, you know. How we were doing. And we were just kind of talking among each other.

And he just said that he knew that Mr. Elizares had a prior conviction of murder.

The Court: Okay.

Now at any time during the deliberations, did you get the impression that [subject juror] had inside information?

The Witness: Oh, no.

The Court: Or extra information?

The Witness: No.

On May 31, 2000, the State filed its Memorandum In Opposition to Defendant's Oral Motion for New Trial. The State argued, inter alia, that jurors were necessarily aware of Elizares' status as a convicted felon pursuant to Elizares' own testimony and by stipulation of the parties, the jury acquitted Elizares of two serious charges, the subject juror testified that

he followed the circuit court's instruction to base his decision solely on the facts, the evidence establishing Elizares' guilt was overwhelming, and, finally, the jury returned its guilty verdict prior to receiving the outside information.

On June 8, 2000, the circuit court denied the oral motion for a mistrial, stating:

Here we have some particular circumstances that we're looking at. One is if there had been no evidence of prior criminal conduct and then suddenly the fact that the defendant has a prior criminal history is interjected into the case, that could be considered prejudicial right there, but that wasn't the case.

They knew he had been convicted of a prior felony. And as the prosecutor pointed out, that was not just mentioned in passing; it was substantially discussed in the case.

Also, the evidence of the defendant's guilt was very very strong in this case. It wasn't iffy at all, as far as the court is concerned.

And so I don't feel that -- also, I think also I have to take into consideration that it's always possible that a juror is going to learn something outside of the courtroom, and we know that.

It happens all the time, and that's why we make a strong admonition to people that if they do happen to learn something, that they are to disregard it and make their decision based only on the evidence as presented in the court. And there is a presumption that people follow those admonitions. There is no evidence here to suggest that [subject juror] didn't follow that admonition. In fact, he actually said just the opposite, for what that's worth.

So I think in this case that -- while it is -- while what was disclosed is strong, given the other circumstances that I have mentioned and have been mentioned by the State, that I am not going to find that there was implied bias or bias as a matter of law.

As far as whether there was misconduct by the juror, I think inadvertently overhearing a conversation is certainly not misconduct. That's the kind of thing, as I mentioned,

we expect will happen, and that's why we give the admonition. Not having told the court, I don't know if we actually instruct the jurors to tell the court if they heard anything. I can't remember. Maybe that's implied in what we said. I just don't remember exactly, but he might have certainly surmised that he should have said something.

Did that -- could that have influenced the jury? Yeah, it could have. That's why we felt that we needed to inquire into it under the case law, the Furutani case that recites a rebuttable presumption that defendant's rights were affected, and that triggers the requirement to do an inquiry to see whether or not it can make a finding that whatever error might have been committed was harmless beyond a reasonable doubt.

In this particular case, after thinking about this a great deal and considering the briefings and the things that have been presented to the court, I have some doubt about it, but I don't have a reasonable doubt.

I think that it was harmless beyond a reasonable doubt, given all the factors that we've talked about, like the fact that -- number one, this was one of a number of -- there were a number of charges here, some of which he was found not guilty of, which shows that the jury was functioning and wasn't biased to convict him just because of some other information.

And certainly not [subject juror], because he voted not guilty, as the State pointed out, to some very serious offenses. And the fact that he was a known prior felon, that that was a significant part of the trial, and that -- the other factors that I already mentioned.

So I am going to deny the motion for new trial or judgment of acquittal.

The circuit court followed the steps set forth in Furutani in responding to Elizares' claim that he was deprived of the right to a fair trial by an impartial jury. The circuit court determined Elizares' claim rose to the level of being substantially prejudicial. A rebuttable presumption of prejudice was therefore raised. The circuit court appropriately investigated the totality of circumstances surrounding Elizares'

claim by questioning the subject juror, jury foreperson, and another juror. The scope and adequacy of the circuit court's investigation is not questioned on appeal. On completing its investigation, the circuit court found that the disclosure to the subject juror by a co-worker that Elizares may have had a prior murder conviction had been proven harmless beyond a reasonable doubt, overcoming the presumption of prejudice created by Elizares' claim.

The circuit court's conclusion presents a mixed question of fact and law because it is dependent upon the facts and circumstances of this particular case, and is therefore reviewed under the clearly erroneous standard. Furutani, 76 Hawai'i at 180, 873 P.2d at 59. Since the circuit court's conclusion that Elizares was not deprived of a fair trial by twelve impartial jurors was not clearly erroneous, we conclude the circuit court did not abuse its discretion in denying Elizares' motion for a mistrial.

Elizares' argument that the subject juror should be deemed biased as a matter of law is without merit. Elizares bases this argument on State v. Kauhi, 86 Hawai'i 195, 948 P.2d 1036 (1997), where a prospective juror was a prosecutor employed by the same office as the prosecutor trying the defendant. There, the Hawai'i Supreme Court said the trial court should "imply bias as a matter of law and dismiss the prospective juror for cause." Id. at 200, 948 P.2d at 1041. We conclude that Furutani, not Kauhi, directs the outcome in the instant case.

IV. CONCLUSION

The circuit court did not abuse its discretion in denying Elizares' motion for a new trial. Accordingly, we affirm the June 28, 2000 Judgments of the circuit court filed in Cr. Nos. 98-0463(2) and 99-0076(2).

DATED: Honolulu, Hawai'i, September 13, 2002.

On the briefs:

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Chief Judge

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Associate Judge

Associate Judge