

NO. 23849

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
SHARON ELLEY, also known as SHARON BLACK,
Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 00-01-0167(1))

MEMORANDUM OPINION

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

I. BACKGROUND

On April 17, 2000, Defendant-Appellant Sharon Elley (Elley), also known as Sharon Black, was charged by indictment in the Circuit Court of the Second Circuit (circuit court) with the following:

Count One: Bribery of a Witness in violation of Hawaii Revised Statutes (HRS) § 710-1070(1) (1993);¹

¹HRS § 710-1070 reads in relevant part as follows:

§710-1070 Bribery of or by a witness. (1) A person commits the offense of bribing a witness if he confers, or offers or agrees to confer, directly or indirectly, any benefit upon a witness or a person he believes is about to be called as a witness in any official proceeding with intent to:

- (a) Influence the testimony of that person;
- (b) Induce that person to avoid legal process summoning him to testify; or
- (c) Induce that person to absent himself from an official proceeding to which he has been legally summoned.

. . . .

(3) The offenses defined in this section are class C felonies.

Count Two: Intimidating a Witness in violation of HRS § 710-1071(1)(a), (b) and/or (c) (1993).²

At a jury trial before the Honorable Artemio C. Baxa, Elley testified that in May 1998 she met and began dating Eric Peterson (Peterson). Two weeks after meeting, their relationship became intimate. Three or four weeks later they terminated their friendship, and Peterson left for the mainland. Peterson returned to Hawai'i in October 1998.

Peterson testified that sometime in 1999, he was subpoenaed to testify in an unrelated trial involving Elley. During the afternoon of April 7, 2000, while he sat waiting for his food at Captain Dave's (the restaurant), Elley approached him and said she knew he would be testifying in her upcoming trial. Peterson testified that Elley asked him to help her out by not testifying at her trial in exchange for \$1,000.00. Elley then offered \$2,000.00, but Peterson told her to "just go away from

²HRS § 710-1071 reads as follows:

§710-1071 Intimidating a witness. (1) A person commits the offense of intimidating a witness if he uses force upon or a threat directed to a witness or a person he believes is about to be called as a witness in any official proceeding, with intent to:

- (a) Influence the testimony of that person;
 - (b) Induce that person to avoid legal process summoning him to testify; or
 - (c) Induce that person to absent himself from an official proceeding to which he has been legally summoned.
- (2) "Threat" as used in this section means any threat proscribed by section 707-764(1).
- (3) Intimidating a witness is a class C felony.

me." After Peterson told Elley to go away, she began swearing at him and pointed at him and said "[y]ou're going to get it," "[s]omebody's going to beat you up," and "[k]eep looking out behind your back." Peterson felt really uneasy about Elley's threats.

Elley testified she was aware that Peterson was an anticipated witness in her upcoming trial. Elley testified that on April 7, 2000, she telephoned an order to the restaurant, which was located behind her house. Five minutes later, Elley went to the restaurant to pick up her order and saw Peterson at the counter. Elley stopped and waited for Peterson to "finish his business" and walk away towards the ocean. Elley testified that Peterson had "cleared the area" before she went to pick up her order. After getting her order, she turned to look for Peterson because she "was afraid of him." Elley saw Peterson staring at her from behind a tree. Elley testified she never approached Peterson nor had any discussion with him that day.

Dave Richter (Richter), the restaurant's manager, testified he knew Elley as a regular customer who came to the restaurant probably three times a week. Richter vaguely knew Peterson as an occasional customer who came to the restaurant approximately once every two weeks. Richter saw both Elley and Peterson at the restaurant on the afternoon of April 7, 2000, when Elley came from inside the marketplace to the counter to

pick up her order a minute or so after Peterson had left the counter. After picking up his order, Peterson had gone back into the marketplace. While Richter believed Elley's and Peterson's "paths had definitely crossed" because Elley had asked him if Peterson was a "regular," Richter never saw Elley and Peterson speak with each other or come within each other's proximity that day.

Elley was found guilty on Count One of the included offense of Tampering with a Witness under subsections (a) and (b) of HRS § 710-1072 (1993)³ and guilty on Count Two of subsections (a), (b), and (c) of HRS § 710-1071 (Intimidating a Witness). Elley was sentenced on September 27, 2000 to one year of probation on Count One and five years of probation on Count Two, both terms to run concurrently. As a special condition of probation, Elley was sentenced to three months of incarceration (to serve forty-five days with the remainder suspended), and ordered to pay a Crime Victim Compensation fee of \$150 and a

³HRS § 710-1072 states as follows:

§710-1072 Tampering with a witness. (1) A person commits the offense of tampering with a witness if he intentionally engages in conduct to induce a witness or a person he believes is about to be called as a witness in any official proceeding to:

- (a) Testify falsely or withhold any testimony which he is not privileged to withhold; or
 - (b) Absent himself from any official proceeding to which he has been legally summoned.
- (2) Tampering with a witness is a misdemeanor.

probation service fee of \$150 and to perform fifty hours of community service. Judgment was entered on September 27, 2000.

On appeal, Elley contends the circuit court plainly erred by failing to properly instruct the jury that the same underlying conduct could not form the basis of guilt for more than one offense, thus violating her constitutionally protected right to a unanimous verdict as guaranteed by the sixth amendment of the United States Constitution⁴ and article 1, sections 5 and 14, of the Hawai'i Constitution.⁵ Elley also contends the

⁴The 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].

⁵Article I, § 5 of the Hawai'i Constitution provides:

Section 5. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Article 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.

circuit court abused its discretion when it denied her motion to continue the trial so that she could retrieve evidence from her home to challenge the credibility of a State's witness on rebuttal, thereby violating her constitutionally protected rights to compulsory process, due process, and a fair trial.

II. STANDARDS OF REVIEW

A. Plain Error and Jury Instructions

As a general rule, jury instructions to which no objection has been made at trial will be reviewed only for plain error. This court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights.

. . . .

. . . If the substantial rights of the defendant have been affected adversely, the error will be deemed plain error.

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. If the instructions requested by the parties are inaccurate or incomplete but are necessary in order for the jury to have a clear and correct understanding of what it is that they are to decide, then the trial court has the duty either to correct any defects or to fashion its own instructions.

Nevertheless, the trial court is not required to instruct the jury in the exact words of the applicable statute but to present the jury with an understandable instruction that aids the jury in applying that law to the facts of the case. 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. If that standard is met, however, the fact that a particular instruction or isolated paragraph may be objectionable, as inaccurate or misleading, will not constitute ground for reversal. Whether a jury instruction accurately sets forth the relevant law is a question that this court reviews *de novo*.

[State v. Sawyer, 88 Hawai'i [325,] 330, 966 P.2d [637,] 642 [(1998)]].

. . . .

Error 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 conviction.

. . . If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.

[State v. Arceo, 84 Hawai'i [1,] 12, 928 P.2d [843,] 854 [(1996)]].

State v. Vanstory, 91 Hawai'i 33, 42-43, 979 P.2d 1059, 1068-69 (1999) (internal quotation marks, citations, and brackets omitted).

B. Denial of a Motion for Continuance

"A motion for continuance is addressed to the sound discretion of the trial court, and the court's ruling will not be disturbed on appeal absent a showing of abuse of that discretion." State v. Lee, 9 Haw. App. 600, 603, 856 P.2d 1279, 1281 (1993). "Generally, to constitute an abuse, it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State v. Crisostomo, 94 Hawai'i 282, 287, 12 P.3d 873, 878 (2000) (internal quotation marks and brackets omitted).

III. DISCUSSION

A. Jury Instructions

Elley contends that while the circuit court gave a general unanimity instruction that "[a]ll 12 jurors must unanimously agree that the same underlying criminal acts have been proven beyond a reasonable doubt," the circuit court plainly erred by failing to properly instruct the jury that the same underlying conduct could not form the basis of guilt for more than one offense. Elley contends the given instructions were insufficient "to ensure that the jury unanimously agreed that the underlying criminal act for Tampering with a Witness was different from that for Intimidating a Witness."

Since Elley failed to challenge the general unanimity instruction at trial or offer the instruction she now argues should have been given, the plain error analysis applies to this court's review. The Hawai'i Supreme Court in State v. Kelekolio, 74 Haw. 479, 849 P.2d 58 (1993), stated:

This 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. Nevertheless, where plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial court.

Id. at 515, 849 P.2d at 74-75 (citation omitted).

Relevant to this appeal, the circuit court instructed the jury as follows:

[THE COURT:] Instruction number 15: The defendant is charged with more than one offense under separate counts in the indictment. Each count and the evidence that applies to that count is to be considered separately.

The fact that you may find the defendant not guilty or guilty of one of the counts charged, does not mean that you must reach the same verdict with respect to the other count charged.

Instruction number 16: In count one of the indictment, the defendant, Sharon Elley, also known as Sharon Black, is charged with the offense of bribery of a witness.

A person commits the offense of bribery of a witness if she confers or offers or agrees to confer directly or indirectly any benefit upon a witness, Eric Peterson, in any official proceeding within [sic] intent to influence the testimony of that person, induce that person to avoid legal process summoning him to testify and/or to induce that person to absent himself from an official proceeding to which he has been legally summoned.

The alternative ways in which the offense of bribery of a witness can be committed are enumerated below as A, B, C, each of which contain two material elements, one and two.

A: 1, that on or about April 7, 2000 in the County of Maui, State of Hawaii, the defendant, Sharon Elley, also known as Sharon Black, conferred or offered or agreed to confer directly or indirectly any benefit upon a witness or person, to wit, Eric Peterson, whom she believed was about to be called as a witness in any trial proceeding.

And 2, that the defendant did so with an intent to influence the testimony of that person.

B: 1, that on or about April 7, 2000, in the County of Maui, State of Hawaii, the defendant, Sharon Elley, also known as Sharon Black, conferred or offered or agreed to confer directly or indirectly any benefit upon a witness or person, to wit, Eric Peterson whom she believed was about to be called as a witness in any official proceeding.

And two, that the defendant did so with an intent to induce that person to avoid legal process summoning him to testify.

C: 1, that on or about April 7, 2000, in the County of Maui, State of Hawaii, the defendant Sharon Elley, also known as Sharon Black, conferred or offered or agreed to confer directly or indirectly any benefit upon a witness or a person to wit, Eric Peterson, whom she believed was about to be called as a witness in any official proceeding.

And 2, that the defendant did so with the intent to induce that person to absent himself from any official proceeding to which he has been legally summoned.

Instruction number 17: If and only if you find the defendant not guilty of the charge of bribery of a witness, or you are unable to reach a unanimous verdict as to this offense, then you must determine whether the defendant is guilty or not guilty of the included offense of tampering with a witness.

A person commits the offense of tampering with a witness if she intentionally engages in conduct to induce a witness or a person, to wit, Eric Peterson, whom she believed was about to be called as a witness in an official proceeding to testify falsely or withhold any testimony which she [sic] is not privileged to withhold or to absent himself from any official proceeding to which he has been legally summoned.

The alternative ways in which the offense of tampering with a witness can be committed are enumerated below as A and B, each of which contain one material elements [sic].

A: 1, that on or about April 7, 2000, in the County of Maui, State of Hawaii, the defendant Sharon Elley, also known as Sharon Black, intentionally engaged in conduct to induce a witness or person, to wit, Eric Peterson, whom she believed was about to be called as a witness in an official proceeding to testify falsely or withhold any testimony which he is not privileged to withhold.

B: 1, that on or about the April 7, 2000 in the County of Maui, State of Hawaii, the defendant Sharon Elley, also known as Sharon Black, intentionally engaged in conduct to induce a witness or a person, to wit, Eric Peterson, whom she believed was about to be called as a witness in an official proceeding to absent himself from any political proceeding -- no, from any official proceeding to [he] which has been legally summoned.

Instruction number 18: In count two of the indictment, the defendant Sharon Elley, also known as Sharon Black, is charged with the offense of intimidating a witness.

A person commits the offense of intimidating a witness if she uses force upon or a threat directed to a witness or a person, to wit, Eric Peterson, whom she believed was about to be called as a witness in an official proceeding with intent to influence the testimony of that person, induce that person to avoid legal process summoning him to testify and/or induce that person to absent himself from an official proceeding to which he has been legally summoned.

The alternative ways in which the offense of intimidating a witness can be committed are enumerated as A, B, C, each of which contain two material elements one and two.

A: 1, that on or about April 7, 2000 in the County of Maui, State of Hawaii, the defendant, Sharon Elley, also known as Sharon Black, used force upon or a threat directed

to a witness or a person, to wit, Eric Peterson, whom she believed was about to be called as a witness in any official proceeding.

And 2, that the defendant did so with an intent to influence the testimony of that person.

B: 1, that on or about April 7, 2000 in the County of Maui, State of Hawaii, the defendant, Sharon Elley, also known as Sharon Black, used force or a threat directed to a witness or a person, to wit, Eric Peterson, whom she believed was about to be called as a witness in any official proceeding.

And 2, that the defendant did so with the intent to induce that person to avoid legal process summoning him to testify.

C: 1, that on or about April 7, 2000, in the County of Maui, State of Hawaii, the defendant, Sharon Elley, also known as Sharon Black, used force upon or a threat directed to a witness or a person, to wit, Eric Peterson, whom she believed was about to be called as a witness in an official proceeding.

And 2, that the defendant did so with an intend [sic] to induce that person to absent himself from any official proceeding to which he has been legally summoned.

The jury provided the following responses with respect to the Special Interrogatory for each offense:

[THE COURT CLERK:] We, the jury, in this case find as follows: Count One, guilty of the included offense of Tampering with a Witness.

Special interrogatory: In Count One, Bribery of a Witness, in order to find Defendant guilty, you must all agree to at least one of the alternatives that are applicable to the Defendant. A "Yes" must be unanimous as to each alternative that you agree upon. As to any alternative or alternatives that you cannot agree upon, you must answer "No." Which alternative or alternatives did all twelve of you find the Defendant guilty of: A, no. B, no. C, no.

Special interrogatory: In Count One, there is an included offense. If and only if you found the Defendant guilty of the included offense of Tampering with a Witness, you must all agree to at least one of the alternatives that are applicable to the Defendant. A "Yes" must be unanimous as to each alternative that you agree upon. As to any alternative or alternatives that you cannot agree upon, you must answer "No". Which alternative or alternatives did all twelve of you find defendant guilty of? A, yes. B, yes.

Count Two, Intimidating a Witness, guilty as charged. Special interrogatory: In Count Two, Intimidating a Witness, in order to find Defendant guilty, you must all agree to at least one of the alternatives that are applicable to the Defendant. A "Yes" must be unanimous as to each alternative that you agreed upon. As to any alternative or alternatives that you cannot agree upon, you must answer "No". Which alternative or alternatives did all twelve of you find Defendant guilty of? A, yes. B, yes. C, yes.

In convicting Elley of the offense of Tampering with a Witness, the jury found Elley intentionally engaged in conduct to induce Peterson to testify falsely or withhold his testimony and absent himself from the trial. In convicting Elley of the offense of Intimidating a Witness, the jury found Elley threatened Peterson to influence his testimony and induce him not to testify. Despite Elley's argument to the contrary, the record in this case does not indicate Elley was convicted of two offenses based on the same underlying conduct. The basis of the Tampering with a Witness conviction was clearly Elley's offer of money to Peterson. The basis of the Intimidating a Witness offense was the threat by Elley to Peterson that he was "going to get it" and was going to be beaten up, and the warning to "keep looking out behind your back." Under the plain error standard of review, the circuit court's failure to give a jury instruction that the same conduct could not form the basis of guilt for more than one offense did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings" or deny Elley's fundamental rights. Vanstory, 91 Hawai'i at 42, 979 P.2d at 1068.

B. Denial of the Motion for Continuance

Elley contends the circuit court abused its discretion when it denied her motion to continue the trial so that she could retrieve evidence from her home to challenge the credibility of a State's witness on rebuttal, in violation of her right to compulsory process, due process, and a fair trial.

This court has addressed the issue of a continuance based on the unavailability of a witness. In State v. Lee, 9 Haw. App. 600, 856 P.2d 1279 (1993), this court began with the premise that courts generally "view with disfavor requests for a continuance made on the day set for trial or very shortly before." Id. at 603, 856 P.2d at 1281 (quoting 3A C. Wright, Federal Practice and Procedure: Criminal 2d § 832 at 263 (1982)).

This case does not present the issue of an unavailable witness, but rather evidence that was within Elley's control at the beginning of a trial where credibility between Elley and a witness for the State became an issue. Elley failed to exercise due diligence in bringing the possible impeachment evidence to court and then sought a continuance on the last day of trial. Here the materiality of the evidence Elley sought to include was limited to impeachment of the credibility of the State's witness. "Abuse of discretion will not ordinarily be found in the denial of a continuance to enable a temporarily unavailable witness to be called whose testimony will not bear directly upon the issue

of guilt and who is called only for purposes of impeachment." Lee, 9 Haw. App. at 605, 856 P.2d at 1282 (internal quotation marks omitted).

Moreover, the witness necessary to authenticate the evidence had already testified, and a continuance on the basis of retrieving possible impeachment evidence would necessarily involve further delay in order to recall the witness to authenticate the evidence. The circuit court did not abuse its discretion by denying Elley's motion for continuance.

IV. CONCLUSION

Accordingly, the September 27, 2000 Judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, October 16, 2002.

On the briefs:

Joyce K. Matsumori-Hoshijo, Deputy Public Defender, for defendant-appellant.	Chief Judge
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Arleen Y. Watanabe, Deputy Prosecuting Attorney, County of Maui, for plaintiff-appellee.	Associate Judge
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Associate Judge