NO. 23948

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
LAURIE ANN MATANZA, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-2147)

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

Defendant-Appellant Laurie Ann Matanza (Matanza) appeals from the November 15, 2000, Judgment of the Circuit Court of the First Circuit (circuit court). Matanza was convicted, pursuant to a jury trial,[1] of Promoting a Dangerous Drug in the Third Degree, in violation of Hawaii Revised Statutes (HRS) § 712-1243 (1993).[2] Matanza was sentenced to a maximum term of imprisonment of five years.

On appeal, Matanza contends the circuit court erred in refusing to instruct the jury on the defense of mistake of fact. We disagree with Matanza and affirm the Judgment of the circuit court.

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[1]The Honorable Dexter D. Del Rosario presided.

[2]HRS § 712-1243 provides, in pertinent part:

> **§712-1243 Promoting a dangerous drug in the third degree.** (1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.
>
> (2) Promoting a dangerous drug in the third degree is a class C felony.

I. BACKGROUND

At trial on September 19, 2000, the following evidence was adduced through the State's witnesses.

On July 31, 1998, Honolulu Police Officer Ray Bermudes (Bermudes) posed as a drug dealer in an undercover capacity. Bermudes was issued four packets containing rock cocaine that he placed in his right front pants pocket. Bermudes wore a transmitter device and was instructed to give two signals once a drug transaction had been completed. The audio signal was "have a nice day," and the hand signal was a wave from the ear straight out. Five other undercover officers stood in a cluster near Bermudes at the corner of Kanoa Street and Pua Lane. The arrest team of five or six police officers observed the scene from within a rented van (the police van), which was parked with its motor running approximately fifteen feet from Bermudes. Another officer videotaped the scene from approximately four- to five-hundred feet south of Bermudes' location.

Matanza drove up and parallel parked about four feet away from Bermudes. Still in the driver's seat, Matanza leaned toward the passenger-side door, outside of which Bermudes was standing. Bermudes opened Matanza's car door and asked if she needed something. Matanza responded that she needed a "20" -- street vernacular for $20 of narcotics. Bermudes pulled a ziploc baggie of rock cocaine from his right front pants pocket and held

it in his palm. Bermudes reached in the car with his right hand and placed the baggie in Matanza's hand, which was facing palm up. Matanza handed Bermudes a $20 bill within five seconds of receiving the baggie. Bermudes did not recall whether Matanza looked at the drugs before handing him the $20 bill. At the conclusion of the transaction, Bermudes said "have a nice day."

The police van began moving toward Matanza before Bermudes gave the signals to indicate the transaction was concluded. After Bermudes signaled, the police van parked perpendicularly behind Matanza, blocking Matanza's car. The arrest team immediately exited the police van. Matanza threw the drugs onto the right front passenger seat. Officer Thomas Taflinger jumped out of the police van, pulled Matanza out of the car, and arrested her for promoting dangerous drugs in the third degree.

No other drug paraphernalia was found in Matanza's car. Matanza was not given any drug tests after her arrest.

Matanza declined to testify, and the defense presented no evidence. After the State and defense rested, the circuit court discussed proposed jury instructions out of the presence of the jury. Defense counsel argued as follows for an instruction on mistake of fact:

> [DEFENSE COUNSEL]: Your Honor, we would argue this is appropriate because there's a number of mistakes the jury could find here and if there's even a scintilla of evidence that would support it. She could be mistaken as to what was happening, what type of transaction was occurring. She could be mistaken as to the type of substance that was

involved in the transaction. Officer Bermudes[']
testimony supports the fact that she didn't look at it.
He doesn't recall if she looked at it even after they
made the transaction. And they never mentioned the word
cocaine in the transaction. So I think there's a number
of ways the jury could find that she had a mistaken
belief about her possession.

THE COURT: [Defense Counsel], would you agree that the mistake of fact goes to the state of mind of the defendant?

[DEFENSE COUNSEL]: Well, yeah, I guess it's whether she was mistaken about a factual issue in the case.

THE COURT: And is there any evidence as to the defendant's state of mind?

[DEFENSE COUNSEL]: Yes, there is, through Officer Bermudes. There's circumstantial evidence that she may not know -- may not have known what she was involved in that transaction -- what substance was involved. That would be circumstantial evidence as to her state of mind.

The court refused the requested instruction over Matanza's objection. After deliberation, the jury found Matanza guilty as charged.

II. STANDARD OF REVIEW

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. 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.

> [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). If there is a reasonable possibility that error might have contributed to a conviction in a criminal case,

> then the error cannot be harmless beyond a reasonable doubt, and the conviction must be set aside.

State v. Klinge, 92 Hawai‘i 577, 583, 994 P.2d 509, 515 (2000) (internal quotation marks and citations omitted).

III. DISCUSSION

In her opening brief, Matanza contends she was entitled to the mistake of fact jury instruction because

> [a] reasonable juror could have inferred that Ms. Matanza thought she was requesting something other than cocaine from Officer Bermudes because no one mentioned the word "cocaine," and no one testified that the term "twenty," in street vernacular, meant a quantity of cocaine.

In State v. Sawyer, 88 Hawai‘i 325, 966 P.2d 637, (1998), the Hawai‘i Supreme Court held:

> Our cases have firmly established that a defendant is entitled to an instruction on every defense or theory of defense having any support in the evidence, provided such evidence would support the consideration of that issue by the jury, no matter how weak, inconclusive, or unsatisfactory the evidence may be. However, this court has also noted that where evidentiary support for an asserted defense, or for any of its essential components, is clearly lacking, it would not be error for the trial court to refuse to charge on the issue or to instruct the jury not to consider it.

Id. at 333, 966 P.2d at 645 (internal quotation marks, citations, and brackets omitted; emphasis in original).

To be convicted for a violation of HRS § 712-1243, the defendant must knowingly possess any dangerous drug in any amount. Matanza would have a viable mistake of fact defense if she was mistaken as to the contents of the ziploc baggie given to her by Bermudes in exchange for $20. Matanza was entitled to the mistake of fact jury instruction if there was any support in the evidence that Matanza made such a mistake.

The evidence shows that Matanza told an undercover police officer that she needed a "20" -- street vernacular for $20 of narcotics. The officer placed a baggie containing rock cocaine into Matanza's hand, which was palm up, and she quickly handed the officer $20. Upon the arrival of the arrest team, Matanza threw the drugs onto the right front passenger seat. Matanza was subsequently arrested.

During his closing argument, Matanza's attorney reminded the jury that the word cocaine was never mentioned during the transaction and that Bermudes did not recall whether Matanza looked at the packet.

The trial record lacks any evidence to support Matanza's contention that a reasonable jury could infer Matanza believed she purchased something other than a dangerous drug from Bermudes. Furthermore, the jury was instructed on the meaning of the terms "knowingly" and "possession" as follows:

> A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature. A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist. 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.
>
> A person is in possession of an object if the person knowingly procured or received the thing possessed or was aware of her control of it for a sufficient period to have terminated her possession.
>
> The law recognizes two kinds of possession, actual possession and constructive possession.
>
> A person who, although not in actual possession, knowingly has both the power and intention, at a given time, to exercise dominion or control over a thing for a sufficient period to terminate her possession of it, either

> directly or through another person or persons, is then in constructive possession of it.
>
> The fact that a person is near an object or is present or associated with the person who controls an object, without more, is not sufficient to support a finding of possession.
>
> The element of possession has been proved if you find beyond a reasonable doubt that the defendant had actual or constructive possession.

The jury instructions, taken as a whole, were not prejudicially insufficient, erroneous, inconsistent, or misleading.

IV. CONCLUSION

The November 15, 2000, Judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai‘i, March 13, 2002.

On the briefs:

Cindy A.L. Goodness,
Deputy Public Defender,
State of Hawai‘i,
for defendant-appellant.

Chief Judge

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge