NO. 23987

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
LEO DIAS SOUZA, JR., Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 00-1-0975)

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

Defendant-Appellant Leo Dias Souza, Jr., also known as Leo D. Souza, Jr., (Souza) appeals from the Judgment entered by the Circuit Court of the First Circuit (the circuit court) on December 5, 2000, convicting and sentencing him for Attempted Theft in the Second Degree, in violation of Hawaii Revised

Statutes (HRS) §§ 705-500 (1993)[1/] and 708-831(1)(b) (1993 & Supp. 2001).[2/]

Souza asserts that the circuit court erred in refusing to give three jury instructions that he had requested. We conclude that the requested instructions were adequately covered

---

[1/] Hawaii Revised Statutes (HRS) § 705-500 (1993) provides:

> **Criminal attempt.** (1) A person is guilty of an attempt to commit a crime if the person:
>
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or
>
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.
>
> (2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.
>
> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

[2/] HRS § 708-831 (1993 & Supp. 2001) provides, in pertinent 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.

by other instructions given to the jury and, accordingly, affirm the judgment.

BACKGROUND

As a result of events that occurred on the evening of March 6, 2000, Souza was charged with Attempted Theft in the Second Degree. At the trial that commenced on September 20, 2000,[3/] the following relevant testimony was adduced:

1. Jennifer Hix [4/]

Jennifer Hix (Hix) testified that at around 7 o'clock on the evening of March 6, 2000, she was at home in her ground floor apartment unit located at 1710 Punahou Street. "[T]he sun had just gone down . . . [and i]t was kind of dark." From her kitchen window, which "faces right out towards the parking lot[,]" she heard a "noise like someone trying to take a lock off [a] moped." Hix's view of the moped was partially obstructed by a car, and Hix estimated the distance from her window to the moped at around forty to sixty feet. Thinking it was Thomas Holden (Holden), her upstairs neighbor who owned the moped, Hix initially paid little attention to the activity outside. After seeing the silhouette of a man holding bolt cutters, however, Hix "started to get more curious about what was going on."

[3/] The Honorable Karen Ahn presided over the trial.

[4/] It is unclear from the record on appeal what the correct spelling of Jennifer's last name is. The Affidavit in Support of Warrantless Arrest spells it "Hix," while the transcripts spell it "Hicks." For purposes of this opinion, we will use the spelling in the affidavit and refer to Jennifer as "Hix."

Through her kitchen window, Hix either saw or heard the man cut the chain off the moped, with the resulting recoil sending him crashing to the ground.[5/] After the fall, Hix looked away for a moment, because she thought the man was Holden, and she "didn't want to embarrass him[.]" When she looked back out the window, Hix saw the man walk around a wall and out of view. At this point, Hix began to realize the man may not be Holden, since Holden would typically "start his moped and take off like he always does. He wouldn't walk around the wall." Moments later, the man emerged from behind the wall, and Hix noticed, for the first time, that the man was wearing "dark pants and [a] dark shirt[,] . . . like a mechanic's outfit." The man walked down the sidewalk, came back through the parking lot, and went back behind the wall, "the whole time watching [Hix] watch him." Hix testified that the man did not try to hide his identity from her and, in fact, had a "quizzical look on his face." After the man went behind the wall, Hix observed a tan Jeep with a broken left tail light pull out of the parking lot and make a right turn onto Punahou Street. Hix did not see the driver of the Jeep.

Hix then went outside to check on the moped and found the moped, as well as a "broken padlock and a broken lock chain." Hix was not sure which unit Holden and his wife, Kathleen Holden, (collectively, the Holdens) lived in, so she "went around the

---

[5/] Hix's testimony is not entirely clear on this point, with Hix at one point testifying she "saw [the man] fall to the floor, to the ground with the bolt cutters[,]" but later saying she had only "heard" him cut the chain and fall. (Emphases added).

building putting notes up asking neighbors if they knew where [the Holdens] were[.]" Hix then went back to her apartment, and a little while later, the Holdens came down to Hix's apartment unit. As the three of them spoke outside of Hix's apartment, the man came back and again went behind the wall. Hix estimates approximately forty-five minutes had elapsed since she first saw the man in the parking lot. According to Hix, the man was now wearing an unbuttoned flannel shirt, with the same pants as before. Hix and the Holdens followed him and asked the man what he was "doing with the moped, why was he trying to take it." The man responded that he thought the moped was abandoned. Holden responded that the moped was most definitely not abandoned, to which, according to Hix, the man replied by saying

> he had a note that explained that the moped was abandoned and that he was going to pick it up. And he said that he waited at the moped for a while. He sat on the moped, waited, and no one came to get it. So he felt that it was abandoned and that he was going to take it.

The man gave Holden the note. Hix and the Holdens then took down the license plate number of the man's Jeep and told the man they were going to call the police. The man then got into his Jeep and left.

2. Holden

Holden testified he and his wife arrived home at around 8 o'clock on the evening of March 6, 2000 and found a lock taped to their door with a note from Hix concerning the attempted theft of his moped. Holden took the lock and went downstairs to look at the moped. He saw that the lock had been cut off from the

chain around the pole to which his moped was secured. The other locking devices around the moped's wheels were intact. Holden then went to Hix's apartment to talk with Hix. As the two spoke, the man Hix had seen earlier returned, and Hix pointed him out to Holden.

Holden and Hix followed the man, who by now had almost reached his Jeep, and confronted him about Holden's moped. Holden testified the man, whom Holden identified in court as Souza, appeared "defensive, nervous." The conversation grew quite heated, with the man insisting he had only come to pick up an abandoned moped and Holden saying his moped was not abandoned. Holden did not recall Souza saying he had sat on the moped or cut off its lock. At some point, Kathleen Holden came down from their apartment and joined her husband, Hix, and Souza. Souza then produced a note which suggested that someone named Doug had told Souza to pick up the moped. Holden told Souza that he was going to call the police and that Souza needed to leave because he was on private property. Souza then got into his Jeep and drove out of the parking lot.

3. Kathleen Holden

Kathleen Holden's testimony closely mirrored that of her husband and Hix, with the following significant differences: (1) she was not present for the entire encounter between her husband and Souza; and (2) unlike her husband, she recalls Souza

saying he had cut the lock and "sat on the moped for a while to see if anybody came to claim it."

4. Detective Eric Tiwanak

Detective Eric Tiwanak (Detective Tiwanak) testified that he has been a Honolulu Police Department appraiser since 1991. He stated that he is a member of the Certified Appraiser's Guild of America and was properly certified and qualified to conduct appraisals on March 17, 2000. He estimated the appraised market value of Holden's 1984 moped at $400, which was the minimum value of a 1984 moped that was operational, in good condition, and "street legal" (i.e., licensed). On cross-examination, Detective Tiwanak admitted to basing his appraisal on photographs, with others having done the actual inspecting of the moped.

5. Douglas K. Blowdorn

Douglas K. Blowdorn (Blowdorn) is the manager of a building located at 1718 Anapuni Street. Blowdorn testified he wanted to dispose of two unclaimed mopeds on the upper level parking lot of his building, which had "sat there" "for approximately anywhere from a year to two years[.]" To this end, on or about March 1, 2000, Blowdorn placed a handwritten note on each of the mopeds asking "for the owners, if the owners were still interested in the mopeds, to identify themselves and

contact [him]. If not, [he] would dispose of the mopeds." Blowdorn testified he wrote only two notes, and he identified the note given to Holden as one of those notes.

When no one responded to either note by the evening of March 5, 2000 or the morning of March 6, 2000, Blowdorn contacted a moped repair shop called "TLC Motorcycle Repair" (TLC), which agreed to pick up the two mopeds on the evening of March 6, 2000. Blowdorn saw the mopeds when he left the building on the morning of March 6, 2000 but noticed they were gone when he returned at 9 o'clock or 10 o'clock that night. Blowdorn testified he had never met Souza before, had never given Souza any note, and had never given Souza permission to take the mopeds, unless Souza was an employee of TLC. TLC later informed Blowdorn that only one moped had been picked up, and TLC wanted to know where the other moped was. Blowdorn testified that he did not know what ultimately happened to the other moped.

6. Randall W. Wong

Randall W. Wong (Wong), the owner and sole employee of TLC, testified that Blowdorn contacted him regarding the two abandoned mopeds and Wong agreed to pick them up on the evening of March 6, 2000. When Wong arrived at Blowdorn's apartment complex between 8:00 p.m. and 9:00 p.m., he found only one moped and took that moped away.

Concerned about the other moped, Wong called Blowdorn the next day and was told there were supposed to be two mopeds for pickup. Wong testified that Souza had been a customer at TLC, but Wong did not know Souza very well. Wong claims he did not give Souza either the note or permission to "collect any moped on behalf of TLC[.]"

7. Souza

Souza testified he is a full-time fuel injection specialist for "Proportion Controls Engineering." His work uniform consists of black boots, blue pants, and a blue shirt with his name and the company logo on it.

On March 6, 2000, Souza finished work at around 4 o'clock in the afternoon. At around 6 p.m., Souza went to TLC, a shop he had been to "[a]t least ten to a dozen times" in the past. While there, Souza claimed, a "local" man he had never met before approached him. Souza recalls the man had a Hawaiian name, perhaps Keoni or Keola (K). K was around five feet eight inches tall, with straight, black hair, a long mustache and a goatee, and tattoos on his "fairly well[-]built" body. Souza further described K as having a dark complexion and estimated K to be in his mid-twenties. K was wearing blue jeans, a brown, short-sleeved shirt, and work shoes.

Souza says that while in TLC, K approached him and asked if he was "interested in buying an abandoned moped . . . in pretty good shape." K then showed Souza a note and explained to Souza that K "was talking to someone at a building complex and they had said that these mopeds are abandoned and that they were going to be disposed of." The note, in its entirety, read, "Abandoned moped? If not please call Doug at 732-8772[.] Otherwise it will be disposed of by 03/09/00[.]" For $50, K offered to reveal the location of the mopeds to Souza. Souza responded that he needed to see the mopeds first, and K suggested the two meet at the YWCA on the corner of Punahou Street and Wilder Avenue.

After Souza and K met at the YWCA parking lot, K showed Souza Holden's moped, which was parked in a lot next to the YWCA, and asked for the $50. Still uncertain about the moped, Souza offered K $20 for the note because he wanted "something to back [him] up." If the moped turned out to be truly abandoned, Souza would pay K the remaining $30.

Souza then went around the fence that divided the YWCA parking lot and the parking lot of the building in which Holden and Hix lived. Souza inspected the moped and noticed its license was current, a fact that struck him as unusual since "[a]bandoned mopeds don't usually have current licenses on them." His

suspicions were further aroused by the "decent shape" of the moped and by the two kryptonite locks securing the vehicle. Souza insisted this was the extent of his contact with the moped, explaining he

> did not touch it. I never touched the moped. I never did anything more than the first glance that I did. When I first went there, saw the license, saw the locks, I already knew that something wasn't right. I never returned to the moped again. I never went towards it. And I never touched anything of it, no locks, no nothing.

Souza "wanted to find out what was going on" and decided to walk back to his Jeep to talk to K.

Souza rounded the fence again, but K was gone. Souza then walked to Holden's building looking for a "[s]ecurity guard, resident manager, even a tenant" to confirm the moped was abandoned. Because the building was secured, Souza was unable to enter through the main entrance and, instead, "went around, down the sidewalk, around the building, came right into the parking lot, [and] right down the side right in the front of the building," looking for an alternate ingress method. At some point, Souza passed near Hix's window and noticed Hix looking at him. Souza first thought to try talking to Hix but ultimately decided against it because he did not want "to make any trouble with anybody, so [he] thought twice." Finding no one, and beginning to think he had been "hustled[,]" Souza went back to his Jeep to look for K.

After driving around the neighborhood for a while, looking for K, Souza decided it was "worth a shot" to try and

call "Doug," the author of the note K had given Souza. Souza returned to the YWCA parking lot, put on a flannel jacket over his work uniform, and again walked around the building in which Holden and Hix lived. Getting nowhere, Souza then began to look for a pay phone, and started making his way back to his Jeep.

Before reaching the Jeep, however, Souza heard a man call him, accusing Souza of trying to steal his moped. Souza testified that the man, whom Souza identified at trial as Holden, was "ticked off" and "in my face[.]" When Holden asked Souza why Souza had cut off his moped lock, Souza denied touching the lock, explained he had a note, and offered Holden the opportunity to inspect Souza's Jeep to prove he had "nothing to cut a lock with." Kathleen Holden then came down and took down Souza's license plate number. In an attempt to clear up the misunderstanding, Souza suggested they call the number on the note. Instead, Holden grabbed the note from Souza, read it, and told Souza to leave. Souza then got into his Jeep and left. Souza claims he never said he cut the locks or sat on the moped, and he knew nothing about TLC picking up the other moped from a nearby apartment.

Towards the close of trial, the attorneys quibbled over jury instructions. In particular, Souza's attorney pushed for the inclusion of three instructions: Souza's Requested Jury Instructions Nos. 1, 4, and 5.

Souza's Requested Jury Instruction No. 1 would have instructed the jury that "[m]ere presence at the scene of an offense, without more, does not constitute criminal wrongdoing on a person's part." When Souza's attorney asked that the instruction be given, the prosecution objected, and the following discussion ensued:

> [PLAINTIFF-APPELLEE STATE OF HAWAI'I'S (THE STATE) ATTORNEY]: Your Honor, [the] State objects. I think that the instructions enumerating that [sic] elements the State has to prove clearly would show the jury that mere presence is not enough, so I don't think it's necessary. I think this instruction is applicable to accomplice liability situations which we don't have in this case, so I'll object.
>
> [SOUZA'S ATTORNEY]: This instruction should be given in the context of the facts of this case especially where we are claiming that the person who cut the padlock was not [Souza]. It was somebody else. And then [Souza] then goes to the scene of the moped, you know. So the applicable facts I think would dictate this instruction being given.

The court then refused to give the instruction, over objection by Souza's attorney, explaining that the instruction dealt with identity, an issue adequately covered by "[Souza's Requested Jury Instruction No.] 2[.]" That instruction was modified by the court, objected to by the prosecution, and read to the jury as follows: "The burden of proof is on the prosecution with reference to every element of the crime charged, and this burden includes the burden of proving beyond a reasonable doubt the identity of [Souza] as the person who committed the crime charged."

Souza's Requested Jury Instruction No. 4 stated:

> Evidence of oral statements by a defendant should be carefully scrutinized by the jury. Though a witness may be perfectly honest, it is difficult for a witness in most

cases to give the exact words in which any statement was made; and, sometimes by the transposition of the words a witness may find a meaning entirely different from that which was intended to be conveyed by a defendant.

Discussion regarding this instruction went as follows:

[THE STATE'S ATTORNEY]: Your Honor, I'll just object for the record. I think the instructions again make clear what the jury's duties are in evaluating, you know, the testimony given, [Souza] gave a rendition of what was said. The witnesses gave their recollections of what was heard, and so this just goes to really determining credibility of witnesses and resolving issues of fact. So I'll just object for the record.

THE COURT: Where is this [instruction] from?

[SOUZA'S ATTORNEY]: This is under the HAWJIC -- where was it? What, uh --

THE COURT: I've never seen this before.

[SOUZA'S ATTORNEY]: Here it is. Right here.

THE COURT: What number is it?

[SOUZA'S ATTORNEY]: HAWJIC 3.11. Now it may not be under the jury instructions dated '91. I've used this once before in another criminal case and it's used in the context of where [the] defendant makes statements to civilian type witnesses as opposed to police officers or, you know, confession, formal confession.

[THE STATE'S ATTORNEY]: Could I see that?

[SOUZA'S ATTORNEY]: And especially where you have, you know, different lay witnesses recalling differently what was or was not said.

[THE STATE'S ATTORNEY]: . . . [C]ould I see that?

THE COURT: Oh, this one?

[THE STATE'S ATTORNEY]: Yeah. I'm just wondering if it has use notes.

[SOUZA'S ATTORNEY]: No, I don't think it's in there.

[THE STATE'S ATTORNEY]: Oh, it is. I see. Oh --

THE COURT: It's no longer a part of HAWJIC?

[SOUZA'S ATTORNEY]: I don't think so. I tried to --

[THE STATE'S ATTORNEY]: Oh, it's a different -- that's something else.

[SOUZA'S ATTORNEY]: Wait a minute. (Reads.)

But it's still law. I mean --

THE COURT: All right. I'm inclined -- I think it can be argued. I'm inclined to refuse over [Souza's] objection.

Finally, Souza's Requested Jury Instruction No. 5 stated:

> Eyewitness testimony has been received in this trial for the purpose of identifying [Souza] as the perpetrator of the crime charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness's identification of [Souza], including, but not limited to, any of the following:
>
> a. The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;
>
> b. The level of attention, if any, that the witness exhibited at the time of the observation;
>
> c. The witness's capacity to make an identification;
>
> d. The period of time between the alleged criminal act and the witness's identification;
>
> e. Whether the witness had prior contacts with [Souza];
>
> f. The extent to which the witness is either certain or uncertain of the identification;
>
> g. Whether the witness's identification is in fact the product of [his or] her own recollection; and
>
> h. Any other evidence relating to the witness's ability to make an identification.

The discussion of the foregoing requested instruction proceeded as follows:

[THE STATE'S ATTORNEY]: Your Honor, the State objects. I believe that there are a number of additional factors. If the court's inclined to give it, there's additional factors which should be listed including [Souza's] statements that he cut the lock and sat on the moped. That would comport as far as cutting the lock. That would comport with [Hix's] observations and her identification of [Souza]. Otherwise this again is covered by the instructions where the jury is to evaluate the credibility of witnesses and, you know, make determinations of fact. So I think it's already covered.

. . . .

[SOUZA'S ATTORNEY]: Uh, the statements of [Souza] really have nothing to do with the identification issue that might go to [Hix's] opinion that she was correct in the first instance. But I think the real key issue is whether or not it was [Souza] who cut the lock, you see. And so the factor that the State talks about is really not relevant. You have a catchall and any other evidence relating to a witness' [sic] ability to make an identification.

And so that [sic] kind of points the State's raised could be argued at the time of final argument, but clearly I think we should provide the jury with some kind of guide as to what some of the factors maybe [sic] that they should consider in deciding the issue of identification.

[THE STATE'S ATTORNEY]: Your Honor -- I'm sorry -- I believe [Souza's attorney] may have obtained this instruction in part from a CALJIC instruction which I know has a number of different additional factors as well. I just have a concern that counsel's carefully selected those issues or those factors that would best -- that he could best present his case in this argument. If we're going to give a CALJIC instruction on identification, I would ask that it be in its entirety, the complete instruction, which lists a number of factors so that the jury could see all the parameters of everything that they are to consider. But otherwise I object to the giving of the instruction.

THE COURT: Okay. Like [Souza's Requested Jury Instruction No.] 4, I think this is a matter of argument. I think Court's [Instruction No.] 9 covers -- it covers the world as long as generally relevant to the issue of credibility, and you certainly can argue all of this. I mean -- and on that basis refused over objection of the defense.

[SOUZA'S ATTORNEY]: May I say a few more words --

THE COURT: Yeah. Oh, sure.

> [SOUZA'S ATTORNEY]: -- on [Souza's Requested Jury Instruction] No. 5?
>
> I think an instruction like this should be given. I'm not saying this exact instruction should be given, especially in the situation where you have only eyewitness testimony as to who was or was not the perpetrator. You don't have corroborating evidence to back up the opinion of the eyewitness. And in that kind of situation this kind of instruction must -- I'm saying it must be given. California takes that position. You can modify the factors.
>
> And speaking of the factors, what I did was I did not put in the factors in my Proposed [Instruction] No. 5 that had nothing to do with the facts in this case; for example, if the witness had made identification to a photographic lineup or a physical lineup, you see. So that I took out. So I wasn't trying to, you know, pick and choose and pick and choose. But anyway that was my intent. I did not try to pick and choose only those items that were favorable.

The court refused to give the instruction, explaining that the instruction was "all covered in Court's [Instruction No.] 9." Court's Instruction No. 9, which was read to the jury, stated as follows:

> It is your exclusive right to determine whether and to what extent a witness should be believed and to give weight to his or her testimony accordingly.
>
> In evaluating the weight and credibility of a witness' [sic] testimony, you may consider the witness' [sic] appearance and demeanor; the witness' [sic] manner of testifying, the witness' [sic] intelligence; the witness' [sic] candor or frankness or lack thereof; the witness' [sic] interest, if any, in the result of this case; the witness' [sic] relation, if any, to a party; the witness' [sic] temper, feeling, or bias if any has been shown; the witness' [sic] means and opportunity of acquiring information; the probability or improbability of the witness' [sic] testimony; the extent to which the witness is supported or contradicted by other evidence; the extent to which the witness had made contradictory statements whether in trial or at other times; and all other circumstances surrounding the witness and bearing upon his or her credibility.
>
> Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. In weighing the effect of inconsistencies or discrepancies,

> whether they occur within one witness' [sic] testimony or as between different witnesses, consider whether they concern matters of importance or only matters of unimportant detail and whether they result from innocent error or deliberate falsehood.

On September 25, 2000, the jury returned a verdict, finding Souza guilty of Attempted Theft in the Second Degree, HRS §§ 705-500 and § 708-831(1)(b), and on December 5, 2000, the circuit court entered the Judgment, convicting Souza and sentencing him to five years' imprisonment, "with a mandatory minimum term of Three (3) Years and Four (4) Months as a repeat offender pursuant to H.R.S. §706-606.5, and with credit to be given for time already served." On January 3, 2001, Souza filed a timely notice of appeal.

ISSUE ON APPEAL

The sole issue on appeal is whether the circuit court committed reversible error in refusing to give the jury Souza's Requested Jury Instructions Nos. 1, 4, and 5. Souza argues that the instructions were of critical importance to his "three-pronged defense."[6/] The prosecution counters by asserting that

---

[6/] This defense is described as follows:

> First, [Defendant-Appellant Leo Dias Souza, Jr., also known as Leo D. Souza, Jr., (Souza)] was merely present at the scene of the incident and did not cut the lock nor aid and abet in the cutting of the lock. Second, the recollection of the witnesses to the heated discussion in the YWCA parking lot was inconsistent and confused, at best. Third, [Hix] assumed [Souza], when he emerged from behind the fence, was the male seen using the cutter. That [Souza] was the male attempting to steal the moped was questionable because the identification provided [by Hix] was probable at best.

(continued...)

the matters raised by Souza's requested instructions were adequately covered by the circuit court's instructions.

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." In re Estate of Herbert, 90 Hawai'i 443, 467, 979 P.2d 39, 63 (1999). In determining the sufficiency of jury instructions, the Hawai'i Supreme Court has stated that

> [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 conviction.

State v. Cabrera, 90 Hawai'i 359, 365, 978 P.2d 797, 803 (1999) (block quote formatting and citation omitted). "Moreover, a refusal to give an instruction that correctly states the law is not error if another expressing a substantially similar principle is given." In re Estate of Herbert, 90 Hawai'i at 467, 979 P.2d at 63 (internal quotation marks and citations omitted). Indeed, the trial judge must walk a fine line, giving the jury "sufficient instructions" while maintaining vigilance "against cumulative instructions." Id. To this end, "repetitious instructions should be avoided by striving to reduce the number

---

[6/](...continued)
(Citations omitted.)

of instructions given and to give a fair and complete single instruction on each issue." Tittle v. Hurlbutt, 53 Haw. 526, 531, 497 P.2d 1354, 1357 (1972).

DISCUSSION

A.

One of the defenses at trial was that Souza did not cut the lock or touch Holden's moped but was merely attempting to determine if the moped was abandoned. Souza's Requested Jury Instruction No. 1 would have instructed the jury that the "mere presence" of Souza at the crime scene was an insufficient basis on which to convict him.

Our review of the record indicates that the foregoing information was adequately covered by the circuit court's instructions concerning the State's burden of proof. Specifically, the court instructed the jury, in relevant part, as follows:

> You must presume [Souza] is innocent of the charge against him. This presumption remains with [Souza] throughout the trial of this case unless and until the prosecution proves [Souza] guilty beyond a reasonable doubt. The presumption of innocence is not a mere slogan but an essential part of the law that is binding upon you. It places upon the prosecution the duty of proving every material element of the offense charged against [Souza] beyond a reasonable doubt.
>
> You must not find [Souza] guilty upon mere suspicion or upon evidence which only shows that [Souza] is probably guilty. What the law requires before [Souza] can be found guilty is not suspicion, not probabilities, but proof of [Souza's] guilt beyond a reasonable doubt.
>
> What is a reason [sic] doubt? It is a doubt in your mind about [Souza's] guilt which arises from the evidence presented or from the lack of evidence and which is based upon reason and common sense. Each of you must decide

individually whether there is or is not such a doubt in your mind after careful and impartial consideration of the evidence. Be mindful, however, that a doubt which has no basis in the evidence presented or the lack of evidence or reasonable inferences therefrom or a doubt which is based upon imagination, suspicion, or mere speculation or guesswork is not a reasonable doubt.

What is proof beyond a reasonable doubt? If, after consideration of the evidence and the law, you have a reasonable doubt of [Souza's] guilt, then the prosecution has not proved [Souza's] guilt beyond a reasonable doubt and it is your duty to find [Souza] not guilty. If, after consideration of the evidence and the law, you do not have a reasonable doubt of [Souza's] guilt, then the prosecution has proved [Souza's] guilt beyond a reasonable doubt and it is your duty to find [Souza] guilty.

. . . .

In Count I of the complaint [Souza] is charged with the offense of attempted theft in the second degree. A person commits the offense of attempted theft in the second degree if he [or she] intentionally engages in conduct which, under the circumstances as he [or she] believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his [or her] commission of theft in the second degree.

There are two material elements of the offense of attempted theft in the second degree, each of which the prosecution must prove beyond a reasonable doubt. These two elements are:

1. That on or about March 6, 2000, in the City and County of Honolulu, State of Hawaii, [Souza] intended to commit theft in the second degree; and,

2. That [Souza] intentionally engaged in conduct which, under the circumstances as [Souza] believed them to be, was a substantial step in a course of conduct intended by [Souza] to culminate in the commission of theft in the second degree.

Conduct shall not be considered a substantial step unless it is strongly corroborative of [Souza's] intent to commit theft in the second degree.

<u>The burden of proof is on the prosecution with reference to every element of the crime charged, and this burden includes the burden of proving beyond a reasonable doubt the identity of [Souza] as the person who committed the crime charged</u>.

(Emphasis added.)

Since the jury was specifically instructed that the State had the burden of establishing, beyond a reasonable doubt, the identity of Souza as the person who committed the crime charged, and the jury was also informed that it had to find, beyond a reasonable doubt, that Souza engaged in conduct which was a substantial step in a course of conduct intended by Souza to culminate in theft in the second degree, the jury was adequately informed that it could not convict Souza based on his mere presence at the crime scene.

B.

At trial, Kathleen Holden testified that Souza

> had the yellow piece of paper in his hand and he was like waving it saying -- trying to ex -- well, explaining that he had been called to pick up the abandoned moped.
>
> . . . .
>
> . . . He said that he was there to pick up the abandoned -- that he was told the moped was abandoned, that he was there to pick it up, that he had cut the lock, that he had sat on the moped for a while to see if anybody came to claim it.

(Emphasis added.) Souza adamantly denied saying that he had cut the lock and testified that he told Holden, "Sir, I didn't cut your lock on your moped. I didn't even touch your moped." Souza claims he also explained to Holden that he could not have cut the lock because "I have nothing to cut a lock with. . . . I don't have no saw or cutters or anything. You can go look at my Jeep."

Souza contends that in light of the disputed testimony at trial, his Requested Jury Instruction No. 4 should have been

given to the jury because it was necessary to address the "most important of issues, i.e[.], whether [Souza] uttered inculpatory and/or exculpatory statements."

In denying Souza's request for this instruction, the circuit court held that the instruction was unnecessary because Souza could argue this point to the jury. The Hawai‘i Supreme Court has held, however, that "where a defendant is entitled to an instruction on a defense and makes a proper request for the instruction, the trial court's refusal to so instruct the jury is" not "justified by allowing closing argument to the jury on the substance of the omitted instruction." State v. Opupele, 88 Hawai‘i 433, 440, 967 P.2d 265, 272 (1998). (Emphasis added.) The key question, therefore, is whether Souza was entitled to his requested instruction regarding the evidence of his prior oral statements.

We hold that Souza was not entitled to have his Requested Jury Instruction No. 4 given because the totality of the circuit court's instructions adequately instructed the jurors that they were the ultimate evaluators of inconsistent or contradictory testimony by the various witnesses. Specifically, the circuit court instructed the jury as follows:

> While you must consider all of the evidence in determining the facts in this case, this does not mean that you are bound to give every bit of evidence the same weight. You are the sole and exclusive judges of the effect and value of the evidence and of the credibility of the witnesses. It is your exclusive right to determine whether and to what extent a witness should be believed and to give weight to his or her testimony accordingly.

> In evaluating the weight and credibility of a witness' [sic] testimony, you may consider the witness' [sic] appearance and demeanor; the witness' [sic] manner of testifying, the witness' [sic] intelligence; the witness' [sic] candor or frankness or lack thereof; the witness' [sic] interest, if any, in the result of this case; the witness' [sic] relation, if any, to a party; the witness' [sic] temper, feeling, or bias if any has been shown; the witness' [sic] means and opportunity of acquiring information; the probability or improbability of the witness' [sic] testimony; the extent to which the witness is supported or contradicted by other evidence; the extent to which the witness has made contradictory statements whether in trial or at other times; and all other circumstances surrounding the witness and bearing upon his or her credibility.
>
> Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. In weighing the effect of inconsistencies or discrepancies, whether they occur within one witness' [sic] testimony or as between different witnesses, consider whether they concern matters of importance or only matters of unimportant detail and whether they result from innocent error or deliberate falsehood.
>
> If you find that a witness has deliberately testified falsely to any important fact or deliberately exaggerated or suppressed any important fact, then you may reject the testimony of that witness except for those parts which you nevertheless believe to be true.
>
> You are not bound to decide a fact one way or another just because more witnesses testify on one side than the other. It is testimony that has a convincing force upon you that counts and the testimony of even a single witness, if believed, can be sufficient to prove a fact.
>
> . . . .
>
> The defendant has no duty or obligation to call any witnesses or produce any evidence. The defendant in this case has testified. When a defendant testifies, his [or her] credibility is to be tested in the same manner as any other witness.

The jury was thus informed that it had the responsibility of weighing the credibility of the different witnesses and evaluating the weight to be given to the evidence

adduced at trial. The circuit court did not err in refusing to give Souza's Requested Jury Instruction No. 4.

C.

Souza's Requested Jury Instruction No. 5 would have instructed the jury about the weight to be given to eyewitness identification testimony and the following eight factors that the jury could consider in determining the reliability of an eyewitness's identification testimony: (1) the opportunity of the witness to observe the alleged criminal act and the perpetrator of the act; (2) the level of attention, if any, that the witness exhibited at the time of the observation; (3) the witness's capacity to make an identification; (4) the period of time between the alleged criminal act and the witness's identification; (5) whether the witness had prior contacts with the alleged perpetrator; (6) the extent to which the witness is either certain or uncertain of the identification; (7) whether the witness's identification is, in fact, the product of the witness's own recollection; and (8) any other evidence relating to the witness's ability to make an identification.

The Hawai‘i Supreme Court has stated that the giving of "[s]pecial instructions regarding identification testimony of a witness" "is within the discretion of the trial court, and an abuse of discretion will be found only if the opening statements, cross-examination of prosecution witnesses, closing arguments, and other instructions to the jury fail to adequately alert the

jury to the issue." State v. Okumura, 78 Hawai‘i 383, 406 n.19, 894 P.2d 80, 103 n.19 (1995) (emphasis added).

In this case, the identification instruction requested by Souza was adequately covered by the circuit court's instructions regarding witness credibility, quoted in Section B above. Moreover, we note that during closing arguments, Souza's attorney asserted that Hix's identification testimony was suspect, stating:

> [Hix] said she heard, you know, the rattling of chains and she just assumed it was [Holden], you know. She heard that rattling of the chains before although you kind of got to scratch your head because he doesn't leave that moped out there too often. So I don't know. Maybe she heard the rattling of the chains on other occasions. But in any event she assumed it was [Holden].
>
> And, ladies and gentlemen, let's face it, you know, like I don't look like Tom Cruise, I don't think anybody can say that [Souza] looks like [Holden]. I mean not even a close resemblance because [Hix] says, hey, look, I saw the man doing this with the bolts, you know, and I even saw that man fall down. And, you know, ladies and gentlemen, even at that point she thought it was [Holden]. Remember she said she was so embarrassed she kind of turned away.
>
> I mean even at that point she thought it was [Holden]. That's the kind of attention she was paying. She said it was dark. She said there were a lot of shadows. Ladies and gentlemen, if that was [Holden], I don't care if there is a lot of shadows. He's kind of bald on the top. I think you would see the top of his head at least.
>
> And, you know, [Hix], we're not saying she's lying, you know. It's not a question of telling the truth or lying. She is mistaken. Sadly. She may try to convince herself that she is not, but she is mistaken. She testified under oath if [she] did not see [Souza] that day, [she] would not have been able to identify that person who [she] thought was [Holden].
>
> And the reason is this. When she finally thought that something was up, that person we would submit was K that was walking around this fence and back to the YWCA parking lot. She said, yeah, it was only for a few seconds, a few steps,

> never got to see his face, unable to see if he had a mustache or not able to determine probably his nationality.
>
> Pants. She doesn't know if he had on short pants, long pants, the color of pants. All she could say was this guy had on a dark shirt. She wasn't even able to say if it was [Souza] because if she had seen [Souza], she would have been able to say that that dark shirt was a mechanic's type of shirt.
>
> And she has the audacity, ladies and gentlemen, to say, well, when I saw [Souza] walking up the sidewalk of Punahou Street, I knew that was the guy who had cut the lock because of the way he walked, his mannerisms I saw. [She] only saw the guy take a few steps around that fence.

Souza's closing arguments clearly alerted the jury to the possibility that Hix had misidentified Souza as the person who had cut the lock. The circuit court, therefore, did not abuse its discretion in refusing to give Souza's requested jury instruction concerning eyewitness identification testimony.

CONCLUSION

In light of the foregoing discussion, we affirm the December 5, 2000 Judgment of the circuit court.

DATED: Honolulu, Hawai‘i, May 2, 2002.

On the briefs:

Chester M. Kanai for
defendant-appellant.

Bryan K. Sano,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.