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NOT FOR PUBLICATION

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NO. 25436

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
NELLENE K.S. MEYER, Defendant-Appellant,  
and KRISTINE KWAI YING LAU, Defendant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 01-1-1646)

MEMORANDUM OPINION

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

Nellene K.S. Meyer (Meyer) appeals from the October 8, 2002 "Judgment Guilty Conviction and Probation Sentence",<sup>1</sup> wherein the First Circuit Court<sup>2</sup> found Meyer guilty as charged in Count I, Forgery in the Second Degree, Hawaii Revised Statutes (HRS) § 708-852,<sup>3</sup> and in Count II, Theft in the Third Degree,

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<sup>1</sup> The notice of appeal was filed on October 29, 2002. The appeal was assigned to this court on August 21, 2003.

<sup>2</sup> Unless otherwise stated, the Honorable Virginia Lea Crandall presided.

<sup>3</sup> In pertinent part, Hawaii Revised Statutes (HRS) § 708-852 (1) (Supp. 2003) states:

**Forgery in the second degree.** (1) A person commits the offense of forgery in the second degree if, with intent to defraud, the person falsely makes, completes, endorses, or alters a written instrument, or utters a forged instrument, or fraudulently encodes the magnetic ink character recognition numbers, which is or purports to be, or which is calculated to become or to represent if completed, a deed, will, codicil, contract, assignment, commercial instrument, or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status.

HRS § 708-832(1)(a);<sup>4</sup>, sentenced her to five (5) years probation for Count I, and one (1) year probation for Count II, both periods of probation to run concurrently; and ordered her to pay restitution in the amount of \$109.32 for Count II. We affirm.

The October 7, 2002 "Findings of Fact, Conclusions of Law and Order Finding Defendant Guilty as Charged in Counts I and II" state, in relevant part, as follows:

FINDINGS OF FACT

. . . .

2. On January 15, 2001, at the Tommy [Hilfiger] store in Waikale, in the City and County of Honolulu, [Meyer] gave Jane Anacleto, store cashier, check No. 521 in the amount of \$218.64 as payment for various items of clothing.

3. Jane Anacleto observed [Meyer] writing out the check on a small counter behind the cash register. She was able to observe [Meyer] as she was the cashier helping [Meyer].

4. Jane Anacleto asked for and received from [Meyer] a photo identification. The photo on the identification matched [Meyer] and the name on the identification, Kristine Lau, matched the name on the check.

5. Check No. 521 in the amount of \$218.64 was not a valid check. The check never belonged to Kristine Lau. The account no. belonged to Chil Sang Yu and said person never gave permission to [Meyer] or Kristine Lau to use the check number or the account number.

6. On February 16, 2001, approximately one month later, Officer Jensen Okagawa asked Ms. Anacleto to view a photographic lineup regarding the transaction of Kristine Lau from the prior day. Ms. Anacleto was shown a paper with photographs of six unidentified females and picked out photograph number six as the person who filled out and presented the check to her on January 15, 2001. Photograph number six was a picture of [Meyer].

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<sup>4</sup> HRS § 708-832(1)(a) (1993) states:

**Theft in the third degree.** (1) A person commits the offense of theft in the third degree if the person commits theft:

(a) Of property or services the value of which exceeds \$100[.]

7. On March 27, 2001, Officer Jensen Okagawa showed another photographic lineup of six unidentified females to Ms. Anacleto and Ms. Anacleto picked out the photograph of Kristine Lau as a person she had seen in the store before but stated she was not the one who wrote out and presented the check on January 15, 2001. Ms. Anacleto further testified that prior to viewing the photographic lineup she was not told by Officer Jensen Okagawa which photographs belonged to [Meyer] and Kristine Lau.

8. On October 2, 2001, . . . Kristine Lau entered a plea of no contest to each of the four charges against her.

9. [Meyer] did not have permission to take items totaling two hundred eighteen dollars and sixty-four cents from Tommy [Hilfiger] and did not have permission to pay for said items with a forged check.

10. Everything that was testified to occurred within the City and County of Honolulu, State of Hawaii.

CONCLUSIONS OF LAW

1. A person commits the offense of Forgery in the Second Degree if, with intent to defraud, she falsely makes, completes, endorses or alters a written instrument, or utters a forged instrument, which is or purports to be, or which is calculated to become or to represent if completed, a commercial or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status.

. . . .

"Utter," in relation to a forged instrument, means to offer, whether accepted or not, a forged instrument with representation by acts or words, oral or in writing, that the instrument is genuine.

. . . .

2. A person commits the offense of Theft in the Third Degree, if she obtains or exerts control over the property of another, with intent to deprive the other of the property, the value of which exceeds \$100.00. . . .

3. The prosecution proved beyond a reasonable doubt:

- (1) That on or about January 15, 2001, in the City and County of Honolulu, State of Hawaii, [Meyer] uttered a forged instrument, which purported to be a commercial instrument or other instrument which evidenced, created, transferred, terminated, or otherwise affected a legal right, interest, obligation, or status; and
- (2) That [Meyer] did so with the intent to defraud.

4. The prosecution proved beyond a reasonable doubt:

- (1) That, on or about January 15, 2001, in the City and County of Honolulu, [Meyer] obtained or exerted unauthorized control over the property of another; and
- (2) That [Meyer] knew and believed the value of the property to exceed \$100; and
- (3) That the value of the property exceeded \$100; and
- (4) That [Meyer] obtained control over the property with the intent to deprive Tommy [Hilfiger] store of the property.

. . . .

6. . . . .

Jane Anacleto remembered [Meyer] because she hid behind the cash register before handling [sic] the check to Anacleto. Anacleto had the opportunity to view [Meyer] at the time of the offense as Anacleto was the cashier for the transaction, she paid attention to [Meyer] during the transaction because [Meyer] engaged in unusual behavior; the accuracy of the description of [Meyer] is high and the degree of certainty of Anacleto in her identification is also high. One month of time is a reasonably close proximity of time to make a reliable identification.

Meyer states her points of error as follows:

1. The trial court abused its discretion in finding [Meyer] guilty by narrowly and unfairly focussing on Jane Anacleto's identification testimony to the exclusion of equally relevant and exculpatory evidence. In its findings of fact, conclusions of law, and order finding [Meyer] guilty as charged in Counts I & II, the trial court in findings of fact 1 through 10 narrowly focussed on Jane Anacleto's identification of [Meyer] to the exclusion of equally relevant and exculpatory evidence of the stipulated evidence of documents examiner Lloyd James Josey, Jr. [w]ho excluded [Meyer] from having authored the check in question and the impact of having previously accepted co-defendant [Kristine Lau's] no contest plea to the self same charges.

2. Underlying the abuse of discretion standard is the foundational principals [sic] of the fair administration of justice and the integrity of the criminal justice system. Here, the trial court abused its discretion in finding [Meyer] guilty in light of the fact that co-defendant [Kristine Lau] had previously entered a no-contest plea to the very same charges against [MEYER], inspite [sic] of the fact that the only witness to testify in this case, [Jane Anacleto], stated that positively, there was only one person at her cashier's station and that person is the same person who wrote out an instrument identified as First Hawaiian Bank check no. 521 payable to TOMMY [HILFIGER] in the amount of \$218.64, and where the HPD documents/handwriting expert Lloyd James Josey, Jr. stated that [Meyer] is excluded from authoring State's Exhibit "3"!

3. A corollary principal [sic] to the presumption of innocence is that where, -- in a jury waived trial, -- the same evidence can be viewed as being both inculpatory and exculpatory, the trial court must acquit the defendant and failure to do so constitutes an abuse of discretion.

More simply stated, Meyer contends that the record does not support her conviction because: (A) in his Crime Laboratory Report, Jim Josey, Senior Forensic Document Examiner, Honolulu Police Department, Crime Laboratory, opined that Meyer did not write the check; (B) Jane Anacleto testified that (1) only Meyer appeared at her cashier's station and (2) Meyer (a) wrote out and (b) uttered the check; (C) Kristine Lau previously pled no contest to, and was convicted of, the same charges; and (D) "where, -- in a jury waived trial, -- the same evidence can be viewed as being both inculpatory and exculpatory, the trial court must acquit the defendant and failure to do so constitutes an abuse of discretion." (Emphasis omitted.)

Contention (D) is wrong. "Verdicts based on conflicting evidence will not be set aside where there is substantial evidence to support the trier of fact's findings." State v. Jenkins, 93 Hawai'i 87, 100-101, 997 P.2d 13, 26-27 (2000) (quoting Tsugawa v. Reinartz, 56 Haw. 67, 71, 527 P.2d 1278, 1282 (1974)) (brackets omitted). "It is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trier of fact." Id. at 101 (quoting State v.

Buch, 83 Hawai'i 308, 321, 926 P.2d 599, 612 (1996)) (brackets omitted).

A trial court's findings of fact are reviewed under the "clearly erroneous" standard of review. Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994). This is true of its implicit and explicit findings.<sup>5</sup> "A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made. State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995) (citation omitted).

The first half of the clearly erroneous test requires substantial evidence. On that issue, the Hawai'i Supreme Court has stated that:

We have long held that evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or a jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact. Indeed, even if it could be said in a bench trial that the conviction is against the weight of the evidence, as long as there is substantial evidence to support the requisite findings for conviction, the trial court will be affirmed.

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<sup>5</sup> Hawai'i Rules of Penal Procedure Rule 23(c) provides:

**(c) Trial without a jury.** In a case tried without a jury the court shall make a general finding and shall in addition, on request made at the time of the general finding, find such facts specially as are requested by the parties. Such special findings may be orally in open court or in writing at any time prior to sentence.

"Substantial evidence" as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion. And as trier of fact, the trial judge is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence.

State v. Batson, 73 Haw. 236, 248-49, 831 P.2d 924, 931 (1992)

(citations omitted).

When applying the "clearly erroneous" test, it must be remembered that

[i]t is for the trial judge as fact-finder to assess the credibility of witnesses and to resolve all questions of fact; the judge may accept or reject any witness's testimony in whole or in part. As the trier of fact, the judge may draw all reasonable and legitimate inferences and deductions from the evidence, and the findings of the trial court will not be disturbed unless clearly erroneous. An appellate court will not pass upon the trial judge's decisions with respect to the credibility of witnesses and the weight of the evidence, because this is the province of the trial judge.

State v. Eastman, 81 Hawai'i 131, 139, 913 P.2d 57, 65 (1996)

(citations omitted).

According to the record, contentions (A), (B) (1), (B) (2) (b), and (C) are facts. However, as suggested by conclusion of law no. 6, the transcript shows that both the first sentence of finding of fact no. 3 and contention (B) (2) (a) are not supported by the evidence. Anacleto testified, in relevant part, as follows:

Q . . . .

Now the person that was at your register - let's see now -- um, that person wrote the check out; is that true?

A Yes.

. . . .

Um, she was kind of hidden.

Q Okay.

A But I could see her writing. That's all she had with her was the check.

Q It's a fair inference -- is that true? --

A Yes.

Q -- that she wrote the check.

Okay. Now the person who wrote the check is the same one who handed you the check; is that true?

A Correct.

. . . .

Q Now did you actually see the check that she was writing out or was it kind of hidden from your view?

A It was hidden 'cause the register was blocking that portion.

Q Okay. So you can actually see her in the process of writing but you can't see what she's writing out; is that correct?

A Correct.

Q So you're assuming it was a check, but you're not positively sure; correct?

A Um, yes.

What Meyer fails to recognize is that even if the first sentence of finding of fact no. 3 and contention (B)(2)(a) are not facts, this combination does not provide her with a defense to the charges. This is so because the fact that Meyer wrote the check is not a material element of either charge. To convict Meyer of Forgery in the Second Degree under HRS § 708-852, the State was required to prove the elements stated in conclusion of law no. 3. To convict Meyer of Theft in the Third Degree under HRS § 708-832(1)(a), the State was required to prove the elements stated in conclusion of law no. 4.



Similarly, the fact that Kristine Lau pleaded no contest to the same charges does not prove that Meyer is innocent. "Guilty pleas of co-defendants are not relevant to or admissible as substantive evidence of a defendant's guilt or innocence." State v. Moore, 337 S.C. 104, 108-09, 522 S.E.2d 354, 357 (App. 1999); see also United State v. Halbert, 640 F.2d 1000 (9th Cir. 1981); United States v. Solomon, 795 F.2d 747 (9th Cir. 1986). It is reasonably possible that (1) both Kristine Lau and Meyer are guilty of the same offense, and/or (2) Kristine Lau was merely trying to cover for Meyer by accepting sole blame.

Anacleto testified that when Meyer left the store, another girl walked out with her. That fact, considered together with the fact that Meyer may have only pretended to write out the check, and the facts of (A), (B) (1), (B) (2) (b), and (C), suggest that Kristine Lau participated with Meyer in the crimes. They do not prove that Kristine Lau committed the crimes and Meyer did not.

Accordingly, we vacate the following part of the October 7, 2002 "Findings of Fact, Conclusions of Law and Order Finding Defendant Guilty as Charged in Counts I and II" that is printed in bold:

FINDINGS OF FACT

. . . . .

3. Jane Anacleto observed [Meyer] writing **out the check** on a small counter behind the cash register. She was able to observe [Meyer] as she was the cashier helping [Meyer].

We affirm the October 8, 2002 "Judgment Guilty Conviction and Probation Sentence."

DATED: Honolulu, Hawai'i, August 10, 2004.

On the briefs:

Bryan K. Sano,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Plaintiff-Appellee.

Chief Judge

Christopher R. Evans  
for Defendant-Appellant.

Associate Judge

Associate Judge