

**NOT FOR PUBLICATION**

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NO. 25621

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs.  
MINH DUC LUU, Defendant-Appellant, and  
XUAN MAI DINH, Defendant.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 00-1-1890)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Minh Duc Luu (Luu) appeals from the Judgment entered by the Circuit Court of the First Circuit (circuit court) on January 28, 2003.<sup>1</sup> After a jury trial, Luu was found guilty of the included offense of theft in the second degree in violation of Hawaii Revised Statutes (HRS) §§ 708-830(2) and 708-831(1)(b) (1993).<sup>2</sup> He was sentenced to five years

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<sup>1</sup> The Honorable Karl K. Sakamoto presided.

<sup>2</sup> Hawaii Revised Statutes (HRS) §§ 708-830(2) and 708-831(1)(b) (1993) provide in relevant part as follows:

**§ 708-830 Theft.** A person commits theft if the person does any of the following:

. . . .

- (2) Property obtained or control exerted through deception. A person obtains, or exerts control over, the property of another by deception with intent to deprive the other of the property.

**§ 708-831 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.

of probation and payment of \$13,921 in restitution.

After a careful review of the record and the briefs submitted by the parties, we resolve Luu's arguments on appeal as follows:

(1) Luu argues that his indictment was defective because it charged him as a principal and not as an accomplice. We reject this argument. As Luu acknowledges, the Hawai'i Supreme Court has held that a defendant can be charged as a principal and convicted as an accomplice even though the indictment contains no allegation of accomplice liability. State v. Fukusaku, 85 Hawai'i 462, 486, 946 P.2d 32, 56 (1997).

(2) Luu argues that because there was no evidence he directly received the public assistance benefits that were paid to his girlfriend, he could not be convicted as a principal of theft by deception, and, therefore, it was error for the circuit court to instruct the jury on a principal's liability for theft by deception. Luu's argument is without merit.

A person need not directly receive property to be guilty as a principal of theft by deception. HRS § 708-830(2). The person need only "obtain" property, with the word "obtain" defined to mean, "[w]hen used in relation to property, to bring about a transfer of possession or other interest, whether to the obtainer or to another." HRS § 708-800 (1993) (Emphasis

added).<sup>3</sup> The absence of evidence that Luu directly received public assistance benefits therefore did not render it improper for the circuit court to instruct on a principal's liability.

(3) Luu argues that the accomplice liability instruction was defective because it did not require that the offense was actually committed by another person and that the accomplice acted intentionally in aiding the principal commit the crime. We disagree. With the agreement of both parties, the circuit court gave an accomplice liability instruction that tracked the relevant language of the accomplice liability statute, HRS § 702-222 (1993). A plain reading of the instruction demonstrates that it sufficiently apprised the jury of the essential elements for accomplice liability.

(4) Luu was charged with theft in the first degree, and the circuit court instructed on the lesser offenses of theft in the second and third degrees. The amount of theft must exceed \$20,000 for theft in the first degree, \$300 for theft in the second degree, and \$100 for theft in the third degree.

According to Luu, the prosecution's evidence only established a lump sum figure of \$27,842 for the public assistance overpayments made to Luu's girlfriend between January 10, 1998, and October 31, 1999, and did not provide the jury a means to calculate any lesser amount of overpayments. Luu argues

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<sup>3</sup> The jury was instructed on the statutory definition of "obtain."

that there was no rational basis in the evidence for the circuit court to have instructed the jury on the included theft offenses because there was no way for the jury to determine an amount of theft below the prosecution's lump sum figure. Based on the same theory, he also claims there was insufficient evidence to support his conviction for theft in the second degree. Luu's sole argument in support of this claim is that there was insufficient evidence for the jury to determine that the amount of theft exceeded the \$300 minimum required for theft in the second degree. Luu's arguments have no merit.

The prosecution's lump sum figure was based on five notes purportedly written by Luu in support of his girlfriend's fraudulent claims for public assistance benefits. The defense disputed the number of notes Luu had written, with Luu testifying that he only wrote two of these notes. There was a rational basis in the evidence for the jury to find that Luu did not write all of the notes and for the jury to hold Luu responsible only for the public assistance overpayments made during the months affected by the notes it found Luu had authored. The prosecution introduced evidence of the public assistance benefits paid to Luu's girlfriend for each month between January 10, 1998, and October 31, 1999, as well as the total overpayments during that period. From this evidence, the jury had the means to gauge the amount of overpayments by month during this period.

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Contrary to Luu's claim, the jury could have rationally determined that the amount of public assistance benefits Luu assisted his girlfriend in obtaining by deception was less than the \$20,000 threshold for theft in the first degree. Thus, the circuit court did not err in instructing on the lesser theft offenses. There was also substantial evidence to enable the jury to apportion the lump sum overpayments by month and to find that Luu aided his girlfriend in obtaining more than the \$300 minimum for theft in the second degree.

Therefore,

IT IS HEREBY ORDERED that the Judgment entered on January 28, 2003, by the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, November 30, 2004.

On the briefs:

Dwight Nadamoto, Deputy  
Attorney General  
for Plaintiff-Appellee.

Acting Chief Judge

James S. Tabe, Deputy  
Public Defender  
for Defendant-Appellant.

Associate Judge

Associate Judge