

DISSENTING OPINION BY NAKAMURA, J.

Defendant-Appellant Bardwell Eberly (Eberly) challenges his two convictions for being a felon in possession of a firearm. Eberly's sole defense at trial was that he was ignorant of the fact that the bag he possessed contained two semi-automatic pistols. A fake identification with Eberly's picture, however, was found in a wallet in the bag. A security guard and a police officer also testified that when the security guard picked up the bag, Eberly snatched it from the guard. Eberly then struggled to keep the bag away from the police officers despite their repeated demands that Eberly drop the bag.^{1/}

For each firearm offense, the jury was instructed that the prosecution had to prove beyond a reasonable doubt that Eberly did "intentionally or knowingly" own, possess, or control a firearm. Because there was no evidence that Eberly was the owner of the two pistols apart from his possession of the bag, the case turned on whether Eberly knowingly or intentionally possessed or controlled the pistols in the bag. The trial court

^{1/} There was also evidence that Defendant-Appellant Bardwell Eberly (Eberly) had five bullets in his pocket that were the same caliber as the pistols in the bag. The jury, however, did not rely on this evidence as the basis for finding Eberly guilty on the felon-in-possession-of-ammunition charge. In interrogatories accompanying the verdict on the ammunition charge, the jury identified Eberly's act of possessing "ammunition within the firearm," and not "the loose ammunition," as the basis for its guilty verdict.

also gave the jury an instruction on Eberly's ignorance-of-fact defense, as follows:

In any prosecution for an offense, it is a defense that the accused engaged in the prohibited conduct under ignorance if the ignorance negatives the state of mind required to establish an element of the offense.

This instruction tracked the language of the statute defining the defense, Hawaii Revised Statutes (HRS) § 702-218 (1993).^{2/} The trial court did not additionally instruct the jury that the prosecution had the burden of disproving Eberly's ignorance-of-fact defense beyond a reasonable doubt.

The majority concludes that the Hawai'i Supreme Court's decision in State v. Locquiao, 100 Hawai'i 195, 58 P.3d 1242 (2002), dictates that Eberly's firearm convictions be reversed. I respectfully disagree. Locquiao is distinguishable because, unlike in Locquiao, the jury in this case was given an instruction on Eberly's ignorance-of-fact defense.

Were it not for Locquiao, my analysis of Eberly's case would be straightforward. In order to find Eberly guilty under the mens rea instruction for the firearm offenses, the jury was required to find beyond a reasonable doubt that Eberly knew there

^{2/} Hawaii Revised Statutes (HRS) § 702-218 (1993) provides in relevant part:

§ 702-218 Ignorance or mistake as a defense. In any prosecution for an offense, it is a defense that the accused engaged in the prohibited conduct under ignorance or mistake of fact if:

- (1) The ignorance or mistake negatives the state of mind required to establish an element of the offense[.]

were two firearms in the bag. As a matter of logic, the jury could not make this finding without also rejecting, beyond a reasonable doubt, Eberly's defense that he did not know what was in the bag. Accordingly, without Locquiao, I would have concluded that no separate instruction on Eberly's ignorance-of-fact defense nor on the prosecution's burden to disprove that defense was required.

Locquiao, however, held that the trial court must give a separate instruction on the statutory ignorance-or-mistake-of-fact defense even when the defense is subsumed within the mens rea instruction already given. Id. at 206-08, 58 P.3d at 1253-55. In support of its holding, the court cited cases from other jurisdictions concluding that a separate instruction on an ignorance-or-mistake-of-fact defense was necessary "in order to draw the jury's attention to the defendant's theory of the case." Id. at 207, 58 P.3d at 1254. The court concluded that the trial court's error in failing to instruct on Locquiao's ignorance-or-mistake-of-fact defense was not harmless beyond a reasonable doubt "[i]nasmuch as the jury was not given the opportunity expressly and separately to consider Locquiao's defense." Id. at 208, 58 P.3d at 1255. (Emphasis in original).

In my view, Locquiao is not dispositive. In Locquiao, the trial court refused to give any instruction on the defendant's ignorance-or-mistake-of-fact defense. Id. at 201, 58

P.3d at 1248. Here, the trial court gave the jury an instruction on Eberly's ignorance-of-fact defense in the language of the statutory defense.^{3/} Thus, Eberly's case turns on an issue not presented in Locquiao -- whether the trial court's instruction on an ignorance-of-fact defense, but not on the prosecution's burden to disprove that defense, requires that Eberly's convictions be vacated.

The standard of review for determining the adequacy of jury instructions is "whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Valentine, 93 Hawai'i 199, 204, 998 P.2d 479, 484 (2000). Unlike in Locquiao, the instruction on Eberly's ignorance-of-fact defense gave the jury the opportunity to expressly and separately consider his defense. The primary concern expressed in Locquiao was therefore substantially addressed in Eberly's case.

The instructions on Eberly's ignorance-of-fact defense and the mens rea required for each firearm offense, when read and considered as a whole, were not "prejudicially insufficient, erroneous, inconsistent, or misleading." Valentine, 93 Hawai'i at 204, 998 P.2d at 484. The jury was instructed that the prosecution had the burden of proving beyond a reasonable doubt

^{3/} The instruction given by the trial court in this case was nearly identical to the instruction requested by the defense but refused in State v. Locquiao, 100 Hawai'i 195, 201, 58 P.3d 1242, 1248 (2002).

that Eberly knowingly or intentionally possessed or controlled a firearm. The jury was also instructed that Eberly had a defense if his ignorance negated the state of mind required to establish the offense. Based on these instructions, the jury could not have found Eberly guilty unless it determined that the prosecution had disproved Eberly's ignorance-of-fact defense beyond a reasonable doubt. Any error in failing to instruct on the prosecution's burden to disprove this defense was therefore harmless beyond a reasonable doubt. Had the jury received the instruction Eberly claims was erroneously omitted, there is no reasonable possibility that the outcome of Eberly's case would have been different.

The other claims Eberly raises on appeal are without merit. Eberly has failed to show that his trial counsel provided ineffective assistance or that the court erred in allowing the jury to ask questions of witnesses. I would affirm Eberly's firearm convictions and therefore respectfully dissent.

Craig H. Nakamura