

NOT FOR PUBLICATION

NO. 25648

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ALAN E. K. KEKAHUNA, Defendant-Appellant

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STATE OF HAWAI'I

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-1247)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Nakamura, JJ.)

Defendant-Appellant Alan E.K. Kekahuna (Kekahuna) appeals from the Amended Judgment^{1/} filed on February 25, 2003, in the Circuit Court of the First Circuit (circuit court), the Honorable Michael D. Wilson, presiding. A jury found Kekahuna guilty of Forgery in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 708-852 (Supp. 2004).^{2/} The State of Hawai'i (the State) moved for an extended term of imprisonment and to sentence Kekahuna as a repeat offender based on his

^{1/} The original Judgment filed on January 24, 2003, erroneously indicated that the conviction of Defendant-Appellant Alan E.K. Kekahuna (Kekahuna) was based on a guilty plea. The Amended Judgment corrected this error by noting that Kekahuna's conviction was based on a jury trial.

^{2/} Hawaii Revised Statutes (HRS) § 708-852 (Supp. 2004) provides, in pertinent part, as follows:

§708-852 Forgery in the second degree. (1) A person commits the offense of forgery in the second degree, if, with intent to defraud, the person . . . utters a forged instrument . . . , 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.

numerous prior convictions: twenty-one convictions for Burglary in the First Degree, two convictions for Attempted Burglary in the First Degree, and a conviction for Escape in the Second Degree. Judge Wilson granted the State's motions and sentenced Kekahuna to an extended term of ten years' imprisonment with a mandatory minimum term of five years as a repeat offender.

On appeal, Kekahuna argues that: 1) the trial court abused its discretion in permitting a detective to testify that no drugs were found on Kekahuna because the State failed to lay a foundation that such testimony was based on the detective's personal knowledge; 2) the trial court erred in refusing Kekahuna's proposed theory-of-defense jury instruction; 3) the cumulative effect of these errors deprived Kekahuna of a fair trial; and 4) Kekahuna's extended term sentence was unconstitutional.^{3/} We affirm.

BACKGROUND

A. The State's Evidence

In the morning on June 8, 2002, Lucia Nembhrajmal (Nembhrajmal) discovered that her purse was missing. The previous night, Nembhrajmal had a group of about eight people at her house to play mah-jongg. Nembhrajmal did not know all of

^{3/} On December 27, 2004, Kekahuna filed a motion to reopen briefing so that he could challenge the constitutionality of his extended term sentence. By order dated January 12, 2005, this court granted Kekahuna's motion and directed both parties to submit letter briefs on whether Kekahuna's extended term sentence violated his Sixth Amendment right to a jury trial.

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these people well. Nembhrajmal felt sick and went to sleep, placing her purse beside her bed, while the others continued to play mah-jongg. When she awoke, her purse, which contained her Bank of Hawaii checkbook, was gone. Nembhrajmal called the police to report the theft and attempted to close her bank account. Nembhrajmal did not know Kekahuna, and he had not been among the people at her house playing mah-jongg.

On June 12, 2002, at about 9:20 a.m., Kekahuna went to the Pearlridge Branch of Bank of Hawaii. He handed the teller a check for \$500, payable to Kekahuna, and asked her to cash it. The check was drawn on Nembhrajmal's account, was signed in Nembhrajmal's name, and contained a notation that it was for a "loan pmt." Kekahuna gave the teller a Hawai'i State identification card. Kekahuna endorsed the back of the check and wrote his address and social security number, which matched the signature and information on his identification card. Because Kekahuna did not have an account with the bank, the teller asked him to place an inked fingerprint of his right index finger on the check. Kekahuna complied.

The teller then accessed the bank's computer system to compare the signature on the check with an image of the signature on Nembhrajmal's signature card. The signatures did not match. The check presented by Kekahuna was also out of sequence with previous checks cashed on the account. The teller notified her

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supervisor of the discrepancies, and the supervisor telephoned Nembhrajmal. Nembhrajmal stated that she had not issued a check for \$500 to Kekahuna and that someone had stolen her checks. After speaking with Nembhrajmal, the supervisor called Pearlridge security and the police.

In the meantime, after waiting a few minutes, Kekahuna told the teller to "hurry up" because he had to go to work. Kekahuna asked if there was a problem with the check. The teller said there was no problem and explained that the bank had to follow certain procedures when a non-depositor cashed a check. Kekahuna asked if it was a "bad check." The teller replied that she did not know and that her supervisor was checking on that. Kekahuna became "antsy" and "fidgety" and kept looking at the entrance door to the bank. The supervisor advised Kekahuna that she had to get in contact with the account holder, and she asked Kekahuna to wait by the next teller window. Kekahuna asked for his identification back so he could go to work. Kekahuna then abruptly left the teller area and headed for the door without the check or his identification card.

Pearlridge Security Officer Ilae Luamanuvae (Luamanuvae) arrived at the bank as Kekahuna was leaving. The supervisor pointed to Kekahuna and Luamanuvae started talking to Kekahuna just outside the bank to stall him until the police arrived. Kekahuna asked Luamanuvae to let him go. Kekahuna

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stated that he was carrying drugs and did not want to get in more trouble. Luamanuvae replied that Kekahuna had to stay until the problem with the bank was resolved.

While Luamanuvae was talking to Kekahuna, Honolulu Police Department (HPD) Officer Lauriano Perreira, who was in uniform and driving a marked police car, pulled up to the bank. When Kekahuna saw Officer Perreira, Kekahuna ran. Officer Perreira chased Kekahuna on foot, yelling at him to stop. The driver of a passing vehicle, who happened to be a Department of Defense policeman, joined in the chase. Kekahuna tripped and was held down by the driver until Officer Perreira arrived. Kekahuna struggled with Officer Perreira, ignoring the officer's repeated demands that Kekahuna put his hands behind his back.

Officer Perreira eventually handcuffed Kekahuna and searched him incident to arrest. Officer Perreira testified that he did not find any contraband on Kekahuna. Neither Officer Perreira nor Luamanuvae, who followed the chase on a bicycle, saw Kekahuna discard anything while fleeing. After Kekahuna's arrest, Luamanuvae submitted a written statement to the police that included Kekahuna's prior statement that Kekahuna had drugs on him.

HPD Officer Mark Tom arrived at the scene shortly after Kekahuna was handcuffed. Officer Tom testified, "He [Kekahuna] said he didn't do anything wrong and the lady gave him the check

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for yardwork, something like that, yeah." That evening, Kekahuna talked to HPD Detective Laurie Takamoto, who had been assigned to the case. Kekahuna told Detective Takamoto that he was unemployed. Kekahuna agreed to provide Detective Takamoto with handwriting samples. Detective Takamoto testified that while providing the samples, Kekahuna stated that "he didn't know it was a F'd up check" and that "a lady gave it to him for doing some yardwork."

The front of the check Kekahuna attempted to cash was written in cursive handwriting. Detective Takamoto asked Kekahuna to replicate that check by filling out blank specimen checks in cursive. Kekahuna refused and instead handprinted the specimen checks, claiming that he did not know how to write in cursive. A handwriting expert testified that Kekahuna's failure to provide a compatible writing sample prevented her from determining whether Kekahuna wrote the front of the check. The expert's analysis was inconclusive, meaning that she could not identify or eliminate Kekahuna as the check's writer.

Detective Takamoto was aware of Luamanuvae's report that Kekahuna claimed to have been in possession of drugs. Detective Takamoto testified that no drugs were found on Kekahuna. She further testified that Kekahuna would have been searched again before being placed in the cell block.

B. Kekahuna's Testimony

Kekahuna testified in his own defense. He denied knowing that the check was forged. According to Kekahuna, he got the check as payment for "side jobs" he did installing car stereos and fixing a car for a man named "Kala." Kekahuna did not know Kala's last name or where he lived. Kekahuna received the check on June 10, 2002, two days before he went to the bank. Kekahuna met with Kala and a woman who Kala introduced as his girlfriend "Lucia" at "Sewers" beach in Waianae. The girlfriend gave the check to Kala who handed it to Kekahuna. This was the only time Kekahuna had ever met Kala's girlfriend.

Kekahuna testified that he willingly endorsed the check and provided a print of his index finger when requested by the bank teller. After waiting three to five minutes, he asked the teller if anything was wrong with the check and later if the check was bad. When the delay continued, Kekahuna testified that he began to panic, not because of concern over the check, but because he had drugs, namely "ice," in his pocket. Kekahuna decided to leave the bank but was stopped by security guard Luamanuvae. Kekahuna told Luamanuvae that Kekahuna was carrying some ice. Kekahuna claimed that Luamanuvae told him to throw the ice away, but as Kekahuna was about to do so, Luamanuvae warned Kekahuna that the police had arrived. Kekahuna got scared and ran.

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Kekahuna stated that after he was arrested, Officer Perreira searched him but did not find the ice because Kekahuna was sitting down and the ice was in his back pocket. Kekahuna was taken to the Pearl City police station where he was booked and placed in a cell. Kekahuna testified that he was not searched before being placed in the cell and that he flushed the ice, which was in a one-inch by one-inch envelope, down the toilet in the cell. Kekahuna was later transported to the cell block at the Honolulu police station where he waited several hours before speaking to Detective Takamoto. Detective Takamoto told Kekahuna to fill out the specimen checks in cursive writing. Kekahuna told her that, except for his signature, he could not write in cursive. He therefore completed the specimen checks in print. Kekahuna attended school up to tenth grade and then went to the Job Corps program. Kekahuna acknowledged that he learned how to write in cursive.

Kekahuna denied telling either Officer Tom or Detective Takamoto that he received the check for doing "yardwork." Instead, Kekahuna testified he told them that he received the check from a lady, whom he believed was "Lucia," for doing "some work." Kekahuna told Officer Tom and Detective Takamoto that Kekahuna had done work for the lady who gave him the check, even though the check was for work done for his friend Kala, because Kekahuna believed the lady could straighten everything out.

DISCUSSION

A. Detective Takamoto's Testimony that No Drugs Were Found on Kekahuna.

During Detective Takamoto's direct examination by the Deputy Prosecuting Attorney (DPA), the following colloquy occurred:

DPA: Now, just a couple things with respect to this investigation. You're the one who actually collects all the reports and statements and puts them all together?

Takamoto: That's correct.

DPA: Were you aware that there was a statement made by the security officer that Mr. Kekahuna had said that he had drugs on him?

Takamoto: Yes.

DPA: During any point in time during this episode, were drugs found on Mr. Kekahuna?

Takamoto: No.

Defense Counsel: Objection, Judge. Lack of foundation. There's been no testimony that she was in a position to make that determination.

DPA: I can --

The Court: All right. Objection's overruled. You can continue.

DPA: And your answer is no?

Takamoto: That's correct; no.

DPA: So that includes even after he was arrested and handcuffed and taken into custody?

Takamoto: That's correct.

DPA: In fact, would he have been searched again before being introduced into the cell block?

Takamoto: Yes.

DPA: And to your knowledge, were any drugs found on him?

Takamoto: No.

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Kekahuna argues that the DPA failed to lay a sufficient foundation that Detective Takamoto had personal knowledge of whether drugs were found on Kekahuna during the episode. Kekahuna therefore contends that the trial court abused its discretion in overruling his lack-of-foundation objection and permitting Detective Takamoto to testify that no drugs were found on Kekahuna. Kekahuna further contends that the court's error was harmful because it abrogated his "defense"^{4/} that he only ran from the bank due to fear of being caught with drugs. Kekahuna asserts that the court's error deprived him of "an honest opportunity to test Detective Takamoto's competence in arriving at her statement and bringing out reasonable doubts in the state's case."

Rule 602 of the Hawaii Rules of Evidence (HRE) provides in relevant part that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." For purposes of Rule 602, "personal knowledge" means that "the witness perceived the event about which he testifies and that he has a present recollection of the perception." Commentary to HRE Rule 602.

^{4/} Kekahuna's actual defense was that he did not act with an intent to defraud because he believed the check was valid. Kekahuna's claim that he ran because he did not want to be caught with drugs did not provide a defense. It only weakened the inference that his flight showed that he knew the check was bad by providing an alternative explanation for his flight.

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We agree with Kekahuna that the DPA failed to lay a proper foundation that Detective Takamoto had personal knowledge of whether drugs had been found on Kekahuna. There was no evidence that Detective Takamoto was present when Kekahuna was searched incident to arrest or when he was booked and placed into a cell at the Pearl City police station. The only foundation laid by the DPA was that Detective Takamoto had collected and assembled the police reports concerning the investigation and was aware of some of its contents. But information supplied by others is not personal knowledge, and absent a hearsay exception, such information is not admissible. State v. Bannister, 60 Haw. 658, 659-60, 594 P.2d 133, 134 (1979).

We disagree with Kekahuna, however, that the court's error was harmful and requires vacating his conviction. There is a difference between Detective Takamoto's ability to testify that no drugs were found on Kekahuna and her ability to testify that she had no knowledge that drugs were found on Kekahuna. A witness has personal knowledge of the extent of the witness's own knowledge. Thus, Detective Takamoto's subsequent testimony, to which Kekahuna did not object, that "to [her] knowledge," no drugs were found on Kekahuna, was permissible. As the detective in charge of Kekahuna's investigation, Detective Takamoto would likely be aware of any significant developments in Kekahuna's case. The jury could reasonably infer from Detective Takamoto's

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lack of knowledge of drugs being found on Kekahuna that, in fact, no drugs were found on him. Accordingly, any incremental prejudice flowing from the improper admission of Detective Takamoto's initial, unqualified testimony that no drugs were found on Kekahuna was minimal in light of the detective's admissible testimony that to her knowledge, no drugs were found on Kekahuna.

In any event, Detective Takamoto's testimony that no drugs were found on Kekahuna was consistent with Kekahuna's own testimony that he discarded the ice without detection by the police. Thus, the testimony to which Kekahuna objected did not prejudice his case. Rather, it was the evidence that Kekahuna was searched by the police without drugs being found that cast doubt on his "defense." However, Officer Perreira, and not Detective Takamoto, testified that Kekahuna had been searched incident to arrest without any drugs being found. In addition, Kekahuna did not object when Detective Takamoto was asked, "[w]ould [Kekahuna] have been searched again before being introduced into the cell block?" Given Detective Takamoto's eleven years' experience with HPD, she presumably had sufficient personal knowledge of HPD's procedures to testify about whether Kekahuna would have been searched before being placed in a cell. See United States v. Quezada, 754 F.2d 1190, 1195-96 (5th Cir. 1985) (holding that a border patrol agent could testify about the

normal procedures that would have been followed in executing the defendant's warrant of deportation, even though the agent had never personally observed the execution of such a warrant). Kekahuna has no basis for complaining about Detective Takamoto's answer that Kekahuna would have been searched before being introduced into the cell block.

As noted, the evidence showed that Detective Takamoto was not present when Kekahuna was arrested or when he was placed in the cell. Detective Takamoto did not describe the methods used in searching Kekahuna or the intensity with which he was searched.^{5/} Thus, contrary to Kekahuna's claim, Detective Takamoto's improper testimony that no drugs were found on Kekahuna did not abrogate his "defense." Kekahuna was free to assert that he only ran because of fear of being caught with drugs and that the police had missed the drugs he possessed. Indeed, Kekahuna's counsel made such arguments during his closing argument.

Even without the evidence of Kekahuna's flight, the State produced compelling evidence of Kekahuna's guilt. Kekahuna attempted to cash a check that had recently been stolen from

^{5/} After Kekahuna testified, the State of Hawai'i (the State) asked for time to obtain rebuttal evidence. Specifically, the State sought the opportunity to determine from Officer Perreira what parts of Kekahuna's body the officer searched and to obtain evidence about the procedures used in searching arrestees before they enter the cell block. Kekahuna objected to the State's request for rebuttal and the trial court denied the State's request.

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Lucia Nembhrajmal, a person Kekahuna had never met. In an attempt to hurry the teller, Kekahuna lied by claiming that he had to "leave for work" when Kekahuna was unemployed. Kekahuna's changing story of how he got the check provided strong evidence of his intent to defraud. After he was arrested, Kekahuna told both Officer Tom and Detective Takamoto that he received the check from a lady for doing "yardwork." If Kekahuna's statement was true, he presumably could have identified the yard he cleaned and thus the lady who paid him. The change in Kekahuna's story at trial was therefore extremely telling. Instead of "yardwork" that could be linked to a particular person, Kekahuna claimed he received the check for "some work" and from a man whose last name and address he did not know.

In addition, the check contained a notation that it was for a "loan payment" which was false under either version of Kekahuna's story. Kekahuna's refusal to cooperate in providing handwriting samples in cursive provided further evidence of his guilt. Kekahuna claimed he could not write in cursive even though he went to tenth grade in school and admitted he learned how to write in cursive.

Given these circumstances, we conclude that the error in overruling Kekahuna's lack-of-foundation objection, when viewed in the context of the entire record, was harmless beyond a reasonable doubt. State v. Sprattling, 99 Hawai'i 312, 320, 55

P.3d 276, 284 (2002). There is no reasonable possibility that such error contributed to Kekahuna's conviction. State v. Pauline, 100 Hawai'i 356, 378, 60 P.3d 306, 328 (2002).

B. Refusal to Give Theory-of-Defense Jury Instruction

Kekahuna proposed the following theory-of-defense jury instruction:

It is the theory of the defense that Defendant is not guilty of Forgery in the Second Degree because the State has failed to prove beyond a reasonable doubt that the Defendant knew the check he presented to the Bank of Hawaii was forged, which raises a reasonable doubt as to whether Defendant acted with the requisite intent to defraud.

The trial judge refused to give the instruction on the grounds that it constituted argument and that "the defense's theory is going to be clear from other instructions."

Among the other instructions the court gave were an essential elements instruction, which required proof that Kekahuna uttered a forged instrument "with the intent to defraud," and an ignorance-or-mistake-of-fact instruction, which provided as follows:

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

Thus, for example, a person is provided a defense to a charge based on an intentional or knowing state of mind, if the person is mistaken (either reasonably, negligently, or recklessly) as to a fact that negates the person's state of mind required to establish an element of the offense.

The burden is upon the prosecution to prove beyond a reasonable doubt that the defendant was not ignorant or mistaken as to a fact that negates the state of mind required to establish an element of the offense. If the prosecution fails to meet its burden, then you must find the defendant not guilty.

Kekahuna argues that the trial judge erred in refusing to give his proposed theory-of-defense instruction and that such error unduly prejudiced his defense. Kekahuna contends that "no instruction was given to the jury providing that, if believed, [Kekahuna's] claim of lack of knowledge [that the check was forged] would in fact be a defense." He therefore claims that the instructions given were "insufficient and inconsistent."

"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. State v. Valentine, 93 Hawai'i 199, 204, 998 P.2d 479, 484 (2000). We disagree with Kekahuna that the court's jury instructions, when considered as a whole, were deficient. In particular, we conclude that the court's essential elements and ignorance-or-mistake-of-fact instructions adequately covered Kekahuna's theory of defense. Under the court's instructions, the prosecution was required to disprove Kekahuna's ignorance-or-mistake-of-fact defense beyond a reasonable doubt. In closing argument, Kekahuna's counsel was able to use the instructions given by the court to present Kekahuna's theory of defense to the jury. The trial court did not err in refusing to give Kekahuna's proposed theory-of-defense instruction.

C. Cumulative Error

Because the trial court did not err in refusing to give Kekahuna's proposed instruction, there are no cumulative trial errors for us to consider on appeal. We thus reject Kekahuna's claim that the trial court's cumulative errors deprived him of a fair trial.

D. Kekahuna's Extended-Term Sentence

The circuit court sentenced Kekahuna to an extended term of imprisonment of ten years pursuant to HRS § 706-662(1) (1993), which authorizes a court to impose an extended term on a "persistent offender" where "necessary for the protection of the public." Kekahuna argues that the imposition of an extended term based on the findings made by the sentencing judge as opposed to a jury was improper under Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531 (2004). Kekahuna's arguments are foreclosed by decisions of the Hawai'i Supreme Court which have held that Hawai'i's extended term sentencing scheme does not violate Apprendi or Blakely. State v. Kaua, 102 Hawai'i 1, 72 P.3d 473 (2003); State v. Rivera, 106 Hawai'i 146, 102 P.3d 1044 (2004).

CONCLUSION

The Amended Judgment filed on February 25, 2003, in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, June 17, 2005.

On the briefs:

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for Defendant-Appellant.

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