

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

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STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee, v.  
JONATHAN H. MORREIRA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(CR. NO. 03-1-0037(1))

SUMMARY DISPOSITION ORDER

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

Jonathan Howard Morreira (Defendant) appeals the November 3, 2003 judgment of the Circuit Court of the Second Circuit (circuit court)<sup>1</sup> that convicted him, upon a jury's verdict, of robbery in the first degree, and carrying a firearm in the commission of a separate felony.

In his opening brief, Defendant raises the following six points of error in his four enumerated points of error:

A. The circuit court committed plain error when it allowed the complaining witness (CW) to opine that the object Defendant allegedly brandished was a firearm, let alone a semiautomatic firearm, because

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<sup>1</sup> The Honorable Joel E. August presided.

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(i) the CW lacked the personal knowledge and expertise required to support his opinion; and

(ii) under the circumstances surrounding his observation of the object, the CW's opinion was unreliable.

B. The circuit court committed plain error when it allowed the CW to identify semiautomatic firearms in a photo array of pistols and revolvers put together by the detective investigating the case, and in any event plainly erred by doing so without a limiting instruction, because

(i) the photo array was overly suggestive and unreliable because the detective had no reliable independent information about the object Defendant allegedly brandished, and the information the CW gave the detective about the object lacked reliability under the circumstances surrounding the CW's observation of the object; and

(ii) the photo array did not include photos of toy guns or air pistols.

C. There was insufficient evidence adduced at trial to convict Defendant of carrying a firearm in the commission of a separate felony because

(i) no firearm was recovered and the CW's testimony regarding the object Defendant allegedly brandished was unreliable and insufficient to show that

the object was "a weapon wherein the operating force was an explosive[,] " Opening Brief at 31; and

(ii) the jury answered "no" to special interrogatory no. 2: "did the prosecution prove beyond a reasonable doubt that the Defendant knew or was aware that, or recklessly disregarded the substantial and unjustifiable risk that, the firearm used in the commission of the [robbery] was a semiautomatic firearm?"

D. The robbery conviction should be vacated because

(i) the evidence supporting the "dangerous instrument" element of the robbery offense lacked reliability as Defendant contends above; and

(ii) the jury's "no" answer to special interrogatory no. 2 confirms the unreliability of that evidence.

E. The circuit court erred in sentencing Defendant to a fifteen-year mandatory minimum term of imprisonment because

(i) the evidence supporting the "semiautomatic firearm" aggravating circumstance was unreliable as Defendant contends above; and

(ii) the jury answered "no" to special interrogatory no. 2.

F. Defendant's trial counsel may have rendered ineffective assistance of counsel because

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(i) counsel failed to object to the testimonies of the CW and the detective wherein the CW identified the object Defendant allegedly brandished as a semiautomatic firearm; and

(ii) counsel failed to request jury instructions on the lesser included offense of robbery in the second degree and the justification defense of protection of others.

In its answering brief, the State responds to the points Defendant raises in his opening brief. In addition, and to its credit, the State *sua sponte* concedes the circuit court gave jury instructions on the material elements of robbery in the first degree which allowed conviction upon a lesser *mens rea* than is required. Hawaii Revised Statutes (HRS) § 708-840(1)(b)(ii) (Supp. 2004); cf. State v. Valentine, 93 Hawai'i 199, 207-08, 998 P.2d 479, 487-88 (2000). The State nevertheless contends the error was harmless beyond a reasonable doubt. The State observes and the record shows that the robbery instructions were given over objection, but the record does not disclose who objected, whether one party or the other or both.

After a painstaking review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties,

including the issue raised *sua sponte* on appeal by the State,<sup>2</sup> we dispose of this appeal as follows:

1. In the absence of any indication in the record about which party or parties objected to the robbery instructions, we take notice of the circuit court's plain error<sup>3</sup> in the jury instructions on the material elements of robbery in the first degree. HRS § 708-840(1)(b)(ii); cf. Valentine, 93 Hawai'i at 207-08, 998 P.2d at 487-488.

2. Although neither party on appeal cites error in the circuit court's jury instructions on the material elements of carrying a firearm in the commission of a separate felony, and here again the record shows that the instructions were given over objection without disclosing who objected, whether one party or the other or both, we take notice of the circuit court's similar plain error<sup>4</sup> in a jury instruction on a material element of carrying a firearm in the commission of a separate felony.<sup>5</sup> See

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<sup>2</sup> See State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000) ("a confession of error by the prosecution is not binding upon an appellate court" (citation and internal quotation marks omitted)).

<sup>3</sup> See Honda v. ERS, No. 23625, slip op. at 2 (Haw. filed June 17, 2005).

<sup>4</sup> See State v. Lemalu, 72 Haw. 130, 132, 809 P.2d 442, 443 (1991); State v. Tran, 105 Hawai'i 148, 152-53, 95 P.3d 2, 6-7 (App. 2002).

<sup>5</sup> The Circuit Court of the Second Circuit instructed the jury on the offense of carrying a firearm in the commission of a separate felony, as follows:

In Count Two of the Complaint, the Defendant, JONATHAN H. MORREIRA, is charged with the offense of Carrying a Firearm While Engaged in the Commission of a Separate Felony.

(continued...)

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HRS § 134-6(a) (Supp. 2004); cf. Valentine, 93 Hawai'i at 207-08, 998 P.2d at 487-88.

3. Erroneous jury instructions are presumptively prejudicial, and because our examination of the record as a whole does not affirmatively reveal that either of those held erroneous here was harmless beyond a reasonable doubt, State v. Sua, 92 Hawai'i 61, 69-70, 987 P.2d 959, 967-68 (1999), the circuit court's November 3, 2003 judgment must be set aside. See also Valentine, 93 Hawai'i at 208, 998 P.2d at 488 (deciding, without discussion, that jury instructions that incorrectly broadened the *mens rea* to include a lower degree "cannot be harmless").

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<sup>5</sup>(...continued)

A person commits the offense of Carrying a Firearm While Engaged in the Commission of a Separate Felony if he knowingly carries on his person, or knowingly has within his immediate control, or intentionally uses or threatens to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether it was operable or not.

There are two material elements of the offense of Carrying a Firearm While Engaged in the Commission of a Separate Felony, each of which the prosecution must prove beyond a reasonable doubt.

These two elements are:

1. That on or about 16, 2003, in the County of Maui, State of Hawaii, the Defendant, JONATHAN H. MORREIRA, knowingly carried on his person, or knowing had within his immediate control, or intentionally used or threatened to use a firearm, whether the firearm was loaded or not, and whether operable or not; and

2. That the Defendant, JONATHAN H. MORREIRA, did so while intentionally, knowingly or recklessly engaged in the commission of a separate felony to wit, the Offense of Robbery in the First Degree.

(Capitalization in the original; emphasis supplied.)

4. Accordingly, we need not address the points of error Defendant raises on appeal, except those that may be implicated in our compelled consideration of the sufficiency of the evidence. State v. Malufau, 80 Hawai'i 126, 132, 906 P.2d 612, 618 (1995), vacated in part on other grounds on reconsideration, 80 Hawai'i 126, 134-38, 906 P.2d 612, 620-24 (1995). In this connection, we decide that the photo array prepared by the detective was neither suggestive nor unreliable nor incomplete, and that the CW's identification of semiautomatic firearms in the array as the kind of object Defendant allegedly brandished was admissible, State v. Padilla, 57 Haw. 150, 153-55, 552 P.2d 357, 360-61 (1976), with or without limiting instruction. Id. at 161-62, 552 P.2d at 364-65. This evidence, in conjunction with the CW's testimony that Defendant pointed the gun right at him when he tried to thwart the theft of his wallet, id. at 157, 552 P.2d at 362 ("where the robber displays a gun to back up his demands, he wants his victim to believe that it is loaded, and the fact-finder may fairly infer that it was" (brackets, citations and internal quotation marks omitted)), was substantial evidence and hence, sufficient evidence to support the convictions. State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998).

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Therefore,

IT IS HEREBY ORDERED that the November 3, 2003 judgment of the circuit court is vacated and the cause remanded to the circuit court for a new trial.

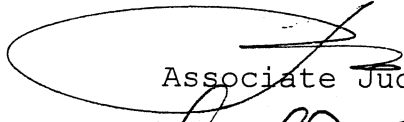
DATED: Honolulu, Hawai'i, July 8, 2005.

On the briefs:

Matthew S. Kohm,  
for defendant-appellant.

Arlene Y. Watanabe,  
Deputy Prosecuting Attorney,  
County of Maui,  
for plaintiff-appellee.

*Corinne K. Watanabe*  
Acting Chief Judge

  
Associate Judge

*Kimberly R. Foley*  
Associate Judge