

NOT FOR PUBLICATION

NO. 26346

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
DARRYLE WONG, Defendant-Appellant

EMERSON ANDO
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STATE OF HAWAI'I

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 03-1-0248)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Darryle Wong (Wong) appeals from the Judgment filed on December 22, 2003, in the Circuit Court of the First Circuit (circuit court).^{1/} A jury found Wong guilty of Forgery in the Second Degree (Forgery II), in violation of Hawaii Revised Statutes (HRS) § 708-852 (Supp. 2004).^{2/} Wong was sentenced to imprisonment of five years.

On appeal, Wong argues that the circuit court erred in 1) refusing to admit court documents showing that another person

^{1/} The Honorable Karen S.S. Ahn presided.

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

§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.

had pleaded no contest to Forgery II in a separate prosecution; and 2) refusing to instruct the jury on the lesser offense of Forgery in the Third Degree (Forgery III). After a careful review of the record and the briefs submitted by the parties, we conclude that Wong's arguments have no merit.

I.

On January 16, 2003, Wong deposited two \$1,000 checks, which bore check numbers 11657 and 11660 and were drawn on the account of Reel Services/Hawaii, Inc. (Reel Services), into his savings account at First Hawaiian Bank. The checks were both made payable to "Vicente M. Atalig" and endorsed in the name of the payee on the back. Wong withdrew \$500 on the day he deposited the checks and \$1,500 on the following day. On January 21, 2003, a bank employee advised Wong by telephone that Wong had to reimburse the bank \$2,000 for the money he withdrew because the checks he deposited had been written on a closed account. Wong expressed shock that the checks did not clear and told the bank employee that Wong would go to the bank on January 27, 2003, to resolve the matter.

On January 27, 2003, Wong went to different branch of First Hawaiian Bank and attempted to deposit a \$3,500 check, made payable to Wong, into his savings account. The check was a credit card convenience check, drawn on the account of Arcela and William Feria, and signed in the name of William C. Feria. The

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teller refused to deposit the check because the check appeared mutilated and Wong's account had been flagged. The teller's supervisor called the police and Wong was arrested. Mr. and Mrs. Feria (the Ferias) testified that they did not know Wong and did not write or sign the check that Wong attempted to deposit. The Ferias stated that they had previously received similar credit card convenience checks through the mail and that two weeks before January 27, 2003, the lock on their mailbox had been broken.

Wong was charged with uttering the forged \$3,500 Ferias check. He was not charged with depositing the two \$1,000 Reel Services checks. Wong attempted to introduce court documents pertaining to a separate prosecution showing that a person named Sherri Ann Johnston (Johnston) had pleaded no contest to Forgery II for falsely making or uttering a check drawn on the Reel Services account. Specifically, Wong sought the admission of Johnston's criminal complaint and her no contest plea form. The Reel Services check in Johnston's prosecution was numbered 11625 while the Reel Services checks deposited by Wong were numbered 11657 and 11660. The circuit court refused to admit the Johnston documents, ruling that they were irrelevant under Hawaii Rules of Evidence (HRE) Rule 401. The court alternatively ruled that even if the Johnston documents were arguably relevant, it was excluding the documents under HRE Rule 403 because their

probative value was outweighed by the danger of jury confusion and by considerations regarding waste of time.

On appeal, Wong argues that the circuit court erred in refusing to admit the Johnston documents. Wong contends that the Johnston documents were relevant because they provided evidence that when he deposited the two \$1,000 Reel Services checks into his account, he did not know they were bad checks. We conclude that Wong failed to provide a sufficient evidentiary link between Johnston's no contest plea and Wong's charged offense to render the Johnston documents admissible. See State v. Rabellizsa, 79 Hawai'i 347, 350-51, 903 P.2d 43, 46-47 (1995) ("[T]here must be some evidence linking the third person to the crime in order to admit evidence of the third person's motive.").

Wong was not charged with depositing the two \$1,000 Reel Services checks; he was only charged with fraudulently uttering the \$3,500 Ferias check. Thus, whether Wong knew the Reel Services checks were invalid at the time he deposited them was collateral to the charged offense.

In addition, Johnston's no contest plea to fraudulently making or passing a different Reel Services check did not tend to prove that Wong believed the two Reel Services checks he deposited were valid when he deposited them. In particular, there was no evidence linking the Reel Services check involved in Johnston's prosecution to the Reel Services checks deposited by

Wong. Indeed, Wong offered evidence that he obtained the two Reel Services checks he deposited from men named John and Albert in payment for a car Wong sold them. Wong did not proffer evidence of any relationship between Johnston and John or Albert. Nor did Wong proffer evidence of any nexus between Johnston and Lisa Wilson, the person who Wong claimed had given him the \$3,500 Ferias check. Given these circumstances, Wong failed to establish the relevance of the Johnston documents.

II.

We reject Wong's claim that the circuit court erred in refusing to instruct the jury on the included offense of Forgery III.

Forgery III encompasses any "forged instrument." HRS § 708-853 (1993). Forgery II is limited to certain types of forged instruments, including a forged "commercial instrument or other instrument which . . . may . . . affect a legal right." HRS § 708-852. The evidence unequivocally showed that the forged instrument at issue in Wong's prosecution was a \$3,500 check drawn on the Ferias' credit card account. The jury was free to reject the prosecution's evidence and find that Wong had not uttered a forged instrument. But if the jury determined that Wong uttered a forged instrument, there was no rational basis in the evidence for the jury to find that the \$3,500 Ferias check (the only instrument offered by the prosecution) was not a

commercial or other instrument affecting a legal right, but was nevertheless some other kind of instrument. The court therefore properly refused to instruct on the included offense of Forgery III. State v. Haanio, 94 Hawai'i 405, 413, 16 P.3d 246, 254 (2001).

In any event, the jury returned a verdict of guilty as charged on the greater offense of Forgery II. Accordingly, any error by the circuit court in failing to instruct on the included offense Forgery III was harmless beyond a reasonable doubt. Id. at 415-16, 16 P.3d at 256-57 (2001); State v. Gunson, 101 Hawai'i 161, 162, 64 P.3d 290, 291 (App. 2003).

III.

The Judgment filed by the circuit court not only correctly reflects that Wong was convicted and found guilty of Forgery II after a jury trial, but it also incorrectly states that Wong pled guilty or no contest to Forgery II. We affirm Wong's conviction and sentence, but remand the case to the circuit court and instruct it to file an Amended Judgment

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deleting the erroneous reference to Wong's having pled guilty or no contest to Forgery II.

DATED: Honolulu, Hawai'i, June 30, 2005.

On the briefs:

Clifford B. Hunt, Esq.,
for Defendant-Appellant.

Mangmang Qiu Brown,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

James A. Burns
Chief Judge

Corinne K.A. Watanabe
Associate Judge

Craig W. Nakamura
Associate Judge