NO. 26390

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
WENDY LEILANI KAAHANUI aka WENDY KURIHARA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CR. NO. 03-1-149K)

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

Defendant-Appellant Wendy Leilani Kaahanui (Kaahanui), also known as Wendy Kurihara, appeals from the Judgment filed on January 12, 2004, in the Circuit Court of the Third Circuit (the circuit court).[1] A jury found Kaahanui guilty as charged of Theft in the Second Degree (Theft II), in violation of Hawaii Revised Statutes (HRS) Sections 708-830(8) (Supp. 2005) and 708-831(1)(b) (1993).[2] The circuit court sentenced Kaahanui to

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[1] The Honorable Ronald Ibarra presided.

[2] Hawaii Revised Statutes (HRS) Sections 708-830(8) (Supp. 2005) 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:
>
> . . . .
>
> (8) Shoplifting.
>
> (a) A person conceals or takes possession of the goods or merchandise of any store or retail establishment, with intent to defraud.
>
> . . . .
>
> The unaltered price or name tag or other marking on goods or merchandise, duly identified photographs or photocopies thereof, or printed register receipts, shall be prima facie evidence of value and ownership of such goods or merchandise. Photographs of the goods or merchandise

five years' imprisonment and imposed a mandatory minimum term of forty months based on her status as a repeat offender.[3]

The circuit court gave the jury a permissive-inference-of-knowledge instruction that was based on an instruction Kaahanui proposed. On appeal, Kaahanui contends that this instruction was defective and requires that her conviction be overturned. We affirm Kaahanui's conviction and sentence.

BACKGROUND

On May 26, 2003, at about 4:00 p.m., Kaahanui entered the Macy's department store at the Makalapua Center in Kona, Hawai'i. Irvin Villacorte (Villacorte), Macy's loss prevention officer, used the store's security cameras to keep Kaahanui under surveillance and to record her activities from the time he first saw her.

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involved, duly identified in writing by the arresting police officer as accurately representing such goods or merchandise, shall be deemed competent evidence of the goods or merchandise involved and shall be admissible in any proceedings, hearings, and trials for shoplifting, to the same extent as the goods or merchandise themselves.

§ 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[.]

[3] Defendant-Appellant Wendy Leilani Kaahanui (Kaahanui) had two prior convictions for Promoting a Dangerous Drug in the Third Degree, making her eligible for a forty-month mandatory minimum period of incarceration under HRS § 706-606.5(1)(b)(iv) (Supp. 2005). Kaahanui moved for a lesser mandatory minimum based on mitigating circumstances pursuant to HRS § 706-606.5(5) (Supp. 2005). The Circuit Court of the Third Circuit (circuit court) denied Kaahanui's motion, finding that Kaahanui's criminal history was replete with shoplifting and theft convictions and that she had been on probation for drug, drug paraphernalia, and theft offenses when she committed the instant offense.

Kaahanui entered the store carrying a Macy's bag. Villacorte testified that when he first observed Kaahanui, the Macy's bag "looked empty." Kaahanui spent almost two and a half hours in the store, looking at merchandise in various departments and entering the fitting rooms several times to try on clothes. Shortly before leaving Macy's, Kaahanui approached Christopher Cordes (Cordes), a customer service supervisor, and told him she had lost her wallet. Kaahanui gave Cordes her name and telephone number in case someone found the wallet.

Without stopping to pay for anything, Kaahanui left the store carrying the Macy's bag that now appeared to be full. Villacorte stopped Kaahanui as she was about to enter a car. He retrieved the Macy's bag and escorted Kaahanui back to Macy's security office, where they were joined by Cordes. Kaahanui claimed that the items in the bag belonged to her. Villacorte asked to see the receipts for the merchandise. Kaahanui could not provide any receipts and told Villacorte that she had lost her wallet.

Villacorte removed fifteen items of merchandise from Kaahanui's bag: nine articles of women's clothing, three sunglasses, and three pieces of identical heart pendant jewelry. Villacorte testified that there was a price tag attached to each of the items removed from the bag, which Cordes confirmed. Villacorte grouped similar items together and photographed all the items so that the price tags were showing. The photographs taken by Villacorte were admitted in evidence.

At some point, Villacorte separated the three jewelry items from the other merchandise and placed the jewelry items on a desk behind him. Cordes scanned the price tags for the items removed from Kaahanui's bag, except the jewelry items, at a sales register to obtain the price of each item. The register receipt generated by Cordes listed the item's description, the item's universal price code number (which matched the number on the price tag), and the item's price. The register receipt reflected a total price, without tax, of $359.07 for the items removed from Kaahanui's bag, excluding the jewelry items. A photocopy of the price tags that Cordes scanned and the register receipt was admitted in evidence.

Villacorte testified that the price listed on a price tag was not necessarily the price a customer would pay because Macy's might sell the item below the listed price. It was therefore necessary to scan the price tag through a register to obtain the actual price. For five of the twelve items scanned by Cordes, the actual sales price based on the register scan was lower than the price listed on the item's price tag. Macy's had price check machines in the store that customers could use to scan a price tag to determine the item's actual price. Both Villacorte and Cordes conceded that there was a chance that the price revealed by a price check scan could also be wrong. After Cordes scanned the price tags of the twelve items to generate the register receipt, he did not attempt to confirm the accuracy of

the register prices by looking to see if the items were from a sale rack or were listed at a lower price on the floor.

Villacorte did not realize until later that the register receipt generated by Cordes did not include the three jewelry items. No register receipt from a scan of the price tags on the jewelry items was admitted in evidence. After being photographed, the merchandise recovered from Kaahanui's bag was returned to the floor for sale.

Kaahanui testified in her own defense at trial. While admitting that she had shoplifted certain items, Kaahanui denied stealing all of the items that Villacorte and Cordes testified had been removed from her bag. According to Kaahanui, when she went to the Kona Macy's on May 26, 2003, she was carrying a Macy's bag that contained jeans, a black top, and underwear that she had earlier purchased at a Macy's in Honolulu. Kaahanui testified that she intended to exchange the jeans and black top, and did not know the underwear was in the bag. Kaahanui stated that she had removed the price tags from the jeans and black top and thrown the tags away. She claimed, however, that she had the receipts for these items in her wallet when she entered the Kona Macy's.

Kaahanui testified that upon entering the store, she looked for items the jeans and black top could be exchanged for and went to a dressing room to try on several items. While in the dressing room, she discovered that she had lost her wallet. Kaahanui explained that she knew she could not exchange the jeans

and black top without the receipts which were in her lost wallet. She therefore decided, at that point, to steal. Except for the jeans, black top, and underwear, Kaahanui admitted stealing the items of clothing found in her Macy's bag as well as the three sunglasses. If the prices for the jeans, black top, and underwear were subtracted from the register receipt that Cordes generated, the resulting total would fall short of the more than $300 threshold required for Theft II. Kaahanui further testified that she did not steal the three jewelry items. Contradicting the testimony of Villacorte and Cordes, Kaahanui claimed that the jewelry items were not in her bag.[4] She estimated that the value of the items she stole was about $200.

DISCUSSION

A. The Statutory Framework

Kaahanui was charged with Theft II for shoplifting more than $300 in merchandise. To prove that charge, the State was required to establish not only that the value of the merchandise Kaahanui stole exceeded $300 but that she knew the stolen merchandise exceeded that value. State v. Cabrera, 90 Hawai'i 359, 366-69, 978 P.2d 797, 804-07 (1999). The charge against

[4] In closing argument, Kaahanui's counsel addressed indirectly the conflict between Kaahanui's testimony that she had thrown away the price tags on the jeans and black top and the testimony of Villacorte and Cordes that price tags were attached to these items when they were removed from Kaahanui's bag. Kaahanui's counsel suggested that Villacorte manipulated the evidence by attaching price tags to the two items after removing them from the bag. Kaahanui's counsel also suggested that Villacorte falsely accused Kaahanui of stealing the three jewelry items because Villacorte realized that without the jeans and black top, the value of the items Kaahanui admitted were in her bag would fall below the more than $300 threshold necessary for a charge of Theft in the Second Degree.

Kaahanui implicated two statutory presumptions, one concerning a presumption of knowledge based on value pursuant to HRS § 708-801(4) (1993) and another concerning a presumption of value based on an item's price tag or printed register receipt pursuant to HRS § 708-830(8). HRS § 708-801(4) provides in relevant part:

> When acting intentionally or knowingly with respect to the value of property or services is required to establish an element of an offense, the value of property or services shall be prima facie evidence that the defendant believed or knew the property or services to be of that value.

HRS § 708-830(8) provides in relevant part:

> The unaltered price or name tag or other marking on goods or merchandise, duly identified photographs or photocopies thereof, or printed register receipts, shall be prima facie evidence of value and ownership of such goods or merchandise.

In addition, Hawaii Rules of Evidence (HRE) Rule 306(a) (1993) governs the use in criminal proceedings of presumptions against the accused, including "statutory provisions that certain facts are prima facie evidence of other facts or of guilt." HRE Rule 306(a)(1). HRE Rule 306(a)(3) provides:

> Instructing the jury. The court may not direct the jury to find a presumed fact against the accused. Whenever a presumption against the accused is submitted to the jury, the court shall instruct the jury that, if it finds the basic facts beyond a reasonable doubt, it may infer the presumed fact but is not required to do so. In addition, if the presumed fact establishes an element of the offense or negatives a defense, the court shall instruct the jury that its existence, on all the evidence, must be proved beyond a reasonable doubt.

(Emphasis added.) In effect, HRE Rule 306(a) converts the statutory presumptions of prima facie evidence in HRS § 708-801(4) and HRS § 708-830(8) into permissive inferences of fact which the jury may choose to accept or reject. See State v. Mitchell, 88 Hawai'i 216, 219, 223-26, 965 P.2d 149, 152, 156-59 (App. 1998).

B. The Circuit Court's Instructions

The circuit court gave the following jury instruction on the material elements of Theft II to the jury:

> In the complaint, the defendant Wendy Leilani Kaahanui is charged with the offense of Theft in the Second Degree. A person commits the offense of Theft in the Second Degree if he or she conceals or takes possession of the goods or merchandise of any store or retail establishment, the value of which exceeds $300, with intent to defraud.
>
> There are four material elements of Theft in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt. These four elements are, number one, that on or about May 26, 2003, in Kona, County and State of Hawaii, the defendant intentionally or knowingly concealed or took possession of the goods or merchandise of Macy's; and number two, that Macy's was a store or retail establishment -- should be and also there --[5] and number three, that the value of goods or merchandise of Macy's exceeded $300; and number four, that the defendant either, A, intended to injure Macy's store, which had value, in which case the requisite state of mind as to each of the foregoing elements is intentionally; or B, knew that she was facilitating an injury to Macy's interest, which had value, in which case the requisite state of mind as to each of the foregoing elements is knowingly.
>
> So if you find beyond a reasonable doubt that the value of the property exceeded $300, you may but are not required to infer that the defendant knew the property to be of that value.
>
> Before returning a verdict of guilty, you must find beyond a reasonable doubt that the defendant intended, under paragraph 4(a) above, or knew under paragraph 4(b) above, that the value of the property exceeded $300.
>
> It is the [sic] defense to Theft in the Second Degree if the defendant believed that valuation of the property to be $300 or less.

(Emphasis added.)

The court's Theft II instruction was based on an instruction proposed by Kaahanui. In particular, the permissive-inference-of-knowledge portion of the court's instruction was substantially the same as the language contained in Kaahanui's proposed instruction. The permissive-inference-of-knowledge

[5] The circuit court was apparently referring to the fact that the court's written instruction was missing the word "and" after the second material element.

portion of Kaahanui's proposed instruction stated:

> If you find beyond a reasonable doubt that the value of the property exceeded $300.00, you may, but are not required to, infer that the Defendant believed or knew the property [to be] of that value. Before returning a verdict of guilty, [you] must find beyond a reasonable doubt that the Defendant intended under [Paragraph 4](a) supra or knew under [Paragraph 4](b) supra that the value of the property exceeded $300.00.

(Bracketed words are added and did not appear in Kaahanui's proposed instruction.) Neither Kaahanui's proposed instruction nor the instruction given by the circuit court contained specific language requiring the jury to consider "all the evidence" in determining whether the State had proven the defendant's state of mind as to the value of the property beyond a reasonable doubt.

The State's proposed jury instructions did not include a permissive-inference-of-knowledge instruction. The State, however, did propose an instruction on the permissive inference of value based on the item's price tag or a register receipt pursuant to HRS § 708-830(8), which the circuit court gave to the jury as follows:

> If you find beyond a reasonable doubt that at the time of the incident the goods or merchandise in question had an unaltered price or name tag or other marking or there was a printed register receipt, you may but are not required to infer the value and ownership of such goods or merchandise from the price or name tag or other marking or the printed register receipt.
>
> If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the state has proven beyond a reasonable doubt the value and ownership of such goods and merchandise.

C. Kaahanui's Claim On Appeal

On appeal, Kaahanui argues that the Theft II instruction on the permissive inference of knowledge based on value, which basically tracked the language of her proposal, was prejudicially erroneous and misleading because it did not fully

comply with HRE Rule 306(a)(3). In accordance with HRE Rule 306(a)(3), the jury was instructed that inferring the defendant's knowledge of the property's value (the presumed fact) from the property's actual value (the basic fact) was permissive. The instruction that was given further satisfied the requirements of HRE Rule 306(a)(3) that the basic fact had to be found beyond a reasonable doubt to trigger the permissive inference and that the jury also had to find the existence of the presumed fact beyond a reasonable doubt. Kaahanui claims, however, that the instruction was defective and violated HRE Rule 306(a)(3) because the jury was not instructed that the existence of the presumed fact must be proved beyond a reasonable doubt "on all the evidence."

We apply the following standard of review:

> 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.
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> . . . .
>
> Erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.
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> . . . .
>
> Furthermore, error is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error may have contributed to conviction. If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.

State v. Vanstory, 91 Hawai'i 33, 42-43, 979 P.2d 1059, 1068-69 (1999) (internal citations and brackets omitted; block quote format changed).

Generally, an invited error does not provide a ground for reversing a conviction. State v. Jones, 96 Hawai'i 161, 166, 29 P.3d 351, 356 (2001). Under Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b), "[p]lain errors or defects affecting substantial rights may be noticed although they were not bought to the attention of the court." We apply the "plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." Vanstory, 91 Hawai'i at 42, 979 P.2d at 1068 (internal quotation marks and citations omitted).

In Mitchell, 88 Hawai'i at 216, 965 P.2d at 149, this court considered the interplay between the statutory presumption in HRS § 708-801(4) and HRE Rule 306(a). The trial court instructed the jury pursuant to HRS § 708-801(4) that "the value of property shall be prima facie evidence that a defendant believed or knew the property to be of that value." Id. at 220, 965 P.2d at 153. The defendant Mitchell objected to this instruction because it failed to make clear, as required under HRE Rule 306(a)(3), that if the jury "finds the basic facts beyond a reasonable doubt it may infer [the] presumed fact (sic), but it is not required to do so. Id. at 221, 965 P.2d at 154 (emphasis omitted). This court held that the trial court's failure to give a permissive-inference-of-fact instruction pursuant to HRE Rule 306(a)(3) improperly shifted to Mitchell the burden of proving his state of mind as to the value of the

property and violated Mitchell's right to due process. Id. at 227, 965 P.2d at 160. This court gave an example of a properly presented statutory presumption under HRE Rule 306(a) as one in which the circuit court:

> (1) first determined that a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find the presumed fact beyond a reasonable doubt; and (2) instructed the jury that it may infer the presumed fact but is not required to do so; and further, (3) if the presumed fact establishes an element of the offense or negatives a defense, instructed the jury that in order to apply the presumption, it must find that the presumed fact exists beyond a reasonable doubt.

Id. (internal citations, quotation marks, and brackets omitted).

As the State notes, the permissive-inference-of-knowledge instruction given in Kaahanui's case complies with the above-quoted example in Mitchell of a proper permissive-inference instruction. The Mitchell decision, however, did not focus on the "on all the evidence" language in HRE Rule 306(a)(3) which Kaahanui claims was prejudicially omitted from the permissive-inference-of-knowledge instruction. Kaahanui argues that because this language was omitted from the permissive-inference-of-knowledge instruction, a juror may have determined that the State satisfied its burden of proving Kaahanui's state of mind as to the value of the property based solely on the permissive inference and without considering all the evidence presented in the case.

The State counters that when read and considered as a whole, the jury instructions were not prejudicially erroneous or misleading. It argues that there were instructions besides the challenged permissive-inference-of-knowlege instruction which

made clear the jury's obligation to consider all the evidence. The circuit court's instructions to the jury included the following:

> Both the prosecution and the defendant has [sic] a right to demand and do demand and expect that you will conscientiously and dispassionately consider and weigh all the evidence and follow these instructions and that you will reach a just verdict.
>
> . . . .
>
> While you must consider all of the evidence in determining the facts in this case, this does not mean that you are bound to give every bit of evidence the same weight.

(Emphasis added.)

We need not resolve the dispute over whether the instructions, considered as a whole, were erroneous. This is because we conclude that any error did not affect Kaahanui's substantial rights, nor did it seriously affect the fairness, integrity, or public reputation of judicial proceedings. Accordingly, Kaahanui is not entitled to have her conviction overturned.

The evidence of Kaahanui's guilt was strong. In convicting Kaahanui of Theft II, the jury must have rejected her testimony that she did not steal the jeans, black top, underwear, and jewelry items. Otherwise, the jury would not have found that the value of the merchandise she stole exceeded $300 -- the threshold required for Theft II. Kaahanui was certainly aware of the items she placed in her own bag. The register receipt total for items recovered from Kaahanui's bag, excluding the jewelry items, exceeded $300 by a substantial amount. Under these circumstances, we conclude that there is no reasonable

possibility that any error in the court's permissive-inference-of-knowledge instruction might have contributed to Kaahanui's conviction. See State v. White, 92 Hawai'i 192, 198, 205, 990 P.2d 90, 96, 103 (1999) (stating the test for the harmless beyond a reasonable doubt standard).

Moreover, the record shows that it was Kaahanui who proposed the permissive-inference-of-knowledge instruction that she now attacks on appeal. In general, invited errors do not provide a basis for appeal. State v. Jones, 96 Hawai'i 161, 166, 29 P.3d 351, 356 (2001). The basic theory underlying the invited error doctrine is that a party should not be allowed to profit from an error that the party induced. State v. Logan, 30 P.3d 631, 633 (Ariz. 2001) (en banc). There must be a penalty attached to the invited error to deter a party from creating the error.

In State v. Timoteo, 87 Hawai'i 108, 115-16, 952 P.2d 865, 872-73 (1997), the Hawai'i Supreme Court held that the defendant had waived the statute of limitations by requesting the trial court to instruct the jury on a time-barred lesser included offense. While not specifically applying the invited error doctrine, the court, in support of its decision, quoted the following justification by a Florida appellate court for the invited error doctrine:

> But even more troublesome to us is the problem of invited error. Defense counsel should not be allowed to sandbag the trial judge by requesting and approving an instruction they know or should know will result in an automatic reversal, if given. After a guilty verdict has been returned based on the requested instruction, defense counsel cannot be allowed to change legal positions in midstream and seek a reversal based on that error.

> Principles of estoppel, waiver, and invited error, forestall the possible success of such a ruse.

Id. at 115, 952 P.2d at 872 (quoting Weber v. State, 602 So.2d 1316, 1319 (Fla. Dist. Ct. App. 1992)).

Other jurisdictions have found that an error invited by a party constitutes a waiver that precludes review even for plain error. E.g., Logan, 30 P.3d at 632-33; City of Seattle v. Patu, 58 P.3d 273, 274 (Wash. 2003); see also United States v. Griffin, 84 F.3d 912, 923-24 (7th Cir. 1996). But even if an invited error is not a complete waiver of appellate review, we conclude that the invited nature of the alleged error should factor into the plain error analysis. Hawai'i's plain error rule, HRPP Rule 52(b), is based on and contains language that is identical to the version of Federal Rules of Criminal Procedure (FRCP) Rule 52(b) that was in effect prior to December 1, 2002.[6] Construing the pre-December 1, 2002, version of FRCP Rule 52(b), the United States Supreme Court held that "Rule 52(b) is permissive, not mandatory[,]" and that it leaves the decision on whether to correct even obvious errors that affect substantial rights to the sound discretion of the appellate court. United States v. Olano,

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[6] Prior to December 1, 2002, Federal Rules of Criminal Procedure (FRCP) Rule 52(b) stated:

> (b) **Plain error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

FRCP Rule 52(b) was amended, effective December 1, 2002, by deleting the words "or defects" and by making stylistic changes. The current version of FRCP Rule 52(b) provides:

> (b) **Plain error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

507 U.S. 725, 732, 735-37 (1993). That discretion should only be exercised where "the error seriously affects the fairness, integrity or public reputation of judicial proceedings." Id. at 732 (brackets and quotation marks omitted).

Hawai'i has a similar test which authorizes an appellate court to correct errors "which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." Vanstory, 91 Hawai'i at 42, 979 P.2d at 1068. Under the circumstances of Kaahanui's case and considering the invited nature of the alleged error, we conclude that the exercise of our discretion under HRPP 52(b) in Kaahanui's favor is not warranted.

CONCLUSION

The Judgment filed on January 12, 2004, in the Circuit Court of the Third Circuit is affirmed.

DATED: Honolulu, Hawai'i, March 29, 2006.

On the briefs:

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

Dale Yamada Ross,
Deputy Prosecuting Attorney,
County of Hawaii
for Plaintiff-Appellee.

James A. Burns
Chief Judge

Corinne K.A. Watanabe
Associate Judge

Craig H. Nakamura
Associate Judge