NO. 27005

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee
v.
WAYNE M. CROWELL, Defendant-Appellant
and
FARLEY B. INOVEJAS, Defendant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-0323)

SUMMARY DISPOSITION ORDER
(By: Burns, Chief Judge, Watanabe, and Nakamura, JJ.)

Defendant-Appellant Wayne M. Crowell (Crowell) appeals from the Judgment entered on November 16, 2004, in the Circuit Court of the First Circuit (circuit court).[1] Crowell and co-defendant Farley B. Inovejas (Inovejas) were charged by complaint with numerous drug-related offenses. Inovejas pleaded guilty to the charges against him, and Crowell proceeded to trial. A jury found Crowell guilty of: 1) Promoting a Dangerous Drug in the Second Degree (PDD2) for knowingly distributing methamphetamine, in violation of Hawaii Revised Statutes (HRS) Section 712-1242(1)(c) (1993 & Supp. 2001)[2] (Count 1); 2) PDD2 for knowingly

[1] The Honorable Derrick H.M. Chan presided.

[2] At the time of the charged offenses, Hawaii Revised Statutes (HRS) § 712-1242(1) (1993 & Supp. 2001) provided, in relevant part:

> (1) A person commits the offense of promoting a dangerous drug in the second degree if the person knowingly:
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> . . . .

possessing at least one-eighth ounce of methamphetamine, in violation of HRS Section 712-1242(1)(b)(i) (1993 & Supp. 2001)[3] (Count 2); and 3) Unlawful Use of Drug Paraphernalia, in violation of HRS Section 329-43.5(a) (1993)[4] (Count 4).

The State of Hawai'i (the State) filed motions to sentence Crowell to extended terms of imprisonment as a persistent and a multiple offender, to impose mandatory minimum terms based on Crowell's status as a repeat offender, and to run the sentences imposed consecutively. In support of its motions, the State introduced evidence that Crowell had numerous prior robbery convictions for which he had been sentenced to concurrent terms of life imprisonment with the possibility of parole and twenty years of imprisonment. The circuit court granted the motions for extended terms and mandatory minimum terms of imprisonment and denied the motion for consecutive sentencing. The circuit court sentenced Crowell to twenty years of

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(b) Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of:

(i) One-eighth ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers; or

(ii) One-fourth ounce or more, containing any dangerous drug; or

(c) Distributes any dangerous drug in any amount.

[3] See footnote 2, supra.

[4] HRS § 329-43.5(a) (1993) provides, in relevant part:

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

imprisonment with a mandatory minimum term of 40 months on each of Counts 1 and 2 and to five years of imprisonment on Count 5, all sentences to run concurrently with each other and with any other sentence Crowell was serving.

On appeal, Crowell argues: 1) the circuit court erred in excluding evidence of a police detective's other bad acts; 2) the court erred in failing to grant Crowell's motion for a mistrial; 3) there was insufficient evidence to convict him on Counts 2 and 4; 4) the circuit court committed plain error in failing to give a unanimity instruction on Count 4; and 5) the circuit court erred in sentencing him to extended terms of imprisonment. We affirm the Judgment as to Counts 1 and 2, vacate the Judgment as to Count 4, and remand the case for further proceedings consistent with this summary disposition order.

After a careful review of the record and the briefs submitted by the parties, we hold as follows:

I.

Crowell argues that the circuit court erred in refusing to admit evidence of the other bad acts of a police detective (hereinafter referred to as "the detective") pursuant to Hawaii Rules of Evidence (HRE) Rule 404(b) (Supp. 2005). The other bad acts Crowell sought to introduce consisted of the detective's alleged misconduct that was referenced in police department Internal Affairs investigative reports and the detective's alleged solicitation of "protection money" from Inovejas in

exchange for allowing Inovejas to continue dealing drugs. According to Crowell, the detective 1) fabricated the methamphetamine distribution charge against Crowell and 2) planted pre-recorded "buy" money used to purchase drugs from Inovejas on Crowell in order to prevent Crowell from credibly revealing the detective's solicitation of protection money from Inovejas. Crowell contends that the proffered evidence of the detective's other bad acts was admissible under HRE Rule 404(b) to show the detective's motive for making up the methamphetamine distribution charge and planting the buy money on Crowell.

We conclude that the circuit court did not err in excluding the proffered HRE Rule 404(b) evidence. Such evidence was clearly not relevant to the December 10, 2001, distribution of methamphetamine charged in Count 1. The detective was not a percipient witness to the December 10, 2001, methamphetamine transaction and did not testify at trial. Officer Juan Alcantar (Officer Alcantar) testified that, while working in an undercover capacity, he purchased methamphetamine from Crowell on December 10, 2001, and submitted the methamphetamine to Officer Steven Erler (Officer Erler). Crowell failed to provide any meaningful link between the proffered evidence of the detective's other bad acts and Officer Alcantar or show how the detective compromised the evidence regarding the December 10, 2001, transaction. See United States v. Peters, 15 F.3d 540, 545 (6th Cir. 1994). The December 10, 2001, methamphetamine distribution charge turned on

Officer Alcantar's credibility and motives, not on those of the detective.

The circuit court also did not err in excluding the proffered HRE Rule 404(b) evidence with respect to Crowell's other charges. Crowell's testimony that the detective had "planted" the buy money on Crowell raised the question of the detective's motive for engaging in the alleged conduct. However, the evidence that the detective had solicited protection money from Inovejas only served to provide a motive for the detective to implicate Inovejas in drug dealing. The detective's possible motive for implicating Crowell was based on pure speculation. Crowell offered no evidence that Crowell was present during the detective's alleged solicitation of protection money from Inovejas or that the detective believed Crowell could provide testimony relevant to the alleged solicitation. Absent such a foundation, evidence of the alleged solicitation was irrelevant or, alternatively, its minimal probative value was substantially outweighed by the danger of unfair prejudice or jury confusion.

As to the other bad act evidence referenced in the Internal Affairs investigative reports, Crowell did not proffer how he would introduce such evidence in a form that was admissible. As the circuit court noted, Crowell did not include witnesses who could competently testify to the evidence referenced in the Internal Affairs reports on his witness list or explain how he would be able to introduce such evidence. In addition, even if competent witnesses to introduce the evidence

referenced in the Internal Affairs reports were available, Crowell did not show how the evidence was relevant to any fact of consequence other than proving the bad character of the detective to show that the detective acted in conformity therewith. Crowell thus failed to satisfy the threshold requirement of HRE Rule 404(b). Under these circumstances, we conclude that the circuit court did not err in excluding the proffered HRE Rule 404(b) evidence.[5]

II.

We reject Crowell's claim that the circuit court erred in denying his motion for a mistrial. Crowell argues that the circuit court should have granted his motion for mistrial because: 1) the circuit court erroneously granted the State's motion *in limine* to exclude the proffered HRE Rule 404(b) evidence concerning the detective before trial; 2) the State opened the door to the proffered HRE Rule 404(b) evidence through its questioning of Crowell; and 3) the circuit court erred in excluding evidence that the detective had planted the buy money on Crowell until the end of trial.

We have already concluded that the circuit court did not err in excluding the proffered HRE Rule 404(b) evidence and thus this action by the circuit court did not provide a ground

[5] Even assuming, *arguendo*, that the trial court erred in excluding the proffered other bad act evidence, such error was harmless beyond a reasonable doubt as to Count 1. There was no meaningful link between the proffered other bad acts of the police detective and Count 1. Thus, there is no reasonable possibility that the exclusion of the other bad act evidence might have contributed to Defendant-Appellant Wayne M. Crowell's conviction on Count 1.

for a mistrial. The State's questioning of Crowell did not open the door to the proffered HRE Rule 404(b) evidence. The Deputy Prosecuting Attorney (DPA) asked Crowell whether Officer Alcantar or Officer Erler had planted the buy money on Crowell. The DPA's questions might have opened the door to evidence regarding the motives of Officer Alcantar or Officer Erler if Crowell had answered in the affirmative. The DPA's questions did not open the door to the proffered HRE Rule 404(b) evidence which pertained to the detective's possible motives for implicating Inovejas in drug dealing.

We do not agree with Crowell's contention that the circuit court had ruled at the beginning of trial that evidence that the detective had planted the buy money on Crowell was inadmissible. Crowell alleges that the court excluded this evidence when it granted the State's motion *in limine* to exclude his proffered HRE Rule 404(b) evidence. Crowell's HRE Rule 404(b) notices, however, did not identify the evidence that the detective planted the buy money as part of the evidence Crowell sought to introduce pursuant to HRE Rule 404(b). Indeed, it is difficult to see why the "planting" evidence would constitute other act evidence subject to HRE Rule 404(b) since it clearly would be evidence that was inextricably intertwined with and part of the *res gestae* of the charged offenses. Although Crowell mentioned the planting allegation during the hearing on the motion *in limine*, he did so in the context of arguing that the detective had been a central figure in the investigation and in

support of Crowell's claim that the evidence Crowell had identified in his HRE Rule 404(b) notices should be admitted. Crowell should have taken steps to clarify whether the circuit court's pre-trial ruling on the State's motion *in limine* included the planting allegation before assuming that it did, or he should have provided a better explanation of what the planting evidence entailed and why it was needed.

In any event, assuming, *arguendo*, that the circuit court's had ruled the evidence that the detective had planted the buy money on Crowell was inadmissible at the beginning of trial and only reversed its ruling at end of the case, there still was no error in denying the motion for mistrial. Crowell was permitted to testify about his allegation that the detective had planted the buy money on him. Crowell did not seek to recall any other witness to provide additional testimony on the planting allegation. Nor did he proffer what evidence any other witness could have provided that would have bolstered his claim that the detective planted the money on him. Under these circumstances, we hold that the circuit court did not abuse its discretion in denying Crowell's motion for mistrial. See State v. McElroy, 105 Hawai'i 352, 356, 97 P.3d 1004, 1008 (2004).

III.

We disagree with Crowell's contention that there was insufficient evidence to prove that he knowingly possessed at least one-eighth ounce of methamphetamine as charged in Count 2

or that he possessed drug paraphernalia with the intent to use it as charged in Count 4. The evidence showed that Crowell and Inovejas were partners in the distribution of drugs. During the December 10, 2001, drug transaction, Officer Alcantar asked Inovejas for methamphetamine, but it was Crowell who supplied the methamphetamine while the three of them were in Inovejas's bedroom. Inovejas's statement in the bedroom that "[w]e don't deal nothing big, just small" provided further evidence of a drug partnership between Crowell and Inovejas. The State adduced additional evidence that Crowell was alone in Inovejas's bedroom when the search warrant was executed; Crowell's possessions were found in the bedroom; Crowell was familiar with crystal methamphetamine, heroin, and marijuana and had seen Inovejas smoke crystal methamphetamine before; and a wallet containing a packet of methamphetamine, another packet of methamphetamine, and empty plastic packets were found in plain view on the bedroom floor. Based on the evidence introduced at trial, the jury could reasonably infer that Crowell and Inovejas jointly shared the methamphetamine and drug paraphernalia found in the Inovejas's bedroom and that these items were part of their drug business. When viewed in the light most favorable to the State, there was sufficient evidence to support Crowell's convictions on Counts 2 and 4. See State v. Ildefonso, 72 Haw. 573, 576-77, 827 P.2d 648, 651 (1992).

IV.

Crowell argues that the circuit court committed plain error in failing to give a specific unanimity instruction regarding Count 4, which charged Crowell with unlawful use or possession of drug paraphernalia. Crowell notes that numerous items of drug paraphernalia were introduced in evidence. He contends that without a specific unanimity instruction, the jury may have found him guilty of Count 4 without unanimously agreeing on which particular item of drug paraphernalia he unlawfully possessed. The State concedes that the absence of a specific unanimity instruction rendered the jury instructions as to Count 4 prejudicially erroneous. We agree with Crowell's argument and the State's concession of error. See State v. Jenkins, 93 Hawai'i 87, 100, 113, 997 P.2d 13, 39 (2000); State v. Tanaka, 92 Hawai'i 675, 677, 994 P.2d 607, 609 (App. 1999). Accordingly, we vacate the Judgment as to Count 4 and remand for a new trial on that count.

V.

Crowell argues the circuit court erred in granting the State's motion for extended terms of imprisonment on Counts 1 and 2 because the required finding that the extended terms were necessary for the protection of public was made by the circuit court and not by a jury. Crowell acknowledges that the Hawai'i Supreme Court has rejected his argument in State v. Rivera, 106 Hawai'i 146, 160-64, 102 P.3d 1044, 1058-62 (2004), and in State v. Kaua, 102 Hawai'i 1, 8-13, 72 P.3d 473, 480-85 (2003), but

contends that these decisions were wrongly decided. We are bound by the Hawai'i Supreme Court's decisions and accordingly reject Crowell's argument.

VI.

We affirm the November 16, 2004, Judgment entered in the Circuit Court of the First Circuit as to Counts 1 and 2, vacate the Judgment as to Count 4, and remand the case for further proceedings consistent with this summary disposition order.

DATED: Honolulu, Hawai'i, January 17, 2007.

On the briefs:

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James A. Burns
Chief Judge

Associate Judge

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