

NO. 27766

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,  
v.  
STEVEN O'CONNOR, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CRIMINAL NO. 03-1-1477)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Foley and Nakamura, JJ.)

Defendant-Appellant Steven O'Connor (O'Connor) appeals from the Judgment filed on January 18, 2006, in the Circuit Court of the First Circuit (circuit court). O'Connor was charged by complaint with second degree theft, in violation of Hawaii Revised Statutes (HRS) § 708-831(1)(b) (1993),<sup>1</sup> for shoplifting more than \$300 in merchandise from Sears, Roebuck and Co. (Sears). After a jury trial,<sup>2</sup> O'Connor was found guilty as

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<sup>1</sup> Hawaii Revised Statutes (HRS) § 708-831(1)(b) (1993) provides:

(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[.]

At the time of the charged offense, HRS § 708-830 (Supp. 2001), entitled "Theft" provided in relevant part:

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.

<sup>2</sup> The Honorable Michael D. Wilson presided.

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STATE OF HAWAII  
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charged. He was sentenced to five years of imprisonment, with a mandatory minimum term of one year due to his status as a repeat offender.

I.

Brandon Wong, a loss prevention agent for Sears, apprehended O'Connor outside the Ala Moana store after seeing him place clothing in a bag and then leave the store without paying. The total value of the merchandise taken by O'Connor was \$499.97.

After his arrest, O'Connor was questioned by Detective Dwayne Takayama. During the taped interview, O'Connor basically denied removing any items from Sears or having any property from Sears in his possession when the Sears security officers detained him. At the end of the interview, Detective Takayama turned off the tape recorder and asked O'Connor if he would be willing to submit to a polygraph examination. According to Detective Takayama's police report, O'Connor responded by saying:

No man, I'm not going to waste the police time. That's all bullshit ([p]ointing to the tape/tape recorder) I fricken did it. I told you that because I got to protect myself. I don't want to go back to jail. I just got out of jail. I want to work with the police, the prosecutors.

Prior to trial, O'Connor moved *in limine* to preclude Detective Takayama from referring to the detective's asking O'Connor to take a polygraph examination. The circuit court ruled that the reference to the polygraph examination added context to O'Connor's subsequent confession and therefore denied O'Connor's motion *in limine*. Detective Takayama was permitted to testify about O'Connor's confession, including O'Connor's reference to his prior interview statements as being "bullshit" and O'Connor's statement that he "did it." The circuit court, however, precluded Detective Takayama from testifying about O'Connor's references to jail and working with the police or prosecutors.

Consistent with the court's ruling, Detective Takayama testified at trial about asking O'Connor to submit to a polygraph

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examination at the conclusion of the interview and to the portion of O'Connor's response that the court had permitted. The court then gave the jury a limiting instruction regarding Detective Takayama's reference to the polygraph examination as follows:

Testimony regarding a polygraph statement was admitted only for the purpose of explaining the context of Mr. O'Connor's reply. It in no way implies that a polygraph examination is admissible in court, and, in fact, it is not.

Prior to trial, O'Connor subpoenaed personnel records from Sears for Brandon Wong. The circuit court reviewed the records *in camera* and released a portion of the records that identified Wong's employment status as "terminated."<sup>3</sup> The court declined to disclose the remainder of the subpoenaed documents.

O'Connor subsequently requested a hearing, out of the presence of the jury, to determine the reason Wong was terminated. O'Connor represented that the personnel records that were disclosed used the word "terminated" to describe Wong's employment status but did not say whether Wong was terminated by firing or left voluntarily. O'Connor stated that he wanted to question either Wong or Bernard Ching, who had been Wong's supervisor at Sears. The circuit court denied O'Connor's request for a hearing out of the presence of the jury.

At trial, O'Connor admitted that on the date in question, he had shoplifted items of women's clothing from Sears. O'Connor, however, denied that he was guilty of theft in the second degree because he claimed the total value of the items he stole did not exceed \$300. O'Connor testified that he was an experienced shoplifter, having previously been arrested about seventeen times for shoplifting, and that he never came close to taking \$300 in merchandise before. O'Connor explained that you can avoid jail if you are arrested for theft offenses that are

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<sup>3</sup> The Honorable Marcia Waldorf presided over the *in camera* review of the subpoenaed records and ruled on the portions of the records that would be disclosed.

less serious than second degree theft:

[Y]ou see, when you're arrested for theft [in the third degree] and theft [in the fourth degree], like I've always been, you don't even go to jail. That's why you do them. Theoretically you can be back in the store the next day or the same afternoon.

O'Connor contended that Wong added merchandise (that O'Connor did not take) to the items O'Connor actually shoplifted so that O'Connor could be charged with a more serious offense.

II.

On appeal, O'Connor argues:

(1) The circuit court erred in denying his motion *in limine* to exclude testimony that Detective Takayama asked O'Connor if he would be willing to take a polygraph examination just prior to O'Connor's confession.

(2) The circuit court deprived O'Connor of his right to confront and cross-examine witnesses by denying his request for a hearing to determine why Wong had terminated his employment with Sears.

(3) The circuit court erred by admitting each page of a two-page report as separate exhibits rather than as one exhibit.

After a review of the record and briefs submitted by the parties and having given due consideration to the issues raised and arguments advances by the parties, we affirm the circuit court's Judgment. We resolve the issues O'Connor raises on appeal as follows:

1. We need not decide whether the circuit court erred in permitting Detective Takayama to refer to his asking O'Connor to submit to a polygraph examination as a prelude to testifying about O'Connor's confession. We conclude that any error in this regard committed by the circuit court was harmless beyond a reasonable doubt. See State v. Machado, 109 Hawai'i 445, 452-56, 127 P.3d 941, 948-52 (2006); State v. Keaweehu, 110 Hawai'i 129, 138-39, 129 P.3d 1159, 1166-67 (App. 2006).

Generally the concern raised by evidence that a defendant was asked to take a polygraph test, even if the test results are not offered, is that the jury will speculate that the defendant refused to take the test or had taken it and failed. State v. Chang, 46 Haw. 22, 35, 374 P.2d 5, 13 (1962), overruled on other grounds by State v. Okumura, 78 Hawai'i 383, 408, 894 P.2d 80, 105 (1995). In O'Connor's case, the risk of prejudice flowing from evidence of the polygraph examination offer was that the jury may have inferred that O'Connor lied in his prior interview statements to Detective Takayama. O'Connor, however, admitted that he lied in his prior interview statements to Detective Takayama when he denied shoplifting anything from Sears. Any potential prejudice attributable to evidence of the polygraph examination offer was rendered immaterial by O'Connor's admission that his prior denial of wrongdoing was a lie. O'Connor's trial testimony served to further diminish any possible prejudice from the reference to the polygraph examination offer. At trial, O'Connor readily admitted that he had shoplifted merchandise from Sears. His sole defense was that the value of the merchandise he shoplifted did not exceed \$300.

Detective Takayama's reference to the offer of the polygraph examination had no bearing on the question of whether O'Connor had shoplifted more than \$300 in merchandise. Detective Takayama's interview with O'Connor did not focus on the amount or value of the merchandise O'Connor had stolen, but only on whether O'Connor had engaged in shoplifting. Because the amount or value of the merchandise was not raised as an issue during the interview, Detective Takayama's reference to the polygraph examination offer could not have raised an inference that O'Connor lied about the amount or value of the merchandise he had shoplifted. Thus, any error in permitting Detective Takayama to refer to the offer of a polygraph examination could not have resulted in any meaningful prejudice to O'Connor.

2. O'Connor claims that the circuit court violated his right to confront and cross-examine witnesses by denying his request for a hearing, outside the presence of the jury, to determine why Wong left his employment with Sears. O'Connor concedes that the reason that Wong left his employment with Sears may or may not have been relevant. He argues, however, that pursuant to Hawaii Rules of Evidence Rule 104 (1993), he was entitled to question Wong or Ching (Wong's supervisor at Sears), outside the presence of the jury, to discover if the reason that Wong no longer worked for Sears had any bearing on Wong's credibility. We reject O'Connor's claim.

Prior to trial, O'Connor subpoenaed Wong's personnel records from Sears and the records were reviewed *in camera* by the circuit court. Our own *in camera* review of the records confirms that the portion of the records the circuit court declined to disclose did not refer to the reason that Wong's employment with Sears was terminated or contain any information relevant to attacking his credibility. Both Wong and Ching were called as witnesses at trial. O'Connor did not seek to question either of them about the reason that Ching's employment with Sears was terminated. We conclude that the circuit court's refusal to grant O'Connor's request for a hearing outside the presence of the jury did not violate O'Connor's right to confront and cross-examine witnesses. The court did not err in denying O'Connor's request for a hearing.

3. We reject O'Connor's claim that the circuit court erred by admitting each page of a two-page report prepared by Karey Ortiz, Jr., a Sears Asset Protection Agent, as separate exhibits rather than as one exhibit. O'Connor stipulated to the admission of the Ortiz report. The first page of the report was admitted as a prosecution exhibit and the second page as a defense exhibit. Each page of the report shows that the page was authored by Ortiz. We fail to see how the circuit court erred in

admitting the pages of the report as separate exhibits or how O'Connor could possibly have been prejudiced by such action.

III.

The January 18, 2006, Judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, December 31, 2007.

On the briefs:

Randal I. Shintani,  
for Defendant-Appellant.

Stephen K. Tsushima,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Plaintiff-Appellee.

*Bernie K. A. Watarale*  
Presiding Judge

*Daniel R. Foley*  
Associate Judge

*Craig H. Nakamura*  
Associate Judge