NO. 27873

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ERWIN E. FAGARAGAN, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 04-1-0595(1))

SUMMARY DISPOSITION ORDER
(By: Recktenwald, C.J., and Watanabe, J., with Nakamura, J., concurring separately)

Erwin E. Fagaragan (Fagaragan) appeals from the January 11, 2006 Judgment of the Circuit Court of the Second Circuit (circuit court).[1]

A jury convicted Fagaragan of: (1) Unauthorized Control of Propelled Vehicle (UCPV) in violation of Hawaii Revised Statutes (HRS) § 708-836 (2006 Supp.) (Count One), (2) Promoting a Dangerous Drug in the First Degree in violation of HRS § 712-1241(1)(a)(i) (2003 Supp.) (Count Two), (3) Prohibited Acts Related to Drug Paraphernalia in violation of HRS § 329-43.5(a) (1993 Repl.) (Count Four), and (4) Promoting a Detrimental Drug in the Third Degree in violation of HRS § 712-1249(1) (1993 Repl.) (Count Five).[2] The circuit court sentenced Fagaragan to incarceration for twenty years on Count Two, five years for each of Counts One and Four, and thirty days for Count Five, with all of the terms to run concurrently.

On February 10, 2006, Fagaragan requested an extension of time for filing his notice of appeal, so that he could obtain

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[1] The Honorable Joel E. August presided.

[2] Count Three, which charged Fagaragan with Attempted Promoting a Dangerous Drug in the First Degree in violation of Hawaii Revised Statutes (HRS) §§ 705-500 (1993 Repl.) and 712-1241(1)(b)(ii)(A) (2003 Supp.), was dismissed at the close of the State's case-in-chief.

new counsel to pursue the appeal. The circuit court granted the request, and gave Fagaragan a sixty-day extension to April 11, 2006. Fagaragan filed the notice of appeal on April 11, 2006. Although the sixty-day extension exceeded the maximum 30 days allowed by Hawai'i Rules of Appellate Procedure (HRAP) 4(b)(5), we nevertheless will consider his appeal so as not to deny him the opportunity for appellate review. State v. Solomon, 107 Hawai'i 117, 125 n.4, 11 P.3d 12, 20 n.4 (2005).

Fagaragan raises four points on appeal: (1) the circuit court committed plain error by permitting police officers to testify that a list of names found in a backpack recovered from the vehicle that Fagaragan was driving included known drug dealers, drug users, and thieves, (2) the circuit court erred in failing to define the phrase "agent of the owner" in its instructions to the jury, especially in light of the jury's request for such a definition, (3) the circuit court erred by permitting the prosecutor to misstate the law relating to Count One in her closing argument, thereby misleading the jury as to what facts the State needed to prove to convict Fagaragan of UCPV, and (4) the circuit court plainly erred by failing to define "attendant circumstance" in its instructions to the jury.

After a careful review of the record and the briefs submitted by both parties, and having given due consideration to the arguments advanced and the issues as raised, we resolve the issues raised by Fagaragan as follows:

1) Because Fagaragan's counsel did not object to the testimony about the list, Fagaragan's potential objections were waived and the testimony was properly admitted. See State v. Wallace, 80 Hawai'i 382, 410, 910 P.2d 695, 723 (1996) ("[t]he rule is well settled that evidence even though incompetent, if admitted without objection or motion to strike, is to be given the same probative force as that to which it would be entitled if it were competent.") (citation and internal quotation marks

omitted); State v. Sua, 92 Hawai'i 61, 76, 987 P.2d 959, 974 (1999). Fagaragan's theory of defense was that the bag containing the list did not belong to him.[3] Indeed, when cross-examining one of the police officers who testified about the list, defense counsel elicited testimony that the list contained George Hoopai's name. Having made a tactical decision not to object to testimony about the list,[4] Fagaragan cannot now claim that the trial court erred by failing to *sua sponte* preclude the testimony.

In any event, any error by the circuit court in allowing testimony about the list of names was harmless beyond a reasonable doubt. There was substantial evidence of Fagaragan's guilt other than the challenged testimony. With regard to Counts Two, Four and Five, the bag containing the list was found on the floor of the vehicle that Fagaragan was driving; the bag was searched and found to contain marijuana, methamphetamine, a digital scale, a glass pipe, court papers with Fagaragan's name on them, and a reminder to appear that had been given to Fagaragan by his probation officer. With regard to Count One, the vehicle that Fagaragan was driving was stolen, and there was no evidence that the registered owner of the vehicle or an agent of the owner who had actual or apparent authority had given Fagaragan permission to use it. State v. Palisbo, 93 Hawai'i

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[3] At trial, Fagaragan's attorney explained to the court that her theory of defense was that "the vehicle [that he had borrowed] was stolen by the Hoopais, and that the content [sic] of the bag found in the vehicle was the Hoopais." Later, however, during closing arguments, counsel modified this theory, maintaining that the bag could not be Fagaragan's because it was a woman's bag.

[4] Fagaragan did at one point object and moved to strike a reference to "him" in testimony by one of the police officers about the list ("This looks like a record of people who owe **him** money.") (Emphasis added). The circuit court granted that motion. The decision by Fagaragan's counsel to object on this point is consistent with our view that Fagaragan's counsel did not object to the remainder of the testimony for tactical reasons, i.e., based on the defense's theory that the bag belonged to the Hoopais, and/or was a woman's bag rather than Fagaragan's.

344, 347, 3 P.3d 510, 513 (App. 2000). Accordingly, we conclude that any error did not contribute to the verdict. See State v. Heard, 64 Haw. 193, 194, 638 P.2d 307, 308 (1981); State v. Perez, 64 Haw. 232, 234-35, 638 P.2d 335, 337 (1981); State v. Pulawa, 62 Haw. 209, 219-20, 614 P.2d 373, 379-80 (1980).

2) We reject Fagaragan's contention that the circuit court erred by not instructing the jury as to the meaning of the phrase "agent of the owner." Although the circuit court instructed the jury with regard to the affirmative defense provided by HRS § 708-836,[5] it was not required to do so since there was no evidence that the individuals whom Fagaragan claimed had loaned him the vehicle (the Hoopais) were in fact agents of the registered owner of the vehicle. See Palisbo, 93 Hawai'i at 355, 3 P.3d at 521. Since there was no basis for instructing the jury on the affirmative defense in the first instance, the circuit court did not err in failing to further define "agent of the owner" when asked to do so by the jury.

3) The circuit court did not err in permitting the Deputy Prosecuting Attorney (DPA) to misstate the law relating to Count One in her closing argument, thereby misleading the jury as to what facts the State needed to prove to convict Fagaragan of UCPV. Viewed in its entirety, the DPA's closing argument fairly summarized the circuit court's instructions, which in turn accurately stated the law as interpreted by this court in Palisbo.

4) The circuit court did not plainly err in failing to define "attendant circumstance" when it instructed the jury with

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[5] The circuit court's instruction number 25 provided:

> Mere lack of knowledge that a vehicle was stolen does not absolve the operator of a stolen vehicle of criminal responsibility. The operator can avoid criminal responsibility if he proves that it is more likely so than not so that he obtained permission to drive the vehicle from the registered owner or from an agent of the owner who had actual or apparent authority to allow such use.

regard to state of mind. Fagaragan claims he was prejudiced by this omission because the jury might not have understood the required state of mind with regard to the second element of UCPV, i.e., that the registered owner did not consent to the defendant's use of the vehicle. However, the circuit court's instructions with regard to the elements of UCPV advised the jury that it had to find that Fagaragan "knowingly operat[ed] said vehicle without the consent of Alamo Rent-A-Car and/or Alamo Financing LP, the owner of said vehicle." This is an accurate statement of the law, and the instruction given by the circuit court here was almost identical to the instruction which this court approved of in Palisbo. Id. at 351, 3 P.3d at 517.

Accordingly, we affirm the January 11, 2006 Judgment of the Circuit Court of the Second Circuit.

DATED: Honolulu, Hawai'i, September 27, 2007.

On the briefs:

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for Defendant-Appellant.

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Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.

Mark Recktenwald
Chief Judge

Corinne K.A. Watanabe
Associate Judge