

NO. 27983

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
IOSE MAFATAUA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 05-1-1113)

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SUMMARY DISPOSITION ORDER

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

On May 31, 2005, Defendant-Appellant Iose Mafataua, also known as Iose Mafatau and Mafataua Iose (Mafataua), was charged with two counts of Ownership or Possession Prohibited of Any Firearm or Ammunition By a Person Convicted of Certain Crimes in violation of Hawaii Revised Statutes (HRS) § 134-7(b) & (h) (Supp. 2004).¹ The charges stemmed from an incident in which Rosaline Puu (Puu), Mafataua's girlfriend of six years, called 911 to report that Mafataua came to her apartment in possession of a firearm. After a jury trial in the Circuit Court of the

¹ Hawaii Revised Statutes (HRS) § 134-7(b) & (h) (Supp. 2004) provides in pertinent part:

§ 134-7 Ownership or possession prohibited, when;
penalty. . . .

(b) No person who is under indictment for, or has waived indictment for, or has been bound over to the circuit court for, or has been convicted in this State or elsewhere of having committed a felony, or any crime of violence, or an illegal sale of any drug shall own, possess, or control any firearm or ammunition therefore.

. . . .

(h) Any person violating subsection (a) or (b) shall be guilty of a class C felony; provided that any felon violating subsection (b) shall be guilty of a class B felony.

. . . .

First Circuit (circuit court),² Mafataua was convicted of Count II, but the jury was unable to reach a verdict as to Count I. The trial court declared a mistrial as to Count I and subsequently dismissed it with prejudice. Mafataua now appeals from the Judgment filed on June 1, 2006 sentencing him to a ten-year term of imprisonment.

On appeal, Mafataua raises the following issues in his "Statement of Points Relied Upon":³

(1) The circuit court erred in its jury instructions, as "the Arseo [sic] instruction was not clear and that jurors could have been confused as to finding the Defendant guilty of possessing ammunition. The Arseo [sic] doesn't go far enough to distinguish a case like this because in this case both charges read identically. Either charge could have been the gun or the bullet. The jury could have thought that the instructions only went to distinguish the two counts."

(2) Mafataua's counsel at the trial level was ineffective because defense counsel: (a) "failed to call critical witness [sic] for the defense," (b) "failed to timely raise any objection, correction, or additions to the trial court's instruction to the jury," and (c) "failed to make objections to suggestive, damaging, and prejudicial testimonies by a police officer in violation of Rules 403 & 404 of Hawaii Rules of Evidence that had been covered in motion in limine."⁴

² The Honorable Karl K. Sakamoto presided.

³ Mafataua's Opening Brief also included a section entitled "Questions Presented," which consisted of single-sentence summaries of the first, second and fourth issues identified in his "Statement of Points Relied Upon," but which omitted any reference to the third issue. For purposes of identifying the issues on this appeal and assessing Mafataua's compliance with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4), we will rely upon his Statement of Points Relied Upon.

⁴ Although not mentioned in the "Statement of Points Relied Upon" section of his opening brief, Mafataua suggests in his argument section that defense counsel was also ineffective because she (a) "raised very limited number [sic] of objections during the State's case in chief [sic]," (b) "made no

(3) The circuit court erred in permitting "testimony from a State witness that was inadmissible under [Hawaii Rules of Evidence] Rule 403 & 404 and Motion in Limine," in that Honolulu Police Department (HPD) Officer Alan Rivers stated that he knew Puu "from previous encounters," that he knew both Puu and Mafataua "for many years from family matters," that he "knew who [Mafataua] was," and that he knew that Puu used "ice."

(4) The circuit court erred in denying Mafataua's motion for a new trial because "[a] critical defense witness was not present at trial, a state witness was allowed to continuously volunteer prejudicial statements to the jury, and there was insufficient jury instruction."

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Mafataua's points of error as follows:

(1) Although Mafataua did not object to the jury instructions at trial, we nevertheless review whether there was any error in the jury instructions, and if so, whether the error was harmless beyond a reasonable doubt. State v. Nichols, 111 Hawai'i 327, 337, 141 P.3d 974, 984 (2006). We conclude that the circuit court's jury instructions were not erroneous.

Mafataua first argues that the jury instructions were insufficient because the charging language in Count I and Count II was identical, and therefore "either charge could have been the gun or the bullet." However, the Deputy Prosecuting Attorney

objections to any of the prosecutor's leading questions to the State's eight (8) witnesses," (c) "did not seem to know what the witnesses would say," and (d) "[d]efense's case showed lack of preparation." Because the opening brief did not satisfy any of the requirements of HRAP Rule 28(b)(4) with regard to these assertions, we review them for plain error. HRAP Rule 28(b)(4) ("Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented."). Moreover, Mafataua does not provide any argument in support of his position, other than simply identifying the issues described. HRAP 28(b)(7) ("Points not argued may be deemed waived."). We accordingly deem these points waived, and in any event, conclude that any error did not rise to the level of plain error.

(DPA) stated in her closing argument that Count I pertained to Mafataua's culpability with respect to a firearm, and Count II pertained to Mafataua's culpability with respect to the ammunition.

Moreover, the circuit court gave a specific unanimity instruction, stating in part:

The law allows the introduction of evidence for the purpose of showing that there is *more than one item* upon which proof of an element of an offense may be based. In order for the prosecution to prove an element, all 12 jurors must unanimously agree *that possession of the same item* has been proved beyond a reasonable doubt.

(Emphasis added.)

There is nothing in the record to indicate the jury was confused as to the election by the DPA, or that the jury did not follow the court's instructions. The jury instructions, "when read and considered as a whole," were not "prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Gonsalves, 108 Hawai'i 289, 292-93, 119 P.3d 597, 600-01 (2005).

Mafataua next argues that the circuit court's unanimity instruction "did not instruct the jury on finding the Defendant guilty of which bullet in Count 2," and that the circuit court should have instead given the jury an interrogatory. However, we conclude that the instruction clearly directed the jury that it had to unanimously agree on which bullet Mafataua possessed before it returned a guilty verdict on Count II,⁵ and

⁵ During closing argument, defense counsel restated the instruction as follows:

The law allows the introduction of evidence for the purpose of showing there's more than one item upon which proof of an element of an offense may be based. In other words, there's two bullets, either one of which could be the basis for finding of guilt [sic] if you had no reasonable doubt that [Mafataua] possessed one of those bullets.

What you have to do though is all 12 agree *he possessed the same bullet or both bullets* but you can't say, six of you, say he possessed the one on the floor and six of you say he possessed the one in his pocket. That's what the instruction

accordingly, this argument is without merit. State v. Jenkins, 93 Hawai'i 87, 113-14, 997 P.2d 13, 39-40 (2000); State v. Arceo, 84 Hawai'i 1, 928 P.2d 843 (1996). Indeed, the instruction here was almost identical to that which this court found sufficient in State v. Auld, 114 Hawai'i 135, 157 P.3d 574 (App. 2007). Thus, the instructions, when "read and considered as a whole," were not "prejudicially insufficient, erroneous, inconsistent, or misleading." Gonsalves, 108 Hawai'i at 292-93, 119 P.3d at 600-01.

(2) We conclude that Mafataua has failed to establish, on the record before us, that his counsel was ineffective. State v. Antone, 62 Haw. 346, 348, 615 P.2d 101, 104 (1980). First, because the circuit court's jury instructions were not erroneous, defense counsel was not ineffective for failing to object to them.

Second, Mafataua argues that his trial counsel was ineffective because counsel "failed to make any objections to suggestive, damaging, and prejudicial testimonies by Officer Rivers in violation of Rules 403 & 404 of Hawaii Rules of Evidence that had been covered in motion in limine." Defense counsel, did, in fact object. In response to Officer Rivers' multiple statements that he recognized Rose Puu "from previous encounters," and his statement that he knew both Mafataua and Puu "for many years from family matters," defense counsel stated:

[Defense Counsel]: Objection. May we approach?

THE COURT: Yes.

(The following proceedings were held at the bench:)

[Defense Counsel]: Your honor, I would like the witness to be advised outside the presence of the jury to quit volunteering phrases about how long and how he's known this couple. It's basically bordering on a violation of the

means. *You have to agree on the same possession. . . .*

(Emphasis added.)

motion in limine.

THE COURT: Yes.

[DPA]: Do you want to take a short break?

THE COURT: No. You can speak to him behind the double door.

Because defense counsel did object to Officer Rivers' testimony, this argument lacks merit. Moreover, as we explain in our discussion in section (3) below, Officer Rivers' testimony was not prejudicial to Mafataua. Accordingly, we conclude that Mafataua has failed to establish ineffective assistance of counsel with regard to this issue.

Finally, with regard to whether counsel was ineffective for failing to obtain HPD Officer Rick Yi's testimony or to ask for a continuance on that basis, we affirm without prejudice to a subsequent Hawai'i Rules of Penal Procedure Rule 40 Post-Conviction Petition. State v. Silva, 75 Haw. 419, 864 P.2d 583 (1993). If such a petition is filed, defense counsel would then have the opportunity to explain the reasons why she chose not to ask for a continuance to obtain Officer Yi's testimony. Briones v. State, 74 Haw. 442, 463, 848 P.2d 966, 977 (1993). On the record before us, we will not speculate about whether there may have been legitimate tactical reasons for counsel's decision.

(3) Because Mafataua did not include an argument section in his opening brief in support of his point of error concerning allegedly prejudicial testimony by Officer Rivers, we deem this point waived under Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7).⁶ In any event, we conclude that this point is without merit. Most of the challenged testimony related to

⁶ To the extent Mafataua's Opening Brief did discuss this issue at all, it did so as part of the "ineffective assistance of counsel" argument. However, the brief did not assert how the admission of Officer Rivers' testimony violated Rules 403 and 404, Hawaii Rules of Evidence, Chapter 626, HRS, or the motion in limine. As this point of error is unsupported by reasoning, citations to the record, case law, or authority, the brief lacks "discernible arguments" in support of it and the point may be deemed waived pursuant to HRAP 28(b)(7). Taomae v. Lingle, 108 Hawai'i 245, 257, 118 P.3d 1188, 1200 (2005).

Puu, rather than Mafataua, and thus was not prejudicial to him; to the contrary, the testimony about Puu's drug use was elicited by defense counsel in order to establish that Puu had a motive to frame Mafataua.

Officer Rivers' testimony that he "knew" Mafataua and Puu "from previous encounters" including "from family matters" did not suggest that either had a prior criminal record or criminal disposition, especially in view of Officer Rivers' testimony that the Palolo housing community had been his "beat" for seven years, and that HPD has "a little substation up there" where officers write their reports and "interact with the community." The officer's comments contained no negative implication or suggestion of Puu or Mafataua's prior involvement with criminal activity, and thus do not constitute evidence of "other crimes, wrongs, or acts" within the meaning of Rule 404(b), Hawaii Rules of Evidence, Chapter 626, HRS, and did not violate the court's ruling on the Motion in Limine. See State v. Gonsalves, 5 Haw.App. 659, 668, 706 P.2d 1333, 1340 (1985), overruled on other grounds by State v. Kelekolio, 74 Haw. 479, 849 P.2d 58 (1993) (where prosecution asked no questions violating the motion in limine order, but rather, "the superfluous information came forth spontaneously from the witness" and was "innocuous," the lower court did not abuse its discretion in denying motion for a new trial based on alleged violation of motion in limine). Accordingly, the circuit court did not abuse its discretion by admitting this testimony.

(4) The circuit court did not abuse its discretion in denying Mafataua's motion for a new trial. Mafataua argues that the court abused its discretion because "[a] critical defense witness was not present at trial, a state witness was allowed to continuously volunteer prejudicial statements to the jury, and there was insufficient jury instruction." Because we have already addressed these issues by determining that Mafataua

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failed to establish that his trial counsel was ineffective,⁷ that the circuit court did not abuse its discretion in admitting the testimony of Officer Rivers, and that the jury instructions were sufficient, we conclude that the court did not abuse its discretion in denying Mafataua's motion for a new trial.

Accordingly, the Judgment filed by the circuit court on June 1, 2006 is hereby affirmed.

DATED: Honolulu, Hawai'i, November 21, 2007.

On the briefs:

Tae Won Kim,
for Defendant-Appellant.

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge

⁷ Preserving, however, the opportunity for Mafataua to argue in an Hawai'i Rules of Penal Procedure Rule 40 Post-Conviction Petition that defense counsel was ineffective for failing to secure Officer Yi's testimony.