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NO. 28542

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

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STATE OF HAWAII
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STATE OF HAWAI'I, Plaintiff-Appellee
v.
TYLER J. MASON, also known as JASON J. MASON,
Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 06-1-0305(1))

MEMORANUM OPINION
(By: Foley, Presiding Judge, Nakamura, and Fujise, JJ.)

A jury found Defendant-Appellant Tyler J. Mason (Mason) guilty of unauthorized control of a propelled vehicle (UCPV) and intentional failure to return a rental car. He was sentenced to concurrent terms of probation: five years for the UCPV offense and one year for the offense of failing to return a rental car.

Mason's defense at trial to the UCPV charge was mistaken identity -- that he was not the driver of the stolen Jeep Wrangler. Mason claimed that the person who stole and drove the Jeep was BP, a person Mason knew from middle school. Mason alleged that through an unfortunate series of events, he was nearby when BP abandoned the stolen Jeep and that a police officer mistakenly identified Mason as the Jeep's driver.

Mason appeals from the Judgment entered by the Circuit Court of the Second Circuit (circuit court) on March 28, 2007.[1] Mason's sole claim of error on appeal is that there was insufficient evidence to identify him as the driver of the stolen Jeep and thus his UCPV conviction must be reversed. We disagree with Mason's claim and conclude that there was sufficient evidence to identify him as the Jeep's driver. Mason does not

[1] The Honorable Joel E. August presided.

challenge his conviction and sentence for the offense of failure to return a rental car. Accordingly, we affirm the circuit court's Judgment.

BACKGROUND

I. Theft of the Jeep

Charles Zerambo and his wife were tourists from Pennsylvania visiting Maui. On April 24, 2006, at about 2:00 p.m., the Zerambos arrived at the Keanae Arboretum. Mr. Zerambo parked his rented green Jeep on the road leading to the arboretum. He noticed other vehicles parked nearby, including a light blue, four-door Chevy sedan, but he did not see anyone inside the Chevy. The Zerambos left the keys for the Jeep as well as their personal possessions in the Jeep. Among these possessions was Mr. Zerambo's wallet, which contained credit cards and three $100 bills.

After hiking inside the arboretum for about twenty minutes, the Zerambos returned to find that their Jeep was gone. The Chevy was also gone. The Zerambos reported the theft of their Jeep to the police and an all points bulletin (APB) was issued for the Jeep at about 2:59 p.m.

II. Officer David Wikoli's Identification of Mason

Maui County Police Officer David Wikoli heard the APB as he was driving on the Hana Highway. At about 3:00 p.m., Officer Wikoli spotted a green Jeep, with the same license plate number as the Jeep reported stolen, coming toward him on the highway. The only person in the Jeep was the driver. Officer Wikoli made a u-turn, activated his flashing lights and siren, and began pursing the Jeep. The Jeep turned off the highway into a residential area. Officer Wikoli lost sight of the Jeep until he turned down Kuloli Place, an unimproved gravel and dirt road, and saw the Jeep. The driver had abandoned the Jeep and left the engine running. Officer turned the ignition off and retrieved personal property, including a woman's wallet, from the Jeep's

passenger-side floor.[2]

Officer Wikoli then saw a blue, four-door Chevy Cobalt sedan coming toward him from farther down Kuloli Place. There was only the driver in the Cobalt. The Cobalt, with the driver's window down, passed about four feet from Officer Wikoli. Officer Wikoli recognized the driver of the Cobalt as the same person who had been driving the stolen Jeep. Officer Wikoli commanded the driver to stop, but the driver continued up the road and accelerated as soon as the driver reached the intersection.

Officer Wikoli reported the description and license plate number of the Cobalt to police dispatch. Officer Wikoli was later notified that the Cobalt had been stopped at the Fukashima store.[3] Upon arriving at the store, Officer Wikoli saw Mason sitting in the driver's seat of the Cobalt. Officer Wikoli identified Mason as the same person Officer Wikoli saw driving the Cobalt on Kuloli Place and the same person he had earlier seen driving the Jeep. Mason had very short hair, was wearing a white t-shirt with a logo on the front and back, and had sunglasses.

Officer Wikoli arrested Mason and found a single $100 bill in a pocket of Mason's shorts. Officer Wikoli ran a check on the Cobalt's license plate number and learned that the Cobalt was a rental car that had not been returned. Mason had rented the Cobalt from Budget Rent-A-Car (Budget) on March 9, 2006, for one week. When Mason failed to return the Cobalt at the end of the rental period, Budget attempted without success to contact Mason. On April 7, 2006, Budget filed a police report regarding Mason's failure to return the Cobalt.

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[2] The items recovered from the Jeep by Officer Wikoli did not belong to the Zerambos but had been stolen from another car parked in a different location than the Jeep.

[3] Plaintiff-Appellee State of Hawai'i indicates that the store's name is "Fukushima" rather than "Fukashima." But we will defer to the trial transcript which uses "Fukashima."

Officer Wikoli testified at trial that he was "sure" that the person he saw driving the Cobalt was the same person he saw driving the Jeep. Officer Wikoli also testified that when the Jeep first passed him on the Hana Highway, he noticed that the Jeep's driver was "possibly Hawaiian/Caucasian looking" with "[w]rap around sunglasses and had like a shaved hairdo." However, Officer Wikoli acknowledged that when he found the Jeep abandoned on Kuloli Place, he reported to dispatch that the driver of the Jeep that fled was a "Hawaiian male" with a shaved head and sunglasses. Mason apparently is Caucasian.

Officer Wikoli also acknowledged that he wrote in his police report that the driver of the Cobalt was "more than likely" the person he had seen in driving the Jeep. Officer Wikoli explained, however, that after arriving at the Fukashima store, he directed Mason to put on Mason's sunglasses. After Mason put on the sunglasses, Officer Wikoli made a positive identification of Mason as the person Officer Wikoli had seen in the stolen Jeep and in the Cobalt leaving Kuloli Place. The parties stipulated to the admission of two photographs of BP along with the dates the photographs were taken and BP's date of birth. Officer Wikoli was shown BP's photographs and stated that he had never seen BP before.

III. Mason's Version of Events

Mason testified that he and his friend, Ray Houston, worked together for Norwegian Cruise Lines (NCL) and roomed together on Maui. In about January of 2006, Mason was placed on medical leave and Houston resigned from NCL. On March 9, 2006, Mason rented a Chevy Cobalt from Budget for a week. Mason admitted that he did not return the car or call Budget when his rental contract expired. He explained his actions by noting that he had used a debit card to pay for the car rental and had left phone numbers where he could be contacted.

By April 2006, Mason's medical benefits had expired. Mason and Houston moved out of the apartment they had been renting. They were essentially homeless and living out of the

rented Cobalt. Houston decided to move back to the mainland. On April 26, 2006, Mason, who was raised on Maui, decided to drive Houston to Hana for sightseeing before Houston departed.

According to Mason, he and Houston stopped at a beach before going to Hana, where they ran into BP, whom Mason knew from middle school. Mason had not seen BP for at least eight years and indicated that BP had only been an acquaintance, rather than a friend. BP asked if he could catch a ride to his uncle's house in Keanae, and Mason agreed. Mason described BP as "not Caucasian" but "Portugese/Filipino/Hawaiian." Mason testified that BP's hair was cut very short and that BP was wearing a white t-shirt and black, square-framed sunglasses.

On the way to Hana, the three men stopped at Keanae Arboretum because Mason had never been there and wanted to see the plants and vegetation. Mason saw a Jeep parked nearby. While Mason and Houston remained in the Cobalt, BP got out and walked to the Jeep, entered the Jeep, and started it. Mason was in "shock" and "dumbfounded" by BP's actions. BP motioned for Mason to follow him. But when Mason saw BP turn to go back toward Kahului, Mason drove in the opposite direction toward Hana because he wanted to "get far away" from BP.

Mason testified that when he and Houston reached Waianapanapa State Park, they encountered heavy traffic and decided to turn around. On the way back, they stopped at Puukaa State Park so that Houston could use the bathroom. Mason saw BP in the Jeep at the park, and as Mason left the park, BP followed in the Jeep.

When Mason reached the Haiku area, he passed a police officer traveling in the opposite direction. Mason saw the police officer stop, make a u-turn, and activate his lights and siren. Instead of pulling over, Mason turned left into a residential area because he thought that BP, who was behind him, would continue on the highway. However, BP followed Mason into the residential area and eventually down Kuloli Place. Through his rear-view mirror, Mason saw BP park the Jeep and run away.

Mason drove down the road until it dead-ended at a cul-de-sac. At that point, Houston jumped out of the Cobalt and walked away.

Mason turned the Cobalt around and drove back up the road, where he now saw a police car parked behind the Jeep. Mason testified that he did not see any police officer and proceeded up the road, turned at the intersection, and drove to the Fukashima store. At the Fukashima store, Mason was detained by a police officer until Officer Wikoli arrived and placed Mason under arrest.

Mason denied that he had ever been in the Jeep or had made plans with BP to steal the Jeep. Houston testified at trial and substantially corroborated Mason's account.

IV. Testimony of Residents

Residents who lived in the vicinity of where the Jeep had been abandoned testified at trial. Rowena Moen and Marlena Dela Cruz were called by the prosecution. Moen and Dela Cruz were both in Moen's yard when they heard a police siren and saw a man walking and running through the yard. Moen stated that the man looked "like a local "Hawaiian/Filipino" while Dela Cruz testified that the man "looked like [a] haole man" with a "bolo head"[4] and wearing a white t-shirt.

At trial, Moen and Dela Cruz were each shown photographs taken of Mason on the day of his arrest and photographs of BP. Moen indicated that she recognized one of Mason's photographs as the person she saw in her yard. Moen stated that the photographs of BP did not show the person she saw in her yard. Dela Cruz identified a photograph of Mason as the man she saw in the yard and stated that BP was not the man she saw.[5]

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[4] The term "bolo head" is slang for someone with a very short haircut or who is bald.

[5] Moen recovered slippers and a white t-shirt on her property which she turned over to the police. The slippers were described as size 11 in the evidence inventory prepared by the police. Mason was barefooted when he was arrested. Mason, however, testified that he wore a size 8 1/2 to 9 slipper.

Noel Smit, Moen's neighbor, was called by the defense. Smit stated that on April 26, 2006, through her living room window, she saw a man wearing a white t-shirt and sunglasses run through her yard. Upon being shown Mason's photographs, Smit testified that Mason was definitely not the person who had run through her yard. Smit stated that BP's photographs were much closer to the person who ran through her yard, but she could not say that BP was that person.

DISCUSSION

Mason argues that evidence identifying him as the driver of the stolen Jeep was "questionable and conflicting" and thus was insufficient to support his conviction for UCPV. We disagree with Mason's contention that the evidence identifying Mason as the driver was insufficient.

In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution. State v. Tamura, 63 Haw. 636, 637, 633 P.2d 1115, 1117 (1981). "The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact." State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998) (quoting State v. Quitog, 85 Hawai'i 128, 145, 938 P.2d 559, 576 (1997)). Even if it could be said that the conviction is against the weight of the evidence, the conviction will nevertheless be affirmed as long as there is substantial evidence to support it. Tamura, 63 Haw. at 637, 633 P.2d at 1117.

"'Substantial evidence'. . . is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Richie, 88 Hawai'i at 33, 960 P.2d at 1241 (quoting State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996)). It is the province of the jury, not the appellate courts, to determine the credibility of witnesses and the weight of the evidence. Tamura, 63 Haw. at 637-38, 633 P.2d at 1117; State v. Aki, 102 Hawai'i 457, 460, 464, 77 P.3d 948, 951, 955 (App. 2003).

In Mason's case, there was substantial evidence to support the identification of Mason as the driver of the stolen Jeep. Officer Wikoli identified Mason as the person Officer Wikoli saw driving the stolen Jeep when Officer Wikoli passed the Jeep on the highway. Officer Wikoli described the driver of the Jeep as having a shaved hairdo and wearing wrap-around sunglasses, which matched Mason's appearance on the day the Jeep was stolen.

Officer Wikoli's identification of Mason as the Jeep's driver was corroborated by the testimony of Moen and Dela Cruz, who were present in the area where the Jeep was abandoned. Both Moen and Dela Cruz identified a photograph of Mason as the man they saw running through Moen's yard, and they both stated that the photographs of BP were not the person they saw in the yard. Dela Cruz's testimony that the man she saw was a haole man with a bolo head and a white t-shirt described Mason's appearance and clothing on the day in question. In addition, given Mason's financial situation, a connection could reasonably have been drawn between the recovery of the $100 bill from Mason's pocket and the three $100 bills Charles Zerambo had left in the Jeep (in Mr. Zerambo's wallet).[6]

In his brief, Mason attacks Officer Wikoli's credibility. Among other things, Mason argues that Officer Wikoli's opportunity to view the driver of the Jeep, while passing in the opposite direction, was poor. Mason also points to Officer Wikoli's reference to the Jeep's driver as "Hawaiian" during a call to dispatch and to the officer's police report in which Officer Wikoli stated that Mason was only "more than

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[6] In its closing argument, the prosecution offered its theory on how Mason had committed the UCPV offense: Mason stole the Jeep and drove it from the Keanae Arboretum, with his accomplice, Ray Houston, following behind in the Chevy Cobalt. When Officer Wikoli started to pursue the Jeep, Mason and Houston turned off the highway and into a residential area. Mason abandoned the Jeep on Kuloli Place and took Houston's place as the driver of the Cobalt. Because Mason knew that rental records would show that he rented the Cobalt, he could not leave the Cobalt near the abandoned Jeep and thus had to try to drive the Cobalt away. Houston, however, was not linked to the Cobalt, and so Houston decided to flee the area on foot.

likely" the person driving the Jeep. However, these attacks on Officer Wikoli's credibility were presented to the jury and evidently failed to persuade the jury. We defer to the jury's evaluation of the credibility of witnesses and the weight of the evidence. Tamura, 63 Haw. at 637-38, 633 P.2d at 1117.[7]

CONCLUSION

The March 28, 2007, Judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, May 29, 2008.

On the briefs:

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Daniel R. Foley
Presiding Judge

Craig H. Nakamura
Associate Judge

Alexa D. M. Fujise
Associate Judge

[7] We also note that the jury was given an instruction on accomplice liability, which provided an alternate basis on which to find Mason guilty. Even if Mason was not the driver of the stolen Jeep, there was substantial circumstantial evidence showing that he was at least an accomplice in the commission of the UCPV offense. By his own testimony, Mason was present when the Jeep was entered and stolen. He did not pull over when Officer Wikoli activated his siren and flashing lights. Instead, Mason proceeded to drive into a residential area and down the same road on which the Jeep was abandoned. Upon leaving the scene in the Chevy Cobalt, Mason ignored Officer Wikoli's command to stop and fled the scene. Mason was found with a $100 bill in his pocket and three $100 bills had been left in the Jeep.