

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 28880

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
JOSEPH CALARRUDA, Defendant-Appellant

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 06-1-1337)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Joseph Calarruda (Calarruda) appeals from a judgment of conviction on 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) and (h) (Supp. 2005) entered on October 5, 2007 in the Circuit Court of the First Circuit¹ (circuit court).

The charges arose out of an incident in which Calarruda, while on probation for a felony, took a package to work in his backpack that contained a firearm and ammunition.

On appeal, Calarruda identifies as error the circuit court's denial of the motion for judgment of acquittal at the close of the prosecution's case and the denial of the renewed motion for judgment of acquittal at the close of all the evidence. Calarruda argues on appeal that there was no evidence that he was aware of that the items in his possession were a firearm and ammunition.

The denial of a motion for judgment of acquittal is reviewed under the following standard: "Viewing the evidence as stated above, i.e., in a light most favorable to Respondent, and in full recognition of the trier of fact's role, it may be concluded that the evidence was sufficient to enable a reasonable

¹ The Honorable David W. Lo presided.

juror to conclude guilt." State v. Davalos, 113 Hawai'i 385, 389, 153 P.3d 456, 460 (2007).

The claim of error in the denial of the first motion for judgment of acquittal was waived by the presentation of evidence by the defense. State v. Mitsuda, 86 Hawai'i 37, 38 n.3, 947 P.2d 349, 350 n.3 (1997); State v. Souza, 119 Hawai'i 60, 73, 193 P.3d 1260, 1273 (App. 2008).

It is well established that when a defendant presents evidence after the denial of his or her motion for judgment of acquittal at the close of the government's case-in-chief, the defendant thereby waives any error in the trial court's denial of the motion. State v. Mitsuda, 86 Hawai'i 37, 38 n.3, 947 P.2d 349, 350 n.3 (1997); State v. Kreps, 4 Haw. App. 72, 75, 661 P.2d 711, 714 (1983).

Souza, 119 Hawai'i at 73, 193 P.3d at 1273. We therefore only consider the sufficiency of the evidence after the presentation of all of the evidence.

Based upon a careful review of all of the evidence, it is apparent that there was sufficient evidence to support a reasonable juror's conclusion that Calarruda was guilty as charged. Calarudda argues that there was conflicting evidence on whether he knew that the package he carried contained a firearm and ammunition. The jury's decision on what evidence to rely on is not reviewed on appeal.

The fact finder may accept or reject any witness's testimony in whole or in part. State v. Cannon, 56 Haw. 161, 166, 532 P.2d 391, 396 (1975) (citations omitted). We will not disturb that finding on appeal. It is the sole province of the jury as the trier of fact to judge the credibility of witnesses and to weigh the evidence. State v. Kelekolio, 74 Haw. 479, 516, 849 P.2d 58, 75 (1993).

State v. Auwae, 89 Hawai'i 59, 65, 968 P.2d 1070, 1076 (App. 1998) rev'd on other grounds by State v. Jenkins, 93 Hawai'i 87, 112 997 P.2d 13, 38 (2000).

Although we conclude that there was substantial evidence to support the convictions for both the possession of the firearm and the ammunition, the trial court committed plain error in imposing sentences for both possession of the firearm and possession of ammunition. An appellate court may notice

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error even if it was not properly preserved at trial or properly raised on appeal.

We have said little more in this regard than HRPP 52(b) itself, that is: appellate courts "have the power, *sua sponte*, to notice plain errors or defects in the record affecting substantial rights [though they were] not properly brought to the attention of the trial judge or raised on appeal." State v. Iaukea, 56 Haw. 343, 355, 537 P.2d 724, 733 (1975) (citations omitted).

State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 676 (1988).

Calarruda was sentenced for both the possession of the firearm and the ammunition found in his backpack. There was no evidence that Calarruda had separately acquired or possessed the firearm and ammunition. The ammunition was in a clip for the firearm. The ammunition matched the firearm. Under the facts of this case, multiple punishments were not authorized for Calarruda's simultaneous possession of a firearm and the ammunition in his backpack. Auwae, 89 Hawai'i at 70, 968 P.2d at 1081. Although the clip was not attached to the firearm in this case and the firearm in Auwae was loaded with the ammunition, that fact does not compel a different result. See United States v. Keen, 104 F.3d 1111, 1112 (9th Cir. 1996).

Therefore,

IT IS HEREBY ORDERED, that the Judgment entered on October 5, 2007 in the Circuit Court of the First Circuit is vacated and this case is remanded for dismissal of either Count I or Count II at the State's option, and for resentencing on the remaining count.

DATED: Honolulu, Hawai'i, April 21, 2009.

On the briefs:

Shawn A. Luiz,
for Defendant-Appellant.

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.



Presiding Judge



Associate Judge



Associate Judge