

NO. 29153

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
DIONISIO MARTIN, Defendant-Appellant and  
DAPHNE HELENIHI, Defendant.

E.M. RIMANDO  
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STATE OF HAWAII

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 07-1-1089)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

Defendant-Appellant Dionisio Martin (**Martin**) appeals from the Judgment of Conviction and Sentence filed on March 13, 2008 in the Circuit Court of the First Circuit (**Circuit Court**).<sup>1/</sup> Martin was convicted by a jury of Theft in the Second Degree in violation of Hawaii Revised Statutes (**HRS**) § 708-831(1)(b) (Supp. 2006).<sup>2/</sup>

Martin raises the following points of error on appeal:

1. the Circuit Court abused its discretion when it denied Martin's motion for a mistrial based on the holding in State v. Batson, 71 Haw. 300, 788 P.2d 841 (1990);<sup>3/</sup>

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<sup>1/</sup> The Honorable Richard W. Pollack presided.

<sup>2/</sup> HRS § 708-831(1)(b) (Supp. 2006) provides:

§ 708-831 **Theft in the second degree.** (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;

<sup>3/</sup> We note that, in State v. Batson, the Hawaii Supreme Court rejected the federal courts' deferential approach to a trial court's determination of whether a defendant raised an inference that the prosecutor's exercise of its peremptory challenge was motivated by a discriminatory purpose and, instead, conducted a *de novo* review. 71 Haw. at 301-02; 788 P.2d at 842.

2. the Circuit Court abused its discretion when it denied Martin's motion for a mistrial based on testimony that there were additional items in a shopping bag involved in the alleged theft and information about the additional items had not previously been disclosed by the State;

3. there was a lack of substantial evidence that Martin had the requisite intentional state of mind with respect to the value of the items inside the subject shopping bag; and

4. the Circuit Court abused its discretion when it denied Martin a new trial; Martin argues that he was denied a fair trial because the cautionary jury instruction regarding the stricken testimony on the additional items in the shopping bag was not an adequate remedy.

Upon a thorough review of the record and the briefs submitted by the parties, and having duly considered the issues and arguments raised on appeal, as well as the constitutional, statutory, and case law relevant thereto, we resolve Martin's contentions as follows:

(1) Martin claims that the State's category-neutral explanation for its peremptory exclusion of two jurors of the same ethnic ancestry as Martin was not supported by the record and that the Circuit Court erred in denying his motion for a mistrial. A trial court's review of peremptory strikes for impermissible racial motive follows a three-step procedure. "First, the defendant must make out a *prima facie* case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." State v. Daniels, 109 Hawai'i 1, 5, 122 P.3d 796, 800 (2005) (citations omitted). "Second, once the defendant has made out a *prima facie* case, the burden shifts to the State to explain the exclusion by offering permissible category-neutral justifications for the strikes." Id. "Third, if a category-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike

has proved purposeful discrimination." Id. at 6, 122 P.3d at 801.

Neither party to this appeal addresses the first step of this analysis, except to apparently agree that two of three of the State's peremptory challenges excused jurors of Filipino ancestry. The first peremptory challenge appears to have been used to excuse a potential juror of another ethnic background. Martin does not argue that all jurors of Filipino ancestry were excused,<sup>4/</sup> although he does cite Daniels for the proposition that, if the effect of the peremptory challenges is to exclude from the jury all members of the same protected group as the defendant, and the defense raises a Batson challenge, the defendant's *prima facie* case is automatically established. See Daniels, 109 Hawai'i at 5, 122 P.3d at 800. In the court below, the prosecutor stated, "there is no pattern of excluding all Filipino jurors on the part of the State."

Without addressing whether the burden properly shifted to the State, the Circuit Court nevertheless examined the State's category-neutral justifications for the strikes. The State explained that it excused one of the jurors because she said that she had difficulty understanding the English language and difficulty understanding and following the proceedings. With respect to the other juror, the State explained that the juror seemed to have difficulty making determinations in the nature of credibility if different versions of events were presented to

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<sup>4/</sup> In the court below, defense counsel argued (emphasis added):

Yesterday when the State exercised its peremptory challenges, they used their second peremptory challenge on [excused juror #2] and third peremptory challenge on [excused juror #3]. Both of those persons are of Filipino ancestry, and they're the only persons based on my view of the jury cards, on the jury box who are of Filipino ancestry, and my client, Mr. Dionisio, is also Filipino.

I also note that these are persons who had, I guess, been born and raised in the Philippines, came to the United States.

her. The Circuit Court indicated that it recalled the questions and answers to which the prosecution was referring and concluded that the State's racially-neutral explanation was satisfactory and sufficient.

It does not appear to this court that Martin established a *prima facie* case of a discriminatory purpose for the exclusion of the subject jurors. Except for counsel's conjecture, there is nothing in the record to support the proposition that these two jurors were the only jurors of Filipino ancestry and Martin points to no other facts in the record giving rise to an inference of discriminatory purpose. Even assuming, *arguendo*, that a *prima facie* case was established, we conclude that the Circuit Court did not err in determining that (1) the State's racially-neutral explanations for its peremptory challenges were valid and sufficient, and (2) Martin has not proven purposeful discrimination.

(2) The Circuit Court did not abuse its discretion in denying Martin's motion for a mistrial following testimony that there were additional items found in the shopping bag that contained the allegedly stolen items. Assuming that the testimony may have been improper, any harm or prejudice to Martin was promptly cured by the Circuit Court's clear instructions to the jury:

THE COURT: Members of the jury, there has been testimony regarding other items aside from those that have been listed in State's Exhibit 1 and 2. State's Exhibit 1 and 2 references eight items that were recovered from the bag. You are instructed not to consider in any way in your deliberation any testimony regarding other items except for those listed in State's Exhibit 1 and 2.

See State v. Samuel, 74 Haw. 141, 149, 838 P.2d 1374, 1378 (1992) (it is presumed that the jury adhered to the court's instructions).

(3) Viewing the evidence and inferences reasonably drawn therefrom in the light most favorable to the State, we conclude that there was substantial evidence to support the

conclusion that Martin committed the offense of Theft in the Second Degree. As the Circuit Court instructed the jury, the four elements of the offense were as follows:

1. That, on or about June 10th, 2007, in the City and County of Honolulu, State of Hawaii, the defendant concealed or took possession of the goods or merchandise at Macy's Department Store; and

2. That Macy's Department Store was a store or retail establishment; and

3. That the value of goods or merchandise of Macy's Department Store exceeded \$300; and

4. That the defendant either (a) intended to use deception to injure Macy's Department Store's interest, which had value, in which case the required state of mind as to each of the foregoing elements is "intentionally," or (b) knew that he was facilitating an injury to Macy's Department Store's interest, which had value, in which case the required state of mind as to each of the foregoing elements is "knowingly."

Two witnesses, who worked as loss prevention agents at Macy's, testified, *inter alia*, that they observed Martin and his co-defendant as the co-defendant twice selected merchandise while Martin stood five to ten feet away and the co-defendant then put the items into a shopping bag while the bag was being held by Martin.<sup>5/</sup> After Martin handed the bag back to his co-defendant, they exited Macy's, walking side-by-side, without paying for the selected merchandise. An authorized Macy's representative, who had knowledge of Macy's inventory records and familiarity with Macy's merchandise, testified regarding the pricing system utilized by Macy's. He testified, *inter alia*, that the total value of the items recovered on June 10, 2007 was \$334.25 based on the scanning of the price tags of the items. A photograph of the selected merchandise, which was later recovered outside the store, was entered into evidence. The evidence also included a sales receipt that had been generated to get the proper price on the merchandise, along with the price tags that were on the items.

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<sup>5/</sup> Martin's co-defendant testified that Martin did not hold the bag or take part in the theft. However, we will not disturb the jury's determination of the credibility of the witnesses.

We reject Martin's argument that there was a lack of substantial evidence that Martin had the requisite state of mind with respect to the value of the merchandise because there was no evidence that Martin selected the items, handled the merchandise or examined the merchandise or the price tags and/or because it was the co-defendant who was carrying the bag as they exited the store. The Circuit Court gave the following instruction to the jury:

As to the offense of Theft in the Second Degree, the prosecution must prove beyond a reasonable doubt that defendant, Dionisio Martin, was aware or believed that the value of the goods or merchandise taken or concealed exceeded \$300.

If you find beyond a reasonable doubt that the value of the goods or merchandise exceeded \$300, you may, but are not required to, infer that the defendant was aware or believed that the value of the goods or merchandise exceeded \$300. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State had proved beyond a reasonable doubt that the defendant was aware or believed that the value of the goods or merchandise exceeded \$300.

On appeal, Martin does not claim that this instruction was given in error. See HRS § 708-801(4) ("When acting intentionally or knowingly with respect to the value of property or services is required to establish an element of an offense, the value of the property or services shall be prima facie evidence that the defendant believed or knew the property or services to be of that value."); see also Hawaii Rules of Evidence Rule 306.

A reasonable factfinder could conclude from the trial testimony and other evidence that the value of the eight items exceeded \$300.00 and then permissibly infer that Martin was aware or believed that the value of the eight items of goods or merchandise he was charged with stealing exceeded \$300.00. Based on the evidence adduced and the reasonable and permissible inferences drawn therefrom, there was credible evidence presented of sufficient quality and probative value to support a conclusion by the jury that each and every element of Theft in the Second Degree had been established beyond a reasonable doubt and that

Martin had committed the theft of property or services the value of which exceeds \$300. HRS § 708-831(1)(b). The Circuit Court did not clearly abuse its discretion in denying the portion of Martin's motion for acquittal which was based upon an insufficiency of evidence.

(4) Martin's argument that, in the interest of justice, he should have been granted a new trial essentially repeats his earlier argument that the curative instruction regarding additional items in the shopping bag was insufficient. For the reasons discussed above, we conclude that the Circuit Court did not abuse its discretion in denying Martin's motion for a new trial.

Accordingly, we affirm the Circuit Court's March 13, 2008 Judgment of Conviction and Sentence.

DATED: Honolulu, Hawai'i, July 30, 2009.

On the briefs:

Dwight C.H. Lum  
for Defendant-Appellant

Stephen K. Tsushima  
for Plaintiff-Appellee

  
Presiding Judge

  
Associate Judge

  
Associate Judge