

NO. 27751

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
LAURA M. KAUWE, Defendant-Appellant, and
ABRAHAM K. KAUWE, JR., Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(Cr. No. 04-1-062)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., Foley and Fujise, JJ.)

Defendant-Appellant Abraham K. Kauwe, Jr. (Abraham) appeals from the February 2, 2006 judgment of the Circuit Court of the Third Circuit (circuit court)¹ finding him guilty of two counts of Theft in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 708-830.5 (1993), and one count of Theft in the Second Degree, in violation of HRS § 708-831 (1993 and Supp. 2004).

Abraham's appeal was consolidated with that of Laura M. Kauwe (Laura), Abraham's wife of 40 years. The Kauwes were convicted of theft of real property and bank and credit-union accounts of an elderly man for whom Laura was a live-in caregiver. This court dismissed Laura's appeal as moot following Laura's death on April 30, 2007.

After a careful review of the issues raised, the arguments advanced, the applicable law, and the record in this case, we resolve Abraham's arguments as follows:

1. Sufficient evidence supports the jury's finding that Abraham was an accomplice to Laura's theft. Abraham argued that the complaining witness, who was in his late eighties at the time of the theft, voluntarily gave Laura two pieces of real estate and his life savings of more than \$50,000. Although

¹ The Honorable Glenn S. Hara presided.

consent could be a defense to a charge of theft because it negates an element of the crime, HRS § 702-233 (1993), the jury could have concluded, based on the evidence presented, that the complaining witness's consent was invalid because dementia rendered the complaining witness unable "to make a reasonable judgment as to the nature or harmfulness of the conduct alleged[.]" HRS § 702-235 (1993).

Abraham also argues that he could not be convicted of theft because the State did not present sufficient evidence of his involvement in the crime. Regardless of the lack of physical evidence tying Abraham to the crime, Abraham could be found criminally liable for Laura's conduct as Laura's accomplice. HRS § 702-221(c) (1993).

While an accomplice must intend to promote or facilitate the offense, HRS § 702-222(1) (1993), the jury could have reasonably concluded, based on the evidence presented at trial, that Abraham had the required intent because he lacked independent financial means and his financial status abruptly improved as a result of living rent-free in the complaining witness's home. See United States v. Jackson, 882 F.2d 1444, 1449-50 (9th Cir. 1989)

In addition to the intent to commit a crime, Hawai'i's complicity statute also requires that the accomplice "aid the other person in planning or committing it[.]" HRS § 702-222(1)(b) (1993). The amount of aid given need not be much, "so long as it was offered to the principal to assist him in committing or attempting to commit the crime." Johnson v. Mechling, 541 F. Supp. 2d 651, 672 (M.D. Pa. 2008) (citation and internal quotation marks omitted). Although there is no evidence to establish Abraham as a principal in this crime, Abraham was more than a "mere presence" in the elderly man's house and more than a passing acquaintance with Laura. See State v. Yabusaki, 58 Haw. 404, 408-09, 570 P.2d 844, 846-47 (1977). A reasonable juror could infer that Abraham and Laura had agreed to refer to themselves as siblings and they did so as part of a scheme to

commit theft. This affirmative act would establish Abraham's liability as an accomplice to Laura's crime. Moreover, Abraham's aid to Laura in "caring" for the complaining witness, by driving the complaining witness to the shopping mall, where the complaining witness was left for virtually the entire day, supported the conclusion that Abraham and Laura acted in concert in their scheme to enjoy the complaining witness's home without having to tend to the complaining witness's needs. Sufficient evidence of these acts by Abraham supports the jury's verdict of guilt based on accomplice liability.

2. The circuit court did not err in denying motions for a mistrial on the basis of prosecutorial misconduct. "[W]henver a defendant alleges prosecutorial misconduct, this court must decide: (1) whether the conduct was improper; (2) if the conduct was improper, whether the misconduct was harmless beyond a reasonable doubt; and (3) if the misconduct was not harmless, whether the misconduct was so egregious as to bar reprosecution." State v. Maluia, 107 Hawai'i 20, 26, 108 P.3d 974, 980 (2005). Although a credit-union employee could not identify Abraham in court, the deputy attorney general's closing arguments made a reasonable inference about the identity of the man seen with Laura at the credit union, where she had gone, according to prosecutors, to "cover her tracks." The prosecutor's comment was not improper given the wide latitude afforded to counsel as they discuss evidence during closing argument. State v. Rogan, 91 Hawai'i 405, 412-13, 984 P.2d 1231, 1238-39 (1999) (citing State v. Quitog, 85 Hawai'i 128, 145, 938 P.2d 559, 576 (1997)); see also HRS § 635-52 (1993). Additionally, Abraham made no showing that the deputy attorney general's opening remarks were made in bad faith. See State v. Valdivia, 95 Hawai'i 465, 480-81, 24 P.3d 661, 676-77 (2001).

Furthermore, the circuit court properly and repeatedly advised the jurors that remarks are not evidence and that they should not rely on the attorneys' interpretation of the evidence. It is presumed that the jury followed the court's admonition,

curing any allegedly improper remarks. See State v. Shabazz, 98 Hawai'i 358, 380, 48 P.3d 605, 627 (App. 2002) (citing Rogan, 91 Hawai'i at 415, 984 P.2d at 1241).

3. The circuit court did not err in denying Abraham's motion for judgment of acquittal. Given that sufficient evidence supports Abraham's theft convictions, we conclude that the court did not err in denying Abraham's motion for judgment of acquittal. See Hawai'i Rules of Penal Procedure Rule 29.

Therefore,

IT IS HEREBY ORDERED that the February 2, 2006 judgment of the Circuit Court of the Third Circuit as to Abraham K. Kauwe, Jr. is affirmed.

DATED: Honolulu, Hawai'i, December 28, 2009.

On the briefs:

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for Defendant-Appellant
Abraham K. Kauwe, Jr.

Chief Judge

Gary K. Senaga,
Deputy Attorney General, and
Donn Fudo,
Special Deputy Attorney
General,
for Plaintiff-Appellee.

Associate Judge

Associate Judge