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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,
Respondent/Plaintiff-Appellee,

vs.

TRACY SOUZA
Petitioner/Defendant-Appellant.

SCWC-13-0002043

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-13-0002043; CR. NO. 12-1-1028)

MAY 30, 2018

CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.
IN WHICH RECKTENWALD, C.J., JOINS

On July 16, 2012, Respondent/Plaintiff-Appellee State of Hawai'i (the State) charged Petitioner/Defendant-Appellant Tracy Souza (Souza) with one count of place to keep unloaded firearms other than pistols and revolvers (place to keep) and one count of ownership or possession prohibited of any firearm or ammunition by a person convicted of certain crimes (possession of

a prohibited firearm).

Prior to trial, Souza indicated to the Circuit Court of the First Circuit (circuit court) that he wished to stipulate to his previous felony conviction. Both Souza and the State proposed different versions of the stipulation, but were unable to come to an agreement. Souza objected to the State's proposed stipulation on the grounds that it would require him to stipulate to several facts which were irrelevant and unduly prejudicial. Ultimately, the circuit court informed Souza that if he accepted the State's stipulation, the stipulation would stand as drafted. Alternatively, the circuit court advised, if Souza did not accept the State's stipulation, the State would be allowed to present evidence on his prior conviction. In light of this ruling, Souza accepted the State's stipulation.

At trial, the State relied on the testimony of Dennis Crail (Crail), a security agent for the Board of Water Supply, to establish that on July 11, 2012, Souza had been seen carrying a rifle in front of a blue tent situated on Board of Water Supply land, and that therefore, Souza was guilty as charged. The State also utilized a written statement that Souza's friend, Brianna Lincoln-Chong (Chong), had given to the police to demonstrate that Souza, not Souza's friend John Wilcox (Wilcox), was the person whom Crail had observed.

After the State rested its case, the circuit court informed the jury, pursuant to the agreed-upon stipulation drafted by the State, that Souza and the State stipulated to the following facts: (1) as of July 11, 2012, Souza had been convicted of a felony offense in the State of Hawai'i; (2) as of July 11, 2012, Souza knew that he had been convicted of a felony offense in the State of Hawai'i; (3) Souza has not been pardoned for this felony offense; (4) as a result of this previous conviction, Souza is prohibited from owning or possessing any firearms or ammunition; and (5) as a result of this previous conviction, Souza knew he was prohibited from owning or possessing any firearms or ammunition.

Souza's defense at trial was that of mistaken identity. Under his theory of the case, Crail had observed Wilcox, not Souza, holding a rifle in front of a blue tent situated on Board of Water Supply land. Souza relied upon Chong and Wilcox's testimony at trial to support his mistaken identity defense. Souza did not testify at trial.

The jury found Souza guilty as charged. He was sentenced to a five-year term of probation on each count, which were to run concurrently. The Intermediate Court of Appeals (ICA) affirmed the circuit court's judgment of conviction and probation sentence.

On certiorari, the Majority holds that based upon our decision in State v. Murray, 116 Hawai'i 3, 169 P.3d 955 (2007), the circuit court erred when it declined to accept Souza's offer to admit his prior conviction, and required Souza to either accept or reject the State's proposed stipulation without modification, which included facts that were not elements of the possession of a prohibited firearm offense and were unduly prejudicial to Souza. The Majority further concludes that the circuit court's error was not harmless beyond a reasonable doubt, reasoning that the jury could have drawn negative inferences about Souza's character from several of the stipulated facts, which might have reasonably contributed to Souza's conviction.

I concur with the Majority that the circuit court erred when it refused to accept Souza's offer to stipulate to his prior felony conviction, and required Souza to accept or reject the State's proposed stipulation without modification. However, I part with the Majority inasmuch as I believe that the circuit court's error was harmless beyond a reasonable doubt. Upon examination of the record, I believe that there is no reasonable possibility that the negative inferences about Souza's character, which the jury arguably could have drawn from several of the facts in the State's stipulation, might have contributed to his conviction.

Therefore, I would affirm the ICA's August 4, 2017 judgment on appeal, which affirmed the circuit court's June 18, 2013 judgment of conviction and probation sentence, but on different grounds. I thus concur in part and dissent in part.

I. DISCUSSION

The Majority holds that the circuit court's error in not accepting Souza's stipulation was not harmless beyond a reasonable doubt. Majority at 42. In support of this conclusion, the Majority first observes that the State's evidence against Souza was not "overwhelming and compelling evidence tending to show [that Souza was] guilty beyond a reasonable doubt." Majority at 29 (quoting State v. Rivera, 62 Haw. 120, 127, 612 P.2d 526, 532 (1980)). The Majority further emphasizes that "[t]he State's stipulation conclusively informed the jury that Souza had not been pardoned for his prior offense and that he was aware that his prior conviction prohibited him from owning or possessing any firearms." Majority at 30. Accordingly, the Majority reasons that because the jury "may have thus drawn negative inferences about Souza's character" from the foregoing facts in the State's stipulation, "including that he was a person who was not worthy of a pardon and that he willfully violated the law as he knew his conduct was a criminal offense," the circuit court's error in refusing Souza's stipulation "would clearly have

been prejudicial to Souza in the jury's evaluation of the evidence in this case." Majority at 30-31. In light of the possibility of such impermissible speculation by the jury, the Majority concludes that there is a reasonable possibility that the circuit court's error in refusing Souza's stipulation contributed to his conviction on both counts. Majority at 42.

Respectfully, I disagree. Indeed, the jury arguably could have drawn negative inferences about Souza's character from the fact that he was not pardoned for his prior conviction, and the fact that he was aware of his prior conviction. However, viewing the circuit court's error in light of the record as a whole, I believe that there is no reasonable possibility that such inferences could have contributed to Souza's conviction.

The dispositive issue in this case was whether Crail had observed Souza or Wilcox holding and examining the rifle while standing near a tent. At the outset of trial, the parties acknowledged that this case turned upon the foregoing issue in their opening statements. The State represented that the evidence would show that Crail saw Souza take out the rifle, examine it, and aim it for a few minutes. In his opening statement, defense counsel responded that the evidence would demonstrate that Souza was "not guilty . . . because he was not in possession of the rifle that day. He was not in possession of

the rifle on July 11th of 2012. . . . [T]he person Mr. Crail saw was John Wilcox."

The State called Crail to testify on its behalf. Crail testified that on July 11, 2012, he observed a blue tent on Board of Water Supply property. Crail attested that he was standing on a hill approximately thirty feet away from the tent, and had an unobstructed view from above. Crail stated that he then saw a male, whom he identified as Souza, exit the tent while carrying a rifle case. Crail attested that Souza was initially facing away from him, but then turned sideways so that Crail could see the side of his face. Crail stated that Souza removed the rifle from the case with his right hand, examined it for a few minutes, and then reentered the tent. After observing Souza holding and examining the rifle, Crail retreated to a safe distance away and called 911. Crail testified that while he knew that there were two other people with Souza in the area near the tent, a male and a female, Crail was "sure it was [Souza] who was holding the rifle and not the other guy."

On cross-examination, defense counsel extensively questioned Crail regarding, inter alia, whether he had actually observed and accurately identified Souza as the individual who was holding the rifle outside of the tent. In particular, defense counsel questioned Crail on his description of the male

suspect's physical features in his written description to the police, the nature and extent to which Crail was able to observe the suspect, and the inconsistencies between Crail's police interview and his testimony at trial.

Chong was also called to testify on behalf of the State. Chong testified that after Souza picked her up from her house, she and Souza drove to a wooded area and hiked to a campsite together. Chong testified that Souza did not have a rifle during their hike and that she did not see a rifle until Wilcox brought one with him later that day, after she and Souza had finished their hike. According to Chong, Souza did not have a rifle from the time she came to the woods with Souza to the time the police arrived; rather, Chong testified, Wilcox was the individual who had a rifle in his possession.

The State then questioned Chong at length regarding the inconsistencies between her testimony and a written statement that she had previously given to the police on July 11, 2012. Specifically, the State pointed out that in her written statement, Chong stated that "John [Wilcox] never had the gun in his possession, only Tracy [Souza] did," and asked Chong to explain the inconsistency. Chong explained that the police officers who brought her to the police station had coerced her into writing that the rifle was in Souza's possession by

threatening to charge her with possession charges if she did not comply with their requests.

Subsequently, the State called several of the police officers who interacted with Chong at the police station, where she gave her written statement, to testify. The police officers testified, inter alia, that they did not threaten to arrest Chong or otherwise coerce her into providing a written statement, and that Chong gave the statement voluntarily.

Lastly, Wilcox testified on Souza's behalf. Wilcox testified that the day before the police came to their campsite, he and Souza had found a rifle and a rifle case in the bushes while they were checking their hunting traps. Wilcox testified that he, not Souza, brought the rifle back to the campsite and placed it in the bushes nearby. The next day, Wilcox brought the rifle back to the tent because he wanted to take another look at it. When the police arrived, Wilcox attested, he put the rifle back in the bushes. Wilcox testified that Souza never handled the rifle, picked up the rifle, or examined the rifle in his hands. On cross-examination, the State questioned Wilcox on the details of the events that took place on July 11, 2012.

During closing argument, the State argued that Crail had observed Souza, not Wilcox, holding a rifle while standing outside of a tent. In support of this position, the State

primarily argued that Crail's testimony and Chong's written statement to the police were credible, and that Chong's and Wilcox's testimony at trial were not credible.

With respect to Chong, the State emphasized that although she testified that she had been coerced into providing her written statement, her testimony conflicted with the police officers' testimony, who all testified that she gave the statement voluntarily. In challenging Wilcox's credibility, the State asserted that his testimony was vague and rife with inconsistencies, that his behavior on the stand was suspect, and that he had an incentive to lie because he was friends with Chong and Souza. Moreover, in defending Crail's credibility, the State emphasized that Crail was a disinterested witness who had confidently and consistently identified Souza as the person whom he had seen in possession of the rifle.

During Souza's closing argument, defense counsel opened with a succinct summary of Souza's mistaken identity defense: "Tracy Souza's not guilty of the charges against him. He's not guilty because he didn't possess that rifle. He didn't pick up that rifle on July the 11th of last year. He was not the person who had the rifle that Mr. Crail says he saw." In advancing this argument, defense counsel attempted to undermine the credibility of Crail's testimony and Chong's written statement to the police,

and bolster the credibility of Chong's and Wilcox's testimony at trial.

In attacking Crail's credibility, defense counsel questioned whether Crail could have gotten a clear look at the male suspect's face while he was holding the rifle, and emphasized that Crail's descriptions of the male suspect's physical features in his written description to the police matched Wilcox's features, as opposed to Souza's features. With respect to Chong's credibility, defense counsel argued that the police officers testified untruthfully regarding whether they coerced Chong into writing a statement that implicated Souza, and urged the jury to believe Chong's trial testimony over her written statement. And, as to Wilcox's credibility, defense counsel attributed the inconsistencies in his testimony to the fact that Wilcox was "probably nervous because he's admitting to doing something wrong," given that he testified that he was the one who was actually in possession of the rifle, not Souza.

On the foregoing record, it appears that the dispositive factual issue at trial was whether Crail saw Souza or Wilcox holding and examining the rifle. To resolve this central factual dispute, the jury had to ascertain the credibility of three key witnesses, who provided conflicting testimony on the matter: Crail, Chong, and Wilcox. However, the nature of

Souza's character was irrelevant to the evidence and arguments that the parties presented at trial concerning whether Crail, Chong, or Wilcox were worthy of belief, and therefore, whether Souza's defense of mistaken identity was meritorious. Moreover, neither the State nor Souza relied upon, mentioned, or otherwise suggested at any point at trial that Souza's character bore upon the jury's evaluation of the evidence or the merits of the parties' legal theories in this case.

Indeed, this court has suggested that in some cases, there are certain types of evidence concerning a defendant's character that are of such an overwhelmingly prejudicial nature that such evidence can affect a jury's determination of a case, irrespective of the nature of the issues and arguments upon which the parties relied at trial. For example, in *Murray*, this court recognized that evidence of "the name and nature" of a defendant's prior conviction carries an especially high risk of "tainting the jury verdict," such that it required certain prophylactic measures be taken in cases where the defendant seeks to stipulate to a prior conviction to establish an element of a charged offense. 116 Hawai'i at 20-21, 169 P.3d at 972-73.

In this case, however, I do not believe that the facts in the State's stipulation were so overwhelmingly prejudicial as to color the jury's evaluation of the evidence and determination

of whether Crail, Chong, or Wilcox were credible, and thus, affect its decision as to whether Souza was guilty of the charged offenses. The State's stipulation did not expose the jury to the name and nature of Souza's prior felony conviction. Rather, the additional facts in the State's stipulation merely informed the jury that Souza had not been pardoned for his previous conviction, and that Souza was aware that he was not allowed to be in possession of a firearm due to his prior conviction. From my perspective, these facts only tangentially support that Souza "possesses a criminal character and acted in conformity with that character," *State v. Behrendt*, 124 Hawai'i 90, 102, 237 P.3d 1156, 1168 (2010), especially in comparison to evidence of the name and nature of Souza's prior offense, which would have more directly illustrated Souza's criminal propensity. Had the State's stipulation informed the jury that Souza had been found guilty of a violent crime, this would be a much different case.

When evidence pertaining to a defendant's prior conviction has been improperly admitted at trial, we ascertain whether the error was harmless beyond a reasonable doubt. See *State v. Pulawa*, 62 Haw. 209, 220, 614 P.2d 373, 379-80 (1980) (analyzing whether a prosecutor's reference to photographs of the defendant as "mug photographs," which suggested that the defendant had been convicted of a previous crime, were harmless

beyond a reasonable doubt); State v. Huihui, 62 Haw. 142, 145, 612 P.2d 115, 117 (1980) (analyzing whether the prosecutor's use of the words "police mug photographs" in a question, which implied that the defendant had a prior criminal record, was harmless beyond a reasonable doubt); State v. David, 141 Hawai'i 315, 326-27, 409 P.3d 719, 730-31 (2017) (analyzing whether the improper admission of defendant's bad character in violation of Hawai'i Rules of Evidence Rule 404(b) was harmless beyond a reasonable doubt). When analyzing whether an error is harmless beyond a reasonable doubt, the issue at the heart of this analysis is not whether there was a risk or the mere existence of any possibility that the jury could have used the evidence in an improper manner to convict the defendant. Rather, it is well-settled that:

[T]he error is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction.

State v. Machado, 109 Hawai'i 445, 452-53, 127 P.3d 941, 948-49 (2006) (bracket in original) (emphasis omitted) (quoting State v. Haili, 103 Hawai'i 89, 100, 79 P.3d 1263, 1274 (2003)). In other words, in deciding whether the improper admission of evidence related to a defendant's prior conviction was harmless beyond a reasonable doubt, the question is whether there was a reasonable

possibility that the risk of undue prejudice could have come to fruition, based upon the specific record in that particular case. See id.

Here, although I acknowledge that there was a risk that the jury could have drawn negative inferences about Souza's character from the facts in the State's stipulation and used such inferences to decide his case on an improper basis, I do not believe that there is a reasonable possibility that this risk manifested into reality based upon the specific record before us. At trial, Souza expressly and exclusively relied upon a defense of mistaken identity; he argued that Crail saw Wilcox, not him, holding a rifle. Accordingly, the dispositive factual issue at trial was whether Crail saw Wilcox or Souza holding a rifle. The parties made abundantly clear to the jury throughout the trial that the resolution of this key factual dispute hinged upon their evaluation of the credibility of Crail, Chong, and Wilcox. Additionally, the parties' evidence and arguments regarding whether these witnesses were worthy of belief did not touch upon or otherwise relate to the nature of Souza's character. Furthermore, the State's stipulation only informed the jury that Souza was not pardoned for his prior conviction, and that he knew that he was prohibited from owning a firearm.

On this record, I believe that it is extremely unlikely

that the facts in the State's stipulation would have led the jury to draw any unfavorable inferences about Souza's character, and that such inferences would have affected the jury's determination of whether Souza was guilty of the charged offenses. See State v. Nofoa, 135 Hawai'i 220, 229-30, 349 P.3d 327, 336-37 (2015) (evaluating the likelihood that the jury could have inferred that the defendant had played a role in the complaining witnesses's death based upon a prosecutor's comment during closing argument, and whether there was a reasonable possibility that such an inference affected the verdict, based upon the evidence adduced at trial). Accordingly, I would hold that the circuit court's error in declining to accept Souza's proposed stipulation, and requiring Souza to accept the State's unmodified stipulation, was harmless beyond a reasonable doubt.

II. CONCLUSION

For the reasons stated above, I concur in part and dissent in part. I would affirm the ICA's August 4, 2017 judgment on appeal, but on different grounds.

Mark E. Recktenwald

Paula A. Nakayama

