NO. CAAP-14-0000061

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
LEON MAKANALANI FAAMAMA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 12-1-1457)

SUMMARY DISPOSITION ORDER
(By: Nakamura, Chief Judge, and Fujise and Reifurth, JJ.)

Plaintiff-Appellee State of Hawai'i (State) charged Defendant-Appellant Leon Makanalani Faamama (Faamama) with first-degree theft of more than $20,000 by deception, in violation of Hawaii Revised Statutes (HRS) § 708-830.5(1)(a) and HRS § 708-830(2) (2014).[1/] The alleged victim and complaining witness was John Vaughn (Vaughn), a pastor who met Faamama through his ministry. The Circuit Court of the First Circuit (Circuit Court)[2/] sentenced Faamama to ten years of imprisonment and ordered him to pay restitution in the amount of $158,910.75.

[1/] HRS § 708-830.5(1)(a) provides: "(1) A person commits the offense of theft in the first degree if the person commits theft: (a) Of property or services, the value of which exceeds $20,000[.]" (Format altered.)

HRS § 708-830(2) provides: "A person commits theft if the person does any of the following: . . . . (2) Property obtained or control exerted through deception. A person obtains, or exerts control over, the property of another by deception with intent to deprive the other of the property."

[2/] The Honorable Glenn J. Kim presided.

On appeal, Faamama contends that: (1) there was insufficient evidence to support his conviction; (2) the Circuit Court erred in failing to instruct the jury on lesser-included theft offenses; (3) the Circuit Court failed to conduct an adequate Tachibana colloquy;[3/] and (4) the prosecutor's remarks in opening statement and closing argument, to which Faamama did not object, constituted prosecutorial misconduct. We affirm Faamama's conviction.

I.

The State presented evidence that Faamama had engaged in an elaborate scheme to defraud Vaughn of over $100,000. Faamama deceived Vaughn into believing that Faamama needed the money to prevent a corrupt Drug Court administrator from putting Faamama in jail and to support a lawsuit by Faamama that would expose the corruption and permit Vaughn to recover the money he had "loaned" to Faamama.

At trial, Vaughn testified that he was sixty-four years old, had served as a pastor for forty years until his retirement, and had most recently served for ten years as the pastor for Kalihi Valley Church. Vaughn also served as a volunteer prison chaplain for eleven years. Vaughn met Faamama seven or eight years ago, during the course of his ministry, and Vaughn described their relationship as a professional relationship which had also developed into a friendship. Vaughn ministered to Faamama's family, helped them with housing, counseled Faamama, and helped Faamama spiritually and with various issues in his life. Faamama and Vaughn would communicate weekly through phone calls, meetings, and text messages.

Sometime before October 2011, Faamama informed Vaughn that he was participating in the Drug Court program and that he needed money because of problems he was experiencing in the program. Faamama told Vaughn that he was being harassed and forced to move from one clean-and-sober house to another.

[3/] Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995).

Faamama said that each time he moved, he had to pay the first month's rent and a security deposit, and he asked Vaughn for money to help make these payments. Vaughn gave Faamama money to help pay the alleged rent and security deposits.

Faamama then told Vaughn that Drug Court administrator, Janice Bennett (Bennett), was harassing Faamama and extorting money from him by requiring him to pay large fees, pocketing some of the money, and threatening to kick Faamama out of the Drug Court program and send him to jail if he failed to pay. When Vaughn expressed concern about the large sums of money he had been giving to Faamama and questioned how he would be repaid, Faamama said that he had filed a lawsuit against Bennett that would expose her corruption, put her in jail, and ensure that Vaughn would get his money back. To assure Vaughn that Faamama's requests for money were legitimate, Faamama had his purported probation officer, "Steve Miura," call Faamama. Vaughn received numerous calls from "Steve" who verified the large fees that Faamama claimed he was being required to pay and told Vaughn how much money Faamama needed. Faamama also told Vaughn that a lawyer named "Mike Star" was assisting Faamama with the lawsuit, and Vaughn talked to "Star" who verified the information Faamama had provided about the lawsuit.

Faamama emphasized to Vaughn that the lawsuit was confidential and that talking about the case could jeopardize it. Faamama also told Vaughn that if Faamama failed to continue paying the fees demanded by Bennett, Faamama would be sent to jail, the lawsuit would be dismissed, and Vaughn would lose the ability to recover the money he had "loaned" to Faamama. Faamama also assured Vaughn that the judge in charge of the Drug Court, Judge Steven Alm, was aware of the lawsuit, and that as soon as the outstanding fees were paid, the lawsuit could be set for trial. Faamama told Vaughn that Judge Alm had a friend in "Treasury" who provided assurance that the money Vaughn had given to Faamama would be returned once the lawsuit was completed.

Beginning in about October 2011, Vaughn began giving money to Faamama. Initially, Vaughn mainly obtained the money by writing checks to cash on his home equity credit line, cashing the checks, and giving the cash to Faamama. Vaughn did this because Faamama said that the Drug Court would not accept checks from Drug Court participants. Between October 2011 and April 2012, Vaughn gave $53,575 to Faamama by writing checks to cash on his home equity credit line. The State introduced bank records and a summary which showed $53,575 in checks written to cash on Vaughn's home equity credit line that Vaughn had cashed during this period. Vaughn gave Faamama additional amounts by writing checks to cash on his checking account and, in one instance, by writing a check for $500 on his checking account payable to Faamama. The State also introduced these checking account records into evidence. Vaughn used his credit cards to obtain about $7,000 in cash advances, which he gave to Faamama. In June, July, and August of 2012, he borrowed money from relatives and friends and gave approximately $47,000 obtained from these sources to Faamama. In August 2012, at the recommendation of his wife, Vaughn began having Faamama sign receipts for the money Vaughn provided. The State introduced four receipts dated August 3, 22, 27, and 30, 2012, which were signed by Faamama, for amounts totaling $18,675 that Faamama received from Vaughn. Vaughn estimated that between October 25, 2011, and September 11, 2012, he gave $164,000 in total to Faamama, none of which Faamama had repaid.

On September 11, 2012, a lieutenant and detective from the Honolulu Police Department's Financial Crimes Detail visited Vauhgn after the lieutenant was notified by First Hawaiian Bank that Vaughn's account activity indicated that Vaughn may be a victim of elder abuse or fraud. At first, Vaughn was reluctant to provide information to the officers. However, after the lieutenant called Judge Alm and informed Vaughn that Judge Alm was not aware of any plans to return money to him, Vaughn realized that Faamama had been defrauding him for a year. Vaughn

provided the police with copies of two letters he had written to Judge Alm, dated March 8, 2012, and March 22, 2012, which Vaughn had given to Faamama to deliver to Judge Alm. In the March 8, 2012, letter, Vaughn expressed his concern about the "drug court staff . . . requiring large sums of money from [Faamama] and threatening that he would go to jail if he did not pay," and Vaughn stated that he had loaned Faamama "about $56,000 that the drug court has required of him for various things." In the March 22, 2012, letter, Vaughn expressed his continued "concern and frustration" about the "new charges that Leon Faamama must pay or go to jail," and Vaughn reported that he had loaned Faamama "over $60,000 over the last several months."

Vaughn also provided the police with his cellular telephone, which contained incoming and outgoing text messages between Vaughn and Faamama and voice messages from Faamama and "Steve." These text and voice messages, which the police extracted from Vaughn's cell phone and were introduced at trial, corroborated Vaughn's description of the fraudulent scheme perpetrated by Faamama. The text and voice messages referred to money and "charges" Faamama was required to pay to avoid being "terminated" from the Drug Court program, acknowledged that Vaughn had already given Faamama "a lot of money," and urged Vaughn to come up with more money so that Faamama's lawsuit would not be "thrown out," which would mean that all the money Vaughn had provided would be "lost." Text messages indicate that Vaughn obtained $3,700 to give to Faamama on July 12, 2012, and about $8,200 to give to Faamama on July 20, 2012. The text messages also indicate that Faamama kept requesting large sums of money from July 22, 2012 through the end of September 2012, and that Vaughn continued to give Faamama money up until September 11, 2012, which is when Vaughn learned from the police that Faamama was defrauding him.

The State called witnesses, including Judge Alm and Bennett, who verified that the representations Faamama had made to Vaughn to induce Vaughn to give him money were false. These

witnesses established that Faamama was not being forced by Bennett to move from one clean-and-sober house to another, was not being required to pay large fees from his own pocket to stay in the Drug Court program, was not being threatened with being terminated from the program or going to jail for failure to pay large sums of money relating to his participation in the Drug Court program, and was not being mistreated or harassed by Bennett. Judge Alm and Bennett testified that they were not aware of any lawsuit filed by Faamama against Bennett or any complaint made by Faamama against Bennett. The State presented evidence that Faamama continued to ask Vaughn for money even after Faamama had completed the Drug Court program. The State also established that there was no probation or parole officer named "Steve Miura" and there was no attorney named "Mike Star" that was licensed to practice law in Hawai'i or licensed in another state and permitted to appear in Hawai'i *pro hac vice*.

Closing arguments were presented in the morning. On the same day, shortly after lunch, the jury reached its verdict and found Faamama guilty as charged. The Circuit Court entered its Judgment on December 4, 2013, and this appeal followed.

II.

We resolve the arguments raised by Faamama on appeal as follows.

1. There was ample and compelling evidence to support the jury's verdict finding Faamama guilty of first-degree theft by deception. We therefore reject Faamama's claim that there was insufficient evidence to support his conviction.

2. Faamama contends that the Circuit Court erred in failing to instruct the jury on lesser-included theft offenses. The State presented overwhelming evidence that Faamama had engaged in a scheme to defraud Vaughn. Faamama acknowledges that the State introduced receipts signed by Faamama and a check payable to Faamama totaling $19,175, but asserts that it failed to present "irrefutable, objective evidence" establishing that he obtained more than $20,000 from Vaughn.

We conclude that any error in the Circuit Court's failure to instruct on lesser-included theft offenses was harmless beyond a reasonable doubt. See State v. Kaeo, 132 Hawai'i 451, 461, 323 P.3d 95, 105 (2014) (stating that "the court's failure to instruct on the included offense is subject to a harmless beyond a reasonable doubt standard"). Vaughn testified that through fraudulent representations, Faamama induced Vaughn to give Faamama more than $100,000. Besides the receipts signed by Faamama and the check made payable to Faamama totaling $19,175, Vaughn's testimony was corroborated by text messages between Vaughn and Faamama, voice messages left by Faamama and "Steve Miura," Vaughn's bank account records which showed over $50,000 in checks written to cash on his home equity account alone, and copies of letters Vaughn wrote to Judge Alm in March 2012 stating that he had already given Faamama about $60,000. Faamama did not present a plausible motive for Vaughn to testify falsely or any significant evidence to contradict Vaughn's testimony, and the State presented evidence that the total amount of money Vaughn gave to Faamama far exceeded the $20,000 threshold for first-degree theft. In light of the evidence adduced at trial, we conclude that there was no reasonable possibility that the Circuit Court's failure to instruct the jury on lesser-included theft offenses affected the outcome of this case or contributed to Faamama's first-degree theft conviction. See State v. Pavich, 119 Hawai'i 74, 89, 193 P.3d 1274, 1289 (App. 2006).

3. Faamama contends that the Circuit Court failed to conduct an adequate Tachibana colloquy. We disagree. Based on our review of the record, we conclude that the Circuit Court engaged in colloquies with Faamama both pre-trial and immediately before the defense rested that complied with the Tachibana requirements, and that the Circuit Court obtained a valid on-the-record waiver by Faamama of his right to testify.

4. We reject Faamama's argument that the prosecutor's remarks in opening statement and closing argument constituted

prosecutorial misconduct. In his remarks, the prosecutor described Pastor Vaughn as a kindhearted, generous, and compassionate man who "cares about people." The prosecutor further stated that Faamama, for "selfish reasons," had engaged in an "unconscionable, deceptive scheme," had taken advantage of Pastor Vaughn's kindness and trust, and had "perpetrated a cold and heartless scam against Pastor Vaughn, a scam that left Pastor Vaughn deeply in debt and out of tens of thousands of dollars." Faamama did not object to the prosecutor's remarks which he now claims constituted prosecutorial misconduct on appeal.

Vaughn testified at trial that he had been a pastor for forty years; that he volunteered for eleven years as a prison chaplain; that he had ministered to Faamama and Faamama's family for seven or eight years and had helped the family with housing; that he counseled Faamama and helped Faamama spiritually and with other issues; that he was a trusting, caring person; and that he decided to help Faamama by loaning Faamama large sums of money because he believed the things Faamama was telling him. The evidence also showed that Faamama took advantage of Vaughn's trusting, caring nature and their friendship by engaging in an elaborate scheme to deceive Vaughn and to take over $100,000 from Vaughn. We conclude that the prosecutor's remarks were based on evidence that he expected to be introduced, and which was introduced, at trial and reasonable inferences from such evidence, and that the prosecutor's remarks did not constitute prosecutorial misconduct. See People v. Foss, 559 N.E.2d 254, 256 (Ill. App. Ct. 1990) ("An opening statement is designed to advise the trier of fact what the evidence will show." (emphasis in original omitted)); State v. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209 (1996) (stating that in closing argument, a prosecutor is permitted "to state, discuss, and comment on the evidence as well as to draw all reasonable inferences from the evidence").

III.

Based on the foregoing, we affirm the Circuit Court's Judgment.

DATED: Honolulu, Hawai'i, March 31, 2016.

On the briefs:

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Craig H. Nakamura
Chief Judge

Associate Judge

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