IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

JOHNSTON ETPISON,
Appellant,
v.
REPUBLIC OF PALAU,
Appellee.

Cite as: 2017 Palau 32
Criminal Appeal No. 16-005
Appeal from Criminal Case No. 16-102

Decided: October 9, 2017

Counsel for Appellant……..Danail M. Mizinov
Counsel for Appellee .....Attorney General

BEFORE: JOHN K. RECHUCHER, Associate Justice
R. BARRIE MICHELSEN, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice

Appeal from the Trial Division, the Honorable Lourdes F. Materne, Associate Justice, presiding.

OPINION

MICHELSEN, Justice:

[¶ 1] Defendant Johnston Etpison and two co-defendants (Kobe Marbou and Anthony Tellei) were tried at a bench trial and all were convicted of Assault in the First Degree (17 PNC § 1401). Etpison has appealed and asks this Court to vacate his conviction on two grounds. First, he argues that the Trial Division erred by overruling numerous hearsay and leading question objections at trial, and furthermore that the rulings resulted in cumulative error which deprived him of his right to a fair trial. Second, he argues that the Trial Division erred in denying his motion for acquittal because the facts

presented at trial do not "prove which of the defendants struck which blow to the victim."

APPLICABLE LEGAL STANDARDS

[¶ 2] We review "the evidence of record in the light most favorable to the prosecution, giving deference to the Trial Division's opportunity to assess the credibility of the witnesses, treating direct and circumstantial evidence equally, and studying the record to learn whether there is sufficient competent evidence to support a rational fact-finder's conclusion of guilt beyond a reasonable doubt as to every element of the crime." *ROP v. Chisato*, 2 ROP Interim 227, 240 (1991).

[¶ 3] Regarding objections to ruling on evidence made by the trial court, "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected…" ROP R. Evid. 103(a).

[¶ 4] The Trial Division's decision to admit evidence will not be overturned unless the Appellate Division finds it to be an abuse of discretion. *Rechucher v. ROP*, 12 ROP 51, 53 (2005). A trial court does not commit an abuse of discretion when it overrules an objection on improper grounds as long as there is a different, proper ground on which the objection could have been overruled. *See Idid Clan v. Palau Pub. Lands Auth.*, 2016 Palau 7 ¶ 7 n. 7 ("where a separate and independent ground supports the decision below, affirmance is proper.").

FACTUAL BACKGROUND

[¶ 5] Etpison, Marbou, and Tellei met up with others at IA Apartments, and armed themselves for a physical confrontation. Etpison carried a machete. So armed, they, together with several other persons, including Victor Marugg and Uriah Stephanus went to Bayside Bar prepared for a fight with some "Ngerbeched boys." They pulled up in three cars to the bar shortly after closing time in the early morning hours. The Trial Division found that during the resulting brawl, the three defendants chased Khan Matsuoka (a "Ngerbeched boy") to a dark area in the parking lot and beat him with their weapons. Mr. Matsuoka's injuries included a "hack wound" to his nose and left eye, and multiple lacerations to the back of his head likely caused by one

or more blunt objects. The victim was sent to the Philippines for treatment after CT scans revealed damage to his brain and he remained in the hospital there for over two months.

[¶ 6] The Trial Division did not make any specific findings about the attackers' motivations when targeting the "Ngerbeched boys." The Republic argued (as other witnesses testified) that Etpison had been in some sort of altercation with unknown individuals who threw rocks at him at the SLC bar earlier that evening. Etpison then texted Marbou, who had Uriah Stephanus pick him and various other people up, to meet at IA apartments to obtain weapons and seek revenge.

I. EVIDENTIARY STANDARDS

[¶ 7] Etpison's highlighted objections to the Trial Division's evidentiary rulings generally fall into two categories: objections to leading questions and objections to hearsay answers. With respect to objections to questions as leading;

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.
>
> ROP R. Evid. 611(c).

> Every question is leading in the sense that it directs the witness' attention to a particular event or topic. An objectionably leading question not only solicits an answer concerning a specific topic but also suggests a desired specific answer in regard to that topic. It is not necessarily improper for counsel to ask his witness a detailed and pointed question that may be answered "yes" or "no." Objectionable leading occurs when the question suggests to the witness the answer that is desired, thereby

> diminishing the likelihood that the answer will be the truth.
>
> *State v. Weese*, 424 A.2d 705, 709 (Me. 1981).

[¶ 8] Regarding hearsay objections, it is not necessarily hearsay for a witness to testify to that witnesses' own out-of-court statement. As noted by the advisory committee's note to Federal Rule 801(d)(1);

> Considerable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classified as hearsay. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem

[¶ 9] This issue is also addressed at 5 Weinstein's Federal Evidence, supra, at § 801.21[4];

> If a witness, questioned about a prior statement, admits on the stand that he or she made the statement and acknowledges that it is true, the witness thereby adopts the prior statement as his or her testimony. This adoption bypasses the requirements of Federal Rule 801(d)(1) and the entire hearsay problem.

[¶ 10] *Accord*; *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 946 F.2d 147 (1st Cir. 1991); *Bell v. City of Milwaukee,* 746 F.2d 1205 (7th Cir. 1984); *United States v. Davis,* 487 F.2d 112 (5th Cir. 1973); *Harman v. United States,* 199 F.2d 34 (4th Cir. 1952) ("When the witness testified that the statement was true it became part of his testimony, and not a mere matter of impeachment.")

[¶ 11] There are, of course, other limitations on the admissibility of such statements, for example the strictures on use of prior consistent statements, ROP R. Evid. 801(d)(1), the requirement of relevance, ROP R. Evid. 401, and the balancing of probative worth compared to prejudicial effect, ROP R. Evid. 403.

[¶ 12] With the above principles in mind, we turn to Etpison's specific objections.

I. EVIDENTIARY STANDARDS

[¶ 13] Etpison addresses six objections in the argument portion of his brief, then directs our attention to his "statement of the case," stating simply that all his other objections to hearsay and leading questions were well taken. However, our focus will be upon the objections that made it into the portion of his "argument." Undeveloped arguments are waived.

[¶ 14] Etpison provides four instances where he avers that the court erred by allowing the prosecution to introduce testimony of witnesses of their own out-of-court statements. The following exchange took place during the testimony of Klaradyn Iyar.

[¶ 15] Q : Did you tell anybody about obtain or getting the license plate?

[¶ 16] MR. MIZINOV : I'll object, that's also calls for hearsay Your Honor.

[¶ 17] MS. MILES : Alright, approach own words.

[¶ 18] THE COURT : Her own words.

[¶ 19] MR.MIZINOV : Her own words are hearsay, actually.

[¶ 20] A : (After hearsay objection overruled) I don't remember.

[¶ 21] Tr. 60:6-12 & 23.

[¶ 22] The answer "I don't remember" does not quote an out-of-court statement and therefore cannot be hearsay, and in any event the admission of that response did not affect the substantive right of the defendant and hence cannot be reversible error.

[¶ 23] The second and third objections of Etpison in the Argument section of his brief concern questions asked of Uriah Stephanus, the driver of the car in which Etpison and co-defendant Marbou were brought to the scene of the crime, and afterward driven away.

[¶ 24] Q : Did you ever talk to the detectives on July 20th?

[¶ 25] A : Yes.

[¶ 26] Q : And you were talking to them about what you told Jason Brel?

[¶ 27] A : No.

[¶ 28] MR. MIZINOV : That's also hearsay your honor. Objection.

[¶ 29] THE COURT : He answered no.

[¶ 30] MR.MIZINOV : The question still calls for hearsay and the answer no is also hearsay.

[¶ 31] Tr.127:2-11.

[¶ 32] This objection is not well-founded. The responsive answer, "no," is not hearsay.

[¶ 33] Etpison also objected to the following exchange as hearsay:

[¶ 34] Q : Did you talk to them about what you said to Jason Brel and Officer Tengoll on July 9th 2016?

[¶ 35] A : Yes.

[¶ 36] Q : Do you remember what you said to them?

[¶ 37] A : No, I don't remember.

[¶ 38] Q : Will your statement help you refresh your memory?

[¶ 39] A : Yes. (mumble)

[¶ 40] Q : Go ahead and read that (long pause) Stopped reading?

[¶ 41] A : (no response)

[¶ 42] Q : Do you remember what you told Officer Jason Brel on July 9th?

[¶ 43] A : Yes.

[¶ 44] Q : What did you say?

[¶ 45] A : I said there is somebody hurt.

[¶ 46] Q : There is somebody hurt?

[¶ 47] A : Yes.

[¶ 48] Q : And did you tell him who did it?

[¶ 49] A : No.

[¶ 50] Tr.127:21-28, Tr.128:1-13.

[¶ 51] The statement "I don't remember" is not hearsay. The statement "I said there is somebody hurt" can be viewed as either not offered for the truth of the matter, and therefore not hearsay, or as a present sense impression, ROP R. Evid. Rule 803(1).

[¶ 52] Etpison's next objection is to the statements of the victim, Khan Matsuoka, who testified he informed his two treating physicians that he could not remember anything that happened to him. This statement is a classic example of ROP R. Evid. 803(4); a statement made by a patient seeking medical diagnosis and treatment. The fact that the patient had no memory of the events is helpful information for a physician gauging the seriousness of head injuries. The statement was properly admitted.

[¶ 53] Etpison also objects to the ruling of the Court when it referred to challenged testimony as "highly relevant", when the prosecution was questioning Victor Marugg, another person who was part of Etpison's group.

[¶ 54] Q : Starting first with Kobe. What did you see Kobe holding?

[¶ 55] A : A stick.

[¶ 56] A : A stick?

[¶ 57] A : Yeah.

[¶ 58] Q : And what did you see Johnston holding?

[¶ 59] A : A machete.

[¶ 60] Q : And what did you see Anthony holding?

[¶ 61] A : A stick.

[¶ 62] Q : Did you have a weapon?

[¶ 63] A : Yes.

[¶ 64] Q : And how did you come into possession of the weapon? Who gave you that?

[¶ 65] A : I found it.

[¶ 66] Q : What did you find?

[¶ 67] A : A pipe.

[¶ 68] Q : Pipe. Was there a conversation at the parking of the IA building amongst yourselves about what you wanted to do with these weapons?

[¶ 69] A : Yes.

[¶ 70] Q : And who was talking during that conversation?

[¶ 71] A : All of us.

[¶ 72] Q : And what was the topic of the conversation?

[¶ 73] MR. MIZINOV : Calls for hearsay Your Honor.

[¶ 74] THE COURT : Overruled. I'll allow it.

[¶ 75] Q : What was the topic of the conversation?

[¶ 76] A : About.....

[¶ 77] Q : I can't hear you.

[¶ 78] A : About fighting.

[¶ 79] Q : And who did you guys want to fight?

[¶ 80] A : Ngerbeched people-- Ngerbeched boys.

[¶ 81] Q : Ngerbeched boys. Was there an agreement that that was what you all were going to do is fight the Ngerbeched boys?

[¶ 82] A : Yes.

[¶ 83] Q : Was that an agreement made between you and Kobe, Johnston and Anthony?

[¶ 84] MR. MIZINOV : Calls for hearsay Your Honor.

[¶ 85] THE COURT : Overruled. Highly relevant, I will allow it.

[¶ 86] A : Yes.

[¶ 87] Tr. 204:8-27, Tr. 205:1-22.

[¶ 88] This testimony was in fact "highly relevant," but more to the point of the objection it was an admission by a party opponent. ROP R. Evid. 801(d)(2)(A), and therefore admissible.

[¶ 89] Another evidence ruling to which Etpison takes exception concerns the questioning of Officer Harris Ubedei, regarding his contact with Victor Marugg.

[¶ 90] Q : Did he ever say to you on Tuesday that.....

[¶ 91] MR. MIZINOV : Calls for hearsay Your Honor.

[¶ 92] THE COURT : Huh, highly relevant, I will hear it. Go ahead Ms. Miles.

[¶ 93] MS. MILES : Did he ever say to you that he felt threatened on Tuesday?

[¶ 94] A : No.

[¶ 95] Q : Coerced to be here?

[¶ 96] A : No.

[¶ 97] Q : Did he ever tell you on Wednesday or Thursday that he felt threatened and coerced to be here?

[¶ 98] A : No.

[¶ 99] Tr. 274:9-19.

[¶ 100] These questions were leading, but the objection was limited to the response as hearsay. The answer "no" was not hearsay, since no out-of-court statement was repeated.

III. CUMULATIVE ERROR

[¶ 101] Etpison argues that the Trial Division's admission of hearsay testimony, along with the overruling "numerous [objections] regarding the Republic's mode of examining its witnesses," amounted to cumulative error when viewed together. Courts recognize cumulative error when "individual errors, insufficient in themselves to necessitate a new trial, may in the aggregate have a more debilitating effect". *U.S. v. Sepulveda*, 15 F.3d 1161, 1195-96 (1st Cir. 1993). In order to prove a finding of cumulative error, Etpison must first prove that there was error on the part of the Trial Division, and that those errors deprived Etpison of his right to a fair trial.

[¶ 102] Etpison invites us to return to his "statement of the case," to consider other objections made at trial but not specifically addressed in the "argument" portion of the brief. We decline to do so, except in summary form. The vast majority of Defendant's "method of examination" objections were for leading questions asked to witnesses who were friends of the Defendants and who accompanied them to the scene of the attack that evening. These witnesses did not want to be testifying in court and the Trial

Court was well within its discretion to allow leading questions to be asked of them. ROP R. Evid. Rule 611(c).

[¶ 103] Regarding his other hearsay objections, either the objected-to statements were not hearsay because they were only offered to prove that the statement itself was made, not the truth of the matter asserted, or admissible because of an exception found in ROP R. Evid. 803, or do not affect substantive rights.

IV. SUFFICIENCY OF THE EVIDENCE

[¶ 104] Lastly, Etpison appeals his conviction based on insufficiency of the evidence. For such an appeal, we consider "whether, viewing the evidence in the light most favorable to the prosecution and giving due deference to the trial judge's opportunity to hear the witnesses and observe their demeanor, any reasonable trier of fact could have found that the essential elements of the crime were established beyond a reasonable doubt." *Ngirarorou v. ROP*, 8 ROP Intrm. 136, 139 (2000).

[¶ 105] Etpison argues that the Trial Division could not have found beyond a reasonable doubt that it was he who specifically caused the injuries to the victim, and that he was never explicitly charged as an accomplice.

[¶ 106] The pertinent provisions of the Palau National Code provide otherwise. A person can be found to be liable for the actions of other persons if that individual is "legally accountable" for the actions of the other participants, 17 PNC § 222(a). Legal accountability exists when one is "an accomplice of such other person in the commission of the offense." 17 PNC § 222(b)(3). An accomplice is defined as one who "aids or agrees or attempts to aid the other person in the planning or committing [the offense]." 17 PNC § 223(a)(2).

[¶ 107] The status of being an accomplice is not an independent crime. It is a theory of liability, and to be convicted as a principal or accomplice, an individual need not be charged as an accomplice. Therefore, the prosecution does not need to show which accomplice struck the blow that did the greatest damage. *Engichy v. FSM*, 1 FSM Intrm. 532 (App. 1984) and cases cited therein.

[¶ 108] It is established case law in a variety of jurisdictions in the United States, including Hawai'i[1] that a defendant charged as a principal can be convicted as a either a principle or an accomplice. For example, in *State v. Fukusaku*, the Supreme Court of Hawai'i held that "one who is charged as a principal can be convicted as an accomplice without accomplice allegations being made in the indictment." 85 Haw. 462, 486, 946 P.2d 32, 56 (1997) (citation and internal quotation marks omitted). *See also, State v. Apao*, 59 Haw. 625, 586 P.2d 250 (1978) (rejecting appellant's argument that because the indictment in this case did not notify him that he was being charged as a principal or accomplice he was unable to prepare a proper defense.)

[¶ 109] With accomplice liability principles in mind, it was reasonable for the Trial Court to find that Marbou, Tellei, and Appellant Etpison acted together, with the end result being that they are all criminally responsible for victim's injuries, as they were part of the same group of men who went to the Bayside Bar with weapons for the purpose of physically attacking "Ngerbeched boys."

CONCLUSION

[¶ 110] For the reasons stated herein, we **AFFIRM** Defendant's conviction.

[1] There is no meaningful difference between the sections which impose liability for the actions of another and define accomplice liability in ROP Palau's Criminal Code, 17 ROP §§ 222 & 223, and the corresponding sections in Hawaii's criminal code, Hawai'i Rev. Stat. §§ 702-221 & 702-222.

SO ORDERED, this 9th day of October, 2017.

JOHN K. RECHUCHER
Associate Justice

R. BARRIE MICHELSEN
Associate Justice

ALEXANDRO C. CASTRO
Associate Justice