IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

KARN EBERT a/k/a KARN MABEL a/k/a KARL DICK,
Appellant,
v.
REPUBLIC OF PALAU,
Appellee.

Cite as: 2020 Palau 21
Criminal Appeal No. 19-003
Appeal from Criminal Case No. 18-196

Decided: October 19, 2020

Counsel for Appellant	Lalii Chin Sakuma
Counsel for Appellee	Christa Boyd-Nafstad, AAG

BEFORE: OLDIAIS NGIRAIKELAU, Chief Justice
JOHN K. RECHUCHER, Associate Justice
GREGORY DOLIN, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Associate Justice, presiding.

OPINION[1]

PER CURIAM:

[¶ 1] Defendant Karn Ebert a/k/a Karn Mabel a/k/a Karl Dick ("Ebert") was convicted by a jury of one count of trafficking methamphetamine. On appeal, he contends that his conviction is undermined by evidence regarding the government's handling of the methamphetamine at issue. Determining that his chain-of-custody arguments are without merit, we **AFFIRM**.

[1] The parties did not request oral argument. No party having requested oral argument, the appeal is submitted on the briefs. *See* ROP R. App. P. 34(a).

BACKGROUND

[¶ 2] Ebert was charged with two counts of trafficking a controlled substance, methamphetamine, in violation of 34 PNC § 3301(b)(5). The charges arose from two controlled buys effectuated by Narcotics Enforcement Agency ("NEA") officers through a paid confidential informant on October 30 (Count One) and November 9, 2018 (Count Two). Because Ebert was acquitted on Count One, we focus our discussion only on his challenge to the conviction on Count Two.

[¶ 3] At trial, NEA officers and the confidential informant testified as follows regarding the November 9 drug buy. While at the NEA office, the confidential informant called Ebert and arranged a drug purchase. Trial Tr. 122; 199; 226-28. The informant was searched to ensure that he did not have any drugs on his person, and the NEA officers provided him with $200. Trial Tr. 123; 295-96. The informant then traveled on foot to the location of the drug buy, all the while remaining in sight of NEA officers. Trial Tr. 125; 296. Ebert picked up the informant in his car and drove to another location, where they smoked methamphetamine together. Trial Tr. 126-27; 201; 203; 297. After about thirty minutes, Ebert dropped the informant at the latter's place of work, which happened to be near the NEA office. Trial Tr. 205; 317-18. The informant then walked to the NEA office, where he gave NEA officers what appeared to be two straws, containing about $200 worth of methamphetamine, that he claimed to have purchased from Ebert. Trial Tr. 205-07. The officers searched him and found no additional contraband. Trial Tr. 206-07; 302. The officers then brought the straws back to the Bureau of Public Safety ("BPS") office, where they were photographed, field tested, and weighed. Trial Tr. 302-03. The straws presumptively tested positive for methamphetamine and were recorded as weighing a total of 0.14 grams. *Id.* The drugs were then bagged, sealed, and labeled by an officer, who completed an evidence and property receipt. Trial Tr. 304-05. The officer and a colleague then deposited the drugs in the BPS storage room, where evidence is ordinarily stored during office hours. Trial Tr. 304; 305:11-17; 398:1-8. The officers testified that, as the two NEA evidence custodians, they are the only people with keys to the storage room and must both be present for anyone to gain access to that room. Trial Tr. 274:1-276:28; 384:1-25.

[¶ 4] The methamphetamine from the November 9 buy was eventually transported from the storage room to Guam by an NEA officer for testing at the crime lab. Trial Tr. 305. The Guam lab criminalist testified at trial that he determined that the straws contained methamphetamine and weighed 0.1413 grams. Trial Tr. 349; 372. He further described the chain of custody from the receipt of the straws in Guam until they were returned to Palau in the custody of an NEA officer. Trial Tr. 349-51; 366; *see also* Trial Tr. 387-89; 398-99. When questioned about the difference between the weight of the straws as recorded in Palau and in Guam, the criminalist opined that this discrepancy was likely due to the "hyper-accura[cy]" of his lab scales. Trial Tr. 374. The methamphetamine seized on November 9 was admitted at trial as a government exhibit. *See* Trial Tr. 402. The jury convicted Ebert on Count Two, and this timely appeal followed.[2]

STANDARD OF REVIEW

[¶ 5] When reviewing the evidentiary basis for a criminal conviction, we consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Kumangai v. ROP*, 9 ROP 79, 82 (2002) (internal quotation marks omitted); *see also Xiao v. ROP*, 2020 Palau 4 ¶ 8. In doing so, we do not "reweigh the evidence," but instead seek only to "determine whether there was *any reasonable evidence* to support the judgment." *Alik v. ROP*, 18 ROP 93, 100 (2011) (emphasis added). That is, as long as the verdict is supported by any reasonable evidence, "[e]ven if this Court would have decided the case differently as the trier of fact, the conviction must be upheld." *Id.*[3]

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[2] On July 4, 2019, the trial court sentenced Ebert to twenty-five years in prison and a fine of $50,000, which are both statutory minimums. *See* 34 PNC § 3301(b)(5).

[3] Although Ebert's trial counsel raised the issues that are the subject of this appeal in his closing argument to the jury, *see* Trial Tr. 438-40, he did not move for a judgment of acquittal before the trial court, *see* ROP R. Crim. P. 29. However, the Government does not contend that Ebert's sufficiency challenge was forfeited, and because forfeiture arguments can themselves be waived or forfeited, *see, e.g.*, *United States v. De Vaughn*, 694 F.3d 1141, 1154 n.9 (10th Cir. 2012), we decide Ebert's appeal on the merits. In any event, especially in criminal cases, we review even unpreserved arguments for plain error. *See Xiao v. ROP*, 2020 Palau 4 ¶ 20; *Scott v. ROP*, 10 ROP 92, 95 (2003).

DISCUSSION

[¶ 6] Ebert contends his conviction cannot stand because of alleged issues with the identity of the substance recovered from the informant after the November 9 drug buy.[4] Specifically, Ebert points to (1) testimony by one of the NEA officers that he had heard of another officer improperly taking drug evidence from the BPS storage room in an unrelated case; and (2) the seeming discrepancy between the drug weight as measured in Palau (0.14 grams) and as measured in Guam (0.1413 grams).[5] Ebert suggests that the Government "failed to prove the chain of custody with regards to whether the [substance that was] sent to Guam for testing [was], in fact, the same [substance] that [was] retrieved from the informant in Palau." Opening Br. at 7.

[¶ 7] We note that Ebert does not draw his arguments on appeal with precision. However, his arguments fail regardless of how they are construed. To the extent Ebert suggests there was insufficient evidence that the substance in the straws from the November 9 buy was indeed methamphetamine, his contention is unpersuasive. Ebert does not argue that there was *no reasonable evidence* to support a jury determination that the substance at issue was methamphetamine, *see Alik*, 18 ROP at 100, and we have no difficulty concluding that the Government presented sufficient evidence on this element through the testimony of the NEA officers and the Guam criminalist, *see* Trial Tr. 274-76, 302-05, 349-51, 366, 372, 384, 387-89, 398-99.

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[4] On appeal, Ebert does not pursue his jury arguments about the informant's credibility. *See* Trial Tr. 435-38.

[5] In his opening brief, Ebert makes several arguments about the NEA's use of an evidence "dropbox." In response, the Government correctly points out that the NEA evidence custodians testified that this "dropbox" was not used to store *the methamphetamine at issue in Count Two*. *See* Trial Tr. 153:19-154:4; 276:20-28; 325:2-8; 398:1-8; 412:12-26. We read Ebert's reply brief as properly conceding this point. *See* Reply Br. at 2. We are unconvinced by Ebert's sketchily drawn suggestion in his reply brief that the use of the "dropbox" in instances *unrelated to Count Two* is "a disturbing practice that casts doubt on the chain of custody of the evidence here." *Id.*

[¶ 8] To the extent Ebert contends that we should vacate his conviction because the verdict is "contrary to the weight of evidence regarding the chain of custody," Opening Br. at 6, his argument also fails. As Ebert acknowledges, "gaps in the chain of custody go to the *weight* to be given a piece of evidence." *Id.* at 6 (citing *Kumangai*, 9 ROP at 82) (emphasis added). But it is not our role as a reviewing court to reweigh the evidence. *Alik*, 18 ROP at 100 ("The Appellate Division should not reweigh the evidence . . . [i]t should only determine whether there was any reasonable evidence to support the judgment.").

[¶ 9] The jury heard the testimony regarding the security of the BPS storage room and the seeming discrepancy in the drug weights, and it heard Ebert's argument that this testimony indicated potential tampering with the drug evidence, yet it decided to convict. We cannot say that its decision was unreasonable or unsupported by any reasonable evidence. *See Alik*, 18 ROP at 100. To the contrary, we find it entirely understandable that the jury seemingly was not swayed by the issues Ebert highlights. Regarding the security of the storage room, there was significant evidence presented that the room is ordinarily secured and under the control of the NEA evidence custodians. *See* Trial Tr. 274:1-276:28; 384:1-25. One officer's testimony that he had heard of a possible breach at a prior unspecified time during his seventeen years as a drug enforcement officer is, at best, slight evidence of ongoing security issues that could have affected the evidence in this case. *See* Trial Tr. 325. A reasonable jury could easily conclude that this testimony had no bearing on the chain of custody *in this case*. Regarding the seeming discrepancy in weights, a reasonable jury could easily credit the criminalist's specific testimony that the difference was due to the more precise measuring capabilities of the equipment at the Guam crime lab. *See* Trial Tr. 374. It is axiomatic that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *ROP v. Chisato*, 2 ROP Intrm. 227, 239 (1991) (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985)). We will not second-guess the jury's decision to not give the evidence Ebert highlights the dispositive weight he thinks it deserves.

[¶ 10] In summary, as we recently opined, "absent extraordinary circumstances, the reviewing court does not weigh the evidence . . . when

making sufficiency of the evidence determinations." *Xiao*, 2020 Palau 4 ¶ 12 n.4 (quoting *United States v. Hemsher*, 893 F.3d 525, 531 (8th Cir. 2018)). Concluding that the alleged issues with the drug evidence do not fundamentally undermine the reasonable basis for Ebert's conviction, we leave the jury's verdict undisturbed.

CONCLUSION

[¶ 11] Ebert's conviction on Count Two is **AFFIRMED**.