NO. CAAP-15-0000367

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
DOUGLAS MANAGO, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CRIMINAL NO. 13-1-0320)

SUMMARY DISPOSITION ORDER
(By: Fujise, Presiding Judge, Leonard and Ginoza, JJ.)

Defendant-Appellant Douglas Manago (**Manago**) appeals from the Judgment of Conviction and Sentence (**Judgment**) filed on March 25, 2015, in the Circuit Court of the First Circuit (**Circuit Court**).[1] Following a jury trial, Manago was found guilty of Burglary in the First Degree, Hawaii Revised Statutes (**HRS**) § 708-810(1)(c) (2014). Manago was sentenced to a ten year term of imprisonment with a mandatory minimum of six years and eight months as a repeat offender.

Manago raises three points of error on appeal, contending that: (1) the Circuit Court erred when it failed to include the complete statutory definition of the term "building"

[1] The Honorable Dexter D. Del Rosario presided.

in its jury instructions; (2) the Deputy Prosecuting Attorney's (**DPA's**) comments during closing argument constituted prosecutorial misconduct; and (3) the Circuit Court erred when it neglected to rule on a defense counsel objection.

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Manago's points of error as follows:

(1) HRS § 708-810(1)(c) states, in relevant part:

> (1) A person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and:
>
> . . . .
>
> (c) The person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

HRS § 708-800 (2014) defines building as "any structure, and the term also includes any vehicle, railway car, aircraft, or watercraft used for lodging of persons therein; each unit of a building consisting of two or more units separately secured or occupied is a separate building."

Consistent with these statutes, the Circuit Court instructed the jury as follows:

> A person commits the offense of Burglary in the First Degree if he intentionally enters a building unlawfully, with intent to commit therein a crime against a person or against property rights, and he recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.
>
> There are four material elements of the offense of Burglary in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.
>
> These four elements are:
>
> 1. That on or about April 10, 2012, on the island of Oahu, the defendant intentionally entered a building

> unlawfully, to wit, the residence of Eduardo Viramontes, and/or Teodoro Dominguez-Delgado, situated at 94-289 Leonui Street, apartment 91; and
>
> 2. That the defendant had the intent to commit therein a crime against a person or against property rights; and
>
> 3. That the defendant recklessly disregarded the risk that the building was the dwelling of another; and
>
> 4. That the building was the dwelling of another.
>
> . . . .
>
> Building includes any structure.
>
> Dwelling means a building which is used or usually used by a person for lodging.

Manago argues that the Circuit Court plainly erred when it failed to include the complete statutory definition of the term "building" in its jury instructions. Specifically, Manago argues that the instruction was erroneous because it did not include the language of HRS § 708-800, that "each unit of a building consisting of two or more units separately secured or occupied is a separate building."

The Hawaiʻi Supreme Court has recognized that the "trial court is not required to instruct the jury in the exact words of the applicable statute but to present the jury with an understandable instruction that aids the jury in applying that law to the facts of the case." State v. Metcalfe, 129 Hawaiʻi 206, 230, 297 P.3d 1062, 1086 (2013) (citation omitted). Moreover, "jury instructions 'should not merely parrot the language of the statute,' but should also adequately apprise the jury, in easily understandable language, the law to be applied in its deliberation." State v. Kaiama, 81 Hawaiʻi 15, 27, 911 P.2d 735, 747 (1996).

We conclude that the Circuit Court did not err in giving the above instruction. The Circuit Court's instruction communicated the four material elements of Burglary in the First Degree, that: (1) Manago intentionally entered a building *i.e.*, 94-289 Leonui Street, apartment 91, unlawfully; (2) Manago had the intent to commit therein a crime against a person or property rights; (3) Manago recklessly disregarded the risk that the building was the dwelling of another; and (4) that the building was the dwelling of another. The Circuit Court's instruction also aided the jury in applying the law to the evidence presented at trial. Eduardo Viramontes (**Viramontes**) and Teodoro Dominguez-Delgado (**Delgado**) testified that they lived at 94-289 Leonui Street, apartment 91 on April 10, 2012. Viramontes testified that a male, later identified as Manago, entered his apartment on April 10, 2012. Viramontes and Delgado testified that they did not give Manago permission to enter their residence. Delgado testified that $400.00 was missing from his bedroom. As part of his investigation, Honolulu Police Department Officer Roberto Cadiz (**Officer Cadiz**) determined that the "suspect had cut the screen and then reached inside. Reached inside and unlocked the door from there." A stipulation provided that Manago's DNA profile matched the DNA recovered from a watch found inside apartment 91. Manago's DNA profile also matched the DNA recovered from the glass jalousie louver of apartment 91. Accordingly, we conclude that the Circuit Court provided the jury "with an understandable instruction that aid[ed] the jury in

applying [the] law to the facts of the case." Metcalfe, 129 Hawaiʻi at 230, 297 P.3d at 1086 (citation omitted).

Manago argues that "the fact that the defense was based on the admission that Mr. Manago was on the premises but did not enter the unit, an idea consistently advanced to the jury, makes the omission of the full definition of 'building' clearly prejudicial to Mr. Manago." The Circuit Court instructed the jury that the State must prove all four elements of Burglary in the First Degree beyond a reasonable doubt. In reaching its guilty verdict, the jury determined that the State proved all four elements of Burglary in the First Degree beyond a reasonable doubt. The jury determined that Manago entered apartment 91, and that apartment 91 was Viramontes and Delgado's dwelling. The Circuit Court defined dwelling as a "building which is used or usually used by a person for lodging." Despite Manago's arguments to the contrary, the jury could not have found Manago guilty of Burglary in the First Degree based on his admission that he was on the premises, but did not enter apartment 91. Therefore, we are not persuaded by Manago's argument.

In sum, the Circuit Court's definition of "building" was not erroneous. The Circuit Court's definition of the term and its Burglary in the First Degree instruction "adequately and understandably apprised the jury of the law to be applied in its deliberation[.]" State v. Lagat, 97 Hawaiʻi 492, 500, 40 P.3d 894, 902 (2002).

(2) Manago argues that the DPA committed prosecutorial misconduct by: (1) "introducing a speculative and prejudicial

theory of the case for the first time during closing argument that was not based on facts in evidence"; and (2) misstating the definition of "building."

"In order to determine whether the alleged prosecutorial misconduct reached the level of reversible error, [appellate courts] consider the nature of the alleged misconduct, the promptness or lack of a curative instruction, and the strength or weakness of the evidence against defendant." State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992) (citation omitted). "Allegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of 'whether there is a reasonable possibility that the error complained of might have contributed to the conviction.'" State v. Rogan, 91 Hawaiʻi 405, 412, 984 P.2d 1231, 1238 (1999) (citations omitted).

During the State's closing argument, the following exchange took place:

> [DPA]: Now, we have two different stories. The State will submit to you our theory of the case. In this trial, in this case, we have three key players. We have defendant, Douglas Manago. We have Natalie Woods. And we have [Viramontes].
>
> Now, defendant and Natalie Woods, they had known each other for a long time. They were dating. Obviously they care for each other. [Viramontes] and Natalie, they knew each other too. They were friends. Obviously [Viramontes] likes [Woods]. But [Woods] was using him for money. She kept borrowing money from him. But maybe he wanted more. He wanted sexual favors, or a relationship. But she didn't want it. She was upset.
>
> So what did she do? She asked [Manago], who didn't know [Viramontes], to go inside to his place, to burglarize his place, to take money.
>
> [Defense counsel]: Objection. Facts not in evidence.

> [DPA]: It's argument.
>
> Why? Because he knew [Viramontes] had a job. He knew where he lived. And he knew he had money, because she had been borrowing money from him. Now, if you take that theory, apply the facts and the physical evidence in this case, you will find that it fits perfectly.

Manago argues that "the idea that Natalie Woods had put Mr. Manago up to burglarizing the unit was never introduced in testimony or exhibits. As such the defense had no opportunity to adduce evidence or testimony to rebut the same." In response, the State contends that "the evidence revealed that the [DPA's] remarks were legitimate comments based upon the evidence and the reasonable inference that could be drawn therefrom."

Closing argument is an opportunity for both parties to "persuade the jury that its theory of the case is valid, based upon the evidence adduced and all reasonable inferences that can be drawn therefrom." Rogan, 91 Hawaiʻi at 413, 984 P.2d at 1239 (citing State v. Quitog, 85 Hawaiʻi 128, 145, 938 P.2d 559, 576 (1997)). During closing argument, it is "within the bounds of legitimate argument for prosecutors to state, discuss, and comment on the evidence as well as to draw all reasonable inferences from the evidence." State v. Clark, 83 Hawaiʻi 289, 304, 926 P.2d 194, 209 (1996). The supreme court has recognized that:

> "Although a prosecutor has wide latitude in commenting on the evidence during closing argument, it is not enough that ... his comments are based on testimony 'in evidence'; his comments must also be 'legitimate.'" "A prosecutor's comments are legitimate when they draw 'reasonable' inferences from the evidence." Finally, it is "generally recognized under Hawaiʻi case law that prosecutors are bound to refrain from expressing *their personal views* as to a defendant's guilt or the credibility of witnesses."

State v. Tuua, 125 Hawaiʻi 10, 14, 250 P.3d 273, 277 (2011) (citations omitted).

In determining whether an inference is reasonable, the "most obvious consideration" is "[w]hether the evidence bears a logical and proximate connection to the point the prosecutor wishes to prove[.]" State v. Basham, 132 Hawaiʻi 97, 112, 319 P.3d 1105, 1120 (2014) (citation omitted). The pivotal issue at trial was whether Manago entered 94-289 Leonui Street, apartment 91. Viramontes testified that a male, later identified as Manago, entered his apartment on April 10, 2012. Viramontes testified that Woods was not at his apartment on April 10, 2012. Woods testified that she was at the apartment and Manago did not enter apartment 91. Manago also testified that he did not enter apartment 91.

Based on Woods's testimony, the DPA could properly infer that Woods was upset because Viramontes did not agree to loan her money. Woods testified that she yelled at Viramontes because he wanted sexual favors. The DPA's comment that Woods asked Manago to "burglarize [Viramontes's] place, to take money[,]" appears to be a reasonable inference as to how the events unfolded, based on Woods's testimony that Viramontes refused to loan her money, as well as the other evidence presented at trial. The DPA's comments were within the bounds of legitimate argument, and "constituted permissible commentary on the evidence." State v. Hauge, 103 Hawaiʻi 38, 54, 79 P.3d 131, 147 (2003).

As to the second Agrabante factor, the Circuit Court did not provide a curative instruction despite Defense's objection.

The third Agrabante factor requires consideration of the weight of the evidence against Manago. As noted above, Viramontes testified that a male entered his apartment on April 10, 2012. Viramontes testified that the long-sleeve t-shirt covering the male's face became loose in the hallway. Viramontes was able to see the male's face, but did not recognize him at that time. At trial, Viramontes identified Manago as the male who entered his apartment on April 10, 2012. On the morning of April 10, 2012, Harold Viernes (**Viernes**), who lived on Leonui Street and was responsible for building maintenance, observed a male, later identified as Manago, "looking up and down, like casing the place." In the afternoon, Viernes heard the tenant in apartment 91 yell, "What are you doing here? Get the f--- out." Viernes testified that the male told him "Oh, that's just my braddah. He just mad." Viernes noticed a long-sleeve t-shirt in the male's hand. After the male left, Viernes testified that the tenant in apartment 91 came onto his balcony, and yelled "that f---er just ripped me off. Break into my house." At trial, Viernes identified Manago as the male he observed on April 10, 2012. Viramontes and Delgado testified that they did not give Manago permission to enter their apartment. A stipulation provided that Manago's DNA profile matched the DNA recovered from the watch found inside apartment 91 and the DNA recovered from

the glass jalousie louver of apartment 91. The weight of the evidence against Manago is strong.

Manago argues that a second instance of prosecutorial misconduct occurred when the DPA defined 'building' in his closing argument. The DPA stated:

> Now, as you know, we're here for Burglary in the First Degree against defendant, Douglas Manago. Judge told you there are four elements in this charge.
>
> The first one being on or about April 10, 2012, on the island of Oahu, the defendant intentionally entered a building unlawfully.
>
> April 10, 2012, and on the island of Oahu. You have heard that throughout the trial. It's not disputed. We all know that that's true. So what are we really looking at? Whether or not the defendant intentionally entered the building.
>
> The State submits to you the State has proven beyond a reasonable doubt that it was intentional. Because, as you saw, that the screen was cut. It wasn't anyone stumble into the apartment. Someone went inside with a purpose. It was intentional. And that the fingerprint was found.
>
> Second, it was a building. Well, using your common sense you know that this was a building indeed.
>
> And third, whether it was unlawful. [Delgado] and [Viramontes] told you that they didn't know [Manago]. And no permission ever was given for him to go inside. So it was uninvited. It was unlawful.

The DPA's comment, when viewed in context, encouraged the jurors to use their common sense in evaluating the evidence. See, e.g., State v. Sawyer, 88 Hawaiʻi 325, 329 n.6, 966 P.2d 637, 641 n.6 (1998); see State v. Nakoa, 72 Haw. 360, 371, 817 P.2d 1060, 1066 (1991). Despite Manago's arguments to the contrary, the DPA's comment did not "compound[] the ambiguity in the Court's insufficient Jury Instructions with regard to the definition of 'building[.]'" As discussed above, the Circuit Court properly instructed the jury that it must determine whether the State proved beyond a reasonable doubt that: (1) Manago

intentionally entered a building *i.e.*, 94-289 Leonui Street, apartment 91, unlawfully; (2) he had the intent to commit therein a crime against a person or property rights; (3) he recklessly disregarded the risk that the building was the dwelling of another; and (4) that the building was the dwelling of another. The jury could not find Manago guilty of Burglary in the First Degree simply based on his admission that he was on the premises, but did not enter apartment 91. Therefore, we conclude the DPA's comment was not improper.

There was no objection to the DPA's remark and, thus, there was no curative instruction. As noted above, the evidence against Manago was strong.

We conclude that there was no prosecutorial misconduct in this case.

(3) Manago argues that the Circuit Court erred when it neglected to rule on the Defense's objection during the exchange, quoted above, concerning the State's theory of the case, *i.e.*, that Woods asked Manago to burglarize Viramontes's apartment.

Manago argues that the "dismissive stance by the Court in response to a legitimate objection substantially prejudiced Mr. Manago by first lending credence to the prosecutions [sic] improper statement and then denigrating the defense while elevating the prosecution." Although it is somewhat unclear, we construe this to be an argument that the Circuit Court disregarded its duty to "maintain the attitude and appearance of impartiality." State v. Pokini, 55 Haw. 640, 645, 526 P.2d 94, 101 (1974). We conclude that Manago reads too much into a silent

record and, upon review of the record of the Circuit Court's conduct of the trial in this case, that this argument is wholly without merit.

For these reasons, the Circuit Court's March 25, 2015 Judgment is affirmed.

DATED: Honolulu, Hawaiʻi, May 18, 2016.

On the briefs:

David A. Fanelli,
for Defendant-Appellant.

Presiding Judge

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge