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NO. CAAP-15-0000432

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
RONALD JHUN, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 13-1-0293)

SUMMARY DISPOSITION ORDER

(By: Leonard, Presiding Judge, Reifurth and Ginoza, JJ.)

Defendant-Appellant Ronald Jhun (Jhun) appeals from a Judgment of Conviction and Sentence (Judgment), entered on April 1, 2015, in the Circuit Court of the First Circuit¹ (circuit court). Judgment was entered against Jhun after a jury found him guilty of committing Sexual Assault in the First Degree (Count I),² in violation of Hawaii Revised Statutes (HRS) § 707-730(1)(b) (2014).³

¹ The Honorable Glenn J. Kim presided.

² Jhun was indicted on five (5) counts, but four (4) of them were dismissed prior to trial.

³ HRS § 707-730 provides in pertinent part that

§707-730 Sexual assault in the first degree. (1) A person commits the offense of sexual assault in the first degree if:

(b) The person knowingly engages in sexual penetration with another person who is less than fourteen years old[.]

(continued...)

On appeal, Jhun asserts that (1) he was denied a fair trial because of prosecutorial misconduct during closing argument, (2) he received ineffective assistance of counsel because defense counsel did not object to the misconduct committed during closing argument, and (3) the circuit court abused its discretion by denying Jhun's motion for mistrial after the prosecutor's improper question during direct examination.

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, as well as the relevant statutory and case law, we affirm.

(1) Prosecutorial Misconduct.

Jhun asserts that the prosecuting attorney for Plaintiff-Appellee State of Hawai'i (State) committed prosecutorial misconduct twice during closing arguments. Both alleged instances of misconduct pertain to the credibility of two children who testified at trial. The State was reliant on the testimony of the two children, the only witnesses to the alleged sexual assault, who were 13 and 14 years old at the time of trial, which was held at least two and a half years after the alleged incident.⁴ The defense's theory of the case was that the children made up the sexual assault because they did not like Jhun, who was the children's grandmother's live-in boyfriend. The children lived with their grandmother, who was their legal guardian. Thus, the pivotal issue was the children's credibility at trial.

Defense counsel did not object to either instance of alleged misconduct identified on appeal.

If defense counsel does not object at trial to prosecutorial misconduct, this court may nevertheless recognize such misconduct if plainly erroneous. "We may recognize plain error when the error committed affects substantial rights of the defendant." *State v. Cordeiro*, 99 Hawai'i 390, 405, 56 P.3d 692, 707 (2002) (citations and

³(...continued)

(2) Sexual assault in the first degree is a class A felony.

⁴ The indictment alleges the incident occurred between June 1, 2011 and July 6, 2012. Trial was held on January 5-7, 2015.

internal quotation marks omitted). See also Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) (2003) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). We will not overturn a defendant's conviction on the basis of plainly erroneous prosecutorial misconduct, however, unless "there is a reasonable possibility that the misconduct complained of might have contributed to the conviction." *State v. Rogan*, 91 Hawai'i 405, 412, 984 P.2d 1231, 1238 (1999).

State v. Wakisaka, 102 Hawai'i 504, 513, 78 P.3d 317, 326 (2003). We must first determine if either instance was improper conduct. Then, if there was improper conduct, we must determine whether there is a reasonable possibility that the misconduct contributed to the conviction, and the factors we consider in this regard are: "(1) the nature of the conduct; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant." *Id.* (quoting State v. Sawyer, 88 Hawai'i 325, 329 n.6, 966 P.2d 637, 641 n.6 (1998)).

(a) During closing arguments, the State addressed gaps in the memory of the Minor complaining witness [Minor CW] regarding dates and street names by arguing as follows:

Now, [Minor CW]. Again, he was emotional. He cried on the stand. You saw that. He was polite. He thought before he answered questions. He even corrected us. If we said something incorrect, he would say no, it's not that. He said if he didn't remember. He wasn't just sitting up there telling a story about anything.

And like we talked about in jury selection, child's memories are different from adults. [Minor CW] wasn't clear on dates. He wasn't sure how old he was. He wasn't sure what year it was. He said 2010ish, maybe 2011. What he did know was the defendant did this to [him] when the defendant was living with them. And you have the time frame when the defendant was with them.

He didn't remember street names. I don't know where is [***] Avenue or [***] Avenue. He didn't remember that. But what he did remember was important details. He remembered the important details and he told you those details.⁵

(Emphasis added.)

On appeal, Jhun challenges the prosecutor's statement: "And like we talked about in jury selection, child's memories are different from adults." Jhun asserts that this statement amounted to misconduct because there was no evidence submitted

⁵ Identifying information is removed from this quote.

during trial to substantiate the State's claim. The State contends in response that, because the issue had been discussed during voir dire and the jurors had agreed that children have different memories than adults,⁶ particularly as to specific dates, it is something commonly recognized.

The prosecutor must refrain from commenting on "matters outside the evidence adduced at trial." State v. Tuua, 125 Hawai'i 10, 14, 250 P.3d 273, 277 (2011). However, the Hawai'i Supreme Court has previously noted that an attorney may comment during closing argument upon matters of common knowledge which are not special to the case in trial. Lauer v. Young Men's Christian Ass'n of Honolulu, 57 Haw. 390, 397, 557 P.2d 1334, 1339 (1976). Moreover, "where statements in voir dire reflect the common experience of the jurors, prosecutors are entitled to refer to the statements in summation." State v. Walsh, 125 Hawai'i 271, 304, 260 P.3d 350, 383 (2011) (Recktenwald, C.J., concurring).⁷ Given the record and circumstances in this case,

⁶ During voir dire, the following exchange occurred:

[Prosecution]: Okay. How would you say children's memories are with regard to perhaps dates when specific things happen or details?

A PROSPECTIVE JUROR: As far as dates, they may not remember the detail of the date, but an occurrence, they're usually pretty clear --

[Prosecution]: Okay.

A PROSPECTIVE JUROR: -- if it happened.

[Prosecution]: So you would say -- correct me if I'm wrong, but what I'm hearing from you is that a child would be more likely to remember details or more important details, but maybe not details such as dates or time frame?

A PROSPECTIVE JUROR: They might remember the day, but not a specific date.

[Prosecution]: Okay. Is there anyone here -- do you all agree with what [prospective juror] said about that? Okay. Record reflect that most jurors are nodding their heads.

Does anyone not agree that children's memories are a little--they have a little more difficult time remembering details such as a specific date? Okay. Record reflect no one is raising their hands.

⁷ We note that Walsh involved a situation where the prosecutor used the defendant's presence at voir dire to attack his credibility by alleging that he tailored his testimony based on juror statements he heard during voir dire regarding the relationship between eye contact and credibility. 125 Hawai'i at 291-92, 260 P.3d at 370-71. It does not appear that the majority in Walsh took issue with the general proposition we quote above from the concurring (continued...)

we conclude that the challenged statement was not plain error that affected Jhun's substantial rights.

Moreover, even if the challenged statement were deemed plain error, it was an isolated and singular instance in which the prosecutor commented on the difference between the memories of adults and children. The State did not belabor the point. It was stated as part of the State's larger argument in response to the defense's challenge to the veracity of the children witnesses, and the State emphasized that the children witnesses remembered the "important details," and were credible based on their candor and conduct while testifying. There was no curative instruction because no objection was made. However, with regard to the strength or weakness of the evidence, the corroborating testimony of the other minor child who witnessed the incident is significant in strengthening the evidence against Jhun in this case. Thus, even if the statement were deemed improper, we cannot say, given the circumstances and record in this case, that there was a reasonable possibility that the misconduct contributed to the conviction.

(b) During the State's rebuttal closing argument, after the defense centered its closing argument on attacking the credibility of the child witnesses, the State asserted that

[The defense] wants you to say the kids are lying because they cannot remember dates?

The kids are telling the truth because you saw them testify. [The defense] wants you to think that [the kids] are making this up, but they're going to take the stand and take an oath and cry when they relive it? If this is the

⁷(...continued)
opinion; rather, as the majority noted:

What is at issue is the prosecutor's argument that Respondent lacked credibility because his allegedly credible demeanor was derived from his presence at trial during which he supposedly heard jurors refer to credibility traits and had mimicked those traits. In that regard, the prosecutor employed voir dire statements regarding eye contact as evidence that Respondent had an advantage that he gained solely from his presence. The prosecutor's attack on Respondent's credibility due to his presence is at issue, not any "common knowledge" of the jurors.

Walsh, 125 Hawai'i at 291 n.35, 260 P.3d at 370 n.35.

case, these kids should be writing movies and acting because kids don't make this stuff up. Not this stuff.

(Emphasis added.)⁸ Jhun asserts the last portion of the argument constitutes misconduct because the State declared that kids do not make up being sexually assaulted, and that this amounted to a statement of personal opinion on the veracity of the child witnesses. The State responds that the prosecutor was clearly referring to just the two children who testified, not kids in general.

"It is generally recognized under Hawai'i 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. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209 (1996). During closing arguments, a prosecutor may "draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence." Id. The prosecutor is permitted to argue, based on his or her analysis of the evidence, the credibility of a witness. State v. Marsh, 68 Haw. 659, 660, 728 P.2d 1301, 1302 (1986). "[C]losing argument affords the prosecution (as well as the defense) the opportunity 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." State v. Klinge, 92 Hawai'i 577, 592, 994 P.2d 509, 524 (2000) (citation and quotation mark omitted).

Review of the entirety of the State's closing arguments demonstrates that the prosecutor's broad theme was that the jury could trust the children because they observed the children testify and witnessed their raw emotion while testifying. This theme was presented throughout the prosecutor's closing argument. In the challenged statement, the prosecutor was responding to the defense's attack on the witnesses' credibility by tying the issue back to the overall theme. The prosecutor stated that "[t]he kids are telling the truth because you saw them testify[,] " noted

⁸ After the State finished its initial closing argument, defense counsel placed on the record an objection to the State's alleged expression of personal opinion during the closing argument regarding the Minor CW's credibility. The defense commented that the State twice stated that the Minor CW was "credible." Defense counsel did not re-raise the objection during the State's rebuttal argument.

that the children took an oath and cried while testifying, and, that children do not fake this type of emotion, nor would they make up such a story. The State followed up the challenged statement with the following:

And you have two child witnesses who you saw testify who were very credible. And that's what this case is about. It's not about two young children making up this huge story as a vendetta to get the defendant out of the house when he was already out. This is what this case is about, ladies and gentlemen.

The prosecutor emphasized the State's broader argument that, based on the observation of the witnesses and the content of their testimony, the witnesses were credible.

Given the State's theory of the case and its reliance on the jurors having observed the child witnesses, the prosecutor's comments were not improper. See State v. Cordeiro, 99 Hawai'i 390, 425, 56 P.3d 692, 727 (2002) (holding that the prosecutor is permitted to comment, based on evidence, that certain testimony is untruthful, and thus comment on the credibility of certain witnesses); Clark, 83 Hawai'i at 306, 926 P.2d at 211 (holding that the prosecutor's argument that the defendant's story was a "cockamamie story" was not improper, and was simply an argument that defendant's denial was improbable and untruthful).

Neither of the above identified instances amounted to reversible prosecutorial misconduct.

(2) Ineffective Assistance of Counsel.

Jhun's ineffective assistance of counsel claim is based on the trial counsel's failure to object to the above identified alleged instances of prosecutorial misconduct. As noted above, we conclude that the identified statements did not amount to prosecutorial misconduct. Therefore, counsel's lack of objection does not reflect a lack of skill, judgment, or diligence, or the withdrawal or substantial impairment of a potentially meritorious defense. Wakisaka, 102 Hawai'i at 514, 78 P.3d at 327.

(3) Motion for Mistrial.

Jhun contends that the circuit court abused its discretion by denying his second motion for mistrial following an exchange between the prosecutor and the children's grandmother,

who was testifying at the time, that indicated to the jury that Jhun had been incarcerated for another offense.

Prior to trial, the circuit court addressed Jhun's motion in limine regarding exclusion of evidence relating to Jhun's prior criminal record, prior arrests, and all other pending legal criminal matters. The State reassured the circuit court that it would not get into Jhun's criminal record, but wanted guidance as to how to address that grandmother had learned on July 6, 2012, that the defendant had been arrested for revocation of his federal supervised release, and it was only then that the children informed grandmother about the sexual assault. The circuit court instructed the prosecutor not to get into why the children told their grandmother about the assault unless the defense opened the door to such questioning during cross-examination.

During the State's direct examination of grandmother, the following occurred:

Q And was there a time soon after that where the defendant no longer had access to the home and your children or the two children?

A Yes.

Q And when was that?

A July 6. I found out he was incarcerated.

After defense counsel objected and moved to strike, a bench conference proceeded in which the defense moved for mistrial. The court ruled that it would strike the answer and tell the jury, to disregard, but deny the motion for mistrial. The court reasoned that the jury could infer that Jhun was incarcerated for the instant offense, and the issue does not rise to the level where the only remedy was a mistrial. The court then instructed the jury as follows: "All right. Ladies and gentlemen, the last answer of the witness is stricken from the record. You will disregard it entirely. It must play no part in your deliberations or your decision of this case. It is stricken from the record."

After a recess, the prosecutor resumed direct examination of grandmother by asking: "[Grandmother], at some point after July 6, 2012, did your granddaughter [] tell you some disturbing information?" Defense counsel objected and the

court called counsel to the bench:

Okay. I'm striking the answer -- the question from the record. I'm not going to allow any further questioning of the area because of the timing, you know. Like I said, one reason I did not declare -- grant the defense motion for mistrial is because again, in my estimation, a fair inference of this jury simply upon hearing the witness say that she found out he was incarcerated could be that it was for this offense, that he had been arrested for this offense. But the point is he wouldn't be arrested for this offense until the children told her this, et cetera, et cetera.

Defense counsel moved for a mistrial because the question was a violation of the court's ruling on the motion in limine. The court responded that it had made its ruling on the motion for mistrial and it had been denied. The bench conference concluded and the prosecutor moved on to a different question.

When prosecutorial misconduct is the basis for a motion for mistrial, a new trial is warranted only where "the actions of the prosecutor have caused prejudice to the defendant's right to a fair trial." *State v. Kupihea*, 80 Hawai'i 307, 316, 909 P.2d 1122, 1131 (1996) (quoting *State v. McGriff*, 76 Hawai'i 148, 158, 871 P.2d 782, 792 (1994)). "In order to determine whether the alleged prosecutorial misconduct reached the level of reversible error, [the reviewing court] consider[s] the nature of the alleged misconduct, the promptness or lack of a curative instruction, and the strength or weakness of the evidence against [the] defendant." *Id.* (quoting *State v. Agrabante*, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992)).

"Because the declaration of a mistrial is discretionary on the part of the trial court, we review the court's action on an abuse of discretion standard." *State v. Lam*, 75 Haw. 195, 201, 857 P.2d 585, 589 (1993) (citations omitted). The same is true with respect to the denial of a mistrial.

State v. Loa, 83 Hawai'i 335, 348-49, 926 P.2d 1258, 1271-72 (1996) (citation omitted).

Jhun contends that the circuit court abused its discretion because the prosecutor's question put Jhun's character into issue and, because the circuit court did not issue a curative instruction, the jury was influenced by Jhun's other criminal actions in violation of Hawaii Rules of Evidence (HRE) Rule 403 and 404(a).⁹

⁹ Jhun only presents argument in his brief that the circuit court abused its discretion by denying the second motion for mistrial. The point of error is phrased as: "The trial court abused its discretion when it denied the defense's motion for mistrial based on the DPA's improper question which violated HRE Rules 403 and 404(a)."

However, the circuit court did not abuse its discretion. While the circuit court did not explicitly strike the prosecutor's question, the circuit court refused to let grandmother answer, and the prosecutor moved on to a different subject. Thus, no evidence was adduced that intimated that Jhun was in jail for a separate issue at the time the children told grandmother about the sexual assault. To the extent that the prosecutor's question may have implied to the jury that Jhun had bad character, the jury instructions included that: "You must consider only the evidence which has been presented to you in this case and such inferences therefrom as may be justified by reason and common sense[,] and "[s]tatements or remarks made by counsel are not evidence. You should consider their arguments to you, but you are not bound by their recollections or interpretations of the evidence." Juries are presumed to follow the court's instructions. State v. Knight, 80 Hawai'i 318, 327, 909 P.2d 1133, 1142 (1996).

We conclude that the prosecutor's actions did not affect Jhun's substantial rights and the circuit court did not abuse its discretion in denying a mistrial.

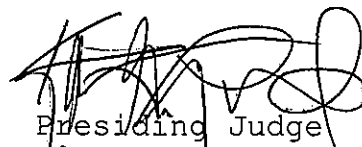

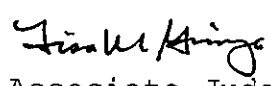
Therefore, IT IS HEREBY ORDERED that the Judgment of Conviction and Sentence, entered April 1, 2015, in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, June 21, 2016.

On the briefs:

William H. Jameson, Jr.,
Deputy Public Defender,
Office of the Public Defender,
for Defendant-Appellant.

James M. Anderson,
Deputy Prosecuting Attorney,
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Presiding Judge

Associate Judge

Associate Judge