SCWC-12-0000537

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Respondent/Plaintiff-Appellee,

vs.

SEAN CONROY, Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-12-0000537; CR. NO. 11-1-0355(4))

DISSENTING OPINION BY RECKTENWALD, C.J.,
IN WHICH NAKAYAMA, J., JOINS

I. INTRODUCTION

The majority vacates Sean Conroy's conviction for causing life-altering and painful injuries to his wife, for which there was overwhelming evidence of Conroy's guilt, based on statements the prosecutor made in closing argument. Contrary to the suggestion of the majority, this was not a mere credibility contest. According to Conroy's own testimony, he punched CW in the face twice. Conroy's blows broke CW's nose in two places, her cheekbone, and a tooth, and caused a blood clot

to form, which permanently restricted the movement of the left side of her face. Despite the fact that Conroy was eight inches taller than CW and twice her weight, Conroy contended that punching CW was justifiable because he believed "that such force [was] immediately necessary for the purpose of protecting himself" from CW, who Conroy alleged had kicked him in the groin and slapped the side of his head. Hawai'i Revised Statutes (HRS) § 703-304(1) (2014).

Although I agree with the majority that the prosecutor's statements were improper, the statements were harmless beyond a reasonable doubt. Quite simply, there was overwhelming evidence that the amount of force Conroy used was not "immediately necessary" for his self-protection, and there is no reasonable possibility that the prosecutor's improper statements might have contributed to his conviction. If a prosecutor's conduct is found to be improper, the reviewing court must determine whether a new trial is warranted under a three-part analysis that considers: (1) the nature of the alleged misconduct; (2) the promptness or lack of a curative instruction; and (3) the strength or weakness of the evidence against defendant. State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992) (citation omitted). In Conroy's case, proper application of the three-part test makes clear that the

evidence against Conroy was overwhelming, and the nature of the misconduct was not so egregious as to require a new trial. Although the trial court did not correct all of the instances of misconduct, on balance, the three factors weigh against granting Conroy a new trial. I therefore respectfully dissent.

II. DISCUSSION

I agree with the majority's conclusion that the prosecutor acted improperly by asserting that Conroy "was going to make sure that [CW] didn't give that smile to any other man, and she won't. She can't"; arguing that Conroy "broke something inside of [CW]"; arguing that "we" (the prosecutor and the jury together) should teach CW that justice exists in order to help CW heal; asserting, "You break my heart, I break your face. That's what this case is about"; and injecting his personal knowledge about the pain caused by a kick to the groin. Majority at 14-15.

An improper statement warrants a new trial if "there is a reasonable possibility that the error complained of might have contributed to the conviction." State v. Tuua, 125 Hawai'i 10, 16, 250 P.3d 273, 279 (2011) (quoting State v. Hauge, 103 Hawai'i 38, 47, 79 P.3d 131, 140 (2003)); see also State v. Nofoa, 135 Hawai'i 220, 229, 349 P.3d 327, 336 (2015) (stating that even if the conduct is improper, a new trial is warranted

only if there is a reasonable possibility that the error might have contributed to the conviction). I conclude that, under the Agrabante test, there is no reasonable possibility that any of the improper statements by the prosecutor contributed to Conroy's conviction, and thus, any error related to these statements was harmless.

A. The Nature of the Improper Statements Weighs Against Granting a New Trial

In analyzing the first Agrabante prong, we compare the nature of the prosecutor's improper statements to those statements in cases in which we have held that a new trial was required. State v. Maluia, 107 Hawai'i 20, 27, 108 P.3d 974, 981 (2005) ("Although the prosecution's [statement] was improper, the conduct was less egregious than that presented in those cases where we vacated the defendants' convictions and remanded for new trials.") (citing State v. Wakisaka, 102 Hawai'i 504, 78 P.3d 217 (2003); State v. Pacheco, 96 Hawai'i 83, 95, 26 P.3d 572, 584 (2001); State v. Marsh, 68 Haw. 659, 728 P.2d 1301 (1986)).

As in Maluia, none of the prosecutor's improper statements here rise to the level of the egregious misconduct addressed in cases where this prong weighed toward granting a new trial. See, e.g., State v. Rogan, 91 Hawai'i 405, 412, 984

P.2d 1231, 1238 (1999) (determining that a prosecutor's statement that it is "every mother's nightmare [to find] . . . some black, military guy on top of your daughter" was "an impermissible appeal to racial prejudice" warranting the reversal of a defendant's conviction);[1] Marsh, 68 Haw. at 660-61, 728 P.2d at 1302-03 (remanding the case for a new trial based on the prosecutor's improper statement during closing argument which expressed her personal opinion about the defendant's guilt: "I'm sure [the defendant] committed the crime"); State v. Basham, 132 Hawai'i 97, 111, 319 P.3d 1105, 1119 (2014) (determining that a prosecutor's "misstatement of the law [during closing argument] for which no curative instruction was given was not harmless beyond a reasonable doubt"); State v. Mainaaupo, 117 Hawai'i 235, 254, 178 P.3d 1, 20 (2008) (granting a new trial where a prosecutor's statement during closing argument improperly commented on the defendant's "fundamental right to remain silent").

Here, the prosecutor's improper statements did not

[1] The majority selectively quotes Rogan, 91 Hawai'i at 414, 984 P.2d at 1240, to make Rogan appear more similar to this case than it truly is. Majority at 15-16, 16 n.8. Rogan stands for the proposition that a prosecutor's improper statement that appeals to racial prejudice is "particularly egregious." Rogan, 91 Hawai'i at 415, 984 P.2d at 1240. Although the effect of the improper statement appealing to racial prejudice in Rogan was "compounded" by the prosecutor's invitation to the jury to place themselves in the victim's mother's shoes, Rogan does not hold that that invitation alone would have required a new trial. Id.

refer to the race or ethnicity of any party, express the prosecutor's personal belief that Conroy was guilty, misstate the law, or comment on the defendant's decision not to testify, distinguishing this case from Rogan, Basham, and Mainaaupo. The improper statements in this case were more akin to those in State v. Klinge, 92 Hawai'i 577, 994 P.2d 509 (2000), in which the prosecutor improperly stated, "The people's safety is the highest law." Id. at 583, 994 P.2d at 515. In Klinge, although this court concluded that statement was "both inappropriate and erroneous" and could "divert[] the jury from its duty to decide the case on the evidence," it further held that the improper statement "did not prejudicially affect Klinge's substantial rights." Id. at 592–93, 994 P.2d at 524–25 (emphasis added). I would reach the same conclusion here.[2] See also State v. West, 95 Hawai'i 484, 500–01, 24 P.3d 680, 696–97 (App. 2000), rev'd on other grounds, 95 Hawai'i 452, 24 P.3d 648 (2001) (prosecutor's

[2] In analyzing the nature of the misconduct, the majority contends that the prosecutor introduced "false evidence" that Conroy acted out of a jealous rage upon suspecting that CW was seeing other men. Majority at 24 n.11. The majority overlooks that Officer Melton, the responding officer, testified Conroy told him that CW was his girlfriend and that Conroy suspected CW of "fooling around." Officer Melton also testified that Conroy told him that on the day of the incident, CW "was going to be with another man." CW also testified regarding a previous incident where Conroy allegedly punched her on the side of her face and grabbed her by the throat and neck in reaction to CW having a "man's name in [her] contact list" in her phone. Based on this evidence, the prosecutor's suggestion that Conroy assaulted CW out of jealousy was a reasonable inference from the evidence adduced at trial. However, I agree that the wording used by the prosecutor improperly suggested that the prosecutor was directly quoting Conroy.

urging the jury to convict so that victim would "know that she can be with God" was "indubitably" prosecutorial misconduct "calculated to inflame the passions or prejudices of the jury," but was not so egregious as to require a new trial).

B. The Inconsistent Curative Instructions Weigh in Favor of Granting a New Trial.

"Generally, we consider a curative instruction sufficient to cure prosecutorial misconduct because we presume that the jury heeds the court's instruction to disregard improper prosecution comments." State v. Wakisaka, 102 Hawai'i 504, 516, 78 P.3d 317, 329 (2003) (citing Rogan, 91 Hawai'i at 415, 984 P.2d at 1241). With respect to two of the prosecutor's improper statements (the statement regarding the pain caused by a kick to the groin, and the statement, "You break my heart, I break your face. That's what this case is about."), the circuit court sustained Conroy's objections, struck the statements, and instructed the jury to disregard the stricken remarks. Thus, we must presume that the jury properly disregarded those statements, and this factor weighs in favor of finding the error harmless with regard to those statements.

As to the prosecutor's improper statements regarding teaching CW that justice exists, while Conroy objected and the court sustained the objection, the statement was not stricken.

However, immediately prior to closing arguments, the court instructed the jury:

> The lawyers will now make their closing arguments. What they say is not evidence, and you are not bound by how they interpret or remember the evidence. The only evidence which you must consider in deliberations comes from the witness[es]' testimony and from the exhibits which are in evidence.

Thus, the jury was aware that it should not consider the prosecutor's closing argument as evidence, and that the defendant's objection was sustained. Given all the circumstances, it appears that the jury was adequately informed that it should not consider this argument.

As to the prosecutor's assertion that Conroy was going to make sure that CW did not give her smile to another man, Conroy did not object. As to the prosecutor's statement that Conroy broke something "inside" of CW, the court overruled Conroy's objection. As to the prosecutor's statement regarding providing justice to help CW heal, the court also appeared to overrule Conroy's objection when it simply stated that the objection was "noted." Because there were no curative instructions by the court in any of these instances, the second factor on balance weighs against finding harmless error with regard to those statements.

C. The Overwhelming Evidence of Conroy's Guilt Weighs Against Granting a New Trial.

1. There was overwhelming evidence of Conroy's guilt of second-degree assault.

Under HRS § 707-711, at the time of Conroy's alleged offense, assault in the second degree required a person to (a) intentionally, knowingly, or recklessly cause substantial bodily injury to another; or (b) recklessly cause substantial or serious bodily injury to another. See HRS § 707-711(1)(a)-(b) (2014). "Substantial bodily injury" is defined as "bodily injury which causes . . . [a] bone fracture . . . ." HRS § 707-700 (2014). Conroy himself testified that he punched CW's face twice. It is also undisputed that CW suffered multiple facial bone fractures as a result of the incident, and that Conroy caused those injuries. Thus, Conroy clearly caused "substantial bodily injury" to CW.

To commit assault in the second degree, Conroy must only have recklessly caused the injury. HRS § 707-711(a)-(b); see also State v. Eastman, 81 Hawai'i 131, 140, 913 P.2d 57, 66 (1996) ("[T]he prosecution needs only to prove the lowest of the three alternative levels of culpability, i.e., recklessness, in order to satisfy the state of mind requirement [for this offense].").

Even if we accept Conroy's account of the events as

true, the evidence supports the conclusion that Conroy's actions were, at the very least, reckless under HRS §§ 702-206(3)(c)-(d) (2014), which provides:

> (c) A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.
>
> (d) A risk is substantial and unjustifiable within the meaning of this section if, considering the nature and purpose of the person's conduct and the circumstances known to him, the disregard of the risk involves a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation.

There was a significant disparity in size between Conroy and CW. On the date of the incident, Conroy was 6'4"-6'5" tall and weighed 240-250 pounds, while CW was only 5'9" and 120 pounds. Additionally, Conroy punched CW twice with enough force to break her nose in several places and fracture her cheekbone, breaking his own hand in the process. Conroy was familiar with CW's physical stature, and a law-abiding person of Conroy's size would have exhibited a higher degree of care in a similar situation. Thus, the undisputed evidence shows beyond a reasonable doubt that Conroy consciously disregarded the risk of his conduct to CW, thus constituting a gross deviation from the standard of conduct a law-abiding person would exhibit in the same situation. See id.

2. There was overwhelming evidence disproving Conroy's self-defense claim.

Self-defense is an affirmative defense to a charge of second-degree assault. HRS § 703-304(1). Conroy raised self-defense by testifying that there were "multiple incidents" where CW previously "attacked" and "injured" him. He referred to a 2009 incident in which CW hit him with a television remote control and knocked out his tooth and a 2010 incident in which CW kicked his hand. Conroy also asserted that CW kicked him in the groin and slapped him, which made his two punches to her face necessary for his own self-defense. But, even taking all of Conroy's testimony to be true, the amount of force he used was not objectively reasonable.[3]

HRS § 703-304(1) provides, "[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself[4] against the use of unlawful force by the

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[3] As noted above, I accept all of Conroy's testimony as true for purposes of this analysis. However, CW denied kicking Conroy in the groin prior to being punched. Officer Melton testified that Conroy did not mention that CW kicked him in the groin, and that if Conroy had done so, he would have noted it in his police report because it is an "attention grabber." Further, Conroy testified that while he was arguing with CW before she allegedly kicked him in his groin, he was thinking, "I'm done being disrespected." Moreover, Jon Brammer, CW's and Conroy's neighbor, testified that he heard Conroy state that CW "asked for it," and stated, "[Y]ou know you had it coming," and "[D]on't tell me you didn't deserve it."

[4] Based on the language of the statute, I disagree with the majority's implication that Conroy's claim that he unthinkingly reacted to CW's slap and

(continued . . .)

other person on the present occasion."[5] Id.

HRS § 703-310(1), which applies to self-defense under HRS § 703-304, provides:

> When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under sections 703-303 to 703-309 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of the actor's use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which recklessness or negligence . . . suffices to establish culpability.

HRS § 703-310(1) (2014).

"HRS § 703-310 quite plainly instructs that self-defense is not available as justification where a defendant believes that the use of force is necessary, but is reckless or negligent in so believing." State v. Culkin, 97 Hawai'i 206, 216, 35 P.3d 233, 243 (2001) (emphasis added) (citing State v.

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kick by punching her two times in the face was itself sufficient to establish that he acted in self-defense. Majority at 26-27. This line of reasoning elides the required legal analysis of the necessity of the defendant's use of force. State v. Tafoya, 91 Hawai'i 261, 269, 982 P.2d 890, 898 (1999). In order to claim self-defense, the defendant's actions must be necessary for his protection, not merely a reaction to the victim's use of force.

[5] Commentary to HRS § 703-304 provides in relevant part:

> Subsection (1) requires a belief by the actor that the use of protective force is actually necessary, and that unlawful force . . . is to be used by the assailant. He must believe, further, that immediate use of force is required[.] . . . Finally, the actor must believe that the particular degree of force used by him is necessary.

HRS § 703-304 cmt. (2014) (emphasis added).

Nupeiset, 90 Hawai'i 175, 186, 977 P.2d 183, 194 (App. 1999) (internal citations omitted)). "HRS § 703-310 . . . reflects the legislature's decision to limit the availability of self-defense as justification to situations in which the defendant's subjective belief that self-defense was necessary is objectively reasonable." Id. (citing Supplementary Commentary on HRS § 703-300 (1972)).

Even if we accept Conroy's account of the events, Conroy's conduct was not justifiable because the force he exerted was not "immediately necessary for the purpose of protecting himself." HRS § 703-304(1). Conroy's conduct was objectively disproportionate given that he was twice CW's weight and eight inches taller than her. Thus, even if CW had kicked and slapped Conroy, Conroy's undisputed punches to CW's face with enough force to fracture her nose and her cheekbone, and break his own hand, were not justifiable for his self-protection. Further, even if Conroy believed that his use of force was necessary, from the viewpoint of a reasonable person in the same situation, his belief was reckless or negligent, and the degree of the force he used was not justifiable. See State v. Tafoya, 91 Hawai'i 261, 269, 982 P.2d 890, 898 (1999) (holding that defendant's self-defense claim "must fail as a matter of law" because the amount of force used was disproportionate to

the threat where defendant alleged that victim only slapped him, and victim suffered multiple facial fractures); State v. Sanchez, 2 Haw. App. 577, 579, 636 P.2d 1365, 1366 (1981) (per curiam) (holding that it was not reasonable for defendant to believe that kicking victim while victim was on the ground was necessary force in self-defense). Thus, Conroy's claim of self-defense is without merit, even taking as true all of the facts he asserts.

This case involved more than the credibility of competing versions of the facts. First, there is no dispute that Conroy punched CW in the face — Conroy testified that he did so, not once, but twice. The only relevant disputed fact is whether CW kicked and slapped Conroy prior to Conroy punching her twice in the face. But even if the jury believed Conroy's account, there was overwhelming evidence of Conroy's guilt, as set forth above. Second, to say that this case is merely a credibility contest discounts the physical evidence of CW's extensive injuries and other testimony, including from Jon Brammer, who was CW and Conroy's neighbor, and testified to the interaction between Conroy and CW immediately after the alleged assault. The majority contends that I neglect the factual issue of whether CW kicked Conroy prior to him punching her two times with enough force to break his own hand and CW's nose,

cheekbone, and tooth. To the contrary, even if CW had kicked Conroy, the amount of force he used in response was clearly disproportionate to the threat posed, and "the strength . . . of the evidence" disproving Conroy's self-defense claim weighs against granting a new trial. Agrabante, 73 Haw. at 198, 830 P.2d at 502.

With respect to the third prong of the harmlessness analysis, this case is again similar to Klinge, in which this court wrote:

> [I]n light of the strength of the evidence against Klinge, [the prosecutor's statement that "the people's safety is the highest law"] taken in context does not reach the level of reversible error. At trial, the evidence with respect to conduct was not in dispute. . . . With regard to the issue of intent, Klinge's defense essentially hinged upon Klinge's testimony.

Klinge, 92 Hawai'i at 593, 994 P.2d at 525.

Here, too, Conroy's conduct was not in dispute, and his defense hinged upon his testimony as to intent. Klinge stands for the proposition that, in such a case, the strength-of-the-evidence prong may still weigh against granting a new trial.

Even taking as true all of the evidence Conroy presented, including his own testimony, there was no reasonable basis for acquitting him of second-degree assault. For this reason, I respectfully disagree with the majority's assertion that the there is a reasonable possibility that the improper

statements contributed to Conroy's conviction. As I discuss supra, Section II(A), the prejudice to the defendant from a prosecutor's statement is properly considered under the first prong of the test, "the nature of the alleged misconduct." Agrabante, 73 Haw. at 198, 830 P.2d at 502.

In sum, the evidence presented supporting Conroy's guilt is so overwhelming that there is no reasonable possibility that his conviction was due to the prosecutor's improper statements. Therefore, the third prong of the harmlessness test weighs in favor of finding harmless error. While I do not condone the prosecutor's improper statements, the error does not require a new trial because it was harmless beyond a reasonable doubt, and accordingly I would affirm Conroy's conviction.

III. CONCLUSION

The prosecutor's improper statements were harmless beyond a reasonable doubt because there was no possibility that the errors contributed to Conroy's conviction. Respectfully, I dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama