

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27894

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
VIET LAP NGUYEN, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 04-1-2219)

K. HAMAKADO  
CLERK, APPELLATE COURTS  
STATE OF HAWAI'I

2007 JUL -5 AM 10:29

FILED

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Nakamura and Fujise, JJ.)

Defendant-Appellant Viet Lap Nguyen (Nguyen) appeals from the Judgment of Conviction and Sentence entered on March 24, 2006, in the Circuit Court of the First Circuit (circuit court).<sup>1</sup> A jury convicted Nguyen of Unauthorized Entry Into A Motor Vehicle (UEMV), in violation of Hawaii Revised Statutes (HRS) § 708-836.5 (Supp. 2005) (Count One),<sup>2</sup> Promoting a Dangerous Drug in the Third Degree, in violation of HRS § 712-1243 (Supp. 2005) (Count Two),<sup>3</sup> and Unlawful Use of Drug Paraphernalia, in violation of HRS § 329-43.5 (1993) (Count Three).<sup>4</sup>

<sup>1</sup> The Honorable Michael D. Wilson presided.

<sup>2</sup> Hawaii Revised Statutes (HRS) § 708-836.5 (Supp. 2005) states:

(1) A person commits the offense of unauthorized entry into motor vehicle if the person intentionally or knowingly enters or remains unlawfully in a motor vehicle with the intent to commit a crime against a person or against property rights.

(2) Unauthorized entry into motor vehicle is a class C felony.

<sup>3</sup> HRS § 712-1243 (Supp. 2005) states:

(1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.

(2) Promoting a dangerous drug in the third degree is a class C felony.

<sup>4</sup> HRS § 329-43.5 (1993) states in relevant part:

(a) It is unlawful for any person to use, or to possess with intent

On March 24, 2005, Defendant was sentenced to five years' imprisonment in Counts One, Two, and Three, all to run concurrently, with a mandatory minimum of four years as a repeat offender in Count Two.

On appeal, Nguyen argues that the Deputy Prosecuting Attorney (DPA) engaged in prosecutorial misconduct when: (1) "Defendant-Appellant Nguyen was in effect labeled a 'liar' for purposefully withholding information to a question by the State even with a delayed curative instruction from the trial court[,]" (2) "Defendant-Appellant Nguyen was asked whether police officers were in effect lying[,]" and (3) the "State was allowed to argue [in closing argument] that Defendant-Appellant Nguyen was a liar and had lied to the jury." Nguyen argues that "the closing argument of the State was so egregious that [he] was denied a fair trial and his conviction should be reversed and reprosecution prohibited under the double jeopardy clause of . . . the Hawaii State Constitution." Finally, Nguyen argues that the multiple instances of alleged prosecutorial misconduct, when viewed cumulatively, denied him a fair trial and require that his conviction be reversed and reprosecution barred.

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 dispose of Nguyen's points of error on appeal as follows:

1. The DPA's question, "[a]re you purposefully withholding information to my question, sir?" was argumentative and therefore improper. However, it was harmless beyond a reasonable doubt since the circuit court sustained Nguyen's objection, limited the scope of additional questions by the DPA

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to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

about that issue, and instructed the jury to disregard the question. Moreover, there was substantial evidence adduced at trial establishing Nguyen's guilt, and undermining his credibility. See State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992) ("In order to determine whether the alleged prosecutorial misconduct reached the level of reversible error, we 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").

2. The DPA's question during cross-examination of Nguyen, "[s]o your testimony is that both Officer Wakabayashi and Officer Tanita are lying about where that pen came from?" was improper. See State v. Maluia, 107 Hawai'i 20, 24, 108 P.3d 974, 978 (2005) ("the prosecution may not ask a defendant to comment on another witness's veracity"). However, it was harmless beyond a reasonable doubt because the circuit court sustained Nguyen's objection to the question, and the jury was later instructed that "[i]t is your exclusive right to determine whether and to what extent a witness should be believed and to give weight to his or her testimony." See State v. Culkin, 97 Hawai'i 206, 228 n.23, 35 P.3d 233, 255 n.23 (2001) (citations omitted). Here, there is no reason to conclude that the jury ignored the circuit court's instruction to use its own judgment in assessing the credibility of the witnesses. Moreover, as we noted above, there was substantial evidence adduced at trial establishing Nguyen's guilt. See Maluia, 107 Hawai'i at 27, 108 P.3d at 981 (although prosecutor improperly asked a defendant to comment on the veracity of other witnesses, that conduct was harmless beyond a reasonable doubt).

3. The DPA did not commit prosecutorial misconduct during closing argument when he repeatedly referred to Nguyen as a liar, and told the jury that he had lied to them. State v. Clark, 83 Hawai'i 289, 305, 926 P.2d 194, 210 (1996) ("Where the

evidence presents two conflicting versions of the same events, a party may reasonably infer, and thus, argue, that the other side is lying.") (citation and internal quotation marks omitted).

4. Finally, the cumulative effect of the prosecutorial misconduct did not deprive Nguyen of a fair trial. The Hawai'i Supreme Court has recognized "that there are situations in which although no single prosecutorial act deprives Defendant of a fair trial, the cumulative effect of the prosecutor's improper conduct can be so prejudicial as to deny him or her a fair trial." State v. Pulse, 83 Hawai'i 229, 244, 925 P.2d 797, 812 (1996) (internal quotation marks, brackets, and citation omitted). Here, however, we conclude that the actions challenged by Nguyen, to the extent they were improper, were isolated and did not affect the outcome of the trial even when viewed cumulatively. Thus, he was not denied a fair trial. Cf. State v. Pemberton, 71 Haw. 466, 476, 796 P.2d 80, 85 (1990) (holding that the cumulative effect of the prosecutor's continuous disregard for the trial court's admonitions and curative attempts was likely to have resulted in the "reverse effect of focusing the jury's attention on that evidence and the fact that it was being suppressed[,] thus denying the defendant a fair trial).

Therefore,

IT IS HEREBY ORDERED that the March 24, 2006 Judgment of Conviction and Sentence of the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, July 5, 2007.

On the briefs:

Chester M. Kanai,  
for Defendant-Appellant.

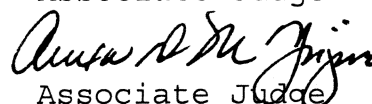
Daniel H. Shimizu,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge