

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,  
Plaintiff-Appellee/  
Cross-Appellant,

vs.

DANIEL SIPE SISNEROS, JR.,  
Defendant-Appellant/  
Cross-Appellee.

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APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 98-1606)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, and Nakayama, JJ., and  
Acoba, J., Dissenting, with whom Ramil, J., joins)

Defendant-appellant Daniel S. Sisneros appeals from the first circuit court's February 22, 1999, judgment of conviction<sup>1</sup> and sentence for first degree assault, in violation of Hawai'i Revised Statutes § 707-710 (1993). Upon carefully reviewing the record<sup>2</sup> and the briefs submitted by the parties and having given

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<sup>1</sup> The Honorable Melvin K. Soong presided.

<sup>2</sup> The most relevant evidence in this case is as follows. Sisneros was driving his truck on a Saturday morning along the freeway headed towards the Waikele area accompanied by an acquaintance, Jimmy Ilae, when Ilae apparently exchanged unpleasantries with the complainant, a passing motorist. The testimony of Sisneros as to what happened during this time is replete with inherent contradictions, such as his testimony that he drove his truck into the lane in front of the complainant "rather slowly" and did not "cut off" the complainant's vehicle, while also acknowledging that the complainant was forced to slam on his brakes as a result of Sisneros's maneuver.

(continued...)

due consideration to the arguments advanced and the issues raised

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<sup>2</sup>(...continued)

Shortly thereafter, Sisneros found himself stopped a few vehicles behind the complainant at a busy intersection at Waikele Shopping Center. Ilae, whom Sisneros testified weighed approximately 300 pounds, got out of the truck, ran over to the complainant's vehicle, and began assaulting the complainant while the complainant sat in his car. Sisneros then drove around several stopped cars waiting at the intersection and proceeded to park his truck in the intersection in a manner that appeared to be blocking the complainant's car. Sisneros's explanation for parking his truck in the middle of this busy intersection was that he just wanted to "see what was going on."

Three witnesses testified that the complainant (who by this time had exited his vehicle) appeared to be losing a scuffle with Ilae. After retrieving a long pole from his truck, Sisneros, according to eyewitnesses unrelated to the complainant, calmly walked up behind the complainant and struck the complainant with the pole while aiming for the complainant's head.

Although Sisneros agreed that Ilae was the aggressor, Sisneros testified that he wanted to be a "peacemaker" and to protect Ilae. He, therefore, took the pole and aimed for the complainant's hand in order to disarm the "weapon" the complainant was holding, which turned out to be the stalk of a sugar cane. However, he missed and instead struck the complainant in the right arm, knocking him backwards seven feet. In the process, Sisneros stated that his own hand slipped down the pole, forcing the pole upwards so that it "moved right up and hit" the complainant in the head.

The undisputed medical expert testimony was consistent with the testimony of the witnesses who said that Sisneros was aiming for the complainant's head as well as with the testimony of the complainant and his wife, and inconsistent with Sisneros's testimony. The evidence indicated that the complainant suffered a "deep laceration" "down to the muscle" on his right cheek that caused permanent scarring. In addition, the complainant's unrefuted testimony indicated that he sustained a dislocated left shoulder and permanent left shoulder damage as a result of the right-sided blow because the complainant's left arm was restrained by Ilae at the time that Sisneros struck him. Even reviewing a cold transcript, it is difficult to imagine how a pole merely "moving up" as Sisneros's hand "slipped" along it could do so with such force that the pole would knock the complainant back seven feet and cause permanent injury to the complainant's right cheek and to the shoulder on the other side of the complainant's body. In short, in addition to the overwhelming evidence derived from the witnesses and medical evidence indicating that Sisneros did not act to "defend" Ilae, the testimony of Sisneros himself was contradictory and inherently incredible.

Finally, Sisneros created a strong inference of his consciousness of guilt when he testified that, rather than proceeding to his intended destination after the incident, he first went to drop off Ilae at home and later returned to the area in a different vehicle.

by the parties, we resolve each of Sisneros's contentions as follows.<sup>3</sup>

First, Sisneros relies upon Agard v. Portuondo, 117 F.3d 696 (2d Cir. 1997), reh'g denied, 159 F.3d 98 (1998), to support his contention that the trial court erred in denying his motion for mistrial premised upon the prosecutor's comments that Sisneros tailored his testimony to that of the other witnesses. Agard's reversal by the United States Supreme Court in Portuondo v. Agard, 529 U.S. 61 (2000), forecloses Sisneros's federal constitutional argument.<sup>4</sup> As to Sisneros's state constitutional argument, we hold that, assuming arguendo that the prosecutor's comments violated Sisneros's state constitutional rights, the trial court's error in denying his motion for mistrial was harmless beyond a reasonable doubt. Our holding is based on our conclusions that: (1) there was overwhelming evidence of Sisneros's guilt; and (2) any adverse effect on Sisneros's credibility resulting from the prosecutor's argument was minimal as compared to the numerous instances where Sisneros's credibility was legitimately called into question.

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<sup>3</sup> Justice Acoba opines that this court has implicitly decided two significant issues of first impression in the resolution of this case. As discussed herein, we have not.

<sup>4</sup> The Supreme Court decided Portuondo after Sisneros filed his opening brief in this case.

As to Sisneros's second contention regarding a juror's spontaneous remark,<sup>5</sup> we hold that the one-word remark was not reversible "structural error." See Hawai'i Rules of Penal Procedure Rule 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

Third, we hold that the juror questioning procedure utilized by the trial court did not deprive Sisneros of due process. See State v. Culkin, 97 Hawai'i 206, 35 P.3d 233 (2001).

Fourth, assuming arguendo that the trial court (a) committed constitutional error when it refused to permit Sisneros to answer a juror question regarding why he did not take an alternate route to his destination and (b) abused its discretion in allowing the prosecution to discuss the alternate route (the existence of which was properly in evidence) during rebuttal argument, we hold that any such error was harmless beyond a reasonable doubt.<sup>6</sup>

Finally, Sisneros alleges several instances of prosecutorial misconduct.

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<sup>5</sup> While questioning the complainant regarding a photograph of his injuries, the prosecutor made reference to a "bit of glare" on the photograph at the injury site. Just as the complainant began to explain, "That's the . . .," a juror stated, "Ointment." And, the complainant stated, "Ointment that was on it."

<sup>6</sup> Justice Acoba would hold that the trial court's actions per se warrant a new trial. Sisneros does not raise such a "per se" argument.

(a) Unlike Commonwealth v. Ferreira, 364 N.E.2d 1264, 1272-72 (Mass. 1977), upon which Sisneros relies, the prosecutor's description of the reasonable doubt standard as being commonplace and "nothing mystical or magical" did nothing to define, minimize, or suggest an inappropriate measure for the standard.

(b) The prosecutor's rebuttal argument did not impermissibly shift the burden of proof onto Sisneros because the prosecutor merely commented on Sisneros's failure to produce material evidence corroborating his testimony. See State v. Napulou, 85 Hawai'i 49, 58-59, 936 P.2d 1297, 1306-07 (App. 1997). With respect to the prosecutor's reference to Sisneros's failure to call Ilae as a witness, such comment was clearly improper. See State v. Cavness, 46 Haw. 470, 472-73, 381 P.2d 685, 686 (1963) (prosecutor's remark that defendant had failed to call accomplice to corroborate his testimony improper).

"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."

State v. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209 (1996) (internal quotations omitted). Although the nature of the alleged misconduct in this case was potentially serious, the court promptly struck the argument. See Cavness, 46 Haw. at 473, 381 P.2d 686-87 (prosecutor's improper remark harmless because it

was stricken by the court). Considering the strength of the evidence against Sisneros, the remark was not reversible error.

(c) Relying on State v. Smith, 91 Hawai'i 450, 984 P.2d 1276 (App. 1999), cert. denied, 91 Hawai'i 450, 984 P.2d 12776 (1999), Sisneros alleges that the prosecutor committed reversible misconduct by arguing that Sisneros may have changed his testimony after looking at his attorney during cross-examination. However, Smith is inapposite because the defendant in Smith did not testify. See id. at 453, 984 P.2d at 1279. Where, as here, the defendant testifies, the prosecutor may legitimately comment on the defendant's appearance and conduct during the testimony.

(d) Sisneros alleges that the prosecutor impermissibly accused defense counsel of helping him lie on the witness stand. The statement that defense counsel "may have twitched" during Sisneros's testimony is not such an accusation, and, in any event, Sisneros did not object to the prosecutor's comment. See State v. Hogle, 71 Haw. 147, 150, 785 P.2d 1311, 1313 (1990). Nor did Sisneros object to the prosecutor's comment on Sisneros's purported temper. See id.

(e) Sisneros lastly asserts that, on several occasions, the prosecutor impermissibly gave his personal opinion that Sisneros was guilty and that his testimony was not credible. In context, the statements complained of were reasonable

inferences derived from specific evidence in the record. See Clark, 83 Hawai'i at 304, 926 P.2d at 209.

Based on the foregoing, we hold that the prosecutor did not commit reversible misconduct. Therefore,

IT IS HEREBY ORDERED that the February 22, 1999 judgment from which this appeal is taken is affirmed. Furthermore, in light of the above disposition, we need not address the prosecution's cross-appeal.

DATED: Honolulu, Hawai'i, December 24, 2002.

On the briefs:

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