NO. 22782

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
BENJAMIN REED, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 99-0003)

MEMORANDUM OPINION
(By: Burns, C. J., Watanabe and Lim, JJ.)

Defendant-Appellant Benjamin Reed (Reed) appeals the July 29, 1999 judgment of the circuit court of the second circuit, which convicted him, as charged, of the offense of robbery in the second degree,[1] and sentenced him to a ten-year indeterminate term of imprisonment subject to a mandatory minimum term of six years and eight months.

On appeal, Reed argues that the prosecutor committed misconduct when he (1) suggested to the jury that Reed had

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[1] Hawaiʻi Revised Statutes (HRS) § 708-841(1)(a) (1993) provides that "[a] person commits the offense of robbery in the second degree if, in the course of committing theft[,] . . . [t]he person uses force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance[.]" HRS § 708-841(2) (1993) provides that "[r]obbery in the second degree is a class B felony."

The court instructed the jury on the elements of the charged offense of robbery in the second degree. The court also instructed the jury on the lesser included offense of theft in the third degree. HRS § 708-832(1)(a) (1993) provides that "[a] person commits the offense of theft in the third degree if the person commits theft . . . [o]f property or services the value of which exceeds $100[.]" HRS § 708-832(2) (1993) provides that "[t]heft in the third degree is a misdemeanor."

conformed his testimony to the statutory elements of the included misdemeanor offense, and (2) argued to the jury that a State witness was "just telling the truth." We disagree with these contentions and affirm.

I. Background.

The opening statements foreshadowed the critical issue separating the parties. The prosecutor opened his statement by declaring that "[t]his case is about a thief and a robber." Reed's counsel countered: "Ladies and gentlemen, this is a shoplifting case."

In the State's case, Kmart loss control officer Stephen Wagner (Wagner) testified that on January 6, 1999, at around 7:00 p.m., he was on duty in the toy section of the Kahului Kmart store, dressed in mufti so as to look like an "ordinary everyday shopper[.]" He saw Reed remove an empty Kmart shopping bag from his pocket, take two computer games (total $247.98 retail) off the store shelf and place them inside the bag. Reed then walked out of the store through the garden shop, passing an open and operating cash register in the process.

Wagner followed Reed out of the store approximately 30 feet into the parking lot and identified himself as "store loss control." Reed continued walking, however, so Wagner reiterated his office and started to display some identification. At that point, Reed punched Wagner in the face and ran. Wagner pursued

and tackled Reed. A struggle ensued, during which Reed punched Wagner a couple more times. Reed again escaped, but Wagner again pursued and tackled him, whereupon Reed finally surrendered.

Wagner testified that he felt pain from Reed's punches. However, under questioning from Reed's attorney, he admitted that he had not mentioned this in any of his three previous reports on the incident. "No, it's a matter of pride[,]" he explained, "I usually don't admit to being in any pain."

Testifying in his own defense, Reed admitted that he went to Kmart to shoplift, and did so in substantially the manner described by Wagner. Reed maintained, however, that as he was leaving the store, Wagner, for reason or reasons inexplicable, grabbed him from behind, pushed him into the parking lot and attempted to pull him to the ground. Although Reed kept telling him, "I give up[,] . . . enough already[,]" Wagner continued his attempt, throwing him onto a parked car and ripping his shirt off in the process, stopping only because "someone finally came[.]" Reed adamantly denied hitting Wagner. Reed surmised that Wagner "took it personal like I actually stole from him or like he had a personal vendetta against me."

To start his closing argument, the prosecutor stated:

> [Reed] is not only a thief but he's a robber too. On January 6th, 1999, he went into Kmart store with the specific intent of taking two V Tech computers from Kmart. He shoplifted the computers.

And because he didn't want to get caught by [Wagner], the loss control agent, because he didn't want to get caught and arrested, he punched [Wagner] in the face to try to knock [Wagner] away, and he kept running away after he punched [Wagner].

And when [Wagner] tackled him, he kept punching him to try and get away. And it wasn't until [Wagner] tackled [Reed] in the bushes that he finally gave up.

. . . .

Now, let's look at the charge here. It's robbery in the second degree. Remember the State needs to prove to you each elements [sic]. There's [sic] two elements here beyond a reasonable doubt.

That on or about January 6, 1999 in the County of Maui, State of Hawaii; [Reed] was in the course of committing theft. And that, two [sic], that while doing so, [Reed] used force against a person of anyone present, to wit, [Wagner], with intent to overcome that person's physical resistance or physical power of resistance.

. . . .

So let's -- what does this mean? It was in the course of committing theft. The law has defined what that is, and I'm going read [sic] it to you and you're going to get this back in the jury room when you're deliberating.

And act [sic] shall be deemed in the course of committing a theft if it occurs in an attempt to commit theft. So if it's an attempt to commit theft, that's in the course of committing theft. In the commission of theft, so if you are actually commit [sic] a theft, that's in the course of committing theft.

But it also includes this element or in the flight after the attempt or commission. So if you find that [Reed] attempted to commit theft, committed theft, or in the flight after the -- after the theft, and that's considered in the course of committing theft.

Further on in his closing argument, the prosecutor told the jury:

> Now, of course, [Reed] in his testimony is saying yeah, you got me on the theft, but I didn't hit him.
>
> **And think about this. You heard [Reed's] testimony. His testimony has to avoid this definition of in the course of committing theft because [Reed] knows he's liable for robbery if he uses force while he's committing theft or in the flight.**
>
> **So can't [sic] admit that he used any force while he was committing the theft or when he was in flight.** And what does his testimony say? What did he tell you? Let's look at his testimony.

(Emphasis added to passage cited on appeal as prosecutorial misconduct.) Towards the end of his closing argument, the prosecutor argued the question of credibility:

> Well, let's think about this: What interest does [Wagner] have in this case? His primary job is shoplifting [sic]. What reason does he have to make up the fact that he got punched?
>
> He told several people, in fact, that he got punched. He told the [police] officers. He filled out an internal report. He came and testified at grand jury, and he came into court and testified giving the same story over again. I got punched by [Reed]. I was trying to stop him from shoplifting the computers.
>
> **Does [Reed] have an interest in the outcome of this case? You bet he does. You bet he does. And that's why his story is -- his testimony s [sic] made up to fit in -- to avoid that definition, this definition right here, in the course of committing theft.**
>
> **Because he can't admit that he used any force while he was committing the theft as he walked out of Kmart or that he used any force when he was trying to escape from [Wagner].**

> **He can't admit to that, so he has to come up with a story, and his story to you is unbelievable, and we discussed why it is.**

(Emphasis added to passage cited on appeal as prosecutorial misconduct.)

Reed's attorney commenced the substance of his closing argument as follows:

> Ladies and gentlemen, this case is about a failed shoplifting and an angry prideful security guard. This case is about a guy who was shoplifting and didn't let himself be dragged into dirt as fast as the security guard wanted.
>
> We're not going to discuss the shoplifting much. It's a given. Everyone agrees [Reed] was shoplifting. Actually if there's any discussion about that, I don't think you need to discuss it because that's what [Reed] told you. There's no dispute. It was shoplifting.

A little later, he crystallized Reed's defense:

> What I'm talking about now is [Reed] stole the computers. He didn't hit the security man.
>
> How is that possible? Well, ask yourself, your common sense, if you commit one crime and were charged with two crimes, why would he confess to both of them? That would be stupid.
>
> . . . .
>
> Basically the whole issue in this case is whether [Reed] hit the security guard twice in the face with a full fist and twice on the body. You realize that's what both me and [the prosecutor] have been talking about. Now it's a question of who to believe and why to believe them.

He echoed this theme throughout his closing argument; for example:

> But in order to convince in -- in order to convict [Reed] of robbery, because you'll get an instruction that you may convict him of theft in the third degree. $247.98, I think.
>
> In order to convict him of robbery, all 12 of you have to believe that [Reed] actually nailed that guy four times. That's what he told you, four times, and didn't even get a red mark.

He ended his closing argument with the same refrain:

> I believe it's your duty to find him guilty of theft in the third degree. I wish I had more to say, but this was a short case. I am sure you can remember the evidence as well as anyone.
>
> So that's all I have to say. Just asking you to think about these things and vote with your conscious [sic]. Find him not guilty of robbery. Thank you.

In arguing credibility, Reed's attorney explained to the jury why Wagner was lying about being punched:

> I think [Reed] testified with more candor, more honesty, than [Wagner]. [Wagner] is an angry guy. What really happened here -- he tried to put [Reed] down in the dirt, and [Reed] is a big guy. He didn't want to go down on the pavement or the dirt.
>
> And that's what they were struggling about. [Reed] is bigger, must have been very difficult for [Wagner] to try to get [Reed] down because that's -- he just stands there. Now that makes sense.
>
> . . . .
>
> Now, that alone should make you have some questions as to whether this punching occurred. And I can visualize this. [Wagner] is around [Reed's] waist, and [Reed's] heavier and not cooperating with his plan to get in the dirt.
>
> I don't think it's a legal obligation to get in the dirt when someone tells you. Imagine how frustrating this is. [Wagner] told you that he didn't mention his pain to anyone until he

> was up here -- and probably had been prepped -- because it was a matter of pride.
>
> He didn't want the people at his store to think he was, I don't know what, a whimp [sic], something like that. But it's also a matter pride [sic] that he had a heck of a time taking this guy down. He's a small guy. He knew he had his hands full.
>
> And there were people watching. They didn't testify, but there were people. So how can he explain it? He can't charge the guy with resisting arrest. [Wagner] is not a police officer.
>
> You have no obligation as you do to a uniformed officer to submit. No resisting arrest. So that charge is out. Only remaining charge is he hit me. It's got to be a robbery.

In his rebuttal argument, the prosecutor responded to the issue Reed raised regarding Wagner's failure, before trial, to complain of the pain he testified about at trial:

> And is it unusual for a man not to admit to pain? I think most wives or girlfriends would say no, that's not unusual. I'm thinking about men that I know. And most men I know that's not that unusual because that's the way we're brought up is we don't admit to pain unless it's like very obvious or we've got something broken. If you ask most guys does that hurt. No, it doesn't hurt that much.
>
> **And that's what [Wagner] did. He doesn't know that the case is going to come to court months later and going to be a robbery. As far as he's concerned, it's a shoplifting case. You heard him no, I'm not -- are you hurt? No, I'm not. He's just telling the truth.**

(Emphasis added to passage cited on appeal as prosecutorial misconduct.)

At the close of the case, the court instructed the jury on the material elements of the charged offense. The court also

laid out the material elements of the lesser included offense of theft in the third degree:

> Instruction number 12: In count one [Reed] is charged with the offense of robbery in the second degree. A person commits the offense of robbery in the second degree if in the course of committing theft, he uses force against the person of anyone present with an intent to overcome that person's physical resistance or physical power of resistance.
>
> There are two material elements of the offense of robbery in the second degree each of which the prosecution must prove beyond a reasonable doubt.
>
> These two elements are: One, that on or about January 6, 1999 in the County of Maui, State of Hawaii, [Reed] was in the course of committing theft.
>
> And two, that while doing so, [Reed] used force against the person of anyone present, to wit, [Wagner] with intent to overcome that person's physical resistance of physical power of resistance.
>
> A person commits theft if he obtains or exerts unauthorized control over the property of another with the intent to deprive the person of the property.
>
> An act shall be deemed in the course of committing a theft if it occurs in an attempt to commit theft, in the commission of theft, or in the flight after the attempt or commission.
>
> "Force" means bodily impact, restraint or confinement or the threat thereof.
>
> If and only if you find [Reed] not guilty or robbery in the second degree, or you are unable to reach a unanimous verdict as to this offense, then you must determine whether [Reed] is guilty or not guilty of the included offense of theft in the third degree.
>
> A person commits the offense of theft in the third degree if the person commits theft of

> property or services, the value of which exceeds $100.
>
> There are two material elements of the offense of theft in the third degree, each of which the prosecution must prove beyond a reasonable doubt.
>
> These two elements are: One, that on or about the [sic] January 6, 1999, in the County of Maui, State of Hawaii, [Reed] committed theft.
>
> Two, that the value of the property taken by the defendant exceeds $100.

II. Issues Presented.

Reed presents two points on appeal, each alleging prosecutorial misconduct. His trial attorney did not object in either instance. Where no objection is made below to argument attacked on appeal as prosecutorial misconduct, "we must determine whether the prosecutor's comment was improper and, if so, whether such misconduct constituted plain error that affected [the defendant's] substantial rights." State v. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209 (1996) (citation omitted). Because we conclude there was no impropriety in either instance, we do not reach the latter inquiry.

First, Reed complains that the prosecutor committed misconduct "when he argued to the jury in closing that [Reed] had conformed his testimony to the statutory elements of the charged offenses [sic] without any evidence to support that argument[.]" With respect to this first averment, Reed cites the following passages from the prosecutor's closing argument:

> And think about this. You heard [Reed's] testimony. His testimony has to avoid this definition of in the course of committing theft because [Reed] knows he's liable for robbery if he uses force while he's committing theft or in the flight.
>
> So can't [sic] admit that he used any force while he was committing the theft or when he was in flight.
>
> . . . .
>
> Does [Reed] have an interest in the outcome of this case? You bet he does. You bet he does. And that's why his story is -- his testimony s [sic] made up to fit in -- to avoid that definition, this definition right here, in the course of committing theft.
>
> Because he can't admit that he used any force while he was committing the theft as he walked out of Kmart or that he used any force when he was trying to escape from [Wagner].
>
> He can't admit to that, so he has to come up with a story, and his story to you is unbelievable, and we discussed why it is.

With respect to these passages, Reed first contends that

> the DPA [deputy prosecuting attorney] argued facts not in evidence. At no time during direct, cross-examination, re-direct or re-cross-examination was [Reed] ever questioned about his knowledge of the statutory requirements of Robbery in the Second Degree. Thus, there was no evidence whatsoever that [Reed] knew of the requirements of the statute. Consequently, the DPA argued facts unsupported by the evidence.

We observe at the outset that the issue -- whether Reed used force against Wagner -- was the pivotal dispute in the case, the resolution of which would determine whether Reed was guilty of the class B felony charged, robbery in the second degree. Reed argued at trial that he was at most guilty of the included

misdemeanor, theft in the third degree. The dispute was patent in the evidence, as outlined above, and was made explicit and central by the respective opening statements and closing arguments, as quoted above. The court gave instructions on both the charged offense and the lesser included offense, thus further framing the debate for the jury.

The prosecutor's arguments followed naturally and reasonably from these circumstances. He needed nothing more by way of evidence to properly argue the inference to the jury, given the fact that Reed was present during the trial and was represented by counsel whose first words to the jury during trial highlighted the issue, and who later repeatedly argued the evidentiary dichotomy between the charged offense and the lesser included offense.

> [A] prosecutor, during closing argument, is permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence. It is also with 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.

Clark, 83 Hawai'i at 304, 926 P.2d at 209 (citations omitted). We conclude that direct evidence of Reed's knowledge of the statutes involved was not necessary to validate the prosecutor's arguments.

Reed next contends that the prosecutor, "[b]y arguing that [Reed] had 'knowledge' [of the statutory elements], . . .

also improperly implied that [Reed] had prior contact with the law." We reject this argument as well, for all Reed's knowledge of the statutory elements implied was that he was, again, present throughout the trial and represented by counsel who made the statutory elements the main issue at trial.

The second instance of alleged prosecutorial misconduct involves the following passage from the prosecutor's rebuttal argument:

> And that's what [Wagner] did. He doesn't know that the case is going to come to court months later and going to be a robbery. As far as he's concerned, it's a shoplifting case. You heard him no, I'm not -- are you hurt? No, I'm not. He's just telling the truth.

Reed argues that the prosecutor here "improperly expressed his personal opinion about Wagner's credibility . . . by stating that Wagner was 'just telling the truth[.]'"

Put into context, as quoted previously, this passage addressed Wagner's failure to report, before trial, that Reed's punches had caused him pain, as he testified at trial. The prosecutor made the argument in rebuttal after Reed's counsel, in his closing argument, had attacked Wagner's credibility based in part upon this circumstance. This case "essentially boiled down to a credibility contest between the State's witnesses and Defendant's witness[,]" State v. Caprio, 85 Hawai'i 92, 107, 937 P.2d 933, 948 (App. 1997), and "[a] prosecuting attorney may comment on the evidence and the credibility of witnesses[.]"

Clark, 83 Hawai‘i at 305, 926 P.2d at 210 (brackets and citations omitted). We therefore discern nothing improper about the prosecutor's statement.

We do not in any event see it as an expression of his personal opinion of Wagner's credibility. Reed relies in this respect on State v. Marsh, 68 Haw. 659, 728 P.2d 1301 (1986), and State v. Sanchez, 82 Hawai‘i 517, 923 P.2d 934 (1996). However, Marsh involved numerous clear and direct expressions of the prosecutor's personal opinion of the credibility of the witnesses and the guilt of the defendant. Marsh, 68 Haw. At 660, 728 P.2d at 1302 (the prosecutor used the following phrases in summation: "I feel it is very clear [that the defendant is guilty]"; "I'm sure she committed the crime[]"; "I sincerely doubt [the witness's credibility]"; and "I find that [a witness's testimony] awfully hard to believe[]"). And Sanchez condemned a clear and direct expression of the prosecutor's opinion of the credibility of two defense witnesses. Sanchez, 82 Hawai‘i at 534, 923 P.2d at 951 (the prosecutor argued that "*I* didn't see anybody, May or Venus [the witnesses] have all this guilt inside for holding in these lies for four months and now coming in and saying, damn, we going [sic] to tell the truth" (citation omitted, italic in the original)). The prosecutor's comment in this case was qualitatively different.

III. Conclusion.

For the foregoing reasons, we affirm the July 29, 1999 judgment.

DATED: Honolulu, Hawaii, March 14, 2001.

On the briefs:

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