NO. 22567

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
DENNIS RAY BROOKS, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 96-0124(2))

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

Defendant-Appellant Dennis Ray Brooks (Brooks)[1] appeals from the May 11, 1999, judgment of the circuit court, which found Brooks guilty of:

> Robbery in the First Degree, in violation of Hawaiʻi Revised Statutes (HRS) § 708-840 (1993) (Count One); and
>
> Terroristic Threatening in the First Degree, in violation of HRS § 707-716(1)(d) (1993) (Count Two).

Brooks was sentenced to twenty years of imprisonment for Count One, with a mandatory minimum sentence of thirteen years and four months; and five years of imprisonment for Count Two, with a mandatory minimum sentence of three years and four months. The sentences were set to run concurrently.

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[1] In the transcripts, Brooks is also referred to by his nickname, "Junior." To avoid confusion, he will be referred to as "Brooks" throughout this opinion.

Brooks contends on appeal that prosecutorial misconduct denied him the right to a fair trial and that the conviction for Terroristic Threatening in the First Degree merged into the conviction for Robbery in the First Degree or, in the alternative, that there was insufficient evidence to convict him of terroristic threatening.

We hold that insurmountable prejudice to Brooks occurred at his trial. We therefore vacate the May 11, 1999, judgment and remand this case to the circuit court for a new trial.

I. BACKGROUND

Pursuant to a jury trial, Brooks was found guilty as charged.[2] Brooks appealed, and this court vacated the judgment and remanded the case to the circuit court for a new trial because the circuit court erred in failing to: (1) strike Holland's testimony about a "mistrial" and his conversations with the prosecutor, (2) sustain Brooks' objection to the prosecutor's improper references to Brooks' other crimes and bad acts, and (3) instruct the jury on such references. State v. Brooks, No. 20523, Memorandum Opinion filed August 6, 1998 (Brooks, Memo Op.).

[2] On March 18, 1996, Brooks was indicted by a Maui Grand Jury in Cr. No. 96-0124(2) for one count of Robbery in the First Degree (HRS § 708-840) (Count One) and one count of Terroristic Threatening in the First Degree (HRS § 707-716(1)(d)) (Count Two).

A second jury trial was held on January 25, 27, and 28, 1999. Brooks was again found guilty as charged and timely appeals.

Michael Holland (Holland)[3], a homeless person who resided in Kahului, Maui, testified for the State in Brooks' second trial that he was drinking beer with some acquaintances on November 7, 1995, between 11:30 a.m. and 12:00 noon behind the Cinemagic store. Holland was with Albert Chock (Chock)[4], Craig Boulter (Boulter), and some other people. They were sitting in a semi-circle, "having a good time" drinking beer that Holland had bought with disability money he received.[5]

Holland testified that Brooks approached the group from behind, sat down beside Holland, pulled a four-inch hunting knife on Holland, and demanded "give me your money or I'll stab you in your fucking stomach." Holland thought Brooks was serious and gave him the $11.00 he had in his pocket. After turning the money over to Brooks, Holland went to the Salvation Army to call 911.

Boulter testified next for the State. Boulter was also homeless and had been living on Maui for four years. Boulter

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[3] Holland is also referred to by his nickname "Booster" in the transcripts. To avoid confusion, he will be referred to as "Holland" throughout this opinion.

[4] Chock is also referred to as "Bo" in the transcripts. To avoid confusion, he will be referred to as "Chock" throughout this opinion.

[5] Holland received $418.00 a month at the time, which he testified was known to other people in the community.

testified that he was at the Cinemagic store between 11:30 a.m. and noon on November 7, 1995, and that he was with Holland, Chock, Mongo (now deceased), and perhaps someone else, drinking beer that Holland had purchased. Brooks, Sam, and Louie drove up in a pickup truck. Brooks jumped out of the truck, went over with a knife in his hand to Holland, and demanded money from Holland. Boulter testified that Brooks crouched over Holland, pointed the knife at Holland's guts, and said something like "you got the money, [Holland]" or "give me the money, [Holland]." Brooks then put the knife to Holland's throat and said something like "I'm going to cut you, . . . give me the money." Holland gave Brooks money from his pocket.

Boutler testified that Chock tried to get Brooks to stop and Brooks turned the knife on Chock. When Brooks turned the knife on Chock, Boulter heard Brooks say something like "how about you guys, you guys got any money[?]" Chock gave Brooks some food stamps. Brooks then left, saying something about "getting" Holland again because Holland owed Brooks more money or because Brooks wanted more money, not just $10.00, from Holland.

Chock testified for the State and stated that he too was at the Cinemagic store between 11:30 a.m. and noon on November 7, 1995, drinking beer with Holland, Boulter, and possibly some others. Brooks arrived in a pickup truck, driven by Louie. The other people in the pickup were Brooks'

ex-girlfriend Jolinda and Louie's girlfriend Samantha. Chock's testimony regarding Brooks' conduct was similar to Boulter's testimony. Chock stated that Brooks showed up, approached Holland, said something like "give me your money," and then pulled a knife and held it to Holland's throat.

II. STANDARD OF REVIEW

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Hawai‘i Rules of Penal Procedure (HRPP) Rule 52(b).

> If the substantial rights of the defendant have been affected adversely, the error will be deemed plain error. Further, this Court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights.

State v. Sawyer, 88 Hawai‘i 325, 330, 966 P.2d 637, 642 (1998) (citation omitted).

> This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system--that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes.

State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993).

III. DISCUSSION

Brooks contends that the prosecutor engaged in misconduct by eliciting improper testimony from a State's witness on direct examination and by referring to Brook's prior jury trial during cross-examination of Brooks -- both of which informed the jury that Brooks had a prior criminal record and/or

had engaged in prior "bad acts." Brooks also asserts that the prosecutor interjected his personal opinion during closing argument that the defense failed to call other defense witnesses to testify, implying that the defense had a burden to disprove Brooks guilt. According to Brooks, these combined acts rose to the level of misconduct which requires that we again vacate Brooks' convictions and remand for a new trial.

The prosecutor and presiding judge in Brooks' first trial were the same in his second trial. Since similar errors were made in Brooks' second trial, we set forth the relevant parts of Brooks' first trial and our previous decision to provide further background for this decision.[6]

A. Brooks' First Trial: November 12-13, 1996.

In vacating the circuit court's first judgment in State v. Brooks, we held that defense counsel did not invite two statements by Holland concerning a "mistrial," but that Holland volunteered such information in an unresponsive answer. The statements Holland made in the first trial are as follows:

> Q. [DEFENSE COUNSEL] On November 7th of '95, that wasn't the first day you ever met [Brooks], was it?

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[6] Hawai‘i Rules of Appellate Procedure (HRAP) Rule 35(c) states:

> **Rule 35. DISPOSITIONS.**
> . . . .
> **(c) Citation.** A memorandum opinion or unpublished dispositional order shall not be cited in any other action or proceeding except when the opinion or unpublished dispositional order establishes the law of the pending case, *res judicata* or collateral estoppel, or in a criminal action or proceeding involving the same respondent. [Emphasis added.]

A. [HOLLAND] No.

Q. You I believe testified you had known him for over a year and a half?

A. (Nods head affirmatively.)

Q. Is that true?

A. If -- anything I tell about him it's going to be against him and it will be a mistrial, so I can't say anything.

THE COURT: He just wants to know how long you have known [Brooks].

A. About a year and a half.

Q. [DEFENSE COUNSEL]: How did you meet him?

[PROSECUTOR]: Your Honor, may we approach?

THE COURT: Yes.

[HOLLAND]: It would be a mistrial.

THE COURT: Hang on a second.

(A bench conference was held outside the hearing of the jury as follows.)

[PROSECUTOR]: The answer defense counsel is about to get is, "Because he robbed my friend." So I object to any further -- going into this. It's going to be --

THE COURT: "How did you meet him?" I don't know what he's going to say, but --

[DEFENSE COUNSEL]: Well, I don't either. He might -- my client's never been convicted of a robbery -- well, he has been convicted of a robbery.

. . . .

The court did not strike Holland's answers or issue a cautionary instruction to the jury.

On redirect examination, the prosecutor not only reopened this area of questioning but went beyond the scope of the defense's cross-examination by referring to other crimes and bad acts by Defendant.

Brooks, Memo Op. at 15-16 (emphasis and brackets in original).

Following this exchange, the prosecutor asked Holland the following questions:

> Q: [PROSECUTOR:] I advised you today that you were not allowed to speak of other events or crimes other than November 7th, 1995. That's what I told you; right?
>
> . . . .
>
> Q: Let me rephrase it, Mr. Holland. Listen carefully.
>
> Prior to coming into court today, I told you that the law did not allow you to speak of other bad acts[.]

Brooks, Memo Op. at 16-17 (emphasis in original). Defense counsel objected to these two questions, but was overruled by the circuit court.

In vacating the judgment against Brooks and remanding the case for a new trial, this court stated:

> Holland's two references to a "mistrial" would lead the jury to believe [Brooks] had previously done something legally wrong. Thus, the court should have stricken Holland's references to "mistrial" and conversations with the prosecutor, cautioned the jury with respect to such testimony, and instructed Holland or had the State advise Holland not to refer to any conversation with the prosecutor. "Even though [a prosecution witness's] remarks may have been improper, any harm or prejudice resulting to the defendant can be cured by the court's instructions to the jury. In such cases it will be presumed that the jury adhered to the court's instructions." State v. Samuel, 74 Haw. 141, 149 n.2, 838 P.2d 1374, 1378 (1992) (internal quotation marks and citation omitted). At the least, then, the court should have instructed the jury to disregard Holland's references to "a mistrial" and the statement that the "prosecutor told me not to say this in court."
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> However, the prosecution not only heightened the court's failure to give a proper instruction, but independently made an express reference to "crimes other than November 7, 1995, [the date of the alleged offenses]" (emphasis added) which had not been referred to in any of the prior questions and testimony. Hence, the prosecutor removed any uncertainty about Holland's reference to a "mistrial" by having Holland confirm that he had told Holland not to speak of other crimes.

> The obvious inference for the jury to draw was that [Brooks] had committed crimes other than the ones for which he was being charged. Such references were plainly improper. "There are instances where a 'deliberate and unresponsive injection by [a] prosecution [witness] of irrelevant references to prior arrests, convictions, or imprisonment may generate insurmountable prejudice to the cause of an accused.'" State v. Kahinu, 53 Haw. 536, 549, 498 P.2d 635, 643 (1972), cert. denied, 409 U.S. 1126 (1973). The same principles apply for prosecutorial misconduct as for "determining whether improper remarks made by a witness constitutes reversible error[.]" Samuel, 74 Haw. at 149, 838 P.2d at 1378. Yet, the court overruled [Brook's] objection to these questions and again failed to instruct the jury to disregard the reference by the prosecutor to other crimes.
>
> We conclude that the court fundamentally erred in failing to strike Holland's improper remarks, in overruling defense counsel's objection to the prosecution's reference to other "crimes" and in failing to give the jury curative instructions regarding Holland's and the prosecutor's remarks. We cannot say beyond a reasonable doubt that these errors did not contribute to the verdict. Kahinu, 53 Haw. at 550, 498 P.2d at 644.

Brooks, Memo Op. at 19-20 (emphasis in original and footnote omitted).

B. Brooks' Second Trial: January 25-28, 1999.

At Brooks' second trial the State again called Holland, Boulter, and Chock. When Boulter testified about the events at the Cinemagic store, the following exchange between the prosecutor and Boulter occurred:

> Q: [PROSECUTOR:] Had you known Junior, also known as Dennis Brooks, prior to November 7th, 1995?
>
> A: [BOULTER:] Yes.
>
> Q: How long prior to November 7th, '95 had you known Junior?
>
> A: Well, he'd just got out of jail about a month or two, something like that.
>
> Q: Well, how long had you known him?

> A: I didn't know him before he went to jail. He was in jail when I got here. And he got out[.]
> [Emphasis added.]

Improper remarks made by a witness can constitute reversible error. State v. Samuel, 74 Haw. 141, 149, 838 P.2d 1374, 1378 (1992). As this court stated in Brooks' first appeal: "There are instances where a `deliberate and unresponsive injection by [a] prosecution [witness] of irrelevant references to prior arrests, convictions, or imprisonment may generate insurmountable prejudice to the cause of an accused.'" Brooks, Memo Op. at 20 (emphasis added) (quoting State v. Kahinu, 53 Haw. 536, 549, 498 P.2d 635, 643 (1972), cert. denied, 409 U.S. 1126 (1973)).

Although Brooks' defense counsel did not object to Boulter's statements about Brooks being in and out of jail, we may notice plain error when the error seriously affects the fairness or integrity of the judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights. Sawyer, 88 Hawai'i at 330, 966 P.2d at 642. This court's holding regarding Holland's testimony in the first trial is applicable to the two statements regarding Brooks' prior time in jail made by Boulter in the second trial: "[This] would lead the jury to believe [Brooks] had previously done something legally wrong. Thus, the court should have stricken [Boulter's] references to [jail] . . . , cautioned the jury with respect to such testimony,

and instructed [Boulter] or had the State advise [Boulter] not to refer to [jail]." Brooks, Memo Op. at 19.

Our reasons for vacating Brooks' conviction in his first appeal apply in his second appeal. The circuit court, prosecutor, and Brooks' counsel were all on notice of the prejudicial effect of testimony regarding Brooks' prior bad acts. In Brooks' second trial, Boulter's testimony was as damaging as Holland's testimony in Brooks' first trial. In Brooks' first trial, Holland referred to a potential "mistrial" which left the jury with the possibility of inferring that Brooks had committed other crimes or bad acts. In Brooks' second trial, Boulter specifically referred to Brooks being in and out of jail. "The obvious inference for the jury to draw was that [Brooks] had committed crimes other than the ones for which he was being charged. Such references were plainly improper." Brooks, Memo Op. at 20.

"We cannot say beyond a reasonable doubt that these errors did not contribute to the verdict." Brooks, Memo Op. at 20. Boulter's statements that Brooks was in and out of jail, without any curative instructions or striking of such statements by the court, generated insurmountable prejudice to Brooks and constituted reversible error. Kahinu, 53 Haw. at 549, 498 P.2d at 643.

IV. CONCLUSION

We vacate the circuit court's May 11, 1999, judgment and remand for a new trial consistent with this opinion. Based on this disposition, we need not address Brooks' contentions regarding prosecutorial misconduct and merger.[7]

DATED: Honolulu, Hawai‘i, April 12, 2001.

On the briefs:

Jock M. Yamaguchi
for defendant-appellant.

Chief Judge

Richard K. Minatoya,
Deputy Prosecuting Attorney,
County of Maui,
for plaintiff-appellee.

Associate Judge

Associate Judge

[7] We note that, pursuant to HRS § 701-109(1)(e) (1993), although "the same conduct of a defendant may establish an element of more than one offense, . . . [t]he defendant may not . . . be convicted of more than one offense if . . . [t]he offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted[.]" Emphasis added. First Degree Robbery, in violation of HRS § 708-840(1)(b), is defined as a continuing offense. State v. Arceo, 84 Hawai‘i 1, 18, 928 P.2d 843, 860 (1996); State v. Hoey, 77 Hawai‘i 17, 38, 881 P.2d 504, 525 (1994) (HRS § 708-840(1)(b)(ii) is also a continuing offense, 77 Hawai‘i at 38 n.19, 881 P.2d at 525 n.19). Since the State argued at trial that the offenses of robbery and terroristic threatening were committed by the same conduct and occurred at the same time, the State's argument that the terroristic threatening occurred after the robbery was completed (made for the first time on appeal) would have failed.