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NO. 24537

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
STANLEY C. CANIO III, also known as Stanley Canio,
Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 98-1932)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Foley, JJ.)

Defendant-Appellant Stanley C. Canio III, also known as Stanley Canio (Canio), appeals from the August 13, 2001 Judgment, Guilty Conviction and Sentence entered by Judge Victoria Marks convicting Canio of Burglary in the First Degree, Hawaii Revised Statutes (HRS) § 708-810(1)(c) (1993),¹ and sentencing him to an indeterminate term of imprisonment of ten years, with a mandatory minimum of three years and four months.

¹ Hawaii Revised Statutes § 708-810 (1993) provides, in relevant part, the following:

(1) A person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and:

. . . .

(c) The person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

Canio argues that the court erred when it

failed to declare a mistrial after improper character evidence had been presented to the jury by [Plaintiff-Appellee State of Hawai'i's (State)] witness testifying that he had met Mr. Canio at the Sand Island Treatment facility after having been advised on three separate occasions by the State that he was not to mention meeting Mr. Canio at Sand Island.

Canio asks that we vacate his judgment of conviction and remand this matter for a new trial. We affirm.

BACKGROUND

On September 4, 1998, Canio was charged, and on March 4, 1999, after a jury trial, was convicted of one count of Burglary in the First Degree in violation of HRS § 708-810(1)(c) (March 4, 1999 conviction). On November 2, 2000, however, the Hawai'i Supreme Court vacated Canio's March 4, 1999 conviction and remanded the case for a new trial (Memorandum Opinion, appeal No. 22615).

On March 14, 2001, Canio filed "Defendant's Motion in Limine #1" (Motion #1). In relevant part, Motion #1 asked the court for the following:

- [4] . . . an Order, excluding and precluding from use at trial the following evidence which the State may attempt to adduce:
- (a) Testimonial or documentary evidence relating to the defendant's prior criminal record, including the following:
 - (1) any testimony during witnesses for fingerprint investigation that Mr. Canio's fingerprints are in the [Honolulu Police Department (HPD)] identification computer data base or that otherwise suggests a prior record;
 - (2) any testimony that Mr. Canio and the complainant Raymond Almeida had first met one another while in a substance abuse treatment program (Sand Island);

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- (3) any testimony that the apartment building that Mr. Canio and the complainant lived in is transitional housing, or a halfway house;
- (b) Testimonial or documentary evidence relating to any other "bad acts" involving the defendant under [Hawai'i Rules of Evidence (HRE)] 404; including items [4](a) (1), (2), (3) above, and that Mr. Canio was evicted from his apartment; and,
- (c) Testimonial or documentary evidence relating to any unfavorable evidence against defendant which may not technically be considered "bad acts" under HRE 404, but which should nevertheless be excluded as irrelevant under HRE 402, or as unfairly prejudicial under HRE 403, including the following, including items [4](a) (1), (2), (3) above; and,
- (d) Hearsay which may be elicited from the State's witnesses; including,
 - 1. Hearsay by Raymond Almeida as to what building security officer Ron Jose told him about Mr. Canio's whereabouts in the early morning hours of August 8, 1998[.]

On May 18, 2001, Canio filed a second motion in limine (Motion #2) asking for an order "excluding all prior bad acts against Defendant STANLEY CANIO, III, should he choose to testify in this matter." On May 18, 2001, the State filed its motion in limine.

On June 5, 2001, Judge Victoria Marks heard Motion #1, Motion #2, and the State's motion in limine. The court and counsel discussed the significance of Canio's and the complainant's living arrangements and the possible inference of prior bad acts.

[DEFENSE COUNSEL]: Well, we know the witnesses were in the transitional house and all the other residents of this house were in the same or similar circumstances, so to the extent that that may come out in the evidence, I believe that that may reflect indirectly on whether these people have records of any form or not. Other than that directly, no, we would not go into the witnesses' specific conviction.

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THE COURT: Okay. So you just want to get into the fact that the -- the living situation was a transitional home?

[DEFENSE COUNSEL]: Well, he seems to invite 'em by leaving his door open. You're in the transitional living house and you don't lock your door, and it's -- you know, everybody around there has had problems in their life.

[DEPUTY PROSECUTOR]: Your Honor, just to clarify, if we're gonna be talking about the complex being a transitional home, then does that mean that we're going to be also testifying or introducing evidence that shows that the victim was convicted of a crime before? I wasn't sure about what we were trying to say.

[DEFENSE COUNSEL]: I was gonna leave it to the phrase "transitional home" and not inquire further. That's the phrase I see in the police report and the transcripts, so I presume that that was what was acceptable. I do see that prior counsel -- and I have adopted her motion -- made a motion to exclude referring to it as a transitional home, but I -- I think that was in reference to wanting to be very careful about the defendant, who will be taking the stand this time. So I'll leave it up to the Court.

. . . .

THE COURT: Well, if you need a handle, can you call it a boarding house?

[DEPUTY PROSECUTOR]: That's fine with me.

[DEFENSE COUNSEL]: Yes, Your Honor.

Thereafter, the court orally granted request [4] (a) of Motion #1.

On June 6, 2001, Canio's trial began. As its first witness, the State called the complainant, Raymond Almeida (Almeida). Almeida testified that, in 1998, he lived at 1020 Isenberg Street, Room 201. Almeida described the room as approximately twelve feet by nine feet and mentioned that he shared a kitchen and bathroom with other residents. When asked if he knew Canio, Almeida testified, in relevant part, as follows:

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Q: Okay. Back in 1998, did you know someone named Stanley C. Canio III or Stanley Canio?

A: Yes.

Q: How did you know him?

A: I --I met him in treatment at Sand Island.

Q: Okay. And did you talk to him face to face?

A: Back then?

Q: Yeah.

A: Yes.

Q: How many times would you talk to him?

A: Two, three times a week maybe.

Defense counsel then requested a bench conference to discuss Almeida's testimony:

[DEFENSE COUNSEL]: I thought that was covered by my motion that there would be no mention of Sand Island treatments in my motion in limine.

THE COURT: I don't think we had any discussion about Sand Island.

[DEPUTY PROSECUTOR]: Well, that's true.

[DEFENSE COUNSEL]: That's why we didn't call it transitional facility.

[DEPUTY PROSECUTOR]: That's true.

[DEFENSE COUNSEL]: It is in the written motion.

[DEPUTY PROSECUTOR]: To -- I did instruct Mr. Almeida not to say anything, not to talk about drugs. He did not say the word "drugs." There's no mention what kind of facility Sand Island is, what sort of treatment it does.

[DEFENSE COUNSEL]: We're gonna move for a mistrial, Your Honor. This is ridiculous. I suppose we could pass it off as -- if we had a motion in limine as -- specifically instructed to make sure the witness is understood. I had to stop myself in opening statements. I couldn't remember what the approved word was.

[DEPUTY PROSECUTOR]: I specifically instructed Mr. Almeida three times, three different occasions, not to -- not to mention drugs. And from the state's position is that he didn't mention it.

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[THE COURT]: I'm gonna deny the motion for a mistrial at this point. Phrase your questions carefully.

[DEPUTY PROSECUTOR]: Okay. Permission for some -- I will lead him a little bit just to -- just to get us through this.

[THE COURT]: Well, hopefully it won't come up any further.

When the conference was over and questioning resumed, Almeida testified that Canio lived in the same building and that, at various times, he had invited Canio into his room.

Almeida testified that he went to bed the evening of August 23, 1998, around 10:30, and left the door to his room ajar to allow for better ventilation because it was a warm night. Around four o'clock the next morning, he heard a noise, looked up, and saw the silhouette of a person in his room. The person was standing in front of the headboard to his bed, so he got up, closed the door, and locked the person in. Almeida claimed he recognized the person as Canio and asked him what he was doing.

According to Almeida, with the lights in his room still off and the door closed, the two men sat down and he asked Canio to put back whatever he took whereupon Canio replied, "[Y]ou caught me just when I came in, I don't have anything." While seated, Almeida asked Canio why he was doing this and again Canio said that he did not take anything. Choosing to trust Canio, Almeida let him leave, but after Canio was gone, Almeida turned on a light and noticed that all but two of his watches were missing. Seeing Canio at the end of the hallway, he "yelled down the hallway to [Canio] [to] bring back the watches" but Canio did

not stop. Almeida immediately reported the incident to the building's security guard who called the police. The police talked to Almeida, made a report, and Almeida returned to his room.

Around daybreak, Canio knocked on Almeida's door. After Almeida let him in, Canio allegedly said, "I'm sorry, I'm sorry, please change the story, . . . so they can take that swivel knob off my door[.]" According to Canio, someone had put a security lock on his doorknob that "covers [his] whole doorknob so there's no way [he] can get to it to open [his] room, open [his] door." Almeida testified that he told Canio that he could not change his story because it was too late and then asked for his watches back, but Canio claimed the watches were "gone already," and offered to pay for them. A few days later, on August 28, 1998, Almeida saw Canio and called 911. The police arrived shortly thereafter and arrested Canio.

After the direct examination of Almeida ended, defense counsel requested another bench conference to address the possible violation, if any, of the order in limine precluding the State from having Almeida testify that he and Canio "had first met one another while in a substance abuse treatment program, Sand Island[.]"

[DEFENSE COUNSEL]: . . . Under 4(a)(2) of my motion in limine, it says any testimony that Mr. Canio and the complainant, Raymond Almeida, had first met one another while in substance abuse treatment program, Sand Island, number 3, and that was any testimony that the apartment building of Mr. Canio, the

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complainant, lived in is a transitional housing or a halfway house. So this was -- the testimony that came in from the witness was clearly covered by our motion in limine. And I thought when we'd gone on to discuss the phrase to use rather than "transitional housing" that it was clear that they would not refer to the treatment center.

[DEPUTY PROSECUTOR]: Your Honor, the only response from the state would be that Mr. Almeida did not refer to the words "substance abuse." If the Court is so inclined and believes that it's necessary, the jury could even be questioned as to whether or not they -- they even know what is Sand Island or what is treatment and be instructed otherwise. However, there really wasn't anymore details that were brought out other than what he initially said.

And also, I should point out that originally when the motions in limine were argued, the position of the defense was to include all of this information, and it was actually the prosecution that requested that we not bring in these -- these prior bad acts. In other words, it was the position of the defense at the very beginning of the motions in limine that it be allowed to be called transitional housing and it was the prosecution that objected to it and wanted to keep all that out. As I believe the Court even stated, it does cut both ways and the state was the one that was arguing that we shouldn't have this information in, not the defense. And as it turned out, we just agreed to go along with that. So I don't think it necessarily changes what was the original strategy of the defense.

[DEFENSE COUNSEL]: I don't believe the defense wanted to call it transitional housing, we wanted some approved phrase because we knew the problem would arise and we would have to have an approved phrase. Transitional housing was what has been referred to in the motion. I was perfectly willing to accept whatever as neutral -- I didn't want to call it a hospice, as I indicated, but a neutral phrase, and that's what we obtained as far as the ruling.

THE COURT: Here's my recollection, and I don't know how accurate it is or not. You're correct, [Defense Counsel], the issue under paragraph 4(a)(2) mentions Sand Island. During argument, I didn't hear anything, at least my recollection is, about Sand Island treatment.

Today, during opening statements, I first heard that they -- that the complaining witness and Mr. Canio had a previous -- had previously met, and that's the first it had been brought to my attention, at least as far as my recollection is at this juncture, we have one sentence that says they had previously met in treatment at Sand Island. I've denied your motion. If this is viewed as a renewal of your motion for a mistrial, I'll deny it again.

Do you want me to give a cautionary instruction or a limiting instruction to the jury or even an instruction telling them to disregard any information about how the complaining witness and the defendant met?

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[DEFENSE COUNSEL]: No, Your Honor. I don't feel that it's up to us to re-pound that information into the jury's memory.

On cross-examination, Almeida testified that he did not flip on the light switch while Canio was in his room because he knew Canio and the light from the nearby street was enough. Almeida admitted that he could not see if Canio was carrying anything in his hands. Although defense counsel specifically asked Almeida if it was his hearing that led to his identification of Canio as the person unlawfully in the room, Almeida insisted it was the shape "of his head and body."

Police Officer Steven Lewis (Officer Lewis) of the Honolulu Police Department (HPD) testified next and said that on August 24, 1998, around 4:30 a.m., he investigated the alleged burglary at 1020 Isenberg Street. Officer Lewis stated that he checked for and lifted a latent fingerprint and conducted a search for witnesses. Gloria Su'a, a fingerprint identification technician with HPD testified that the latent print lifted by Officer Lewis at the alleged crime scene was not identifiable.

Police Officer Eddie Belluomini (Officer Belluomini) of the HPD also testified and stated that he arrested Canio on August 28, 1998. After Officer Belluomini's testimony, the State rested.

At the end of the State's case, Canio moved for a judgment of acquittal and renewed his motion for a mistrial because of Almeida's mention of "treatment at Sand Island." The

court denied the motion saying, "One sentence regarding prior meeting of . . . the defendant does not amount to being so prejudicial as to require a mistrial."

Canio testified that on August 24, 1998, he had worked at the All Star Café until late and returned to his room around 1:45 to 2:00 in the morning. Canio said that after he "washed up," he went downstairs to watch TV, but soon discovered he was running out of cigarettes, so he went back to his room, got some money, and walked to the McCully branch of 7-Eleven, somewhere around 4:00 a.m. Canio claimed he returned home around 5:00 a.m. and discovered a security lock on his door. He allegedly looked for a security guard to unlock the door but he was unable to find any security personnel, so he called a friend and slept over at his house until early afternoon. According to Canio, it was not until the following day that he was able to contact the building's management and find out what had allegedly happened. Canio asked to be allowed to retrieve his clothes from his room and was told that if he came back on the property, the police would be called. He was also told that in order to retrieve his things, he needed to pay the balance of his rent. The next day, Canio picked up his belongings, but before he could leave, he was arrested. After he testified, the defense rested. Later that afternoon, the jury found him guilty of Burglary in the First Degree.

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STANDARD OF REVIEW

Motion for Mistrial

The denial of a motion for mistrial is within the sound discretion of the trial court and will not be upset absent a clear abuse of discretion. The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Rogan, 91 Hawai'i 405, 411, 984 P.2d 1231, 1237 (1999)

(citations and quotation marks omitted).

DISCUSSION

Canio argues that the trial court abused its discretion by not declaring a mistrial when, in partial violation of the court's order in limine precluding the introduction of "any testimony that Mr. Canio and the complainant, Raymond Almeida, had first met one another while in a substance abuse treatment program, Sand Island," the State introduced evidence that Almeida had "met [Canio] in treatment at Sand Island." Canio argues that

the reference to the fact that the Defendant had met the victim at Sand Island treatment indicated that the Defendant either had or currently has an addiction from which he had gone to treatment. Right out of the gate the Defendant was painted as a person with an addiction. He had been to treatment for that addiction. He was living in a boarding house. This type of character evidence would not be an element to the offense and it[']s being presented to the jury only would have cast an unfavorable stigma around the defendant. Being cast as a recovering addict who at some point in time as an addict had been in treatment. This would have unfairly tainted Mr. Canio as an addict and as an addict he would have been more inclined to have committed the burglary so he could go fence the property to get what ever his addiction called for, and it could have been viewed by the jury that he would have been more inclined to lie about what occurred to try to get himself out of the case.

The Hawai'i Supreme Court has said that an appellate court must consider three factors to determine "whether improper

remarks made by a witness constitute reversible error . . .

(1) 'the nature of the misconduct'; (2) 'the promptness of a curative instruction'; and (3) 'the strength or weakness of the evidence against the defendant.'" State v. Webster, 94 Hawai'i 241, 248, 11 P.3d 466, 473 (2000) (quoting State v. Samuel, 74 Hawai'i 141, 148-49, 838 P.2d 1374, 1378 (1992)).

(1)

In this case, the nature of the misconduct was that Almeida testified that he "met [Canio] in treatment at Sand Island." The introduction of this evidence partially violated the order 4(a)(2) barring "any testimony that Mr. Canio and the complainant, Raymond Almeida, had first met one another while in a substance abuse treatment program, Sand Island[.]" Unlike Samuel, where the witness was only warned by the State not to mention prior bad acts, see Samuel, 74 Haw. at 148-49, 838 P.2d at 1378, here the court ordered the State not to introduce evidence that Canio and Almeida "had first met one another while in a substance abuse treatment program" at the Sand Island treatment facility. In part, the State violated the court's order.

(2)

In Samuel, the judge immediately advised the jury to disregard the remark. Id. In this case, after the direct examination of Almeida was concluded, Judge Marks offered to

"give a cautionary instruction or a limiting instruction to the jury or even an instruction telling them to disregard any information about how the complaining witness and the defendant met[.]" Worried about possible prejudice to his client, Canio's counsel refused an instruction saying, "I don't feel that it's up to us to re-pound that information into the jury's memory."

(3)

While we are required by Samuel, 74 Haw. at 148-49, 838 P.2d at 1378, to consider the strength or weakness of the evidence against Canio, "it is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence" because that "is the province of the [trier of fact]." State v. Jenkins, 93 Hawai'i 87, 101, 997 P.2d 13, 27 (2000) (quoting State v. Buch, 83 Hawai'i 308, 321, 926 P.2d 599, 612 (1996)) (citations omitted, bracket in the original). Here, the State's case depends upon the credibility of Almeida and the lack of credibility of Canio. When Almeida testified that he "met [Canio] in treatment at Sand Island[,]" whatever harm he caused to Canio's credibility in the eyes of the jury, he caused as much to himself.

The Hawai'i Rules of Civil Procedure Rule 61, provides that

[n]o error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order,

unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The question that sparked defense counsel's objection was, "How do you know [Canio]?" The question itself was rather innocuous, apparently intended to provide evidence of Almeida's prior contact with Canio in order to establish that Canio was known to him.² Although Almeida's mention of "treatment at Sand Island" could have created a question in the jury's mind as to what type of treatment was involved, the statement does not necessarily impart an inference that this was a drug treatment facility or suggest an addiction of any kind. The term "treatment" can imply a wide variety of possible therapies. This court has said that a motion for mistrial should be granted when there is an "occurrence of such character and magnitude that a party is denied the right to a fair trial." Stewart v. Brennan, 7 Haw. App. 136, 149, 748 P.2d 816, 825 (1988) (citation omitted). To the extent that it violated the order in limine precluding the introduction of evidence that Almeida and Canio "had first met one another while in a substance abuse treatment program, Sand Island," the mention of "treatment at Sand Island"

² Complainant Raymond Almeida could have and did establish his familiarity with Defendant-Appellant Stanley C. Canio III, also known as Stanley Canio (Canio), when he testified that both men had rooms in the same building and that Canio visited his room on occasion. The manner of his response to the question suggests that he must have thought the question required him to say where they first met.

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was not of "such character and magnitude" nor was the possible harm to Canio so substantial that it denied him his right to a fair trial. The trial court did not abuse its discretion when it declined to declare a mistrial.

CONCLUSION

Accordingly, we affirm the Judgment, Guilty Conviction and Sentence entered on August 13, 2001.

DATED: Honolulu, Hawai'i, April 4, 2003.

On the briefs:

Richard D. Gronna
for Defendant-Appellant.

Chief Judge

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge