

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27740

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ANDREW POWELL, Defendant-Appellant

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2007 AUG 29 AM 9:06

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 04-1-1338)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding J., Nakamura, and Fujise, JJ.)

Defendant-Appellant Andrew Powell (Powell) appeals from the Judgment entered by the Circuit Court of the First Circuit (the circuit court) on December 6, 2005,¹ convicting and sentencing him for (1) Unlawful Imprisonment in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 707-722 (1993);² (2) Terroristic Threatening in the Second Degree, in violation of HRS § 707-717 (1993);³ (3) Theft in the Second

¹ The Honorable Michael A. Town presided.

² Hawaii Revised Statutes (HRS) § 707-722 (1993) provides, in relevant part, as follows: "A person commits the offense of unlawful imprisonment in the second degree if the person knowingly restrains another person."

³ HRS § 707-717 (1993) provides, in pertinent part, that "[a] person commits the offense of terroristic threatening in the second degree if the person commits terroristic threatening other than as provided in section 707-716."

"Terroristic threatening" is defined in HRS § 707-715 (1993) as follows:

Terroristic threatening, defined. A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony:

- (1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person; or
- (2) With intent to cause, or in reckless disregard of the risk of causing evacuation of a building,

(continued...)

Degree, in violation of HRS § 708-831(1)(b) (Supp. 2006);⁴ and (4) Abuse of Family and Household Member, in violation of HRS § 709-906 (Supp. 2006).⁵

Powell contends that (1) he was denied a fair and impartial jury trial because the circuit court denied his motion for mistrial even though a state witness disclosed twice that

³(...continued)

place of assembly, or facility of public transportation.

HRS § 707-716 (Supp. 2006) states:

Terroristic threatening in the first degree. (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:

- (a) By threatening another person on more than one occasion for the same or a similar purpose;
- (b) By threats made in a common scheme against different persons;
- (c) Against a public servant arising out of the performance of the public servant's official duties. For the purposes of this paragraph, "public servant" includes but is not limited to an educational worker. "Educational worker" has the same meaning as defined in section 707-711; or
- (d) With the use of a dangerous instrument.

(2) Terroristic threatening in the first degree is a class C felony.

⁴ HRS § 708-831(1)(b) (Supp. 2006) currently provides, as it did when Defendant-Appellant Andrew Powell (Powell) allegedly committed the offenses with which he was charged, in relevant part as follows: "A person commits the offense of theft in the second degree if the person commits theft . . . [o]f property or services the value of which exceeds \$300[.]"

At the time Powell allegedly committed the offenses with which he was charged, HRS § 708-830 (Supp. 2006) provided, in relevant part, as follows: "A person commits theft if the person does any of the following: (1) Obtains or exerts unauthorized control over property. A person obtains or exerts unauthorized control over the property of another with intent to deprive the other of the property." (Formatting revised.)

⁵ The relevant part of HRS § 709-906(1) (Supp. 2006) currently provides, as it did when Powell allegedly committed the offenses with which he was charged, as follows: "It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member For the purposes of this section, 'family or household member' means . . . persons who have a child in common[.]"

Powell had been in jail; (2) he was deprived of a fair and impartial jury trial because the circuit court improperly admitted prior bad acts evidence, a Temporary Restraining Order (TRO) against him that had nothing to do with the underlying criminal case; and (3) the circuit court erred in denying his Motion for Judgment of Acquittal (MJOA) for the offense of Theft in the Second Degree.

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced, the issues raised, and the relevant statutory and case law, we disagree and resolve Powell's points of error as follows:

(1) We conclude that the circuit court did not abuse its discretion in denying Powell's motion for mistrial.

In determining whether improper remarks made by a witness constitutes reversible error, the appellate court will consider: (1) the nature of the misconduct; (2) the promptness of a curative instruction, or lack of it; 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) (internal quotation marks omitted).

As to the first factor, defense counsel stated at trial that "there is no allegation . . . of prosecutorial error or misconduct." Defense counsel was aware that the deputy prosecutor had instructed the witness not to mention Powell's criminal record or that Powell had been in jail. Additionally, the record indicates that the witness "was quite excited" when she mentioned that Powell had been in jail and did not realize that she had violated the deputy prosecutor's prior instructions until her lapse was pointed out to her by the circuit court. Furthermore, defense counsel let the witness's first slip pass without objection.

As to the second factor, the Hawai'i Supreme Court has stated that any harm or prejudice resulting from improper comments can be cured by the court's instructions to the jury and it will be presumed that the jury adhered to the court's instructions. Id. at 248-49, 11 P.3d at 473-74. The record reflects that the circuit court immediately, clearly, and cogently struck the two comments by the witness "as totally irrelevant" and instructed the jury not to consider the witness's comments. The circuit court judge also informed the jury that he was "going to take a recess and try to impress that upon the witness." Furthermore, the curative instruction was rendered more cogent by the circuit court's general instructions to the jury not to consider comments that have been stricken from the record. Cf. State v. Kupihea, 80 Hawai'i 307, 317-18, 909 P.2d 1122, 1132-33 (1996).

Finally, the evidence against Powell was strong.

All in all, we are satisfied that the circuit court's instructions to the jury cured any misconduct on the part of the witness and that Powell's right to a fair trial was not prejudiced.

(2) In State v. Clark, 83 Hawai'i 289, 302, 926 P.2d 194, 207 (1996), the Hawai'i Supreme Court held that "where a victim recants allegations of abuse, evidence of prior incidents of violence between the victim and the defendant are relevant to show the trier of fact the context of the relationship between the victim and the defendant, where . . . that relationship is offered as a possible explanation for the victim's recantation." Once evidence of prior bad acts is determined to be relevant, "the court must then balance the probative value of the relevant evidence against its prejudicial impact." Id. "The responsibility for maintaining the delicate balance between probative value and prejudicial effect lies largely within the

discretion of the trial court." State v. Asuncion, 110 Hawai'i 154, 166, 129 P.3d 1182, 1194 (2006).

After the complaining witness (the CW) recanted the statement she gave to police on the evening of the alleged abuse by Powell, the prosecution introduced evidence of a prior TRO that the CW had obtained against Powell. The circuit court restricted the CW's testimony to explaining why she obtained the TRO and did not allow the underlying facts of the TRO into evidence. The circuit court then issued limiting instructions to the jury to alleviate any chance of prejudice the TRO might cause.

Evidence of the prior TRO was relevant, Hawaii Rules of Evidence (HRE) Rule 401, and the probative value of such evidence was not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." We conclude that the circuit court did not abuse its discretion in admitting the CW's testimony about the prior TRO.

(3) The evidence presented by the prosecution established that the day after the CW's argument with Powell, the CW believed her Hawaiian heirloom bracelet inscribed with the name "Nainoa"⁶ was missing. The CW's mother testified that she paid \$620 for the bracelet. Powell's ex-girlfriend testified that several weeks after Powell was charged with theft in the second degree, Powell asked her to return some things on his behalf to the CW. One of the items she testified she returned on behalf of Powell was a bracelet she recognized as belonging to the CW. Powell's ex-girlfriend testified that the bracelet she returned was inscribed with the name "Nainoa[.]"

⁶ "Nainoa" is the name of the complaining witness's son.

Viewing the evidence in the light most favorable to the prosecution, a reasonable mind could fairly conclude beyond a reasonable doubt that Powell committed the offense of theft in the second degree. HRS §§ 708-830(1) and 708-831(1)(b). See State v. Keawe, 107 Hawai'i 1, 4, 108 P.3d 304, 307 (2005). We conclude that the circuit court did not err in denying Powell's MJOA.

Accordingly, the December 6, 2005 Judgment is affirmed.

DATED: Honolulu, Hawai'i, August 29, 2007.

On the briefs:

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