

NO. 22615

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee

vs.

STANLEY C. CANIO, III, Defendant-Appellant

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

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

Defendant-appellant Stanley Canio, III appeals his conviction and sentence of one count of burglary in the first degree in violation of Hawai'i Revised Statutes (HRS) § 708-810(1)(c) (1993). On appeal, Canio argues that the trial court: 1) committed plain error in failing to act upon the prosecutor's misconduct during closing argument; and 2) abused its discretion in improperly polling the jury. We hold that Canio is entitled to a new trial because the prosecutor committed misconduct by indirectly referring to Canio's failure to testify. Therefore, we vacate Canio's conviction and remand the case for a new trial.

I. BACKGROUND

On September 4, 1998, Canio was charged via complaint with one count of burglary in the first degree. R at 10. A jury trial began on March 3, 1999. Canio did not testify and the defense did not present any evidence. The complaining witness, Raymond Almeida, testified to the following events.

Canio, Almeida, and several others lived in a Honolulu

apartment building where the residents had their own rooms but shared common living areas. Canio and Almeida were friends; Canio had visited Almeida's room approximately eight times prior to the incident. Trans. 3/3/99 at 25-31. Canio knew that Almeida often bought broken watches at the swap meet in order to fix them. Canio had seen the watches laid out on the night stand in Almeida's room. Id. at 41-42, 49.

When Almeida went to sleep on the night of August 23, 1998, he left his door open about eight to ten inches in order to improve the ventilation. At approximately 4:30 a.m., Almeida was awakened by a noise that sounded like jewelry being moved around. He saw a person in his room and realized that it was Canio. Almeida testified that he shut the door and told Canio to sit down. He also told Canio to put back whatever he had taken. Canio replied that he had just come in and did not have anything. After Canio left the room, Almeida turned on the light and noticed that seven of the nine watches that were on his night stand were missing. Almeida went into the hallway and called after Canio to come back and return the watches, but Canio did not turn around. Id. at 31-35.

Almeida reported the incident to building security and the police were called. Id. at 39. Later that morning, sometime after 6:00 a.m., Canio returned to Almeida's room and asked him not to report the incident. Almeida asked about his watches and Canio said that he had sold all of them. Id. at 43-44. On

cross-examination, Almeida testified that he purchased the seven watches for approximately eighty dollars. Id. at 50. The prosecution called two other witnesses who established that only one fingerprint was recovered from the scene and it was unidentifiable. Id. at 68-86.

Counsel presented their closing arguments on March 4, 1999. The prosecutor argued that the evidence against Canio was "uncontroverted" and emphasized that there was no evidence to contradict Almeida's testimony. Trans. 3/4/99 at 8, 13, 15, 25. The defense did not object to any of these arguments. Defense counsel argued that Almeida's version of the events was implausible because stealing eighty dollars worth of used watches was not worth the risk of felony conviction. Later that day, the jury returned a verdict of guilty as charged. R at 103. The trial court asked for a "show of hands" if any of the jurors disagreed with the verdict. None of the jurors responded. Trans. 3/4/99 at 41.

The judgment of guilty conviction and sentence was entered on June 8, 1999. R at 118-19. Canio was sentenced to ten years' imprisonment. The circuit court also granted the prosecution's motion to sentence Canio as a repeat offender under HRS § 706-606.5 (1993 & Supp. 1998) and imposed a mandatory minimum term of three years and four months. R at 113-17, 121-22. Canio timely appealed. He argues that the prosecutor committed misconduct by referring to his failure to testify and

present a defense and that the trial court abused its discretion in failing to properly poll the jury.

II. DISCUSSION

A. Standard of review

1. Prosecutorial misconduct

"Allegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of 'whether there is a reasonable possibility that the error complained of might have contributed to the conviction.'" [State v.] Rogan, 91 Hawai'i [405,] 412, 984 P.2d [1231,] 1238 [(1999)]. "Factors to consider are: (1) the nature of the conduct; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant." Id.

State v. Klinge, 92 Hawai'i 577, 584, 994 P.2d 509, 516 (2000)

(some citations omitted).

2. Plain error

"We may recognize plain error when the error committed affects substantial rights of the defendant." [State v.] Kotis, 91 Hawai'i [319,] 329, 984 P.2d [78,] 88 [(1999)]. See also Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) (1993) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

Id. (some citations omitted).

3. Polling the jury

Where neither party requests that the jury be polled, whether and in what manner a jury poll is conducted is within the trial court's discretion. See HRPP Rule 31(c); State v. Keaulana, 71 Haw. 81, 784 P.2d 328 (1989). "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." Klinge, 92

Hawai'i at 584, 994 P.2d at 516 (quoting Rogan, 91 Hawai'i at 411, 984 P.2d at 1237).

B. The prosecutor committed misconduct by indirectly commenting on Canio's failure to testify.

Canio argues that the prosecutor committed misconduct during closing argument and rebuttal by commenting on his failure to testify and to present a defense. Canio points to the following allegedly improper statements by the prosecution:

- 1) Defendant is guilty based on "uncontroverted" evidence, "not contradicted in any way." Trans. 3/4/99 at 8.
- 2) There is "no question whatsoever beyond a reasonable doubt" that it was Canio who entered Almeida's apartment. Id. at 11.
- 3) "[T]here's nothing in the evidence to indicate otherwise. Nothing to contradict [that defendant entered with intent to steal]. Number one, I would ask you to think, why does somebody sneak into someone else's apartment at 4:00 in the morning." Id. at 13.
- 4) "And the watches were actually taken, which goes to show what his intent was the reason he went in there. He went in there to take stuff." Id.
- 5) "There wasn't a lot of witnesses. There wasn't a ton of evidence that came out. But the evidence that did come out, the evidence that you have before you points to one thing." Id. at 15.
- 6) There is no reasonable doubt as to identity of the intruder "because we the State ha[ve] put forth so much evidence to indicate that it was [Canio]. Ray Almeida's testimony alone leaves no doubt that it was the defendant. There's nothing to contradict that it was the defendant that was in that room. . . . [Almeida] knew him before he saw him up close, and the defendant himself admits to being in that room." Id. at 25.
- 7) "Look at the evidence that was presented, and there's only one conclusion you can come to." Id. at 27.

Canio argues that, because he was the only potential witness who could contradict Almeida's testimony, the prosecution's comments about the uncontroverted evidence and the lack of reasonable doubt constituted improper comments on his failure to testify or to present a defense. Because defense counsel did not object to

any of these remarks, we must determine whether the alleged misconduct amounted to plain error which affected Canio's substantial rights. See Klinge, 92 Hawai'i at 592, 994 P.2d at 524 (citing State v. Ganai, 81 Hawai'i 358, 376, 917 P.2d 370, 388 (1996) (citing HRPP Rule 52(b); (citing State v. Marsh, 68 Haw. 659, 661, 728 P.2d 1301, 1302 (1986))).

We have previously stated that:

With regard to the prosecution's closing argument, a prosecutor is permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence. It is also within 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.

Rogan, 91 Hawai'i at 412, 984 P.2d at 1238. However, the prosecutor may not refer to the defendant's failure to testify or to present a defense.

The test to be applied is whether the language used was "manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." The prosecution is entitled to call attention to the fact that the testimony of the witnesses for the prosecution has not been controverted, unless the circumstance that the defendant is the only one who could possibly contradict that testimony would necessarily direct the jury's attention solely to the defendant's failure to testify. State v. Padilla, 57 Haw. 150, 158, 552 P.2d 357, 362-63 (1976) (citations omitted); see also United States v. Clark, 982 F.2d 965, 968 (6th Cir. 1993) (ruling a prosecutor can comment on a defendant's failure to call witnesses, but must avoid commenting "in such a way that he[/she] treads on the defendant's constitutional rights and privileges") (citation omitted); United States v. Lopez, 803 F.2d 969, 973 (9th Cir.) (stating a prosecutor "may call attention to the defendant's failure to present exculpatory evidence if those comments do not call attention to the defendant's failure to testify") (citations omitted), cert. denied, 481 U.S. 1030 (1986).

State v. Smith, 91 Hawai'i 450, 456, 984 P.2d 1276, 1282 (App.)

(emphasis added, alterations in original, some citations omitted), cert. denied, 92 Hawai'i 632, 994 P.2d 564 (1999).

Statements 2, 4, 5, and 7, supra, were merely arguments regarding the weight of the evidence adduced at trial and were not improper. However, statements 1, 3, and 6 were indirect references to Canio's failure to testify.¹ The prosecutor's arguments that the evidence was "uncontroverted" or "not contradicted" were improper because Canio was the only person who could have contradicted Almeida's testimony. Only Canio could have testified whether he was in Almeida's room on the night in question and, if he was there, whether he had permission to be there and what his intent was in being there. Canio is the only person who could have contradicted Almeida's testimony that he admitted to taking the watches and selling them. The prosecutor's statements would have, therefore, necessarily called the jurors' attention to the fact that Canio did not testify.

Defense counsel did not object to the prosecutor's statements; therefore there was no specific curative instruction immediately following the prosecutor's statements. However, the jury was instructed that:

The defendant has no duty or obligation to call any witnesses or produce any evidence.

The defendant has no duty or obligation to testify, and you must not draw any inference unfavorable to the defendant because he did not testify in this case, or

¹ In addition, although not cited by Canio, the prosecutor also argued that there was "nothing to contradict" Almeida's testimony that he did not give Canio permission to enter his room on the night in question. Trans. 3/4/99 at 12.

consider this in any way in your deliberations.

R at 89-90. The jury is presumed to have followed the court's instructions. Klinge, 92 Hawai'i at 592, 994 P.2d at 524.

However, these instructions were part of the general jury instructions and were given well after the prosecutor's improper remarks.

Finally, we address the strength or weakness of the evidence. Almeida testified that he recognized Canio, who was a friend of his, when he awoke and spoke to him briefly before Canio left the room. Thus, although the physical evidence was inconclusive, the prosecution presented a strong case based on Almeida's testimony. However, because of the impropriety of the prosecutor's indirect references to Canio's failure to testify and the lack of an immediate, specific, curative instruction, we must conclude that Canio's substantial rights were prejudiced.

The prosecutor committed misconduct by drawing the jury's attention to Canio's failure to testify. There is a reasonable possibility that the prosecutor's comments prompted the jury to draw negative inferences from Canio's failure to testify and that these inferences contributed to his conviction. Canio's constitutional right against being compelled to be a witness against himself was prejudicially affected. The trial court's failure to take specific curative action was plain error.

Canio is entitled to a new trial.²

C. The trial court did not abuse its discretion in polling the jury.

Canio also argues that the trial court abused its discretion by improperly polling the jury before accepting the jury's verdict. Because we vacate Canio's conviction based on the prosecutor's misconduct, it is not necessary to reach this point of error. However, we note that there was no abuse of discretion in the manner in which the trial court polled the jury.

HRPP Rule 31(c) provides:

When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, or there is not concurrence by the number of jurors stipulated to as being necessary for returning a verdict, the jury may be directed to retire for further deliberations or may be discharged.

Neither party requested that the jury be polled. See Trans. 3/4/99 at 41. Thus, the decision whether to poll the jury was within the trial court's discretion. The trial court elected to do so by asking for a show of hands if any of the jurors disagreed with the verdict. None of jurors responded; the verdict was unanimous and no further polling was required. The

² Canio's retrial is not barred by double jeopardy. Although the prosecutor's misconduct warrants a new trial, it did not rise to the level of highly prejudicial misconduct which warrants reversal. Double jeopardy principles bar reprosecution where "there is a highly prejudicial error affecting a defendant's right to a fair trial and will be applied only in exceptional circumstances" Rogan, 91 Hawai'i at 423 n.11, 984 P.2d at 1249 n.11. In the present case, although there is a "reasonable possibility that the error complained of might have contributed to the conviction[.]" id. (citation omitted), the prosecutor's indirect references to Canio's failure to testify were not the type of highly prejudicial misconduct which Rogan recognized would bar reprosecution.

trial court did not abuse its discretion.³

III. CONCLUSION

Based on the foregoing, we vacate Canio's conviction and sentence and remand the case for a new trial.

DATED: Honolulu, Hawai'i, November 2, 2000.

On the briefs:

Arthur E. Ross
for defendant-appellant

Bryan K. Sano, Deputy
Prosecuting Attorney,
for plaintiff-appellee

³ Although we hold that there was no abuse of discretion in the manner in which the trial court polled the jury, we note that the better procedure is to ask each juror on the record whether he or she agrees with the verdict.