

NO. 23120

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

DIONICIO TANGONAN, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-1226)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.,
and Circuit Judge Hirai, in place of Acoba, J., recused)

Following a jury trial in the Circuit Court of the First Circuit, the Honorable John C. Bryant, Jr. presiding, the jury found defendant-appellant Dionicio Tangonan (Appellant) guilty of sexual assault in the third degree, in violation of Hawai'i Revised Statutes (HRS) § 707-732(1)(b) (1993) (Count III).¹

On appeal, Appellant contends that the trial court erred by: (1) denying his motion for mistrial and for dismissal of the charges based on the police officer's discarding the complaining witness's written statement; and (2) permitting the testimony of the prosecution's expert witness, June Ching, Ph.D. (Dr. Ching), regarding recantation in child sex abuse cases.

¹ HRS § 707-732 (1)(b) (1993) states, "A person commits the offense of sexual assault in the third degree if . . . [t]he person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such person to have sexual contact with the person[.]"

Appellant also contends that he was denied his right to a fair trial as the result of the cumulative effect of the following incidents that occurred during the trial: (1) Complainant's crying outside the court room; (2) reference by Dr. Ching to the involvement of Child Protective Services (CPS); (3) reference by a police officer to the trial as a felony case; (4) the jury's exposure to statements by Complainant's sister overheard by a juror and divulged during deliberations; and (5) sending the jury back for further deliberations after it had returned inconsistent verdict forms as to Count III.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we resolve the issues raised on appeal as follows:

First, the trial court did not abuse its discretion under HRPP Rule 16(e)(9) (1997)² by ordering that Complainant and Officer James Gombio be recalled to testify as to the written statement and determining that such measure cured the presumed prejudice to the Appellant. State v. Okumura, 78 Hawai'i at 383, 401, 894 P.2d at 80, 98 (1995) (recognizing long-standing rule that "violation of [HRPP] Rule 16 does not warrant an immediate

² HRPP Rule 16(e)(9) (1997) provides for sanctions for violations of the discovery rule and states, in relevant part,

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may order such party to permit the discovery, grant a continuance, or it may enter such other order as it deems just under the circumstances.

declaration of a mistrial by the trial court"); State v. Moriwaki, 71 Haw. 347, 355, 791 P.2d 392, 296 (citation and quotation marks omitted) ("In exercising its broad discretion as to sanctions [under HRPP Rule 16], the trial court should take into account the reasons why the disclosure was not made, the extent of prejudice, if any, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances."), reconsideration denied, 71 Haw. 665, 833 P.2d 900 (1990).

Moreover, we hold that Appellant's right to a fair trial and opportunity to present a complete defense under the United States and Hawai'i Constitutions were not violated or impaired because he has failed to demonstrate that the contents of the written statement were favorable or so critical to the defense that its destruction necessarily resulted in a fundamentally unfair trial. See Okumura, 78 Hawai'i at 402, 894 P.2d at 99.

Second, we hold that the trial court did not abuse its discretion in admitting Dr. Ching's expert testimony on recanting child witnesses in sex abuse cases because she presented relevant specialized knowledge that was unknown to the average juror and would aid the jury in evaluating the evidence at trial. See State v. Clark, 83 Hawai'i 289, 298-99, 926 P.2d 194, 203-04 (1996); State v. Batangan, 71 Haw. 552, 557-58, 99 P.2d 48, 51-52 (1990).

Third, because Appellant has failed to demonstrate that the jurors could not follow the instructions as given or that they were "so inflamed" by the Complainant's crying outside the courtroom, we hold that the trial court did not abuse its discretion in denying the motion for mistrial. State v. Holbron, 80 Hawai'i 27, 46, 904 P.2d 912, 931 (recognizing "presumption of appellate practice that jurors are reasonable and generally follow the instructions they are given"), reconsideration denied, 80 Hawai'i 187, 907 P.2d 773 (1995).

Fourth, we conclude that the reference to CPS during Dr. Ching's testimony, although in violation of the trial court's in limine ruling, was harmless beyond a reasonable doubt because there is no reasonable possibility that her remark might have contributed to Appellant's conviction. See Samuel, 74 Haw. at 148, 838 P.2d at 1378 (whether a witness's improper remarks constitute reversible error requires consideration of three factors: (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).

Fifth, inasmuch as the jury was not informed of the penalties of the offense and that Appellant has failed to demonstrate how he has been prejudiced by the mention of the word "felony" during Officer John Chinen's testimony, we hold that the reference to "felony" at trial was harmless beyond a reasonable doubt.

Sixth, although the jurors were improperly exposed to extraneous evidence from the complaining witness's sister during deliberations, we hold that the trial court did not abuse its discretion by denying Appellant's motion for mistrial because the trial court (1) conducted individual voir dire of all the jurors, (2) investigated whether they could adhere to the court's instructions to consider only the evidence which had been presented during trial, and (3) determined that the jurors could continue to fairly and impartially deliberate in the case based solely on the evidence presented.

Seventh, we hold that Appellant was not substantially prejudiced when the trial court sent the jury back to deliberate, after returning two verdict forms with respect to Count III (not guilty of the charged offense, but guilty of the lesser included offense). Although the two verdicts forms were returned by the jury contrary to the court's instructions and were technically improper, the verdicts were not inconsistent. See State v. Feliciano, 62 Haw. 637, 618 P.2d 306 (1980) (stating that a finding of guilty on a lesser included offense is deemed an acquittal of the greater charge). Moreover, "[w]hen an . . . improper verdict is returned by the jury, the court should permit the jury to correct the mistake before it is discharged." State v. Manipon, 70 Haw. 175, 177, 765 P.2d 1091, 1092-93 (1989) (quoting Dias v. Vanek, 67 Haw. 114, 117, 679 P.2d 133, 135 (1984)).

Finally, because the alleged individual errors raised by Appellant are by themselves harmless or insubstantial, it is unnecessary to address the cumulative effect of these alleged errors. See State v. Samuel, 74 Hawai'i 141, 160, 838 P.d 1374, 1383 (1992) (citation omitted). Therefore, we hold that Appellant was not denied a fair trial. Accordingly,

IT IS HEREBY ORDERED that the trial court's December 27, 1999 judgment of conviction and sentence is affirmed.

DATED: Honolulu, Hawai'i, September 26, 2003.

On the brief:

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