NOT FOR PUBLICATION

NO. 25008

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee

vs.

JERRY MARZAN, Defendant-Appellant

APPEAL FROM THE THIRD CIRCUIT COURT
(CR. NO. 01-1-0185)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant-Appellant Jerry Marzan (Defendant) appeals from the February 27, 2002 judgment of the third circuit court (the court)[1] convicting him of Sexual Assault in the Third Degree, Hawaiʻi Revised Statutes (HRS) § 707-732(1)(b) (Supp. 2002),[2] charged in Count I of the indictment. For the reasons discussed herein, Defendant's conviction on Count I is affirmed.

On appeal, Defendant contends that: (1) the court erroneously permitted the Mother (Mother) of the fourteen-year-old complainant (S.A.) to testify as to her opinions and

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[1] The Honorable Riki May Amano presided over the matter.

[2] HRS § 707-732(1)(b) provides:

> (1) A person commits the offense of sexual assault in the third degree if:
> . . . .
> (b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person.

inferences regarding Defendant's guilt; (2) the admissible evidence adduced at trial was insufficient to convict; (3) prosecutorial misconduct warrants a new trial; and (4) the cumulative effect of the prosecution's misconduct bars retrial.

As to Defendant's first argument, Defendant claims that Mother's testimony was inadmissible under either Hawai'i Rules of Evidence (HRE) Rule 701 or Rule 403. "[E]videntiary rulings are reviewed for abuse of discretion, unless application of the rule admits of only one correct result, in which case review is under the right/wrong standard." State v. Ortiz, 91 Hawai'i 181, 189, 981 P.2d 1127, 1135 (1999) (citations omitted). HRE Rule 701 provides in pertinent part that a "witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." See State v. Nishi, 9 Haw. App. 516, 521, 852 P.2d 476, 479 (1993). Based upon what Mother observed, she could rationally infer that S.A. was being sexually abused. Thus, Mother's testimony was helpful to a clear understanding of S.A.'s testimony and the determination of a fact in issue. HRE Rule 403 provides in relevant part that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Mother's testimony did not lack probative value. As an observer, Mother may be allowed to testify to

reasonable inferences from her observations. Mother testified she had not seen Defendant fondling S.A. but had reached that conclusion from her obsevations. With this qualification, Mother's testimony could not have unfairly prejudiced Defendant. Therefore, the court did not abuse its discretion in allowing Mother's opinion testimony.

As to Defendant's second argument, "evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction[.]" State v. Quitog, 85 Hawai‘i 128, 145, 938 P.2d 559, 576 (1997) (emphasis omitted). Defendant argues that because the jury acquitted him of Counts II, IV, and V,[3] a reasonable inference can be made that the jury disbelieved S.A.'s testimony and that his conviction on Count I was a result of Mother's testimony. To the contrary, Mother's opinions and inferences aside, Mother testified she discovered pubic hair in S.A.'s bed, prior to the July 5, 1999 incident. Mother related she saw S.A. lying with her legs across Defendant's lap, S.A.'s shirt was above S.A.'s belly button, and her pants below the belly button, S.A. confirmed Defendant touched her, and Defendant begged Mother not to call the police. The jury was able to consider this evidence along with the testimony of S.A. as to the sexual assault alleged

[3] Counts II, IV, and V were all charges of sexual assault in the third degree, HRS § 707-732(1)(b), however, the counts alleged the sexual assault occurred on different days from Count I, upon which Defendant was found guilty.

in Count I and the testimony of the two police officers who responded on the night of July 5th. Accordingly, when viewed in the strongest light in favor of the prosecution, there was substantial evidence to support the verdict of the jury.

As to his third argument, Defendant argues that opening statement and closing and rebuttal arguments prejudicially affected his rights and deprived him of a fair trial. Defendant contends that the prosecutor's opening statement, to which Defendant did not object at trial, misstated the facts and was argumentative.[4] However, preceding the opening statements, the court instructed the jury that the opening statement is "to allow attorneys to give you an idea . . . of what they believe the evidence will show" and is "not evidence but merely intended to help . . . [the jury] in considering the evidence." (Emphasis added). Furthermore, there was no misconduct committed by the prosecutor in opening statement.[5] Defendant also argues that the prosecution committed misconduct as to closing and rebuttal

[4] Defendant maintains that the prosecutor's opening statement suggested (1) that Mother had actually seen Defendant fondling S.A. when in fact Mother had not and (2) that the use of phrases such as "shameful secret" and the family "falling apart" constituted argument.

[5] As to item (1), the prosecutor's statement regarding fondling described generally the act for which Defendant was accused. Later in her opening statement the prosecutor described what Mother saw, said, and did, making clear that Mother had not actually seen the fondling. As to item (2), the prosecution introduced the events that led up to Defendant's charges by stating how Mother's "family fell apart when she caught this Defendant in the act, and how her daughter's shameful secret came uncovered." In light of evidence that the "family" (Mother, Defendant, S.A. and another child) was dissolved as a result of the incident, there was evidence that the family "fell apart." Also, in light of S.A.'s testimony that several incidents of abuse had been committed by Defendant, and that she had been afraid to tell anyone, there was evidence of a "shameful secret."

argument.[6] The court twice instructed the jury that the attorneys' statements were not evidence. During 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." State v. Rogan, 91 Hawai'i 405, 412, 984 P.2d 1231, 1238 (1999) (citations omitted). "In other words, closing argument affords the prosecution (as well as the defense) the opportunity to persuade the jury that its theory of the case is valid, based upon the evidence adduced and all reasonable inferences that can be drawn therefrom." Id. at 413, 984 P.2d at 1239. A review of the prosecutor's statements in closing and rebuttal arguments disclose that, viewed in context, the prosecutor was legitimately commenting on the evidence and on

[6] Although he interposed an objection at trial only with respect to item (5) infra, Defendant now maintains that during closing and rebuttal argument, (1) the prosecutor's remark that "[w]ith a mother's instinct," Mother "knew something was wrong[,]" and her "reaction [was that] of an appropriate mom" implicitly invited the jury to empathize with Mother; (2) the prosecutor again told the jury in closing argument that Mother actually saw Defendant touching S.A.'s vagina, which had no basis in the evidence adduced at trial; (3) the prosecutor asserted that Mother "told you [of those things] because she was being honest, [and] she was being truthful[,]" thus conveying the prosecutor's personal opinion that Mother had testified honestly and truthfully; (4) the prosecutor said that S.A. gained "justice for herself" in testifying, thus expressing the prosecutor's view that their cause was just; (5) the prosecutor addressed individual jurors, implicitly asking them to empathize with the prosecution witnesses or to distance themselves from Defendant; (6) the prosecutor's referral to "violations" against S.A.'s body invited the jury's sympathy; and (7) the prosecutor sought the empathy of the jury by arguing S.A. had the courage to testify and said that "the State requests that you the jury have the courage to bring a verdict of guilty."

reasonable inferences therefrom.[7] Because there was no misconduct by the prosecutor in her opening statement and closing or rebuttal arguments, it need not be decided whether the conduct was harmless beyond a reasonable doubt. See State v. Valdivia, 95 Hawaiʻi 465, 482, 24 P.3d 661, 678 (2001) (holding that because the prosecutor's statements did not constitute prosecutorial misconduct in the first instance, it need not reach the question whether it was harmless beyond a reasonable doubt).

Finally, Defendant contends that the cumulative effect of the prosecutor's misconduct warrants reversal of his conviction. However, "it is unnecessary to address the cumulative effect of these 'alleged errors'" when the "individual errors raised . . . are by themselves insubstantial." State v. Gomes, 93 Hawaiʻi 13, 22, 995 P.2d 314, 323 (2000) (citation omitted).

[7] As to Defendant's item (1), the prosecution's remarks described Mother's reaction after Defendant flung the pillow away and Mother saw that S.A.'s shorts were "way down." As to item (2), the prosecutor's reference to "appropriate reaction" referred to Mother's separating S.A. from Defendant and calling the police, thus attempting to dispel the notion that Mother was jealous or overreacting. Additionally, the prosecutor did not state that Mother actually saw Defendant touching S.A.'s vagina, but described Mother's observation of S.A. and Defendant, clarifying later that Mother "couldn't really see what was going on" because of the position of the pillow held by Defendant. Again in rebuttal argument, the prosecutor conceded "Mom never said she saw the actual touching. She couldn't have. The pillow was hiding it." As to item (3), the prosecutor argued that Mother was honest because Mother's testimony of her "reaction or actions . . . did not cast her in a good light." As to item (4), the prosecutor was arguing S.A.'s "motive" in coming to court and what she would gain by testifying. As to item (5), the arguments made were in and of themselves permissible as applying the law to the evidence. As to item (6), the prosecutor's reference to "violations" was in the context of pointing out "what happened to . . . [S.A.'s] intimate body parts and how it was violated" and S.A. "trying to forget the violations . . . against her body." As to item (7), the prosecution argued in context that S.A. was "only fourteen years old . . . and brave enough to come forward[,]" in asking the jury to return a guilty verdict.

Therefore, in accordance with Hawai‘i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the court’s February 27, 2002 judgment is affirmed.

DATED: Honolulu, Hawai‘i,December 30, 2003.

On the briefs:

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for defendant-appellant.

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