

*** FOR PUBLICATION ***

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellant,

vs.

KALEOKALANI YAMADA, Defendant-Appellee.

NO. 26506

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 03-1-1509)

OCTOBER 21, 2005

MOON, C.J., LEVINSON, AND NAKAYAMA, JJ.;
ACOPA, J., DISSENTING; DUFFY, J., DISSENTING

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OPINION OF THE COURT BY MOON, C.J.

Plaintiff-appellant State of Hawai'i [hereinafter, the prosecution] appeals from the March 15, 2004 findings of fact, conclusions of law and order of the Circuit Court of the First Circuit, the Honorable Michael A. Town presiding, granting a new trial to defendant-appellee Kaleokalani Yamada, who had been convicted of two counts of robbery in the first degree, in violation of Hawai'i Revised Statutes (HRS) § 708-840(1)(b)(i) and (ii) (Supp. 1998),¹ and one count of assault in the first

¹ HRS § 708-840 provides in pertinent part:

Robbery in the first degree. (1) A person commits the offense of robbery in the first degree if, in the course of committing theft:

. . . .

(continued...)

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degree, in violation of HRS § 707-710 (1993).² On appeal, the prosecution contends that the trial court abused its discretion in granting Yamada's motion for new trial inasmuch as the court based its decision on the sole ground that a juror slept through twelve minutes of defense counsel's one-hour long closing argument, "without a showing of actual prejudice from the defense or a finding of prejudice by the circuit court, and where the record as a whole evinced no prejudice to defendant." For the following reasons, we vacate the circuit court's March 15, 2004 order and remand this case for sentencing.

I. BACKGROUND

On July 9, 2003, Yamada was charged by complaint with two counts of robbery in the first degree and one count of assault in the first degree. Trial commenced on November 24, 2003. The sole issue contested at trial was the identity of the perpetrator. During his opening statement, defense counsel stated to the jury:

¹(...continued)

- (b) The person is armed with a dangerous instrument and:
- (i) The person uses force against the person of anyone present with intent to overcome that person's physical resistance or physical power of resistance; or
 - (ii) The person threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property.

² HRS § 707-710 provides in pertinent part: "A person commits the offense of assault in the first degree if the person intentionally or knowingly causes serious bodily injury to another person."

* * * FOR PUBLICATION * * *

Mistaken identity, ladies and gentlemen. . . . The evidence will show that [Yamada] is not guilty[.] [T]he evidence will show that there are a lot of inaccuracies here. There's a lot of inconsistencies. There's reasonable doubt, and the State cannot prove these charges beyond a reasonable doubt because [Yamada] did not do this.

At trial, the prosecution presented two witnesses who positively identified Yamada in a police lineup. Yamada presented one alibi witness who testified that she was with him at her house on the night of the incident and that Yamada had remained with her until the next afternoon. Additionally, Yamada's then-employer testified for the defense as to Yamada's physical appearance and pertinent company policies regarding physical appearance to contradict the prosecution witnesses' physical descriptions of the perpetrator.

On December 2, 2003, after the court read its instructions to the jury, the parties presented closing arguments. During defense counsel's closing argument, the bailiff signaled to the judge that a juror "might be sleeping." The judge noticed that one of the jurors' "head was over," although he could not see her eyes.³ At that point, the judge interrupted defense counsel, asking, "Everybody wide awake? Everybody awake? You can rest your eyelids, but listen." At that point, the judge noticed that the foreperson either "A[,] opened her eyes and was awake, or B[,] woke up." Despite the interruption, defense counsel continued his argument without repeating or requesting to repeat any portion of his argument.

³ This particular juror later turned out to be the foreperson of the jury.

After the prosecution's rebuttal, the court made its final charge to the jury with instructions to return at 8:30 a.m. the next morning, unless it reached a verdict that afternoon. The jury did not reach a verdict and was, therefore, instructed to return the following day.

The next morning, outside of the jury's presence, defense counsel moved for a mistrial on the following grounds:

(1) several jurors "seemed sleepy [during defense counsel's closing argument] and did not consider the closing argument" and (2) the prosecution made improper statements regarding certain evidence during its closing argument.⁴ In support of Yamada's motion for mistrial, defense counsel recalled:

I think it was two or three jurors who seemed to be very sleepy. In fact, one of the jurors looked like she was sleeping. In fact, that juror turned out to be the foreperson of the jury.

The prosecution similarly recounted that another juror, Joe Gomez, appeared drowsy during closing argument:

[Prosecution]: Your honor, I did not notice [the foreperson]. However, I did notice the gentleman right next to her. I forget his name.

THE COURT: Gomez.

[Prosecution]: [Gomez] had his eyes closed so what I did is I dropped -- while I was doing my closing argument, he had his eyes closed and wasn't looking at me so I dropped the pictures and made kind of a loud sound and it didn't appear that he was sleeping because as soon as I did that, he looked up and, you know, it's like he focused his attention

⁴ Specifically, Yamada argued that the prosecution referred to certain inadmissible evidence relating to Yamada's identification; however, this issue is not before this court on appeal.

After hearing further argument, the court ruled:

On the allegation there may have been a sleeping juror, I'm going to deny the mistrial now without prejudice to raise it again depending on the verdict, with your preference, [defense] counsel, to take some testimony from the foreperson if she was asleep later assuming today and if so, only [the foreperson] or Mr. Gomez[.]

The court also noted that, because a third juror, Thomas Saka, "might have had his eyes closed[,] . . . I gotta talk to 'em. We gotta get it right."

After the court denied Yamada's motion, the jury returned a unanimous verdict finding Yamada guilty as charged on all counts. The court then dismissed the jury, except for the three jurors, who were believed to be sleeping during closing arguments. The court then proceeded to voir dire Saka, Gomez, and the foreperson. Of the three jurors, only Saka admitted to sleeping during the parties' closing arguments:⁵

THE COURT: [Saka], it's the procedure if someone -- if a juror is perceived to maybe have closed their eyes or gone to sleep during -- not the trial but closing, did at anytime during closing arguments when [the prosecution] or [defense counsel] were arguing the case, did you go to sleep?

[Saka]: I may have passed out a couple of seconds, but I did notice on the Power Point, I think it was during [the prosecution's closing argument] and when I did open them, it came back up, it was pretty much on the same bullet point.

THE COURT: What would have been the longest time that you would have gone to sleep?

[Saka]: Maybe ten, 15 seconds. I'm not sure.

THE COURT: Ten or 15 seconds? Okay . . .

[Prosecution]: If I understand correctly, [Saka], this was on my closing?

[Saka]: I'm pretty sure.

[Prosecution]: And you recall any similar event when [defense counsel] was presenting their closing?

⁵ The foreperson stated that she was not sleeping; according to her, she was merely closing her eyes as her way of "handling that kind of repetition without getting distracted with the repetitions." Gomez similarly informed the court that he "never fell asleep."

[Saka]: I think it might have been [during defense counsel's closing argument] because actually it was on this -- it was on the -- this board that was being shown.

[Prosecution]: You're saying the white board underneath the clock?

[Saka]: Yes.

THE COURT: Any questions, [defense counsel]?

[Defense counsel]: Just briefly. [Saka], do you remember what bullet point it was possibly, what area?

[Saka]: No, I don't.

[Defense counsel]: Do you remember what witness I was talking about or what part of the case I was talking about?

[Saka]: Not specifically, no.

[Defense counsel]: And you said it was just ten to 15 seconds or so?

[Saka]: I think so. I think when I -- you were still on the same bullet point, yes.

[Defense counsel]: And you weren't really drifting out in any part or were you drifting?

[Saka]: I may have been drifting. I'm not sure.

[Defense counsel]: You were drifting in and out throughout my closing?

[Saka]: I don't think throughout the whole thing. Maybe --

[Defense counsel]: Throughout half of it or so?

[Saka]: I think less than that.

[Defense counsel]: About how much? I'm sorry.

[Saka]: Maybe 20 percent at the most.

[Defense counsel]: 20 percent at most? Okay. Okay. And do you recall if it was basically at the beginning part of my closing or the end of my closing?

[Saka]: Probably more towards the middle.

[Defense counsel]: More towards the middle? Okay. Thank you very much.

The court summarized the jurors' statements:

It sounds to me like [the foreperson], even though her eyes were closed, was able to hear. She may have been a little drowsy, so to speak, but people get drowsy. Mr. Gomez clearly was wide awake. [Saka] said he was asleep for ten to 15 seconds, but he doesn't know. He may have missed as much as 20 percent of the defense closing.

The court dismissed the jurors and directed defense counsel to file a written motion for new trial.

On December 12, 2003, Yamada filed a motion for new trial, wherein he argued that, inter alia, juror misconduct deprived him of a fair trial and a new trial was required "in the interests of justice." On January 29, 2004, the court heard argument on the motion.

On March 14, 2004, the court entered an order granting Yamada's motion for new trial, finding and concluding as follows:

FINDINGS OF FACT

1. A complaint was filed on July 9, 2003, charging [Yamada] with two (2) counts of Robbery in the First Degree and one (1) count of Assault in the First Degree for an incident that occurred on February 14, 2003. Following a jury trial, [Yamada] was convicted as charged of all offenses on December 3, 2003.
2. Defendant's Motion for a New trial (hereinafter "Motion") was filed on December 12, 2003, within the time period specified by Rule 33, Hawai'i Rules of Penal Procedure. Inter alia, the Motion claimed that a new trial should be granted because a juror fell asleep during defense counsel's closing argument
3. The Court granted the Motion on the sole basis that a juror was asleep for about twenty per cent (20%) of defense counsel's closing argument, that was approximately one hour long, thus the juror was asleep for about twelve (12) minutes.
4. The Court had "serious discomfort" with [the prosecution]'s use of the bat as evidence establishing [Yamada]'s identity.^{6]}

CONCLUSIONS OF LAW

1. This court has jurisdiction over the Motion pursuant to Rule 33, Hawaii Rules of Penal Procedure, as it was filed within the time period proscribed by that Rule.
2. The Motion is granted in the interest of justice. ACCORDINGLY IT IS HEREBY ORDERED that [Yamada's] Motion for a New Trial be and the same is hereby granted.

(Emphasis added).

On April 12, 2004, the prosecution filed its timely notice of appeal.

II. STANDARD OF REVIEW

As a general matter, the granting or denial of a motion for new trial is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. The same principle is applied in the context of a motion for new trial premised on juror misconduct. 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. Furutani, 76 Hawai'i 172, 178-79, 873 P.2d 51, 57-58 (1994) (citations and quotations omitted).

⁶ See supra note 4.

State v. Kim, 103 Hawai'i 285, 290, 81 P.3d 1200, 1205 (2003).

III. DISCUSSION

On appeal, the prosecution argues that the trial court abused its discretion by granting Yamada's motion for new trial based on a juror sleeping during defense counsel's closing argument, "without a showing of actual prejudice from the defense or a finding of prejudice by the circuit court, and where the record as a whole evinces no prejudice to [Yamada]." Specifically, the prosecution asserts that finding that a juror was sleeping, without more, does not demonstrate prejudice and that any misconduct on Saka's part was harmless because (1) he did not sleep through any testimony, evidence, or jury instructions and (2) the portion of the argument allegedly missed was not significant. Moreover, the prosecution points out that, if defense counsel believed Saka slept through significant portions of the proceedings, defense counsel was under the duty to bring the misconduct to the court's attention at that time for the court to correct the problem immediately.

With respect to jury misconduct, this court has noted:

The sixth amendment to the United States Constitution^[7] and article I, section 14 of the Hawai'i Constitution^[8] guarantee the criminally accused a fair

⁷ "The sixth amendment to the United States Constitution provides in relevant part that, '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed'" Kim, 103 Hawai'i at 290-91 n.5, 81 P.3d at 1205-06 n.5.

⁸ "Article I, section 14 of the Hawai'i State Constitution, provides in relevant part that, '[i]n all criminal prosecutions, the accused shall enjoy
(continued...)"

trial by an impartial jury. State v. Gabalis, 83 Hawai'i 40, 45, 924 P.2d 534, 539 (1996) (citation omitted). If any juror was not impartial, a new trial must be granted. Id. However, "not all juror misconduct necessarily dictates the granting of a new trial. A new trial will not be granted if it can be shown that the jury could not have been influenced by the alleged misconduct." Furutani, 76 Hawai'i at 180, 873 P.2d at 59.

Kim, 103 Hawai'i at 290-91, 81 P.3d at 1205-06 (emphasis and brackets added) (footnote numbers altered). Consequently,

[w]hen the basis for the motion [for new trial] is juror misconduct[,] . . . the first responsibility of the trial court is to determine whether the misconduct is of a nature which could substantially prejudice the defendant's right to a fair trial. Whether it does rise to that level is ordinarily left to the discretion of the trial court. [Furutani, 76 Hawai'i] at 180, 873 P.2d at 59 (citing State v. Keliioholokai, 58 Haw. 356, 359, 569 P.2d 891, 895 (1977)). Where the trial court determines that the juror misconduct could substantially prejudice the defendant's right to a fair and impartial jury, a rebuttable presumption of prejudice is raised and the court must investigate the totality of circumstances to determine if the misconduct impacted the jury's impartiality. Furutani, 76 Hawai'i at 181, 873 P.2d at 60 (citing State v. Williamson, 72 Haw. 97, 102, 807 P.2d 593, 596 (1991)). In order to overcome the rebuttable presumption, the prosecution must show that the alleged deprivation of the right to a fair trial was harmless beyond a reasonable doubt. Furutani, 76 Hawai'i at 181, 873, P.2d at 60 (emphasis added).

State v. Adams, 10 Haw. App. 593, 599-600, 880 P.2d 226, 231-32 (1994) (ellipses points and emphases added). Stated differently, this court, in State v. Pauline, 100 Hawai'i 356, 381-82, 60 P.3d 306, 331-32 (2002), noted:

The defendant must first make a prima facie showing of a deprivation that could substantially prejudice his or her right to a fair trial by an impartial jury. We also suggested that defendant should first present some specific, substantial evidence showing a juror was possibly biased. Once the defendant has satisfied this burden, the trial court then determines whether the nature of the alleged deprivation rises to the level of being substantially prejudicial. If the trial court determines that the alleged deprivation is substantially prejudicial, the trial court

⁸(...continued)
the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed" Kim, 103 Hawai'i at 291 n.6, 81 P.3d at 1206 n.6.

then becomes duty bound to further investigate the totality of circumstances surrounding the alleged deprivation to determine its impact on jury impartiality.

(Citations, brackets, and quotation marks omitted.) (Emphases added.) Additionally, this court has stated that:

Error is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes[] whether there is a reasonable possibility that the error might have contributed to the conviction.

State v. Perez, 64 Haw. 232, 234, 638 P.2d 335, 337 (1981)

(citation omitted).

Assuming that Saka's sleeping constituted misconduct, the trial court was under the duty to "determine whether the misconduct [was] of a nature which could substantially prejudice [Yamada]'s right to a fair trial." Adams, 10 Haw. App. at 599, 880 P.2d at 232. The trial court did not expressly enter a finding of prejudice, but granted the motion for new trial "on the sole basis that a juror was asleep for about . . . twelve (12) minutes." Finding No. 3. Generally, courts have held that "the mere falling asleep for a short time, by a juror, during the argument of counsel for the defendant in a criminal cause, does not of itself constitute a sufficient cause for a new trial." Whiting v. State, 516 N.E.2d 1067, 1068 (Ind. 1987) (citation omitted); see also U.S. v. Springfield, 829 F.2d 860, 864 (9th Cir. 1987) (finding no prejudice where a juror missed a portion of witness testimony during a nap).

In U.S. v. Barrett, 703 F.2d 1076, as amended, (9th Cir. 1982), the court followed the same test, noting:

Even if the juror in the present case is found to have been asleep during portions of the trial, a new trial may not be required if he did not miss essential portions of the trial and was able fairly to consider the case.

Id. at 1083 (emphasis added); see also State v. Hampton, 549 N.W.2d 756 (Wis. Ct. App. 1996); State v. Wright, 453 P.2d 1 (Kan. 1969); Hasson v. Ford Motor Co., 185 Cal. Rptr. 654 (Cal. 1982). Notwithstanding the trial court's failure in the instant case to make a specific finding "that the juror misconduct could . . . substantially prejudice [Yamada's] right to a fair and impartial jury," Adams, 10 Haw. App. at 600, 880 P.2d at 232, we believe such finding was implicit in its grant of Yamada's motion for new trial. See Ala Moana Boat Owners' Ass'n v. State, 50 Haw. 156, 158, 434 P.2d 516, 518, reh'g denied, 50 Haw. 181, 434 P.2d 516 (1967) (noting the "presumption of correctness and regularity that attend the decision of the lower court") (Citations omitted.). Thus, the dispositive question for us in this appeal is whether the prosecution has overcome the rebuttable presumption by showing that the alleged deprivation of the right to a fair trial was harmless beyond a reasonable doubt. We believe it has.

Initially, as the prosecution points out, there is nothing in the record of the instant case to suggest that Saka slept through any of the evidence adduced at trial⁹ or any of the jury instructions that were given. There is also nothing in the

⁹ As this court has previously noted, "arguments of counsel are not evidence." State v. Quitoq, 85 Hawai'i 128, 144, 938 P.2d 559, 575 (1997) (citation omitted).

record to suggest that he was unable to fully participate in jury deliberations. At the hearing on the motion for new trial, defense counsel argued that his client was substantially prejudiced because Saka missed crucial arguments "focused on reasonable doubt and the inability of the [prosecution] to prove the charges beyond a reasonable doubt."

During closing argument, defense counsel focused on: (1) his contention that the prosecution's witnesses mistakenly identified Yamada; (2) the lack of physical evidence confirming Yamada's involvement; and (3) what constitutes reasonable doubt. As noted supra, the defense presented its theories of mistaken identity and lack of evidence during his opening statement. Further, the defense's theory of the case was clearly presented to the jury during the presentation of the its two witnesses. Moreover, the prosecution argues that there is nothing to suggest that Saka did not hear the instructions given prior to the parties' closing arguments, which included an explanation of the reasonable doubt standard:

What the law requires before the defendant can be found guilty is not suspicion, not probabilities, but proof of the defendant's guilt beyond reasonable doubt.

What is reasonable doubt? It is a doubt in your mind about the defendant's guilt which arises from the evidence presented or from the lack of evidence and which is based on reason and common sense. Each of you must decide individually whether there is or is not such a doubt in your mind after careful and impartial consideration of the evidence. . . . What is proof beyond a reasonable doubt? If, after consideration of the evidence and the law, you have a reasonable doubt of the defendant's guilt, then the prosecution has not proved the defendant's guilt beyond a reasonable doubt, and it is your duty to find the defendant not guilty.

If, after consideration of the evidence and the law, you do not have a reasonable doubt of the defendant's guilt, and it is your duty to find the defendant guilty.

You must consider only the evidence that has been presented to you in this case and such inferences therefrom as may be justified by reason and common sense.

Even if Saka was sleeping and did not hear a portion of defense counsel's closing arguments, he was given the correct instruction, and we presume he followed it. See State v. Kupihea, 80 Hawai'i 307, 317-18, 909 P.2d 1122, 1132-33 (1996). We, therefore, believe, based on the totality of circumstances, that the prosecution has met its burden in establishing that the alleged deprivation of the right to a fair trial was harmless beyond a reasonable doubt.

The dissent, relying on People v. Evans, 710 P.2d 1167 (Col.), reh'g denied, cert. denied, 710 P.2d 1167 (1985), maintains that, because closing argument is "one of the most consequential parts of the trial," id. at 1168, juror inattention during argument is prejudicial. In our view, the decision of the court in Evans is consistent with our cases and those of other jurisdictions that require more than an assertion that a juror's inattention -- or that sleeping per se -- constitutes prejudice, dictating the need for a new trial. In Evans, one of the jurors was asleep during defense counsel's closing argument. Defense counsel, however, was unaware of the misconduct until the trial court initiated contempt proceedings against the juror following the verdict. Even after finding that the juror's conduct was "unsatisfactory[]" and was contemptuous of the seriousness of what

we are talking about here," id., the trial court denied defendant's motion for judgment of acquittal, or alternatively for a new trial because it believed that the facts "d[id] not suggest that the defendant's rights were violated." Id.

On appeal, the Colorado Court of Appeals agreed "with [the trial court's] conclusion that the juror's inattention during that stage of the proceedings was not only 'contemptuous of the court, but contemptuous of the rights of the defendant.'" Id. (emphasis added). Recognizing the inconsistency between the trial court's finding that the juror's misconduct was "contemptuous of the rights of the defendant" and its ruling that the defendant's rights were not violated, the appellate court stated: "Since the trial court obviously determined that the juror's misconduct was sufficiently grave to warrant a contempt proceeding and imposition of a penalty, we fail to see how this same misconduct falls short of constituting prejudice to the defendant." Id. (emphasis added). In other words, the appellate court clearly recognized that the juror's inattention was not merely a case of sleeping per se, but that the juror's conduct was so egregious it not only warranted a contempt proceeding, but resulted in a finding of contempt, which the appellate court equated with a finding of prejudice.

In the instant case, the trial court, unlike Evans, specifically determined that its grant of a new trial was based "sole[ly on the fact] that a juror was asleep . . . for twelve

minutes [of defense counsel's closing argument]," see Finding No. 3., and nothing more. Although we do not condone jurors sleeping or being otherwise inattentive while court is in session, we recognize -- as did the Supreme Court of California in Hasson v. Ford Motor Company, 650 P.2d 1171 (1982), that, at some point during a trial, even the most diligent jurors may be less than one hundred percent focused on the proceedings and may "reach the end of [their] attention span at some point during a trial and allow [their] mind[s] to wander temporarily from the matter at hand." Id. at 1190. At the outset, we emphasize that our citation to Hasson should not be construed as indicating our agreement with the ultimate decision to affirm the trial court's denial of the defendant's motion for new trial given the totality of circumstances of the incidents of juror misconduct described therein. As indicated, infra, we cite with approval the principles espoused by the California Supreme Court with regard to a jury's duty and the rebuttable presumption that arises from any juror misconduct.

In Hasson, the court addressed a number of instances of juror misconduct, including allegations of inattentiveness. The misconduct involved, inter alia, five of twelve jurors reading a novel or other extraneous materials and/or doing crossword puzzles while witnesses and evidence were being presented. It was alleged that such activities occurred "'over approximately a one-month period,' '[o]n many occasions,' and 'intermittently

over a period of many days.'" Id. at 1185. In addressing the arguments made by the parties, the California Supreme Court prefaced its analysis by stating:

We agree with the basic premise that a jury's failure to pay attention to the evidence presented at trial is a form of misconduct which will justify the granting of a new trial if shown to be prejudicial to the losing party. The duty to listen carefully during the presentation of evidence at trial is among the most elementary of a juror's obligation.

Id. (emphasis added). The court concluded that,

by failing to fulfill their duty of attentiveness, the jurors committed misconduct.

This conclusion does not end our discussion, however, because a new trial is required only if it can be established that [the defendant] was somehow prejudiced by the jurors' inattentiveness. Prejudice exists if, in the absence of proven misconduct, it is reasonably probable that a result more favorable to the complaining party would have been achieved.

. . . [The defendant] urges that we should presume prejudice from the fact of inattentiveness alone. In People v. Honeycutt (1977) 20 Cal. 3d 150, 156, 141 Cal. Rptr. 698, 570 P.2d 1050, we stated: "It is well settled that a presumption of prejudice arises from any juror misconduct However, the presumption may be rebutted by proof that no prejudice actually resulted."

Id. at 1188 (emphases added).

Although the trial court in the instant case did not explicitly determine that the juror's sleeping constituted misconduct, we agree with its implicit finding that, by sleeping for twelve minutes, the juror breached his duty of attentiveness and that he was, therefore, guilty of juror misconduct. However, as emphasized by the court in Hasson and as this court has repeatedly stated, "not all juror misconduct necessarily dictates the granting of a new trial." Kim, 103 Hawai'i at 290-91, 81 P.3d at 1205-06 (citation omitted). As previously stated, once the trial court determines that juror misconduct could

substantially prejudice the defendant's right to a fair and impartial jury, -- which we believe was implicit in the trial court' granting of a new trial, -- a rebuttable presumption is raised, and the prosecution must then show that the alleged deprivation of the right to a fair trial was harmless beyond a reasonable doubt. And, as previously discussed, we agree with the prosecution that, based on the totality of circumstances, the juror misconduct in this case was harmless beyond a reasonable doubt.

Finally, we emphasize, as the court did in Hasson, that:

Retrials are to be avoided unless necessitated by a more substantial dereliction of jurors' duties than was evident in this case.^[10] "Society has a manifest interest in avoiding needless retrials: they cause hardship to the litigants, delay the administration of justice, and result in social and economic waste."

Id. at 1190 (citation omitted). We believe that the requirements set forth in our case law and as discussed herein provide the

¹⁰ Again, we reiterate that we do not concur with the Hasson court's assessment of the jurors' conduct in that case. In fact, it would appear that the dissent's view would have been more appropriate:

This misconduct was pervasive, involving five of the twelve jurors including the "forewoman." It continued over an extended period of time, variously described as "approximately a one-month period," or "over a period of several weeks," or "on many occasions," or "intermittently over a period of many days." It occurred while witnesses and evidence were being presented. **The misconduct was not the momentary dozing of a single juror in an isolated incident.** Rather, it involved almost half the jury in frequent, prolonged, intentional mental activity of a type that was diverting and that required thought and contemplation. . . . Such activities, in my opinion, were wholly incompatible with a juror's duties[.]

Hasson, 650 P.2d at 1193 (Richardson, J., dissenting) (underscored emphases in original) (bold emphasis added).

assurance that the hardship and delay of a new trial are not needlessly imposed.

Accordingly, we hold that the trial court abused its discretion in granting a new trial.

IV. CONCLUSION

Based on the foregoing, we vacate the circuit court's March 15, 2004 order granting a new trial and remand this case for sentencing.

On the briefs:

James M. Anderson,
Deputy Prosecuting Attorney,
for plaintiff-appellant

Harrison L. Kiehm,
for defendant-appellee

