

NO. 25231

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,

vs.

ROBERT AZEVEDO, JR., Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 01-1-1181)

AMENDED SUMMARY DISPOSITION ORDER¹

(By: Moon, C.J., Nakayama, Acoba, and Duffy, JJ.;
Levinson, J., Concurring in Result Only)

Defendant-appellant Robert Azevedo, Jr. appeals from his February 1, 2002 judgment of conviction for two counts of sexual assault in the first degree, in violation of Hawai'i Revised Statutes (HRS) § 707-730(1)(b) (1993), entered by the Circuit Court of the First Circuit, the Honorable Karl K. Sakamoto presiding. On appeal, Azevedo contends that: (1) the trial court erred in denying his motion for a mistrial based on Complainant's grandmother's hand signals to Complainant while he testified; (2) the trial court erred in excluding evidence of Complainant's sexual fantasies, prior sexual assaultive behavior, and psychological treatment for sexual behavior; (3) the prosecutor committed prosecutorial misconduct during closing argument; (4) the trial court erred in denying his motion for a

¹ This amended summary disposition order is being filed to reflect the addition of the underscored language in the first paragraph. No other changes have been made to the original summary disposition order.

new trial; and (5) the cumulative effect of the foregoing alleged errors deprived him of a fair trial.

Upon carefully reviewing the record and the briefs submitted and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Azevedo's contentions as follows.

(1) With respect to the hand signals, we cannot say the trial court, upon considering the testimony of Complainant and his grandmother, as well as the arguments of counsel, "clearly exceeded the bounds of reason" to Azevedo's "substantial detriment" by denying Azevedo's Motion for a Mistrial. State v. Davia, 87 Hawai'i 249, 253, 953 P.2d 1347, 1351 (1998); State v. Peters, 44 Haw. 1, 352 P.2d 329 (1959).

(2) With respect to the evidence of Complainant's sexual fantasies, Azevedo does not dispute the occurrence of the sexual acts underlying his conviction. Thus, we conclude that State v. Kelekolio, 74 Haw. 479, 849 P.2d 58 (1993) is not controlling as to the issue of relevancy. Even assuming, arguendo, that evidence of Complainant's sexual fantasies is relevant, its probative value is substantially outweighed by the danger of unfair prejudice. See Hawai'i Rules of Evidence (HRE) Rule 403 (1993); see also HRE Rule 403 Commentary (1993).

With respect to the evidence of Complainant's alleged prior sexual assaultive behavior, Azevedo argues that the trial court erred by excluding evidence of Complainant "sexual assaulting [the girlfriend of Complainant's biological father] [hereinafter, Incident One], the licking the vagina of a three year-old girl [hereinafter, Incident Two], and engaging in sexual

activity with a male relative who was a year of [sic] two older than him, [hereinafter, Incident Three]." As for Incidents Two and Three, the trial court ruled, and we agree, that Azevedo failed to timely move to offer evidence of these incidents in accordance with the dictates of HRE Rule 412. See HRE Rule 412(c)(1) (Supp. 2001). As to Incident One, we hold that State v. Calbero, 71 Haw. 115, 785 P.2d 157 (1989), and In re Doe, 81 Hawai'i 447, 918 P.2d 254 (App. 1996), are not dispositive under the facts and circumstances of the instant case. Inasmuch as evidence of Incident One was not relevant and was improperly offered to prove Complainant's character to show a "propensity or inclination to behave similarly on the occasion in question," HRE Rule 412 Supplemental Commentary (1993), the trial court properly excluded it.

As for evidence of Complainant having received counseling for his sexual behavior, we hold that the trial court did not err by excluding the evidence inasmuch as its probative value is far outweighed by the danger of unfair prejudice. See HRE Rule 403.

(3) Although we conclude that the prosecutor's comment to the effect that Complainant would always remember that he was used to gratify Azevedo's sexual desires amounted to prosecutorial misconduct, we hold that it did not constitute reversible error under the factors outlined in State v. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209. See State v. Mara, 98 Hawai'i 1, 16, 41 P.3d 157, 172 (2002). Further, we cannot say that, when reviewed for plain error, the prosecutor's remarks to "do justice" or that Complainant was "entitled to justice"

prejudicially affected Azevedo's substantial rights. See State v. Iuli, 101 Hawai'i 196, 208, 65 P.3d 143, 155 (2003); see also Freeman v. State, 776 So.2d 160, 186 (Ala. Crim. App. 1999) ("There is no impropriety in a prosecutor's appeal to the jury for justice[.]" (Citation omitted.)); Lafevers v. State, 819 P.2d 1362, 1370-71 (Okla. Crim. App. 1991) (prosecutor's comments concerning jury's duty to do justice by returning a verdict of guilty not outside the scope of permissible closing argument where jurors pledge to uphold justice); cf. People v. Bass, 585 N.W.2d 1, 6 (Mich. Ct. App. 1997) (holding that prosecutor's remark to jury "to do the right thing" and "do justice" did not deny defendant a fair and impartial trial where comments were isolated and prosecutor's argument was otherwise proper and an objection and curative instruction could have eliminated any prejudicial effect).

(4) Inasmuch as the testimony of Complainant's cousin was clearly offered for the sole purpose of impeaching Complainant, Azevedo's assertion that the cousin's testimony amounted to newly discovered evidence warranting a new trial fails under State v. McNulty, 60 Haw. 259, 267-68, 588 P.2d 438, 445 (1978), cert. denied, 441 U.S. 961 (1979).

With respect to Azevedo's challenge to the denial of his motion for a psychiatric evaluation of Complainant as a basis for a new trial, Azevedo fails to argue this point in his Opening Brief beyond simply stating that it was a ground asserted in his Motion for a New Trial. Thus, we hold the point is waived. See Hawai'i Rules of Appellate Procedure Rule 28(b)(7) (2002).

Azevedo's remaining grounds for a new trial relate to the trial court's rulings with respect to Complainant's grandmother's hand signals, evidence of Complainant's sexual fantasies and prior sexual assaultive behavior, and the alleged prosecutorial misconduct during closing argument. As discussed supra, we find no error.

(5) "After carefully reviewing the record, we conclude that the individual errors raised by [Azevedo] are by themselves insubstantial. Thus, it is unnecessary to address the cumulative effect of these 'alleged errors.'" State v. Samuel, 74 Haw. 141, 160, 838 P.2d 1374, 1383 (1992); see also State v. Pulse, 83 Hawai'i 229, 244, 925 P.2d 797, 812 (1996). Therefore,

IT IS HEREBY ORDERED that Azevedo's February 1, 2002 judgment of conviction is affirmed.

DATED: Honolulu, Hawai'i, October 29, 2003.

On the briefs:

James S. Tabe,
Deputy Public Defender,
for defendant-appellant

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

CONCURRING SEPARATELY BY LEVINSON, J.

I concur in the result only.