NO. 22808

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
JOSEPH F. PYNE, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-0474)

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

Defendant-Appellant Joseph F. Pyne (Pyne) appeals the August 12, 1999 judgment of the circuit court of the first circuit, which convicted him, upon a jury verdict, of the included offense of robbery in the second degree,[1] and sentenced him to five years of probation under terms and conditions, including one year in prison subject to early release upon (1) entry into a residential substance abuse treatment program, or (2) a confirmed transfer of probation to the State of Massachusetts, or any other state.

[1] Hawaiʻi Revised Statutes (HRS) § 708-841(1)(b) (1993) provides that "[a] person commits the offense of robbery in the second degree if, in the course of committing theft . . . [t]he 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[.]" Pyne was charged with robbery in the first degree, which is defined by HRS § 708-840(1)(b)(ii) (Supp. 2000), as follows: "A person commits the offense of robbery in the first degree if, in the course of committing theft . . . [t]he person is armed with a dangerous instrument and . . . [t]he 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."

On appeal, Pyne contends that the court abused its discretion when it denied his motion for mistrial, made upon the complainant's testimony before the jury that Pyne had previously assaulted her. We disagree and affirm the judgment of the circuit court.

I. BACKGROUND.

Before trial, Pyne filed a motion in limine seeking to exclude various categories of evidence, including "[t]estimonial or documentary evidence relating to any . . . 'bad acts' involving the defendant under [Hawai'i Rules of Evidence] 404[.]"

At the hearing on the motion, defense counsel referenced a history of abuse between Pyne and the complainant "over the past ten or eleven years, both here and on the Mainland." With respect to prior bad acts, the State responded, "Your Honor, I have no problem. First of all, the state did not intend to adduce any prior criminal or alleged criminal conduct on the part of defendant in this particular case as a part of the trial." The court granted Pyne's request to exclude evidence of prior bad acts, except for certain specified exceptions not relevant here.

At trial, the complainant, Susan Chaggaris (Chaggaris), testified that she had moved to Hawai'i in 1992. At that time, she was in a long-term relationship with Pyne. In 1994, they moved into a fifth-floor apartment on Kinau Street.

In November 1998, however, Pyne stopped living with her at the Kinau Street apartment. The colloquy surrounding this testimony unfolded as follows:

> Q [Prosecutor] With respect to you and the defendant, how long was the defendant living with you at that apartment 509 at 1112 Kinau Street?
>
> A [Chaggaris] It's been a rocky relationship, you know. It's gone back and forth over the years.
>
> Q But was there a point where he stopped living at that residence?
>
> A Yes. Last November, of '98, basically he wasn't really there. He was only there at certain times when we were seeing each other.
>
> Q You say that's November of 1998?
>
> A Yes.
>
> Q So after November of 1998 what is significant about that date with respect to your relationship with the defendant?
>
> A (No response)
>
> Q Let me rephrase that question. Was that a date where your relationship with the defendant changed?
>
> A Yes.
>
> Q In what manner did it change?
>
> A He assaulted me.
>
> [Prosecutor]: May we approach, Your Honor?
>
> The Court: Ms. Chaggaris, would you step away from the witness stand while we sort out these legal issues.
>
> (BENCH DISCUSSION:)

[Defense Counsel]: I make a motion to strike the language and make a motion for mistrial as well. Because I believe the damage can't be repaired by a motion to strike and I believe it's in violation of the motion in limine. And counsel was aware that this was an incident that occurred before, so he has to take responsibility for her not being cautious about not bringing it up that way, even though I don't think it was intentional.

[Prosecutor]: Your Honor, I did direct the witness not to mention anything about any prior incidents.

The Court: But it seemed from the way the question was phrased that you were perhaps inadvertently inviting that sort of answer.

[Prosecutor]: She was going to say that the relationship ended. That is really what I was seeking from the question.

The Court: I think the statement by the witness was that the relationship changed; in that, you had asked the question, if I'm not mistaken, how did the relationship change. And that she volunteered the information that she had been assaulted. I don't know. The motion to strike would accentuate the evidence that has been provided by the witness in her testimony. I don't quite know how to repair the damage that is done. May I just have a moment?

(Confers with bailiff)

The Court: The Court will grant the motion to strike and just proceed further. And try and stay away from, try to ask your questions in a way that would not invite any further reference to this incident that took place in which an assault was alleged to have occurred.

[Prosecutor]: I would urge the Court -- in light of the Court's ruling, I assume the Court is not going to declare a mistrial at this point.

The Court: The Court will deny motion for mistrial and will give cautionary instruction to the jury with regard to evidence stricken.

> [Prosecutor]: If I may have just a couple of minutes to re-inform this witness that she not say anything about these incidents.
>
> The Court: How are you going to do that?
>
> [Prosecutor]: I will just walk up to her and tell her.
>
> The Court: Just leave it alone. Just be very careful about how you ask the questions.
>
> (OPEN COURTROOM:)
>
> The Court: During bench conference the Court granted a motion to strike the last question and answer. The Court granted the motion to strike. You are not to consider that response as evidence in any way, shape, or form.
>
> Please proceed.

Chaggaris then testified that on March 4, 1999, she was watching television and drinking vodka with Seven-Up. Pyne came to the apartment in the late afternoon. She gave him "[t]en to fifteen dollars" for beer, and he left. At about 8:30 or 9:00 p.m. the same evening he returned, "already drunk."

Soon arguments commenced over "[m]ore money." Pyne asked her for $50. According to Chaggaris, they had "helped each other out [financially] before." This time, however, she refused. This angered him, and he started "yelling, screaming, swearing, [and] calling me names." He demanded the money again. Chaggaris testified that she refused the same demand "many times." When Pyne -- now "[v]ery angry" -- threatened to take her microwave and television and sell them, Chaggaris got upset and started to "argue back." At one point as their argument

continued, Pyne told her that "he might mess me up or something toward that effect." Chaggaris asked him to leave "four or five times[,]" but to no avail. Chaggaris testified that his demands for money were of the following tenor: "Just 'Give me money, I want money,' you know. 'Don't argue with me, just give it to me.'"

Things soon escalated as Pyne got a knife -- "a buck knife or a hunting knife" -- from somewhere in the apartment. He held the knife in his hand and "mentioned he wanted to have that $50." Chaggaris first testified, then insisted, that the knife was not open (blade out), despite being confronted by the prosecutor with her three prior statements to the police.

Pyne put the knife back into his pocket. Chaggaris then called 911 in an attempt to get him to leave, but not intending to actually contact the police. She thought she had terminated the call: "'Cause it's a cordless phone, and I thought I had pushed the button, and I just threw the phone down on the bed." As it turns out, the line to 911 remained open while they continued to argue, bibulously, about money and other grievances. Pyne then grabbed the phone from the bed, pushing her down onto the bed and bruising her in the process. For some reason, he was attempting to call his daughter.

At this point, Chaggaris noticed that the police had arrived downstairs. When she told Pyne about the police, he ran out of the apartment, taking the phone with him. When the first

policeman arrived at her door, Chaggaris confirmed that it was Pyne running down the hall, and the officer gave chase.

On cross-examination, Chaggaris admitted that she still loves Pyne, but does not consider him her "boyfriend." She was similarly unclear about whether he was living at the apartment on or about March 4, 1999. She was clear on the fact that the government subsidy for her apartment does not permit anyone else to live there. She acknowledged that Pyne was assisting her with the bills for the apartment because she was saving her money for a trip to her brother's May wedding in Massachusetts.

Chaggaris further admitted that she had started drinking at about 1:00 p.m. the day of the incident, and had imbibed about ten glasses of shot-and-a-half vodka and Seven-Up by the time the argument started. She also described her nightly medications, Ambien -- "a sleeping pill" -- and Remeron -- "a semi antidepressant to help me relax to go to sleep," both of which were affecting her memory and clarity of thought at the time of the incident.

The police officer that first arrived at the door of the apartment, Officer Benton Akina, testified that after Chaggaris had informed him about the incident, he called down to his backup officer with a warning that Pyne "had a knife on him." When he did so, he saw Pyne, who was sitting on the adjacent parking deck in the custody of the backup officer, reach into his pocket and discard an item. An evidence specialist later

recovered a "folding buck knife" and a telephone receiver from the same area.

After the State rested, Pyne demanded that the State elect the *actus reus* of the offense, pursuant to State v. Arceo, 84 Hawai'i 1, 32-33, 928 P.2d 843, 874-75 (1996). In response, the State committed to proceed only on the alleged demand for $50.00, and not on the alleged theft of the telephone.

In his defense, Pyne testified that he was residing with Chaggaris in the apartment at the time of the incident. He was paying the bills for the apartment in order to help her save money for her trip to the mainland.

On the day of the incident, they awoke about noon. As was her wont, Chaggaris starting drinking within an hour of awakening and continued throughout the day and night. Pyne maintained that he did not drink until after dinner that night.

At about 6:00 p.m., Pyne asked Chaggaris for a loan of $50.00. He was expecting his public assistance monies the next day and would pay her back with that, but in the meantime wanted to have "spending money in [his] pocket." Pyne was surprised that Chaggaris refused his request because she had lent him money before, but he left it at that. After dinner, around 10:00 p.m., he tried again. Chaggaris again refused, but this time emphatically and angrily. In his words, "she just jumped all

over me. I couldn't believe it. . . . She just, like, exploded on me. . . . It was like a volcano eruption."

During her tirade, Chaggaris accused Pyne of being "no good" and told him that his daughter concurred. This upset him, and he picked up the phone to call his daughter. This further incensed Chaggaris, who commenced to yell. Unable to hear for all the yelling, Pyne stepped into the hallway outside the apartment, then out onto the adjacent parking deck. Still unable to reach his daughter on the phone, Pyne headed for the pay phone at the nearby Makiki Post Office. On his way there, he was hailed, stopped and handcuffed by a police officer. The arresting officer returned him to the parking deck, where he pointed out the knife in his pocket to the arresting officer when Officer Akina called down his warning. According to Pyne, the arresting officer thereupon took the knife from his pocket.

Pyne explained that he had the knife in his pocket because previous arguments with Chaggaris had ended with him locked out of the apartment. On two such occasions he had been attacked while sleeping out in the open. Earlier in the evening, before the argument started, Chaggaris had reached into his pocket and asked him what the knife was for. He gave her the same explanation. He claimed that he never took the knife out of his pocket that night.

On rebuttal, the arresting officer, Andrew Beam, testified that when he arrived at the apartment, Chaggaris

pointed Pyne out to him and told him he had taken her phone. Officer Beam told Pyne to halt and he did, but when Officer Beam identified himself as a police officer, Pyne ran down the fire escape. As Officer Beam gave chase, he saw Pyne go over a fence in the parking lot. Officer Beam commanded, "Stop; police." Pyne eventually climbed back over the fence and returned. After Officer Beam sat Pyne down on the parking deck, Officer Akina told him over the radio "that we [have] a possible robbery with a possible knife being involved." At that point, Pyne took the knife from his pocket and threw it on the ground. Officer Beam testified that he then handcuffed Pyne. He also located the telephone nearby.

II. DISCUSSION.

The State makes no attempt to argue on appeal that the testimony about the previous assault was anything but improper. As a general rule, it is for the circuit court to determine whether improper testimony "merits a mere prophylactic cautionary instruction or the radical surgery of declaring a mistrial." State v. Kahinu, 53 Haw. 536, 549-550, 498 P.2d 635, 644 (1972) (citation omitted). This determination involves an exercise of the court's discretion. State v. Webster, 94 Hawai'i 241, 248, 11 P.3d 466, 473 (2000). A 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. Kealoha v. County of Hawai‘i, 74 Haw. 308, 318, 844 P.2d 670, 675 (1993).

In deciding whether improper remarks made by a witness require that a criminal conviction be vacated, we must consider "the nature of the misconduct, the promptness of a curative instruction or lack of it, and the strength or weakness of the evidence against the defendant." State v. Samuel, 74 Haw. 141, 148, 838 P.2d 1374, 1378 (1992) (citation omitted).

Hence, we first consider the nature of the misconduct.

The testimony regarding the assault was an indisputably improper transgression of the court's ruling in limine against evidence of prior bad acts. And it appears that the prosecutor did instruct Chaggaris about the ruling in limine before she took the witness stand.

However, Pyne does not argue on appeal and did not argue in the trial below that Chaggaris violated the ruling in limine intentionally or in bad faith. As stated by defense counsel in requesting the mistrial, "I don't think it was intentional." We also note that the record is devoid of any hint that the prosecutor solicited the improper testimony, or that he neglected his duty to properly instruct his witnesses. Indeed, after reviewing the colloquy leading up to the offending testimony, we hesitate to wholeheartedly adopt the trial court's assertion that the prosecutor in his line of questioning was "perhaps inadvertently inviting that sort of answer."

Pyne argues instead that the transgression, whether intentional or inadvertent, so prejudiced him in the eyes of the jury that the court's striking of the evidence and its following instruction to the jury could not effectively cure the injury.

We disagree. In Samuel, supra, the Hawai'i Supreme Court encountered a knife-murder case in which an expert witness for the State mentioned -- despite being warned by the State not to -- the defendant's "criminal history summary record of offenses in California and Hawaii[,]" as well as her "history of -- of a similar experience." Samuel, 74 Haw. at 147, 838 P.2d at 1378 (emphasis omitted). A pretrial motion in limine brought by the defendant, a prison inmate at the time of the offense, had specifically mentioned an allegation that she had committed another murder in a mainland prison. Id. at 146, 838 P.2d at 1377.

Despite the arguably more egregious misconduct and prejudice involved in Samuel, the supreme court held that the court's immediate response of striking the offending testimony from the record and instructing the jury to disregard it was sufficient prophylaxis. Id. at 149, 838 P.2d at 1378.

Samuel involved what the supreme court described as "an overzealous witness for the prosecution[.]" Id. at 148, 838 P.2d at 1378. Thus, even if this case involved deliberate misconduct on the part of Chaggaris, the curative power of the court's instruction was not thereby derogated.

In connection with its holding in Samuel, the supreme court noted the presumption that the jury adhered to the court's instructions:

> "[E]ven though a prosecutor's remarks may have been improper, any harm or prejudice resulting to the defendant can be cured by the court's instructions to the jury. In such cases it will be presumed that the jury adhered to the court's instructions." ***State v. Amorin***, 58 Haw. 623, 629, 574 P.2d 895, 899 (1978) (citation omitted). The same holds true with respect to a witness for the prosecution.

Id. at 149 n.2, 838 P.2d at 1378 n.2 (typesetting in the original).

The power of the presumption has been borne out in numerous other cases involving misconduct. See, e.g., State v. Cavness, 46 Haw. 470, 473, 381 P.2d 685, 686 (1963) (in holding that improper closing argument by the prosecutor was cured by the court's instruction to disregard, the supreme court applied "the ordinary presumption that the jury abided by the court's admonition"); State v. Kahalewai, 55 Haw. 127, 129, 516 P.2d 336, 338 (1973) (citing the presumption and holding that the cumulative effect of numerous instances of prosecutorial misconduct, though grave, was cured by "the prompt action of the trial court" in sustaining defense objections, striking statements from the record and instructing the jury to disregard); State v. Sawyer, 88 Hawai'i 325, 329 n.6, 966 P.2d 637, 641 n.6 (1998) (citing Samuel, supra, and holding that the

prosecutor's statement, which could be construed as urging the jury to disregard the court's instructions in favor of common sense, was "improper in the extreme" but nonetheless cured when the court sustained the defendant's objection and immediately instructed the jury to the contrary); Webster, 94 Hawai'i at 247-49, 11 P.3d at 472-74 (citing the presumption and holding that a detective's testimony implying that his informant had passed a polygraph examination was cured when the court struck the testimony and instructed the jury to disregard, even though the defendant's motion for mistrial and the court's responses were not contemporaneous with the offending testimony); but see State v. Marsh, 68 Haw. 659, 660-62, 728 P.2d 1301, 1302-3 (1986) (prosecutorial misconduct involving numerous expressions of personal belief and opinion during closing argument "here overcomes the presumption that the court's instructions to the jury rendered it harmless" (citation omitted); though the trial court several times instructed the jury that "the arguments of counsel are not evidence[,]" it failed to issue a specific instruction regarding the improper arguments).

Therefore, in considering "the promptness of a curative instruction or lack of it" in this case, Samuel, 74 Haw. at 148, 838 P.2d at 1378, we are mindful of the strength and resilience of the presumption that the jury adheres to the court's instructions. We note in this respect that the court immediately struck the offending testimony and quite emphatically instructed

the jury to disregard it. We observe, in addition, that at the end of the case, the court again instructed the jury that "[y]ou must disregard entirely any matter which the court has ordered stricken."

Pyne counters that this court has referred to instances in which a curative instruction will not suffice to cure the prejudice engendered by improper testimony:

> Defendant submits that the unfair prejudice resulting from Complainant's unsolicited reference to Defendant's alleged prior bad acts was not cured by the trial court's prompt instruction. The Supreme Court of Hawai'i has held that "'any harm or prejudice resulting to the defendant [from a remark by a witness for the prosecution] can be cured by the court's instructions to the jury. In such cases it will be presumed that the jury adhered to the court's instructions.'" *State v. Samuel*, 74 Haw. 141, 149 n.2, 838 P.2d 1374, 1378 (1992) (quoting *State v. Amorin*, 58 Haw. 623, 629, 574 P.2d 895, 899 (1978)). Even so, there are instances where a "deliberate and unresponsive injection by [a] prosecution [witness] of irrelevant references to prior . . . [bad acts] may generate insurmountable prejudice to the cause of an accused." *State v. Kahinu*, 53 Haw. 536, 549, 498 P.2d 635, 643 (1972), *cert. denied*, 409 U.S. 1126, 93 S.Ct. 944, 35 L.Ed.2d 258 (1973).

State v. Corella, 79 Hawai'i 255, 264-65, 900 P.2d 1322, 1331-32 (App. 1995) (brackets in the original). Even so, in Corella, which involved two instances of improper testimony in a rape trial (that the defendant (1) had been violent and (2) had fondled several women in the past), we declined to vacate the

defendant's conviction on that basis, even though the trial court erroneously overruled the defendant's objection to the latter instance. Id. at 265, 900 P.2d at 1332.

Similarly, in Kahinu, supra, from which we drew the subject observation in Corella, the supreme court held that a detective's testimony that the defendant was in police custody on another case -- which the trial court struck, but without contemporaneous instruction to the jury -- was harmless, and affirmed. Kahinu, 53 Haw. at 548-50, 498 P.2d at 643-44.

Thus, when we consider the final factor in our analysis, "the strength or weakness of the evidence against the defendant[,]" Samuel, 74 Haw. at 148, 838 P.2d at 1378, and note the ample evidence to convict Pyne, including his own testimony which, while exculpatory, nevertheless corroborated in many respects Chaggaris's accusations, we are constrained to conclude that the court did not abuse its discretion in denying his motion for mistrial. Cf. Webster, 94 Hawai'i at 249, 11 P.3d at 474 (the testimony of eyewitnesses and the defendant's admission that he shot at the victims constituted "ample evidence" under the supreme court's Samuel analysis).

III. CONCLUSION.

For the foregoing reasons, we affirm the August 12, 1999 judgment of the first circuit court.

DATED: Honolulu, Hawai‘i, January 18, 2001.

On the briefs:

Linda C. R. Jameson,
Deputy Public Defender,
for defendant-appellant.

Acting Chief Judge

Bryan K. Sano,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge