NOT FOR PUBLICATION

NO. 24452

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
DANIEL H. CUNNINGHAM, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CR. NO. 00294602)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Lim and Foley, JJ.)

Daniel Howard Cunningham (Cunningham) appeals the February 26, 2001 judgment of the district court of the first circuit, the Honorable David W. Lo, judge presiding, that convicted him of the offense of harassment. Hawaii Revised Statutes § 711-1106(1)(a) (1993 & Supp. 2002).

Also specified in Cunningham's notice of appeal is the court's May 30, 2001 order denying his February 27, 2001 motion for new trial. Inasmuch as Cunningham makes no argument on appeal with respect to the court's May 30, 2001 order, we will not review it. Hawaiʻi Rules of Appellate Procedure Rule 28(b)(7) (West 2002).

With respect to the court's February 26, 2001 judgment, after a sedulous review of the record and the briefs submitted by the parties, and giving due consideration to the arguments

advanced and the issues raised by the parties, we resolve Cunningham's two points of error as follows:

Cunningham first argues that "[t]he trial court erred or plainly erred in admitting the irrelevant and prejudicial testimony regarding [Cunningham's] prior bad acts."[1] Opening

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[1] In his opening brief, Defendant-Appellant Daniel Howard Cunningham (Cunningham) identifies the purportedly exceptionable testimony the complainant gave on direct examination, as follows:

> Herein, the trial court erred in admitting extensive testimony about [Cunningham's] prior bad acts, including his criminal history, loss of his chiropractic license, illegal administering of the human growth hormone to others, and violent conduct toward [the complainant].

Opening Brief at 18. Elsewhere in his opening brief, Cunningham presents a similar -- but not identical -- catalogue:

> In his direct examination of [the complainant], the [deputy prosecuting attorney] elicited damaging testimony that [Cunningham] abused the human growth hormone to the point where it caused him to have violent outbursts, that he had illegally given hormone injections to others, that he had lost his chiropractic license for sexual misconduct, been incarcerated and had problems with the [Internal Revenue Service].
> . . . .
> Further, the lower court not only improperly admitted [the complainant's] testimony about [Cunningham's] prior bad acts, but it also permitted [the complainant] to offer irrelevant testimony about his concern that [Cunningham] could "sniper me from a bush," and how [the complainant] was "seriously worried that [Cunningham is] gonna hurt somebody. If not me, he's gonna kill somebody by these shots he's been given [(sic)]," and how [the complainant] was going to stop [Cunningham's] illegal activity.

Opening Brief at 19-20. We observe, however, that the court sustained Cunningham's objections to (1) the complainant's testimony about why Cunningham lost his chiropractic license ("He had lost it because of floundering [(sic)] women or something."), and (2) the complainant's testimony about Cunningham's violent outbursts, allegedly resulting from human growth hormone abuse. We also note that the complainant's testimony about Cunningham's alleged administration of hormone injections to others was relevant to the State's theory of motive -- that Cunningham attacked the complainant because the complainant refused to relinquish documents containing incriminating information about Cunningham's administration of life-threatening hormone shots to others, documents Cunningham knew the complainant intended to use against him.

Brief at 10. Cunningham was convicted after a bench trial. While some of the testimony admitted at trial may have been irrelevant or potentially prejudicial, "[i]t is well established that a judge is presumed not to be influenced by incompetent evidence[,]" State v. Antone, 62 Haw. 346, 353, 615 P.2d 101, 107 (1980) (citations omitted), and "the normal rule is that if there is sufficient competent evidence to support the judgment or finding below, there is a presumption that any incompetent evidence was disregarded and the issue determined from a consideration of competent evidence only." State v. Gutierrez, 1 Haw. App. 268, 270, 618 P.2d 315, 317 (1980) (citations omitted). See also State v. Vliet, 91 Hawai'i 288, 298, 983 P.2d 189, 199 (1999). Furthermore, "[t]he fact that it was a trial without a jury minimized the danger of undue prejudice." State v. Arakawa, 101 Hawai'i 26, 35, 61 P.3d 537, 546 (App. 2002). See also Woodring v. United States, 360 F. Supp. 240, 243 (C.D. Cal. 1973) (in a bench trial, "the Court can disregard inadmissible testimony, and has greater discretion in the conduct of the trial, among other things, in matters which might be confusing and prejudicial in the minds of the jury"); People v. Deenadayalu, 772 N.E.2d 323, 329 (Ill. App. Ct. 2002) ("when other-crimes evidence is introduced for a limited purpose, it is presumed that the trial judge considered it only for that purpose" (citation omitted)); State v. Anderson, 824 So. 2d 517,

521 (La. Ct. App. 2002) ("[a] judge, unlike a jury, by virtue of the judge's training and knowledge of the law is fully capable of disregarding any impropriety" (citations and internal quotation marks omitted)); Corley v. State, 987 S.W.2d 615, 621 (Tex. Ct. App. 1999) (in a bench trial, "the danger that the trier of fact will consider extraneous offense evidence for anything other than the limited purpose for which it is admitted is reduced, and the likelihood that the extraneous evidence will unfairly prejudice the defendant is diminished").

Cunningham does not deny that there was sufficient competent evidence adduced at trial to support the judgment, and our independent review of the record reveals there clearly was. Moreover, most of the evidence Cunningham complains of was adduced in non-responsive testimony by the complainant. The court's patent impatience with such non-responsive testimony, increasingly apparent as the trial went on, indicates that our invocation here of the presumption established by the foregoing authorities is *apropos*. Accordingly, this first point of error lacks merit:

> Given the absence of a jury in the case at bar, and in light of the substantial evidence contained in the record . . . , we are convinced that there is no "reasonable possibility that error might have contributed to conviction." See State v. Kaiama, 81 Hawai'i 15, 22-23, 911 P.2d 735, 742-43 (1996) ("Error is not to be viewed in isolation and considered purely in the abstract. It must be examined in 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 error might have contributed to

> conviction." (Brackets and citation omitted)); [Hawai'i Rules of Penal Procedure] Rule 52(a).

Vliet, 91 Hawai'i at 298, 983 P.2d at 199.

Cunningham also asserts that his trial counsel rendered ineffective assistance of counsel by eliciting similarly irrelevant and prejudicial testimony[2] during his cross-examination of the complainant. The same principles and authorities governing our rejection of Cunningham's first point of error, applied to the record before us, dictate our rejection of this second point of error as well. The court's interjection during the cross-examination of the complainant epitomizes the court's ability and willingness in this case to disregard any incompetent evidence and remain immunized from any unduly prejudicial aspects of the evidence:

> Alright, counsel, excuse me, just a minute. I've been letting this go long enough. Remind counsel and the witness, this is a criminal charge, and as far as, unless it's gonna be brought in and tied up with some relevancy, I don't see it, alright? So, let's move on.

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[2] Cunningham catalogues this testimony, as follows:

> During the cross-examination of the complainant, defense counsel elicited testimony from [the complainant] that: 1) [Cunningham] constantly called and threatened [the complainant], his mother, his partner's wife and roomate's [(sic)] parents, 2) [Cunningham] was subject to violent mood swings, 3) [Cunningham's] father and brother both had mental problems, 4) [Cunningham] was illegally administering human growth hormone shots to others, including senior citizens, and that someone was going to die from this, 5) [Cunningham] was involved in illegal activity to hide or launder money, 6) [Cunningham] went to prison for molesting women, and 7) how [the complainant] was talking to federal and state agents about [Cunningham's] illegal activity.

Opening Brief at 24.

Accordingly, we believe that if, *arguendo*, trial counsel committed "specific errors or omissions" during his cross-examination of the complainant, these did not result in "the withdrawal or substantial impairment of a meritorious defense." Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (citation omitted). Hence, this second point of error must also fail.

Therefore,

IT IS HEREBY ORDERED that the court's February 26, 2001 judgment, and its May 30, 2001 order denying Cunningham's February 27, 2001 motion for new trial, are affirmed.

DATED: Honolulu, Hawai'i, May 12, 2003.

On the briefs:

Joyce Matsumori-Hoshijo,
Deputy Public Defender,
State of Hawai'i,
for defendant-appellant.

Chief Judge

Associate Judge

Mangmang Qui Brown,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge