NO. 24772

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JOSEPH SILVA, JR., Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 98-2558)

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

Joseph Silva, Jr. (Silva) appeals the November 20, 2001 judgment of the circuit court of the first circuit, the Honorable Virginia Lea Crandall, judge presiding. The judgment convicted Silva of sexual assault in the first degree, a violation of Hawaii Revised Statutes (HRS) § 707-730(1)(b) (1993)[1] (Count I); unlawful use of drug paraphernalia, a violation of HRS § 329-43.5(a) (1993)[2] (Count II); and promoting a detrimental drug in the third degree, a violation of HRS § 712-1249 (1993)[3]

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[1] Hawaii Revised Statutes (HRS) § 707-730(1)(b) (1993) provided, in pertinent part, that, "(1) A person commits the offense of sexual assault in the first degree if: . . . . (b) The person knowingly subjects to sexual penetration another person who is less than fourteen years old[.]" (Format modified.)

[2] HRS § 329-43.5(a) (1993) provides, in relevant part, that, "It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter."

[3] HRS § 712-1249(1) (1993) provides that, "A person commits the offense of promoting a detrimental drug in the third degree if the person knowingly possesses any marijuana . . . in any amount."

(Count III).

Upon a painstaking review of the record and the briefs submitted by the parties, and giving sedulous consideration to the arguments advanced and the issues raised by the parties, we dispose of Silva's points of error on appeal as follows:

1. Silva contends the court committed constitutional error when it barred him from confronting the thirteen-year-old complaining witness (the CW) with statements she had made to the police that another man kidnapped and attempted to sexually assault her the afternoon before the matinal incident with Silva. We disagree. The court did not clearly err in deciding Silva had failed to carry his burden to prove the CW's statements false by a preponderance of the evidence; hence, the statements were inadmissible and the court committed no error, constitutional or otherwise, in barring them. State v. West, 95 Hawai'i 452, 460-61, 24 P.3d 648, 656-57 (2001); Hawaii Rules of Evidence Rule 412(b) (1993). Silva's attempts below and on appeal to remove the CW's statements from the purview of West, supra, by re-characterizing them as evidence of "attendant circumstances" or the *res gestae*, are not persuasive. Similarly, Silva's suggestion that the court should have admitted her statements, at least insofar as they described the kidnapping and not the

attempted sexual assault, is also unavailing.[4]

2. Silva asserts that his statement to Honolulu Police Detective James E. Anderson (Detective Anderson) was not made knowingly and voluntarily and thus, his motion to suppress the statement should have been granted. Silva makes three primary arguments in this respect.

a. Silva avers that, because Detective Anderson failed to give him Miranda warnings before engaging in preliminary questioning about his mental state and capacity, his admission therein that he had smoked marijuana four days earlier, on the day of the sexual assault should have been suppressed. But even assuming, *arguendo*, that the preliminary question in this connection was custodial interrogation, see State v. Pebria, 85 Hawai‘i 171, 174, 938 P.2d 1190, 1193 (App. 1997), the error was harmless beyond a reasonable doubt because there was no reasonable possibility that it could have contributed to Silva's convictions. See State v. Holbron, 80 Hawai‘i 27, 32, 904 P.2d 912, 917 (1995). Detective Anderson had already conducted a warrant search of the fanny pack Silva was wearing during the incident and found marijuana and drug paraphernalia, before he interviewed Silva. Silva never disputed that he and the CW smoked marijuana during the incident and, in fact, testified at

[4] HRS § 707-720 (1993) provides, in relevant part, that, "A person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to: . . . . subject that person to a sexual offense[.]" (Enumeration omitted and format modified; emphasis supplied.)

trial that they did. Indeed, the fact that he offered her marijuana when they first met was a linchpin of his overall defense at trial. Besides, Silva told the court during the trial that he was not contesting Counts II (drug paraphernalia) and III (marijuana).

b. Silva also argues, however, that the balance of the statement following his admission, including his inculpatory statements regarding the sexual assault (Count I), was inadmissible "fruit of the poisonous tree." See Pebria, 85 Hawai‘i at 175, 938 P.2d at 1194. We disagree. There is absolutely no indication in the record that Silva gave the balance of his statement because he had "let the cat out of the bag" about his use of marijuana on the day in question, or that the balance of his statement was otherwise obtained through exploitation of this preliminary admission. Id. (citing State v. Medeiros, 4 Haw. App. 248, 252, 665 P.2d 181, 184 (1983)). Indeed, after receiving Miranda warnings and waiving his rights, Silva told Detective Anderson initially that he did not smoke marijuana with the CW. It is abundantly clear Silva admitted doing so, and then engaging in sexual intercourse with the CW, only after and because Detective Anderson told him that previously-garnered witness statements and evidence recovered from the CW and the scene of the crime could prove that sexual intercourse did occur.

c. Finally, on this point of error, Silva asserts

"[t]here must have been something" Detective Anderson told him that was a promise to release him if he said what Detective Anderson wanted to hear. Silva argues that this, combined with his below-average mental ability and his fear of being locked up indefinitely if he did not talk, rendered his statement involuntary. Lacking any real support in the record other than the fact of his release shortly after the interrogation, Silva's assertion is purely speculative, and the court's finding that his statement was not induced nor coerced was not clearly erroneous. State v. Hoey, 77 Hawai'i 17, 32, 881 P.2d 504, 519 (1994). Upon our independent review of the whole record, and considering the totality of the circumstances thus revealed, we conclude Silva's statement to Detective Anderson was voluntary. Id.

3. Silva next argues the court abused its discretion in denying his several oral motions for a mistrial. See State v. Napulou, 85 Hawai'i 49, 55, 936 P.2d 1297, 1303 (App. 1997). We disagree, because the oral motions were based upon the following:

a. The court's refusal to allow evidence of the CW's statements regarding the prior kidnapping and attempted sexual assault. This, as we have discussed, was not error.

b. Detective Anderson's testimony that he did not do further testing of evidence because Silva had "confessed." We cannot agree with Silva that this was opinion testimony regarding credibility or the strength or weakness of either side's case. Rather, it was testimony material to the issue of the

thoroughness of the police investigation, an issue Silva had made a constant refrain throughout the trial. Hence, we conclude this was not error, either.

c. Detective Anderson's testimony that he did not stop questioning Silva after Silva had initially denied having sex with the CW, because "I didn't feel he was being truthful." Any prejudice here was cured because the court sustained Silva's immediate objection, struck the testimony before the jury, and instructed the jury to "disregard it and treat it as if you did not hear it." Cf. State v. Klinge, 92 Hawai'i 577, 595, 994 P.2d 509, 527 (2000). We presume the jury followed the court's instruction. Id. at 592, 994 P.2d at 524.

4. Silva also argues, however, that the cumulative effect of the foregoing multiple errors justified a mistrial. We disagree. "After carefully reviewing the record, we conclude that the individual errors raised by Appellant 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) (citation omitted).

5. Silva next contends the court erred in instructing the jury that the prosecution is not required to present all possible witnesses and evidence. Silva argues that the instruction somehow relieved the State of its burden to prove guilt beyond a reasonable doubt. This argument is unavailing. The instruction was a correct statement of the law. See State v.

Eastman, 81 Hawai‘i 131, 141, 913 P.2d 57, 67 (1996). And the entirety of the court's jury instructions, "when read and considered as a whole," State v. Sua, 92 Hawai‘i 61, 69, 987 P.2d 959, 967 (1999) (citations, block quote format and internal quotation marks omitted), did not in any way derogate the State's burden of proof.

6. Silva avers the court erred in instructing the jury that it must determine the voluntariness of Silva's statement to Detective Anderson, without at the same time mentioning the jury's duty to also decide the veracity of the statement. Silva argues that the court thus misled the jury by having them focus only on the voluntariness issue, rather than considering the totality of the circumstances. This point lacks merit. "We are convinced that the jury instructions, when read and considered as a whole, did not bind the jury to accept any or all of [Silva's videotaped] statement to Detective [Anderson] merely because it had been deemed legally admissible." State v. Kelekolio, 74 Haw. 479, 519, 849 P.2d 58, 76 (1993).

7. Finally, Silva asserts the court erred in ordering disclosure of only some of the records Silva subpoenaed from various sources. This point of error is devoid of merit. The records the court kept from disclosure were not relevant and hence, we conclude the court was right in its ruling on discovery. State v. White, 92 Hawai‘i 192, 198, 990 P.2d 90, 96 (1999). Moreover, "[a]lthough a defendant should be afforded the

opportunity to subpoena *relevant* documents, a defendant may not use the subpoenas duces tecum to launch a fishing expedition." Id. at 204, 990 P.2d at 102 (citations omitted; emphasis in the original).

Therefore,

IT IS HEREBY ORDERED that the court's November 20, 2001 judgment is affirmed.

DATED: Honolulu, Hawai'i, November 26, 2003.

On the briefs:

Dwight C. H. Lum,
for defendant-appellant.

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Chief Judge

Associate Judge

Associate Judge