

NO. 26156

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee, v. FRANK GLEICH, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CR. NO. 02-1-0026)

SUMMARY DISPOSITION ORDER

(By: Lim, Acting C.J., Nakamura and Fujise, JJ.)

Defendant-Appellant, Frank Gleich ("Appellant"), appeals the judgment filed on August 18, 2003 in the Circuit Court of the Fifth Circuit^{1/} sentencing Appellant to multiple, concurrent terms of imprisonment, resulting in a maximum indeterminate term of twenty years for multiple counts of sexual assault and attempted sexual assault. We resolve Appellant's points of error as follows:^{2/}

1. The trial court's response to and treatment of the complaining witness' ("Complainant") plea bargain remark at trial does not constitute plain error. See Hawai'i Rules of Penal

^{1/} The Honorable Clifford L. Nakea presided.

^{2/} This case was assigned to this court on October 28, 2004.

Procedure (HRPP), Rule 52(b) (2000); State v. Rivera, 106 Hawai'i 146, 102 P.3d 1044 (2004). Hawaii Rules of Evidence (HRE), Rule 410 (1981) does not bar the admission of Complainant's remark because it referenced neither a withdrawn plea agreement nor a statement made in relation to a plea agreement or plea discussions. See State v. Fox, 70 Haw. 46, 760 P.2d 670 (1988).

Additionally, an improper remark by a witness does not necessarily constitute reversible error. State v. Webster, 94 Hawai'i 241, 11 P.3d 466 (2000). Such a remark is harmless beyond a reasonable doubt if it has not contributed to the verdict, State v. Kahinu, 53 Haw. 536, 498 P.2d 635 (1972), and the trial court has the discretion to decide whether to declare a mistrial or to issue a curative instruction. Webster, 94 Hawai'i at 248-49, 11 P.3d at 473-74. We do not find reversible error here because Complainant merely referred to the plea bargaining process in general, it was a single and limited reference, the judge instructed the jury prior to deliberation to consider only the evidence presented, and the strength of evidence against Appellant was sufficiently strong. See State v. Samuel, 74 Haw. 141, 838 P.2d 1374 (1992). Finally, the instructions given by the judge prior to jury deliberation cured any potential prejudice created by his statement in response to Complainant's plea bargain remark. See State v. Hague, 103 Hawai'i 38, 79 P.3d 131 (2003).

2. Appellant's contention that the prosecution (hereinafter the "State") committed prosecutorial misconduct by shaping Complainant's memories of the assault since she had "repressed memories" and thereby coached her testimony was litigated at the Motion for New Trial proceeding and disposed of in the court's Order Denying Defendant's Motion for New Trial.^{3/} The trial court did not abuse its discretion^{4/} in denying Appellant's motion because the record does not support the allegation of prosecutorial misconduct. See HRPP Rule 33 (2003); State v. Maluia, No. 25689, 2005 WL 675580 (Haw. March 24, 2005); State v. Shabazz, 98 Hawai'i 358, 48 P.3d 605 (App. 2002). Appellant failed to establish as a factual matter, despite cross-examination of both Complainant and the deputy prosecuting attorney, and testimony of the defense's expert witness, that Complainant's memories were "repressed" or that the State committed misconduct which shaped Complainant's memories.

3. Appellant's contention that the State committed prosecutorial misconduct by violating HRPP Rule 16 and preventing Appellant from presenting a complete defense was litigated at the Motion for New Trial hearing and disposed of in the court's Order

^{3/} We note that Appellant's points 2-4 herein do not comply with Hawai'i Rules of Appellate Procedure (HRAP), Rule 28(b)(4)(2000) because he fails to raise the alleged error committed by the trial court with respect to the Motion for New Trial proceeding. We caution counsel that this court may disregard nonconforming points and that we may also impose sanctions for same. HRAP Rules 28(b)(4) and 51.

^{4/} State v. Furutani, 76 Hawai'i 172, 178-79, 873 P.2d 51, 57-58 (1994).

Denying Defendant's Motion for New Trial. Again, the trial court did not abuse its discretion in denying Appellant's motion because the record does not support the allegation of prosecutorial misconduct. See *id.* Appellant did not establish as a factual matter that Complainant's memories were "repressed," that the State had any reason to believe they were "repressed," or that "repressed memories" constitute favorable evidence which would have created a reasonable doubt about Appellant's guilt that would not have otherwise existed. See HRPP 16 (2000); State v. Matafeo, 71 Haw. 183, 787 P.2d 671 (1990); State v. Okumura, 78 Hawai'i 383, 894 P.2d 80 (1995). Finally, we do not decide the issue of whether the State committed misconduct by failing to disclose additional statements made to it by Complainant as Appellant has failed to specify which purportedly undisclosed statements he alleges as error. See Hawai'i Rules of Appellate Procedure, Rule 28(b)(4) (2000).^{5/}

4. Appellant's contention that the State committed misconduct by failing to correct a portion of Complainant's testimony was litigated at the Motion for New Trial proceeding and disposed of in the court's Order Denying Defendant's Motion

^{5/} Appellant's additional contention that the State violated Hawai'i Rules of Penal Procedure Rule 16 and committed misconduct by failing to refer Complainant to a third party before interviewing her, in an attempt to shield information under the work product doctrine, is also without merit because there were no third party reports to disclose and the State had no duty to refer Complainant to a third party to handle the "repressed memories" because there is no evidence that Complainant had "repressed memories."

for New Trial. The trial court did not abuse its discretion in denying Appellant's motion because the record does not support the allegation of prosecutorial misconduct. See HRPP Rule 33 (2003); State v. Maluia, No. 25689, 2005 WL 675580 (Haw. March 24, 2005); Shabazz, 98 Hawai'i at 375, 48 P.3d at 622. Appellant failed to assert how the failure to correct this portion of Complainant's testimony prejudiced him^{6/} and nothing in the record indicates that it would have had a prejudicial effect.

5. Finally, Appellant's allegation that the State committed prosecutorial misconduct by burden-shifting is untenable because any potential prejudice caused by the alleged burden-shifting was harmless beyond a reasonable doubt and therefore does not provide grounds for a new trial or dismissal. See *id.* Most significant to this determination is that the jury was made well aware that Appellant had no burden of proof through defense counsel's prompt, thorough and specific curative argument which was preceded by a relevant general instruction by the court. Thus, any potential prejudice was cured. See State v. Meyer, 99 Hawai'i 168, 172-73, 53 P.3d 307, 311-12 (App. 2002) (holding that although the court did not give a specific curative instruction, a generally relevant instruction can cure a

^{6/} We note that Appellant's mere restatement by way of a heading in the Argument section of his opening brief that the State failed to correct Complainant's testimony does not comply with HRAP Rule 28(b)(7). We caution counsel that points not argued may be deemed waived by this court and that we may also impose sanctions for same. HRAP Rules 28(b)(7) and 51.

prosecutor's improper argument, particularly where such instruction is given more than once).

Therefore,

IT IS HEREBY ORDERED that the August 18, 2003 judgment is affirmed.

DATED: Honolulu, Hawai'i, April 26, 2005.

On the briefs:

Caren Dennemeyer,
for Defendant-Appellant.



Acting Chief Judge

Tracy Murakami,
Deputy Prosecuting Attorney
County of Kaua'i
for Plaintiff-Appellee.



Associate Judge



Associate Judge