NO. 26512

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
RICKEY GAINES, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 04-1-1098)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Nakamura, JJ.)

Defendant-Appellant Rickey Gaines (Gaines or Mr. Gaines) appeals from the March 17, 2004 judgment (Judgment) entered in the Family Court of the First Circuit[1] (family court). The Judgment was based on a jury verdict finding Gaines guilty as charged of violating an order for protection, Hawaii Revised Statutes (HRS) § 586-11.[2] The Judgment sentenced Gaines to imprisonment for six months with credit for time served, running concurrent with any other incarceration being served. On April 14, 2004, Gaines timely filed a notice of appeal. The appeal was assigned to this court on November 23, 2004. We affirm the Judgment.

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[1] Judge Rhonda Nishimura presided.

[2] Hawaii Revised Statutes (HRS) § 586-11 provides, in relevant part, that, "[w]henever an order for protection is granted pursuant to this chapter, a respondent or person to be restrained who knowingly or intentionally violates the order for protection is guilty of a misdemeanor."

BACKGROUND

On June 30, 2003 an Order of Protection (Protective Order) was issued by Judge Matthew Viola of the First Circuit Family Court in favor of complaining witness, Stephanie Johnson (Johnson), ordering Gaines, in relevant part, to comply with the following terms and conditions:

> IT IS FURTHER ORDERED that:
>
> . . . .
>
> 1 [Gaines] is prohibited from contacting [Johnson].
>
> . . . .
>
> 3 [Gaines] is prohibited from coming or passing within 100 yards of . . . where [Johnson] lives and within 100 yards of each other at neutral locations.
>
> 4 Notwithstanding the foregoing Order, [Gaines] may have LIMITED contact with [Johnson] in person for the purpose of Future Court Proceedings.
>
> 5 [Gaines] is prohibited from contacting the following: Stephanie D. Johnson.
>
> 6 [Johnson] shall promptly report any violation of this Order to the Police Department[.]

On January 21, 2004, Plaintiff-Appellee State of Hawai‘i (State) filed a Complaint which alleged,

> On or about JANUARY 16, 2004, in the City and County of Honolulu, State of Hawaii, RICKEY GAINES did intentionally or knowingly violate the Order for Protection issued in FC-DA No. 03-1-1438 on JUNE 30, 2003 by the Honorable MATTHEW J, VIOLA, Judge of the Family Court of the First Circuit, State of Hawaii, pursuant to Chapter 586 of the Hawaii Revised Statutes, thereby committing the offense of Violation of an Order for Protection in violation of Section 586-5.5 and Section 586-11(a)(1)(A) of the Hawaii Revised Statutes.

At the jury trial, which commenced on March 9, 2004, Deputy Prosecuting Attorney (DPA) Ryan Shinsato (Shinsato or Mr. Shinsato) appeared for the State, and Thomas Otake (Otake or Mr.

Otake) and Kenneth Shimozono appeared as co-counsels for Gaines.

The State presented evidence that Jess Matsuda (Matsuda), a Volunteer Legal Services family court officer, served the Protective Order on Gaines on July 1, 2003 in the presence of a family court judge, bailiff, and the clerk. Matsuda testified that he followed procedures of service by explaining to Gaines standard provisions of the restraining order and any stipulations and/or amendments added by the judge.

Johnson testified that, on January 16, 2004, Gaines was her husband but they had been separated for six or seven months. Johnson was living with her co-worker, Kalatrece Yozgadlian (Yozgadlian). Sometime between 2:00 and 4:00 p.m., Gaines arrived at Yozgadlian's residence, knocked on the door, and made verbal contact with Johnson who was within Yozgadlian's residence.

Gaines did not testify and did not present any witnesses.

POINT ON APPEAL

In his opening brief, as his sole point of error, Gaines contends that "[t]he [DPA's] improper questioning and comments during direct examination, bench conference, and closing argument amounted to prosecutorial misconduct and impermissibly infringed upon Mr. Gaines' right to a fair trial."

Specifically, Gaines argues that the DPA committed five

forms of prosecutorial misconduct throughout the jury trial: (1) violation of an order granting his motion in limine and the Hawai‘i Rules of Penal Procedure (HRPP) Rule 16(b)(1)(ii) (Supp. 2005) by eliciting a statement made by Gaines which was undisclosed to the defense; (2) improper comments during closing argument, shifting the burden of proof to the defense; (3) failure to follow the court's admonitions throughout the trial; (4) improper personal attacks against defense counsel during the course of the trial; and (5) the cumulation and repetition of all aforementioned individual acts. We summarily disagree with (3), (4), and (5). We will discuss (1) and (2).

STANDARDS OF REVIEW

"Allegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of whether there is a reasonable possibility that the error complained of might have contributed to the conviction." State v. Rogan, 91 Hawai‘i 405, 412, 984 P.2d 1231, 1238 (1999) (internal quotation marks and citations omitted) (quoting State v. Sawyer, 88 Hawai‘i 325, 329 n.6, 966 P.2d 637, 641 n.6 (1998)).

"Prosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a

fair trial." State v. McGriff, 76 Hawai'i 148, 158, 871 P.2d 782, 792 (1994). "In order to determine whether the alleged prosecutorial misconduct reached the level of reversible error, we consider the nature of the alleged misconduct, the promptness or lack of a curative instruction, and the strength or weakness of the evidence against defendant." State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992).

DISCUSSION

A.

HRPP Rule 16 (2005) provides, in relevant part,

> (1) DISCLOSURE OF MATTERS WITHIN PROSECUTION'S POSSESSION. The prosecutor shall disclose to the defendant or the defendant's attorney the following material and information within the prosecutor's possession or control:
>
> . . . .
>
> (ii) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a co-defendant if intended to be used in a joint trial, together with the names and last known addresses of persons who witnessed the making of such statements;

On March 9, 2004, Gaines filed a Motion in Limine which requested, in relevant part:

> Defendant RICKEY GAINES . . . moves this Court for the following Orders:
>
> . . . .
>
> (7) Statements from the Defendant not specified in Discovery - an Order prohibiting the prosecuting attorney from introducing evidence of undisclosed and undiscovered statements made by Defendant, HRPP Rule 16.

After the court asked Shinsato "statements from [Gaines] not specified in discovery, anything that you're aware of?" and Shinsato responded "Nothing, Your Honor[,]" the court granted

Gaines' Motion in Limine No. 7.

Gaines argues that the DPA violated the court's order granting Defendant's Motion in Limine No. 7 and HRPP Rule 16 by eliciting, through Yozgadlian's testimony, a statement allegedly made by Gaines which had not been disclosed to the defense. Yozgadlian testified, in relevant part:

> Q. (By Mr. Shinsato) If I could take you a couple steps back. You told the -- you told [Johnson] the defendant was at the door, what did [Johnson] tell you?
>
> A. Tell him to go away, tell him to go away, I don't wanna see him, I don't wanna see him.
>
> Q. Okay. And what did she do after that?
>
> A. She just went back into the restroom. She walked in the hallway and told me to take care of him.
>
> Q. Okay. And at this time, was the door open or closed?
>
> A. I had closed it.
>
> Q. Okay.
>
> A. But I still had my hand on the doorknob, but I closed it.
>
> Q. And then what happened next?
>
> A. And then I was talking back to [Gaines], and he wasn't gonna leave until he seen her. He's like I'm not going nowhere, I wanna --

(Emphasis supplied.)

Otake objected to the underscored testimony as hearsay and as a violation of the court's order granting Defendant's Motion in Limine No. 7 and his due process rights. Shinsato responded that "I don't know exactly what he said. I know . . . that in the 252 there, it says that she had a discussion with him."

Although a copy of Yozgadlian's "252" statement supplied by the State to the defense is not a part of the record on appeal, it appears that the statement reported that Gaines and Johnson had a discussion and that they yelled at each other, but did not report that Gaines stated that he was not leaving until he saw Johnson.

The court sustained Gaines' objection and granted his motion to strike the disputed statement from the record. The court then instructed the jury as follows:

> THE COURT: The jurors will disregard the last statement from [Yozgadlian] with respect to attributing any statement to the defendant, i.e. to with I'm -- I'm not going to leave. The jurors will disregard that and not to have you to consider that in your deliberations.

Yozgadlian then testified, in relevant part, as follows:

> Q. (By Mr. Shinsato) And when the defendant and [Johnson] were having a discussion, where were they?
>
> A. [Johnson] was . . . behind the door with the door cracked, and he was on the other side of the door.
>
> Q. And what was [Johnson's] demeanor at the time?
>
> A. She was a little upset.
>
> Q. And what was the defendant's demeanor?
>
> A. He wanted to know where she was going, he was upset.
>
> Q. Okay. And what was his tone of voice?
>
> A. He wasn't just talking to her. He was --
>
> Q. Was he yelling?
>
> A. I -- you could say that.
>
> Q. But was she yelling too?
>
> A. They both started yelling, and she ended up getting calm

with her voice,'cause --

Q. How long did . . . this argument occur?

. . . .

A. They just exchanged words and then that was it.

Q. And what happened at this point, after the argument stopped?

A. She closed the door and she went in there and started doing her hair again and her makeup.

Q. And the defendant?

A. He walked down the steps.

In this appeal, Gaines argues that the DPA "failed to disclose Mr. Gaines' statement and then elicited that statement from Yozgadlian[,]" thereby committing prosecutorial misconduct. We disagree.

The order granting Motion in Limine No. 7 went well beyond the mandate of HRPP Rule 16(b)(1)(ii). The latter requires disclosure of "the following material and information within the prosecutor's possession or control": "any written or recorded statements and the substance of any oral statements made by the defendant[.]" In contrast, the court's order prohibited "the prosecuting attorney from introducing evidence of undisclosed and undiscovered statements made by Defendant, HRPP Rule 16."

There is nothing in the record to support the allegation that prior to trial Yozgadlian had informed the State that Gaines had made this statement. Did the order impose upon the prosecuting attorney a pre-trial duty to discover that Gaines

had made this statement or that Yozgadlian would so testify in response to the DPA's question at trial? In light of the language of HRPP Rule 16(b)(1)(ii), we conclude that the answer is no. The order requires disclosure of only those "statements made by Defendant" that were known to the DPA.

B.

Prior to the closing arguments, the court instructed the jury, in relevant part, as follows:

> You must presume the defendant is innocent of the charge against him. This presumption remains with the defendant throughout the trial of the case unless and until the prosecution proves the defendant guilty beyond a reasonable doubt.
>
> The presumption of innocence is not a mere slogan, but an essential part of the law that is binding upon you. It places upon the prosecution the duty of proving every material element of the offense charged against the defendant beyond a reasonable doubt.
>
> . . . .
>
> The defendant has no duty or obligation to call any witnesses or produce any evidence. The defendant has no duty or obligation to testify, and you must not draw any inference unfavorable to the defendant because he did not testify in this case, or consider this in any way in your deliberations.
>
> You must disregard entirely any matter which the Court has ordered stricken.

In his opening argument to the jury, Otake stated, in relevant part:

> Now, the evidence will show that there was an order in effect on that day, and the evidence will show that Mr. Gaines was given the order the next day. He was not in court when the order was granted, he did not have a chance to have the judge explain to him what happened.
>
> Now, . . ., Stephanie Johnson and Rickey Gaines , they don't have the perfect marriage. In fact, they were separated at the time, and they actually had a lot of issues going on, court-related issues, divorce. They have a child, child . . . custody, property issues, all kinda things to talk about. And the evidence will show that the court order allows contact between the two

> parties to discuss future court proceedings.
>
> And, on the day in question, the evidence will show that my client, Mr. Gaines, went over there to talk about all these issues, ... But on that day, the problem was Stephanie didn't wanna talk to him about these future court proceedings . . . because . . . she was angry.
>
> See, at the time Rickey, my client, was seeing another girl named Michaela, and on that day when he went over to Stephanie's house, Michaela was in the car with him. She waited, though, she waited at the curb, she waited in the car, she didn't get out of the car. . . . [Gaines] needed to talk to Stephanie about these future court proceedings. He needed to talk to Stephanie about all these issues, and Michaela was in the car. And we believe the evidence will show that Stephanie, . . . through her window, saw Michaela sitting in that car, and this set her off, this upset her. She was angry . . . .
>
> . . . .
>
> MR. OTAKE: The evidence will show that instead of talking to him, she decided she was gonna get him in trouble. . . .
>
> MR. SHINSATO: Objection, Your Honor. . . .
>
> THE COURT: Sustained.
>
> MR. OTAKE: The evidence will show that she decided to use this order for protection as a sword instead of a shield.
>
> MR. SHINSATO: Objection, Your Honor.
>
> . . . .
>
> THE COURT: I have sustained it, Mr. Shinsato.

Gaines argues that numerous statements by Shinsato in his closing argument were improper because they inappropriately shifted the burden of proof to the defense. The following are the major examples cited by Gaines:

> MR. SHINSATO: Well, in the opening statements, the defense told you that they were gonna show that the defend- defendant wasn't aware.
>
> MR. OTAKE: Objection, Your Honor. Can we approach?
>
> THE COURT: Approach.
>
> (The following proceedings were held at the bench:)
>
> MR. OTAKE: Your Honor, he's commenting on the defendant's

right to remain silent.

MR. SHINSATO: No, it's not. It's commenting on your . . . opening statement.

. . . .

MR. OTAKE: No. He's – he's bringing it up to point out my guy didn't get up there (inaudible). . .

. . . .

MR. SHINSATO: It doesn't comment on his right to remain silent. As you said, opening is not evidence, and if he's gonna say it in evidence, he -- you know, he better live up to that promise. I should – it's a common practice to hold him up to what they say in opening. It's a common –

. . . .

THE COURT: You're – you're shifting the burden to (inaudible).

MR. SHINSATO: No, I'm not. I'm just commenting on what he said in the opening.

. . . .

MR. OTAKE: Okay. What he's saying is we didn't put on our case. What exactly that means is we didn't call our defendant. What that does is it infringes upon his right to remain silent.

MR. SHINSATO: It doesn't – I'm not gonna say that he – you know, why didn't he take the stand, whatever, but if the defense is gonna make statements in their opening, they should be held accountable for that.

. . . .

THE COURT: You're saying that they should have – they should put on evidence?

. . . .

THE COURT: (Inaudible) the defendant has no (inaudible).

. . . .

THE COURT: But they have no obligation --

MR. SHINSATO: I understand, but he said it in his opening. It's a promise. He said it in his opening.

THE COURT: Sustained.

. . . .

MR. OTAKE: Your Honor, you've made a ruling, let's move on.

With regards to my motion for a mistrial?

THE COURT: Denied.

. . . .

MR. OTAKE: Move to strike.

THE COURT: Stricken.

. . . .

MR. SHINSATO: . . . .

. . . .

When you look at the circumstantial evidence that I said, and ask yourself what makes sense. There was no evidence that there was a future court proceeding, there was no evidence at all.

MR. OTAKE: Objection, Your Honor.

. . . .

THE COURT: Sustained. Stricken.

. . . .

MR. SHINSATO: Based on what Stephanie told you, there's no evidence of future court proceedings. On top of that, there's no evidence that the defendant can't read the order. There's no evidence he can't read English. There's no evidence that he didn't understand the order. He went to court --

MR. OTAKE: Objection, Your Honor. . . .

. . . .

THE COURT: Sustained. Stricken.

MR. SHINSATO: What is the defense hiding? What are they hiding?

MR. OTAKE: Your Honor, same objection.

THE COURT: Sustained. Stricken.

In his opening statement to the jury, Otake stated that "the evidence will show that my client, Mr. Gaines, went over there to talk about all these issues, ... But on that day, the problem was Stephanie didn't wanna talk to him about these future court proceedings . . . because . . . she was angry." In

his closing argument, Otake stated that "[t]he State has presented to us no evidence to show that [Gaines] did not go there that day to discuss future court proceedings."

On appeal, Gaines contends that "[t]he DPA's various statements during his closing argument were impermissible because they created the false impression that Mr. Gaines was obligated to present evidence to disprove that he intentionally or knowingly violated the Order for Protection." We disagree.

The decision of the Hawai‘i Supreme Court in State v. Valdivia, 95 Hawai‘i 465, 482, 24 P.3d 661, 678 (Sup. 2001) is dispositive under context analogous to that of the present case. In that case, defendant Valdivia asserted that the prosecutor remarked as follows on his failure to testify and to adduce any evidence:

> Ladies and gentlemen, a lot of evidence, a lot of testimony, a lot of things for you to consider. But if you remember common sense, what happened and what is in evidence. And remember, opening statements are not evidence. And opening statements, you heard things [from defense counsel] about, oh, it's a mistake, the officer got tangled, this and that. Okay? That was not the evidence that was presented to you. The evidence that was presented to you about the kidnapping [sic] and the arm being pinned in the car--

Counsel for Valdivia objected and argued that the foregoing statements were a "flagrant effort . . . to make a comment on the fact that defense did not present any evidence, and [did] not present Mr. Valdivia to testify[.]" Id. Counsel for Valdivia maintained that the DPA had "comment[ed] on the defendant's right

to remain silent." Id. Although the circuit court sustained Valdivia's objection, the prosecutor's statements were not stricken, nor did defense counsel move for them to be, and no curative instruction was given to the jury. Id.

On appeal, the Hawai'i Supreme Court concluded, in pertinent part:

> "The test to be applied" in determining whether a prosecutor has improperly commented upon a defendant's failure to testify is "whether the language used was 'manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" State v. Padilla, 57 Haw. 150, 158, 552 P.2d 357, 363 (1976) (quoting United States v. Wright, 309 F.2d 735, 738 (7th Cir.1962)). Utilizing this formulation, we disagree with Valdivia that the DPA's statement constituted misconduct. The most that can be said is that the DPA was highlighting the fact that the evidence adduced at trial did not comport with defense counsel's assertions during opening statements. So construed, the DPA's remark appears to be "within the bounds of legitimate argument," inasmuch as a prosecutor is, in closing argument, given "wide latitude . . . in discussing the evidence" and may "state, discuss, and comment on the evidence as well as draw all reasonable inferences therefrom." State v. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209 (1996) (citations omitted). Moreover, the statement did not expressly refer to Valdivia or to the fact that he did not testify. We do not believe that the jury would foreseeably interpret the DPA's statement as a comment on Valdivia's failure to testify. Accordingly, we hold that the DPA's statement did not constitute prosecutorial misconduct in the first instance and need not reach the question whether it was harmless beyond a reasonable doubt.

Valdivia, 95 Hawai'i at 482-483, 24 P.3d at 678-79.

In a subsequent case, the Hawai'i Supreme Court stated, in relevant part:

> [P]rosecutorial commentary on the evidence that this court has approved has included: (1) arguing that the defendant, as well as some of his witnesses, were testifying falsely whereas the prosecution's witnesses were not, *Cordeiro*, 99 Hawai'i at 425, 56 P.3d at 727; (2) "highlighting the fact that the evidence adduced at trial did not comport with defense counsel's assertions during opening statements," Valdivia, 95 Hawai'i at 482, 24 P.3d at 678; and (3) "comment[ing] during closing argument that, '[w]hen the defendant comes in here and tells you that he was not on cocaine

> ... it's a cockamamie story and it's asking you [(*i.e.*, the jury)] to take yourselves as fools.'"

State v. Hauge, 103 Hawai‘i 38, at 56, 79 P.3d 131, at 149 (2003) (emphasis supplied).

In light of this precedent, we conclude that the substance of the DPA's remarks remained within the "bounds of legitimate argument" and within the "wide latitude" afforded prosecutors in discussing evidence. The DPA's comments did not expressly refer to the fact that Gaines did not testify, and the jury would not have been led to forseeably interpret the DPA's statement as a comment on Gaines' failure to either (1) testify or (2) meet an evidentiary requirement, in violation of his due process rights. Therefore, the disputed statements by the DPA during closing arguments did not serve to improperly shift the burden of proof upon Gaines nor constitute prosecutorial misconduct. Moreover, in light of the fact that all of the DPA's disputed statements were objected to, sustained, and stricken from the record, any theoretical prejudice therefrom would have been rendered harmless beyond a reasonable doubt. This is because precedent establishes that "a prosecutor's improper remarks are [generally] considered cured by the court's instructions to the jury, because it is presumed that the jury abided by the court's admonition to disregard the statement." State v. McGriff, 76 Hawai‘i 148, 160, 871 P.2d 782, 794 (1994) (quoting Pemberton, 71 Haw. at 475, 796 P.2d at 87 (internal

quotation marks omitted)).

CONCLUSION

Accordingly, the March 17, 2004 Judgment is affirmed.

DATED: Honolulu, Hawai‘i, January 31, 2006.

On the briefs:

Anthony F. Quan, Jr.,
Deputy Public Defender,
for defendant-appellant.

Chief Judge

Stephen K. Tsushima,
Deputy Prosecuting Attorney,
City & County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge