

NO. 26956

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
MARK DULATRE, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 04-1-1450)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Watanabe and Foley, JJ.)

Defendant-Appellant Mark Dulatre (Dulatre) appeals from the Judgment^{1/} filed on October 18, 2004 in the Family Court of the First Circuit (family court).^{2/} A jury found Dulatre guilty of Abuse of Family or Household Members, in violation of Hawaii Revised Statutes (HRS) § 709-906 (Supp. 2005). The family court sentenced Dulatre to five days in jail and two years of probation and ordered him to pay fees of \$200.00.

On appeal, Dulatre argues:

(1) The State engaged in a persistent course of misconduct throughout the trial that individually and

^{1/} On October 18, 2004, the circuit court filed the Judgment of Conviction and Sentence standard form. However, the clerk failed to check the box to identify the document as the Judgment of Conviction and Sentence and checked only the box identifying the document as an "Order Denying Motion to Set Aside Judgment of Conviction and for New Trial." Dulatre's notice of appeal stated that he was appealing from this order instead of from the Judgment. However, as this order included the sentence for Dulatre, pursuant to Hawaii Revised Statutes § 641-11 (Supp. 2005), this order is the Judgment in the case.

^{2/} The Honorable Reynaldo D. Gaulty presided.

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STATE OF HAWAII

cumulatively prejudiced Dulatre's right to a fair trial and contributed to his conviction. This misconduct included:

(a) the State impermissibly shifting the burden of proof to Dulatre by (i) asking Dulatre on cross-examination why he did not appeal to friends who had witnessed the incident to make supportive statements on his behalf to police, which improperly implied that Dulatre had the burden of producing witnesses to support his testimony, and (ii) during its closing argument, contending that Dulatre's inaction spoke to his guilt;

(b) the State, during its closing argument, misstating the law regarding justifiable use of force -- thereby potentially confusing the jury; and

(c) the State misstating the testimony of Officer Tsue during its closing argument and asking the jury to draw an inference from the misstatement that prejudiced Dulatre.

(2) The family court:

(a) abused its discretion by allowing the State to cross-examine Dulatre at length on why he did not appeal to friends who had witnessed the incident to make police statements on his behalf;

(b) abused its discretion by allowing the State to argue, over Dulatre's objection, that because Dulatre had not asked his friends to make police statements on his behalf, it

could be inferred Dulatre was mindful of his guilt and had acted accordingly;

(c) abused its discretion by not correcting, *sua sponte*, the State's three misstatements of the law of self-defense mentioned in (1)(b) above;

(d) committed plain error by allowing the State to "impeach" the Complainant with Complainant's police statement because it was inadmissible hearsay not falling under any exception;

(e) abused its discretion by receiving the Complainant's hearsay statement as substantive evidence under the prior inconsistent statement exception to the hearsay rule; and

(f) abused its discretion by sustaining the State's objection to Dulatre's testimony that he did not think he would go to trial since "it's my first time being convicted of this" and instructing the jury to disregard the statement as evidence.

Based on the foregoing, Dulatre asserts that the Judgment should be reversed.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we hold that:

(1) The State did not commit prosecutorial misconduct when it questioned Dulatre regarding his failure to obtain exculpatory statements from his friends. At trial, Dulatre did not object to the State's questions on hearsay grounds, and we are not required to address this point on appeal. State v. Wallace, 80 Hawai'i 382, 410, 910 P.2d 695, 723 (1996). Nevertheless, we hold that this point of error fails.

(a) The State's questions were not improper because they had a rational bearing upon Dulatre's capacity for truth and veracity: they cast doubt on Dulatre's self-defense claim. State v. Lubong, 77 Hawai'i 429, 431, 886 P.2d 766, 768 (App. 1994).

(b) Further, in so questioning Dulatre, the State was fulfilling its burden to disprove the facts Dulatre had introduced in support of his self-defense claim. Id.

(c) Finally, it is unlikely that the State's questions prejudiced Dulatre because in his closing argument, Dulatre's counsel explained to the jury "[T]hey [the State] have to bring in enough [witnesses] to prove the case beyond a reasonable doubt. The state has to explain why these don't equal reasonable doubt." Also, the court read curative instructions to the jury, and "juries are presumed to follow all of the trial court's instructions," State v. Knight, 80 Hawai'i 318, 327, 909 P.2d 1133, 1142 (1996) (ellipsis omitted).

(2) The State did not shift the burden of proof to Dulatre and, by extension, did not commit prosecutorial misconduct when it commented in its closing argument on Dulatre's failure to obtain exculpatory statements from his friends. Although the State did not reiterate that the burden of proof was on the government, the State did not contend Dulatre's failure to provide exculpatory evidence required a guilty verdict. United States v. Vaandering, 50 F.3d 696, 701 (9th Cir. 1995). Furthermore, the circuit court instructed the jury to place the burden of proof on the State, and "juries are presumed to follow all of the trial court's instructions." Knight, 80 Hawai'i at 327, 909 P.2d at 1142 (ellipsis omitted).

(3) In its closing argument, the State did misstate the law of self-defense when the State repeatedly suggested that a person must be struck first before they can hit in self-defense. The State also misstated the law when it argued that there was a duty to retreat before self-defense could be justified. However, given that the family court properly instructed the jury on self-defense and "juries are presumed to follow all of the trial court's instructions," Knight, 80 Hawai'i at 327, 909 P.2d at 1142 (ellipsis omitted), it is unlikely that Dulatre was prejudiced by the State's misstatement of the law in its closing argument. State v. Mahoe, 89 Hawai'i 284, 290, 972 P.2d 287, 293 (1998).

(4) Dulatre did not object at trial to the State's alleged misstatement of Officer Tsue's testimony, and it is the general rule "that an issue raised for the first time on appeal will not be considered by the reviewing court." Wallace, 80 Hawai'i at 410, 910 P.2d at 723.

(a) The State misstated Officer Tsue's testimony in its closing argument. However, Dulatre was not prejudiced because Complainant's testimony provided substantial evidence that Complainant left the club at 4:00 a.m. The family court had explained to the jury prior to closing arguments that what the attorneys said in their closing arguments would not be evidence and instructed jury members to rely on their own individual and collective recollections of the evidence in deliberating upon and reaching a verdict. "[J]uries are presumed to follow all of the trial court's instructions." Knight, 80 Hawai'i at 327, 909 P.2d at 1142 (ellipsis omitted).

(b) Further, there is ample evidence in the record on appeal, including the rest of Complainant's testimony and the testimony of Officer Tsue, that negated Dulatre's self-defense claim.

(5) The family court did not abuse its discretion by allowing the State to comment on Dulatre's failure to procure potentially exculpatory evidence during the State's closing argument. The State did not shift the burden of proof by so

commenting because it did not state or imply that Dulatre's failure to obtain that evidence obliged the jury to find Dulatre guilty. Vaandering, 50 F.3d at 701. Further, the family court averted any jury misunderstanding regarding burden of proof by providing the jury with curative instructions prior to the jury's deliberations, and "juries are presumed to follow all of the trial court's instructions." Knight, 80 Hawai'i at 327, 909 P.2d at 1142 (ellipsis omitted).

(6) The family court did not abuse its discretion by not correcting, *sua sponte*, the State's three misstatements of the law of self-defense in its closing argument. The State's misstatements were cured by the family court's jury instructions, and "juries are presumed to follow all of the trial court's instructions." Knight, 80 Hawai'i at 327, 909 P.2d at 1142 (ellipsis omitted).

(7) The family court did not commit plain error by allowing the State to question Complainant about his police statement.

(a) In the instant case, the requirements of Hawaii Rules of Evidence (HRE) Rule 802.1 were met because (i) Complainant was subject to cross-examination concerning the subject matter of Complainant's police statement; (ii) Complainant's police statement was inconsistent with Complainant's testimony; (iii) whether or not Complainant punched

or pushed Dulatre prior to being punched by Dulatre was a material fact, as it would have made a significant difference to the jury in its determination of whether Dulatre acted in self-defense; and (iv) it would have been natural for Complainant to state in his police report that he had pushed or punched Dulatre. Asato v. Furtado, 52 Haw. 284, 288, 474 P.2d 288, 292 (1970); see also HRE Rule 802.1.

(b) Further, Complainant's statement was offered in compliance with HRE Rule 613(b) because the State brought the circumstances of Complainant's police statement to Complainant's attention and asked Complainant whether he had made the statement. See HRE Rule 613(b).

(8) The family court did not abuse its discretion by receiving Complainant's hearsay statement as substantive evidence under the prior inconsistent statement exception because Complainant's testimony was inconsistent with his police statement. HRE Rules 802.1 and 613; Asato, 52 Haw. at 288, 474 P.2d at 292.

(9) In the instant case, the State did not "open the door" to Dulatre's statement that he had never been convicted of Abuse of Family or Household Members. In examining Dulatre, the State merely inquired into Dulatre's reasons for not asking friends to make exculpatory statements on his behalf and did not directly or indirectly refer to Dulatre's criminal record or lack

thereof. Therefore, the family court did not abuse its discretion by sustaining the State's objection to and striking Dulatre's comment.

Therefore,

IT IS HEREBY ORDERED that Judgment filed on October 18, 2004 in the Family Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, August 22, 2006.

On the briefs:

Nathan Pohakea Roehrig,
Deputy Public Defender,
for Defendant-Appellant.


Chief Judge

Ryan Yeh,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Associate Judge


Associate Judge