

NO. 27687

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

STATE OF HAWAI'I, Plaintiff-Appellee,  
v.  
ROBERT BALES, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CRIMINAL NO. 05-1-0034)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Robert Bales (Bales) appeals from the November 28, 2005 Judgment entered in the Circuit Court of the First Circuit.<sup>1</sup>

For an incident that allegedly occurred on December 31, 2004, a Complaint that was filed on January 7, 2005 charged Bales with having committed the following offenses: Count I, Assault Against a Law Enforcement Officer in the First Degree, Hawaii Revised Statutes (HRS) § 707-712.5(1)(a); Count II, Criminal Property Damage in the Third Degree, HRS § 708-822(1)(b); and Count III, Harassment, HRS § 711-1106(1)(a).

On September 2, 2005, when discussing pre-trial motions, the following was stated:

[DEPUTY PROSECUTING ATTORNEY (DPA)]: On the complainant's police report, he's there at 1745, and then at --

THE COURT: This is one of the police officers?

[DPA]: This is the victim.

THE COURT: The alleged victim?

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<sup>1</sup> Judge Steven S. Alm presided.

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[DPA]: Yes. So he's doing his thing, and then at 1745 he arrests the defendant for harassment. At 1754, that's when he assaults the police officer; and then at 1819, that's when he does the CPD III. It's all part and parcel of the arrest process.

In her opening statement to the jury, the deputy public defender (DPD) stated in part:

You will hear that while [Bales] was in the parking lot, he was approached by two local guys in a white van. One of the local guys went up to [Bales] and hit him in the face. A police officer, Officer Kendall, did come later, but he let the two local guys go rather than finding out what happened. You will hear that [Bales] was arrested at some point, and at some point during the arrest Officer Kendall took [Bales] down to the ground -- and this was on the sidewalk in front of the 7-Eleven store -- and you will hear that Officer Kendall was on [Bales]'s back and that [Bales] was in pain; and [Bales] will tell you that in order to make the pain stop, he used force to try to get the officer, Officer Kendall, off of his back, and in the process, [Bales] made contact with Officer Kendall, and he will tell you that he was just trying to make the pain stop; he was just trying to get the officer off of his back.

The following are relevant parts of the DPD's closing argument to the jury and the DPA's rebuttal argument to the jury:

[DPD]: . . . .

. . . .

Now, all we have is Officer Kendall's word. And the state is not required to call each and every single witness, but in this case, that is not enough. There's no independent verification. There are no independent witnesses. Yet, you heard there were a lot of people around who could have verified that. There is reasonable doubt as to whether [Bales] kicked Officer Kendall in the groin intentionally and knowingly.

Now, this case is not a case about your feelings about alcohol or drinking alcohol. This case is not about how you feel about a police officer's job, and this case is not about whether you like or dislike [Bales], how he was behaving. This case is about what happened on December 31st, 2004, in the late afternoon at the 7-Eleven, and this case is about whether the state proved the charges against [Bales] beyond a reasonable doubt. . . .

And, again, the state doesn't have to call everybody, all potential witnesses; but in a case like this, where the credibility of an officer or officers are at issue, independent verification, independent witnesses are important. And the officers know that. They made no effort to take the names of any bystanders. They made no effort to take any statements from these bystanders. There's no evidence of any contact, no evidence -- or no photos were shown to you, nothing.

Now, I went through the officers' stories. Not credible. Goes against reason and common sense. There is reasonable doubt

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as to all charges against [Bales], and you must find him not guilty. Thank you.

THE COURT: Thank you, [DPD]. [DPA], rebuttal.

[DPA]: . . . .

. . . .

Now, the defendant -- he did testify. That was his right. Officers Kendall, Hill, Detective Nagata, Maioho -- they all testified as well. You heard Officer Kendall testify he was the victim in this case. He is the witness. Don't need any other witnesses. The state only needs one witness to prove its case -- the victim. The victim was on the stand. The victim testified. The victim's testimony here was the same as he put in his report. Small details may have been different but not the major important facts, the facts about the harassment.

In part, the court instructed the jury that "arguments of attorneys are not evidence. You should consider their arguments to you, but you are not bound by their recollections or interpretations of the evidence."

On September 9, 2005, the jury found Bales guilty as charged. For Count I, the November 28, 2005 Judgment sentenced Bales to probation for five years upon various terms and conditions including the following: imprisonment for 180 days, pay \$105 to the crime victim compensation fund, pay a \$150 probation service fee, and pay a monetary assessment of \$500 or the actual cost of the DNA analysis, whichever is less, to the DNA registry special fund. For Counts II and III, the Judgment sentenced Bales to concurrent terms of 30 days in prison and gave Bales credit for already having served 8 days.

On December 28, 2005, Bales filed a notice of appeal.

The sole point asserted by Bales in this appeal is that "[t]he DPA committed prosecutorial misconduct during closing

argument when he repeatedly referred to Off. Kendall as the 'victim.'" In support of this point, Bales presents the following argument in the opening brief:

During rebuttal, the DPA argued to the jury:

The victim was on the stand. The victim testified. The victim's testimony here was the same as he put in his report.

The DPA's repeated references to Off. Kendall as a "victim" constituted prosecutorial misconduct because the DPA improperly commented on the status of Off. Kendall. By calling Off. Kendall the "victim", the DPA conveyed the message to the jury that in his personal opinion, he had predetermined that Off. Kendall had in fact been wronged, when in fact, that issue is for the jury to determine, and not the DPA. See State v. Nomura, 79 Hawai'i 412, 903 P.2d 718 (1995).

Further, under State v. Marsh, 68 Haw. 659, 728 P.2d 1301 (1986), any direct expression of the DPA's personal opinion on the credibility of the witnesses and the guilt of the defendant is strictly prohibited. In this case, no objection was placed to the comments. In such an event, the appellate court must determine whether "the prosecutor's comment was improper and, if so, whether such misconduct constituted plain error that affected [the defendant's] substantial rights." State v. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209 (1996).

In State v. Nomura, this court stated in part:

Defendant further maintains that in referring to Witness as the "victim" in Instruction No. 01 (the elements instruction), the trial court improperly commented on the evidence in violation of Hawai'i Rules of Evidence (HRE) Rule 1102, thereby prejudicing Defendant. The term "victim" includes a "person who is the object of a crime . . . as the victim of a robbery is the person robbed." *Black's Law Dictionary* 1567 (6th ed. 1990). "Victim" also refers to "one that is acted on and usu[ally] adversely affected by a force or agent [or] one that is injured." *Merriam Webster's Collegiate Dictionary* 1316 (10th ed. 1993).

Hence, the term "victim" is conclusive in nature and connotes a predetermination that the person referred to had in fact been wronged. Because the question of whether Witness had been abused was a question yet to be decided by the jury, it was improper to refer to her as "the victim." Furthermore, Defendant denied any contact with Witness which might have caused her injury, making the existence of any "injury" another question to be decided by the jury. Obviously, the trial court could have used the term "complaining witness" or referred to Witness by her name to avoid any appearance of partiality. We agree, then, that the trial court violated HRE Rule 1102.

. . . .

Accordingly, we hold that the reference to a complaining witness as "the victim" in criminal jury instructions is

inaccurate and misleading where the jury must yet determine from the evidence whether the complaining witness was the object of the offense and whether the complaining witness was acted upon in the manner required under the statute to prove the offense charged. Here, the question of whether Witness was the object of the crime and whether she suffered physical "abuse" were elements required to be proven under the statute and, hence, matters for the jury to evaluate and not for the court to comment upon. Thus, we disapprove of the reference to the complaining witness as a "victim" in Instruction No. 01.

We must decide, however, whether the subject instruction was prejudicial to Defendant in light of the other instructions given in this case. Where the instructions are challenged, "the ultimate question on appeal is whether the instructions, as a whole, correctly stated the law." *State v. Toro*, 77 Hawai'i 340, 348, 884 P.2d 403, 411 (App.), cert. denied, 77 Hawai'i 489, 889 P.2d 66 (1994). . . .

. . . .

We hold, then, that viewed in their entirety, the instructions were not prejudicially inaccurate or misleading in this case. It follows that the court's error in using the term "the victim" in the instruction on elements would not have had a substantial influence upon the jury's verdict and thus, the error was harmless under Hawai'i Rules of Penal Procedure Rule 52(a). See *Toro*. [77 Hawai'i 340, 884 P.2d 403.]

79 Hawai'i 413, 416-18, 903 P.2d 718, 721-23 (1995), cert. denied, 80 Hawai'i 187, 907 P.2d 773 (1995) (footnotes omitted).

"The term 'prosecutorial misconduct' is a legal term of art that refers to any improper action committed by a prosecutor, however harmless or unintentional. Therefore, our conclusion that the prosecution's question was improper compels us to apply the label 'prosecutorial misconduct.'" *State v. Maluia*, 107 Hawai'i 20, 25, 108 P.3d 974, 979 (2005) (emphasis in original).

"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)

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(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).


In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs, and duly considering and applying the law relevant to the issues raised and arguments presented, we affirm the November 28, 2005 Judgment.

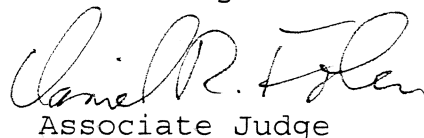
DATED: Honolulu, Hawai'i, April 12, 2007.

On the briefs:

Linda C.R. Jameson  
for Defendant-Appellant.

Loren J. Thomas,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Defendant-Appellee.

  
Chief Judge

  
Associate Judge

  
Associate Judge