NO. 27967

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
MARK R. BROWN, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 05-1-2387)

SUMMARY DISPOSITION ORDER
(By: Recktenwald, C.J., Watanabe and Fujise, JJ.)

Defendant-Appellant Mark R. Brown (Brown) appeals from the Judgment of Conviction and Sentence filed on May 8, 2006 by the Family Court of the First Circuit (family court).[1]

On December 21, 2005, Plaintiff-Appellee State of Hawai'i (State) filed a complaint charging Brown with Violation of an Order for Protection. See Hawaii Revised Statutes §§ 586-5.5 and 586-11(a)(1)(A) (Supp. 2005). The complaint alleged that Brown violated a protective order which prohibited him from contacting the complaining witness, Linda Stuber (Stuber). After a jury trial, Brown was found guilty and sentenced to two years of probation, with a condition that he serve 45 days in jail with credit for time served.

Brown raises the following points on appeal:

(1) "The lower court plainly erred in admitting the testimony [of Honolulu Police Department Officers William Gasper, Jr. and Stewart Ferriman] which was improper comment upon [Stuber's] credibility and prejudiced [Brown's] substantial rights[,]"

(2) "The lower court plainly erred in admitting [Stuber's] hearsay testimony that two eyewitnesses told her that they saw [Brown] hit her van where the State failed to properly establish the unavailability of these eyewitnesses and this error violated [Brown's] constitutional right to confrontation[,]"

---

[1] The Honorable Patrick W. Border presided.

(3) "The [Deputy Prosecuting Attorney's (DPA)] improper comments during summation constituted prosecutorial misconduct which violated [Brown's] substantial rights[,]" and

(4) "In the alternative, [Brown] was deprived of his constitutional right to effective assistance of counsel where trial counsel's errors and omissions during trial substantially impaired [his] defense of reasonable doubt" in the following ways:

(a) "[C]ounsel failed to object to the testimony of the police officers which bolstered the credibility of [Stuber] and affected the substantial rights of [Brown,]"

(b) "[C]ounsel elicited hearsay testimony from [Stuber] that two witnesses told her that they saw [Brown] hit her van with his truck and failed to argue that the State did not establish the unavailability of these witnesses," and

(c) "[C]ounsel failed to object to the inflammatory and prejudicial remarks during the DPA's summation telling the jury that if they did not convict [Brown], they were sending the wrong message and that in his next encounter with [Stuber], he could threaten to kill her or run her over."

After a careful review of the record and the briefs submitted by both parties, and having given due consideration to the arguments advanced, we resolve Brown's points of error as follows:

(1) We review the challenged testimony by Officers Gasper and Ferriman for plain error, since Brown's counsel did not object to that testimony. Appellate courts "may recognize plain error when the error committed affects substantial rights of the defendant." State v. Aplaca, 96 Hawai'i 17, 22, 25 P.3d 792, 797 (2001) (citation omitted); see Hawai'i Rules of Penal Procedure Rule 52(b) (2006) ("Plain errors or defects affecting substantial rights *may* be noticed although they were not brought to the attention of the court.") (emphasis added).

The testimony was not admissible, since it did not serve any relevant purpose and could have been interpreted as

suggesting that the officers' superiors believed Stuber's allegations. State v. Ryan, 112 Hawai'i 136, 141, 144 P.3d 584, 589 (App. 2006). However, the error was harmless beyond a reasonable doubt and did not affect Brown's substantial rights. Aplaca, 96 Hawai'i at 22, 25 P.3d at 797. The challenged testimony was far less suggestive than the testimony that this court found to be harmful in Ryan.[2] Moreover, Officer Gasper acknowledged on cross-examination that it was not his job to determine whether Stuber was telling him the truth, but rather to simply document what she had to say in his report. Finally, Officer Gasper's testimony about his observations of damage to Stuber's van, bits of tail light lens on the ground nearby, and skid marks consistent with the van having been struck, all corroborated Stuber's testimony.

In sum, since the challenged testimony did not affect Brown's substantial rights, this point of error is without merit.

(2) Brown waived his hearsay challenge to Stuber's testimony about two individuals who told her they witnessed the incident involving Brown, because he did not raise that challenge in the family court. State v. Crisostomo, 94 Hawai'i 282, 290, 12 P.3d 873, 881 (2000). Brown's counsel elicited that testimony on cross-examination, and she did not object or move to strike the testimony when Stuber offered it.

(3) We review the DPA's remarks in closing argument for plain error, since Brown's counsel did not object to them.

---

[2] Honolulu Police Department (HPD) Officer William Gasper, Jr. testified that a sergeant would not have approved his report unless "all the elements" of the offense were reflected in the report; HPD Officer Stewart Ferriman testified that a sergeant would not have authorized Defendant-Appellant Mark R. Brown's arrest or "accept[ed]" it after the fact if the elements of violation of a protective order "were not met." Although ambiguous, at least one plausible reading of this testimony is that the facts needed to establish a crime had been alleged, regardless of whether they were true or false. In contrast, the officers in State v. Ryan were asked directly if they had found "any reason" or "any evidence" to believe that the complaining witness was not telling the truth. State v. Ryan, 112 Hawai'i 136, 138, 140-41, 144 P.3d 584, 586, 588-89 (App. 2006). Moreover, in Ryan, the State elicited testimony that emphasized the training and experience that the officers had in investigating domestic abuse cases, id. at 139, 144 P.3d at 587, while the State here did not elicit any such testimony about the background or expertise of the sergeants mentioned by Officers Gasper and Ferriman.

The DPA's "send a message" statement was made in the context of an argument that the jury should return a guilty verdict if the facts and the law supported it, and accordingly was not itself improper. Cf. State v. Apilando, 79 Hawai'i 128, 142, 900 P.2d 135, 149 (1995). While the DPA's reference to possible future acts of violence by Brown was improper, we conclude that it was harmless beyond a reasonable doubt since (1) the court instructed the jury that it "must not be influenced by pity for the defendant or by passion or prejudice against the defendant[,]"[3] (2) the comment was an isolated reference in an otherwise proper closing, and (3) there was substantial evidence supporting Brown's conviction. Accordingly, no plain error occurred.

(4) The actions of Brown's trial counsel with respect to the foregoing issues did not constitute ineffective assistance of counsel. State v. Wakisaka, 102 Hawai'i 504, 516, 78 P.3d 317, 329 (2003) (in order to establish ineffective assistance of counsel, defendant must show that (1) there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence, and (2) such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense).

Defense counsel's failure to object to the testimony of Officers Gasper or Ferriman, or to the DPA's improper comment in closing argument, did not reflect a lack of skill, diligence or judgment by defense counsel, since objections on these points

---

[3] The family court instructed the jury in relevant part:

> Statements or remarks made by counsel are not evidence. You should consider their arguments to you, but you are not bound by their recollections or interpretations of the evidence. . . .
>
> . . . .
>
> You must not be influenced by pity for the defendant or by passion or prejudice against the defendant. Both the prosecution and the defendant have a right to demand, and they do demand and expect, that you will conscientiously and dispassionately consider and weigh all of the evidence and follow these instructions, and that you will reach a just verdict.

would have drawn the jury's attention to issues that they might otherwise not have considered significant. Cf. State v. Antone, 62 Haw. 346, 352, 615 P.2d 101, 106 (1980) ("We find that counsel's decision to refrain from objecting constituted a legitimate tactical choice."); State v. Silva, 75 Haw. 419, 441, 864 P.2d 583, 593 (1993) ("Lawyers require and are permitted broad latitude to make on-the-spot strategic choices in the course of trying a case.") (citations omitted). Moreover, as we noted above, the errors themselves were in any event harmless. Accordingly, we conclude that defense counsel's failure to object or otherwise act did not result in the impairment or withdrawal of a potentially meritorious defense. Wakisaka, 102 Hawai'i at 516, 78 P.3d at 329.

Finally, we cannot say on this record whether defense counsel's decision to cross-examine Stuber regarding the two eyewitnesses, and counsel's subsequent failure to seek to strike the hearsay testimony that these questions elicited, reflected a lack of skill, judgment or diligence. The record suggests that defense counsel knew something about these individuals,[4] and thus may have had a basis for undertaking this line of questioning. However, without having heard defense counsel's explanation for her actions, we cannot evaluate their reasonableness. See Silva, 75 Haw. at 439 n.5, 864 P.2d at 592 n.5.

In any event, we conclude that the challenged testimony did not result in the withdrawal or substantial impairment of a potentially meritorious defense. The theory of the defense was that Stuber was lying, and defense counsel repeatedly emphasized in her closing that Stuber was the only eyewitness to testify for the State at trial. From the defense perspective, Stuber's testimony about the two other eyewitnesses was simply one more fabrication by Stuber. Absent some corroboration from the witnesses themselves, this testimony did not significantly

[4] At one point, defense counsel asked the complaining witness, Linda Stuber, whether she knew who "Frank" was, and Stuber said he was one of the two eyewitnesses.

bolster Stuber's credibility. Thus, we cannot see how the admission of this testimony could have possibly impaired a potentially meritorious defense. Wakisaka, 102 Hawai'i at 516, 78 P.3d at 329; Antone, 62 Haw. at 348-49, 615 P.2d at 104 (citations omitted).

Accordingly, the Judgment of Conviction and Sentence filed on May 8, 2006 by the Family Court of the First Circuit is hereby affirmed.

DATED: Honolulu, Hawai'i, October 25, 2007.

On the briefs:

Joyce K. Matsumori-Hoshijo,
for Defendant-Appellant.

Stephen K. Tsushima,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Mark E. Recktenwald
Chief Judge

Corinne K.A. Watanabe
Associate Judge

Associate Judge