

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 28000

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
GAVIN W. BOLOSAN, Defendant-Appellant

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 04-1-2433)

MEMORANDUM OPINION

(By: Recktenwald, C.J., Watanabe and Nakamura, JJ.)

Defendant-Appellant Gavin W. Bolosan (Bolosan) appeals from the Judgment of Conviction and Sentence filed on May 26, 2006, in the Circuit Court of the First Circuit (circuit court).¹ Bolosan was charged in an indictment with Robbery in the Second Degree in violation of Hawaii Revised Statutes (HRS) § 708-841(1)(a) (1993). Bolosan allegedly used force to take a purse from Josephina DeLong (DeLong) at Waimea Falls Park on November 9, 2003.

At trial, there was testimony concerning how police had identified Bolosan as a suspect in the case. In explaining how he had linked Bolosan to a particular address, Honolulu police detective Brian Johnson (Detective Johnson) testified that "I found that a Mr. Gavin Bolosan had used that address and phone number as his own on a previous case. . . ." Defense counsel moved for a mistrial based on the reference to "a previous case." The circuit court denied the motion and warned the jury to

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The Honorable Michael D. Wilson presided over the trial.

disregard the reference. The jury found Bolosan guilty, and the circuit court sentenced Bolosan to a ten-year term of imprisonment.²

On appeal, Bolosan argues that the circuit court erred when it denied his motion for a mistrial based on Detective Johnson's statement. He contends that "[t]here was a failure to give a prompt curative instruction," and that "the curative instruction was insufficient in that the jury was never instructed to disregard 'the previous case' statement of Detective Johnson."

For the reasons discussed below, we affirm.

I. BACKGROUND

DeLong and her sister Juana Moreno (Moreno) visited Oahu for a week in November, 2003. On November 9, they decided to go to Waimea Falls Park. DeLong was carrying a straw bag with a strap containing a camera, approximately \$980 in cash, and a box of chocolates. They took a city bus to the park, and stayed for about two and a half hours. At the end of their visit, DeLong and Moreno began walking from the park back to the highway. They were approached by a man, who asked them for directions to get across a nearby stream. DeLong described the man as "short and chunky," clean-cut, with black hair. DeLong told the man that she didn't know how to get across the stream. The man kept walking, both ahead and behind the sisters, appearing to look for a way across the stream. He occasionally

² The circuit court ordered that Bolosan serve the sentence consecutively with a sentence imposed in another felony case.

asked if they knew how to get across, and DeLong repeated that they didn't know. He also asked if there was anyone in the booth by the park entrance and DeLong said she didn't know, but suggested that he go to the booth to see if anyone could tell him how to cross the stream.

DeLong testified that at that point, the man grabbed her purse, which was on her shoulder, and began pulling on it. She struggled with the man, holding the purse straps with both hands while trying to prevent him from taking the purse. However, he was able to break her hold and gain control of her purse. As a result of the struggle, DeLong's arm was bruised and swollen.

Once the man took the purse from her, he ran up the hill toward the entrance of the park. DeLong and Moreno pursued him and saw him get into a white van. Moreno attempted to stop the van, and DeLong ran up to the van and saw the man lying on the floor of the van. Moreno pleaded with the driver, whom she described as a "skinny guy, dark complexion," to help while DeLong demanded the return of her purse. Nevertheless, the van drove off.

An employee of the park, Randall Hoopai (Hoopai), heard screams and saw DeLong and Moreno chasing a man up the hill in the direction of the entrance to Waimea Falls Park. Less than five minutes later, Hoopai witnessed a white van speeding toward the exit of the park. Hoopai observed the driver of the van, whom he believed to be Filipino/Chinese, and noted the van's

license number. Hoopai approached Moreno and DeLong and observed that they were panting, "hysterical," and "shook up," so he tried to calm them down. When police arrived about thirty minutes later, Hoopai gave them the license number of the white van.

Detective Johnson was assigned to investigate the case. He traced the license number of the van to the registered owner, and determined that Eduardson Cansino (Cansino), the son of the registered owner, appeared to fit the physical description of the van driver. Johnson created a photographic lineup of six individuals including Cansino, but Hoopai could not identify Cansino from the lineup.

Additionally, during his investigation, Detective Johnson determined that Bolosan had previously used the address to which the van was registered. Detective Johnson created another photographic lineup which contained the photographs of six individuals, including Bolosan. When the photographic lineup was shown to DeLong in May, 2004, she "immediately" identified Bolosan as the man who took her purse. Additionally, at trial, DeLong identified Bolosan in the courtroom as the man who had taken her purse.

When Detective Johnson testified about the photographic lineup shown to DeLong, the deputy prosecutor asked him why he had included Bolosan's photograph. Detective Johnson responded that when he was investigating the address to which the van was registered, he found that Bolosan had used that address and phone number and that "[Bolosan] fit the weight and physical

description other than the height was a little bit off of [the] second suspect. . . ." Bolosan objected to this answer and asked the court to strike the statement. Finding the question more probative than prejudicial, the circuit court overruled Bolosan's objection. However, to mitigate the prejudicial effect of the testimony, the court gave a cautionary instruction, reminding the jury that it was their duty to determine the identity of the perpetrator of the offense. When the State's direct examination continued, Detective Johnson was asked to go back to the question referring to how he put together the photographic lineup.

Detective Johnson responded:

Because when I did the background check on the registered owner of the vehicle, the white van that I had a license plate for, I found that the registered owner didn't resemble the description of the suspects. I ran the address of that registered owner to find out who else resided at that address and may be driving that van. I found that Eduardson Cansino did fit the description of the driver of the van and he's the son of the registered owner. I also continued to check and I found that a Mr. Gavin Bolosan had used that address and phone number as his own on a previous case and --

(emphasis added).

Defense counsel moved for a mistrial based on Detective Johnson's comment regarding "a previous case." After a bench conference, the circuit court took a recess to consider the motion. After the recess, the court advised counsel that it would not admit the photographic lineup into evidence in order to "minimiz[e] . . . the potential prejudicial effect of the detective's statement" The court then gave the following curative instruction to the jury:

The evidence has referred to a photograph of the defendant in the possession of the police. The government has access to photographs of people from different sources and for different

purposes. The fact that the police had the defendant's photograph does not mean that he or she committed any offense or was involved in any prior offense.³

The deputy prosecutor then completed the examination of Detective Johnson. Defense counsel had no questions and the court recessed for lunch. After the recess, the court again cautioned the jury: "I did want to instruct you that with respect to the testimony of the last witness, any testimony regarding how information was obtained by the detective about Mr. Bolosan's photograph is irrelevant and is stricken and should be disregarded entirely by you."

The State then called Cansino to testify. Cansino testified that Bolosan had asked him for a ride to Turtle Bay so that Bolosan could get money from Bolosan's mother. In order to drive to Bolosan's mother's residence, Cansino used his father's white Dodge van. On the way back, Bolosan asked Cansino if he could stop at Waimea Falls Park to "see someone." Bolosan asked Cansino to park on a gravel area on the side of the road that leads into Waimea Falls Park. According to Cansino, after about twenty to thirty minutes, "[Bolosan] fly [sic] inside and he's like go, go, go. Hurry up. Let's go. Let's go. And he's getting all excited." As Cansino drove off, he saw a woman who was screaming and asking for help, but Bolosan kept saying "go, go, go" and "hurry up." After a brief encounter with DeLong and Mareno, Cansino drove off, with Bolosan lying down between the back seats of the van. When Cansino asked him what had happened,

³ The circuit court did not rule on the motion for a mistrial at that time, but rather denied it the next day after the parties had rested.

Bolosan did not respond. Cansino dropped off Bolosan and went home. After this testimony, the State rested.

Bolosan's wife testified for the defense that Bolosan had always had a mustache since they were married in 2001. The defense then rested.

The circuit court revisited Bolosan's motion for a mistrial and ruled as follows:

I took under consideration the motion for mistrial that was made by the defense at the time that the detective testified about the gathering of the photograph that was used for the photographic lineup. Having considered the motion for mistrial and making a determination in light of State versus Brennan as well as State versus Webster, I note that a motion for a mistrial is granted where there is an occurrence of such character and magnitude that a party is denied the right to a fair trial, and I consider whether Mr. Bolosan has been at this time deprived of a fair trial.

And in making that determination, I consider the curative nature of the instruction that was given as well as the decision to exclude the evidence of the photo lineup itself. Also, I consider the nature of the evidence, including the testimony of the complaining witness that her identification was based upon her observation of the defendant as she looked at him through the window of the van and the testimony of Mr. Cansino regarding the defendant's conduct at Waimea.

And based on those factors, I do find that Mr. Bolosan has not been deprived of his right to a fair trial and would deny the motion for a mistrial at this time.

In closing arguments, defense counsel did not dispute that Bolosan had taken DeLong's purse, but rather contended that the prosecution had failed to show that Bolosan had used force to take the purse. The jury returned a verdict of guilty as charged. On May 26, 2006, the trial court sentenced Bolosan to a ten-year term of imprisonment, to be served consecutive to a sentence in another case.

II. STANDARD OF REVIEW

We review the circuit court's denial of Bolosan's motion for a mistrial for an abuse of discretion.

The denial of a motion for mistrial is within the sound discretion of the trial court and will not be upset absent a clear abuse of discretion. The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Lagat, 97 Hawai'i 492, 495, 40 P.3d 894, 897 (2002)

(internal quotation marks and citations omitted).

III. DISCUSSION

A. The Circuit Court Correctly Gave Prompt, Direct, And Unambiguous Curative Instructions On Detective Johnson's Testimony Regarding "A Previous Case"

Bolosan contends that the circuit court erred by denying his motion for a mistrial because the curative instructions regarding Detective Johnson's statements about "a previous case" were not given promptly. However, Bolosan fails to consider all of the factors used by the Hawai'i Supreme Court to determine whether a trial court committed reversible error by denying a motion for a mistrial.

To determine whether a witness's improper remarks constitute reversible error, the Hawai'i Supreme Court looks at three factors: (1) the nature of the misconduct, (2) the promptness of a curative instruction or lack of it, and (3) the strength or weakness of the evidence against the defendant.

State v. Samuel, 74 Haw. 141, 148-49, 838 P.2d 1374, 1378 (1992)

(emphasis added). Additionally, in State v. Perez, 64 Haw. 232, 638 P.2d 335 (1981), the Hawai'i Supreme Court stated that:

Error is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes, whether there is a reasonable possibility that the error might have contributed to the conviction.

Id. at 234, 638 P.2d at 337.

Furthermore, "[a] trial court has the discretion to determine whether the challenged statement 'merits a mere prophylactic cautionary instruction or the radical surgery of declaring a mistrial.'" State v. Webster, 94 Hawai'i 241, 248, 11 P.3d 466, 473 (2000) (citing State v. Kahinu, 53 Haw. 536, 540, 498 P.2d 635, 644 (1972)).

In Samuel, the Hawai'i Supreme Court considered the adequacy of a curative instruction in circumstances similar to those here. 74 Haw. at 149, 838 P.2d at 1378. The defendant had been charged with murder for stabbing a fellow inmate to death, and contended at trial that she was not guilty because of a mental condition and emotional disturbance at the time of the incident. Id. at 145, 838 P.2d at 1377. A psychologist for the prosecution testified to "a history of-of a similar experience." Id. at 147, 838 P.2d at 1378. This testimony violated the trial court's pretrial ruling on a motion in limine, and the trial court instructed the jury to disregard the comment and strike it from the record. Id. at 147, 838 P.2d at 1378. After noting that "it was within the judge's discretion to determine that [the psychologist's] improper remark merited only a curative instruction to the jury," and then applying the three-factor test discussed above, the Hawai'i Supreme Court affirmed the defendant's conviction. Id. at 148, 838 P.2d at 1378.

Here, Bolosan argues that this court should reverse the circuit court's ruling based purely on the second part of the

three-factor test. However, this argument goes against the Hawai'i Supreme Court's pronouncement in Perez, 64 Haw. at 234, 638 P.2d at 337, and fails to apply the three-factor test for reversible error stated in Samuel, 74 Haw. at 149, 838 P.2d at 1378. Instead, applying the three factors set forth in Samuel, it is clear that the circuit court did not abuse its discretion by denying the motion for mistrial.

1. The nature of the misconduct

Though Bolosan does not address this factor, the nature of the misconduct was not a cause for a reversal or a mistrial because it was not "egregious." See State v. Senteno, 69 Haw. 363, 366, 742 P.2d 369, 372 (1987) (finding that the prosecutor's statements in closing argument, which were stopped by the court and were about to reference excluded evidence, were not egregious) (citing State v. Marsh, 68 Haw. 659, 661, 728 P.2d 1301, 1303 (1986) (finding that the prosecutor's statements in closing argument, expressing his personal opinions about the veracity of a witness and the victim, substantially prejudiced the defendant)). Detective Johnson's testimony that "[he] found that a Mr. Gavin Bolosan had used that address and phone number as his own on a previous case . . ." is not the type of "egregious" statement that requires a mistrial. Rather, this statement is ambiguous. Neither the context nor the language of the statement suggest how Bolosan was involved in "a previous case," i.e., whether as a complainant, a witness, or a suspect.

Additionally, the Hawai'i Supreme Court in Webster noted that the prohibited testimony regarding a polygraph test was "inadvertent" when determining if there was prejudicial error. 94 Hawai'i at 248, 11 P.3d at 473. Here, the record shows that Detective Johnson was rephrasing his previous testimony after Bolosan's objection had just been overruled. Similar to the testimony in Webster, Detective Johnson's statement appears to have been inadvertent and quickly cured by two curative instructions to the jury.

2. The promptness of the curative instructions

Bolosan contends that the circuit court's curative instructions were not "prompt" because "the length of time" between Detective Johnson's statements and the curative instruction "was so great that the prejudice instilled in the jury could not be overcome." However, Bolosan makes this assertion without citing a single authoritative source or legal precedent.

The record shows that circuit court "promptly" gave three curative instructions regarding Detective Johnson's "previous case" testimony. As discussed above, the circuit court's first curative instruction was the first substantive statement that the jury heard following the recess after Bolosan's sustained objection, which cautioned the jury that police receive photographs from a variety of sources, and that their possession of the photo "[d]oes not mean that the defendant committed any offense or was involved in any prior case." The

second curative instruction was given at the close of Detective Johnson's testimony when the court instructed the jury that "any testimony regarding how information was obtained by the detective about Mr. Bolosan's photograph is irrelevant and is stricken and should be disregarded entirely by you." The final curative instruction was given during jury instructions, in which the circuit court reiterated that "[the jury] must disregard entirely any matter which the Court has ordered stricken," and that the fact that the police had a photo of the defendant "does not mean that he committed any offense."

A review of Hawai'i case law shows that all of the circuit court's curative instructions regarding Detective Johnson's statement were given promptly. In Perez, the Hawai'i Supreme Court stated that a "[t]rial judge may give a cautionary instruction at the time the jury is instructed on the law of the case rather than immediately following the receipt of testimony, where the rights of the accused are adequately protected." 64 Haw. at 233, 638 P.2d at 336. In Webster, the Hawai'i Supreme Court held that the trial judge's curative instructions, made at the end of the witness's testimony and after a recess, were sufficiently prompt. 94 Hawai'i at 249, 11 P.3d at 474. Therefore, under both Perez and Webster, all of the circuit court's curative instructions were prompt.

Finally, though Bolosan asserts that the circuit court's curative instructions were insufficient, he did not argue or offer any evidence to overcome the long-standing presumption

that a jury adheres to a court's curative instructions. Perez, 64 Haw. at 233, 638 P.2d at 336. The record clearly shows that the circuit court declared Detective Johnson's statement "irrelevant" and "stricken" from the record. Therefore, under Perez, when the circuit court removed the "prior case" testimony from evidence and cautioned the jury about it, it can be presumed that the jury made its determination of Bolosan's guilt without giving any consideration to Detective Johnson's prohibited testimony. Therefore, the circuit court's curative instructions were both prompt and sufficient.

3. The strength or weakness of the evidence

Finally, there was substantial evidence supporting the jury's verdict that Bolosan was guilty of robbery in the second degree. Defense counsel conceded in closing arguments that Bolosan committed theft when he took the purse from DeLong. Thus, the only issue under HRS § 708-841(1)(a) (1993) was whether Bolosan used force in obtaining DeLong's purse.⁴

As DeLong's testimony shows, not only did she and Bolosan struggle for the purse, the struggle caused her arm to be bruised and swollen. Furthermore, she testified that she still suffered from the effects of the struggle for months.

Also, the facts in the record support the jury's determination that Bolosan intended to use force to get the purse

⁴ Hawaii Revised Statutes § 708-841(1)(a) (1993) provides:

(1) A person commits the offense of robbery in the second degree if, in the course of committing theft:

(a) The person uses force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance[.]

from DeLong. Bolosan asked Cansino to go to Waimea Falls Park, he followed DeLong and her sister for several minutes, grabbed the bag, and instead of releasing it when he felt DeLong's resistance, he tore it from her grasp and ran away.

Thus, the circuit court did not clearly abuse its discretion when it denied Bolosan's motion for a mistrial.

B. The Circuit Court's Curative Instructions Specifically Instructed The Jury To Disregard The "Previous Case" Statement By Detective Johnson

Although Bolosan contends that the circuit court did not instruct the jury to disregard Detective Johnson's statement, the record shows otherwise. As discussed above, the circuit court twice admonished the jury that Detective Johnson's statement was to be "stricken from the record and should be disregarded entirely by you." (emphasis added).

IV. CONCLUSION

Accordingly, we affirm the May 26, 2006 Judgment of Conviction and Sentence entered in the Circuit Court of the First Circuit.

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

On the briefs:

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for Defendant-Appellant.

Loren J. Thomas,
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City and County of Honolulu,
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Chief Judge



Associate Judge



Associate Judge