

NO. 28403

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
FRANK A. KALUA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(CR. NO. 06-1-0101(3))

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STATE OF HAWAI'I

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SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Frank A. Kalua appeals from the January 11, 2007 Judgment entered in the Circuit Court of the Second Circuit (circuit court),<sup>1</sup> convicting him of two counts of Burglary in the First Degree in violation of Hawaii Revised Statutes § 708-810(1)(c) (1993).

The charges relate to a February 25, 2006 burglary at Apartment No. 25-103 at Keonekai Villages in Kihei, Maui (Count One), and another burglary on the same date at Apartment No. B-105 at Paradise Gardens in Kihei, Maui. A jury found Kalua guilty of both burglary charges, but acquitted him of a theft charge relating to the burglary at Paradise Gardens. The circuit court sentenced Kalua to ten years imprisonment on each count, to be served consecutively, with a mandatory minimum term of ten years on Count One.

Kalua raises the following points of error on appeal:

(1) "The lower court erred in denying Mr. Kalua's Motion for New Trial where the [Deputy Prosecuting Attorney's

<sup>1</sup> The Honorable Joseph E. Cardoza presided.

(DPA)] comments in opening statements and Officer Manlapao's testimony at trial violated Mr. Kalua's privilege against self-incrimination and right to a fair trial . . . ."

(2) "The DPA's improper assertion of personal knowledge during her redirect examination of witness Christina Symonds constituted misconduct and violated Mr. Kalua's right to a fair trial."

(3) "The lower court erred in allowing the irrelevant and prejudicial testimony of Mr. Fell-McDonald of his observations of a black pickup truck parked at Keonekai Villages on February 17, 2006."

(4) "There was insufficient evidence to support a conviction for the burglary offenses herein where the substantial evidence failed to establish the requisite evidence of identity and state of mind."

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, we resolve Kalua's points of error as follows:

(1) The circuit court did not err in denying Kalua's motion for a new trial. The DPA's comments in her opening statement about Kalua's statements to police do not appear to be "manifestly intended or . . . of such character that the jury would naturally and necessarily" interpret them as a comment on Kalua's invocation of his right to remain silent. See State v. Smith, 106 Hawai'i 365, 375, 105 P.3d 242, 252 (App. 2004) (citing State v. Padilla, 57 Haw. 150, 158, 552 P.2d 357, 362

(1976)). Testimony similar to that described by the DPA here has been found not to be improper. See, e.g., Rowan v. Owens, 752 F.2d 1186, 1190 (7th Cir. 1984), cert. denied, 476 U.S. 1140 (1986) (officer's testimony that defendant stated "he didn't want to say anything else" at the conclusion of an interrogation was not a comment on defendant's post-arrest silence because it simply indicated the end of the interrogation); Lindgren v. Lane, 925 F.2d 198 (7th Cir. 1991); United States v. Haro-Portillo, 531 F.2d 962, 963-64 (9th Cir. 1976).

Even assuming arguendo that the DPA's comments were improper, they were harmless beyond a reasonable doubt. State v. Rogan, 91 Hawai'i 405, 412, 984 P.2d 1231, 1238 (1999). The reference was brief and isolated, and the DPA did not elicit any testimony at trial regarding Kalua's termination of his questioning. See State v. Olivieri, 860 So. 2d 207, 214 (La. Ct. App. 2003); cf. State v. Sullivan, 927 P.2d 1033, 1040-41 (Mont. 1996). Although no curative instruction was given by the court, the DPA's remarks were preceded by the circuit court's preliminary instruction to the jury that "during the opening statements . . . statements or remarks of the attorneys are not evidence." In addition, the circuit court reiterated the substance of this preliminary instruction prior to closing argument. Finally, as we discuss below, there was ample evidence to support the jury's verdict.

The circuit court also did not err in denying the motion for a new trial based on Officer Manlapao's reference at trial to "drug paraphernalia" recovered from Kalua's truck.

State v. Samuel, 74 Haw. 141, 149, 838 P.2d 1374, 1378 (1992).

The DPA had warned Officer Manlapao against referring to the paraphernalia, the circuit court struck the testimony and gave a prompt curative instruction to the jury, and there was ample evidence against Kalua. Id.

Finally, we conclude that the cumulative effect of the DPA's comments and Officer Manlapao's testimony does not require a new trial.

(2) The DPA's questioning of Symonds was not improper, since the question did not interject the DPA's own recollection of a fact in issue. Cf. State v. Rulona, 71 Haw. 127, 785 P.2d 615 (1990), overruled on other grounds by State v. Mueller, 102 Hawai'i 391, 393, 76 P.3d 943, 945 (2003). In any event, if the question constituted error, it was harmless beyond a reasonable doubt. See State v. Torres, 85 Hawai'i 417, 423, 945 P.2d 849, 855 (App. 1997).

(3) The circuit court did not err in allowing Fell-McDonald to testify regarding the incident on February 17, 2006. This evidence was probative of identity, intent, planning and preparation, and its probative value was not outweighed by any unfair prejudice. Hawaii Rules of Evidence Rules 403, 404(b); State v. Yamada, 116 Hawai'i 422, 435, 173 P.3d 569, 582 (App. 2007). Even assuming arguendo that the circuit court erred in allowing Fell-McDonald to testify that the vehicle was "suspicious" and that the behavior of the person near the vehicle was "odd," given the strength of the evidence against Kalua, any such error was harmless beyond a reasonable doubt. See Hawai'i

Rules of Penal Procedure Rule 52(a).

(4) Considering the evidence in the light most favorable to the State, State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998), there was substantial evidence to support the convictions.

With regard to the burglary at apartment 25-103 at Keonekai Villages, one of the occupants of the apartment, Complaining Witness 1 (CW 1), testified that an intruder entered the unit through a sliding glass door on the evening of February 25, 2006 at about 9:50 p.m. and ran at the sight of CW 1. CW 1 did not know the person and did not give him permission to enter the unit. A female resident at the complex testified that at about the same time she saw an individual running toward the visitor parking area, jump into a pickup truck and reverse out of the complex with the lights off.

Officer Manlapao testified that Kalua admitted that he went inside apartment 25-103 on February 25, 2006 at about 9:50 p.m. Kalua told Officer Manlapao that Kalua went to the apartment in order to collect money for a tile job from a person named Jon, and left when Jon became angry and refused to give him the money.

From the evidence described above, the jury could have rejected Kalua's explanation as to why he was in CW 1's apartment, State v. Birdsall, 88 Hawai'i 1, 8-9, 960 P.2d 729, 736-37 (1998) (noting that the jury may accept or reject any witness's testimony in whole or in part); Slaughter v. State, 290 S.E.2d 338, 339 (Ga. Ct. App. 1982) (jury could accept

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defendant's admission that she was inside a store during a theft but reject her testimony that she was not involved in the theft), and reasonably inferred that Kalua was the intruder in apartment 25-103 on February 25, 2006, and that he intentionally entered the apartment with the intent to commit a crime therein.

With regard to the burglary at apartment B-105 at Paradise Gardens, a resident of the apartment, Complaining Witness 2 (CW 2) testified that an intruder entered the apartment through a sliding glass door at about 11:50 p.m. and fled when approached by CW 2. CW 2 told his girlfriend to call 911, and then ran outside within "five to ten seconds" and went to the parking lot. CW 2 did not see anyone initially, but then heard a vehicle door close nearby and saw a truck pull out without its lights on. CW 2 was able to see the license plate number and reported it to police. CW 2 also testified that he remembered that there was a passenger in the vehicle that could have been "female or male with long hair." Police found Kalua and Symonds about ten minutes later on Pauloa Place in a truck bearing that license plate number; Kalua was driving and Symonds was in the passenger seat.

In addition, Officer Manlapao testified that (1) Kalua admitted that he was at Paradise Gardens on February 25, 2006; (2) Kalua claimed that he was there to visit his friend Tampa, but did not know Tampa's apartment number; (3) Kalua claimed that he walked into another unit through the screen door before realizing that it was the wrong unit, so he left and went next door to Tampa's apartment.

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Symonds testified that she and Kalua had visited Paradise Gardens twice that evening. Symonds testified that on the second occasion, Kalua left her in the truck for a period of time; when he returned, they drove out of Paradise Gardens and proceeded to Pauloa Place, where they were stopped by police while still inside the truck.

The jury could have reasonably inferred from the evidence described above that Kalua was the intruder in CW 2's apartment on February 25, 2006, and that Kalua intentionally entered the apartment with the intent to commit a crime therein.

Accordingly, the Judgment entered in the Circuit Court of the Second Circuit on January 11, 2007 is hereby affirmed.

DATED: Honolulu, Hawai'i, October 30, 2008.

On the briefs:

Joyce K. Matsumori-Hoshijo  
for Defendant-Appellant.

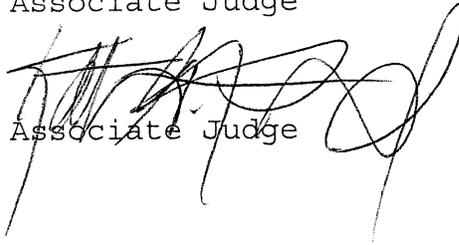
Scott K. Hanano,  
Deputy Prosecuting Attorney,  
County of Maui,  
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge