

NO. 28381

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
MOON SOO KIM, Defendant-Appellant

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E.J. RIMANDO
CLERK APPELLATE COURTS
STATE OF HAWAII

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 05-1-2109)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Moon Soo Kim (Kim) appeals from the Judgment of Conviction and Sentence (Judgment) filed on December 21, 2006 in the Circuit Court of the First Circuit (circuit court).¹ A jury convicted Kim of Assault in the Third Degree (third degree assault), in violation of Hawaii Revised Statutes (HRS) § 707-712(1)(a) (1993).

On appeal, Kim contends (1) the circuit court plainly erred by admitting inadmissible hearsay; (2) defense counsel was ineffective for failing to object to the inadmissible hearsay testimonies; and (3) the circuit court abused its discretion by allowing prosecutorial misconduct during closing arguments. Kim asks this court to vacate the Judgment and remand the case for a new trial.

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, as well as the relevant statutory and case law, we resolve Kim's points of error as follows:

The circuit court's failure to strike or preclude admission of hearsay testimony into evidence did not constitute plain error. In State v. Fields, 120 Hawai'i 73, 201 P.3d 586 (App. 2005), aff'd on other grounds, 115 Hawai'i 503, 168 P.3d 955 (2007), this court stated that "[g]enerally, at trial, absent an objection by the defendant to the hearsay testimony offered by

¹ The Honorable Reynaldo D. Gaulty presided.

the prosecution, the court lacks sufficient information to decide that its failure to preclude admission of the hearsay testimony into evidence, or to strike it after it has been admitted into evidence, is a plain error." 120 Hawai'i at 93, 201 P.3d at 606. See Tabieros v. Clark Equipment Co., 85 Hawai'i 336, 379 n.29, 944 P.2d 1279, 1322 n.29 (1997) (declining to address defendant's argument that an exhibit should have been excluded as inadmissible hearsay, where defendant failed to object at trial). The circuit court, therefore, "did not violate a duty not to admit inadmissible hearsay testimony into evidence or a duty to strike inadmissible hearsay testimony after it was admitted into evidence," Fields, 120 Hawai'i at 93, 201 P.3d at 606, where defense counsel failed to object to Complainant's statements as related by Officers Ohai, Lee, and West.²

Kim's ineffective assistance of counsel claim is denied without prejudice to Kim filing a Hawai'i Rules of Penal Procedure (HRPP) Rule 40 Petition on this claim. In Fields, this court established:

Matters presumably within the judgment of counsel, like *trial strategy*, will rarely be second-guessed by judicial hindsight.

. . . .

When defendant's trial counsel does not exercise his right to object to inadmissible hearsay evidence offered by the prosecution, and the record is unclear or void as to the basis for counsel's actions or inactions, counsel shall be given the opportunity to explain his or her actions or inactions in an appropriate proceeding before the trial court judge.

Generally, such an opportunity to explain is best provided in a post-conviction proceeding initiated by the defendant, pursuant to HRPP Rule 40.

120 Hawai'i at 92-93, 201 P.3d at 605-06 (internal quotation marks, citations, and brackets omitted; italics in original; emphases added). See Fields, 115 Hawai'i at 529 n.17, 168 P.3d at 981 n.17 ("[W]e think it prudent to reserve judgment and

² With respect to Officer Campbell's statement, the circuit court did not abuse its discretion by admitting the testimony under State v. Feliciano, 2 Haw. App. 633, 636, 638 P.2d 866, 869 (1982). In Feliciano, this court held that statements made by a non-testifying declarant to a law enforcement officer may be admitted as non-hearsay if offered "to explain an officer's conduct during the investigation procedures leading up to the arrest of the defendant, but not for their truth." Id.

permit Fields to file a[n] HRPP Rule 40 petition for post-conviction relief, as the ICA concluded. To that end, we acknowledge that Fields' trial counsel's failure to object to Officer Ke's testimony as to Staggs' out-of-court statements will require a great deal of explanation.").

As in Fields, Kim's defense counsel failed to object to inadmissible hearsay testimony and the record is silent as to why he failed to do so.

The circuit court did not abuse its discretion with respect to the Prosecutor's statements during closing arguments. "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).

The Prosecutor's statement that "[Kim] needs to be taught a lesson that he's not above the law" is akin to the "send-a-message" statement that the Hawai'i Supreme Court held improper in State v. Apilando, 79 Hawai'i 128, 143, 900 P.2d 135, 150 (1995), and was thus improper. The Prosecutor's improper statement, however, was sufficiently cured by the circuit court's subsequent corrective instruction, which ordered the jury to disregard the statement. See State v. Wakisaka, 102 Hawai'i 504, 516, 78 P.3d 317, 329 (2003) ("Generally, we consider a curative instruction sufficient to cure prosecutorial misconduct because we presume that the jury heeds the court's instruction to disregard improper prosecution comments.").

Similarly, any impropriety created by the Prosecutor's statements that "[defense] realized . . . [Complainant] could not be here to testify" (emphasis added); "I don't want you to feel bad about convicting [Kim] because [Complainant] is not here. Think about cases where the victims are children and cannot

testify or tourists who are not here anymore." (emphasis added); and "[d]on't hold it against the State [that Complainant] could not be here to testify" (emphases added) were also cured when the circuit court sustained defense counsel's objections, struck the Prosecutor's arguments, and provided the jury a corrective instruction.³ See Wakisaka, 102 Hawai'i at 516, 78 P.3d at 329.

THEREFORE,

IT IS HEREBY ORDERED that the Judgment of Conviction and Sentence filed on December 21, 2006 in the Circuit Court of the First Circuit is affirmed, without prejudice to Kim filing an HRPP Rule 40 petition on his claim of ineffective assistance of counsel.

DATED: Honolulu, Hawai'i, May 21, 2009.

On the briefs:

Glenn D. Choy
for Defendant-Appellant.

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Acting Chief Judge


Associate Judge


Associate Judge

³ Specifically, the circuit court instructed the jury:

THE COURT: Ladies and gentlemen, the court has stricken the argument with regard to why [Complainant] is not here. That is irrelevant to the case.

. . . You take the evidence presented to you, and you make a decision, and we don't worry about . . . who's not here.

The court has stricken that particular line of argument by the prosecution.