

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 28925

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
ANTONIO KEONI BELEN, Defendant-Appellant,
and CHARLES H. FOSTER, Defendant

KHAMAKA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 06-1-0500)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding J., Nakamura, and Fujise, JJ.)

Defendant-Appellant Antonio Keoni Belen (Belen) appeals from the judgment entered by the Circuit Court of the First Circuit¹ (circuit court) on October 31, 2007, convicting and sentencing him for promoting a dangerous drug in the second degree.²

Belen contends that his right to a fair trial was violated when the deputy prosecuting attorney made improper comments to the jury during closing argument, which constituted prosecutorial misconduct. Belen identifies the following statements of the deputy prosecuting attorney as improper:

He's the only one that has a motive to lie here. Protect himself and protect his friend. You see, maybe he's lying to protect Mr. Foster because he might feel a little guilty. His [sic] trying to find someone to sell. He messed up that night. The person he thought he could sell to, the person he arranged to sell it to turned out to be a cop. Maybe that's why he's saying what he's saying in court. And, you know, his story really is the only out that they have. That's all they have.

¹ The Honorable Richard W. Pollack presided.

² Although the record indicates that Belen was charged, convicted, and sentenced for promoting a dangerous drug in the second degree, which is a violation of Hawaii Revised Statutes (HRS) § 712-1242(1)(c) (Supp. 2005), the judgment in this case incorrectly states that Belen was originally charged with and convicted of violating "§712-1243, H.R.S. [,]" which defines the offense of promoting a dangerous drug in the third degree.

Belen argues that it was improper for the deputy prosecuting attorney to argue that Belen was lying, it was improper to refer to Belen's testimony as a "story[,] " and it was improper to suggest that Belen's attorney collaborated with Belen in the false testimony.

A prosecutor's alleged misconduct during closing argument that was not objected to in the circuit court is reviewed for plain error. State v. Iuli, 101 Hawai'i 196, 204, 65 P.3d 143, 151 (2003); State v. Mars, 116 Hawai'i 125, 132-33, 170 P.3d 861, 868-69 (App. 2007). The analysis of a claim of prosecutorial misconduct first requires a determination of whether or not the conduct of the prosecutor was improper. State v. Maluia, 107 Hawai'i 20, 26, 108 P.3d 974, 980 (2005).

We conclude that the deputy prosecuting attorney's argument in this case was not improper. It is not improper for a prosecuting attorney to argue during closing arguments that a defendant's testimony was untruthful. State v. Cordeiro, 99 Hawai'i 390, 425, 56 P.3d 692, 727 (2002); State v. Clark, 83 Hawai'i 289, 304-05, 926 P.2d 194, 209-10 (1996). Referring to Belen's testimony as a "story" was also not improper. See id., 926 P.2d at 209-10. Finally, it appears that Belen is mistaken in assuming that the deputy prosecuting attorney was referring to Belen and defense counsel when she referred to "they[.]" In the context of the deputy prosecuting attorney's argument, it appears clear that "they" refers to Belen and his co-defendant, Charles H. Foster, and not to Belen and his attorney.

Therefore,

IT IS HEREBY ORDERED that the judgment entered by the circuit court on October 31, 2007, convicting and sentencing Belen for promoting a dangerous drug in the second degree, is affirmed. However, because the judgment cites the wrong statute for the foregoing offense, see footnote 2, this case is remanded

to the circuit court for entry of an amended judgment, nunc pro tunc, that reflects the correct statute, HRS § 712-1242(1)(c) (Supp. 2005).

DATED: Honolulu, Hawai'i, February 20, 2009.

On the briefs:

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