

NO. 29175

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
JESSE BROOKS, Defendant-Appellant

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 03-1-2325)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding J., Foley, and Leonard, JJ.)

Defendant-Appellant Jesse Brooks (Brooks) appeals from the Judgment of Conviction and Sentence (Judgment) filed on May 19, 2008 in the Circuit Court of the First Circuit (circuit court).¹ The circuit court convicted Brooks and found him guilty of four counts of Sexual Assault in the First Degree (Counts 1, 2, 3, and 4), in violation of Hawaii Revised Statutes (HRS) § 707-730(1)(b) (1993), and three counts of Sexual Assault in the Third Degree (Counts 5, 6, and 7), in violation of HRS § 707-732(1)(b) (1993). The court sentenced Brooks to twenty years of incarceration on each of Counts 1, 2, 3, and 4, and five years of incarceration on each of Counts 5, 6, and 7. The sentences were to run concurrently with each other and with any other term being served.

Prior to trial in this case (the second trial), Brooks was tried by a jury on the same counts, based on the same underlying facts (the first trial). At the first trial, Brooks waived his right to remain silent and testified. The first trial

¹ The Honorable Virginia Lea Crandall presided.

resulted in a mistrial due to the jurors' inability to reach a decision.

On appeal, Brooks argues the following:

(1) The circuit court plainly erred and deprived him of his right to due process, secured under the Fourteenth Amendment to the United States Constitution and article 1, §§ 10 and 14 of the Hawai'i State Constitution, in denying the Motion to Dismiss Grand Jury Indictment (Motion to Dismiss Indictment) because the State of Hawai'i (the State) engaged in prejudicial prosecutorial misconduct by presenting to the O'ahu Grand Jury (grand jury) irrelevant and inflammatory testimony regarding Brooks's alleged prior bad acts, which were similar or identical to the charges alleged in the indictment, but outside the indictment period. Brooks claims that the State should have given the grand jury a limiting instruction for the use of the prior bad acts and the State's error biased the grand jury. Related to this point is Brooks's contention that in the Order Denying Motion to Dismiss Grand Jury Indictment (Order Denying Motion to Dismiss Indictment), Finding of Fact (FOF) 5 is clearly erroneous and Conclusion of Law (COL) 2 is wrong.

(2) The circuit court erred and deprived him of his right against self-incrimination as encompassed by the Fifth Amendment to the United States Constitution and article 1, § 10 of the Hawai'i State Constitution (right against self-incrimination), in admitting into evidence at the second trial portions of Brooks's testimony from the first trial (Brooks's prior testimony).

(3) The circuit court erred and deprived him of his right to due process by allowing the State to reopen its case at the second trial.

(a) The State improperly reopened its case to bolster Minor's testimony and attack Chisel Casintahan's (Chisel's) testimony.

(b) Brooks's prior testimony about Chisel's having beaten Minor with a stick constituted improper hearsay without exception in violation of Hawaii Rules of Evidence (HRE) Rules 801(3) and 802 and improper character evidence without exception in violation of HRE Rule 404(a) and (b) and violated HRE Rules 401, 402, and 403 because the alleged act occurred in 1995 and the testimony about Chisel beating Minor was vague and ambiguous.

(c) The court's admission into evidence of portions of Brooks's prior testimony violated the doctrine of completeness because the State did not introduce the prior testimony in its entirety, making the "whole thought and essence of [Brooks's] prior testimony . . . not truly ascertainable."

(4) The circuit court plainly and reversibly erred and violated his rights to a fair trial and due process, as guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and article 1, § 5 of the Hawai'i State Constitution, in instructing the jury to consider Brooks's prior testimony as if Brooks were actually giving it in court, which was impossible. The instructions were not clear, intelligent, or proper and were erroneous, confusing, and misleading.

Brooks asks that we reverse or vacate his conviction.

Upon careful review of the record and the briefs submitted by the parties, we hold:

(1) The circuit court did not plainly err or deprive Brooks of his right to due process in denying the Motion to Dismiss Grand Jury Indictment, and FOF 5 is not clearly erroneous and COL 2 is not wrong.

(a) It is undisputed that the State presented sufficient evidence for the grand jury to find probable cause to issue the indictment, and it does not clearly appear that the evidence presented before the grand jury improperly influenced the grand jurors. State v. Pulawa, 62 Haw. 209, 218, 614 P.2d 373, 378 (1980) ("As has often been observed, an indictment should only be quashed on the clearest and plainest grounds."); State v. Mendonca, 68 Haw. 280, 283, 711 P.2d 731, 734 (1985) (holding that dismissal of indictment is required only in "flagrant" cases); State v. Layton, 53 Haw. 513, 516, 497 P.2d 559, 561 (1972) ("There is a presumption that an indictment has been found by a grand jury upon sufficient evidence."); State v. Apao, 59 Haw. 625, 637-38, 586 P.2d 250, 258-59 (1978) (holding that reception of illegal or incompetent evidence would not authorize court to set aside indictment if remaining legal evidence, considered as whole, suffices to warrant indictment, unless illegal or incompetent evidence clearly appears to have improperly influenced grand jurors).

(b) The State was not required to give the grand jury a limiting instruction regarding the use of the evidence because the circuit court, not the prosecutor, is charged with

instructing the grand jury. HRS § 612-16(d) (Supp. 2008) ("In charging the grand jurors and alternate grand jurors, the court shall give them such information as it may deem proper as to their duties and as to the law pertaining to such cases as may come before them. The court may further charge the grand jurors and alternate grand jurors from time to time, as it may deem necessary."); State v. Freedle, 1 Haw. App. 396, 401, 620 P.2d 740, 744 (1980) ("We know of no rule of law that mandates the prosecutor to give to the grand jury an instruction to disregard improper testimony[.]").

(2) The circuit court did not err or deprive Brooks of his right against self-incrimination in admitting into evidence at the second trial portions of Brooks's prior testimony. Brooks provides no authority for the notion that the circuit court was required to advise him that his testimony at the first trial could be used against him at a subsequent trial, and we find none. See generally Tachibana v. State, 79 Hawai'i 226, 236, 900 P.2d 1293, 1303 (1995) (holding that "in order to protect the right to testify under the Hawai'i Constitution, trial courts must advise criminal defendants of their right to testify and must obtain an on-the-record waiver of that right in every case in which the defendant does not testify").

(3) The circuit court did not abuse its discretion or deprive Brooks of his right to due process by allowing the State to reopen its case at the second trial.

(a) The portions of Brooks's prior testimony that were admitted into evidence did not bolster Minor's testimony or attack Chisel's testimony. See HRE Rule 608 (1993) (stating that

"[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation," but character evidence may refer only to a witness's character for truthfulness or untruthfulness); see also State v. Torres, 85 Hawai'i 417, 424-26, 945 P.2d 849, 856-57 (1997).

(b) Brooks's prior testimony about Chisel having beaten Minor with a stick did not constitute hearsay because it was not offered to prove the truth of the matter asserted. HRE Rules 801(3) (1993) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted") and 802 (1993) (providing that hearsay is generally inadmissible).

(c) The prior testimony about Chisel having beaten Minor with a stick was not improper character evidence because it was not introduced to prove action in conformity therewith on a particular occasion. HRE Rule 404(a) and (b) (Supp. 2008) (stating that "[e]vidence of a person's character or a trait of a person's character is not admissible for the purpose of proving action in conformity therewith on a particular occasion," with exceptions).

(d) The prior testimony about Chisel having beaten Minor with a stick was relevant, with no exception, to Chisel's credibility because it described Brooks's relationship with Minor, a highly significant aspect of this case, since Minor had testified that she and Brooks saw each other often and had a close relationship, which helped to explain the frequency of the alleged sexual contact and Minor's complacency with regard to it.

The evidence also tended to show that Chisel did not like Minor and may have been biased against Minor when Chisel testified at the second trial. HRE Rule 401 (1993) (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); HRE Rule 402 (1993) (providing that in general, all relevant evidence is admissible); HRE Rule 403 (1993) (providing that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of the evidence"). Given the court's instructions to the jury regarding the testimony, the court's admission of the evidence did not result in unfair prejudice or confusion of the issues or mislead the jury. See State v. Cardus, 86 Hawai'i 426, 439, 949 P.2d 1047, 1060 (App. 1997) (holding that a jury is presumed to follow the court's instructions).

(e) The circuit court's admission into evidence of portions of Brooks's prior testimony did not violate the doctrine of completeness. It is undisputed that the entire testimony on each topic area reviewed by the State and Brooks was read in full to the jury. Hence, there was no "other part" missing "which ought in fairness" have been "considered contemporaneously with" the part introduced. Monlux v. General Motors Corp., 68 Haw. 358, 366, 714 P.2d 930, 935 (1986) (citation omitted); HRE Rule 106 (stating that "[w]hen a writing

or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it"); see Liftee v. Boyer, 108 Hawai'i 89, 100-01, 117 P.3d 821, 832-33 (App. 2004) (stating that HRE Rule 106 is based on two considerations, one of which is "the misleading impression created by taking matters out of context," and "the rule of completeness allows the remainder to be put in to secure for the tribunal a complete understanding of the total tenor and effect of the utterance") (internal quotation marks omitted); State v. Corella, 79 Hawai'i 255, 263-65, 900 P.2d 1322, 1330-31 (App. 1995) (holding that the objective of HRE Rule 106 "is to ensure that a writing should be considered as a whole when the thought as a whole, and as it actually existed, cannot be ascertained without taking the utterance as a whole and comparing the successive elements and their mutual relations").

(4) The circuit court did not plainly or reversibly err or violate Brooks's rights to a fair trial and due process in instructing the jury to consider Brooks's prior testimony as if he were actually giving it in court. Brooks waived the opportunity to have his credibility tested via live testimony before the jury when he declined to testify at the second trial. Further, Brooks's counsel actively cooperated with the State in determining what portions of the prior testimony the State would submit into evidence at the second trial. See United States v. Yida, 498 F.3d 945, 950 (9th Cir. 2007) ("The primary object of the constitutional provision in question was to prevent

depositions . . . [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.") (internal quotation marks and citation omitted).

Therefore,

IT IS HEREBY ORDERED that the Judgment of Conviction and Sentence filed on May 19, 2008 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, October 19, 2009.

On the briefs:

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State of Hawai'i,
for Defendant-Appellant.

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Corinne K. A. Watanabe

Clarence R. Foley
[Signature]