NO. 23670

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

ROBERT MICHAEL CONNELLY, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-1632)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba JJ.)

The defendant-appellant Robert Michael Connelly appeals from the first circuit court's judgment, the Honorable Virginia Lee Crandall presiding, convicting him of and sentencing him for, inter alia, the class "A" felony offense of kidnapping, in violation of Hawai'i Revised Statutes (HRS) § 707-720(1)(e) (1993). On appeal, Connelly raises two points of error. First, he asserts that the circuit court erred in denying his motion to dismiss the kidnapping conviction. According to Connelly, because the jury also convicted him of the class "B" felony offense of robbery in the second degree, in violation of HRS § 708-841(1)(a) (1993), and expressly found that the kidnapping offense merged with the robbery offense, the circuit court erred in reversing his second degree robbery conviction rather than his kidnapping conviction. Second, Connelly urges us to invoke plain error to remedy the deputy prosecuting attorney's (DPA's) alleged misconduct.

Upon carefully reviewing 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, we hold as follows. With regard to Connelly's first point of error, the circuit court was right to rely on State v. Jumila, 87 Hawai'i 1, 4, 950 P.2d 1201, 1204 (1998), for the limited proposition that where a defendant has been unlawfully convicted of two offenses in violation of HRS § 701-109 (1993), the appropriate remedy is to affirm the conviction of the offense of the greater class and/or grade, even if that offense is, technically speaking, "included" within the other. As such, the circuit court did not abuse its discretion in denying Connelly's motion to dismiss the kidnapping offense or in ordering the dismissal of the second degree robbery offense. With regard to Connelly's second point of error, we disagree that the DPA's remark constituted misconduct in the first instance, see, e.g., State v. Lincoln, 3 Haw. App. 107, 124-25, 643 P.2d 807, 819-20 (1982) (holding that a DPA's remarks, alleged to constitute improper commentary on the defendant's right not to testify, uttered in response to argument advanced by defense counsel in closing argument did not constitute prosecutorial misconduct), superceded by statute on other grounds, see Briones v. State, 74 Haw. 442, 848 P.2d 966 (1993); in any event, assuming arguendo that the remark was improper, it was harmless beyond a reasonable doubt and did not affect Connelly's substantial rights. Therefore,

IT IS HEREBY ORDERED that the first circuit court's July 18, 2000 judgment of conviction and sentence from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, July 12, 2001.

On the briefs:

Linda C.R. Jameson (Deputy Public Defender), for the defendant-appellant, Robert Michael Connelly

Bryan K. Sano (Deputy Prosecuting Attorney), for the plaintiff-appellee, State of Hawai'i