

NO. 21729

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

WENDELL JENKINS, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 96-0127)

MEMORANDUM OPINION

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

Defendant-appellant Wendell Jenkins appeals from the circuit court's June 18, 1998 judgment of conviction of and sentences for: (1) robbery in the first degree, in violation of Hawai'i Revised Statutes (HRS) § 708-840(1)(b)(i) (1993); (2) kidnaping, in violation of HRS § 707-720(1)(c) (1993); and (3) burglary in the first degree, in violation of HRS § 708-810(1)(a) (1993). Jenkins was sentenced as a repeat offender, pursuant to HRS § 706-606.5(1)(a)(ii)-(iii) (Supp. 1997). On appeal, Jenkins argues that: (1) his rights to due process and a speedy trial were violated and that the circuit court erred in denying his Hawai'i Rules of Penal Procedure (HRPP) Rule 48(b) motion to dismiss his indictment; (2) he was denied a fair trial due to prosecutorial misconduct; and (3) the sentencing court erred in sentencing him as a repeat offender.

For the reasons stated below, we affirm Jenkins's conviction, but vacate his sentences and remand for re-sentencing.

I. BACKGROUND

On September 17, 1994, the complainant, Sue Martin, allowed Jenkins, whom she knew, to enter her Honolulu apartment. He proceeded to threaten her with a knife, bind and gag her, and search for items to steal. In a police photographic line-up two days later, Martin identified Jenkins as the perpetrator. Martin knew Jenkins from earlier contacts with him because he had previously performed auto body repair work for her. Martin also had Jenkins's name, address, and telephone number on a piece of paper that Jenkins had given her some three years earlier. Martin reportedly gave the piece of paper to Honolulu Police Detective Joseph Natividad, one of the investigating officers on the day of the incident. In addition to the alleged note and the photographic identification, the police collected physical evidence from the scene including fingerprints, a pair of sunglasses, a ball consisting of cord and tape, a cord, and a newspaper.

Five days later, on September 22, 1994, Jenkins was arrested for first degree robbery and jailed. He was "released" on the robbery charge the following day, but remained in custody because his parole was revoked. While still in custody in January 1995, Jenkins wrote a letter to Detective Natividad, asking about "the status of [his case]." Jenkins told Natividad

that he was being held on a parole violation, in "medium security," due to the nature of his pending charges. He also stated that he wanted to clear things up "so that [he could be] classified to a minimum custody level and become able to move to a minimum security facility."

On January 23, 1996, approximately sixteen months after the incident involving Martin and while still in custody on the parole revocation, Jenkins was indicted for the instant offenses. Throughout the following year, the trial was delayed by several continuances requested by either Jenkins (on at least three occasions) or the prosecution (on one occasion).

On January 27, 1997, approximately one year after the indictment, Jenkins filed a motion for dismissal of the charges due to pre-indictment delay. At the April 11, 1997 hearing on the motion, Jenkins alleged that the sixteen-month delay in indicting him was a deliberate attempt by the prosecutor's office to gain a tactical advantage over him and that the State was in possession of potential exculpatory evidence, i.e., the paper that Martin had given to the police containing the perpetrator's name, address, and telephone number.¹ Jenkins did not explain at this hearing how the paper was potentially exculpatory. The circuit court denied his motion on May 28, 1997 because it found that Jenkins had not established that the delay in indicting him

¹ Although Jenkins previously had different counsel, his current counsel was apparently the first to raise the issue regarding the note.

was prejudicial to him. The denial, however, was without prejudice in order to allow him the opportunity to obtain the note or any other evidence demonstrating that he had been prejudiced.

The prosecutor subsequently reported to Jenkins that the police did not have the note, and neither the officers involved nor the technician in charge of collecting evidence for the case could remember receiving it. Jenkins then filed a second motion for dismissal of the indictment due to pre-indictment delay on June 18, 1997, averring that the note that Martin had given the police, which allegedly contained Jenkins's name, address, and telephone number, was "critical and perhaps exculpatory" evidence because it was the only evidence, other than Martin's testimony, that identified Jenkins as the perpetrator. Jenkins argued that the indictment should be dismissed because either Martin lied under oath,² or the police lost the evidence "without explanation." Jenkins argued to the motions court (although he did not claim at trial and does not claim on appeal) that the name listed on the note was someone other than Jenkins. The court denied the motion on August 7, 1997, finding that Jenkins had failed to establish that the missing note had any exculpatory value or that the government had acted in bad faith.

² Martin had testified before the grand jury that she gave the paper to one of the police officers investigating the crime.

On March 2, 1998, the court granted Jenkins's oral motion in limine to exclude any reference to his prior criminal record. Jenkins was specifically concerned about the picture of him the police used in the photographic line-up they had presented to Martin. Jenkins wanted to be sure that nothing in the photographs themselves or in the testimony presenting them suggested to the jury that he had a previous record.

Jury trial began the following day. Martin testified that Jenkins had first performed auto body work for her sometime in the 1980s and that she had called him again to do work for her in 1991, approximately three years before the incident. Apparently, Jenkins would pick up Martin's car at her home and then return the car when he was finished. At that time, in 1991, Martin had paid Jenkins \$350 in advance to do additional work on her vehicle, and he was to return to pick up the car at some unspecified future date. At that time, he gave her the piece of paper that listed his name, address, and telephone number. Martin testified that Jenkins never returned to pick up the car and that she unsuccessfully tried several times to contact him. She said she kept the paper in her billfold even though she considered her money to be "a loss."

Jenkins finally contacted her three years later -- approximately two weeks before the incident -- saying that he had been away, but that he wanted to fix her car now. In eliciting

testimony about that contact, the following exchange occurred, none of which was objected to by Jenkins:

- Q. [By the prosecutor]: Okay. So you just counted [the \$350] as a loss?
- A. [By Martin]: I costed [sic] it as a loss.
- Q. Now, you say about three years, somewhere about three years after that, he contacted you?
- A. Yes.
- Q. And what was that about?
- A. He said he had come - he said he was sorry, he was in some trouble, and so and so forth. And he was in the mainland. But he's back in town now. And he had a job. And he'd like to, you know, take my car and paint it
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- Q. Did you see him in person that day?
- A. Yeah, because he said he wanted to come get the car. And he said I'm back in town. And he said he wanted to, you know, pick up the car. And could he come up [from the lobby where he was calling from to the apartment]? And I said yeah. I never thought anything about him coming up. He'd been up here before, three or four times fixing the car and picking it up before.
- So he came up. And he said well, I don't have the money now. And that's when he explained to me that he was away for like three years and was in some trouble. But he's back, and he's working. And he wanted to be sure -- he wanted to pick the car up. But I didn't have the car. I had already sold it. Because you can only talk about 30 seconds on that phone intercom until it clicks off. I either had to go downstairs or ring him up.

(Emphases added.) Martin also testified that, after she told Jenkins that she had sold the car, he promised to pay back the money that she had advanced him in small increments.

According to Martin, Jenkins came to her apartment two weeks later, on September 17, 1994, ostensibly to begin paying his debt to her. Instead, he threatened her with a knife and bound, gagged, and robbed her. Specifically, Martin testified that Jenkins put his arm around her neck, held a knife to her, and told her that, if she screamed, he would cut her. He asked her for money; when she said she didn't have any, Martin stated

that Jenkins then asked for "jewelry or something around here that I need because I'm desperate and I got to have some money." According to Martin, Jenkins proceeded to gag her with tape, tie her hands behind her with what appeared to be a shoelace, and forced her to sit in the middle of the floor while he searched the apartment for "something that I can sell." Martin identified Jenkins as the perpetrator in open court. On cross-examination, Martin testified that Jenkins had left his sunglasses in the apartment and that he had been carrying a newspaper. She also testified that she gave the piece of paper containing Jenkins's name, address, and telephone number to Detective Natividad on the day of the incident.

The prosecution next called Detective Natividad and, at one point, sought to introduce evidence of Martin's identification of Jenkins via the photographic line-up:

- Q. [By the prosecutor]: Okay. Just a few more questions. A couple of days after the 17th of September, 1994, did you meet with Sue Martin again regarding her viewing a photo lineup?
- A. [By Natividad]: Yes, sir. I did.
- Q. Okay. And why do you conduct a photo lineup, what's the purpose of that?
- A. The purpose of it is to get positive identification of the person that committed the offense.
- Q. Okay.
- A. Based on the information that she gave me regarding her knowledge of the suspect, I was able to obtain a police department photograph of that person she identified.

(Emphasis added.) Subsequently, outside of the hearing of the jury, Jenkins moved for a mistrial on the grounds that Detective Natividad's reference to a "police department photograph," in combination with Martin's earlier references to Jenkins being "in

trouble," constituted an improper reference to Jenkins's criminal history, in violation of the motion in limine.

The court denied the motion for mistrial, ruling that the reference was not so prejudicial as to require a mistrial. The court stated that the reference to the photographs was "arguably somewhat prejudicial and perhaps in violation of the motion in limine. However, the officer's statement does not indicate that those were mug shots." The court directed the prosecutor to instruct Detective Natividad not to make any "further references to the source" of the photographs. Although the court made reference to the possibility of a curative instruction, none was ever given.

When trial resumed, Detective Natividad testified that Martin had picked Jenkins out of the line-up without hesitation. The photographs themselves were never admitted into evidence. The items found in Martin's apartment, however, -- the sunglasses, the ball made of cord and tape, the cord, and the newspaper -- were received into evidence during Detective Natividad's testimony, which appeared to corroborate Martin's testimony.

On cross-examination, Detective Natividad testified that he did not receive the alleged note and that, as far as he knew, it did not exist. He also stated that he was not aware of the results of fingerprint testing done because the fingerprint report was apparently completed after he had submitted his

closing report in the case and that he had not checked further for the results at any time thereafter. One of the items apparently tested for fingerprints was the sunglasses. The prosecution, however, did not submit any testimony or exhibits regarding the fingerprint results.

Jenkins was the only defense witness. He testified that he was not at Martin's apartment on the date in question and that he did not remember what he did that day because it was an "ordinary day."

During closing argument, the prosecutor discussed at length the conflicting testimony of Martin and Jenkins. He pointed out that the case hinged on the credibility of Martin versus the credibility of Jenkins. Specifically, the prosecutor argued:

But what it really boils down to . . . is was it the defendant, or wasn't it him that committed those acts? All right.

Was it the defendant telling the truth, or was it Sue Martin telling the truth? You got two stories here that are totally opposite of each other. This isn't a case of well, maybe they're both a little mixed up and they both could sort of be right, and because there's a passage of time, well, you know, maybe they're just not sure.

But we have two opposite stories. The defendant says not there. Sue Martin, who knows him - defendant says Sue Martin knows him. She can identify him, he can identify her. She says he was there. One person is lying, one person is telling the truth. And your job as jurors is to determine credibility, who to believe and who not to believe. All right. Who is telling the truth and who is not telling the truth? And in this case, they're opposite stories.

Okay. I would argue to you there's no in between on this case, there's no mistakes.

The prosecutor then went on to suggest factors the jury might consider in evaluating credibility, such as "[a]pppearance; demeanor of the witness, the way they testified; their intelligence; their candor or frankness, or lack of; interest, if any, in the result of the case[.]" He discussed why Martin's testimony was credible, noting primarily her demeanor, lack of motive to "make all this stuff up[.]" and the physical evidence in the case. He concluded this discussion by impugning Jenkins's credibility, pointing out that Jenkins "hedged" on some answers and that it was not believable that Jenkins would forget where he was on the day in question when he was arrested a few days later for such a serious crime. Finally, during rebuttal and while again contrasting the credibility of Martin's testimony with the credibility of Jenkins's testimony, the prosecutor stated, "Somebody had to be lying." Jenkins did not object to any of the prosecutor's comments regarding credibility.

In his closing argument, defense counsel focused the jury's attention on the missing note and suggested that its absence was significant. He also called attention to the lack of fingerprint evidence. Ultimately, the jury found Jenkins guilty as charged.

After trial, the prosecution moved to have Jenkins sentenced as a repeat offender, pursuant to HRS § 706-606.5, based on Jenkins's prior felony conviction for unauthorized control of a propelled vehicle, in violation of HRS § 708-836

(1993). At the June 18, 1998 sentencing hearing, Jenkins stipulated to his eligibility for sentencing as a repeat offender. The court sentenced Jenkins to separate twenty-year indeterminate prison terms, with mandatory minimums of six years and eight months, for first degree robbery and kidnaping and an indeterminate term of ten years, with a mandatory minimum of three years and four months, for first degree burglary. Each sentence, including the mandatory minimum terms, was to be served concurrently. The mandatory minimum terms were required due to Jenkins's repeat offender status.³ Jenkins timely appealed.

³ The repeat offender statute, HRS § 706-606.5 (Supp. 1997), provides in relevant part:

(1) . . . any person convicted of . . . any class A felony, any class B felony, or any of the following class C felonies: . . . [HRS §] 708-836 relating to unauthorized control of propelled vehicle; . . . and who has a prior conviction or prior convictions for the following felonies, including an attempt to commit the same: . . . a class A felony, a class B felony, [or] any of the class C felony offenses enumerated above, . . . shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole during such period as follows:

(a) One prior felony conviction:

. . . .

(ii) Where the instant conviction is for a class A felony--six years, eight months;

(iii) Where the instant conviction is for a class B felony--three years, four months[.]

(Emphasis added.)

Robbery in the first degree is a class A felony. HRS § 708-840(3). The circumstances under which Jenkins was convicted of kidnaping make it a Class A felony. HRS § 707-720(2)-(3). Burglary in the first degree is a class B felony. HRS § 708-810(3).

II. DISCUSSION

A. Dismissal of Indictment and Speedy Trial Rights

On appeal, Jenkins challenges the motions court's refusal to dismiss the indictment. He argues that: (1) the lengthy time period between his arrest and trial -- nearly forty-two months -- violated his right to a speedy trial guaranteed by the sixth amendment to the United States Constitution, article I, section 14 of the Hawai'i Constitution,⁴ and Hawai'i Rules of Penal Procedure (HRPP) Rule 48(b) (1994);⁵ and (2) the time period between his arrest and indictment -- sixteen months -- violated his rights to due process guaranteed by the fourteenth amendment to the United States Constitution and article I, section 5 of the Hawai'i Constitution.⁶ These constitutional claims are subject to de novo review. See State v. Lau, 78 Hawai'i 54, 58, 980 P.2d 291, 295 (1995). Likewise, the

⁴ Both article I, section 14 of the Hawai'i Constitution and the sixth amendment to the United States Constitution state in part that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" Unless express reference is made to differences between the federal and Hawai'i constitutional rights to a speedy trial, our discussion of the singular speedy trial "right" refers to both constitutional rights.

⁵ HRPP 48(b) provides in relevant part:

[T]he court shall, on motion of the defendant, dismiss the charge, with or without prejudice in its discretion, if trial is not commenced within 6 months from:

(1) the date of arrest or of filing of the charge, whichever is sooner, on any offense based on the same conduct or arising from the same criminal episode for which the arrest or charge was made[.]

⁶ Both constitutions provide that no person shall be deprived of "life, liberty, or property, without due process of law[.]" As indicated in note 4, supra, our discussion of the singular due process "right" refers to both federal and state constitutional rights unless express reference is made to differences between them.

interpretation of HRPP Rule 48 is a question of law reviewable de novo. Id. We address each contention in turn.

1. **Speedy Trial**

Jenkins argues that the right to a speedy trial begins when one is "held to answer" for a crime and that he was "held to answer" for the present crimes by virtue of his incarceration on the parole violation that began five days after the offenses.

Of the forty-two months that Jenkins contends constitutes a violation of his speedy trial rights, sixteen months consisted of the time period between his arrest and indictment. Jenkins's speedy trial argument with respect to these sixteen months is foreclosed by this court's recent decision in State v. White, 92 Hawai'i 192, 990 P.2d 90 (1999).⁷ In White, we expressly held that, for the purposes of both an accused's constitutional right to a speedy trial and HRPP Rule 48(b), a defendant is not being "held to answer" for a new charge when he or she is being held in custody because of a parole violation prompted by an arrest on the new charge. Rather, the defendant is being "'held to answer' for the remainder of the penalty imposed [by] a previous conviction" because he violated the conditions of his parole. White, 92 Hawai'i at 201, 203, 990 P.2d at 99, 101. In other words, when an accused is detained for an "investigatory arrest" and "released" as to those charges, but later indicted for the same conduct, neither the constitutional

⁷ The parties filed their briefs in this case before White was decided.

right to a speedy trial nor the six-month time limit from indictment to trial mandated by HRPP Rule 48(b) begins to run until the indictment is filed -- even if the individual is being detained before indictment on a parole violation triggered by the conduct that is the subject of the indictment. Because Jenkins was not being "held to answer" for the instant offenses during the sixteen-month period between his arrest and indictment, we reject Jenkins's claim that the pre-indictment period denied him his constitutional or HRPP Rule 48(b) rights to a speedy trial. See id. We now address whether the remaining post-indictment period of approximately twenty-six months denied Jenkins these rights. In this appeal, Jenkins does not contend that his HRPP Rule 48(b) right to a speedy trial after indictment was violated. Our analysis, therefore, is limited to his post-indictment speedy trial constitutional claims.

In State v. Alameida, 54 Haw. 443, 509 P.2d 549 (1973), this court adopted the four factors articulated by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972), to determine whether an accused's constitutional right to a speedy trial has been violated. See Alameida, 54 Haw. at 447-49, 509 P.2d at 551-53. The factors are to be used in "balancing" the State's interests and the defendant's interests. Id. (citing Barker, 407 U.S. at 530). The four Barker factors are: (1) the length of the delay; (2) the reason the government gives for the delay; (3) whether the defendant asserted his or her right to a

speedy trial; and (4) whether the delay resulted in prejudice to the defendant. Id.

a. length of the delay

Hawai'i case law establishes that inquiry into the Barker factors is triggered by a determination of whether the first factor -- the length of the delay -- is presumptively prejudicial. See State v. Nihipali, 64 Haw. 65, 68, 637 P.2d 407, 411 (1981) ("[T]he length of the delay serves as a triggering mechanism to the Barker analysis."). Although no hard and fast rule exists to determine what constitutes "presumptively prejudicial" delay, Hawai'i precedent suggests that the approximate twenty-six month delay in this case (or, more specifically, 770 days) is presumptively prejudicial. Compare State v. Smith, 59 Haw. 456, 468, 583 P.2d 337, 345-46 (1978) (eighteen-month delay triggered evaluation of reasons for the delay), State v. Mata, 1 Haw. App. 31, 38-39, 613 P.2d 919, 924-26 (1980) (same for nine-month delay), and Alameida, 54 Haw. at 448, 509 P.2d at 552 (seven-month delay presumptively prejudicial) with State v. O'Daniel, 62 Haw. 518, 524, 616 P.2d 1383, 1388-89 (1980) (three-month delay not presumptively prejudicial). Consideration of the remaining Barker factors is, therefore, warranted.

b. reason for the delay

Of the 770 days that elapsed between Jenkins's indictment and trial, Jenkins expressly or impliedly waived his

speedy trial rights for 514 of them. Four hundred sixty-five days were directly attributable to eight different defense motions to continue trial, withdraw counsel, or dismiss the indictment, during which the court found that Jenkins knowingly, intelligently, and voluntarily waived his constitutional right to a speedy trial. In addition, Jenkins impliedly waived his speedy trial rights for forty-nine more days by an additional request to change counsel. These waivers are constitutionally permissible. See Barker, 407 U.S. at 529 (“We hardly need add that, if the delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine[.]”). We next examine the remaining 256 days.

In so doing, we look to the Court in Barker, which suggested the following approach:

[D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531 (footnote omitted).

The record discloses that the remaining 256-day delay was attributable to “valid” or “neutral” reasons. Specifically, seventy-seven days were attributable to prosecution motions for continuances due to the unavailability of the complainant to testify, a presumptively “valid” reason. The remaining 179 days were attributable to “neutral” reasons: twenty-nine days

accounted for by one defense motion to withdraw as counsel because Jenkins's counsel had a family medical emergency; fifty days accounted for by a prosecution motion for continuance because the prosecutor took an unexpected medical leave; and 100 days apparently attributable to nothing other than the routine time it takes for the criminal justice system to process the case.

When all of these numbers are totaled, 514 days are directly attributable to the defendant's actions, seventy-seven days are attributable to "valid" reasons, and 179 days are attributable to "neutral" factors. Although the Barker analysis does not envision a mechanical incantation of a numerical formula, the reasons for the lengthy period between indictment and trial, when viewed in their entirety, do not suggest that the prosecution attempted to "hamper the defense[,]" Barker, 407 U.S. at 531, nor do the reasons weigh heavily in favor of Jenkins's claim. Id.

c. defendant's assertion of his speedy trial right

The third Barker factor is whether the defendant asserted his speedy trial right. The third factor is entitled to "strong evidentiary weight" in determining if the right to a speedy trial has been violated. Barker, 407 U.S. at 531. Jenkins points to the January 1995 letter that he wrote to Detective Natividad as an assertion of his speedy trial right.

The letter, however, cannot be considered an assertion of Jenkins's speedy trial right because, as White determined, Jenkins's speedy trial right was not implicated until after his indictment a year later. See White, 92 Hawai'i at 203, 990 P.2d at 101. Even if we were to give Jenkins the benefit of the doubt and consider this letter in the analysis, the letter does not weigh heavily in Jenkins's favor because he did not directly assert his speedy trial right in the letter. Rather, he simply inquired as to the status of his case in the hopes of clearing it up so that he could move to a lesser security level within the prison system.⁸ Cf. White, 92 Hawai'i at 204, 990 P.2d at 102 (noting that a HRPP 48 motion to dismiss is not necessarily an assertion of constitutional speedy trial right).

d. prejudice to the defendant _____

For purposes of the Barker analysis, prejudice to the defendant refers to the need

(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker, 407 U.S. at 532 (footnote omitted). Jenkins has failed to show, and our review of the record fails to reveal, any evidence of "oppressive pretrial incarceration." The record does not reflect whether Jenkins's incarceration during any part of the post-indictment period was attributable solely to the new

⁸ See text supra at 2.

charges rather than the continued revocation of his parole. Jenkins does not assert that he was eligible for release after indictment and could not make an unreasonable bail. Thus, there is no evidence in the record to support an inference that Jenkins could have been released during the post-indictment period, but remained in jail solely because he was awaiting trial on the new charges. Likewise, there is no evidence that Jenkins was subjected to excessive "anxiety and concern." He has also failed to point to anything in the record demonstrating that the length of the post-indictment period impaired his ability to defend himself at trial. Rather, Jenkins suggests that the length of time per se affected his ability to defend himself. Although we have previously indicated that the length of the delay is "presumptively prejudicial," our cases have used this term in reference to an imprecisely-determined length of time beyond which the court should inquire further into the reasons for the delay (i.e., to consider the other Barker factors), not in reference to a presumption of inherent prejudice that must be rebutted by the prosecution. Cf. Nihipali, 64 Haw. at 68, 637 P.2d at 411 (comparing time periods from earlier cases in order to determine if further inquiry into other Barker factors was warranted). Jenkins is required to show that he has actually been adversely affected by the delay; he has not done so.

Jenkins's proposition that a long period of time per se affected his ability to defend himself has also been impliedly rejected by

the “balancing” approach articulated in Barker. Cf. Barker, 407 U.S. at 530 (“A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis.”). Thus, Jenkins has not demonstrated any prejudice attributable to the length of time it took to bring his case to trial.

When the Barker factors are considered together, there is a lengthy 770-day period between Jenkins’s indictment and trial, but the majority of that time can be attributed to Jenkins’s own actions and voluntary waiver of his speedy trial rights. Because there is no assertion of the speedy trial right by the defendant and no evidence that he was prejudiced by the delay, we hold that Jenkins’s constitutional right to a speedy trial was not violated.

2. **Pre-indictment Delay and Due Process**

Jenkins next asserts that his indictment should have been dismissed because the sixteen-month period between his initial arrest and the indictment violated due process. Preliminarily, we note that a defendant’s right to due process can be violated by an onerous pre-indictment delay. See United States v. Marion, 404 U.S. 307, 324-25 (1971) (although speedy trial right does not begin until after indictment, pre-indictment delay may be a due process violation); see also State v. Bryson, 53 Haw. 652, 655-56, 500 P.2d 1171, 1173-74 (1972) (adopting similar analysis). The Court in Marion suggested that two factors are significant in evaluating pre-indictment delay:

(1) whether there has been "substantial prejudice" to the defendant's right to a fair trial; and (2) whether the delay was an "intentional device" to gain a tactical advantage over the defendant. Marion, 404 U.S. at 324-25. Although some jurisdictions have held that both factors must be present in order to prove a due process violation, Hawai'i and other states have not gone so far as to necessarily require the second factor, *i.e.*, "intentional" state action. See State v. English, 61 Haw. 12, 17-18 & n.8, 594 P.2d 1069, 1073-74 & n.8 (1978). Rather, our rule is to first determine whether there has been any prejudice to the defendant because of the delay. If some prejudice to the defendant can be shown, we then balance such prejudicial effect against the prosecution's proffered reason for the delay. See English, 61 Haw. at 18, 594 P.2d at 1073; see also State v. Dunphy, 71 Haw. 537, 543-44, 797 P.2d 1312, 1315-16 (1990). In other words, if a delay resulted in prejudice to the defendant, but was not an "intentional device" on the part of the prosecution, due process may still be violated. If, however, no prejudice can be shown in the first instance, there is no due process violation. See State v. Levi, 67 Haw. 247, 249, 686 P.2d 9, 10 (1984); see generally Dunphy, 71 Hawai'i at 542-44, 797 P.2d at 1315.⁹

⁹ However, we note that this proposition may be incomplete insofar as we have never been presented with a situation where there is no prejudice to the defendant but where we held that actual bad faith (arguably an "intentional device") on the part of the prosecution existed. That is, perhaps a finding of bad faith in and of itself may be reason enough for a due

(continued...)

In this case, Jenkins argues that he was prejudiced by the sixteen-month delay in indicting him. In denying his motion to dismiss based on pre-indictment delay, the circuit court expressly ruled that Jenkins was not prejudiced by the pre-indictment delay, which Jenkins disputes. For the reasons discussed below, we agree with the circuit court.¹⁰

Jenkins asserts two reasons why his ability to defend himself was substantially prejudiced by the sixteen-month period it took to indict him. First, he claims that the prosecution lost "critical and perhaps exculpatory evidence" needed for his defense. Second, he implies that the prosecution gained a tactical advantage over him because a sixteen-month delay is inherently prejudicial. Both arguments fail.

a. loss of evidence

Jenkins claims that he was prejudiced because the missing note that Martin allegedly gave to Detective Natividad on

⁹(...continued)
process violation even in the absence of prejudice to the defendant.

The circuit court expressly held that there was no bad faith on the part of the prosecution. Jenkins disputes this, suggesting that the prosecution on has a deliberate practice of doing nothing to move along towards indictment those cases where a defendant is already in jail so as to prejudice their subsequent trial on the new charges. However, Jenkins offers only conjecture and no evidence to support this claim. For this reason, we reject his contention that the prosecution acted in bad faith or with intent to delay his trial.

¹⁰ The United States Supreme Court in Marion also stated that evidence to prove a due process violation may be presented at trial, not just in a pre-trial motion for dismissal. See Marion, 404 U.S. at 326. Because Jenkins did not have the benefit of White to guide his argument regarding the specific constitutional claim, in evaluating his claim we will consider record evidence presented at Jenkins's trial even though he does not clearly raise this evidence in his brief.

the day of the incident could have contained someone else's name and address. He maintains that, since this is the only piece of physical evidence available that could have refuted the victim's eyewitness testimony regarding identification, it was crucial.

In State v. Matafeo, 71 Haw. 183, 787 P.2d 671 (1990), this court stated that, with "potentially exculpatory" evidence, due process is violated if the State "lose[s] or destroy[s] material evidence which is 'so critical to the defense as to make a criminal trial fundamentally unfair' without it." Id. at 187, 787 P.2d at 673 (citing Arizona v. Youngblood, 488 U.S. 51, 61 (1988) (Stevens, J., concurring (rejecting the Youngblood majority's bad faith requirement to prove a due process violation)). In Matafeo, this court concluded that the condition of missing torn undergarments in a sexual assault case was not so critical to a claim by the defendant that the complainant had consented that it rendered the trial fundamentally unfair:

Turning to consider the circumstances of Appellant's case, we conclude that the complainant's clothing is not evidence so crucial to the defense that its destruction will necessarily result in a fundamentally unfair trial. The State carefully identified and described the articles of clothing, and turned over to the Appellant the police evidence report containing these observations. The testimony of [the police detective] and the description of the garments contained in the police evidence report supply no reasonable inference that evidence of the condition of the garments would have favored the defense.

Matafeo, 71 Haw. at 187-88, 787 P.2d at 673.¹¹

¹¹ We note, however, that the defendant in Matafeo did have "access" to the evidence in the form of police reports describing its condition. Matafeo, 71 Haw. at 187-88, 787 P.2d at 673.

An example of what is "so critical to the defense as to make a criminal trial fundamentally unfair without it" is illustrated by State v. Dunphy, supra, decided within months of Matafeo. In Dunphy, this court held that the police department's loss of potentially exculpatory evidence was critical to the defense where the defendant claimed he was entrapped and the lost evidence consisted of taped conversations between the defendant and an undercover police officer during an alleged sale of large quantities of cocaine. Dunphy, 71 Haw. at 540, 797 P.2d at 1314. The conversations with the officer were critical to the defense of entrapment and would have made the trial fundamentally unfair without them. Id.

In the present case, there may be potential exculpatory value to the missing note because the note might impeach Martin's credibility if it did not have Jenkins's name on it as she claimed it did. However, the missing note was not so critical to his defense that his trial was rendered fundamentally unfair. Jenkins merely articulates one conceivable way in which the alleged missing note possibly could have helped him. The primary evidence against Jenkins was not the note itself, but, rather, Martin's testimony, her identification of him, and the physical evidence the police found in her apartment that corroborated her story. Unlike Dunphy, where the value of the missing tapes was readily apparent and the conversations with the officer were

essential to prove a defense of entrapment, the potential value of the missing note in this case is far more attenuated.

Furthermore, Jenkins was able to at least present the issue of the alleged missing evidence and its significance to the jury. Jenkins questioned Martin and Detective Natividad about the note and suggested in his closing argument that its absence was significant. Martin testified that she gave it to the police, while the police, in essence, indicated that they do not remember receiving it. The logical explanations for this discrepancy are either that the police or Martin were mistaken or lying. The jury had an opportunity to resolve this issue and its significance by weighing the evidence and judging the credibility of the witnesses.

Jenkins also argues that he was prejudiced by the fact that latent fingerprints were not tested until "long after the incident." However, the only pertinent information in the record is that the detective in charge of the case did not obtain the fingerprint results. In fact, Jenkins did point out this lack of fingerprint evidence to the jury in his closing argument.

We conclude that neither the alleged missing note nor the supposed unavailability of fingerprint results was so critical to Jenkins's defense that his trial was fundamentally unfair without them. Accordingly, we hold that the lack of such evidence did not substantially prejudice him at trial.

b. inherent prejudice in the sixteen-month period before indictment

Jenkins appears to argue that the prosecution gained a "tactical advantage" over him because the sixteen-month period it took to indict him is inherently prejudicial. However, Hawai'i courts have already rejected similar contentions. See Levi, 67 Haw. at 249, 686 P.2d at 10-11 ("[Defendant] failed to make any showing of actual prejudice, but instead relies on the presumption that a thirty-one-month delay will cause obvious memory loss. . . . [T]his contention, by itself, is insufficient[.]"); see also State v. Carvalho, 79 Hawai'i 165, 168, 880 P.2d 217, 220 (App. 1994) ("real possibility of prejudice inherent in any delay" is not enough, in itself, to be violative of due process (citing Marion, 404 U.S. at 326)), cert. dismissed as improvidently granted, 79 Hawai'i 165, 880 P.2d 217 (1994); Dunphy, 71 Haw. at 542, 797 P.2d at 1315 ("a mere claim of loss of memory coupled with a lapse of time does not, of itself, establish prejudice for purposes of a claim of violation of due process"). Jenkins offers no evidence to support his claim of prejudice other than to raise the hypothetical possibility that the prosecution was able to further investigate the incident and gather evidence against him, while he could not investigate the incident himself because he was incarcerated. Although the above cases do not address the question of inherent prejudice when the defendant is incarcerated, White establishes

that Jenkins's pre-indictment incarceration is attributable to the enhanced consequences of a previous conviction and not because of the new charges. White, 92 Hawai'i at 201, 203, 990 P.2d at 99, 101. Therefore, Jenkins's bare assertion of prejudice due to his pre-indictment incarceration, without more, is insufficient to prove it.¹²

Because Jenkins fails to demonstrate that he was prejudiced by the pre-indictment delay, we need not inquire further into the reasons for the delay. Therefore, we hold that the circuit court did not err in denying Jenkins's motion to dismiss based on pre-indictment delay. Further, based on our review of the record, we find nothing raised at the actual trial to support his due process claim.

B. Prosecutorial Misconduct

Jenkins next argues that: (1) the prosecutor improperly allowed prosecution witnesses to refer to his previous criminal record in violation of the motion in limine, thus committing reversible error; (2) the prosecutor's closing argument was sufficiently prejudicial to warrant reversal; and (3) even if neither of the above is individually sufficient to warrant reversal, their cumulative impact denied him a fair trial.

¹² Jenkins further contends that he suffered prejudice by being transferred to a higher security level (because of the alleged robbery and kidnaping charges) during his pre-indictment incarceration. However, he does offer evidence to demonstrate that his ability to defend himself at trial was affected by his incarceration at one security level versus another.

1. **Prosecution Witnesses' References to Jenkins's Prior Record**

Jenkins's first argument to support prosecutorial misconduct alleges that the prosecutor elicited improper testimony, citing Martin's references to Jenkins being "in trouble" and Detective Natividad's reference to "police department photographs." However, Jenkins offers insufficient evidence that it was the prosecutor's actions that led either Martin or Detective Natividad to allegedly refer to his prior record. With regard to Martin, the context of the questioning clearly reveals that the focus of the direct examination at the time the comments were made was to establish the times when Martin had prior contacts with Jenkins and to lend credibility to her identification of him by showing that she had seen him before. Furthermore, her references to Jenkins telling her he had been "in trouble" are too vague to attribute them as references to his previous record. Regarding Detective Natividad's reference to obtaining a "police department photograph," the relevant testimony, as previously set forth, is as follows:

- Q. [By prosecutor]: Okay. And why do you conduct a photo lineup, what's the purpose of that?
- A. [By Natividad]: The purpose of it is to get positive identification of the person that committed the offense.
- Q. Okay.
- A. Based on the information that she gave me regarding her knowledge of the suspect, I was able to obtain a police department photograph of that person she identified.

(Emphasis added.) Assuming that the reference to the photograph is improper, there is no indication that this line of questioning was deliberately intended to elicit testimony that Jenkins had a criminal record. If Jenkins is claiming that, rather than deliberately eliciting this improper reference, the prosecutor was unduly "sloppy" in his examination and this sloppiness "drew out" the improper comment, he does not explain how. Thus, we cannot conclude that the detective's reference to the fact that the photograph was a "police department photograph" constituted prosecutorial misconduct.

a. trial court error irrespective of prosecutorial conduct

As an aside, in addition to prosecutorial misconduct, Jenkins appears to be arguing that the trial court committed error in denying his motion for mistrial based on the cumulative prejudicial effect of the witnesses' statements, even if the prosecutor had nothing to do with eliciting them. If so, this claim lacks merit. We review the denial of a mistrial under the abuse of discretion standard. State v. Lam, 75 Haw. 195, 201, 857 P.2d 585, 589 (1993). An abuse of discretion exists when "[t]he trial court . . . clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." State v. Klinge, 92 Hawai'i 577, 584, 994 P.2d 509, 516 (2000) (internal quotations and citations omitted). In determining whether a remark by a witness presents grounds for a mistrial, this court looks to (1)

the nature of the alleged improper references, (2) the promptness of a curative instruction or lack of it, and (3) the strength or weakness of the evidence against the defendant. See State v. Samuel, 74 Haw. 141, 148, 838 P.2d 1374, 1378 (1992).

Samuel illustrates how the above factors are applied. In Samuel, a prosecution expert witness testified that "there is also a history of -- of a similar experience" despite being earlier warned not to refer to the defendant's prior record. Id. at 147, 838 P.2d at 1378. Defense counsel objected; the judge instructed the jury to disregard the remark and struck it. Id. This court held that the prompt curative instruction and otherwise overwhelming evidence in the record did not warrant reversal. Id. at 149, 838 P.2d at 1379.

In this case, the nature of the alleged references is far less damaging than in Samuel. Even if the detective's comments constituted a violation of the motion in limine, there was no explicit reference to similar past behavior or explicit reference to a past record, as in Samuel. The trial court likewise indicated that it did not find the purported violation was prejudicial, stating "he didn't say those were mug shots." Cf. State v. Huihui, 62 Haw. 142, 144-45, 612 P.2d 115, 116-17 (1980) (prosecutor's reference to "police mug photographs" improper); accord State v. Pulawa, 62 Haw. 209, 219-20, 614 P.2d 373, 379 (1980). As far as Martin's comments about Jenkins telling her that he had been "in trouble," her comments are even

more attenuated than the police detective's because multiple inferences could be had from her reference to Jenkins being in "trouble."

The other factors articulated in Samuel also do not support Jenkins's argument. Although the trial court did not give a curative instruction, it did take steps to minimize any potential further prejudice by ordering the prosecutor (out of the hearing of the jury) to instruct the witness not to make any further similar comments. Moreover, in this particular instance, a curative instruction would likely have called additional attention to the witnesses' comments, making it more likely that jurors would recognize them as references to Jenkins's prior record. Finally, there was strong evidence against Jenkins irrespective of the alleged prejudicial references, which included the personal descriptive testimony of the victim, corroborating physical evidence, and Martin's identification of Jenkins, bolstered by the fact that she knew him from previous contacts.

Considering this, the trial court did not clearly exceed the bounds of reason or disregard rules or principles of law or practice to the substantial detriment of Jenkins when it denied his motion for mistrial.

2. ___Prosecutor's Closing Comments on Witness Credibility

Jenkins also contends that the prosecutor's closing argument concerning the credibility of Jenkins and Martin was

misconduct because the prosecutor improperly expressed his personal views. Although he did not object at trial, this court may recognize plain error "when the error committed affects substantial rights of the defendant." State v. Balanza, 93 Hawai'i 279, 286, 1 P.3d 281, 288 (2000) (citation omitted).

"It is generally recognized under Hawai'i case law that prosecutors are bound to refrain from expressing their personal views as to a defendant's guilt or the credibility of witnesses." State v. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209 (1996). Nevertheless, during closing, a prosecutor "is permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence." Id. It is also permissible for prosecutors to "state, discuss, and comment" on the evidence. Id.

"State, discuss, and comment" is precisely what the prosecutor did in this case. He made reference to the witnesses' testimony and asked the jury to judge their credibility by using observations normally used to judge credibility. This is not inappropriate; it is the essence of persuasive argument. Cf. Clark, 83 Hawai'i at 306, 926 P.2d at 211 (prosecutor's reference to defendant's "cockamamie" story held permissible); State v. Apilando, 79 Hawai'i 128, 142, 900 P.2d 135, 149 (1995) (prosecutor's closing remark that, "because [defendant] had the highest stake in the outcome of the case, he had the greatest motive to lie[,] " held permissible).

Jenkins's reliance on State v. Marsh, 68 Haw. 659, 728 P.2d 1301 (1986), as support for his contention that the prosecutor inappropriately commented on the witnesses' credibility, is misplaced. In Marsh, the prosecutor's repeated first-person comments on the veracity of witnesses led this court to vacate the defendant's conviction. Id. at 660-61, 728 P.2d at 1301-03. The prosecutor made no such first-person references here. See also State v. Ganal, 81 Hawai'i 358, 374-77, 917 P.2d 370, 386-89 (1996) (several first-person and inflammatory references by prosecutor were improper but not reversible error).

Jenkins also appears to contend that, because the pivotal determination in this case came down to Martin's credibility versus Jenkins's credibility, the prosecutor had a heightened responsibility to avoid pitting one witness against the other so as not to lend the State's endorsement to one of the witnesses. However, the non-binding authority that he cites supporting this proposition, United States v. Williamson, 53 F.3d 1500 (10th Cir.), cert. denied, Dryden v. United States, 516 U.S. 882 (1995), and United States v. Richter, 826 F.2d 206 (2d Cir. 1987), both involve a prosecutor directly eliciting testimony from the defendant about whether or not law enforcement agents testifying for the prosecution were lying. See Williamson, 53 F.3d at 1521; Richter, 826 F.2d at 208-10. Unlike these cases, the prosecutor here did not attempt to impugn Jenkins's credibility by forcing Jenkins to comment on the credibility of

law enforcement agent witnesses presumably carrying the imprimatur of the State.

Based on the above, we reject Jenkins's claim that the prosecutor's closing argument was improper.

3. **Cumulative Effect of the Alleged Errors**

Jenkins's final claim with respect to prosecutorial misconduct is that the cumulative effect of these alleged errors was unfairly prejudicial. Because none of the conduct complained of was improper, we reject this contention.

C. Sentencing Error

In his last point of error, Jenkins argues for the first time on appeal -- and the State concedes -- that he was improperly sentenced as a repeat offender because the repeat offender law did not apply to him at the time the instant offenses were committed. We have previously stated that,

even when the prosecutor concedes error, before a conviction is reversed, it is incumbent on the appellate court first to ascertain that the confession of error is supported by the record and well-founded in law and second to determine that such error is properly preserved and prejudicial. In other words, a confession of error by the prosecution is not binding upon an appellate court, nor may a conviction be reversed on the strength of the prosecutor's official action alone.

State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000)

(internal quotations, brackets, ellipses, and citations omitted).

There is no question that the error is supported in the record because the prosecution's motion for sentencing as a repeat offender and the defense counsel's oral stipulation at the sentencing hearing both indicate that Jenkins was eligible for sentencing as a repeat offender. Although Jenkins did not

"properly preserve" his objection at the time of sentencing, we again note that "[w]e may recognize plain error when the error committed affects substantial rights of the defendant." Balanza, 93 Hawai'i at 286, 1 P.3d at 288 (citations and internal quotations omitted); see also HRPP 52(b). Because HRS § 706-606.5 provides for mandatory minimum sentences, it removes the paroling authority's discretion to allow Jenkins to be released on parole at an earlier point during the term of his prison sentence. Thus, if the statute was erroneously applied to Jenkins, it affects his substantial rights and may properly be recognized as plain error. Certainly, under this circumstance, the error is also "prejudicial" to Jenkins and thus may be addressed by this court under the above-noted "confession of error" standard.

We conclude that Jenkins was not properly sentenced as a repeat offender pursuant to HRS § 706-606.5 because to do so required retroactive application of the statute in violation of the ex post facto clause of the United States Constitution.¹³ In Calder v. Bull, 3 U.S. 386 (1798), the Supreme Court defined one type of ex post facto law as a "law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." Id. at 390. HRS § 706-606.5 lists

¹³ Article I, section 9 of the United States Constitution states in part that "[n]o bill of Attainder or ex post facto Law shall be passed."

several "enumerated offenses" that trigger its application. When sentencing a defendant for a class A or class B felony, if the defendant has been previously convicted of one of the enumerated offenses, then the defendant must receive a mandatory minimum sentence. This court has previously characterized such mandatory minimum sentences as a "stiffened penalty" for the subsequent crime. State v. Freitas, 61 Haw. 262, 276, 602 P.2d 914, 924 (1979). In this case, Jenkins was sentenced for class A and class B felonies, and, at the time he was sentenced in 1998, he had previously been convicted of one of the enumerated offenses -- unauthorized control of propelled vehicle (UCPV). However, UCPV was added to the list of enumerated offenses in 1996, after Jenkins committed the instant crimes in 1994. See 1996 Haw. Sess. L. Act 87, § 1 at 119-120. Therefore, the repeat offender law that "stiffened" the sentence for the instant crimes was not enacted until two years after the crimes were committed. Thus, to apply the repeat offender law to Jenkins would "[inflict] a greater punishment" than "the law annexed to the crime[s]" when Jenkins committed them in 1994. For this reason, we hold that the law as applied to Jenkins is an impermissible ex post facto law.¹⁴

¹⁴ As applied to Jenkins, the law also contradicts HRS § 1-3 (1993), which states in relevant part that "[n]o law has any retrospective operation, unless otherwise expressed or obviously intended."

III. CONCLUSION

Based on the foregoing, we hold that: (1) the motions court did not err in denying Jenkins's motions for dismissal of the indictment due to pre-indictment delay; (2) Jenkins's rights to a speedy trial pursuant to HRPP Rule 48(b), the Hawai'i Constitution, and the United States Constitution were not violated; (3) the prosecutor did not improperly elicit evidence in violation of the motion in limine or make an improper closing argument; (4) the trial court did not abuse its discretion in denying Jenkins's motion for mistrial; and (5) the sentencing court erred in sentencing Jenkins as a repeat offender. Therefore, we affirm the judgment of conviction, but vacate Jenkins's sentences and remand this case to the circuit court for re-sentencing.

DATED: Honolulu, Hawai'i, January 18, 2001.

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