NO. 22757

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I,	)	CR. NO. 97-1317
	)	
Plaintiff-Appellee,	)	
	)	FIRST CIRCUIT COURT
vs.	)	
	)	
DUECES OCTAVIO,	)	
	)	
Defendant-Appellant.	)	
	)	

MEMORANDUM OPINION

Defendant-appellant Dueces Octavio (Octavio) appeals his convictions of promoting a dangerous drug in the third degree, in violation of Hawai'i Revised Statutes (HRS) § 712-1243 (1993),[1] and unlawful use of drug paraphernalia, in violation of HRS § 329-43.5(a) (1993).[2] Octavio contends that the circuit court reversibly erred in: (1) convicting him in the absence of sufficient evidence, and (2) failing to sustain his objection to an allegedly improper comment made by plaintiff-appellee State of Hawai'i (the prosecution), which he maintains constituted

[1] HRS § 712-1243 provided in relevant part:
(1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.

[2] HRS § 329-43.5(a) provides in relevant part:
(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

prosecutorial misconduct. Because we hold that the comment amounted to prejudicial prosecutorial misconduct, we vacate Octavio's convictions and remand for a new trial.

I. BACKGROUND

On June 5, 1997, the prosecution charged Octavio via complaint with one count of harassment, in violation of HRS § 711-1106(a) (1993), one count of promoting a dangerous drug, see supra note 1, and one count of unlawful use of drug paraphernalia, see supra note 2. On September 14, 1997, a jury found Octavio guilty of the harassment charge but could not reach a verdict on the promotion of a dangerous drug and the drug paraphernalia charges. Accordingly, the circuit court declared a mistrial as to the two drug charges. This appeal stems from the prosecution's retrial of Octavio on these drug charges.

The following evidence was adduced at Octavio's retrial on February 11 and 12, 1999. Honolulu Police Department (HPD) Officer Curtis Kissel (Officer Kissel) testified that at about 3:00 p.m. on May 29, 1997, he and HPD Officer Cyrus Hanuna (Officer Hanuna) were summoned to assist in connection with a possible sex assault in the Chinatown area. Officers Kissel and Hanuna located and detained Octavio based on a description relayed in an all points bulletin. According to Officer Hanuna, an Officer Theommes subsequently arrived and directed Officer

Kissel to arrest Octavio for harassment. Officer Kissel then handcuffed Octavio and conducted a patdown search prior to placing him in the police car. A patdown search, as explained by Officer Kissel, "allows the officer to feel immediate areas of the suspect for weapons, a means of escape[,] or instruments of the crime." The only object that Officer Kissel found while conducting the patdown of Octavio was a hairbrush in his right back pocket. Aside from that pocket, Officer Kissel denied reaching into any of Octavio's other pockets. After patting Octavio down, Officer Kissel claimed that he performed a quick check of the back seat area by lifting the seat cushion to ensure that there were no foreign items underneath the cushion. Officer Kissel then placed Octavio in the back seat of the squad car and delivered him to the main police station. About one hour before arresting Octavio, Officer Kissel searched the car prior to starting his shift, in accordance with standard checkout procedures. This inventory search, which involved checking both underneath and on top of the back seat cushion for foreign items, revealed nothing. Officer Kissel stated that Octavio was the first and only person whom he transported on May 29, 1997. Officer Kissel further noted that, en route to the station, Octavio sat near the center of the back seat. After securing his firearm in a gun locker located approximately five feet away from

the squad car, Officer Kissel escorted Octavio to the receiving desk for processing. Upon returning to the car, he checked underneath the back seat cushion for a third time and discovered a three-inch crack pipe with residue, which the parties subsequently stipulated contained crack cocaine. Octavio left a sweat stain that marked the area where he sat, and Officer Kissel located the pipe immediately beneath that area in the center portion of the back seat. Officer Kissel then summoned Officer Hanuna, who verified where the pipe was found and submitted the pipe into evidence. When probed about how certain he was about whether the pipe was in the back seat before Octavio was arrested, Officer Kissel responded that, "I'm a hundred percent sure that the [pipe] wasn't there on my first two checks." Officer Kissel, however, admitted that he would be subject to punishment if he could not state with absolute certainty that the pipe was not present during his first two checks of the back seat.

On cross-examination, Officer Kissel participated in a patdown demonstration. Defense counsel inserted the pipe recovered from the car (and the evidence bag that contained the pipe) into a pocket of the pants that Octavio wore during the arrest and laid the pants down on a bench. When he asked Officer Kissel to see if he could feel the pipe, Officer Kissel responded

in the affirmative. According to Officer Kissel, if he felt such an item during his search, he would definitely mention it in his report. On the day of the arrest, however, Officer Kissel maintained that, except for the hairbrush, he did not feel anything inside Octavio's pockets.

Officer Hanuna's testimony corroborated his partner's account. After observing Officer Kissel perform a patdown search of Octavio, he helped escort Octavio to the car. From a distance of about five feet away, Officer Hanuna saw Officer Kissel tilt the back seat cushion and check the back of the car before placing Octavio in the back seat. According to Officer Hanuna, at no time did they leave Octavio unattended, nor were the windows rolled down when Octavio was in the vehicle. Upon arriving at the station, they removed Octavio from the car and, in accordance with standard procedure, closed the car doors. After escorting Octavio to the receiving desk, Officer Kissel searched the back seat area of the car again and found a pipe underneath the location where Octavio sat. Officer Kissel promptly informed Officer Hanuna of his discovery. Officer Hanuna testified that he did not have the pipe dusted for fingerprints because he assumed it belonged to Octavio.

Octavio relayed a different version of events on the stand. According to Octavio, on the afternoon of May 29, 1997, he went to Fort Street Mall. At the time of the arrest, Octavio stated that he weighed about thirty to forty pounds less than he did during trial. Specifically, he asserted that he weighed 150 to 160 pounds and wore size 30 pants at the time of the arrest, but he had since ballooned up to 190 pounds and a size 34. The defense submitted the clothes that Octavio wore on May 29, 1997 into evidence, and the parties stipulated that the clothes "were tight on [Octavio]" -- the inference being that Officer Kissel would have felt a crack pipe on Octavio's person during the patdown search if such a pipe existed. During the patdown search, Octavio claimed that the officers directed him to empty his pockets and "show what [he] had." Moreover, Octavio denied possessing a crack pipe or depositing such a pipe in the seat cushion of the police car. Octavio further denied ever sitting in the middle portion of the back seat of the car. Octavio also claimed that the officers left him in the police car with the door wide open for about five to eight minutes. However, Octavio stated that, during that interval, he did not see anyone toss a crack pipe into the vehicle.

After closing arguments, the following exchange occurred during the prosecution's rebuttal:

[Prosecutor]: Now, what about this[,] there's a big deal made about how much thinner [Octavio] was, you know 30, 40 pounds, whatever it is. You judge. You saw [Octavio]. You saw him take the stand. You saw how -- what his waist is like. Look at the waist of these pants, all right, fairly like say 30.
Now use your reason and common sense.
Cocaine is a stimulant. Use your every day experience --

[Defense Counsel]: Objection, Your Honor.

[Prosecutor]: -- stimulates --

[Defense Counsel]: No evidence.

[Prosecutor]: Your Honor, I'm asking them to use their reason and common sense.

THE COURT: All right, overruled.

[Prosecutor]: Stimulant. People on cocaine are very active. Their appetite is suppressed. Is it likely that he was on cocaine that time[?] [S]ure[,] he's much thinner.

(Emphases added.) On February 16, 1999, the jury found Octavio guilty as charged, and, on July 21, 1999, the circuit court sentenced Octavio to a five-year term of incarceration for each count, both terms to run concurrently.

II. STANDARDS OF REVIEW

A. Sufficiency of Evidence

> "[V]erdicts based on conflicting evidence will not be set aside where there is substantial evidence to support the [trier of fact's] findings." Tsugawa v. Reinartz, 56 Haw. 67, 71, 527 P.2d 1278, 1282 (1974). We have defined "substantial evidence" as "credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion." See, e.g., In re Doe, Born on January 5, 1976, 76 Hawai'i 85, 93, 869 P.2d 1304, 1312 (1994) (citations omitted) (brackets in original).

Aga v. Hundahl, 78 Hawai'i 230, 237, 891 P.2d 1022, 1029 (1995). "[I]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the [trier of fact]."

> State v. Buch, 83 Hawai'i 308, 321, 926 P.2d 599, 612 (1996) (citation omitted). "We have long held that evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction." State v. Batson, 73 Haw. 236, 248, 831 P.2d 924, 931 (1992), reconsideration denied, 73 Haw. 625, 834 P.2d 1315 (1992) (citations omitted).

State v. Staley, 91 Hawai'i 275, 281-82, 982 P.2d 904, 910-11 (1999) (citations omitted) (brackets in original).

B. Prosecutorial Misconduct

> > Allegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of "whether there is a reasonable possibility that the error complained of might have contributed to the conviction." State v. Balisbisana, 83 Hawai'i 109, 114, 924 P.2d 1215, 1220 (1996) (quoting State v. Holbron, 80 Hawai'i 27, 32, 904 P.2d 912, 917, reconsideration denied, 80 Hawai'i 187, 907 P.2d 773 (1995)) (citations and internal quotation marks omitted); see also State v. Sanchez, 82 Hawai'i 517, 528, 923 P.2d 934, 945 (App.), cert. denied, 84 Hawai'i 127, 930 P.2d 1015 (1996) (citation omitted). Factors to consider are: (1) the nature of the conduct; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant. State v. Samuel, 74 Haw. 141, 148, 838 P.2d 1374, 1378 (1992) (citation omitted).
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> State v. Sawyer, 88 Hawai'i 325, 329 n. 6, 966 P.2d 637, 641 n. 6 (1998). Misconduct of a prosecutor may provide grounds for a new trial if there is a reasonable possibility that the misconduct complained of might have contributed to the conviction. Balisbisana, 83 Hawai'i at 114, 924 P.2d at 1220.

State v. Rogan, 91 Hawai'i 405, 412, 984 P.2d 1231, 1238 (1999).

III. DISCUSSION

A. The Record Contained Sufficient Evidence to Support Octavio's Convictions.

Octavio argues that insubstantial evidence was adduced at trial to support his convictions. His argument lacks merit.

Officer Kissel testified that, prior to transporting Octavio, he did not see the crack pipe when he inspected the area underneath the back seat of the car on two separate occasions. He claimed that he was "a hundred percent sure" that the crack pipe was not underneath the back seat of the car prior to taking Octavio to the police station. Furthermore, aside from the back pocket where he retrieved the hairbrush, Officer Kissel denied reaching into Octavio's other pockets during his patdown search -- the inference being that Octavio could have concealed the pipe in his other pockets. Additionally, Octavio was the first and only civilian transported in his vehicle that day. Officer Hanuna also testified that at no time did he or Officer Kissel leave Octavio unattended, nor where the windows rolled down when Octavio was inside the car. Indeed, Octavio testified that he did not see any person toss a pipe into the squad car. Moreover, both Officers Kissel and Hanuna testified that the pipe was found underneath the center portion of the back seat cushion of the vehicle. According to Officer Kissel, Octavio sat immediately above the area where he found the crack pipe.

Finally, Octavio testified that he knew that he would be subject to an inventory search upon reaching the station.

Accordingly, in the light most favorable to the prosecution, sufficient evidence was adduced at trial to support Octavio's convictions of promoting a dangerous drug in the third degree and unlawful use of drug paraphernalia. See supra notes 1 and 2. It appears that the jury found the officers' testimony more credible than that proffered by Octavio, and such a determination lies exclusively within its province. See Staley, 91 Hawai'i at 281, 982 P.2d at 910.

B. The Circuit Court Reversibly Erred in Failing to Sustain an Objection to a Comment that Amounted to Prosecutorial Misconduct.

Octavio argues that the prosecution committed misconduct by "giving unsworn testimony regarding the effect of cocaine on a person's appetite and designating Octavio as a cocaine user because he had gained weight since the time of the incident." We agree.

Allegations of prosecutorial misconduct are subject to the harmless beyond a reasonable doubt standard of review, and the relevant factors in determining whether such conduct might have contributed to the conviction are: (1) the nature of the alleged misconduct; (2) the promptness of a curative instruction;

and (3) the strength or weakness of the evidence against the defendant. Rogan, 91 Hawai‘i at 412, 984 P.2d at 1238.

1. Nature of the Alleged Misconduct

The prosecution contends that the prosecutor "was just arguing that one possible reason for the difference between [Octavio's] weight at the time of trial and at the time of the charged incident could have been his use of cocaine, which would have supported the jury finding [Octavio] had the requisite intent to possess the 'crack pipe.'" This court has repeatedly stated that a prosecutor is "permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence. It is also within the bounds of legitimate argument for prosecutors to state, discuss, and comment on the evidence as well as to draw all reasonable inferences from the evidence." Rogan, 91 Hawai‘i at 412, 926 P.2d at 1238 (quoting State v. Quitog, 85 Hawai‘i 128, 145, 938 P.2d 559, 576 (1997)) (emphasis added). In this case, however, the record is devoid of any evidence about the effect of cocaine upon a person's appetite. In the absence of any evidence that cocaine is an appetite suppressant, it was impermissible for the prosecutor to argue that the jury could infer that, because Octavio was so thin at the time of the arrest, it was likely that he was using cocaine, and, therefore, it was likely that he

possessed the crack pipe. See Rogan, 91 Hawai'i at 413, 984 P.2d at 1239 (observing that "[American Bar Association] Prosecution Function Standard 3-5.8(a) (1993) states: 'In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record'") (emphasis added).

On appeal, the prosecution asserts that it is common knowledge that cocaine is a appetite suppressant and supports this claim by pointing to an internet encyclopedia definition of "cocaine."[3] The editorial decision of the publisher of one encyclopedia to define a term in a particular manner does not, however, transform that definition into common knowledge. Indeed, dictionaries uniformly define "cocaine" as a narcotic obtained from coca leaves, without any reference to its effects on a person's appetite. See, e.g., American Heritage Dictionary 286 (2d ed. 1982); Random House College Dictionary 258 (1979); Webster's Third New International Dictionary 434 (1967). The omission of cocaine's effect on the appetite in the dictionary definitions cited above suggests that the concept of cocaine as an appetite suppressant is not as commonly known as the prosecution would have had the jury believe. Rather, cocaine's

[3] The prosecution cites the following definition of "cocaine": "Cocaine when ingested in small amounts produces feelings of well-being and euphoria, along with a decreased appetite, relief from fatigue, and increased mental alertness." (Emphasis added.) [Answering Brief at 11 (quoting Encyclopedia Britannica, britannica.com (March 10, 2000) at http://www.britannica.com/bcom/article/7/0,5716,24947+1,00.html)]

effect on a person's appetite appears to be a matter involving specialized or scientific knowledge and, thus, should properly be introduced through the testimony of an expert witness in accordance with Hawai'i Rules of Evidence (HRE) Rule 702 (1993).[4] Accordingly, the circuit court erred in failing to sustain Octavio's objection to the prosecution's improper comment, which amounted to testimony that lacked any legitimate basis in the evidence adduced at trial.

2. Promptness of a Curative Instruction

Because the circuit court did not perceive the comment to be improper, it did not issue a curative instruction. Hence, this factor weighs also weighs in favor of Octavio.

3. Strength/Weakness of the Evidence

Contrary to the prosecution's contentions, the evidence against Octavio, although sufficient to convict, was equivocal at best. Octavio's case essentially devolved into a credibility contest between Officers Kissel and Hanuna, on one hand, and Octavio, on the other. The prosecution adduced no direct

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[4] HRE Rule 702 provides

> **Testimony by experts**. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

evidence linking Octavio to the pipe (i.e., fingerprints on the pipe that matched Octavio). Given that Octavio denied having possessed the pipe or depositing the pipe in the car, we cannot say that the evidence against Octavio was overwhelming.

Because all three factors discussed above weigh against the prosecution, we cannot conclude that the prosecution's improper comment about cocaine as a appetite suppressant was harmless beyond a reasonable doubt. Accordingly, we hold, on the record before us, that the comment constituted prosecutorial misconduct that denied Octavio his right to a fair trial.

III. CONCLUSION

Based on the foregoing discussion, we vacate the July 21, 1999 judgment of conviction and sentence and remand for a new trial.

DATED: Honolulu, Hawai'i, June 26, 2000.

On the briefs:

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