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NO. CAAP-20-0000650

(CONSOLIDATED NOS. CAAP-20-0000438, CAAP-20-0000506 and
CAAP-20-0000650)

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII,	)	CASE NO.1PC091001524
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	1) JUDGMENT OF CONVICTION AND
vs.	)	SENTENCE; NOTICE OF ENTRY, and
	)	MITTIMUS, WARRANT OF
STANLEY CANOSA,	)	COMMITMENT filed June 4, 2020
	)	(CAAP-20-0000438)
Defendant-Appellant.	)	2) AMENDED JUDGMENT OF
	)	CONVICTION AND SENTENCE;
	)	NOTICE OF ENTRY, and AMENDED
	)	MITTIMUS, WARRANT OF
	)	COMMITMENT, filed July 10, 2020
	)	(CAAP-20-0000506)
	)	3) ORDER DENYNG DEFENDANT'S
	)	MOTION TO CORRECT ILLEGAL
	)	SENTENCE PURSUANT TO RULE
	)	35(a) OF THE HAWAII RULES OF
	)	PENAL PROCEDURE FILED 8/24/20,
	)	filed October 21, 2020 (CAAP-20-
	)	0000650)
)	
	)	CIRCUIT COURT OF THE FIRST
	)	CIRCUIT
)	
	)	HONORABLE KAREN T. NAKASONE
	)	JUDGE

ANSWERING BRIEF OF THE STATE OF HAWAII

APPENDICES A - B

and

CERTIFICATE OF SERVICE

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ANSWERING BRIEF OF THE STATE OF HAWAII

Defendant-Appellant Stanley Canosa appeals from the July 10, 2020 Amended Judgment of Conviction and Sentence of the Circuit Court of the First Circuit, the Honorable Karen Nakasone presiding, sentencing him to (1) ten years extended to twenty years imprisonment for Burglary in the First Degree, and (2) five years extended to ten years for Unauthorized Entry in a Dwelling, terms to run concurrent. CAAP-20-0000506 (**CAAP-20-506**) Docket Number (**Dkt. No.**) 1. Canosa also appeals from the October 21, 2020 order denying his motion to correct that sentence. CAAP-20-0000650 (**CAAP-20-650**) Dkt. No. 1. On appeal, Canosa raises two points that essentially allege the same error: (1) “[t]he trial court abused its discretion in re-sentencing [him] to an extended sentence after his underlying maximum sentence . . . had expired . . . ;” and (2) “[t]he trial court abused its discretion in denying [his] motion Motion for Correction of Illegal Sentence as [his] underlying maximum sentence as to both underlying charges had already expired.” CAAP-20-650 Opening Brief (**OB**) Dkt. No. 25 at 14. Because Canosa’s points on appeal are without merit, the State respectfully requests that this Honorable Court affirm his sentence.

I. STATEMENT OF THE CASE

This case has a long history, and only the background pertinent to deciding this case will be reiterated here.¹

¹ The State requests that this Court take judicial notice of the records in the cases to which this brief refers. *See State v. Akana*, 68 Haw. 164, 165, 706 P.2d 1300, 1302 (1985) (explaining that “[t]he most frequent use of judicial notice of

A. First Trial (1PC) And First Appeal (CAAP-11-1051)

On September 29, 2009, Canosa was charged with Burglary in the First Degree (Count 1), Sexual Assault in the First Degree (Count 2), and Unauthorized Entry in a Dwelling (Count 3) in Case Number 1PC091001524 (1PC). Record on Appeal (ROA) 1 CAAP-16-0000497 (CAAP-16-497) Dkt. No. 105 at 165-167.²

Canosa was also charged with two counts of Sexual Assault in the Third Degree (Counts 4 and 5), pertaining to incidents with other women. CAAP-16-497 ROA 1 Dkt. No. 105 at 168. A jury found Canosa guilty of Counts 1 through 3 and acquitted him of Counts 4 and 5.³ CAAP-16-497 ROA 2 Dkt. No. 107 at 649-653.

On November 29, 2011, the trial court entered its judgment and sentenced Canosa to extended terms of twenty years imprisonment in Count I, life with the possibility of parole in Count II, and ten years imprisonment in Count III.⁴ CAAP-16-497 ROA 3 Dkt. No. 109 at 388. The circuit court denied the State's motion for consecutive sentencing explaining that it "believes that given the sentence for extended term in

ascertainable facts is in noticing the content of court records. Wright and Graham, 21 *Federal Practice and Procedure: Evidence* § 5121 (1977). This court has validated the practice of taking judicial notice of a court's own records in an interrelated proceeding where the parties are the same").

² The cited page numbers in JEFS documents are the Portable Document Format (PDF) page numbers.

³ The court appointed Walter Rodby as counsel on October 28, 2009. ROA 1 CAAP-16-497 Dkt. No. 105 at 199-200.

⁴ The court appointed Emmanuel Tipon as Canosa's second counsel on December 13, 2011. ROA 3 CAAP-16-497 Dkt. No. 109 at 411.

count 2, the life -- the life term of imprisonment with the possibility of parole is sufficient for the protection of the public.” Tr. 11/29/11 CAAP-11-0001051 (CAAP-11-1051) Dkt. No. 73 at 19.

On appeal, Canosa raised numerous issues. *State v. Canosa*, 2014 WL 503045, at 1 (Hawai'i App. February 7, 2014) (Memo. Op.) [hereinafter *Canosa I*]; see Appendix A. Of the issues raised, this Court found that the Deputy Prosecuting Attorney's comment during rebuttal regarding \$75.00 was improper and that the statement was not harmless beyond a reasonable doubt. *Id.* at 5. This Court then remanded the case for a new trial on Counts 1 through 3. *Id.* at 6. Canosa applied for a writ of certiorari, which the Hawai'i Supreme Court rejected. *State v. Canosa*, 2014 WL 2765222 (June 17, 2014).

B. Second Trial (1PC) And Second Appeal (CAAP-16-497)

Trial commenced on April 8, 2015. See generally Tr. 4/8/15 CAAP-16-497 Dkt. No. 128. However, the circuit court declared a mistrial six days later because Canosa requested a new attorney.⁵ Tr. 4/14/15 CAAP-16-497 Dkt. No. 98 at 48, 51. Trial commenced again on March 30, 2016. See generally Tr. 3/30/16 CAAP-16-497 Dkt. No. 73. The jury found Canosa guilty on Counts 1 and 3 and hung as to Count 2. ROA 4 CAAP-16-497 Dkt. No. 111 at 977.

⁵ The court appointed Jeffrey Hawk as Canosa's third counsel on April 15, 2015. ROA 4 CAAP-16-497 Dkt. No. 111 at 391. Richard Gronna was appointed as Canosa's fourth counsel on November 17, 2015. ROA 4 CAAP-16-497 Dkt. No. 111 at 560.

On June 22, 2016, the sentencing phase of the trial commenced. *See generally* Tr. 6/22/16 CAAP-16-497 Dkt. No. 100. After the presentation of evidence, the jury found that the State proved beyond a reasonable doubt that an extended sentence was necessary for the protection of the public. Tr. 6/22/16 CAAP-16-497 Dkt. No. 100 at 111-114. On June 27, 2016, the circuit court entered its judgment and sentenced Canosa to an extended term of twenty years imprisonment for Count 1 and an extended term of ten years imprisonment for Count 3, both terms to run consecutively. ROA 4 CAAP-16-497 Dkt. No. 111 at 977.

On appeal, Canosa argued, *inter alia*, that the circuit court “abused its discretion by sentencing him to extended and consecutive terms of imprisonment, [and] by imposing a new sentence that [was] more severe following retrial”⁶ *State v. Canosa*, 2018 WL 1889511, at 2 (Hawaii App. April 20, 2018) (SDO) [hereinafter *Canosa II*]; *see* Appendix B. As to the extended sentence, this Court held that “[g]iven that the jury made the required factual findings under [Hawai‘i Revised Statutes (**HRS**)] § 706-662, it was within the Circuit Court’s discretion to sentence Canosa to extended terms of imprisonment.” *Id.* at 3 (emphasis added). As to the consecutive sentence, this Court held that “[g]iven that the Circuit Court articulated on the record its reason for sentencing Canosa to consecutive terms of imprisonment, the Circuit Court did not abuse its discretion. *Id.*

⁶ The court appointed Shawn Luiz as Canosa’s fifth counsel on June 28, 2016. 1PC Dkt. No. 303.

This Court then looked at whether the sentence after the second trial was more severe than the sentence after the first trial by evaluating the individual sentence and the aggregate sentences. *Id.* This Court found that the individual prison terms for each count after the first trial were identical to that of the sentence after the second trial. *Id.* But, “due to the imposition of consecutive terms in Canosa’s second sentence, the maximum possible imprisonment was increased from twenty to thirty years.” *Id.* This Court then vacated the circuit court’s judgment of conviction and sentence “to the extent it imposes consecutive sentences in violation of HRS § 706-609 and remand for resentencing consistent” with its decision. *Id.* at 4. Canosa applied for a writ of certiorari, which the Hawai’i Supreme Court rejected. *State v. Canosa*, 2019 WL 258698 (January 18, 2019).

C. Resentencing Hearing (1PC)

Following the rejection of Canosa’s application for writ of certiorari on January 18, 2019, the record on appeal reflects no activity in the case until the March 24, 2020 minutes, which stated, “[b]y agreement, STC continued to 3/27/20 at 9:00 a.m.” ROA CAAP-20-650 Dkt. No. 7 at 79; 1PC Dkt. No. 512. The next entry is the March 27, 2020 minutes, which stated, “[t]elephonic STC held. Resentencing set Thursday 6/4/20 at 11:00 a.m. Court will arrange for extra security.” ROA CAAP-20-650 Dkt. No. 7 at 79; 1PC Dkt. No. 513.

On the morning of the sentencing hearing, Canosa filed his “Written Objection to Resentencing” 1PC Dkt. No. 514. During the hearing, the circuit

court recessed twice so Canosa could confer with counsel. Tr. 6/4/20 CAAP-20-0000438 (CAAP-20-438) Dkt. No. 9 at 5, 10.

Canosa himself argued, “I don’t think the extended term is still upheld. The ICA vacated that sentence.” Tr. 6/4/20 CAAP-20-438 Dkt. No. 9 at 15. Canosa explained, “nowhere in here does it say that the extended term is still upheld, or they never modify ‘em in part or -- they wouldn’t say that specifically if the extended term still stands but the consecutive is vacated. No. They would have said it. If not, they not saying that in here. Everything is vacated.” Tr. 6/4/20 CAAP-20-438 Dkt. No. 9 at 16.

Canosa, continued that he was prejudiced because “the time still run. And before you was able to sentence me, that time expired, the ordinary terms. And one extended term is in essence extending the ordinary sentences beyond the statutory terms. And once that expired, I mean, what is there to extend?” Tr. 6/4/20 CAAP-20-438 Dkt. No. 9 at 22.

Finally, Canosa argued, “I cannot have one fair opportunity for present mitigation and allocution of my sentence. How? And to persuade you for just give me the ordinary term and run ‘em concurrent. That’s not fair. Because the thing expired. The thing went expire.” Tr. 6/4/20 CAAP-20-438 Dkt. No. 9 at 22.

After considering Canosa’s arguments, the circuit court, “based on the jury verdict’s finding and in view of defendant’s extensive criminal history and the nature of the current offenses, [found] that the State’s request for extended term sentencing based on the jury’s findings -- that such sentence was appropriate.” Tr.

6/4/20 CAAP-20-438 Dkt. No. 9 at 24. The circuit court sentenced Canosa to ten years extended to twenty years for the Burglary conviction and five years extended to ten years for the Unauthorized Entry of a Dwelling. Tr. 6/4/20 CAAP-20-438 Dkt. No. 9 at 25. The circuit court ruled that the terms were to run concurrent, with credit for time served. Tr. 6/4/20 CAAP-20-438 Dkt. No. 9 at 25.

D. Motion To Correct Illegal Sentence (1PC) And Third Appeal (CAAP-20-438, CAAP-20-506, CAAP-20-650 Consolidated)

The circuit court entered its judgment resentencing Canosa on June 4, 2020, and Canosa filed a timely notice of appeal on July 6, 2020 initiating case number CAAP-20-438. 1PC Dkt. Nos. 522, 526. On July 10, 2020, the circuit court entered an amended judgment, correcting clerical errors. 1PC Dkt. No. 530. Canosa filed a second notice of appeal, thus initiating case number CAAP-20-506. 1PC Dkt. No. 534.

Subsequent to filing his two notice of appeals, Canosa himself moved the circuit court to correct an illegal sentence pursuant to Hawai'i Rules of Penal Procedure (**HRPP**) Rule 35(a). 1PC Dkt. No. 538. Canosa argued that “on June 4, 2020 the resentencing court extended the ‘expired’ ten (10) year ordinary term of imprisonment for my Burglary conviction to twenty (20) years . . .” and “extended the ‘expired’ five (5) year ordinary term of imprisonment for my unauthorized Entry in a Dwelling conviction to ten (10) years” 1PC Dkt. No. 538 at 5. Canosa explains, “I already completed serving the ordinary terms of imprisonment for both my . . . convictions which expired before the resentencing court could extend it to impose the extended sentences” 1PC Dkt. No. 538 at 6.

The circuit court denied Canosa’s motion. 1PC Dkt. No. 591. Canosa filed a notice of appeal from this denial, creating a third appellate case, CAAP-20-650. 1PC Dkt. No. 593. This Court consolidated Canosa’s three appeals—CAAP-20-438, CAAP-20-506, and CAAP-20-650—under CAAP-20-650. CAAP-20-650 Dkt. No. 5.

II. STANDARD OF REVIEW

“Unless cogent reasons support the second court’s action, any modification of a prior ruling of another court of equal and concurrent jurisdiction will be deemed an abuse of discretion.” *Hussey v. Say*, 139 Hawai‘i 181, 185, 384 P.3d 1282, 1286 (2016).

III. ARGUMENT

Again, Canosa raises two points that essentially allege the same error: (1) “[t]he trial court abused its discretion in re-sentencing [him] to an extended sentence after his underlying maximum sentence . . . had expired . . . ;” and (2) “[t]he trial court abused its discretion in denying [his] motion Motion for Correction of Illegal Sentence as [his] underlying maximum sentence as to both underlying charges had already expired.”⁷ CAAP-20-650 OB Dkt. No. 25 at 14.

⁷ Without a point of error, Canosa includes in the argument section of his brief that the “extended sentence was an abuse of discretion as the State did not prove that [he] was a danger to the public.” OB CAAP-20-650 Dkt. No. 25 at 21. The State considers this argument waived insofar as it was not a point of error raised. *See* Hawai‘i Rules of Appellate Procedure (**HRAP**) Rule 28 (b)(4). Should this Court address this argument, the jury found that the State proved beyond a reasonable doubt that Canosa was a persistent offender, a multiple offender, and that an extended sentence was necessary for the protection of the public. Tr. 6/22/16 CAAP-16-497 Dkt. No. 260 at 49-51.

“The law of the case doctrine holds that a determination of a question of law made by an appellate court in the course of an action becomes the law of the case and may not be disputed by a reopening of the question at a later stage of litigation.” *Hussey*, 139 Hawai‘i at 186, 384 P.3d at 1287 (citation and quotation marks omitted). “Thus, as the United States Supreme Court held, the law of the case doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided.” *Id.* (citation and quotation marks omitted).

This Court, in CAAP-16-497, held that “[g]iven that the jury made the required factual findings under HRS § 706-662, it was within the Circuit Court’s discretion to sentence Canosa to extended terms of imprisonment.” *Canosa II*, SDO at 3. This holding is law of the case. This Court also found that “while the individual prison terms imposed for each count in the second sentence were identical to those imposed in the first sentence, due to the imposition of consecutive terms in Canosa’s second sentence, the maximum possible imprisonment was increased from twenty to thirty years.” *Id.* This Court then held that “Canosa’s second sentence was more severe and violated HRS § 706-609, and we must remand.” *Id.* This holding is also law of the case.

In remanding this case, this Court specifically vacated the circuit court’s judgment “to the extent it imposes consecutive sentences in violation of HRS § 706-609 and remand for resentencing consistent with this summary disposition order.” *Id.* at 4. Thus, the only portion of the judgment that was vacated was the consecutive sentence. “[T]he phrase ‘vacate and remand’ indicates the litigation

continues in the court or agency in accordance with the appellate court's instruction." HRAP Rule 35(d). So, the only task left for the circuit court was to enter a judgment of conviction and sentence without the consecutive sentence.

That the circuit court did not abuse its discretion in imposing an extended term is law of the case and cannot be re-litigated. Moreover, the portion of the judgment relating to the underlying and the extended sentences were not vacated and, thus, remained in effect. Insofar as the underlying and extended sentences remained in effect, they were not subject to be re-litigated on remand.

IV. CONCLUSION

Because the portion of the judgment relating to Canosa's underlying and extended sentences were not vacated, Canosa's argument that his sentence expired is meritless. As such, the State respectfully requests that this Court affirm the July 10, 2020 Amended Judgment of Conviction and Sentence and the order denying Canosa's motion challenging that sentence as illegal.

Dated at Honolulu, Hawai'i: July 12, 2021.

Respectfully submitted,

STATE OF HAWAII
Plaintiff-Appellee

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By /s/ SONJA P. MCCULLEN
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133 Hawai'i 451
Unpublished Disposition
Unpublished disposition. See
HI R RAP Rule 35 before citing.
Intermediate Court of Appeals of Hawai'i.

STATE of Hawai'i, Plaintiff–Appellee,
v.
Stanley CANOSA,
Defendant–Appellant.

No. CAAP–11–0001051.
|
Feb. 7, 2014.

Appeal from the Circuit Court of the First
Circuit (CR. No. 09–1–1524).

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NAKAMURA, C.J., FOLEY and GINOZA, JJ.

MEMORANDUM OPINION

*1 Defendant–Appellant Stanley Canosa
(Canosa) appeals from a Judgment of
Conviction and Sentence (Judgment) filed on
November 29, 2011, in the Circuit Court of
the First Circuit (circuit court).¹ Judgment
was entered against Canosa for Count I,
Burglary in the First Degree in violation of
Hawaii Revised Statutes (HRS) § 708–810(1)

(c) (1993);² Count II, Sexual Assault in the
First Degree in violation of HRS § 707–730(1)
(a) (Supp.2013);³ and Count III, Unauthorized
Entry in a Dwelling in violation of HRS § 708–
812.6 (Supp.2010).⁴ The jury found Canosa
not guilty of Counts IV and V, both charging
Sexual Assault in the Third Degree in violation
of HRS § 707–732(1)(f) (Supp.2013), which
involved different complaining witnesses than
the complaining witness for Counts I–III.⁵
Canosa was sentenced to serve an extended
term of imprisonment of twenty (20) years,
in Count I; life with the possibility of parole,
in Count II; and ten (10) years in Count III,
concurrent, with credit for time already served.
The sentences are to run concurrent with any
other sentence now being served.

1 The Honorable Randal K.O. Lee presided.

2 HRS § 708–810 provides in pertinent part:
§ 708–810 Burglary in the first degree. (1) A person
commits the offense of burglary in the first degree if
the person intentionally enters or remains unlawfully
in a building, with intent to commit therein a crime
against a person or against property rights, and:
....
(c) The person recklessly disregards a risk that the
building is the dwelling of another, and the building
is such a dwelling.
....
(3) Burglary in the first degree is a class B felony.

3 HRS § 707–730 provides in pertinent part:
§ 707–730 Sexual assault in the first degree. (1) A
person commits the offense of sexual assault in the
first degree if:
(a) The person knowingly subjects another person to
an act of sexual penetration by strong compulsion;
(2) Sexual assault in the first degree is a class A felony.

4 In 2009, HRS § 708–812.6 provided in pertinent part:
[§ 708–812.6] Unauthorized entry in a dwelling.
(1) A person commits the offense of unauthorized
entry in a dwelling if the person intentionally or
knowingly enters unlawfully into a dwelling with
reckless disregard of the risk that another person was

lawfully present in the dwelling, and another person was lawfully present in the dwelling.

(2) Unauthorised entry in a dwelling is a class C felony.

5 HRS § 707–732 provides in pertinent part:

§ 707–732 Sexual assault in the third degree. (1) A person commits the offense of sexual assault in the third degree if:

....

(f) The person knowingly, by strong compulsion, has sexual contact with another person or causes another person to have sexual contact with the actor.

....

(2) Sexual assault in the third degree is a class C felony.

The incidents pertinent to Counts I–III occurred on a boat at the Keehi Lagoon small boat harbor (Keehi Lagoon), where the complaining witness for those counts (CW) lived with her boyfriend.

On appeal, Canosa contends: (1) the circuit court abused its discretion in denying Canosa's Motion to Dismiss Indictment for Phase I and Phase II Evidence Presented to the Grand Jury; (2) the circuit court abused its discretion in denying Canosa's Motion to Dismiss Indictment for Violation of [Hawai'i Rules of Penal Procedure \(HRPP\) Rule 5\(c\)\(1\) & \(2\)](#), and for Lack of Jurisdiction; (3) the circuit court abused its discretion in denying Canosa's Motion to Dismiss Indictment for Failure to Present Clearly Exculpatory Evidence to the Grand Jury; (4) the circuit court abused its discretion in denying Canosa's Motion for New Trial; (5) the circuit court abused its discretion in denying Canosa's motion to dismiss Counts I–III due to the destruction of a complaining witness's written statement to police; (6) the circuit court abused its discretion in denying Canosa's motion for severance of charges; (7) the trial Deputy Prosecuting Attorney (DPA) committed misconduct during voir dire by asking questions that were meant to indoctrinate the jurors to be favorable

to the State's case; and (8) the DPA made improper statements during closing argument that cumulatively deprived Canosa of his right to a fair trial.

We address the pertinent points of error below and reject most of them. However, we vacate Canosa's convictions on Counts I–III due to prosecutorial misconduct that was not harmless beyond a reasonable doubt in this case.

I. Motions to Dismiss Indictment

A. Motion to Dismiss the Indictment for Phase I and Phase II Evidence Presented to the Grand Jury

Canosa argues that the circuit court abused its discretion in denying his motion to dismiss the indictment for allegedly using Phase I and Phase II language in the grand jury proceedings. Canosa contends that because Phase I refers to the probable cause phase and Phase II refers to an extended term phase, such references notified the grand jury that Canosa had prior convictions.

*2 Canosa fails to indicate where in the record references were made before the grand jury to Phase I and Phase II.⁶ It appears that there were only four brief references to Phase I when the DPA presented charging language to the grand jury and then entered the charging language as an exhibit. It does not appear that there was any reference to Phase II during the relevant grand jury proceedings, as alleged by Canosa. Further, there is nothing in the record to establish that the grand jury in this case knew the meaning as to Phase I or that reference to Phase I would necessarily entail an extended sentence Phase II.

6 Canosa's opening brief fails to properly cite to the record multiple times and simply references "RA:JEFS". This is not a proper record cite and fails to comply with [Hawai'i Rules of Appellate Procedure \(HRAP\) Rule 28](#).

Canosa has not established prejudice based on the passing references to Phase I. See [State v. Griffin](#), 126 Hawai'i 40, 53, 266 P.3d 448, 461 (App.2011) (noting that the defendant has the burden regarding motions to dismiss for prosecutorial misconduct in grand jury proceedings). Moreover, even without considering Canosa's burden, the record here does not demonstrate that the deputy prosecutor's brief references to Phase I "prevent[ed] the exercise of fairness and impartiality by the grand jury[.]" [State v. Chong](#), 86 Hawai'i 282, 289, 949 P.2d 122, 129 (1997) (emphasis in original omitted); "clearly infringe[d] upon the [grand] jury's decision-making function [.]" [State v. Pulawa](#), 62 Haw. 209, 218, 614 P.2d 373, 378 (1980) (citation omitted); or "invade[d] the province of the grand jury or tend[ed] to induce action other than that which the jurors in their uninfluenced judgment [would] deem warranted on the evidence fairly presented before them." [State v. Joao](#), 53 Haw. 226, 229, 491 P.2d 1089, 1091 (1971) (citation omitted).

The circuit court did not abuse its discretion in denying Canosa's motion to dismiss the indictment based on the deputy prosecutor's references to Phase I before the grand jury.

B. Motion to Dismiss the Indictment for Violation of [HRPP Rule 5\(c\)](#)

Canosa contends that the circuit court abused its discretion in denying his motion to dismiss the indictment for violating [HRPP](#)

[Rule 5\(c\)](#), asserting that he was entitled to a preliminary hearing and the circuit court lacked jurisdiction because the grand jury indictment was not issued prior to the date of the preliminary hearing scheduled in the district court. The preliminary hearing was scheduled for the district court's afternoon calendar on September 29, 2009.⁷ It is undisputed that the grand jury indictment was filed on the same date at 1:35 p.m., and that at 1:37 p.m. the scheduled preliminary hearing was continued based on the State's representation that there had been a grand jury indictment. The continued preliminary hearing was subsequently stricken due to the grand jury indictment. The circuit court ruled that Canosa was not entitled to a preliminary hearing because he was indicted by the grand jury before his preliminary hearing was called in the district court.

7 Canosa contends the preliminary hearing was scheduled for 1:30 p.m., but there is nothing in the record to establish the actual time. Regardless, given the other undisputed facts, this fact is not dispositive.

[HRPP Rule 5\(c\)](#) outlines the procedure by which the district courts handle felony charges. Canosa relies on that part of the rule which states that, if a defendant does not waive a preliminary hearing, "the court shall schedule a preliminary hearing, provided that such hearing shall not be held if the defendant is indicted or charged by information before the date set for such hearing." [HRPP Rule 5\(c\)\(1\)](#). This provision mandates that a scheduled preliminary hearing not proceed if an indictment is filed before the date set for the hearing; however, it does not suggest or mandate that a preliminary hearing *must proceed* when a grand jury indictment is handed

down on the same date that a preliminary hearing is scheduled.

*3 The Hawai'i Supreme Court has determined that “[t]he right to a preliminary examination is not a constitutional right[,]” and the purpose of a preliminary hearing is to attain a determination of probable cause. *Chung v. Ogata (Ogata I)*, 53 Haw. 364, 366, 493 P.2d 1342, 1343 (1972); *State v. Tominaga*, 45 Haw. 604, 609, 372 P.2d 356, 359 (1962). A preliminary hearing and an indictment are separate avenues to establish probable cause. *HRPP Rule 7*. The return of an indictment removes a defendant's right to a preliminary hearing before the district court and all attendant “benefits.” *See Chung v. Ogata (Ogata II)*, 53 Haw. 395, 495 P.2d 26 (1972). Once the grand jury indicts, the district court no longer has jurisdiction to hold a preliminary hearing, even when an indictment is issued between the original scheduled hearing and the continued hearing. *Tominaga*, 45 Haw. at 610, 372 P.2d at 360.⁸

⁸ Canosa asserts that *Tominaga* was decided prior to the effective date of the HRPP in 1977 and contends that the purpose of a preliminary hearing under HRPP 5(c) is different than a preliminary hearing when *Tominaga* was decided. We do not agree. *Tominaga* and the *Ogata* cases were decided prior to 1977, when District Court Rules of Penal Procedure (DCRPP) and separate Hawai'i Rules of Criminal Procedure (HRCrP) governed preliminary hearings and indictments, respectively. However, the current HRPP is substantially modeled after the DCRPP and HRCrP, with changes made to accommodate new legal precedent and to bring Hawaii's rules more in line with the federal rules. *See generally* Introduction and *HRPP Rule 5*, note (Proposed Draft Sept. 15, 1975). The propositions in *Tominaga* and the *Ogata* cases are not undermined by the adoption of the HRPP. The Note for proposed *HRPP Rule 5(c)* states in relevant part that subsection (c)(1) is the same as DCRPP 25(a), except for certain changes including “the last sentence has been modified to conform to the language in Federal *Rule 5(c)*,

in order to make clear that no preliminary need be held not only when an indictment is returned but also when a complaint is filed in the circuit court (upon waiver of indictment).” *HRPP Rule 5*, note at 15 (Proposed Draft Sept. 15, 1975).

The circuit court did not abuse its discretion in denying Canosa's motion to dismiss the indictment based on *HRPP Rule 5(c)*.

C. Motion to Dismiss for Failure to Present Clearly Exculpatory Evidence to the Grand Jury

Canosa contends that the circuit court abused its discretion in denying his motion to dismiss based on the State's failure to present clearly exculpatory evidence to the grand jury. Canosa contends that the State failed to present to the grand jury: the testimony of Officer Gregg Arii (Officer Arii), who initially interviewed the CW related to the alleged sexual assault that was later charged in Count II (Sexual Assault in the First Degree) and who characterized the incident as an attempted Sex Assault; and the testimony of Dr. Wayne Lee, who examined the CW and found no visible signs of trauma.

During grand jury proceedings, the prosecution is not required to present evidence which may have a tendency to exculpate the accused, but is required to present evidence which is clearly exculpatory. *State v. Higa*, 126 Hawai'i 247, 264, 269 P.3d 782, 799 (App.2012).

The evidence that Canosa contends should have been presented to the grand jury is not clearly exculpatory. First, Officer Arii's report stated that the CW asserted that Canosa “reached into her shorts and touched her vaginal area attempting to have sex with her,” which potentially corroborates the CW's allegation.

The fact that Officer Arie characterized the incident as an attempted sexual assault at that early stage of the investigation is not clearly exculpatory.

Second, Dr. Lee's trial testimony demonstrates that the fact the CW had no visible signs of trauma on her vagina is not clearly exculpatory. Dr. Lee testified that in this type of situation, "more than half the time" there are no signs of injury. Dr. Lee concluded that the CW's physical condition was consistent with his finding that minimal penetration had occurred. Dr. Lee's isolated statement identified by Canosa is not clearly exculpatory.

The circuit court did not abuse its discretion in denying Canosa's motion to dismiss the indictment for failure by the State to present clearly exculpatory evidence to the grand jury.

II. Motion to Dismiss for Loss/Destruction of Evidence

*4 Canosa contends that the circuit court abused its discretion in denying his oral motion to dismiss Counts I–III because of the loss or destruction of the CW's written statement. The circuit court did not err because it is questionable whether the statement ever existed. The only testimony which establishes its existence is from the CW herself. All of the police officers who testified at the [Hawai'i Rules of Evidence \(HRE\) Rule 412](#) hearing regarding the written statement stated that no such statement existed.

Even assuming the statement existed, the CW testified that the written statement contained basically the same details she related in her video recorded statement given to police and

in her grand jury testimony. Given this record, there is no indication that the purported written statement would have assisted Canosa.

Due to the speculative nature of the written statement, we cannot say that it "is so critical to the defense as to make a criminal trial fundamentally unfair without it." [State v. Steger](#), 114 Hawai'i 162, 169, 158 P.3d 280, 287 (App.2006) (citation and internal quotation marks omitted).

III. Prosecutorial Misconduct During Closing Arguments

Canosa contends that the DPA at trial made five improper statements during closing arguments that individually and cumulatively deprived Canosa of a fair trial.

"Prosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a fair trial." [State v. Carvalho](#), 106 Hawai'i 13, 16 n. 7, 100 P.3d 607, 610 n. 7 (App.2004) (citation omitted). An appellate court "evaluates claims of improper statements by prosecutors by first determining whether the statements are improper, and then determining whether the misconduct is harmless." [State v. Tuua](#), 125 Hawai'i 10, 14, 250 P.3d 273, 277 (2011). "To determine whether reversal is required under [HRPP Rule 52\(a\)](#) because of improper remarks by a prosecutor which could affect Defendant's right to a fair trial, we apply the harmless beyond a reasonable doubt standard of review." [State v. Sanchez](#), 82 Hawai'i 517, 528, 923 P.2d 934, 945 (App.1996) (citation and brackets omitted). "In applying [this] standard, the court is required to examine the record and determine

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) (citation omitted). In assessing whether prosecutorial misconduct was harmless beyond a reasonable doubt, the following factors are considered: “(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. Pacheco*, 96 Hawai'i 83, 93, 26 P.3d 572, 582 (2001) (citation omitted) (block quote format altered).

The defense theory during trial was that the CW and her boyfriend owed Canosa money for marijuana. Canosa testified that he had gone to Keehi Lagoon multiple times to try to collect the money he was owed, but CW and her boyfriend kept making excuses and did not pay him. As to Count III, Canosa claims he wanted his money and the CW allowed him onto the boat to wait for her boyfriend. As to the incident related to Counts I and II, Canosa claims to have gone to Keehi Lagoon early in the morning to again try to collect the debt because he had learned that the CW's boyfriend was in the process of selling a boat. Canosa claims that he spoke to the CW's boyfriend that morning, who was working to moor a boat and told Canosa to come back later. Canosa claims that when he came back that morning, the CW's boyfriend had not returned, but that the CW invited him on to their boat to wait. Canosa claims he ultimately left without incident before the CW's boyfriend returned.

*5 During closing argument, the DPA argued

[Canosa's] the only one who has an interest in the outcome of this case. Ask yourselves if

[he] was telling the truth. He told you about this 75-dollar debt for marijuana. Well, first of all, do you believe that? Do you believe that a dealer would give drugs to someone and not get the money right away? Does this make sense? And even if you do believe it, is [the CW] going to report sexual assault over \$75 and go through everything she has had to do?

Canosa did not object.

The defense argued during closing argument, *inter alia*, that a debt was owed to Canosa, that CW's boyfriend kept giving Canosa the runaround, that CW's boyfriend was about to get \$7,000 for selling a boat but did not want to pay Canosa, and thus CW and her boyfriend had the motive to lie in this case.

In rebuttal closing argument, the DPA again attempted to comment on the alleged debt:

[DPA:] ... Is \$75 going to make a—

[Canosa's counsel]: We—

[DPA]:—difference to [the CW's boyfriend]?

[Canosa's counsel]: We object. Nobody mentioned \$75. We object, and we move to strike.

The court overruled the objection, stating it would “leave it to the jurors' memories.”

The DPA's comments were improper. The State admits the “\$75” figure is not in evidence.⁹ During closing arguments, a prosecutor may “draw reasonable inference from the evidence and wide latitude is allowed in discussing the evidence.” *State v. Mars*, 116 Hawai'i 125,

142, 170 P.3d 861, 878 (App.2007) (citation omitted). However, the prosecutor must refrain from commenting on “matters outside the evidence adduced at trial.” *Tuua*, 125 Hawai‘i at 14, 250 P.3d at 277. Here, the prosecution associated an exact dollar figure to a debt that had only been referred to as a general debt owed. The DPA then leveraged the specific dollar figure as an attack on the credibility of the defense's theory of the case and a simultaneous buttressing of the credibility of the CW. The introduction of facts not in evidence was improper.

9 The State acknowledges the only time a witness identified the debt for \$75 was during Detective Dwight Sato's testimony before the grand jury.

The DPA's improper statement was not harmless beyond a reasonable doubt. As to the first factor, the nature of the conduct, the DPA's argument relying on facts not in evidence was particularly harmful because it permitted the State to directly attack Canosa's theory of defense by suggesting that the CW would not have subjected herself to the negative effects of reporting the alleged crime just to avoid such a small debt owed to Canosa. The jury rejected Canosa's defense in relation to the counts involving the CW (while acquitting him of Counts IV and V alleging Sexual Assault in the Third Degree involving other complaining witnesses). In a case dependent to a large degree on credibility, the first factor favors Canosa.

As to the second factor, Canosa did not initially object, and therefore no curative instruction was given after the DPA first used the \$75 figure during closing argument. However, after Canosa objected to the DPA's use of the \$75 figure during rebuttal argument, the circuit

court overruled the objection and left the issue to the jurors' recollections. The State argues that the court's instruction that closing arguments are not evidence is sufficient to cure any impropriety because the jury is presumed to follow the court's instructions. However, given the particular circumstances of this case, we cannot conclude that such instruction was sufficient to render the misconduct harmless beyond a reasonable doubt.

*6 The third factor supports a conclusion that the misconduct was not harmless beyond a reasonable doubt. “In close cases involving the credibility of witnesses, particularly where there are no disinterested witnesses or other corroborating evidence, this court has been reluctant to hold improper statements harmless.” *Tuua*, 125 Hawai‘i at 17, 250 P.3d at 280. The case against Canosa involving the CW in Counts I–III was dependant to a large degree on the credibility of the witnesses. There was limited physical evidence supporting the accusations and, as to Counts I and II, there were witnesses on both sides as to whether Canosa was present at Keehi Lagoon at the time the incident allegedly occurred.

We conclude that the DPA's arguments that the debt owed to Canosa was only for \$75 had a reasonable possibility of contributing to the jury's conviction of Canosa. However, the misconduct was not so egregious as to require reversal of the conviction. See *State v. Rogan*, 91 Hawai‘i 405, 424, 984 P.2d 1231, 1250 (1999). Rather, Canosa is entitled to a new trial.

Because we conclude that a new trial is warranted, we need not reach Canosa's

assertion of other alleged incidents of prosecutorial misconduct.

IV. Motion to Sever

Canosa argues that the circuit court abused its discretion in denying his motion to sever, which sought to have Counts I and II tried together, and all other counts tried separately. Canosa's argument to sever in regard to Counts IV and V is moot because he was acquitted on those counts. Our ruling that he is entitled to a new trial affects only Counts I–III.

On appeal, Canosa does contend that Counts I and II should be retried separately from Count III, but offers no substantive argument as to how he is prejudiced by the joinder of these three counts. [HRPP Rule 14](#); see *State v. Cordeiro*, 99 Hawai'i 390, 411, 56 P.3d 692, 713 (2002) (“Joinder may prejudice a defendant by (1) preventing him or her from presenting conflicting defenses or evidence

with respect to each charge, (2) permitting the prosecution to introduce evidence that would be inadmissible with respect to certain charges if tried separately, or (3) bolstering weak cases through the cumulative effect of the evidence.”). Canosa has failed to demonstrate how the court abused its discretion by not severing Counts I–III.

V. Conclusion

Based on the foregoing, the Judgment of Conviction and Sentence filed on November 29, 2011, in the Circuit Court of the First Circuit, is vacated as to the convictions for Counts I, II and III and the case is remanded for a new trial on these counts.

All Citations

133 Hawai'i 451, 330 P.3d 389 (Table), 2014 WL 503045

142 Hawai'i 210
Unpublished Disposition
Unpublished disposition. See
HI R RAP Rule 35 before citing.
Intermediate Court of Appeals of Hawai'i.

STATE of Hawai'i, Plaintiff–Appellee,
v.
Stanley CANOSA, Defendant–Appellant

NO. CAAP-16-0000497

|
April 20, 2018

APPEAL FROM THE CIRCUIT COURT OF
THE FIRST CIRCUIT (CR. NO. 09–1–1524)

Attorneys and Law Firms

On the briefs:

[Shawn A. Luiz](#), Honolulu, for Defendant–
Appellant.

[Sonja P. McCullen](#), Deputy Prosecuting
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Plaintiff–Appellee.

(By: [Fujise](#), Acting Chief Judge, [Reifurth](#) and
[Chan](#), JJ.)

SUMMARY DISPOSITION ORDER

*1 Defendant–Appellant Stanley Canosa (Canosa) appeals from the June 27, 2016 Judgment of Conviction and Sentence entered by the Circuit Court of the First Circuit (Circuit Court).¹ After a jury trial, the Circuit Court convicted Canosa in Count 1 of Burglary in the First Degree, in violation of [Hawaii Revised](#)

[Statutes \(HRS\) § 708–810 \(2014\)](#),² and in Count 3 of Unauthorized Entry in a Dwelling, in violation of [HRS § 708–812.6 \(Supp. 2010\)](#).³ Canosa was sentenced to consecutive extended terms of imprisonment of twenty (20) years in Count 1 and ten (10) years in Count 3.

1 The Honorable Karen S.S. Ahn presided.

2 [HRS § 708–810](#) provides, in relevant part:
(1) A person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and:

....
(c) The person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

3 [HRS § 708–812.6](#) then provided, in relevant part:
Unauthorized entry in a dwelling.
(1) A person commits the offense of unauthorized entry in a dwelling if the person intentionally or knowingly enters unlawfully into a dwelling with reckless disregard of the risk that another person was lawfully present in the dwelling, and another person was lawfully present in the dwelling.

On appeal, Canosa argues that the Circuit Court erred in: (1) denying his motion for a mistrial; (2) denying his motion for judgment of acquittal; (3) sentencing him to consecutive and extended terms of imprisonment that were “harsher” than the sentence he received in his previous trial;⁴ and (4) and admitting unduly prejudicial testimony during his post-trial sentencing hearing in violation of [Hawaii Rules of Evidence \(HRE\) Rule 403](#).

4 For clarity, two of Canosa's points of error were consolidated into one.

After a careful review and consideration of the parties' arguments, the record on appeal, and legal authorities, we resolve Canosa's points on

appeal as follows and affirm his conviction, but remand for resentencing.

1. The Circuit Court did not abuse its discretion by denying Canosa's motion for a mistrial. At trial, the Complaining Witness (CW) stated in response to an unrelated question her belief Canosa stole from her in the past. Both the State and Canosa objected and the court immediately struck the remark. The Hawai'i Supreme Court has held that “[w]hen an unresponsive or improper answer is given to a proper question, the remedy is a motion to strike.” [State v. Hashimoto](#), 46 Haw. 183, 195, 377 P.2d 728, 736 (1962). Furthermore, when a prosecution's witness makes an improper remark, “any harm or prejudice resulting to the defendant can be cured by the court's instructions to the jury. In such cases it will be presumed that the jury adhered to the court's instructions.” [State v. Samuel](#), 74 Haw. 141, 149 n.2, 838 P.2d 1374, 1378 n.2 (1992) (citation and internal quotation marks omitted). Given the promptness of the curative instruction we conclude that the Circuit Court did not abuse its discretion in denying Canosa's motion for mistrial.

*2 2. The Circuit Court did not err in denying Canosa's motion for judgment of acquittal as, taking the evidence in the light most favorable to the prosecution, [State v. Timoteo](#), 87 Hawai'i 108, 112–13, 952 P.2d 865, 869–70 (1997), there was substantial evidence of his intent to commit a crime.

The Hawai'i Supreme Court has held that, “[b]ased on the plain language of the statute and the historical development of the offense of burglary, ... in order to sustain a burglary conviction, the evidence must show that the

unlawful entry was effected for the purpose of committing an offense against a person or property rights.” [State v. Mahoe](#), 89 Hawai'i 284, 288, 972 P.2d 287, 291 (1998). “The intent to commit the offense must have existed at the time the unlawful entry was made.” *Id.* “[T]he crime intended to be committed on the premises does not have to be committed in order to make the act of entering or remaining the crime of burglary, only the intent must be formed.” [State v. Robins](#), 66 Haw. 312, 314, 660 P.2d 39, 41 (1983) overruled on other grounds by [State v. Robins](#), 66 Haw. 312, 660 P.2d 39 (1983). Canosa challenges his Burglary in the First Degree conviction because he argues “there was no evidence showing that [he] had an intent to commit a crime prior to allegedly entering the subject boat.”

We are thus drawn back to the oft-repeated proposition that, given the difficulty of proving the requisite state of mind by direct evidence in criminal cases, “we have consistently held that ... proof by circumstantial evidence and reasonable inferences arising from circumstances surrounding the [defendant's conduct] is sufficient.... Thus, the mind of an alleged offender may be read from his acts, conduct and inferences fairly drawn from all the circumstances.”

[State v. Stocker](#), 90 Hawai'i 85, 90, 976 P.2d 399, 406 (1999) (citation and some brackets omitted). From Canosa's conduct and inferences fairly drawn from all the circumstances, there was substantial evidence that Canosa intended to commit sexual assault while on the boat even if such an assault was not committed. Witnesses testified that Canosa entered the boat without permission. CW testified that Canosa had

previously encountered CW on-board the boat when Canosa had entered the boat without permission, that on the morning in question Canosa again entered the boat without permission, found CW asleep on the boat, held down the CW while trying to remove her pants and insert his fingers into her vagina, and only relented and left after CW tricked him into thinking her boyfriend had returned.

Based on the testimony of the State's witnesses and viewing all inferences in light most favorable to the State, the State provided sufficient evidence to show that Canosa intended to commit a crime against CW when he entered CW's boat. The Circuit Court did not err in denying Canosa's motion for judgment of acquittal.

3. Canosa argues that the Circuit Court abused its discretion by sentencing him to extended and consecutive terms of imprisonment, by imposing a new sentence that is more severe following retrial in violation of [HRS § 706-609](#) (2014), and that the sentence was unconstitutionally cruel and unusual. Canosa does not challenge the Circuit Court's authority to impose either extended or consecutive terms nor does he dispute that the jury found the State proved beyond a reasonable doubt that Canosa was a multiple offender and that it was necessary for the protection of the public to extend his sentences. See [HRS § 706-662](#) (2014); see also [HRS § 706-664](#) (2014). Rather, without identifying any support presented in the record, Canosa argues only that “a ten year sentence for the burglary in the first degree and a five year sentence for unauthorized entry in a dwelling in the second degree, to run concurrently, would have been

more than sufficient” in light of factors we presume Canosa gleaned from [HRS § 706-606](#) (2014).⁵

5 [HRS § 706-606](#) requires that the sentencing court consider the following factors in determining the particular sentence to be imposed:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) The need for the sentence imposed:
 - (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
 - (b) To afford adequate deterrence to criminal conduct;
 - (c) To protect the public from further crimes of the defendant; and
 - (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) The kinds of sentences available; and
- (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

*3 Given that the jury made the required factual findings under [HRS § 706-662](#), it was within the Circuit Court's discretion to sentence Canosa to extended terms of imprisonment. See [HRS § 706-661](#) (2014). Canosa fails to present specific argument with respect to the imposition of consecutive sentences. “[A]bsent clear evidence to the contrary, it is presumed that a sentencing court will have considered all the factors.” [State v. Hussein](#), 122 Hawai'i 495, 518, 229 P.3d 313, 336 (2010) (citation, internal quotation marks, ellipses, emphasis, and some brackets omitted). The Circuit Court indicated that it considered the [HRS § 706-606](#) factors and, after doing so, concluded that “[Canosa] has shown himself to be a danger to the community.” Given that the Circuit Court articulated on the record its reason for sentencing Canosa to consecutive terms of

imprisonment, the Circuit Court did not abuse its discretion.

Canosa also argues the Circuit Court abused its discretion by imposing a new sentence that is more severe following retrial in violation of HRS § 706–609. HRS § 706–609 provides, “When a conviction or sentence is set aside on direct or collateral attack, the court shall not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence.” “HRS § 706–609 prevents a sentencing court from issuing a more severe sentence after the initial sentence has been set aside upon review.” Keawe v. State, 79 Hawai'i 281, 289, 901 P.2d 481, 489 (1995). Here, the Circuit Court imposed the same terms of imprisonment for each offense, but specified they be served consecutively, rather than the concurrent sentence in the prior trial. Thus, the relevant consideration is whether ordering the service of the same terms of imprisonment consecutively is more severe than a concurrent sentence.

In Keawe, the Hawaii Supreme Court determined that “[a] sentence is ‘[t]he judgment formally pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, imposing the punishment to be inflicted, usually in the form of a fine, incarceration, or probation.’ ” 79 Hawai'i at 289, 901 P.2d at 489 (emphasis omitted) (quoting Black's Law Dictionary 1362 (6th ed. 1990)). There, the court held that resentencing to two consecutive five year terms of imprisonment from two concurrent extended ten year terms of imprisonment was not more severe because the maximum term

of imprisonment was the same irrespective of negative parole implications for the latter. Id. at 290, 901 P.2d at 490.

In State v. Samonte, the Hawai'i Supreme Court held extending the term of years on two counts after retrial violated HRS § 706–609 when the aggregate sentence was life without parole. 83 Hawai'i 507, 543, 928 P.2d 1, 37 (1996). In the first trial, Samonte was sentenced to two ten-year terms of imprisonment for two firearms offenses, to run concurrently with all other sentences. Id. at 511, 928 P.2d at 5. On retrial, Samonte was sentenced to two extended twenty-year terms of imprisonment for the same firearms offenses, to run concurrently with all other sentences. Id. at 513, 928 P.2d at 8. On remand, the court required that Samonte be resentenced to: (1) not more than ten years in each firearms offense and (2) the terms must run concurrently with the remaining counts. Id. at 543–44, 928 P.2d at 37–38.

Applying the definition and principles from Keawe and Samonte, to determine whether a sentence is more severe under HRS § 706–609 we must evaluate each individual sentence as well as the aggregate sentence. Here, while the individual prison terms imposed for each count in the second sentence were identical to those imposed in the first sentence, due to the imposition of consecutive terms in Canosa's second sentence, the maximum possible imprisonment was increased from twenty to thirty years. Therefore, Canosa's second sentence was more severe and violated HRS § 706–609, and we must remand.

*4 Canosa further argues that his sentence constituted cruel and unusual punishment.

Canosa was sentenced to an extended term of twenty years for Burglary in the First Degree. Article I, section 12 of the Hawai'i Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." Generally, a penalty legal under a constitutionally valid sentencing statute is not cruel and unusual. [State v. Iaukea](#), 56 Haw. 343, 359, 537 P.2d 724, 735 (1975). Further, the courts will not interfere with legislative judgment as to the adequate penalty to prevent crime, unless manifestly cruel and unusual. [State v. Solomon](#), 107 Hawai'i 117, 131, 111 P.3d 12, 26 (2005). The supreme court has held an extended sentence for Burglary in the First Degree does not amount to cruel and unusual punishment. See [State v. Melear](#), 63 Haw. 488, 500, 630 P.2d 619, 628 (1981). Reviewing the facts and circumstances of this case, in light of developing concepts of decency and fairness, we conclude Canosa has failed to show his sentence was so disproportionate as to shock the conscience or cause outrage to the moral sense of the community. [State v. Guidry](#), 105 Hawai'i 222, 237, 96 P.3d 242, 257 (2004).

4. The Circuit Court did not plainly err in admitting witness testimony of a prior crime during the post-trial sentencing hearing. For the first time on appeal, Canosa argues the testimony of the complaining witness from a prior conviction was more prejudicial than probative under HRE Rule 403.⁶ Generally, objections to the admission of incompetent evidence not raised at trial are not subject to plain error review. [State v. Metcalfe](#), 129 Hawai'i 206, 225, 297 P.3d 1062, 1081 (2013). Notwithstanding there was no error. The jury in a post-trial sentencing hearing is tasked

with finding facts necessary for imposing an extended term of imprisonment, such as whether a longer term than the statutory maximum is necessary for the protection of the public. [State v. Keohokapu](#), 127 Hawai'i 91, 111, 276 P.3d 660, 680 (2012); see also HRS § 706–662. The witness testified the underlying events that led to a prior Kidnapping conviction, in violation HRS § 707–720 (2014), which was relevant as to whether Canosa posed a danger to the public. Canosa does not dispute the relevance of the testimony or provides argument for why the testimony was unduly prejudicial. As the Hawai'i Supreme Court has noted, "evidence with a capacity for unfair prejudice cannot be equated with testimony simply adverse to the opposing party; for evidence is only material if it is prejudicial in some relevant respect." [Kaeo v. Davis](#), 68 Haw. 447, 454, 719 P.2d 387, 392 (1986). Canosa, therefore, fails to demonstrate the Circuit Court plainly erred in allowing the witness testimony.

⁶ HRE Rule 403 provides,

Although 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 cumulative evidence.

Therefore, we vacate the Circuit Court of the First Circuit's June 27, 2016 Judgment of Conviction and Sentence in CAAP–16–0000497 to the extent it imposes consecutive sentences in violation of HRS § 706–609 and remand for resentencing consistent with this summary disposition order.

All Citations

142 Hawai'i 210, 416 P.3d 931 (Table), 2018 WL 1889511

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V.

STATEMENT OF RELATED CASES

The State is unaware of any related cases pending before the Hawai'i courts or agencies.

NO. CAAP-20-0000650

(CONSOLIDATED NOS. CAAP-20-0000438, CAAP-20-0000506 and
CAAP-20-0000650)

**IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII**

STATE OF HAWAII,	)	CASE NO.1PC091001524
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	1) JUDGMENT OF CONVICTION AND
vs.	)	SENTENCE; NOTICE OF ENTRY, and
	)	MITTIMUS, WARRANT OF
STANLEY CANOSA,	)	COMMITMENT filed June 4, 2020
	)	(CAAP-20-0000438)
Defendant-Appellant.	)	2) AMENDED JUDGMENT OF
	)	CONVICTION AND SENTENCE;
	)	NOTICE OF ENTRY, and AMENDED
	)	MITTIMUS, WARRANT OF
	)	COMMITMENT, filed July 10, 2020
	)	(CAAP-20-0000506)
	)	3) ORDER DENYNG DEFENDANT'S
	)	MOTION TO CORRECT ILLEGAL
	)	SENTENCE PURSUANT TO RULE
	)	35(a) OF THE HAWAII RULES OF
	)	PENAL PROCEDURE FILED 8/24/20,
	)	filed October 21, 2020 (CAAP-20-
	)	0000650)
)	
	)	CIRCUIT COURT OF THE FIRST
	)	CIRCUIT
)	
	)	HONORABLE KAREN T. NAKASONE
	)	JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2021, one (1) copy of the **Answering Brief of the State of Hawai'i**, was served by electronic notification through JEFIS to:

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