

NO. 22892

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
ROLAND KEHANO, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND COURT
(FC-CR. NO. 99-0336(1))

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe, and Foley, JJ.)

Defendant-Appellant Roland Kehano (Kehano) appeals the September 23, 1999, judgment of the Family Court of the Second Circuit (trial court), which found Kehano guilty of:

Count One: Abuse of Family and Household Member, in violation of Hawaii Revised Statutes (HRS) § 709-906¹; and

Count Two: Terroristic Threatening in the Second Degree, in violation of HRS § 707-717(1)².

¹ HRS § 709-906 (Supp. 2000) provides in relevant part as follows:

§709-906 Abuse of family or household members; penalty. (1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member . . .

For the purposes of this section, "family or household member" means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

² HRS § 707-717 (1993) provides in relevant part as follows:

§707-717 Terroristic threatening in the second degree. (1) A person commits the offense of terroristic threatening in the second degree if the person commits terroristic threatening other than as provided in section 707-716.

On appeal, Kehano contends the trial court erred in admitting evidence of a prior conviction for abuse that was not allowed under Hawai'i Rules of Evidence (HRE) Rule 404(b). We disagree with Kehano's contention and affirm the September 23, 1999, judgment.

I. BACKGROUND

Kehano was charged by complaint filed June 2, 1999; the complaint alleged that on June 1, 1999, Kehano physically abused his girlfriend, Ali Barona (Barona).

Barona was called to testify at trial regarding the incident that occurred on June 1, 1999. Her testimony differed significantly from her statements made to responding Police Officer Ronald Parker (Officer Parker) and her statements made

HRS § 707-716 (1993) provides:

§707-716 Terroristic threatening in the first degree. (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:

- (a) By threatening another person on more than one occasion for the same or a similar purpose; or
 - (b) By threats made in a common scheme against different persons; or
 - (c) Against a public servant, including but not limited to an educational worker, who for the purposes of this section shall mean an administrator, specialist, counselor, teacher, or other employee of the department of education, or a volunteer as defined by section 90-1, in a school program, activity, or function that is established, sanctioned, or approved by the department of education, or a person hired by the department of education on a contractual basis and engaged in carrying out an educational function; or
 - (d) With the use of a dangerous instrument.
- (2) Terroristic threatening in the first degree is a class C felony.

June 1, 1999, on a Maui Police Department Abuse of Family & Household Members Victim's Voluntary Statement Form No. 100 (VVS).

At trial, Barona testified that she and Kehano lived together in Kula in the County of Maui. They had two children. Barona and Kehano lived together since 1993 except for a two-year separation that ended in March 1999. They were living together on June 1, 1999. Barona recalled "a little" about an argument that night with Kehano. When asked what they argued about she responded that she "was upset." While Kehano was taking a shower, Barona received a phone call from Kehano's former girlfriend Leslie Pruce (Pruce). Barona stated that she [Barona] was "upset of a few things she [Pruce] had told me [Barona] on the phone." Barona began kicking the bathroom door. Kehano came out of the bathroom, and Barona let him know Pruce called. Later she heard Kehano on the phone with Pruce, although she did not know whether he called Pruce or Pruce called back a second time. Barona got "more upset." She yanked the phone from its jack in the wall and grabbed the cordless phone away from Kehano. Kehano stood up to grab the phone back from her. Barona then started attacking him with the cordless phone. Kehano grabbed her to stop her from attacking him because she was hitting him with the cordless phone. Kehano told her to cool down and stop. Barona

would not stop and kept yelling. Kehano told her to leave for the rest of the night and cool down.

Barona testified that after the argument she left the residence and drove to her friend Sarina's house. "Out of anger," Barona called the police from Sarina's house. When asked whether she gave the police a statement, Barona stated that "I don't recall what I told them[.]"

Barona testified that she remembered speaking with Officer Parker. She did not remember telling Officer Parker that Kehano hit and kicked her. She did not remember telling Officer Parker that she curled up in a ball on the floor to protect her body or that Kehano grabbed her by her neck from behind, in a choke type hold, for a few seconds before letting her go. She did not remember telling Officer Parker that Kehano went into the kitchen, grabbed a knife, and returned to the living room as she was getting up. She did not remember telling Officer Parker that Kehano came up to within two feet of her with the knife and yelled, "[g]et the fuck out."

The State introduced into evidence the VVS that Barona acknowledged writing out and signing when Officer Parker responded to her call. The VVS concerned the argument between Kehano and Barona on June 1, 1999. Barona placed a check mark in the space after question 1, "[w]ere you physically hurt, harmed, or abused?" Barona indicated "6/1/99" in response to the next

question, "[i]f yes, when did this occur?" In response to question 2, "[d]escribe how you were physically hurt, harmed or abused," Barona wrote: "[p]unched, kicked, tried to twist neck, lifted knife next to me and thought he would stab me." Question 3 asked her to identify "[w]hat part(s) of your body hurts and/or has injuries?" Barona wrote: "[l]eft arm still hurts, head hurt when he punched me." Question 4 of the VVS asked "[d]id you do anything to Roland Kehano, Jr. BEFORE [he] hurt you?" Barona wrote, "[h]e went after me, so in self-defense I had my phone in my hand and blocked his hand [with] the phone." In response to question 5, "[d]id you do anything AFTER he/she hurt you?," Barona wrote, "leave." At trial, Barona stated that "[t]hese [statements] are all lies." The State elicited the following testimony at trial:

Q: [Deputy Prosecuting Attorney] [Barona], has Mr. Kehano ever hurt, harmed or abused you in the past?

A: [Barona] No.

Q: Last January/February, 1998, did Mr. Kehano strike you?

A: I can't recall that incident.

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Q: Do you remember Mr. Kehano going to jail for hitting you?

A: Yes.

Following a bench trial, Kehano was convicted on both counts and sentenced to serve one year of imprisonment for each

count, sentences to be served concurrently, with two hours credit given for time served. The trial court stayed the sentence pending appeal.

II. STANDARDS OF REVIEW

A. Admissibility of Evidence

"Different standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard." State v. Staley, 91 Hawai'i 275, 281, 982 P.2d 904, 910 (1999). "Evidentiary decisions based on HRE Rule 403, which require a 'judgment call' on the part of the trial court, are reviewed for an abuse of discretion. The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." Id. (citations and internal quotation marks omitted).

III. DISCUSSION

On appeal, Kehano contends the trial court denied him a fair trial by admitting evidence of a prior conviction for abuse

that was not allowed under HRE Rule 404(b). Specifically, Kehano contends that where evidence of a prior incident of abuse is introduced to show the "context of the relationship" between a victim and an alleged abuser when the victim recants his/her story at trial, an expert witness must be called to testify to the relevance of the prior abuse and offer the nature of the relationship as a possible explanation for the recantation. In addition to challenging the relevance of such evidence absent an expert, Kehano contends that if relevance is established, its prejudicial impact far outweighs its probative value in this case. Kehano contends that such error entitles him to a new trial.

A. Alleged Errors in Admitting Evidence

1. Relevancy of prior incidents of abuse.

On June 1, 1999, Barona called police from her girlfriend Sarina's house to report an incident of abuse. When police arrived, Barona wrote out and signed a VVS in which she identified Kehano as physically hurting, harming, or abusing her and allowed photographs taken of her observable injuries. Prompted by line 6 of the VVS, "[i]s there anything else you would like to add?" Barona stated that "he went to jail for abuse w/ me last Jan/Feb 1998. Struck me before and did not call police." When Barona was confronted with the statements set

forth in the VVS at trial, she stated that "[t]hese are all lies."

Kehano contends the trial court erred in allowing the State to question Barona regarding these prior incidents of abuse for which Kehano went to jail in January/February 1998, and he argues that under HRE 404(b) such evidence should have been precluded.

Hawai'i Rules of Evidence Rule 404(b) provides:

Rule 404 Character evidence not admissible to prove conduct; exceptions; other crimes.

. . . .

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

Kehano contends that the Hawai'i Supreme Court set forth a requirement for allowing prior incidents of violence between a victim and abuser to show the "context of the relationship" where such relationship is offered as a possible explanation for a victim's recantation of abuse at trial. Kehano asserts that under State v. Clark, 83 Hawai'i 289, 926 P.2d 194 (1996), the State is required to call an expert in domestic violence to explain (1) the relevance of the prior abuse and (2)

how the relationship may serve as a possible explanation for the victim's recantation at trial. Kehano misstates the holding in Clark. In Clark, the defendant-appellant (Clark) challenged the admissibility of testimony by Wendy Mow-Taira (the expert), who had never met nor evaluated the victim or abuser in that case. The expert's testimony was being offered to the jury to aid them in understanding the psychology of domestic abuse, where victims often recant their testimony at trial in order to protect their abusers. Clark characterized the expert's testimony as "junk science," and stated that absent an evaluation and diagnosis of the victim in that case, any testimony offered by the expert was irrelevant and "nothing more than unproved generalizations," which would allow the jury to speculate whether or not the victim would lie under oath because she suffered from domestic abuse. Id. at 298, 926 P.2d at 203. Relying on this court's holding in State v. Cababag, 9 Haw. App. 496, 850 P.2d 716, cert. denied, 74 Haw. 652, 853 P.2d 542 (1993), the Hawai'i Supreme Court recognized that an expert's testimony regarding "battered housemate/spouse syndrome is relevant specialized knowledge that is unknown to the average juror and will aid the average juror in determining the credibility of the [alleged battered housemate/spouse's] testimony." Clark, 83 Hawai'i at 299, 926 P.2d at 204 (quoting Cababag, 9 Haw. App. at 497, 850 P.2d at 717).

The Hawai'i Supreme Court in Clark concluded that the expert's testimony was admissible and it was proper to allow the jury to determine whether the behavior of the victim in that case was consistent with the recantation phenomenon described by the expert. Clark did not require that an expert on domestic violence be called to explain the relevance of prior abuse and how the relationship may serve as a possible explanation for the victim's recantation at trial. Clark held that "where a victim recants allegations of abuse, evidence of prior incidents of violence between the victim and the defendant are relevant to show the trier of fact the context of the relationship between the victim and the defendant, where . . . that relationship is offered as a possible explanation for the victim's recantation." Id. at 302, 926 P.2d at 207.

Barona called the police to report that she was abused by Kehano on June 1, 1999. She made statements on that day to the police regarding a prior incident of violence against her by Kehano. Barona then recanted these statements at trial claiming that she lied to the police. The statements made on the VVS regarding a prior incident of abuse provided an explanation for her recantation at trial. The trial court therefore properly admitted the prior incident to show the context of her relationship with Kehano as an explanation for her recantation.

2. HRE Rule 403 Balancing Test.

Kehano contends the evidence of his prior conviction for abuse in January/February 1998 is "far more prejudicial than probative of any fact at issue." Once the trial court determines that evidence of prior incidents of abuse is relevant, "the court must then balance the probative value of the relevant evidence against its prejudicial impact." Clark, 83 Hawai'i at 302, 926 P.2d at 207 (internal quotation marks omitted).

Hawai'i Rules of Evidence Rule 403 provides:

Rule 403 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. 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.

The Hawai'i Supreme Court has recognized that "[t]he responsibility for maintaining the delicate balance between probative value and prejudicial effect lies largely within the discretion of the trial court." State v. Iaukea, 56 Haw. 343, 349, 537 P.2d 724, 729 (1975). However, in bench trials such as this, "it is well established that a judge is presumed not to be influenced by incompetent evidence." State v. Vliet, 91 Hawai'i 288, 298, 983 P.2d 189, 199 (1999) (internal quotation marks omitted). See Santos v. Perreira, 2 Haw. App. 387, 394, 633 P.2d 1118, 1124 (1981) (presumption in a non-jury trial that all incompetent evidence was disregarded and the issues were

determined upon an appropriate consideration of the competent evidence only); State v. Antone, 62 Haw. 346, 353, 615 P.2d 101, 107 (1980) (judge is presumed to be uninfluenced by incompetent evidence).

In arguing his contention that evidence of his prior conviction for abuse should have been precluded, Kehano relies on the Hawai'i Supreme Court's decision in State v. Castro, 69 Haw. 633, 756 P.2d 1033 (1988), where the court decided that the trial court had abused its discretion in allowing evidence of prior acts of violence between the defendant and his girlfriend because the record presented no dispute as to defendant's identity. The Castro court did recognize instances of need, stating:

In deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

Id. at 644, 756 P.2d at 1041 (citing E.W. Cleary, McCormick on Evidence § 190 (3d ed. 1984)).

Under Castro, the consideration of "the need for the evidence" as a legitimate balancing factor under Rule 404(b), allowing the trial court to consider prior acts of violence between Kehano and Barona, is warranted to explain "the context of the relationship" where the nature of the relationship is a possible explanation for Barona's recantation at trial. We

conclude that the trial court did not abuse its discretion in determining that the prior conviction for abuse assisted in deciding whether Barona's testimony at trial was truthful.

IV. CONCLUSION

The trial court's September 23, 1999, judgment in this case is affirmed.

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

On the briefs:

Kevin A. Souza,
Deputy Public Defender,
for Defendant-Appellant.

Chief Judge

Richard K. Minatoya,
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Associate Judge

Associate Judge