

NO. 23119

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
THOMAS MCVEA, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 99-2852)

MEMORANDUM OPINION

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

On November 8, 1999, Defendant-Appellant Thomas McVea (McVea) was charged by complaint with Harassment in violation of Hawai'i Revised Statutes (HRS) § 711-1106(1)(a) (Supp. 2000). A bench trial before Judge I. Norman Lewis of the Family Court of the First Circuit (the family court) was held on December 29, 1999. McVea was found guilty as charged, sentenced to six months of probation, and ordered to pay a Criminal Injuries Compensation Commission fee of \$25.00 and to undergo domestic violence intervention/anger management class. Judgment was entered on December 29, 1999.

On appeal, McVea contends the family court erred when it denied both his oral motion to dismiss the complaint and his written Motion for New Trial based on newly discovered evidence.

We disagree with McVea's contentions and affirm the December 29, 1999, judgment of the family court.

I. BACKGROUND

Rodanelia McVea (Rodanelia) testified at trial that she and McVea had been married for five years, but they had been separated for the last two months. When Rodanelia returned to the house on October 27, 1999, to collect her belongings, she was trying to move out of the house in which she, her son, McVea, and some roommates had been living. Rodanelia went to the house three times on October 27, 1999, the third time with a police escort. The third time, McVea, the landlord, and two roommates, were at the house. The police asked McVea to let Rodanelia into the bedroom. Rodanelia followed McVea to the bedroom while the landlord and roommates remained in the living room and the police remained outside.¹ At the bedroom door, McVea pushed the door against Rodanelia's left leg, she pushed back, and then McVea kicked Rodanelia in the left leg. Rodanelia collected her things and left. She did not inform the police at that time about McVea kicking her; however, when a police officer came to her home on November 2, the officer asked her about the bruises on her leg. When she explained to the officer how she got the bruises, the

¹ At the hearing on McVea's Motion for New Trial, Rodanelia testified that she did not remember the total number of police officers present on October 27. However, in response to the question, "When you say they stay outside, can you describe that, outside of the house?," Rodanelia replied that one police officer was watching television and one officer was speaking with the landlord inside the house, and a third (or perhaps more) remained outside the house.

officer photographed her leg and charges were filed against McVea.

Defense witness Emmerine Noland (Noland) testified that he was McVea's roommate. Noland returned home from work on October 27 around 6:00 p.m. and McVea was there. He stated that Rodanelia arrived at the house between 7:30 and 8:30 that evening, escorted by two police officers. Noland never saw McVea and Rodanelia struggle nor heard the sounds of someone being hit, expressing pain, or crying.

Defense witness Florante Sebastian (Sebastian), the landlord of the property, testified that he was cleaning his yard on the morning of October 27, when Rodanelia came to the house and asked him for the key to McVea's bedroom. He told Rodanelia that he could not give her the key without McVea's permission, so Rodanelia went into the house and got some of her things from the living room. Sebastian testified that McVea arrived home between 5:00 and 6:00 p.m. on the day of the incident, and that Rodanelia arrived accompanied by two police officers between 7:30 p.m. and 8:00 p.m. Sebastian did not see McVea and Rodanelia struggle, nor hear Rodanelia accuse McVea of hurting her, nor hear Rodanelia complain that she had been injured.

Defense witness Police Officer Kaloheaulani Kawaa (Officer Kawaa) testified that he was assigned to monitor the situation while Rodanelia removed her belongings on October 27.

Officer Kawaa was sent to McVea's house between 7:00 and 8:00 p.m. on October 27, but he did not meet up with "either party" on that date. He was sent out again on October 28 to stand by while Rodanelia picked up some personal items, and he testified that Rodanelia did not indicate to him that she had been abused by McVea on October 27.

McVea testified that he caught a ride home from work with a co-worker on October 27 and got home around 6:00 p.m.² He testified that between 8:00 and 8:30 p.m. the police came to the door with Rodanelia and his son. The police asked McVea to open the bedroom door for Rodanelia, and he complied. One officer stood in the doorway the whole time and another outside by the steps. McVea testified that no physical confrontation occurred between him and Rodanelia that evening. McVea thought the wall clock in his bedroom was working on October 27, because "it's still working, it's still ticking."

On November 8, 1999, McVea was charged by complaint with intent to harass, annoy, or alarm Rodanelia McVea, by striking, shoving, kicking, or otherwise touching her in an offensive manner or subjecting her to offensive physical contact, in violation of HRS § 711-1106(1)(a). On November 26, 1999, pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 12.1(a),

² Alice Chan, the vice president of the company where McVea worked, testified that she gave McVea a ride and dropped him off at his house around 6:00 p.m.

McVea provided notice to the State of his intent to rely on the defense of "alibi." On November 30, 1999, pursuant to HRPP Rule 12.1(b), the State responded, in relevant part:

The offense is alleged to have been committed at approximately 5:20 p.m. on October 27, 1999, at the location of 2008 Puukapu Street, Honolulu, Hawaii [Hawai'i] 96819.

At a December 3, 1999, return hearing on McVea's subpoena duces tecum to the Honolulu Police Department (HPD) Custodian of Records, defense counsel represented to the family court that he had received the subpoenaed documents from HPD. Defense counsel then gave the State in open court copies of those documents, which included the HPD "Complaint History Detail" (computerized logs reflecting that police officers escorted Rodanelia to the residence to pick up belongings on 10/27/99, 10/28/99, 10/29/99, and 10/30/99). These logs reflected that Rodanelia's initial call to the police occurred at 7:17 p.m. on October 27, 1999.

On the morning of trial, prior to its starting, Rodanelia was in the witness room and the prosecutor asked her whether the incident at issue occurred in the day time or night time. Rodanelia informed the prosecutor that the clock (in McVea's bedroom) indicated the time was 5:30, but that it was dark outside. The prosecutor informed defense counsel and the family court that Rodanelia may have been mistaken in her statement to the police that the harassment offense occurred at

approximately 5:20 p.m. on October 27. The prosecutor, defense counsel, and the court had a colloquy in which the prosecutor stated that Rodanelia indicated the incident happened with police escorting her there and that a defense exhibit (an HPD call log) shows HPD received a call from Rodanelia requesting an escort to her house at 7:17 p.m.

Defense counsel moved the family court to dismiss the case against McVea on the ground that this new information (that the offense occurred later than 5:20 p.m.) violated McVea's rights to due process and a fair trial and unfairly surprised the defense on the morning of trial. Defense counsel represented that she and McVea had prepared his case based upon Rodanelia's statement in the police report that the incident occurred at 5:20 p.m., and that "we got an alibi for that time."

The prosecutor argued that the severe sanction of dismissal was not provided for under the rules (HRPP) and that any prejudice incurred by the defense in preparing its case could be cured by a continuance.

The family court found the State did not intentionally mislead the defense with respect to the information about the actual time of the offense. The court denied the motion for dismissal and offered to continue the case to allow the defense to further prepare. Defense counsel replied, "we are not seeking

a continuance," and indicated they wished to proceed to trial. The family court found McVea guilty.

On January 7, 2000, McVea filed a written Motion for New Trial based, in part, on the ground that "newly discovered material evidence exists which could not have been reasonably discovered prior to trial." A hearing on the Motion for New Trial was held on January 26, 2000.

At the hearing, defense witness Police Officer Mikel Kunishima (Officer Kunishima) testified that he and his trainer, Officer Dela Cruz, escorted Rodanelia to McVea's home at about 7:24 p.m. on the evening of October 27, 1999. No other officers were present at the home that evening. While Officer Kunishima escorted Rodanelia up the stairs and into the house, Officer Dela Cruz remained on the stairs. While Rodanelia obtained her belongings, Officer Kunishima stood inside the front door facing inside. He did not see any physical confrontation between Rodanelia and McVea.

Despite this testimony, the family court found the State had discovered the time discrepancy just prior to commencement of trial and thus did not engage in improper conduct. The court denied the Motion for New Trial.

II. STANDARDS OF REVIEW

A. Notice of Alibi

We review the family court's decision allowing the State to amend its response to McVea's notice of alibi for an abuse of discretion. State v. Davis, 63 Haw. 191, 198, 624 P.2d 376, 380-81 (1981).

B. Motion for New Trial

We review the family court's denial of a motion for a new trial for an abuse of discretion. State v. McNulty, 60 Haw. 259, 267-68, 588 P.2d 438, 445 (1978), overruled on other grounds, Raines v. State, 79 Hawai'i 219, 225, 900 P.2d 1286, 1292 (1995).

C. Credibility of Witnesses

"It 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. Stocker, 90 Hawai'i 85, 90, 976 P.2d 399, 404 (1999) (brackets and internal quotation marks omitted).

III. DISCUSSION

A. The Family Court Did Not Abuse Its Discretion in Denying McVea's Motion to Dismiss Complaint.

McVea argues the family court erred when it allowed the State to change the time the offense was committed in its response to McVea's notice of alibi and when it denied McVea's

motion to dismiss complaint. McVea maintains the State's response to his notice of alibi should have been treated as a bill of particulars and that the State should have been "limited to proving its case based on the date and time alleged" in its response.

The State correctly points out that a bill of particulars is designed to inform a defendant of the specifics of the charge brought against him. Thus, the "primary purpose[] of a bill of particulars . . . [is] to enable a defendant to prepare for trial and to prevent surprise." State v. Valenzona, 92 Hawai'i 449, 452, 992 P.2d 718, 721 (App. 1999). "A bill of particulars may be amended at any time subject to such conditions as justice requires." HRPP Rule 7(g). More on point, "[f]or good cause shown, the court may grant an exception to any of the requirements of [the alibi] rule." HRPP Rule 12.1(f). As the Hawai'i Supreme Court stated in Davis:

The notice-of-alibi rule is not rigid and inflexible; it gives to the trial court the discretion, upon a showing of good cause, to make exceptions to the rule so as to balance the interests of both the government and the defendant to give both an opportunity to discover on equal terms.

Id. at 198, 624 P.2d at 380-81.

The defense had in its possession the complaint, which set forth the date of the alleged offense. On December 3, 1999, the defense had in its possession the HPD "Complaint History Detail" police log, which stated the date, time (7:17 p.m.), and purpose of Rodanelia's request for police assistance and escort

to McVea's home. All defense witnesses (including McVea) testified that Rodanelia arrived with the police on the date of the alleged offense between 7:30 and 8:30 p.m. All defense witnesses also testified that they did not see any physical confrontation between McVea and Rodanelia. Prior to trial, McVea learned Rodanelia may have been mistaken in her statement to the police that the harassment occurred at approximately 5:20 p.m. The family court offered McVea a continuance, and McVea's counsel replied, "Your Honor, we are not seeking a continuance," and stated that the defense wished to proceed with the trial.

Any surprise or prejudice to defendant was remedied by the family court's offer of a continuance to McVea. Hawai'i Rules of Penal Procedure Rule 12.1 required no more. The family court did not abuse its discretion in allowing the State to correct the time in its response to McVea's "Notice of Alibi."

B. The Family Court Did Not Err by Denying McVea a New Trial.

McVea argues that the family court erred in denying his Motion for New Trial because (1) material evidence (that police officers were present at the time of the incident) came out for the first time at trial; (2) such evidence could not have been discovered through the discovery materials the defense received; and (3) such evidence would have probably changed the result reached at trial because it would have contradicted Rodanelia's testimony that the two officers present at the scene were inside

the house. The family court denied McVea's Motion for New Trial and adopted the findings of fact and conclusions of law proposed by the State.

The Hawai'i Supreme Court has ruled that a motion for a new trial based upon newly discovered evidence will be granted only if all of the following factors are met:

(1) the evidence has been discovered after trial; (2) such evidence could not have been discovered before or at trial through the exercise of diligence; (3) the evidence is material to the issues and not cumulative or offered solely for the purposes of impeachment; and (4) the evidence is of such a nature as would probably change the result of a later trial.

McNulty, 60 Haw. at 267-68, 588 P.2d at 445 (emphasis added).

Prior to trial, defense counsel was in possession of police call logs that correctly showed the time Rodanelia called for a police escort to get her belongings from the home she previously shared with McVea. Additionally, this information also came out at trial, not after.

McVea argues the evidence that police officers were present and not outside at the time of the incident was needed to impeach Rodanelia, which is contrary to the factors considered in a motion for a new trial as stated in McNulty.

Finally, the evidence McVea offered would probably not have changed the result of a later trial. Officer Kunishima testified at the hearing on the Motion for New Trial before the same judge who presided at trial. Officer Kunishima gave essentially the same testimony other defense witnesses provided

at trial. Officer Kunishima's testimony would have had no impact on the issue of whether McVea kicked Rodanelia. Officer Kunishima, as in the case of the defense witnesses, did not see (and was not in a position to see) McVea kick Rodanelia. At the conclusion of the evidence the family court stated:

The Court has heard the evidence presented by the State and the defense. The State by and through [its] witnesses, the defendant by and through [his] witnesses and on his own behalf. In this particular case, yes, it does come down to credibility, and the Court fully understands that when it comes to credibility, people tend to recall things in the way that they are best able to do so consistent, of course, (indiscernible).

In this particular case, the Court will find from the evidence that the State has proven its case beyond a reasonable doubt. Accordingly, find the defendant guilty as charged.

"It 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." Stocker, 90 Hawai'i at 90, 976 P.2d at 404 (brackets and internal quotation marks omitted).

A denial of a motion for a new trial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion. McNulty, 60 Haw. at 268, 588 P.2d at 445. The family court did not abuse its discretion in denying McVea's Motion for New Trial.

IV. CONCLUSION

The December 29, 1999, judgment of the family court is affirmed.

DATED: Honolulu, Hawai'i, July 9, 2001.

On the briefs:

Adrienne N. Heely,
Deputy Public Defender,
for defendant-appellant.

Chief Judge

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge