NOT FOR PUBLICATION

NO. 24535

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
WALLACE WAYNE RODRIGUES, aka "Ditto", Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CASE NO. 98-1711)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Watanabe and Lim, JJ.)

Wallace Wayne Rodrigues, aka "Ditto" (Rodrigues), appeals the July 11, 2001 judgment of the circuit court of the first circuit[1] that convicted him, upon a jury's verdict in a severed trial of Count I of the indictment, of murder in the second degree, a violation of Hawaiʻi Revised Statutes (HRS) § 707-701.5 (1993).[2]

Upon a sedulous review of the record and the briefs submitted by the parties, and giving due consideration to the arguments advanced and the issues raised by the parties, we

[1] The Honorable Dexter D. Del Rosario, judge presiding.

[2] Hawaii Revised Statutes (HRS) § 707-701.5 (1993) provides in pertinent part that "a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person."

resolve Rodrigues' points of error on appeal, as follows:

1. Rodrigues first argues that the court erred when it denied his second motion *in limine* and thereupon allowed State's witness Kellie-Rae Key (Key) to testify at trial that she saw Rodrigues and his alleged victim, Lorenzo Young (Young), in Young's car as the car sped by her at fifty-five miles per hour in the predawn twilight shortly before the murder. We disagree.

> When the defendant challenges admissibility of eyewitness identification on the grounds of impermissibly suggestive pre-trial identification procedure, he or she has the burden of proof, and the court, trial or appellate, is faced with two questions: (1) whether the procedure was impermissibly or unnecessarily suggestive; and (2) if so, whether, upon viewing the totality of the circumstances, such as opportunity to view at the time of the crime, the degree of attention, and the elapsed time, the witness's identification is deemed sufficiently reliable so that it is worthy of presentation to and consideration by the jury.

State v. Okumura, 78 Hawai'i 383, 391, 894 P.2d 80, 88 (1995) (brackets, citation and block quote format omitted). Key knew both persons well. She had gone to school with Rodrigues and Young was her sister's boyfriend. Key was also familiar with Young's car, and in fact was hoping at the time that he would drive by and give her a lift. Although Young's car drove by at a high rate of speed, it passed only about ten feet away from Key. And although it was twilight, Key testified that the natural and artificial light available at the time and place was sufficient for identification. Key also maintained that she was sure of her identifications. In light of the foregoing, we conclude the

court did not err in ruling that "the concerns expressed by the defense are matters for cross-examination and this would go to the weight of the evidence and not to its admissibility."

2. Rodrigues next contends the court erred when it denied his request for a special jury instruction on eyewitness identification. Rodrigues does not argue in this connection that the court abused its discretion under the particular circumstances of this case, but that a special jury instruction should be required in every case in which eyewitness identification is at issue:

> Under the standards applied to jury instructions generally, [Rodrigues] would have been entitled to such an instruction. In the absence of any justification for the disparate treatment of instructions relating to a defense of misidentification, the law regarding eyewitness identification instructions represented by State v. Vinge, 81 Hawai'i at 316-317 should be overruled and the general rules pertaining to jury instructions should be applied to eyewitness identification defenses.

Opening Brief at 24-25. What Rodrigues in essence invites us to do -- overrule the Hawai'i Supreme Court's holding in State v. Vinge, 81 Hawai'i 309, 316, 916 P.2d 1210, 1217 (1996) ("The giving of special instructions on identification has been regarded as within the discretion of the trial judge or superfluous in the light of adequate general instructions." (Citations and internal quotation marks omitted.)) -- we cannot do. And under Vinge, our independent review of "all aspects of the trial" satisfies us that, in light of the "the opening statements, the cross-examination of prosecution witnesses, the

arguments to the jury, and the general instructions given by the court, . . . the jury's attention was adequately drawn to the identification evidence." Id. (citation and block quote format omitted).

3. Rodrigues argues that the court erred when it denied his third motion *in limine* and thereupon allowed State's witness Bruce Adam Florence (Florence) to testify at trial that he saw Rodrigues with a gun several days before the murder.

Rodrigues first asserts that Florence's testimony was evidence of a prior bad act that is "absolutely prohibited." Opening Brief at 26. We disagree. Although Hawaii Rules of Evidence (HRE) Rule 404(b) (Supp. 2002) provides that "[e]vidence 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 is "admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of . . . opportunity . . . [and] identity," id., and the court so concluded correctly in denying Rodrigues' third motion *in limine*.

Rodrigues next avers that Florence's observation was irrelevant because Florence could not positively identify the type of gun he saw nor tie it to the murder weapon. However, Florence testified that the gun was a semiautomatic resembling a

HI-Standard .22 caliber semiautomatic firearm, one of three different guns shown to him by a detective. Other State's witnesses tied the HI-Standard .22 caliber model to a handgun clip found the day of the murder on a nearby golf course; to shell casings, a holster and a bullet found at the scene of the crime; and to bullet fragments recovered from Young's body. Florence's testimony was also consistent with Rodrigues' admission that he used a .22 caliber firearm to shoot Young.

Hence, Florence's testimony was unquestionably relevant. HRE Rule 401 (1993) ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Rodrigues nonetheless insists that Florence's testimony "did not add reliability to the quantum of proof as to any material element of the offense charged." Opening Brief at 26. It is elementary, however, that generally, "[a]ll relevant evidence is admissible," HRE Rule 402 (1993), and that to be admissible, relevant evidence need not be conclusive. State v. Irebaria, 55 Haw. 353, 356, 519 P.2d 1246, 1248-49 (1974).

Rodrigues also argues that Florence's testimony was more prejudicial than probative. HRE Rule 403 (1993) ("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."). Again, we disagree. It is well established that

> [i]n 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.

State v. Castro, 69 Haw. 633, 641, 756 P.2d 1033, 1041 (1988) (brackets in the original; citation and block quote format omitted). As discussed, the testimony was relevant and corroborative, and the need for it was great, as there was no eyewitness to the shooting, no physical evidence otherwise linked Rodrigues to the crime, and no other competent evidence could show that Rodrigues possessed a firearm at the relevant time. Moreover, the court instructed the jury that Florence's testimony could not be used to infer bad character, but could be "considered . . . only on the issue of identity, and for no other purpose[,]" and we presume the jury complied. State v. Amorin, 58 Haw. 623, 629, 574 P.2d 895, 899 (1978). On balance, the probative value of Florence's testimony was not "substantially outweighed by the danger of unfair prejudice[.]" HRE Rule 403.

4. Rodrigues contends the court erred in not allowing him to cross-examine Samson Fernandez, Jr. (Fernandez) about threats Fernandez allegedly made to Clayton Pirtle (Pirtle). We disagree. Fernandez, the State's star witness, testified on direct that Rodrigues bragged to him about killing Young with a .22 caliber firearm. Thereupon, counsel for Rodrigues cross-examined Fernandez extensively about, *inter alia*, the various benefits he received under his agreement with the State concerning his testimony against Rodrigues, a cross-examination spanning more than sixty pages of transcript. This cross-examination revealed, in one of many particulars, that potential charges of attempted murder, terroristic threatening and kidnapping arising out of the Pirtle incident, crimes carrying prison terms of life, five years and twenty years, respectively, were not pursued by the State as part of the agreement. Rodrigues was thus able to fully press what he calls his "attack on [Fernandez's] credibility with evidence of bias, interest or motive[,]" Opening Brief at 27, and the court did not abuse its discretion in this connection. State v. White, 92 Hawai‘ 192, 205, 990 P.2d 90, 103 (1999) ("When the trial court excludes evidence tending to impeach a witness, it has not abused its discretion as long as the jury has in its possession sufficient information to appraise the biases and motivations of the

witness." (Citations, internal quotation marks and block quote format omitted.)) If Rodrigues is complaining that he was not allowed to challenge Fernandez's statement to the police -- that he had ceased his life of crime -- with the Pirtle allegations and thereby impeach Fernandez's general credibility, any error was merely collateral to the relevant scope of the cross-examination, id., and harmless beyond a reasonable doubt in the overall context of the trial. State v. Holbron, 80 Hawai'i 27, 32, 904 P.2d 912, 917 (1995).

5. Rodrigues next argues that the court erred in granting motions *in limine* brought by the State, thus excluding testimony from Anthony Rabellizsa (Rabellizsa) that Fred Mahuka (Mahuka) admitted killing Young. This argument lacks merit. Mahuka's statement to Rabellizsa was inadmissible hearsay, HRE Rules 801 (1993) & 802 (1993). It was not within the statement-against-interest hearsay exception because Mahuka was not "unavailable as a witness[.]" HRE Rule 804(b)(3) (1993). Rodrigues' assertion that Mahuka was rendered unavailable by the State's motion *in limine* seeking to bar witnesses who would assert the privilege against self-incrimination is erroneous, not only in substance but because the State withdrew that motion *in limine*. Even assuming, *arguendo*, that Mahuka was unavailable, Rabellizsa's testimony would remain inadmissible because it

lacked "corroborating circumstances [that] clearly indicate the trustworthiness of the statement[.]" HRE Rule 804(b)(3). See also State v. Christian, 88 Hawai'i 407, 431, 967 P.2d 239, 263 (1998); State v. Bates, 70 Haw. 343, 349, 771 P.2d 509, 513 (1989). Rodrigues' overarching assertion in this respect, that it was unfair to exclude Rabellizsa's testimony on reliability grounds where the testimonies of the State's key witnesses were unreliable, is an apples-and-oranges argument without basis in law. We conclude the court's exclusion of Rabellizsa's testimony was not an abuse of discretion. Christian, 88 Hawai'i at 418, 967 P.2d at 250.

6. Rodrigues' penultimate point of error is that the court erroneously sustained the State's objection to the following portion of his counsel's closing argument:

> The other thing about Samson Fernandez is this. You know, he's saying that he's standing there listening and Rodrigues is just telling him about this thing about Lorenzo Young. He doesn't ask any questions and he's just listening. I suggest to you, ladies and gentlemen, he said that because he knows that he can't put in any more details than the few things he heard and what is in the physical evidence that is clearly out there in the community.
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> [DEPUTY PROSECUTING ATTORNEY (DPA)]: Your Honor, we're going to object to the personal opinion.
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> THE COURT: Sustained.

This point is unavailing. The court did not abuse its discretion in preventing defense counsel's assertion of his personal knowledge or opinion of Fernandez's thought processes. Hawai'i Rules of Professional Conduct Rule 3.4(g) (West 2001); State v.

Adams, 61 Haw. 233, 233-34, 602 P.2d 520, 520-21 (1979). And in any event, defense counsel was allowed to argue comprehensively and at length that Fernandez's knowledge of the murder came not from Rodrigues, but from rumors being bruited about in the community, such that any error was harmless beyond a reasonable doubt. Holbron, 80 Hawai'i at 32-33, 904 P.2d at 917-18.

7. Finally, Rodrigues asserts that the DPA committed prosecutorial misconduct in two instances. First, Rodrigues contends the DPA improperly elicited testimony from Fernandez that Rodrigues was involved in other deaths:

> Q. Did [Rodrigues] bring up the subject of Lorenzo Young when he made a reference to two deaths that had occurred on [Lionel Sequin's] property [(where the conversation took place)] in 1990?
> A. Yes.

We disagree. This was not testimony that Rodrigues was involved in the two deaths. Second, Rodrigues avers that the DPA's rebuttal argument improperly commented upon Rodrigues's criminality:

> But remember we didn't pick Fernandez as a witness in this case. The police didn't pick Fernandez as a witness in this case. It was the defendant right over there who picked Fernandez as a witness in this examination [(sic)] because, remember, that's his friend. As bad as we might think Fernandez is, that is his friend, the person he hangs out with, the person he goes all over the place with.
>
> And [defense counsel in his closing argument] wants to say Mr. Fernandez knows all the criminals in Waianae. He hangs out with Rodrigues. What does that say about Rodrigues? Fernandez was there when he confessed. He's not going to confess to someone who's a choir boy or an Eagle scout or a respectable member of the community. He's going to confess to a murder to his good friend, Samson Fernandez because Samson Fernandez has just pulled 12 years of hard time and now he wants to impress Fernandez with his own misdeeds. And so he brags about killing Lorenzo Young.

Here again, we disagree with Rodrigues' interpretation. The fair import of the DPA's remarks was to explain why Rodrigues would confess his murderous past to Fernandez in particular. Accordingly, the remarks were not improper. And the DPA's reference to criminal associations was in direct, relevant and legitimate response to defense counsel's numerous references in closing argument to Fernandez's criminality. See, e.g., State v. Clark, 83 Hawai'i 289, 304-305, 926 P.2d 194, 209-210 (1996). Hence, we cannot agree with Rodrigues that the DPA committed prosecutorial misconduct.

Therefore,

IT IS HEREBY ORDERED that the July 11, 2001 judgment of the court is affirmed.

DATED: Honolulu, Hawai'i, July 23, 2003.

On the briefs:

Michael Tanigawa (Char Sakamoto Ishii Lum & Ching), for defendant-appellant.

Chief Judge

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

Associate Judge

Associate Judge