

NO. 26265

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

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STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee, v.
ROYNES DURAL, aka Eric Dural and Bull, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-2791)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., and Lim, J.; with Nakamura, J.,
concurring separately)

Roynes Joseph Dural II, aka Eric Dural and "Bull"
(Defendant), appeals the November 3, 2003 judgment of the Circuit
Court of the First Circuit (circuit court)¹ that convicted him,
upon a jury's verdict and as charged, of committing one count of
sexual assault in the first degree and four counts of sexual
assault in the third degree upon the then twelve-to-thirteen-
year-old complaining witness (Complainant).

After a meticulous review of the record and the briefs
submitted by the parties, and giving careful consideration to the
arguments advanced and the issues raised by the parties, we
resolve Defendant's points of error as follows:

1. During pretrial hearings on motions *in limine*,

¹ The Honorable Karen S.S. Ahn presided.

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Defendant established that his primary defense at trial would be that Complainant's mother (Mother), who previously had been intimately involved with Defendant, influenced Complainant into making the sexual assault allegations against him:

Yes, [Defendant broke off his relationship with Mother] and she was so upset that she tried to kill herself. She was so upset about this situation that she tried to kill herself. To say that -- certainly, that's relevant in this type of situation where our defense is, and [the prosecutor's] going to point it out as much as anybody else that our defense is that [Complainant] is under the influence of [Mother]. She's under [Mother's] thumb here. And, remember, Your Honor, remember, . . . it wasn't [Complainant] who came out and pointed the finger at [Defendant]. It was [Mother].

On appeal, Defendant avers that the circuit court erred in excluding, *in limine*, evidence that Mother had made three other purportedly false allegations of sexual molestation. Defendant contends the excluded evidence would have shown the jury Mother's lack of credibility and/or her preexisting bias against him.

First, Defendant proffered an allegation Mother purportedly made that her son had been sexually molested by a friend of the son's father. However, Defendant could present no evidence that Mother had made such an allegation, even though the circuit court held hearings spanning several days on motions *in limine*, including a lengthy evidentiary hearing.

Second, Defendant proffered an allegation Mother purportedly made that her son had been sexually molested by her erstwhile sister-in-law (Defendant's ex-wife). But again, Defendant could not present any evidence that Mother had made such an allegation. At the *in limine* evidentiary hearing, the

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sister-in-law first testified that her brother (Mother's ex-husband) told her that Complainant had made the allegation. Then, the sister-in-law testified that her brother told her it was either the son or the Complainant who had made the allegation. Further on in the evidentiary hearing, the son testified that he confided in his sister, the Complainant, about the sexual molestation, who then told Mother. There was, at any rate, no evidence before the circuit court *in limine* that Mother had originated or communicated the allegation. Indeed, at one point during the *in limine* evidentiary hearing, Defendant apparently changed tack and instead proffered that the son's accusation would go to show that "the family has history of making false accusations."

Third, Defendant proffered an allegation, which Mother did in fact make to the police, that she, herself, had been raped several times by Defendant. At first, Defendant told the circuit court that he was proffering this allegation to impeach Mother's credibility, inasmuch as the allegation was untrue. Then, Defendant told the circuit court that he was proffering the allegation to show Mother's resulting bias against him, in the event the allegation was true. In response to a query from the circuit court, Defendant confirmed that, by the latter proffer, he was indeed prepared to tell the jury he had raped Mother. Later, Defendant told the circuit court that he was offering the allegation to show both bias and a lack of credibility. Finally,

at the end of the *in limine* evidentiary hearing, in which Mother had testified that Defendant forced himself upon her several times in the course of their intimate relationship, Defendant in argument seemed to settle upon two other bases of relevance; namely, (1) that the purportedly false allegation exemplified Mother's bias against Defendant, and (2) that Mother made the allegation in order get the police to expedite the arrest of Defendant for his sexual assaults upon Complainant.

Given the foregoing circumstances, and upon a review of the entire record, we conclude the circuit court did not abuse its discretion in excluding, *in limine*, evidence that Mother had made three other allegations of sexual molestation. Hawaii Rules of Evidence (HRE) Rule 403 (1993); State v. Clark, 83 Hawai'i 289, 302, 926 P.2d 194, 207 (1996).

2. Defendant also contends on appeal that the circuit court erred in excluding, *in limine*, evidence that Mother attempted suicide because Defendant told her he was leaving her, thereby shielding from the jury the very exemplar of the intensity of Mother's preexisting bias against him. By the way, we observe that evidence was adduced at the *in limine* evidentiary hearing that Mother attempted suicide because Defendant had raped her. The same evidence also indicated that it was Mother who broke off the relationship, in part because of the rapes, and that it was Defendant who was roiled by the breakup. In any

event, there was ample other evidence adduced at trial to show Mother's alleged bias against Defendant. State v. Balisbisana, 83 Hawai'i 109, 114, 924 P.2d 1215, 1220 (1996) ("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." (Citation and internal quotation marks omitted.)). Upon a review of the entire record, we conclude the circuit court did not abuse its discretion in excluding, *in limine*, evidence that Mother attempted suicide. HRE Rule 403; Balisbisana, 83 Hawai'i at 116, 924 P.2d at 1222.

3. Finally, Defendant invokes plain error and avers that the deputy prosecuting attorney (DPA) engaged in misconduct during his cross-examination of Defendant and during his closing argument; specifically, when the DPA challenged, in those venues, Defendant's assertion that he was never alone with Complainant, by pointing out that no witness other than Defendant had so testified, and that all of the relevant witnesses at trial had testified to the contrary. Defendant argues that the DPA improperly implied that Defendant had the burden to present witnesses and produce evidence. We disagree. The DPA did not imply what Defendant insists he implied. State v. Napulou, 85 Hawai'i 49, 58, 936 P.2d 1297, 1306 (App. 1997) ("commenting on a defendant's failure to call a witness does not have the effect of shifting the burden of proof unless it taxes the

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exercise of the defendant's right not to testify" (brackets, citation and internal quotation marks omitted)). Furthermore, the subject cross-examination and argument constituted proper rebuttal to Defendant's testimonial contention that he was never alone with Complainant. Id. at 59, 936 P.2d at 1307 ("[i]t is not error to comment on the defendant's failure to produce evidence on a phase of the defense upon which he seeks to rely" (citation and internal quotation marks omitted)).

Therefore,

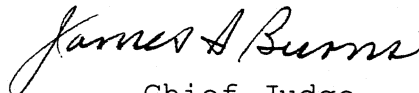
IT IS HEREBY ORDERED that the November 3, 2003 judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, June 29, 2005.

On the briefs:

Catherine H. Remigio,
Deputy Public Defender,
State of Hawai'i,
for defendant-appellant.

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.


Chief Judge


Associate Judge