NOT FOR PUBLICATION

NO. 26457

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ROBERT SAPANARA, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 03-1-0004)

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Lim, and Nakamura, JJ.)

Defendant-Appellant Robert Sapanara (Sapanara) appeals from the Judgment filed on February 18, 2004, in the Family Court of the First Circuit (family court).[1] Sapanara was accused of sexually abusing his two daughters, Complainant 1 and Complainant 2, when they were younger than fourteen years old. Sapanara was charged by indictment with four counts of Sexual Assault in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 707-730(1)(b) (1993),[2] and three counts of

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[1] The Honorable Richard K. Perkins presided.

[2] Hawaii Revised Statutes (HRS) § 707-730(1)(b) (1993) provides:

(1) A person commits the offense of sexual assault in the first degree if:

. . .

(b) The person knowingly subjects to sexual penetration another person who is less than fourteen years old . . .

Sexual Assault in the Third Degree, in violation of HRS § 707-732(1)(b) (1993).[3] The indictment alleged as follows:

> Count I: On or about the 14th day of June, 1995, to and including the 16th day of January, 2000, . . . ROBERT SAPANARA . . . did knowingly subject to sexual penetration, [Complainant 1], who was less than fourteen years old, by inserting his penis into her vagina, thereby committing the offense of Sexual Assault in the First Degree . . . .
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> Count II: On or about the 14th day of June, 1995, to and including the 16th day of January, 2000, . . . ROBERT SAPANARA . . . did knowingly subject to sexual penetration, [Complainant 1], who was less than fourteen years old, by inserting his finger into her vagina, thereby committing the offense of Sexual Assault in the First Degree . . . .
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> Count III: On or about the 14th day of June, 1995, to and including the 16th day of January, 2000, . . . ROBERT SAPANARA . . . did knowingly subject to sexual penetration, [Complainant 1], who was less than fourteen years old, by inserting his penis into her mouth, thereby committing the offense of Sexual Assault in the First Degree . . . .
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> Count IV: On or about the 14th day of June, 1995, to and including the 16th day of January, 2000, . . . ROBERT SAPANARA . . . did knowingly subject to sexual contact, [Complainant 1], who was less than fourteen years old or did cause [Complainant 1] to have sexual contact with ROBERT SAPANARA, by placing her hand on his penis, thereby committing the offense of Sexual Assault in the Third Degree . . . .
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> Count V: On or about the 14th day of June, 1995, to and including the 16th day of January, 2000, . . . ROBERT SAPANARA . . . did knowingly subject to sexual contact, [Complainant 1], who was less than fourteen years old or did cause [Complainant 1] to have sexual contact with ROBERT SAPANARA, by placing his hand on her breast, thereby committing the offense of Sexual Assault in the Third Degree . . . .
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> Count VI: On or about the 14th day of June, 1995, to and including the 16th day of January, 2000, . . . ROBERT SAPANARA . . . did knowingly subject to sexual contact, [Complainant 1], who was less than fourteen years old or did cause [Complainant 1] to have sexual contact with ROBERT SAPARANA, by placing his mouth

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[3] HRS § 707-732(1)(b) (1993) provides:

(1) A person commits the offense of sexual assault in the third degree if:

. . .

(b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person[.]

> on her breast, thereby committing the offense of Sexual Assault in the Third Degree . . . .
>
> Count VII: On or about the 30th day of April, 1998, to and including the 8th day of June, 2000, . . . ROBERT SAPARANA . . . did knowingly subject to sexual penetration, [Complainant 2], who was less than fourteen years old, by inserting his penis into her vagina, thereby committing the offense of Sexual Assault in the First Degree . . . .

After a jury trial, Sapanara was found guilty as charged on all counts. The family court sentenced Sapanara to twenty years' imprisonment on each of Counts I, II, III, and VII and to five years' imprisonment on each of Counts IV, V, and VI, all terms to be served concurrently.

On appeal, Sapanara argues: 1) the family court abused its discretion in excluding a videotape of a family beach outing in which Sapanara is shown playing in the water with Complainant 1 and Complainant 2; and 2) Sapanara's counsel provided ineffective assistance at trial. We conclude that Sapanara's arguments lack merit and affirm the family court's Judgment.

BACKGROUND

I. The Prosecution's Evidence

Sapanara has two daughters, Complainant 1 and Complainant 2. In 1993, when Complainant 1 was seven years old and Complainant 2 was six years old, their mother filed for divorce from Sapanara and moved to the mainland. Sapanara remained in Hawaii and was awarded custody of his daughters. In the ensuing years, Complainant 1 and Complainant 2 only had

infrequent contact with their mother. Sapanara and his daughters lived together at a variety of locations. In 1993 or 1994, they lived with the girls' maternal grandparents in Waipahu. In June 1994, Sapanara and the girls moved to Kona to live with Sapanara's brother. They returned to Oahu and, beginning in November 1994, lived for two years in Ewa Beach with Sapanara's friend, Jason Ikekai, and Ikekai's family. In late 1996, Sapanara and his daughters moved into their own home in Waialua and resided there until early 1999, when they again moved in with the girls' maternal grandparents.

At trial, Complainant 1 testified that between June 14, 1995, and when she turned fourteen in January 2000, she was subjected to repeated sexual assaults by Sapanara. The sexual assaults included Sapanara inserting his penis into her vagina, inserting his fingers into her vagina, massaging and licking her breasts, and making her put her mouth and hands on his penis. According to Complainant 1, Sapanara had sexual intercourse with her about once a month while they lived in Ewa Beach and "about every night" while they lived in their own home in Waialua. Complainant 1 testified that she submitted to Sapanara's sexual demands as part of a tacit agreement with Sapanara that if she had sex with him, he would leave her younger sister, Complainant 2, alone. Complainant 1 believed that Sapanara was honoring their agreement and had spared Complainant 2.

Complainant 2, however, testified that in 1999 or 2000, Sapanara sexually assaulted her while they were living at her grandparents' house. Using a rubber glove as a condom, Sapanara inserted his penis into Complainant 2's vagina and had sexual intercourse with her. At the time of the sexual assault, Complainant 2 recalled that she was in the seventh grade and eleven or twelve years old.

Sapanara induced Complainant 1 and Complainant 2 to remain silent about the sexual abuse. He said that if they told anyone, he would go to jail and they would have no one to care for them.

In the meantime, Complainant 1's and Complainant 2's mother, along with her new husband, returned to Hawaii. The girls reunited with their mother and gradually developed a close relationship with her. Complainant 1 moved in with her mother and stepfather in about July of 2000, and Complainant 2 followed a few months later. In March of 2002, Complainant 1 learned for the first time from Complainant 2 that Sapanara had sexually abused Complainant 2. That same day, Complainant 1 and Complainant 2 went to their mother and stepfather and disclosed that Sapanara had sexually abused them.

II. The Defense Case

Sapanara testified in his own defense at trial. He described his relationship with Complainant 1 and Complainant 2

as "outstanding," and stated that he loved his daughters. He emphatically denied his daughters' allegations of sexual abuse and stated that it would be "very sick" for a father to have sex with his own children. The defense also elicited testimony from Justin Ikekai and Sapanara's brother, mother, and aunt that Sapanara was a good father, that Sapanara and his daughters had a happy and loving relationship, that his daughters did not appear to be afraid or nervous around Sapanara, and that the witnesses were not aware of Sapanara engaging in any inappropriate behavior with his daughters.

DISCUSSION

I. The Family Court Did Not Err in Excluding the Videotape.

At trial, Sapanara sought to introduce an eight-minute videotape of a family beach outing in January 1999 that included Complainant 1, Complainant 2, Sapanara, and Sapanara's brother and parents. Sapanara offered the videotape to show that his daughters were happy, and not anxious, around him. In particular, he argued that the videotape was necessary to refute Complainant 1's claim that she was anxious around Sapanara because Sapanara was routinely having sex with her during that time period. The family court excluded the videotape under Hawaii Rules of Evidence (HRE) Rule 403. The court found that the videotape had "minimal probative value," that it was cumulative of the expected testimony of witnesses regarding

Sapanara's positive relationship with his daughters, and that it was the type of evidence that could be overemphasized and misused by the jury in evaluating the true relationship between Sapanara and his daughters.

On appeal, Sapanara argues that the family court abused its discretion in excluding the videotape under HRE Rule 403. We disagree. 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.

The eight-minute videotape consists mostly of views of the beach and ocean. A short portion of the videotape, no more than 90 seconds, shows Sapanara twice tossing Complainant 1 and once tossing Complainant 2 off his shoulders and into the water. We agree with the family court that the videotape was of minimal probative value. The videotape provided only a snapshot of a momentary interaction between Sapanara and his daughters in the midst of other family members. As the family court noted, the videotape would not fairly represent the true relationship between Sapanara and his daughters.

Sapanara offered the videotape for the primary purpose of showing that Complainant 1's behavior at the beach was inconsistent with her allegations of sexual abuse. The videotape would only serve this purpose, however, if it was unusual for an adolescent girl to also experience happy moments with her father

during the same time frame that he was subjecting her to sexual abuse. We cannot say that the family court was wrong in discounting the premise underlying Sapanara's offer of the videotape. Indeed, Complainant 1 testified that she loved her father, that Sapanara was a good father at times, and that there were occasions when he would do "normal things" with her that made living with him good. We conclude that the videotape had little, if any, probative value in impeaching Complainant 1's allegations of sexual abuse.

The videotape was of even less value in impeaching Complainant 2's allegations of sexual abuse. This is because the trial evidence indicated that the videotape was taken before Sapanara's alleged sexual assault of Complainant 2. Defense witnesses testified that the videotape was taken in January 1999, while Sapanara and his daughters were still living in Waialua. Complainant 2, however, testified that Sapanara sexually assaulted her while they were living with her maternal grandparents, when she was in the seventh grade. Complainant 2 moved to her grandparents' house after living in Waialua and did not enter the seventh grade until after January 1999.

In excluding the videotape, the family court determined that the minimal probative value of the videotape was substantially outweighed by the danger that the jury may overemphasize and misuse the videotape in evaluating the

relationship between Sapanara and his daughters. The family court also noted that the videotape would be cumulative. The defense called several witnesses who had observed the relationship between Sapanara and his daughters over long periods of time, including periods encompassing the alleged sexual assaults. These witnesses were able to provide more probative evidence of Sapanara's relationship with his daughters than the eight-minute videotape. The witnesses testified that Sapanara and his daughters had a happy and loving relationship, that the girls were not afraid or nervous around Sapanara, and that there was no evidence of inappropriate behavior by Sapanara.

We conclude that the family court did not abuse its discretion in excluding the videotape under HRE Rule 403. The court's evidentiary ruling did not "clearly exceed[] the bounds of reason or disregard[] rules or principles of law or practice." State v. McCrory, 104 Hawai'i 203, 207, 87 P.3d 275, 279 (2004).[4]

II. Sapanara Was Not Denied the Effective Assistance of Counsel.

Sapanara contends that his trial counsel provided ineffective assistance because counsel elicited the following

[4] Although not articulated by the trial court, the decision to exclude the videotape was also supported by considerations of undue delay. Admitting the videotape would have opened the door to the prosecution's offering evidence of specific incidents in which Complainant 1 or Complainant 2 were observed to be unhappy or anxious around their father, adding unnecessary length and confusion to the trial.

evidence from prosecution witnesses during cross-examination: 1) Complainant 1 stated that Sapanara had sexually assaulted Complainant 1 prior to the time period alleged in the indictment and had grabbed Complainant 1 by the throat; 2) Complainant 1's stepfather stated that while Sapanara was still married, he psychologically abused his ex-wife and yelled at his daughters; 3) Complainant 1's maternal grandfather stated that Sapanara was an "exaggerator;" and 4) a doctor specializing in child abuse, who examined Complainant 1 and Complainant 2 in connection with their sexual abuse allegations, stated that a) in order to verify whether Complainant 1 and Complainant 2 were telling the truth, the doctor looked for clues in the manner in which they explained their allegations and b) the doctor "had no reason to disbelieve" Complainant 2's allegation that Sapanara had masturbated in Complainant 2's presence. Sapanara also complains that his counsel was ineffective for failing to lay a sufficient foundation to introduce supposed evidence that his daughters resented doing chores as a possible motive for their falsely accusing Sapanara of sexual abuse.

We review claims of ineffective assistance of counsel to determine whether, "viewed as a whole, the assistance provided was within the range of competence demanded of attorneys in criminal cases." Dan v. State, 76 Hawai'i 423, 427, 879 P.2d

528, 532 (1994) (internal quotation marks, citation, and brackets omitted).

> [T]he defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.

State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998). As a general rule, the court will not employ judicial hindsight to second-guess a lawyer's trial strategy. Briones v. State, 74 Haw. 442, 463, 848 P.2d 966, 977 (1993). If counsel's allegedly erroneous actions have "an obvious tactical basis for benefitting the defendant's case," they "will not be subject to further scrutiny." Id. at 462-63, 848 P.2d at 976.

Both of Sapanara's daughters provided emotional and graphic testimony of his sexual abuse. Casting doubt on the girls' credibility was critical to Sapanara's defense. The record shows that Sapanara's counsel employed a strategy of attacking the veracity of Sapanara's daughters by vigorously cross-examining the girls and the other prosecution witnesses. Part of that strategy involved taking chances by asking Complainant 1 and Complainant 2 to provide details regarding their sexual abuse allegations, including non-charged incidents, in an attempt to bring out inconsistencies in their testimony. Sapanara's counsel also sought to develop, through cross-examination of the prosecution's witnesses, the defense theory

that Sapanara's ex-wife was influencing the girls to falsely accuse Sapanara so that she could obtain custody of the girls and avoid payment of child support.

In cross-examining the prosecution's witnesses, Sapanara's counsel may not have always elicited favorable evidence or obtained the answers he sought. In other words, the strategy Sapanara's counsel employed may not have always been successful. But that is not the test. Based on our review of the record, we conclude that Sapanara's counsel was pursuing a reasonable strategy when the unfavorable evidence of which Sapanara complains was elicited on cross-examination. Counsel's actions had "an obvious tactical basis for benefitting the defendant's case," and therefore are not subject to judicial second-guessing. Briones, 74 Haw. at 462-63, 848 P.2d at 976.

We also reject Sapanara's claim that his counsel was ineffective for failing to lay a foundation for the introduction of supposed evidence that his daughters resented doing chores as a possible motive for their falsely accusing him. Under HRE Rule 609.1, extrinsic evidence of a witness's bias or motive is not admissible unless the matter is first brought to the witness's attention on cross-examination and the witness is afforded the opportunity to explain or deny it. Complainant 2 was first to testify and was not asked if she resented doing chores. Complainant 2's maternal grandmother then testified that the

grandmother had a problem with Sapanara making his daughters do chores, such as washing Sapanara's clothes and cooking for him. Sapanara's counsel was precluded from asking the grandmother whether the girls resented doing chores because counsel had not laid the foundation required by HRE Rule 609.1. Complainant 1 later testified on cross-examination that she and Complainant 2 did chores including washing clothes and cooking for their father. Complainant 1 stated that she did not resent doing chores, but did have "a problem" with "having to do his things sometimes." Complainant 1 testified that she never told her grandmother that she resented doing chores.

Sapanara's counsel was not ineffective, during his cross-examination of Complainant 2, in failing to lay a foundation by asking Complainant 2 whether she resented doing chores for her father. The chores situation was brought to light by Complainant 2's grandmother who did not testify until after Complainant 2. The record shows that during Complainant 1's subsequent testimony, Sapanara's counsel did ask Complainant 1 whether she resented doing chores.[5]

Sapanara's counsel laid a sufficient foundation to recall the grandmother to ask whether Complainant 1 resented

[5] In his opening brief, Defendant-Appellant Robert Sapanara (Sapanara) asserts that his counsel "never brought the matter of chores and [Complainant 1's] resentment of chores to [Complainant 1's] attention." In his reply brief, Sapanara concedes that this assertion was wrong.

doing chores for her father. In declining to recall the grandmother or Complainant 2 to pursue this matter, counsel made a permissible strategic choice. Although the grandmother testified that she did not like Sapanra making his daughters do chores, it was uncertain what she would say about whether the girls resented doing chores for their father. Counsel may also have decided that emphasizing that Sapanara made the girls do "his things" would hurt Sapanara's defense. Moreover, a claim that Sapanara's daughters falsely accused Sapanara because of resentment over doing chores was so implausible that Sapanara's counsel properly declined to pursue it. A more plausible motive, which counsel did pursue, was that the girls' mother influenced them to fabricate the allegations so the mother could obtain custody of the girls from Sapanara.

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CONCLUSION

The Judgment filed on February 18, 2004, in the Family Court of the First Circuit, is affirmed.

DATED: Honolulu, Hawai'i, November 18, 2005.

On the briefs:

James S. Tabe,
Deputy Public Defender,
for Defendant-Appellant.

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Corinne K.A. Watanabe
Acting Chief Judge

Associate Judge

Craig H. Nakamura
Associate Judge