

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27701

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
WERNES OTIS, aka Mike Jackson, aka Rooster,
Defendant-Appellant

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

2007 AUG 22 PM 1:22

FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 05-1-2139)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Wernes Otis, aka Mike Jackson, aka Rooster, (Otis) appeals from the Judgment of Conviction and Sentence filed on December 9, 2005 in the Family Court of the First Circuit (family court).^{1/}

On October 17, 2005, the State of Hawaii (the State) charged Otis via a Complaint with one count of Abuse of Family or Household Members, in violation of Hawaii Revised Statutes (HRS) § 709-906 (Supp. 2005). The Complaint alleged that on or about October 14, 2005, Otis did intentionally, knowingly or recklessly physically abuse his wife, the Complainant.

On December 8, 2005, the jury returned a guilty verdict. The family court filed its Judgment on December 9, 2005. Otis filed a Notice of Appeal on January 6, 2006. On appeal, Otis argues that the family court reversibly erred in (1) allowing Otis's probation officer to testify regarding Otis's prior conviction, (2) admitting the Complainant's Honolulu Police Department (HPD) 252 Form under Hawaii Rules of Evidence (HRE) Rule 802.1, (3) admitting Officer Malina's statement of what

^{1/} The Honorable Patrick W. Border presided.

Complainant told him as an excited utterance, and (4) giving a prejudicially misleading and flawed jury instruction regarding Otis's prior conviction.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we hold:

(1) The family court did not err in allowing Otis's probation officer to testify as to Otis's prior conviction. Otis's 2003 prior conviction for assaulting Complainant was relevant to show the jury the context of the relationship between Complainant and Otis, where the relationship was offered as an explanation for Complainant's recantation at trial. HRE Rule 404(b); HRE Rule 403; State v. Clark, 83 Hawai'i 289, 303, 926 P.2d 194, 208 (1996); State v. Asuncion, 110 Hawai'i 154, 161-62, 129 P.3d 1182, 1189-90 (App. 2006).

(2) Having met the four prong test for admissibility as substantive evidence as set forth in State v. Eastman, 81 Hawai'i 131, 137, 913 P.2d 57, 63 (1996), Complainant's prior inconsistent statement was properly admitted under HRE Rule 802.1(1)(B).

(3) Complainant's statement to Officer Malina satisfied the three foundational requirements of HRE Rule 803(b)(2) and thus was admissible under the hearsay exception for excited utterance. Assuming arguendo that the family court erred in admitting Complainant's statement as an excited utterance, there is no reasonable possibility that the error contributed to Otis's conviction because there was nothing in Complainant's statement to Officer Malina that had not already been admitted into evidence -- namely, Heusner's testimony and HPD Form 252. Therefore, the error, if any, was harmless beyond a reasonable doubt. HRE Rule 803(b)(2); State v. Machado, 109 Hawai'i 445,

451, 127 P.3d 941, 947 (2006); State v. Moore, 82 Hawai'i 202, 219, 921 P.2d 122, 139 (1996).

(4) The family court properly instructed the jury in accordance with Hawai'i precedent. State v. Gonsalves, 108 Hawai'i 289, 292-93, 119 P.3d 597, 600-01 (2005); State v. Nichols, 111 Hawai'i 327, 337, 141 P.3d 974, 984 (2006); State v. Clark, supra; State v. Asuncion, supra.

Therefore,

The Judgment of Conviction and Sentence filed on December 9, 2005 in the Family Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, August 22, 2007.

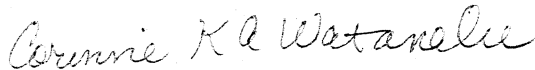
On the briefs:

Lila C.A. King,
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for Defendant-Appellant.

Brian R. Vincent,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge