NO. 27327

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee
v.
SANDRA FRAZIER, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR No. 04-1-2260)

MEMORANDUM OPINION
(By: Recktenwald, Chief Judge, Watanabe, and Nakamura, JJ.)

Defendant-Appellant Sandra Frazier (Sandra) appeals from the Judgment filed on April 29, 2005, in the Family Court of the First Circuit (family court).[1] After a jury trial, Sandra was found guilty as charged of violating a protection order by contacting her ex-husband, David Frazier (David), a violation of Hawaii Revised Statutes (HRS) Section 586-11 (2006).[2] The family

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[1] The Honorable Patrick W. Border presided.

[2] Hawai'i Revised Statutes (HRS) § 586-11 (2006) provides in relevant part:

> (a) Whenever an order for protection is granted pursuant to this chapter, a respondent or person to be restrained who knowingly or intentionally violates the order for protection is guilty of a misdemeanor.
>
> . . . .
>
> (2) For a second conviction for violation of the order for protection:
>
> (A) That is in the nature of non-domestic abuse, and occurs after a first conviction for violation of the same order that was in the nature of non-domestic abuse, the person shall be sentenced to a mandatory

(continued...)

court sentenced Sandra to a two-year term of probation, subject to a condition that she serve 180 days of imprisonment.

BACKGROUND

I.

A.

On March 10, 2003, the family court issued an Order for Protection (First Protection Order) which prohibited Sandra from all contact with David and their daughter, Autumn Frazier (Autumn). The First Protection Order described the types of contact that were prohibited to include:

> 3. [Sandra] is prohibited from telephoning, writing or otherwise electronically communicating (by recorded message, pager, etc.), including through third parties, with [David] and any children residing with [David].

The First Protection Order was scheduled to expire on March 10, 2004.

On March 8, 2004, the family court issued an Extended Order for Protection (Extended Protection Order) which extended the expiration date of the First Protection Order until March 10, 2006. The Extended Protection Order modified the First Protection Order by permitting Sandra to have unsupervised visits with Autumn every Monday and phone contact with Autumn every Thursday at 8:00 p.m., but otherwise retained the prohibitions against contact contained in the First Protection Order.

On Thursday, October 28, 2004, at 8:00 p.m., Sandra placed her weekly phone call to Autumn. David listened in and recorded the conversation between Sandra and Autumn. During the phone call, Sandra became upset when she learned that Autumn had not received photographs that Sandra had sent. David interjected and terminated the call by hanging up the phone.

> Sandra: So the pictures that have mommy and me, I mean me and you, that I had our names put on, you did not get it?

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[2](...continued)

> minimum jail sentence of not less than forty-eight hours and be fined not more than $250 . . . [.]

Autumn: Yeah.

Sandra: Okay, that does it, that's it. Dave, fucked up, you fucked up. So Daddy took your picture away from you. Yeah?

Autumn: Mm-hmm.

Sandra: Okay, then where is it, Autumn.

Autumn: I don't know, it wasn't in this pile.

Sandra: Did you give, um, Amanda her pictures?

Autumn: No, I didn't have those either.

Sandra: So, Daddy took those away, too.

Autumn: Uh-huh.

Sandra: So where'd they go?

David: She has all the pictures, and if you cuss at her on the phone again, I'm ending this conversation. Do you understand?

Sandra: Don't break your own TRO.

David: Do you understand?

Sandra: You hear me, you're messing with the wrong chick. Get off the phone.

David: This conversation is now over. Goodbye.

About ten minutes later, Sandra called back and left the following message on the answering machine:

Sandra: Hello. Autumn, I'm sorry Daddy hung up on you. But I'm glad that I didn't get it recorded as far as you did not (indiscernible) that Daddy did take your pictures away. And Dave, don't you get on the phone and start yelling at me. You're the one who got yourself into this. And don't you ever tell me what I have to do anymore. This conversation might be over, but these court hearings are just gettin' started. Don't be playin' me no more and while you're doin' this to me, you are totally manipulating our child. You're screwin' up. I'm recording this too. I will see her Saturday morning. And you also lied about Dr. Ashley. And don't think that report is not gonna be in, 'cause it is. You tell my daughter I love her. And I'm tired of your ass. How else could you not know that she just told me that . . . [end of tape]

B.

Prior to trial, Plaintiff-Appellee State of Hawai'i (the State) gave notice of its intent to introduce evidence that Sandra had been convicted of 27 violations of the First Protection Order and a prior temporary restraining order (TRO). The State offered this evidence pursuant to Hawaii Rules of

Evidence (HRE) Rule 404(b) (Supp. 2006) to prove Sandra's intent, motive, modus operandi, and lack of mistake or accident. Sandra moved to preclude evidence of the prior convictions, arguing that they constituted impermissible bad character evidence and that their probative value was substantially outweighed by the danger of unfair prejudice.

The family court ruled that the State could introduce evidence of 24 of Sandra's prior convictions for violating the First Protection Order to show modus operandi and a pattern of conduct on [Sandra's] part. The family court reasoned:

> [T]he state proposes that that the presentation of this evidence [(24 prior convictions)] shows a modus operandi to disregard the order, to give it no value, to just simply uniformly disregard it.
>
> And for that reason, why I'm inclined to do is to say that to the extent the convictions are for telephone calls which violate the order, they show a pattern of conduct which not only negates accident, but further shows a modus operandi of something disregarding the rule. The rule has no value to the defendant, according to this theory and this evidence would tend to support that theory.

The 24 prior convictions the family court permitted the State to introduce all involved violations of the First Protection Order, which prohibited Sandra from all contact with David and Autumn, and not violations of the Extended Protection Order, which permitted Sandra to have phone contact with Autumn every Thursday at 8:00 p.m.

During trial, David testified as follows:

> [Deputy Prosecuting Attorney (DPA)] Q: When we last left off yesterday afternoon, I had asked you a question as to basically the situation with you calling the police for help after the October 28 violation, okay. [David], have you had to call the police before because of a violation by [Sandra] of this same order for protection?
>
> . . . .
>
> [David] A: Yes, I have.
>
> Q: [David], approximately how many times since this order has been in effect did you have to call the police because the defendant had violated the order?
>
> A: Numerous times in 2003.
>
> Q: Would you say more than five times?

A: Yes.

Q: More than ten times?

A: Yes.

Q: About how many times have you had to call in 2003?

A: From March to September, 2003, approximately 24 times.

Q: And in each of those 24 times, [David], could you explain to the jury what sort of behavior [Sandra] had engaged in that caused her to violate the order?

A: A few times she actually came to our residence. Another time, she had someone else call me on her behalf and, but most of the violations were threatening messages left on my answering machine.

Q: And these threatening messages that were left on your machine, were they during one of these 8 p.m., phone calls or were they just on its own?

A: Most of them were on its own.

Q: Okay. Now, in each of those times, did you call the police for help?

A: Yes, I did.

Q: Okay. And did you make a report in each of those times?

A: Yes, I did.

Q: And did you fill out a witness statement?

A: Yes, I did.

Q: And were charges, in fact, filed against [Sandra]?

A: Yes, they were.

Q: And [David], to your knowledge, for each of those 24 counts that you just mentioned, you told the jury about, how were those cases resolved?

A: She pled guilty in court.

Q: And how do you know that?

A: I was there.

Following this testimony, the family court gave the jury the following limiting instruction:

THE COURT: Ladies and gentlemen, I wanna instruct you that the Court has permitted the introduction of evidence relating to prior violations of the same order for protection. You are not to use this evidence to determine that the defendant is a person of bad character or that she acted in conformity with her prior conduct in the instant case.

> The evidence was admitted for the limited purpose of proof or lack thereof of a possible motive, intent, modus operandi, knowledge or absence of mistake or accident on the part of the defendant. You are instructed that such evidence may only be considered by you for this purpose and no other.

During subsequent questioning by Sandra's counsel, David clarified that none of the prior convictions involved situations where Sandra was calling Autumn at 8 p.m. on a Thursday night. Sandra did not testify in her own defense at trial.

DISCUSSION

I.

On appeal, Sandra argues that the family court erred in allowing the State to introduce evidence of her 24 prior convictions for violating the First Protection Order because: 1) the evidence was not relevant; 2) the evidence was not admissible under HRE Rule 404(b); 3) the probative value the evidence was substantially outweighed the danger of unfair prejudice, especially in view of the high number of prior convictions revealed to the jury; and 4) the admission of the evidence dissuaded her from testifying, thereby violating her right to testify in her own defense.

Although we conclude that evidence that Sandra had previously pleaded guilty to violating the First Protection Order was relevant and admissible for purposes permissible under HRE Rule 404(b), the probative value of allowing the jury to hear that Sandra had 24 prior convictions was substantially outweighed by the danger of unfair prejudice. We therefore hold that the family court abused its discretion in admitting evidence that Sandra had 24 prior convictions for violating the First Protection Order and remand the case for a new trial.

II.

Sandra did not dispute that on October 28, 2004, she called David's house and left a message on the answering machine after David had terminated her authorized weekly phone call to Autumn. Sandra's theory of defense was that she believed that

leaving the message on the answering machine was part of her authorized call to Autumn, since her initial call had been improperly terminated by David. Sandra thus claimed that she did not knowingly or intentionally violate the Extended Protection Order.

The determination of whether evidence of other crimes, wrongs, or acts are admissible under HRE Rule 404(b)[3] involves a two-step inquiry. First, the court must determine that the evidence is probative of another fact that is of consequence to the determination of the case other than propensity to commit the crime. State v. Castro, 69 Haw. 633, 644, 756 P.2d 1033, 1041 (1988). If the first step is satisfied, the court must also determine that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Our Supreme Court has stated:

> [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.

Id. (emphasis added).

In order to prove the charged offense, the State was required to establish that Sandra knew that her conduct in leaving a message on David's answering machine on October 28, 2004, constituted a violation of the Extended Protection Order. We agree with the State that evidence that Sandra had previously pleaded guilty and been convicted of violating the First

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[3] Hawaii Rules of Evidence (HRE) Rule 404(b) (Supp. 2006) provides in relevant part that:

> (b) Other crimes, wrongs, or acts. Evidence 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 may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

Protection Order for leaving messages on David's answering machine was relevant to prove her knowledge and intent. Such evidence would serve to show Sandra's knowledge that contacting David by leaving a message on his answering machine was a violation of the Extended Protection Order. Evidence that Sandra had deliberately violated the First Protection Order in the past was also relevant to show that her actions in this case were not the product of an honest or mistaken belief that her conduct was permitted by the Extended Protection Order.

Although evidence that Sandra had prior convictions for violating the First Protection Order was admissible under HRE Rule 404(b), we conclude that the family court abused its discretion in allowing the State to introduce evidence that Sandra had 24 prior convictions. The extraordinary number of prior convictions, which the State referred to in its closing argument, undoubtedly "rouse[d] the jury to overmastering hostility" against Sandra, notwithstanding the court's limiting instruction. The family court could have permitted the State to introduce evidence that Sandra had multiple prior convictions for violating the First Protection Order without disclosing the number of convictions. However, the incremental probative value of allowing the jury to hear that Sandra had 24 prior convictions was substantially outweighed by the danger of unfair prejudice.

We note that the probative value of Sandra's prior convictions was diminished by the fact that they involved violations of the First Protection Order whereas Sandra's defense was premised on the modified language of the Extended Protection Order. In addition, the State did not attempt to elicit specific details about whether Sandra's prior convictions involved conduct that was similar to the charged offense, proof that would have enhanced the probative value of the evidence. Instead, the State used the sheer number of Sandra's prior convictions as a blunt instrument against her. On retrial, the family court should

apply the factors set forth in Castro in determining to what extent evidence of Sandra's prior convictions should be allowed.[4]

CONCLUSION

We vacate the April 29, 2005, Judgment entered by the family court and remand the case for a new trial.

DATED: Honolulu, Hawai'i, August 29, 2007.

On the briefs:

Summer M.M. Kupau
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City and County of Honolulu
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Chief Judge

Associate Judge

Associate Judge

[4] Because we conclude that the trial court erred in admitting evidence that Defendant-Appellant Sandra Frazier (Sandra) had 24 prior convictions, we need not address Sandra's claim that the admission of such evidence dissuaded her from testifying, thereby violating her right to testify in her own defense. We simply note that ordinarily, the admission of evidence that satisfies HRE Rule 404(b) does not violate a defendant's right to testify in his or her own defense.