

\*\*\* NOT FOR PUBLICATION \*\*\*

NO. 25253

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,  
vs.  
MARY LOU FRENCH, Defendant-Appellant.

K. HAMAKAHO  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

2006 FEB 17 AM 10:28

FILED

APPEAL FROM THE SECOND CIRCUIT COURT  
(FC-CR NO. 01-1-0384 (3))

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Following a jury trial, defendant-appellant Mary Lou French (Mary Lou), also known as Mary Lou Barr and Mary Lou Spradlin, appeals from the final judgment filed on June 13, 2002, in the Family Court of the Second Circuit, the Honorable Joseph E. Cardoza presiding, convicting her of and sentencing her for two counts of Custodial Interference in the First Degree, in violation of Hawai'i Revised Statutes (HRS) § 707-726(1)(b) (Supp. 2000).<sup>1</sup> On appeal, Mary Lou claims that the trial court erred by: (1) providing a prejudicially erroneous jury

<sup>1</sup> HRS § 707-726 states in relevant part that:

(1) A person commits the offense of custodial interference in the first degree if:

(b) The person intentionally or knowingly takes, entices, conceals, or detains a minor less than eleven years old from that minor's lawful custodian, knowing that the person had no right to do so[.]

instruction regarding the "choice of evils" defense; (2) allowing the prosecution to cross-examine herself and one of the defense witnesses regarding certain matters that forced them to assert their fifth amendment privileges in front of the jury; and (3) precluding two expert witnesses from testifying as to the reasonableness of Mary Lou's beliefs regarding the likelihood that her two adopted children were being sexually abused. For the reasons discussed infra, we vacate the trial court's June 13, 2002 judgment of conviction and sentence and remand for a new trial.

I. BACKGROUND

On May 2, 2001, Mary Lou was charged by complaint with two counts of Custodial Interference in the First Degree. The prosecution alleged that, on January 7, 1999, Mary Lou intentionally or knowingly took, enticed, concealed, or detained her two minor adopted children, both under eleven years old, from their adoptive father and lawful custodian, knowing that she had no right to do so. Mary Lou waived her right to a preliminary hearing and probable cause determination. Trial commenced on March 19, 2002.

A. Trial

1. **Prosecution Witnesses**

a. testimony of James French

James French (Jim) and Mary Lou married on June 19, 1992 and adopted two children, Emily and Sarah, from China.

Emily was born on September 23, 1994 and adopted at five-and-a-half months of age in early 1995. Sarah was born on November 25, 1995 and adopted at seven months of age in the summer of 1996. Jim filed for divorce in 1997, and, after a jury trial, the Family Court of the Second Circuit issued a divorce decree on March 31, 1998 (the divorce decree). The divorce decree granted Jim and Mary Lou joint custody and control of Emily and Sarah, and ordered Mary Lou to pay Jim sixty thousand dollars plus attorney's fees. The divorce decree also set forth the following parenting schedule, where Jim would have physical custody:

(1) for the first three months following the divorce, one night per week and two days of the week; (2) for months four until month seven, two nights per week; and (3) from the seventh month, three nights per week. Mary Lou complied with the terms of the divorce decree from its effective date of March 31, 1998 until January 5, 1999, more than seven months later.

Pursuant to the divorce decree, Jim was scheduled to have custody of the children from Friday, January 7, 1999 at 8:00 a.m. for two nights until Sunday at 8:00 a.m. Jim had made arrangements to meet Mary Lou at the designated transfer site to pick up the children. At 8:00 a.m. on January 7, 1999, Mary Lou did not appear with the children. Jim was not notified that Mary Lou was going to keep the children, and he had not given her permission to keep the children on that date or to take them out of the State of Hawai'i.

When Jim realized that Mary Lou was not going to bring the children, he called her friends to find out if something was wrong. Mary Lou's friends told him that they did not know where she was. Jim next went to the police and reported that Mary Lou had not come to the transfer site. When he went to Mary Lou's house, it appeared empty, and a "Mrs. White" told him that she had bought the property. Jim also filed a report with the Federal Bureau of Investigation (FBI) and contacted the National Center for Missing and Exploited Children. That same day, Jim obtained a court order freezing all of Mary Lou's assets and awarding him temporary custody of the children.

On January 17, 2000, the Justice Department informed Jim that Mary Lou and the children had been located in Costa Rica. Thereafter, he traveled to Costa Rica and spent nine weeks there before being informed that he had to return to the United States.

At trial, the prosecution entered a videotape into evidence showing the security gate at the Los Angeles International Airport (LAX) on January 5, 1999, two days prior to the arranged pick up date. Jim identified Mary Lou, the children, and Dr. Strong (Mary Lou's friend and the children's pediatrician) in the video. Jim also acknowledged that, on June 19, 1992, he and Mary Lou had entered into a prenuptial agreement, although Jim could not recall the terms of the agreement.

b. testimony of Dr. Sandi Angevine

Dr. Sandi Angevine, a pediatrician at Kaiser Permanente (Kaiser), reviewed the medical records for the year 1998 for the French children. She was one of several doctors who saw the French children that year at Kaiser. Dr. Angevine testified that there were no notations by any physician regarding possible sexual abuse of the French children. There were also no notations in the records of any parent's reporting suspected sexual abuse. The records showed that, on September 23, 1998, both children received vaccinations for Hepatitis A.

c. deposition of Donna Spradlin

A videotaped deposition of Donna Spradlin, Mary Lou's sister-in-law, was taken pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 15 on March 1, 2002. The videotape, a transcript of which was admitted into evidence, was shown to the jury. Therein, Spradlin testified to the following events:

Shortly after the Frenches' divorce, Mary Lou informed her via telephone that she was unhappy with the family court's decision to award Jim joint physical custody of the children. Mary Lou told Spradlin that she felt Jim was taking the children in order to punish her and that she did not feel he was taking care of them properly. Mary Lou expressed concern that Jim was abusing the children. She also complained that it was unfair that she had to pay him \$60,000 in light of the prenuptial agreement.

Sometime between March 31, 1998 and September 1, 1998, Mary Lou told Spradlin that she had been researching the internet in order to go "underground" and leave the country with her children because she was unhappy with the custody situation. She also told Spradlin that she sold her houses in Maui and California and placed her money in offshore accounts so it could not be traced.

On January 5, 1999, Spradlin and her husband met Mary Lou and the children at LAX at 5:00 a.m. Mary Lou informed Spradlin that she had \$80,000 attached to her body with duct tape. At that time, Mary Lou told the Spradlins that she would probably never see them again because she would not be able to get back into the country.

Later that day, the Spradlins took Mary Lou and the children back to LAX where they met Dr. Strong, who was bringing Mary Lou's airline tickets. After eating dinner at Denny's, the Spradlins took Mary Lou, Dr. Strong, and the children back to the airport.

d. testimony of Gil Torrez

FBI special agent Gil Torrez (Agent Torrez) was the legal attache assigned to the United States Embassy in the Republic of Panama. On April 25, 2000, Agent Torrez was informed that Mary Lou had been located in a hotel in Panama City. When he met Mary Lou and the children at the office of Panamanian National Police, he was given documents, including Costa Rican

passports, airline tickets, and United States passports that belonged to Mary Lou and the children. The Panamanian passports bore Mary Lou's and the children's photographs but did not bear their true names. The tickets were for a flight originating in Panama City, Panama, to Bangkok, Thailand, with a connecting flight to Beijing, China. On April 26, 2000, Agent Torrez returned Mary Lou and the children to Miami, Florida, where Jim met them.

## 2. Defense Witnesses

### a. testimony of Joy Shiabazian

Joy Shiabazian met the Frenches when she and her husband were interested in adopting a child from China. At the time of trial, Shiabazian had known the family for about six years, and, after Jim moved out of the house in May of 1997, she saw Mary Lou and the children an average of two to three times per week. She witnessed several incidents with the children. One incident occurred in mid to late June of 1998, where Sarah stripped naked and threw herself on the bed with her legs spread, yelling "logs on my butt, logs on my butt." When Mary Lou went to pick her up, she was very stiff and rigid and cried for two hours after that. Another incident occurred in which Shiabazian was at the dining room table with Mary Lou when Emily pulled up her dress and Mary Lou told her that such behavior was not polite. Emily responded, "[b]ut daddy shows me his pee pee." In another incident, Shiabazian tried to lock Emily out of the

bathroom, and Emily said, "Oh, daddy does that with Sarah. He takes Sarah into the bathroom and locks the door." On two or three different occasions after the children returned from spending time with Jim, Emily was very uncharacteristically remote, and, at one time, she hid behind the couch with her thumb in her mouth.

b. testimony of Beverly James

Beverly James, a clinical social worker who had written books on child sexual abuse and childhood trauma, was called as an expert witness to testify on several matters, discussed more fully infra, in section III.E.2. Upon the prosecution's objection to her testimony as an improper opinion of Mary Lou's credibility, the trial court held a hearing outside the jury's presence. The trial court determined that her testimony was impermissible and precluded James from testifying.

c. testimony of Dr. Linda Strong

At the prosecution's request, the trial court held a hearing outside the presence of the jury to address issues of Dr. Strong asserting her fifth amendment rights regarding self-incrimination. A trial run of her proposed testimony was held outside the presence of the jury. Dr. Strong refused to answer questions about events that took place after October 1, 1998.

After hearing the proposed testimony, the court found that events occurring from October 1, 1998 until January 7, 1999



were relevant to Mary Lou's intent. The court permitted the prosecution to ask Dr. Strong questions about events occurring after October 1, 1998 and said she would have to assert her fifth amendment rights in front of the jury. The court found that, by using the procedure, the prosecution was not being denied meaningful cross-examination.

At trial, Dr. Strong testified that she was a pediatrician at Kaiser Permanente from 1993 through 1998. She first met Mary Lou at Kaiser and became Emily and Sarah's primary care pediatrician from the time that they arrived from China until Dr. Strong left Hawai'i and moved to Washington in September 1998. Dr. Strong and Mary Lou became good friends, and she visited Mary Lou's house on Oili Road, Maui, many times.

In 1998, when Dr. Strong's seventeen and fifteen year-old daughters baby-sat the French children, they called her on several occasions with problems. They first called because Emily wanted the babysitters to rub lotion on her buttocks as a treatment for diarrhea when she did not have diarrhea. They also reported that Sarah frequently asked them to kiss her butt and became insistent and hysterical when they refused.

Dr. Strong further testified that Jim had called her several times wanting to know about how to treat Emily's rashes and her lack of bowel movements. He also had multiple questions about her vaginal and anal area. Dr. Strong indicated that although Jim's questions were normal, she was concerned because

he had so many questions that did not coincide with what she observed.

Dr. Strong stated she was uncomfortable about contacting Child Protective Services (CPS) because she could not predict what kind of action they would take. At times, she would call about a suspicion, and CPS would immediately remove the children from their homes. At other times, she would make a report and nothing would happen. According to Dr. Strong, she did not immediately report the incidents with the French children because, as a physician, she did not have enough physical evidence to say that she was concerned, except for the "red flags" indicating that the French children were being sexually abused. Dr. Strong did call CPS and talked to an intake worker about the red flags and stated that she was calling as a friend due to her lack of evidence. The two decided to recommend the French children for "play therapy".<sup>2</sup>

In late September, before she left Maui, Dr. Strong had a conversation with Mary Lou in which she explained that, although she did not have any physical evidence, she knew the children were being sexually molested by their father. Although Dr. Strong was one hundred percent positive of her conclusions,

---

<sup>2</sup> Dr. Strong testified that "play therapy" is used by an outside specialist to prepare a report that assists her in determining how to treat her patients. In the process, the children take dolls and play with each other to see how they interact so the specialist can pick up subtleties that may be elusive in a physical exam or during questioning of small children.

she told Mary Lou that the allegation of sexual abuse would not hold up in court.

On cross-examination, the prosecution questioned Dr. Strong as to the events that occurred after October 1998, including her involvement in Mary Lou's relocation to Costa Rica. Dr. Strong asserted her fifth amendment right in response to all questions regarding events between October 1, 1998 and January 7, 1999.

d. testimony of Dr. Robert Geffner

Dr. Robert Geffner, a psychologist with extensive training, education, and experience in the field of family violence, was qualified as an expert in the following areas: child sexual abuse and family violence, the interaction of child sexual abuse and family violence with family custody proceedings, and the family court's response to allegations of sexual abuse.

Dr. Geffner explained the child abuse accommodation syndrome and behavioral indicators, or red flags, of symptoms of sexual abuse by children. He stated that there is almost no way a person can know for sure that a particular person has sexually abused a child. Dr. Geffner further explained that, in looking for red flags, he looks at all the information, including whether the child makes any statements to anybody about the sexual abuse. If they have, then he looks at how they said it, what they said, and how much detail there was, as well as the context in which they said it. He also looks for documented medical evidence, if

any. The next step is to look at the alleged offender and whether that person has confessed, whether they have control issues, and what their characteristics are. Finally, he looks at other people who have information and whether they have actually seen the abuse occur or whether the child told them about it. In the second step, he looks at indicators of the children themselves, including behavior that involves, inter alia, nightmares, trust issues, and depression.

Mary Lou made an offer of proof that Dr. Geffner was going to offer an opinion as to whether there were red flags in the French case. The trial court ruled that Dr. Geffner could not give such an opinion because fact witnesses could provide the jury with evidence or facts and that it was up to the jury to ultimately evaluate the credibility of the facts the way the fact witnesses would present it. The court held that allowing Dr. Geffner to render such an opinion would be contrary to the principles set forth in State v. Batangan, 71 Haw. 552, 799 P.2d 48 (1990), and precluded him from testifying as to his opinion about the existence of red flags in the French case.

e. testimony of Mary Lou

Mary Lou testified that, after the divorce, the girls started to exhibit bizarre behavior, which led her to suspect sexual abuse. Mary Lou recalled that, when it was time for the children to stay with Jim, Emily, who was three years old at the time, went to her bed, whimpered, rolled up in a fetal position

and sucked her thumb. After coaxing her out of bed, Emily stood on top of the stairs and urinated down her legs, begging Mary Lou not to make her go. She also recalled a time when Emily, after returning from a visitation with Jim, hid behind a chair and sucked her thumb when Shiabazian and her daughter came to the house. She further testified that, in April 1998, Sarah took her clothes off during dinner and, thereafter, proceeded to the bedroom, where she threw herself on the bed, spread her legs, and insisted that lotion be applied to her butt. She said that Emily always complained of diarrhea even though her stool was firm and that Emily told Mary Lou that her father said she had diarrhea and that he put medicine on her butt every day.

Dr. Strong advised Mary Lou to take the children to see Dr. Marilyn Wright, a child psychiatrist. After two or three visits, Dr. Wright informed Mary Lou that she could no longer see the children because Jim had stormed into her office, demanding to see her notes.

Mary Lou testified that she first became committed to the idea of moving elsewhere in September 1998, when Dr. Strong expressed her suspicions that the children were being sexually abused. The following month, when she went to visit Dr. Strong in Washington, she decided to meet Dr. Strong at LAX on January 5, 1999. Between September 1998 and January 1999, Mary Lou sold her houses, liquidated her assets, and wired money to several foreign banks. She decided to move to Costa Rica because the

country had a child protective service that would protect her children in the event that she was caught by the authorities.

Mary Lou testified that, when she made her decision to leave, she was positive that Jim was sexually abusing the children. Notwithstanding her suspicion and her decision to move, she continued to adhere to the visitation schedule set forth in the divorce decree until she left on January 5, 1999. She left the children with Jim while on her trip to Washington in September 1998. Mary Lou further stated that, from September to December 1998, she never reported any sexual abuse allegation to the police, CPS, or the family court. She explained that, when she had previously reported physical abuse to the police, no action was taken. On January 3, 1999, Mary Lou wrote letters to her family and her attorney explaining her decision to go "underground."

Mary Lou testified that she and the children left Maui on the evening of January 4, 1999, and arrived the next morning in Los Angeles. The Spradlins met them at the airport and later picked up Dr. Strong as well. On January 6, 1999, Mary Lou, Dr. Strong, and the children flew to Costa Rica. Mary Lou stated that she knew she was supposed to return the children to Jim on January 7, 1999, but that she had no intention of returning to the United States.

Mary Lou admitted that she had a Hawai'i identification card with her photograph, but that it had Dr. Strong's name and

social security number on it. She also admitted paying \$16,000 for falsified Costa Rican passports.

Mary Lou testified that, prior to her marriage to Jim, she and Jim signed a prenuptial agreement. She stated that she wanted the agreement because she had assets, whereas Jim had filed for bankruptcy. She did not present the prenuptial agreement at the divorce proceedings because she did not find it until after the proceedings were concluded. In September 1998, during the hearing on her motion to enforce the prenuptial agreement, Mary Lou did not allege any sexual abuse but stated that, at that time, she intended to gain sole custody of her children. She stated that family court Judge Romanchak refused to reconsider the custody issue, and took the motion under advisement. Mary Lou also testified that, sometime during the divorce proceedings, she learned that: (1) Judge Romanchak's mother worked in the same office as Jim; (2) Judge Romanchak was a season subscriber to the Maui Symphony, where Jim worked; and (3) Jim and Judge Romanchak were members of the same rotary club. Mary Lou stated that, when she expressed her concerns about Judge Romanchak to her divorce attorney, he informed her that there was no basis to have the judge disqualified.

On cross-examination, the prosecution questioned Mary Lou about what had happened to the money she transferred to foreign banks. Mary Lou, on the advice of counsel, invoked her fifth amendment privilege to remain silent in front of the jury.

B. Jury Verdict and Sentence

The jury found Mary Lou guilty as charged on April 15, 2002. On June 13, 2002, Mary Lou was sentenced to: (1) probation for a period of five years for each count; (2) a six month term of imprisonment; (3) two hundred hours of community service; (4) a two hundred dollar Criminal Victim Compensation fee; (5) a one hundred and fifty dollar probation service fee; and (6) a five thousand dollar fine. Mary Lou filed a timely notice of appeal on August 8, 2002.

II. STANDARDS OF REVIEW

A. Jury Instructions

When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading.

[E]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.

[E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that the error may have contributed to the conviction. If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.

State v. Valentine, 93 Hawai'i 199, 204, 998 P.2d 479, 484 (2000)

(internal quotation marks and citations omitted) (brackets in original) (emphasis added).



Ordinarily, instructions to which no objection was made at trial may not be raised as error on appeal. Hawaii Rules of Penal Procedure (HRPP) Rule 30(e). An appellate court may presume that an instruction correctly stated the law if no objection to the allegedly erroneous instruction was made at trial. . . .

Where an erroneous instruction affected the substantial rights of a defendant, however, we may notice the error as "plain error" and remand for corrective action. . . .

Where instructions were not objected to at trial, if the appellant overcomes the presumption that the instructions correctly stated the law, the rule is that such erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.

State v. Pinero, 75 Haw. 282, 291-92, 859 P.2d 1369, 1374 (1993) (citations, internal quotation marks, brackets, and footnote omitted) (italicized emphasis in original) (underscored emphasis added), disapproved of on other grounds by Raines v. State, 79 Hawai'i 219, 900 P.2d 1286 (1995).

#### B. Admissibility of Evidence

The admissibility of evidence requires different standards of review depending on the particular rule of evidence at issue.

When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard. However, the traditional abuse of discretion standard should be applied in the case of those rules of evidence that require a "judgment call" on the part of the trial court.

State v. Cordeiro, 99 Hawai'i 390, 403-04, 56 P.3d 692, 705-06, reconsideration denied, 100 Hawai'i 14, 58 P.3d 72 (2002) (citations omitted); State v. Ortiz, 91 Hawai'i 181, 189, 981 P.2d 1127, 1135 (1999).

#### C. Expert Witnesses

This court employs the right/wrong standard in reviewing a challenges to a court's relevancy decision regarding

the admissibility of expert witness testimony under Rule 702 of the Hawai'i Rules of Evidence (HRE). State v. Vliet, 95 Hawai'i 94, 107, 19 P.3d 42, 55 (2001). The trial court's determination of the reliability of the expert witness' testimony is reviewed for abuse of discretion. Id. at 108, 19 P.3d at 56. "An abuse of discretion occurs when the decisionmaker exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party." Id. (quoting In re Water Use Permit Applications, 94 Hawai'i 97, 183, 9 P.3d 409, 495 (2000)) (internal quotation marks omitted).

### III. DISCUSSION

#### A. "Choice of Evils" Instruction

At trial, Mary Lou asserted the "choice of evils" defense, pursuant to HRS § 703-302 (1993), which provides in relevant part:

- (1) Conduct which the actor believes to be necessary to avoid an imminent harm or evil to the actor or to another is justifiable provided that:
  - (a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
  - (b) Neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
  - (c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(Emphasis added.) On appeal, Mary Lou argues that the trial court's instruction on her "choice of evils" defense was prejudicially erroneous in that it included inappropriate common law considerations that placed undue burdens on her. In its answering brief, the prosecution concedes that the instruction

given was erroneous, but argues that it was harmless and did not contribute to Mary Lou's conviction because she failed to show that there was an imminent threat of harm.

The "choice of evils" instruction given to the jury in the case at bar was identical to the instruction given in State v. Maumalunga (Maumalunga I), 90 Hawai'i 96, 976 P.2d 410 (App. 1998), aff'd as modified by State v. Maumalunga (Maumalunga II), 90 Hawai'i 58, 976 P.2d 372 (1998). In Maumalunga I, the defendant had allegedly received an anonymous phone call, informing him of a possible robbery at his workplace that evening. He asserted the "choice of evils" defense for carrying a gun to a gas station later that night. 90 Haw. at 98, 976 P.2d at 412. The trial court instructed the jury that:

In order for the "choice of evils" defense to apply, four conditions must be satisfied. *First, the defendant must have reasonably believed that there was no legal alternative available to him. Second, the defendant must have reasonably believed that the harm sought to be prevented was imminent or immediate. Third, the defendant's conduct must have been reasonably designed to actually prevent the threat or greater harm. Fourth, the harm sought to be avoided must have been greater than the harm sought to be prevented by the law defining the offense charged.*

Id. at 105, 976 P.2d at 419 (italicized emphasis in original) (underscored emphases added). The jury found the defendant guilty of carrying a loaded firearm without a license, and the defendant appealed.

On appeal, the Intermediate Court of Appeals (ICA) majority noted that, although the defendant may have been justified in taking the gun to work, there was no justification for taking it to the gas station, as the "imminent threat" was of

robbery at the workplace. Id. at 106, 976 P.2d at 420. The ICA majority concluded that, the instruction was erroneous inasmuch as it "attempt[ed] to incorporate both statutory requirements and case law considerations without distinguishing between the two." Id. In a concurring opinion, then Associate Judge Acoba agreed with the majority that the instruction was erroneous, but noted that the additional common law considerations placed undue burdens on the defendant. Id. at 113, 976 P.2d at 427. Specifically, he noted that the additional requirement that "the defendant must have believed that there was no legal alternative available," "places upon a defendant the burden of adducing evidence that there was no 'third alternative' or, assuming the existence of one, that such alternative was not 'reasonably available.'" Id. at 111, 976 P.2d at 425. Judge Acoba also noted that, by adding the consideration that the conduct be designed to "actually prevent the threat," the threshold is raised from requiring the defendant to believe the conduct was "necessary," to believing it was certain to avoid harm. Id. at 112, 976 P.2d at 426. Therefore, he opined that these two considerations shift the burden from the prosecution to the defendant. Ultimately, the majority held, and Judge Acoba agreed, that the erroneous instruction was harmless because the defendant presented "no evidence" as to the necessity of his conduct, thereby failing to satisfy an element of the "choice of evils" defense. Id. at 107, 976 P.2d at 421. Although this

court affirmed the result reached by ICA majority, we adopted the rationale of Judge Acoba's concurrence, stating that

the elements of the choice of evils defense are set forth, in their entirety, in the express language of [HRS § 703-302] and do not include additional elements from the "common law" formulation . . . because they were superseded by the adoption of the Hawai'i Penal Code in 1973.

Maumalunga II, 90 Hawai'i at 59, 976 P.2d at 373 (quotation marks in original) (citations omitted).

In the instant case, the prosecution argues that, similar to Maumalunga I, the record is "totally devoid of any evidence" that Mary Lou believed her conduct was necessary due to imminent harm, thereby failing to satisfy an element of the "choice of evils" defense. Consequently, the prosecution contends the error was harmless. However, unlike in Maumalunga I, there is evidence in this case indicating that Mary Lou believed there was an ongoing threat of sexual abuse any time the children visited with their father. Her belief was supported by the testimony of Shiabazian and Dr. Strong, as well as their observations of the children's behavior. Moreover, Mary Lou also testified as to her belief that her conduct was necessary to protect them from the continued and future harm by their father. Therefore, based on the testimony adduced at trial, we cannot conclude that there is "no evidence" as to the necessity of Mary Lou's conduct or her belief that the harm was imminent.

Based on the record as a whole, we conclude that there is a reasonable possibility that Mary Lou was convicted by virtue of the erroneous instruction, which led the jurors to believe

that her conduct was not justified because (1) Mary Lou did not reasonably believe that there was "no legal alternative" available to her, other than leaving the country without notifying any authorities or (2) her conduct was not "reasonably designed to actually prevent the threat of greater harm." Accordingly, we hold that the erroneous instruction was prejudicial.<sup>3</sup> Consequently, we vacate Mary Lou's conviction and sentence and remand this case for a new trial.

B. Remaining Issues

In light of our decision to vacate the conviction and remand for new trial, we need not address Mary Lou's remaining contentions. We do so here, however, as guidance to the trial court upon remand.

1. **Cross-examination of Dr. Strong**

Mary Lou contends that the trial court reversibly erred by allowing the prosecution to cross-examine Dr. Strong regarding her involvement with Mary Lou's trip to Costa Rica in order to impeach her credibility. Specifically, Mary Lou argues that the

---

<sup>3</sup> Mary Lou also argued that defense counsel provided ineffective assistance of counsel by, inter alia, failing to object to the erroneous "choice of evils" instruction. Therefore, inasmuch as we determine that the erroneous instruction was prejudicial, we need not address Mary Lou's claim of ineffective assistance of counsel.

prosecution's use of specific instances of conduct was improper under HRE Rule 608(b) (1993),<sup>4</sup> which only allows use of such conduct for impeachment purposes where the conduct is probative of untruthfulness. The prosecution counters that Mary Lou's reliance on HRE Rule 608(b) is misplaced, as HRE 609.1(a) allowed the prosecution to attack Dr. Strong's credibility with evidence of bias, interest, or motive, and that the questions regarding the specific events were probative of Mary Lou's intent.

HRE 608(b) applies to the admissibility of specific instances of a witness' conduct for the purpose of attacking the witness' credibility. HRE 609.1 (1993),<sup>5</sup> on the other hand, relates to an attack on a witness' credibility through evidence of bias, interest, or motive. However, under HRE Rule 403, such evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless

---

<sup>4</sup> HRE Rule 608(b) states that:

Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking the witness' credibility, if probative of untruthfulness, may be inquired into on cross-examination of the witness and, in the discretion of the court, may not be proved by extrinsic evidence.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

<sup>5</sup> HRE Rule 609.1 states that:

(a) General rule. The credibility of a witness may be attacked by evidence of bias, interest, or motive.

(b) Extrinsic evidence of bias, interest, or motive. Extrinsic evidence of a witness' bias, interest, or motive is not admissible unless, on cross-examination, the matter is brought to the attention of the witness and the witness is afforded an opportunity to explain or deny the matter.

presentation of cumulative evidence." Thus, a trial court must exercise its discretion in permitting evidence under HRE Rule 609.1(b), but at the same time must balance the probative value of the evidence with its prejudicial effect, pursuant to HRE Rule 403. State v. Balisbisana, 83 Hawai'i 109, 114, 924 P.2d 1215, 1220 (1996).

In the instant case, the trial court engaged in a trial run of Dr. Strong's testimony outside the presence of the jury to determine when she would exercise her fifth amendment right to remain silent. The trial court found that the events between October 1, 1998 until January 7, 1999, including Dr. Strong's participation in Mary Lou's relocation to Costa Rica, were relevant to the "interest, motive, [and] bias on the part of the witness."

The record demonstrates that Dr. Strong was called by the defense to testify that, in her professional opinion as a pediatrician, the children were being sexually abused by their father. The prosecution was, thus, entitled to attack her credibility by eliciting evidence of her bias and interest in the case as someone who aided Mary Lou in leaving the country. The court properly balanced Mary Lou's right to have Dr. Strong testify regarding her belief that the children were sexually abused by their father against the requirements for meaningful cross-examination, including the prosecution's right to attack her credibility regarding that opinion. Accordingly, the trial



court did not abuse its discretion by permitting questioning that required Dr. Strong to assert her fifth amendment rights.

**2. Cross-examination of Mary Lou**

Mary Lou contends that the trial court reversibly erred by allowing the prosecutor to confront her about the whereabouts of the money she wired to foreign banks in order to impeach her credibility and by failing to follow the requirements of HRE Rule 513(b) when it forced her to assert her fifth amendment privilege in front of the jury. The prosecution counters that such questioning was proper under HRE Rule 609.1, rather than HRE Rule 608, as discussed supra.

Because Mary Lou is the defendant in this case, the issues regarding her cross-examination involve additional considerations. This court stated in State v. Culkin, 97 Hawai'i 206, 35 P.3d 233 (2001), that:

A defendant who elects to testify in his own defense is subject to cross-examination as to any matter pertinent to, or having a logical connection with the specific offense for which he is being tried. In this regard, a defendant may be cross-examined on collateral matters bearing upon his credibility, the same as any other witness. [HRE] Rule 608(b) (1993) instructs in relevant part that specific instances of the conduct of a witness, for the purpose of attacking the witness' credibility, if probative of untruthfulness, may be inquired into on cross-examination of the witness and, in the discretion of the court, may be proved by extrinsic evidence. While HRE Rule 608 invests the trial judge with discretion to admit extrinsic evidence, the HRE Rule 403 balancing test will dictate exclusion of that extrinsic evidence in certain cases.

Id. at 220-21, 35 P.3d at 247-48 (citations, internal quotation marks, and brackets omitted). This court also noted that:

[T]he risk of unfair prejudice occasioned by compelling a criminal defendant to invoke the fifth amendment privilege in front of jurors is substantial. Generally, claims of privilege must be made outside of the presence of the jury in order to avoid the layman's natural first suggestion that the resort to the privilege in each instance is a clear confession of crime.

Id. at 222, 35 P.3d at 249 (internal quotation marks, citations, and some brackets omitted).

The prosecution argues that the questions regarding the whereabouts of Mary Lou's money were not specific instances of conduct probative of untruthfulness under HRE 608. Rather, they were offered to show evidence of her interest in keeping Jim from reaching her money under HRE 609.1. Mary Lou opened the door to questions about her money when she testified on direct examination that, when she decided to leave the country, she liquidated all her assets and when she answered on cross-examination that she had wired the money to foreign banks. Upon defense counsel's objection to questions about Mary Lou's access to her money in Costa Rica, the court overruled the objection, stating that, "[t]he Court's view is that [it] is proper grounds for cross-examination. It is for the jury to decide." Mary Lou asserted her fifth amendment right in response to questions about: (1) money that was wired to London; (2) money transferred to the Cayman Islands; and (3) the final whereabouts of \$350,000. In response to several other questions about her money, Mary Lou answered "I don't remember" or "I don't know." Based on the record and Mary Lou's varying responses, the trial court did not

abuse its discretion by permitting the prosecution's cross-examination.

### 3. Admission of Expert Testimony

Mary Lou contends that the trial court erred in precluding: (1) Dr. Geffner from providing an expert opinion as to whether he identified "red flags" with regard to the French children and (2) Beverly James from testifying as to the reasonableness of Mary Lou's belief that (a) Jim was sexually abusing the children and (b) Mary Lou's conduct was necessary in order to protect the children from further abuse.

HRE Rule 702 (1993) governs the admission of expert testimony at trial:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

This court addressed the admissibility of expert testimony that directly opined on the truthfulness of a victim's testimony in State v. Batangan, 71 Haw. 552, 799 P.2d 48 (1990). Batangan was convicted of first-degree sexual abuse of his seven-year-old daughter. At trial, the prosecution presented Dr. Bond, an expert in the field of clinical psychology with a subspecialty in the treatment of sexually abused children. Id. at 554-55, 799 P.2d at 50. Dr. Bond testified about: (1) what the complainant had related to him regarding the incidents of sexual abuse;

(2) the behavior of child sex abuse victims in general; and  
(3) how he evaluates whether a child is telling the truth about being sexually abused. Id. Dr. Bond then implicitly testified that the complainant was believable and that she had been abused by the defendant. Id. The trial court admitted the testimony under State v. Kim, 64 Haw. 598, 645 P.2d 1330 (1982), over the objection of the defendant. Batangan, 71 Haw. at 555, 799 P.2d at 50. This court overruled the trial court, stating that:

Expert testimony assists the trier of fact by providing a resource for ascertaining truth in relevant areas outside the ken of ordinary laity. Specialized knowledge which is the proper subject of expert testimony is knowledge not possessed by the trier of fact who lacks the expert's skill, experience, training, or education. Although an expert's testimony on matters within the competence of the jurors may be relevant and helpful, the possibility that the jury may be unduly influenced by the expert's opinion would mitigate against admission. Scientific and expert testimony, with their aura of special reliability and trustworthiness, courts the danger that the triers of fact will abdicate [their] role of critical assessment and surrender [] their own common sense in weighing testimony.

The common experience of a jury, in most cases, provides a sufficient basis for assessment of a witness' credibility. Thus, expert testimony on a witness' credibility is inappropriate. . . .

\* \* \*

. . . The pertinent consideration is whether the expert testimony will assist the jury without unduly prejudicing the defendant.

Thus, while expert testimony explaining seemingly bizarre behavior of child sex abuse victims is helpful to the jury and should be admitted, conclusory opinions that abuse did occur and that the child victim's report of abuse is truthful and believable is of no assistance to the jury, and therefore, should not be admitted. Such testimony is precluded by HRE Rule 702.

Once the jury has learned the victim's behavior from the evidence and has heard experts explain why sexual abuse may cause delayed reporting, inconsistency, or recantation, we do not believe the jury needs an expert to explain that the victim's behavior is consistent or inconsistent with the crime having occurred.

The jury is fully capable, on its own, of making the connections to the facts of the particular case before them and drawing inferences and conclusions therefrom.

Id. at 556-58, 799 P.2d at 51-52 (citations, internal quotation marks, and some brackets omitted) (some brackets in original) (emphases added).

This court further noted that, "where the effect of the expert's opinion is the same as directly opining on the truthfulness of the complaining witness, such testimony invades the province of the jury." Id. at 559, 799 P.2d at 52 (internal quotation marks and citation omitted).

a. Dr. Geffner's testimony

In the instant case, the trial court properly permitted Dr. Geffner to testify as to what was meant by "red flags" and how they are used as indicators of possible sexual abuse. The trial court properly excluded testimony as to whether "red flags" were present in the French case, noting that "the fact witnesses can provide the jury with evidence or facts" and that Dr. Geffner's conclusions that (1) one or more "red flags" were present in the French children and (2) there was alleged sexual abuse present was "contrary to the principles set forth in Batangan. The trial court's exclusion of such testimony was especially appropriate where Dr. Geffner had not interviewed any of the Frenches, nor had he reviewed the tapes of the French children's interviews with CPS. Moreover, Mary Lou and the other defense witnesses testified as to signs of red flags based on the children's behavior. The jury was fully capable of drawing

inferences from Dr. Geffner's testimony as to what amounted to a red flag and the facts presented by the witnesses in concluding whether sexual abuse occurred. Based on the foregoing analysis, the trial court did not err in limiting Dr. Geffner's testimony.

b. Beverly James' testimony

Mary Lou contends that the trial court erred in precluding Beverly James from testifying because James' "specialized knowledge would have assisted the jury in determining whether it was reasonable for Mary Lou to believe that her conduct was necessary in order to prevent Jim from further sexually abusing the children." Mary Lou argues that such testimony would not have constituted a commentary on the credibility of any witness in the case and that her testimony was reliable because she was an expert in childhood trauma and sexual abuse.

James, a clinical social worker who had written books on child sexual abuse and childhood trauma, was asked to do several evaluations in the Frenches' divorce case. Mary Lou paid James to evaluate the functioning of Mary Lou and Jim as parents, to evaluate the functioning of the children, and to make recommendations to the court.

Mary Lou made an offer of proof that the trial court should permit James to: (1) give an expert opinion on whether the information Mary Lou had prior to leaving with the children would

cause a reasonable person to conclude that the children had been sexually abused; (2) describe the functioning of the family court on Maui; and (3) describe how the court would respond to an allegation of child abuse after a hard-fought custody battle.

The trial court held a hearing outside the presence of the jury to determine whether James would be allowed to testify.

Thereafter, the court determined that James was an expert in the field of childhood trauma and child sexual abuse. However, the trial court precluded James from testifying for several reasons, including: (1) she was not an expert in the practicality of reporting allegations of child sexual abuse in a situation where there has been a divorce decree; (2) her opinion of Jim's parenting skills was not relevant to the issues before the jury; (3) she did not indicate where she stood with respect to her degree of certainty or probabilities of her opinion; (4) James' database and her information did not address the relevant period of the summer of 1998 because her role in the divorce case ended in January of 1998; and (5) her testimony was an improper attempt to assess the credibility and reliability of the witnesses under Batangan. Based on a careful review of the record and in light of the trial court's consideration of the issues, the trial court did not err in precluding James from testifying.

#### IV. CONCLUSION

Based on our conclusion that the erroneous "choice of evils" instruction was prejudicial, we vacate the trial court's

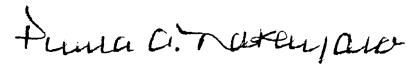
June 13, 2002 judgment of conviction and sentence and remand this case for a new trial.

DATED: Honolulu, Hawai'i, February 17, 2006.

On the briefs:

James S. Tabe,  
Deputy Public Defender,  
for defendant-appellant

Glenn Pesenhofer,  
Deputy Prosecuting Attorney,  
for plaintiff-appellee



Glenn E. Dubois