

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

JUAN VEGA AGPAOA, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-0619)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, and Nakayama, JJ.;
Ramil, J., Dissenting and Concurring Separately; and
Acoba, J., Dissenting Separately, with whom
Ramil, J., partially joins)

Following a jury trial,¹ defendant-appellant Juan Vega Agpaoa appeals his convictions of and sentence for terroristic threatening in the first degree, in violation of Hawai'i Revised Statutes (HRS) § 707-716(1)(d) (1993), and terroristic threatening in the second degree, in violation of HRS § 707-717(1) (1993). On appeal, Agpaoa contends that the trial court erred in admitting an audio taped interview of the Complainant because plaintiff-appellee State of Hawai'i (the prosecution) failed to lay the proper foundation for its admission and that the admission of the audio taped interview

¹ The Honorable Frances Q. F. Wong, presiding.

violated the confrontation clauses of the United States and Hawai'i State Constitutions.

Upon carefully reviewing 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 resolve Agpaoa's contentions as follows.

At trial, Complainant recanted her prior allegations against Agpaoa and claimed a lack of memory as to the statements she made to the police. In light of Complainant's recantation, the prosecution sought to introduce her prior audio taped and written statements, which were substantially the same, as evidence. Subsequent to the trial court's ruling that the prosecution had laid the proper foundation for the admission of Complainant's written statement under the past recollection recorded exception to the hearsay rule, see Hawai'i Rules of Evidence (HRE) Rule 802.1(4), Agpaoa objected to the admission of both the written and audio taped statements. The trial court indicated that it would make a similar "reasonable inference . . . with respect to the" foundation requirements for past recollection recorded as to the audio interview, and admitted the audio interview.²

² The trial court excluded the written statement based upon its determination that the written statement and audio interview were "cumulative of each other."

Although the trial court may have based its ruling on the "wrong" rule of evidence (HRE Rule 802.1(4)) in admitting the audio taped statements, this court should affirm the trial court's judgment where the record clearly exhibits an alternative and proper basis to support a trial court's ruling. See State v. Ross, 89 Hawai'i 371, 378 n.4, 974 P.2d 11, 18 n.4 (1998). Extrinsic evidence of prior inconsistent statements made by a declarant who testifies at trial may be offered to prove the truth of the matter asserted if the requirements of HRE Rules 802.1(1) (1993) and 613(b) (1993) are met. The requirements are as follows: (1) the declarant is subject to cross-examination concerning the subject matter of the declarant's statement; (2) the statement is inconsistent with the declarant's testimony; (3) the statement was recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement; and (4) the circumstances of the statement have been brought to the attention of the witness and the witness has been asked whether the witness made the statement. HRE Rule 802.1(1); HRE Rule 613(b).

First, the record clearly demonstrates that, despite intermittent and contradictory statements that she did not remember what happened, Complainant testified as to the underlying events and denied that Agpaoa threatened her. In other words, Complainant was subject to cross-examination

regarding the underlying events of the statements she made in the audio tape, and the trier of fact was able to meaningfully compare the two versions of the events and assess the witness' credibility at trial. See State v. Canady, 80 Hawai'i 469, 480-81, 911 P.2d 104, 115-16 (App. 1996).

Second, Complainant's testimony at trial that Agpaoa did not threaten to kill her was clearly inconsistent with her prior audio taped statements. Although she claimed a lack of memory, she contradicted herself by testifying as to the events surrounding Agpaoa's alleged threats, denying that the threats took place and claiming that she lied to the police. A feigned lack of memory or evasive answers can constitute inconsistency under HRE Rule 613(b) and 802.1(1). See, e.g., People v. Green, 479 P.2d 998 (Cal.) (discussing application of evidence code provisions similar to HRE Rules 613(b) and 802.1(1), stating that "inconsistency in effect . . . is the test"), cert. dismissed, 404 U.S. 801 (1971). The audio taped statements were materially and substantially inconsistent with Complainant's testimony at trial.

Third, although Complainant claimed that she did not remember making the audio taped statement to the police, the police officer testified as to the circumstances of the audio tape and authenticated it, and Complainant identified herself on

the tape. The audio tape is a contemporaneous recording of the witness' statements at the time she made them.

Fourth, the prosecution questioned Complainant about the taped interview. Although the prosecution did not go through the interview line by line with Complainant in open court,³ she admitted that she listened to the audio tape and reviewed a transcript of the audio tape the day before with a police officer. In response to the prosecution's questions about whether listening to the tape and reading the transcript refreshed her recollection, she still claimed that she did not remember making the statements. Thus, the Complainant's statements were brought to her attention, and she was asked whether she made them, giving her an opportunity to explain the inconsistencies. Moreover, on cross-examination, she explained that the statements were lies.

II. CONCLUSION

Based on the foregoing, we hold that, under the circumstances of this case, the audio taped statements were admissible under HRE Rules 802.1(1) and 613(b) and did not violate the confrontation clauses of the United States and Hawai'i State Constitutions. Because the trial court did not err in admitting

³ We note that the prosecution questioned Complainant extensively about her written statement, which contained substantially the same accounting of events as the audio tape.

Complainant's audio taped statements, we affirm the judgment of conviction.

DATED: Honolulu, Hawai'i, December 20, 2002.

On the briefs:

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for defendant-appellant

Loren J. Thomas,
Deputy Prosecuting Attorney,
for plaintiff-appellee