

OPINION BY RAMIL, J.
DISSENTING IN PART AND CONCURRING IN PART

For the following reasons, I would hold that the tape-recorded statement of the witness was properly admitted as past recollection recorded and could be relied upon by the jury.

I disagree with the majority's decision to analyze and affirm on the basis of the "prior inconsistent statement" exception to the hearsay rule, as opposed to the "past recollection recorded" exception relied on by the circuit court. See majority at 3 ("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." (emphasis added; citation omitted)). In my view, adequate foundation was laid to establish the accuracy of the tape-recorded statement, such that the circuit court judge did not abuse his discretion in admitting the statement under the past recollection recorded exception. Affirmance under an evidentiary rule not briefed by the parties or relied on by the circuit court is unnecessary in the present case. See State v. Poaipuni, 98 Hawai'i 387, 402, 49 P3d. 353, 368 (Moon, C.J., concurring) ("The judicious use of our authority and resources demands that we exercise prudence by generally declining to issue opinions unnecessary to the resolution of the case before us.").

Hawai'i Rules of Evidence (HRE) Rule 802.1(4)¹ is identical to its federal counterpart, Federal Rules of Evidence (FRE) Rule 803(5). See State v. Sua, 92 Hawai'i 78, 84, 987 P.2d 976, 982 (App. 1999) ("According to its commentary, HRE Rule 802.1(4) is 'identical with' Federal Rules of Evidence (FRE) Rule 803(5)."). When the Hawai'i rule is identical to the FRE, we may examine the Advisory Committee Notes for the FRE in construing the Hawai'i rule. See Lai v. St. Peter, 10 Haw. App. 298, 309, 869 P.2d 1352, 1359 (1994) (referring to the Advisory Committee Notes for the FRE). The Advisory Committee Notes for FRE Rule 803(5) state: "No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate." FRE Rule 803 Advisory Committee Notes; see also State v. Discher, 597 A.2d 1336, 1341 (1991) (the Supreme Judicial Court of Maine quoting the Advisory Committee Notes for FRE Rule 803(5), and stating that where "a witness may be unable or unwilling to testify from present memory," "[f]urther inquiry

¹ **Past recollection recorded.** A memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

into the ability of the witness to recall the event in question" is "time-consuming and unproductive.").

When the Hawai'i rule is identical to the FRE, we may also refer to federal case law. See State v. Jhun, 83 Hawai'i 472, 478, 927 P.2d 1355, 1361 (1996) (citation omitted). The Sixth Circuit, in interpreting FRE Rule 803(5), stated:

Rule 803(5) does not specify any particular method of establishing the knowledge of the declarant nor the accuracy of the statement. It is not a sine qua non of admissibility that the witness actually vouch for the accuracy of the written memorandum. Admissibility is, instead, to be determined on a case-by-case basis upon a consideration . . . of factors indicating trustworthiness, or the lack thereof.

United States v. Porter, 986 F.2d 1014, 1017 (6th Cir. 1993) (emphasis added). Thus, the Sixth Circuit recognized that the accuracy of the statement may be proved without direct or express affirmance by the witness. Significantly, the plain language of HRE Rule 802.1(4) and FRE Rule 803(5) requires only that the statement be "shown to have been made or adopted by the witness." See State v. Marcy, 680 A.2d 76, 80 (1996) (noting that the Vermont Rule "is phrased in the passive voice, requiring only that the memorandum or record be 'shown to have been made or adopted by the witness.'" (citation and emphasis omitted)). Had the drafters intended that the witness be required to testify, it would have altered the language of the rule.

The approach taken by the Advisory Committee Notes to FRE Rule 803(5) and by the Sixth Circuit comports with the rationale supporting the development of hearsay exceptions: that

those statements are surrounded by sufficient indicia of reliability such that they overcome the need for exclusion. See State v. Christian, 967 P.2d 239, 262, 88 Hawai'i 407, 430 (1998) ("A number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination."); see also Porter, 986 F.2d at 1017 ("The touchstone for admission of evidence as an exception to the hearsay rule has been the existence of circumstances which attest to its trustworthiness." (citation omitted)). In Porter, the Sixth Circuit acknowledged that the district court found "sufficient indicia of trustworthiness" to admit portions of the statement, including the details contained in the statement, its internal consistency, and its consistency with other evidence. Porter, 680 F.2d at 1017.

In State v. Marcy, 680 A.2d 76 (Vt. 1996), the Supreme Court of Vermont considered whether the trial court properly admitted the victim's tape-recorded statement, pursuant to Vermont Rules of Evidence (VRE) 803(5), as past recollection recorded.² The court determined that "[a]s the victim of the

² VRE 803(5) provides:

(5) **Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless
(continued...)

assault, the witness once had knowledge of it, and her tape-recorded statement relates that knowledge in detail.” Id. at 78. After reviewing the transcript of the tape-recording in the instant case, where the witness identified herself and described the events in detail, I would find that the requirement was met in our case as well. The Marcy court also determined that the testimony of the police officer who tape-recorded the statement was sufficient to establish that the statement was made by the witness. Id. In the instant case, Officer Lovell testified as to the time, place, and manner of the interview with Lettie Agpaoa, and his testimony is attuned with the information on the tape.

The Marcy court then considered whether the witness must affirm the accuracy of the statement. The court noted:

Defendant, arguing that the statement should not have been admitted, emphasizes that the statement was not sworn, and that the witness never affirmed the truth or accuracy of the statement when it was made. Defendant misconstrues the requirements of Rule 803(5). Nothing in the language of the rule indicates that, to be admissible, the prior statement must be sworn, or that the witness must affirm the accuracy of the prior statement.

²(...continued)
offered by an adverse party.

For a document to be admitted pursuant to VRE 803(5), the following three requirements must be met:

(1) The document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant’s knowledge when the matters were fresh in his memory.

Marcy, 680 A.2d at 78 (citing State v. Paquette, 497 A.2d 358, 360 (Vt. 1985) (quoting People v. Kubasiak, 296 N.W.2d 298, 302 (Mich. 1980)).

Id. at 78-79 (internal citations omitted). The court distinguished its case from cases where "the statements involved were not prepared by the witness, but by another person, usually a law enforcement agent." Id. at 79. In the case before the Marcy court, and in the instant case, the statements are tape-recordings of the witnesses' own voices.³ Thus, "although the [witness] did not sign the statement, that factor is much less important." Id. at 80 n.2.

In determining whether the tape-recorded statement accurately reflected the witness's knowledge when the matter was fresh in her memory, the Marcy court stated that

The trial court, in finding the statement admissible, relied upon the following evidence of its accuracy: the statement was given to a police officer within a day of the assault; the tape-recorded statement was made shortly after and was consistent with a prior interview with the police officer; the statement revealed details of the assault; the statement described the events chronologically; the witness spoke coherently, logically, and relatively directly, responding appropriately to questions from the officer; the witness did not appear sleepy or groggy to the officer, despite her later testimony that she was taking prescription drugs at the time the statement was given; and the police officer's interviews with the other residents of the house provided some corroboration. The trial court also emphasized that the witness never recanted the statement, or indicated that

³ Justice Acoba's dissenting opinion states that

Complainant did not remember going to the police station on March 23, 1993 to meet with Officer Lovell. She did not remember giving an audio interview to Lovell. Accordingly, she did not testify, as required under HRE Rule 802.1(4), (1) that she made or adopted the taped statement, (2) that she did so when the matter was fresh in her memory, and (3) most significantly, that the tape "reflected that knowledge correctly." Obviously, then, she did not confirm that she once had knowledge of the contents of the audio interview, that the contents of the audio interview were made when the events were fresh in her memory, and that it reflected her knowledge accurately.

Dissent at 17-18. As discussed above, Rule 802.1(4) does not require that the witness be the one to affirm the accuracy of a statement. Moreover, in the case of a tape-recorded statement, the witness's own voice affirms the statement, even where the text of her testimony does not.

the statement was inaccurate or given involuntarily, but rather testified that if she had talked to a police officer she would have tried to be truthful. Specifically, the witness testified that she would not have "intentionally" or "deliberately" lied to the officer.

Id. at 79. Thus, the Marcy court concluded that "taken together, the evidence presented by the State is sufficient to show that the tape-recorded statement of the witness correctly reflects her knowledge of the assault at the time it was made." Id. In the instant case, the witness testified about events that had occurred three days prior, the tape-recorded statement was made the same day and was consistent with a prior interview with a different police officer, the statement reveals details of the events, the statement described the events chronologically, and the witness spoke coherently, logically, and directly, responding appropriately to questions from the officer.⁴

As stated by the Marcy court, "the language of the rule contemplates a more flexible case-by-case determination of the admissibility of a statement as past recollection recorded, that evaluates the trustworthiness of the prior statement instead of focusing on hypertechnical evidentiary requirements." Id. at 80. In the case before us, the evidence relied on by the circuit court is sufficient to establish the accuracy of the statement,

⁴ I note that the facts in Marcy are not perfectly analogous to this case, because the witness in Marcy did testify that "she would not have 'intentionally' or 'deliberately' lied to the officer." Marcy, 680 A.2d at 79. In the instant case, the witness claimed "I don't remember" to a number of questions posed by the State. Although the State would have laid a more thorough foundation by asking the witness whether she would have lied to the officer, I believe that the reasoning in Marcy is still applicable. As discussed above, there is no requirement in the rule that the witness be the one to affirm the accuracy of the statement. That the witness in Marcy testified that she would have tried to be truthful was not determinative, but was one factor supporting the accuracy of the statement.

and the circuit court judge did not abuse his discretion in finding that the foundational requirements for admissibility were satisfied. Accordingly, I would hold that the tape-recorded statement of the witness was properly admitted as past recollection recorded and could be relied upon by the jury.