DISSENTING OPINION OF ACOBA, J.

I dissent from the decision to dismiss the writ of certiorari as improvidently granted.

The question before us is whether a defendant's prior sex assault convictions should have been admitted to prove "intent." The credibility of Defendant-Appellant Angel Inoue (Defendant) was the dispositive issue in the instant case. In that respect, allowing Defendant's prior convictions into evidence as proof of intent was error. Under such circumstances, no cautionary instruction limiting the jury's consideration of the convictions to the issue of intent would be effective. Consequently, the writ of certiorari was properly granted in the first instance, and then improperly dismissed.

I.

A grand jury indicted Defendant for the offense of kidnapping, Hawai‘i Revised Statutes (HRS) § 707-720(1)(d) (1993).[1] After his third trial in the first circuit court (the court),[2] Defendant was convicted as charged. He appealed to the Intermediate Court of Appeals (ICA), which affirmed his conviction on May 16, 2002, through a Summary Disposition Order

---

[1] HRS § 707-720(1)(d), relating to the offense of kidnapping, states as follows: "(1) A person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to: . . . (d) Inflict bodily injury upon that person or subject that person to a sexual offense."

[2] The Honorable Frances Q. F. Wong presided over this matter.

(SDO). He sought certiorari in this court, which was originally granted on June 19, 2002.

A.

At trial, the complainant (Complainant) testified that on March 8, 1998, when she was sixteen years old, Defendant, her uncle, contacted her and asked her to clean his house. He picked her up shortly after ten o'clock in the evening and drove her to his apartment. The two entered the apartment and Defendant closed and locked the door behind them. Complainant then cleaned Defendant's apartment and asked Defendant to take her home, which he refused to do, urging her to have a "drink." Complainant was coerced into consuming straight tequila. Subsequently, she awoke to find her legs dangling over the edge of Defendant's bed and Defendant lying on top of her. He was holding Complainant's wrists down and was kissing her. She had not given Defendant permission to either physically restrain, fondle, or kiss her.

Complainant's mother testified that, when she arrived at Defendant's apartment, she forced her way in and found Complainant not "conscious," lying on the floor, wearing only a bra and unzipped jeans. Once Complainant's mother was outside of the apartment with her, Complainant told her that Defendant had rubbed her genitalia. Officer Brian Wong testified that Complainant told him that Defendant fondled her breasts and genitalia.

B.

Defendant testified that, on March 8, 1998, Complainant's mother called him and asked him to "hold [Complainant] over at [his] apartment" because Complainant had failed to come home for several nights. Defendant denied lying on top of Complainant:

> [DEFENSE COUNSEL]: Did you ever kiss her on the lips that day?
> [DEFENDANT]: No.
> Q: Did you ever kiss [Complainant] on the lips?
> A: No. Only here on the side of her face.[[3]]
> . . . .
> Q: [Defendant],,[sic] on the night of March 8th, 1998, did you hold [Complainant]'s arms down on the bed?
> A: No.
> Q: Did you put your body on top of hers?
> A: No.
> Q: Did you put your tongue in her mouth?
> A: No.
> Q: Did you touch her breast area?
> A: No.
> Q: Did you touch her area between her legs at any time that night?
> A: No.
> Q: <u>Did you ever do any of those things at any time in your life</u>?
> A: <u>No</u>.

(Emphases added.) After defense counsel had completed direct examination, Plaintiff-Appellee State of Hawai‘i (the prosecution), outside the jury's presence, asked to be allowed to cross-examine Defendant about his two prior convictions for sexual assault involving two girls, ages six and twelve. The prosecution contended that Defendant had "opened the door" to such evidence and that Defendant had placed intent in issue because "he is saying he had no intent to commit a sexual

[3] Earlier in his testimony, Defendant explained that, when he picked up Complainant, she kissed him hello, the two then ran an errand at Defendant's employer's home, and then proceeded to the grocery store. The hello kiss is not one of the acts for which Defendant was indicted.

offense[.]" Defense counsel contended that Defendant's denial of any prior alleged act was specific to Complainant, and thus the "door" to the prior convictions was not opened. The court allowed the convictions in evidence "under the reasons that [the prosecution] had stated."

The prosecution then cross-examined Defendant regarding his prior bad acts as follows:

> [PROSECUTION]: *Isn't it true that in February of 1999, that is, February of last year, you were convicted for sexually assaulting two little girls in this very courthouse*?
> [DEFENDANT]: I got blamed for it.
> Q: *You were convicted by a jury, isn't that correct*?
> A: On a lesser charge they found me.
> Q: Okay. *Now, isn't it correct that a jury, just like these people over here, found you guilty of three charges of Sexual Assault in the Third Degree? Isn't that correct[,] [Defendant]*?
> A: After you prosecuted me because you never bring in the first sister who slept over my house. You only wanted the one who would testify against me.
> . . . .
> Q: Okay. *So you were found guilty of Sexual Assault in the Third Degree for the 12-year-old girl because you had placed your hand on her breast and fondled her; isn't that correct*?
> A: Because of the mother told the two girls to say that about me, but they couldn't bring the first girl in court to testify good about me.
> Q: [Defendant], would you answer my question. *You were found guilty for sexually assaulting a girl in February in 1998 [sic], is that correct, a 12-year-old girl*?
> A: [Prosecutor], I'm not going to answer that question.
> Q: Well, do you deny that you were found guilty?
> A: I only denying that I never touch little Rachel or Theresa, 12 years old.
> Q: Okay. *But a jury found you guilty of touching the 12-year-old and a 6-year-old, is that correct*?
> A: The reason they found me guilty because you guys didn't bring the other sister who slept at my house the first night.

(Emphases added.) The questioning of Defendant regarding his prior convictions continued, due to Defendant's refusal to

specifically answer the prosecution's questions regarding the prior convictions.

The court instructed the jury three times that it was not to consider the evidence of Defendant's prior convictions for any purpose other than as evidence of Defendant's intent in the instant case.[4]

The jury found Defendant guilty as charged on May 26, 2000.

II.

Defendant argued on appeal, inter alia, that the court improperly admitted evidence of his prior bad acts. A court's ruling on the admissibility of prior bad acts evidence is reviewed for an abuse of discretion. See State v. Cabrera, 90 Hawai'i 359, 369-70, 978 P.2d 797, 807-08 (1999) ("We review the circuit court's ruling pursuant to [Hawai'i Rules of Evidence (HRE)] Rules 403 and 404 for an abuse of discretion[.]") An ICA decision will be reversed if it contains grave errors of law. See State v. Dow, 96 Hawai'i 320, 322, 30 P.3d 926, 928 (2001) ("In granting a writ of certiorari, this court reviews decisions for[, inter alia,] grave errors of law or fact[.]" (Citing HRS § 602-59 (1993).)).

---

[4] Such instructions were given at the outset of the prosecution's cross-examination, after cross-examination, and in the course of the reading of the jury instructions.

A.

HRE Rule 404(b) (Supp. 2001) reads, in part:

> 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 <u>action in conformity therewith</u>. It may, however, be admissible where such evidence is <u>probative of another fact that is of consequence to the determination of the action</u>, such as proof of motive, opportunity, <u>intent</u>, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

(Emphases added.) As explained in <u>State v. Renon</u>, 73 Haw. 23, 828 P.2d 1266 (1992), "HRE 404(b) 'reiterates the common law rule "that the prosecution may not introduce evidence of other criminal acts of the accused . . . to suggest that[,] because the defendant is a person of criminal character, it is more probable that he [or she] committed the crime for which he [or she] is on trial."'" <u>Id.</u> at 31, 828 P.2d at 1270 (quoting <u>State v. Castro</u>, 69 Haw. 633, 643, 756 P.2d 1033, 1042 (1988)).

Because Defendant completely denied either restraining Complainant or lying on top of her, the issue that was "of consequence to the determination of the action," HRE Rule 404(b), was whether it was Complainant or Defendant who was credible. In light of the central question of credibility in the instant case, the ultimate effect of allowing Defendant's prior convictions into evidence was to submit that, on March 8, 1998, he acted in conformity with prior conduct underlying those convictions -- in essence, to establish that Defendant was lying about what he did and did not do on that date.

<u>State v. Torres</u>, 85 Hawai'i 417, 945 P.2d 849 (App. 1997), illustrates when evidence of prior bad acts may be

admitted to prove intent. In Torres, the defendant was charged with sexual assault for knowingly sexually penetrating the complainant under the age of fourteen, in the course of bathing her. See id. at 422, 945 P.2d at 854. The complainant testified that the defendant penetrated her vagina with his finger during the bath, while the defendant claimed that "he 'had no bad intentions' when he agreed to bathe [the c]omplainant and washed her vagina." Id. The defendant denied the digital penetration. See id. The ICA explained that evidence of the defendant's prior interactions with the complainant was properly admitted because at issue was whether he intended to commit sexual assault in his subsequent contact with her:

> In []Renon, [supra], the supreme court stated that intent is "the state of mind with which an act is done" while motive means "the state of mind that prompts a person to act in a particular way; an incentive for certain volitional activity." 73 Haw. at 36-37, 828 P.2d at 1272-73 (citations omitted).
>
> In this case, it was undisputed that [the d]efendant washed [the c]omplainant's vagina. However, there was a dispute regarding who prompted the bath and what occurred during the bath. Consequently, evidence of why [the d]efendant bathed [the c]omplainant -- i.e., [the d]efendant's motive, purpose, and intent for washing [the c]omplainant's vagina -- were undoubtedly relevant to prove a fact of consequence, that [the d]efendant "*knowingly* subjected [the c]omplainant to sexual penetration." ([Italicized e]mphasis added.)
>
> For these purposes, evidence that [the d]efendant (1) "kissed and stuck his tongue in [the c]omplainant's mouth"; (2) "tried to lay on top of [the c]omplainant"; (3) "told [the c]omplainant to sit on his lap and would try to kiss [the c]omplainant more"; and (4) "told [the c]omplainant, 'Let's go someplace and make love[,]'" were all relevant to show [the d]efendant's motive, purpose, and intent to sexually penetrate [the c]omplainant when he bathed her.

Id. (brackets and ellipses points omitted) (emphases added). Contrastingly, in the instant case, actual physical contact alleged between Defendant and Complainant was disputed:

Defendant denied so touching Complainant. Thus, unlike the facts in Torres, Defendant's state of mind in touching Complainant was not at issue, and, thus, evidence of his "intent" was not "undoubtedly relevant." Id. Whereas Defendant denied sexually touching Complainant (rather than, as in Torres, admitting to touching her, but for non-sexual reasons), the court abused its discretion by admitting evidence of Defendant's prior convictions to prove intent.

Moreover, it cannot be reasonably argued that Defendant invited the introduction of the convictions, as his denial of "do[ing] any of those things" related specifically to Complainant in this case. First, as argued by Defendant in his opening brief, the questions posed to Defendant regarding whether or not he had "do[ne] any of those things at any time in [his] life" was at best ambiguous. Defendant would have had to explicitly state that he had never touched or kissed any girl in a sexual manner. Taken in context, all preceding questions to Defendant related specifically to Complainant regarding "that day," "the night of March 8," and, finally, after Defendant denied such conduct, "at any time of [his] life." Notably, the indictment accused Defendant of committing the crime "[o]n or about the 8th day of March, 1998[.]" (Emphasis added.) A reasonable and fair assessment of his answer to the question, in the context in which the question was asked, is that Defendant had never done the stated acts as to Complainant.

B.

In State v. Gomes, 59 Haw. 572, 584 P.2d 127 (1978), this court, quoting the United States Supreme Court, suggested that more than the mere denial of the crime charged was required to justify the introduction of prior convictions for the purpose of impeaching a defendant:

> In Walder[v. United States, 347 U.S. 62, 65 (1954), the United States Supreme Court explained that] "the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics". [sic] It was held that this assertion on direct examination opened the door, solely for the purpose of attacking the defendant's credibility, to cross-examination of the defendant with respect to his possession of heroin unlawfully seized from his home in his presence and suppressed as evidence in a prior case, and also to testimony with respect to the seizure of the heroin.

Id. at 573, 584 P.2d at 129 (emphases added). Defendant's response to the question did not go "beyond a mere denial" nor did it constitute a "sweeping claim that he had never" acted as charged. Id. Applying Gomes, then, the door was not opened to the introduction of Defendant's prior convictions.

III.

Other cases which have upheld the admission of HRE Rule 404(b) evidence are also distinguishable. For example, in State v. Richie, 88 Hawai'i 19, 960 P.2d 1227 (1998), a promoting prostitution case, this court affirmed a trial court's decision to admit the defendant's statement that "he had been involved with prostitution from a young age, that he knew what prostitution was, and that what occurred in the present case was

not prostitution." Id. at 37, 960 P.2d at 1245. This court determined that such evidence was admissible to establish the defendant's knowledge of the prostitution business. See id. Richie's defense at trial and claim on appeal was that his business did not amount to one which promoted prostitution. Thus, Richie is distinguishable from the instant case insofar as the HRE 404(b) evidence admitted there directly contradicted the defendant's defense.

Renon is also inapposite. There, the trial court's decision to admit evidence of a shooting between rival gangs that occurred twenty-four hours earlier in a gang-related shooting case was upheld. This court indicated that such evidence "was relevant to establish the continuing and escalating hostilities between the rival gangs[.]" 73 Haw. at 34, 828 P.2d at 1271. The Renon court also explained that the evidence disproved Renon's claim that he shot one of the victims in self-defense, which "plac[ed] his intent in issue." Id. at 37, 828 P.2d at 1273. Thus, like Torres and Richie, the Renon holding is distinguishable because the HRE Rule 404(b) evidence that was admitted directly refuted the defenses raised.

IV.

Finally, the court's cautionary instructions with regard to evidence of Defendant's prior bad acts would not reasonably cure the error of admitting evidence of Defendant's

prior convictions. Cf. State v. Kahinu, 53 Haw. 536, 549, 498 P.2d 635, 644 (1972) (explaining that, where a prosecution witness injects testimony regarding a defendant's prior convictions, "an immediate cautionary instruction by the court to the jury may be insufficient to cure the prejudice" (citing Gregory v. United States, 369 F.2d 185, 190 (D.C. Cir. 1966), cert. denied, 396 U.S. 865 (1969))), cert. denied, 409 U.S. 1126 (1973). Inasmuch as the evidence admitted could only have been interpreted as establishing that Defendant must have committed the charged offenses because he had been found guilty of similar prior crimes, any curative instruction would necessarily fail. The introduction of Defendant's prior bad acts was not harmless, as may be evidenced by the fact that, in Defendant's second trial, where the evidence was not admitted, the jury was hung.

For the foregoing reasons, I would not dismiss the writ of certiorari as improvidently granted, would find grave error in the ICA's May 16, 2002 affirmation of Defendant's conviction for kidnapping, would vacate the court's judgment of conviction and sentence filed on October 14, 2000, and would remand the case for a new trial.