

NO. 24404

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

PHILLIP BUGADO, Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 00-1-0156(2))

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, JJ.,
and Circuit Judge Hirai, assigned by reason of vacancy;
and Acoba, J., dissenting)

The defendant-appellant Phillip Bugado appeals from the amended judgment of the second circuit court, the Honorable Shackley Raffetto presiding, convicting him of and sentencing him for one count of terroristic threatening in the first degree (Count I), in violation of Hawai'i Revised Statutes (HRS) § 707-716(1)(d) (1993), three counts of abuse of a family or household member (Counts II, IV, and V), in violation of HRS § 709-906 (Supp. 2001), one count of unlawful imprisonment in the second degree (Count VI), in violation of HRS § 707-722(1) (1993), and one count of possession of a firearm by persons under restraining orders (Count VII), in violation of HRS §§ 134-7(f) and (h) (Supp. 2001). On appeal, Bugado contends that the circuit court: (1) erred in admitting the hearsay testimony of Faith Marciel and Lieutenant Duane Asami to bolster the credibility of the complainant, in violation of Hawai'i Rules of Evidence (HRE) Rule 608(a)(2) (1993); (2) erred in allowing evidence of Bugado's prior bad acts, in violation of HRE Rule 404(b) (Supp. 2001),

where such evidence was irrelevant and prejudicial; and (3) plainly erred in allowing the deputy prosecuting attorney (DPA) impermissibly to comment on Bugado's constitutional rights to be present at trial and to confront adverse witnesses during her rebuttal argument, in violation of article 1, sections 5 and 14 of the Hawai'i Constitution and the sixth and fourteenth amendments to the United States Constitution.

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, we affirm the judgement of the circuit court. With respect to Bugado's first point of error, inasmuch as Marciel and Asami never testified as to the complainant's character for truthfulness or untruthfulness in general or her credibility with respect to her version of the incidents in connection with which Bugado was charged, such testimony did not violate HRE Rule 608(a)(2), see State v. Torres, 85 Hawai'i 417, 424, 945 P.2d 849, 856 (App. 1997). With respect to Bugado's second point of error, inasmuch as Bugado's testimony during direct examination "opened the door" to the introduction of prior-bad-acts evidence, the circuit court correctly ruled that such evidence was relevant to prove the nature of Bugado's relationship with the complainant under HRE Rule 401, see State v. Clark, 83 Hawai'i 289, 301-02, 926 P.2d 194, 206-07 (1996); Torres, 85 Hawai'i at 421-22, 945 P.2d at 853-54, and did not commit an abuse of discretion in determining that the probative value of such evidence was not substantially outweighed by its potential for unfair prejudice under HRE Rule 403, see Clark, 85 Hawai'i at 423, 945 P.2d at 855; Torres, 85 Hawai'i at 423, 945 P.2d at 855. With respect to Bugado's third point of error, we hold that the DPA's remarks during rebuttal

argument -- i.e., that Bugado had tailored his testimony to that of all the witnesses who preceded him at trial -- did not violate his rights to be present at trial and confront adverse witnesses under the sixth and fourteenth amendments to the United States Constitution, see Portuondo v. Agard, 529 U.S. 61, 73 (2000), and, therefore, were not plainly erroneous under federal law. Moreover, assuming, arguendo, that we were to hold that the DPA's remarks constituted misconduct pursuant to article 1, sections 5 and 14 of the Hawai'i Constitution, such error would be harmless beyond a reasonable doubt under our holding in State v. Rogan, 91 Hawai'i 405, 412, 984 P.2d 1231, 1238 (1999). Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, January 21, 2003.

On the briefs:

Joyce K. Matsumori-Hoshijo,
Deputy Public Defender,
for the defendant-
appellant Phillip Bugado

Jerry W. Hupp,
Deputy Prosecuting Attorney,
for the plaintiff-
appellee State of Hawai'i

I dissent. See State v. Sisneros, No. 22345 (Haw. Dec. 24, 2002) (summary disposition order) (Acoba, J., dissenting).