NO. 22762

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
JOYCE KIRKLAND, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR. NO. 99-0315)

MEMORANDUM OPINION
(Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Joyce Kirkland (Kirkland) appeals the family court's July 22, 1999 Judgment convicting her, as charged, of Abuse of Family or Household Member, Hawaiʻi Revised Statutes § 709-906 (Supp. 1999). We affirm.

DISCUSSION

A.

On May 24, 1999, Kirkland allegedly physically abused John Wilson (Wilson).[1] Wilson called the 911 operator.

At the July 22, 1999 trial, Wilson testified that he did not want the State of Hawaiʻi (the State) to prosecute Kirkland, had signed a withdrawal of prosecution form, and did not want to see her go to jail. Wilson's testimony was much less incriminating than parts of his Victim's Voluntary Statement Form and the audiotape of Wilson's alleged 911 call.

According to the audiotape, Wilson told the operator

[1] John Wilson rented a room from Joyce Kirkland. He had his own bedroom and bathroom and they shared a kitchen.

that "[Kirkland] smacked me twice in the head, hit me in the face. I just pushed her away and walked out the condominium and brought the phone with me. You know, I don't need to get into this, she's a small woman, but she's been drinking and she's very violent. . . ."

At trial, Wilson testified that he did not "remember exactly what happened" and "[Kirkland] was screaming and ranting and yelling, [and] that she may have struck me."

Kirkland contends that reversible error occurred when the family court, over objection, allowed the State to introduce the audiotape of Wilson's alleged 911 call into evidence to impeach Wilson. Specifically, Kirkland contends that the evidence did not satisfy any exception to the Rule 802, Hawai‘i Rules of Evidence, Chapter 626, Hawaii Revised Statutes (HRE Rule 802) against hearsay.

HRE Rule 802.1 states, in relevant part, as follows:

> **Hearsay exception; prior statements by witnesses.** The following statements previously made by witnesses who testify at the trial or hearing are not excluded by the hearsay rule:
>
> (1) Inconsistent statement. The declarant is subject to cross examination concerning the subject matter of the declarant's statement, the statement is inconsistent with the declarant's testimony, the statement is offered in compliance with rule 613(b), and the statement was:
>
> . . . .
>
> (C) Recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement.

HRE Rule 613(b) states, in relevant part, as follows:

"Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless, on direct or cross examination, (1) the circumstances of the statement have been brought to the attention of the witness, and (2) the witness has been asked whether the witness made the statement."

Kirkland alleges that the State did not ask Wilson whether he had made any of the statements in the audiotape, the voices on the audiotape were not identified, and the audiotape itself was not offered into evidence. Based on these allegations, Kirkland concludes that the evidence was not offered in compliance with HRE Rule 613(b). We disagree with the allegations and conclusion.

The taped statement was played in court and the transcript reports all that was played. Wilson testified, in relevant part, as follows:

> Q. Now, sir, you listened to the 911 tape; is that correct?
>
> A. Correct.
>
> Q. Does that refresh your memory any to what occurred on May 24th, 1999?
>
> . . . .
>
> BY [DEPUTY PROSECUTING ATTORNEY]:
> Q. Sir, does that tape refresh your memory about what happened?
>
> A. Vaguely, yeah.
>
> . . . .
>
> Q. Okay. How is it that that tape refreshed your memory? Is it clearer in a sense?
>
> A. I remember -- I remember calling 911 and I remember going down in the parking lot and sitting on the hood of my car

> and, ah, the next thing I remembered was four, five -- a number of police cars pulled into the parking lot with lights and sirens and a bunch of 'em came running towards the apartment.
>
> . . . .
>
> Q. But you remember making the phone call?
>
> A. Yeah, I remember making the phone call after hearing the tape, sure.

Alternatively, the State contends that the audio taped statements were admissible as a present sense impression or an excited utterance because Kirkland's attack on Wilson continued during his call to 911. It being unnecessary to do so, we do not decide the merits of this alternative argument.

B.

The transcript reports that, at the conclusion of the trial, the court ruled, in relevant part, as follows:

> Looking at [Wilson's] statement that he made that's in evidence, that he made that night, and listening to his tone at the time he made the call, all indicates that he did suffer some abuse from Ms. Kirkland during that night.
>
> And so based on the voluntary statement that he made that I received into evidence, I find the defendant committed a . . . household abuse of Mr. Wilson that night and find the defendant guilty of the offense.

Although the trial occurred on July 22, 1999, the Judgment was dated and file stamped "July 21, 1999." This variance led Kirkland to contend that the trial court committed plain error in finding her guilty before the trial.

In response to this court's October 9, 2000 Order of Temporary Remand, the family court determined that the correct date of the Judgment was July 22, 1999, and that the erroneous July 21, 1999 date was the result of a clerical mistake. On

October 27, 2000, the family court (a) "ORDERED that the date of the Judgment is hereby amended to show the date of July 22, 1999, as the correct date of the Judgment, and that an Amended Judgment be filed to show the correct date of the Judgment[,]" and (b) filed the Amended Judgment, Notice of Entry.

The State seeks our application of Hawai‘i Rules of Penal Procedure (HRPP) Rule 36. That rule states as follows:

> Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time of its own initiative or on motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the supreme court, and thereafter while the appeal is pending may be so corrected with leave of te supreme court or the intermediate court of appeals.

Professor Wright states, "Rule 36 also may be used . . . to correct dates on various papers[.]" 3 Wright, Federal Practice and Procedure: Criminal 2d § 611 at 528.

Federal precedent states that "the correct date of the judgment, if endorsed incorrectly thereon, can be amended to show the correct date without invalidating the judgment[.]" Flanagan v. United States, 179 F.2d 703, 704 (C.A. 6th 1949) (citations omitted).

We conclude that HRPP Rule 36 permits the "clerical mistake" in the date of the Judgment in this case to be changed from July 21, 1999 to July 22, 1999.

CONCLUSION

Accordingly, we affirm the family court's July 22, 1999 Judgment.

DATED: Honolulu, Hawai‘i, December 28, 2000.

On the briefs:

Mark Graven
for Defendant-Appellant.

Richard K. Minatoya,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.

Chief Judge

Associate Judge

Associate Judge