NO. 22884

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

IN THE INTEREST OF JOHN DOE,
Born on August 25, 1986

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-J NO. 99-44548)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Foley, JJ.)

On April 5, 1999, Defendant-Appellant John Doe (Doe), a minor, was charged by petition with one count of Sexual Assault in the Fourth Degree, in violation of Hawaiʻi Revised Statutes (HRS) § 707-733(1)(a) (1993)[1].

Following a bench trial in the Family Court of the First Circuit[2] (family court) on August 2, 1999, Doe was convicted as charged; sentenced to probation; and ordered to receive mental health services until clinically discharged, to

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[1]HRS § 707-733 provides in relevant part:

> **§707-733 Sexual assault in the fourth degree.** (1) A person commits the offense of sexual assault in the fourth degree if:
>
> (a) The person knowingly subjects another person to sexual contact by compulsion or causes another person to have sexual contact with the actor by compulsion[.]
>
> . . . .
>
> (2) Sexual assault in the fourth degree is a misdemeanor.
>
> (3) Whenever a court sentences a defendant for an offense under this section, the court may order the defendant to submit to a pre-sentence mental and medical examination pursuant to section 706-603.

[2]Per diem Family District Court Judge Paul T. Murakami presided.

perform and complete forty hours of home chores by October 2, 1999, and to undergo a screening by Catholic Charities Juvenile Sex Offender Program (Program) as well as his mental health provider for appropriateness in the Program. If deemed appropriate for the Program, Doe was ordered to participate in counseling and/or treatment. A Decree Re: Law Violation Petitions was entered on August 2, 1999. On August 17, 1999, Doe filed a Motion for Reconsideration of Adjudication, which was denied on September 9, 1999 by Order re: Motion for Reconsideration of Adjudication Filed August 17, 1999.

On appeal, Doe contends the family court erred by allowing evidence of improper lay opinion, admitting evidence at trial of Doe's prior bad acts, and issuing erroneous Findings of Fact (FoF) and Conclusions of Law (CoL), and the evidence adduced at trial was legally insufficient to support a finding that Doe violated HRS § 707-733(1)(a). We agree with Doe's contention that the family court erroneously admitted evidence of Doe's prior bad acts. The August 2, 1999 Decree Re: Law Violation Petitions and the September 9, 1999 Order re: Motion for Reconsideration of Adjudication Filed August 17, 1999 are vacated and this case is remanded to the family court.

I. BACKGROUND

The complainant in this case (Complainant) testified that on February 10, 1999 she was "bending down getting my

(indiscernible) and then [Doe] bend and reached for my butt." Complainant is not married to Doe and did not give him permission to touch her. The following exchange occurred at trial:

> [Deputy Prosecuting Attorney (Prosecutor)]: In your opinion, do you think it was mistake that he touched your butt?
>
> [Deputy Public Defender (PD)]: Objection, your Honor, relevance.
>
> [Prosecutor]: Your Honor ---
>
> THE COURT: That objection overruled.
>
> [Prosecutor]: In your opinion, do you think it was a mistake that he touched your butt?
>
> [Complainant]: No, I don't think so.
>
> [Prosecutor]: And why not.
>
> [Complainant]: Because he's been doing it before ---
>
> [PD]: Objection, your Honor, speculation. Also move to strike the last answer regarding anything that happened prior.
>
> THE COURT: Mr. [Prosecutor]?
>
> [Prosecutor]: Your Honor, that wouldn't be speculation. She's giving the reason for why she believes that it wasn't on purpose.
>
> THE COURT: Alright, to the second objection.
>
> [Prosecutor]: To the second objection -- well, it's not -- those cases aren't being adjudicated. It's just basically her state of mind, your Honor, as to why she felt that it wasn't a mistake.
>
> THE COURT: Your response, counsel?
>
> [PD]: Your Honor, I object to the prior question. I know I objected on relevance. I should have objected on speculation. I renew my objection based on speculation. Also, still stands my objection regarding anything that might have happened prior.
>
> THE COURT: Based on, what's the basis of that objection?
>
> [PD]: Well,

THE COURT: (indiscernible) speculation.

[PD]: It's highly prejudicial. It's more prejudicial than probative. Prior bad acts should not be allowed, and it's not what's being adjudicated here.

THE COURT: And you have the last shot Mr. [Prosecutor]. What's your response to that argument?

[Prosecutor]: Your Honor, we would argue that it's not, it's more probative than prejudicial. In this case, we must prove that he knowingly subjected [Complainant] (indiscernible). We would say that it is probative as to his intent.

THE COURT: Overrule both objections. Answer the question, please?

[Complainant]: What was the question?

[Prosecutor]: Okay, how do you know that [Doe] didn't grab your butt by mistake?

[Complainant]: Because he used to do it often before.

[PD]: I renew my objection, your Honor, and move to strike.

THE COURT: Standing objection noted for the record, overruled.

Complainant testified that at the time the incident occurred, she and Doe were in English class together. Complainant and Doe were talking about another boy (Boy) whom Complainant liked when Complainant bent forward over her desk to grab a pen and Doe reached for her butt. The English teacher (Teacher) stood right behind Doe, saw the incident, and took Complainant to a female teacher's office. The female teacher took Complainant to the principal's office to report the incident because it happened "so much times." Complainant testified that

she and Doe often made fun of one another, pushing, slapping, and grabbing one another.

Doe testified that the following occurred:

> Then I was doing my work (indiscernible) and then I started irritating her, and then she started talking about [Boy], and I told her, yeah, why, [Boy] no like you, you ugly, and then she pushed me, and then cause I had my pencil in my hand, and then whack her with the pencil, and then she bent over towards her bag, and then I kine'a whacked her with the pencil on her butt and she slapped me, and then [Teacher] called out to class.

Doe testified that he was aiming for Complainant's lower back, but when she bent over, he hit "her lower, lower back, the butt."

Teacher testified as follows:

[Teacher]:	Okay. Basically, what I recall is [Doe] had, [Doe] and [Complainant] were standing, okay, and [Doe] was, I mean [Complainant] was wearing her short shorts, which is typical of girls that age in that school, and while they were conversing, [Doe] bent down, reached and grabbed her leg approximately the lower butt, buttocks area of her leg, about the hemline of where the shorts were. And after he grabbed her because this was not the first time I have seen this ---
[PD]:	Same objection, your Honor.
THE COURT:	You want to state the objection.
[PD]:	Your Honor, I think it's not permissible under the rules of evidence for people to be talking about any prior bad acts of an accused because of the prejudicial value of it; and furthermore, we have not been given any discovery regarding the use of priors and what the specifics are gonna be, what the dates are, so we haven't been able to prepare to rebut this type of evidence. It's highly prejudicial, much more prejudicial than probative.
THE COURT:	Mr. [Prosecutor] (indiscernible)?
[Prosecutor]:	At this point, we would withdraw that part of the -- I mean, we would, at this point.

THE COURT: The testimony is stricken then. Thank you very much, please proceed.

In its order adjudicating [Doe] a law violator, the family court made the following FoF and CoL:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

. . . .

2. The Court heard the testimony of [Complainant] (hereinafter "[Complainant]"). [Complainant] stated that [Doe] grabbed her buttocks without her permission on February 10, 1999. [Complainant] then testified that on February 10, 1999, [Doe] harassed her continuously before grabbing her buttocks. As such, [Complainant] believed [Doe] grabbed her buttocks knowingly. [Complainant] also said that she and [Doe] were never married. [Complainant] finally testified that all these events occurred at . . . Intermediate School which is located on the island of O'ahu.

3. The Court then heard the testimony of [Teacher] (hereinafter "[Teacher]") who is the instructor for both [Complainant] and [Doe] at . . . Intermediate School. Teacher testified that [Doe] walked up to [Complainant] and declared "[Complainant] is my girl". [sic] [Teacher] further said that [Doe] then grabbed [Complainant]'s buttocks knowingly. [Teacher] felt that the action was done knowingly for two reasons:

1) [Doe] is constantly trying to get [Complainant]'s attention, and

2) [Doe] has grabbed [Complainant]'s buttocks on prior occasions.

[Teacher] then stated that [Complainant] said something to the effect of "Get away from me" right after the incident occurred. Finally [Teacher] testified that all these events transpired at . . . Intermediate School which is located on the island of O'ahu.

4. [Doe] testified that he did make contact with [Complainant] on her rear portion of her thigh but definitely did not touch her buttocks. [Doe] also claimed that he had no romantic inclinations towards [Complainant].

5. The Honorable Paul T. Murakami found the testimony of both [Complainant] and [Teacher] credible and the State proved its case of Sexual Assault in the Fourth Degree beyond a reasonable doubt. As a result, the Court adjudicated [Doe] and found him to be a law violator under H.R.S. Section 571-11(1).

6. On August 17, 1999, Deputy Public Defender . . . filed a Motion for Reconsideration of Adjudication on the

> grounds that the Court improperly admitted [Teacher]'s testimony regarding [Doe]'s prior bad acts.
>
> 7. On September 9, 1999, the Honorable Paul T. Murakami denied the Motion for Reconsideration of Adjudication on the grounds that even without the evidence concerning [Doe]'s prior bad acts, the State had still proved its case beyond a reasonable doubt.
>
> ACCORDINGLY IT IS HEREBY ORDERED that [Doe] is adjudicated a law violator under H.R.S. Section 571-11(1).

II. STANDARDS OF REVIEW

A. Admission of Evidence

> [D]ifferent standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard. However, the traditional abuse of discretion standard should be applied in the case of those rules of evidence that require a "judgment call" on the part of the trial court.

Kealoha v. County of Hawai‘i, 74 Haw. 308, 319-20, 844 P.2d 670, 676, reconsideration denied, 74 Haw. 650, 847 P.2d 263 (1993). "Under the right/wrong standard, [the appellate court] examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answer to it." State v. Timoteo, 87 Hawai‘i 108, 113, 952 P.2d 865, 870 (1997) (internal quotation marks omitted; brackets added).

"Generally, to constitute an abuse, it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State v. Crisostomo, 94 Hawai‘i 282, 287, 12 P.3d 873, 878 (2000) (internal quotation marks and brackets omitted).

B. Sufficiency of the Evidence

Regarding appellate review for insufficient evidence, the Hawai‘i Supreme Court has repeatedly stated:

> [E]vidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support the conviction; the same standard applies whether the case was before a judge or jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.
>
> State v. Quitog, 85 Hawai‘i 128, 145, 938 P.2d 559, 576 (1997) (quoting State v. Eastman, 81 Hawai‘i 131, 135, 913 P.2d 57, 61 (1996)) (emphasis omitted). "'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Eastman, 81 Hawai‘i at 135, 913 P.2d at 61.

State v. Richie, 88 Hawai‘i 19, 33, 960 P.2d 1227, 1241 (1998).

III. DISCUSSION

Doe contends that the family court erred in admitting evidence of an improper lay opinion under Hawai‘i Rules of Evidence (HRE) Rule 701 and of prior bad acts under HRE Rule 404(b).[3] Specifically, Doe complains that the evidence admitted at trial regarding prior incidents with Complainant amount to bad character evidence, inadmissible under HRE Rule 404(b) (2001), which provides:

> **Rule 404 Character evidence not admissible to prove conduct; exceptions; other crimes.**
>
> . . . .
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the

[3]Since it appears from the record that the family court admitted the evidence under Hawai‘i Rules of Evidence Rule 404(b), that issue is properly before us.

> character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

(Emphasis added.)

Doe contends that Complainant's statements amounted to prior bad acts testimony inadmissible under HRE Rule 404(b) because the vague, unspecified nature of Complainant's testimony only served a possible inference that Doe had a propensity to engage in such conduct. Doe complains that admission of the Rule 404(b) evidence prejudiced his ability to prepare a defense and present rebuttal evidence.

A trial court's ruling regarding admissibility of "other crimes, wrongs, or acts" is reviewed on appeal under the abuse of discretion standard. State v. Renon, 73 Haw. 23, 31, 828 P.2d 1266, 1270 (1992). "Generally, to constitute an abuse, it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Crisostomo, 94 Hawai‘i at 287, 12 P.3d at 878 (internal quotation marks and brackets omitted). Considered under this standard, it appears the family court abused its discretion in allowing witnesses to

testify about Doe's prior incidents with Complainant without prior notice or good cause shown.

The State contends that the Rule 404(b) evidence was probative of the fact that Doe knowingly subjected Complainant to sexual contact by compulsion with respect to the charged incident. However, the State did not give notice prior to trial or attempt to give notice during trial, and did not show good cause for this failure.

The following testimony was elicited during trial:

[Prosecutor]:	In your opinion, do you think it was a mistake that he touched your butt?
[Complainant]:	No, I don't think so.
[Prosecutor]:	And why not.
[Complainant]:	Because he's been doing it before ---
. . . .	
[Prosecutor]:	Okay, how do you know that [Doe] didn't grab your butt by mistake?
[Complainant]:	Because he used to do it often before.
[PD]:	I renew my objection, your Honor, and move to strike.
THE COURT:	Standing objection noted for the record, overruled.

The State concedes it "gave no notice prior to trial of its intent to utilize the prior bad act evidence," but argues that "the court excused the lack of pretrial notice" and defense counsel "did not object to the evidence for lack of pretrial notice at all."

The family court relied on the testimony of Complainant and Teacher regarding Doe's prior bad acts in its FoF and CoL where the family court found in FoF No. 2 that "[Complainant] believed [Doe] grabbed her buttocks knowingly." The State concedes that the family court's FoF No. 3 is clearly erroneous with respect to Teacher's "belief" that Doe knowingly made sexual contact with Complainant because Teacher had seen Doe grab Complainant's buttocks on prior occasions. As the State concedes, this testimony was stricken from the record after defense counsel made the "same objection" to the Rule 404(b) evidence stating that it was

> not permissible under the rules of evidence for people to be talking about any prior bad acts of an accused because of the prejudicial value of it; and furthermore, we have not been given any discovery regarding the use of priors and what the specifics are gonna be, what the dates are, so we haven't been able to prepare to rebut this type of evidence. It's highly prejudicial, much more prejudicial than probative.

During Complainant's testimony, defense counsel objected as follows:

> Your Honor, I object to the prior question. I know I objected on relevance. I should have objected on speculation. I renew my objection based on speculation. Also, still stands my objection regarding anything that might have happened prior.

The family court overruled the objection, and defense counsel renewed the objection and moved to strike. Again, the family court overruled the objection, stating "[s]tanding objection noted for the record." Therefore, we disagree with the State's

assertion that "the defense did not object to the evidence for lack of pretrial notice at all."

The family court erred when it admitted evidence of Doe's prior bad acts with Complainant. It is well settled that this error

> is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction.
>
> . . . If the answer to the "real question" is "no," then the error is harmless.

State v. Kwak, 80 Hawai‘i 297, 305-06, 909 P.2d 1112, 1120-21 (1995) (internal quotation marks and citations omitted).

Based on the family court's FoF and CoL that relied on the prior bad acts testimony, we cannot say the error was harmless. The State's failure to provide notice as expressly required by Rule 404(b) prejudiced Doe in that his defense could not adequately address prior bad acts because he did not know they would be introduced. Doe was unable to investigate the prior bad acts or adequately prepare for cross-examination.

The record does not support Doe's contention that there was insufficient evidence to support a conviction based on a HRS § 707-733(1)(a) violation. Complainant and Teacher provided substantial evidence, which the family court found credible, that Doe knowingly touched Complainant's buttocks. Viewing the evidence most favorably to the State, it cannot be said there was

insufficient evidence to support a conviction. Richie, 88 Hawai‘i at 33, 960 P.2d at 1241.

IV. CONCLUSION

Accordingly, the August 2, 1999 Decree Re: Law Violation Petitions and the September 9, 1999 Order re: Motion for Reconsideration of Adjudication Filed August 17, 1999 are vacated and this case is remanded to the family court.

DATED: Honolulu, Hawai‘i, April 30, 2002.

On the briefs:

Taryn R. Tomasa,
Deputy Public Defender,
for Minor-Appellant

Chief Judge

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee

Associate Judge

Associate Judge