NOT FOR PUBLICATION

NO. 23425

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
RAYMOND RODRIGUEZ, SR., also known as "Papa",
Defendant-Appellant, and JOSEPH RODRIGUEZ, et al., Defendant.

APPEAL FROM CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 98-2504)

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

Raymond Atlantis Rodriguez, Sr. (Rodriguez) appeals the March 13, 2000[1] amended judgment of the circuit court of the first circuit, the Honorable Melvin K. Soong, judge presiding,[2] that convicted him of one count (count 2) of attempted sexual assault in the first degree, in violation of Hawaii Revised

[1] The May 5, 2000 notice of appeal filed by Defendant-Appellant Raymond Rodriguez, Sr. (Rodriguez) designates "the Judgement and Sentence filed herein on April 5, 2000[,]" and not the March 13, 2000 amended judgment, as the judgment from which this appeal is taken. The variance may be attributable to the court's April 5, 2000 order extending the time for filing the notice of appeal to and including May 5, 2000, entered upon Rodriguez's *ex parte* motion of even date.

[2] The Honorable Karen S.S. Ahn presided over the sentencing of Rodriguez and entered the March 13, 2000 amended judgment. The Honorable Melvin K. Soong presided over the pretrial and trial proceedings, from which Rodriguez takes exceptions.

Statutes (HRS) §§ 707-730(1)(b) (1993)[3] and 705-500 (1993);[4] and two counts (counts 3 and 4) of sexual assault in the third degree, in violation of HRS § 707-732(1)(b) (1993 & Supp. 2002).[5] We affirm.

I. Background.

On December 2, 1998, the grand jury indicted Rodriguez on four counts of sexual assault upon the complaining witness

[3] Hawaii Revised Statutes (HRS) § 707-730(1)(b) (1993) provided, in pertinent part, that "[a] person commits the offense of sexual assault in the first degree if: The person knowingly subjects to sexual penetration another person who is less than fourteen years old[.]" HRS § 707-700 (1993) defines "Sexual penetration" as "vaginal intercourse, anal intercourse, fellatio, cunnilingus, anilingus, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight, but emission is not required. For purposes of this chapter, each act of sexual penetration shall constitute a separate offense."

[4] HRS § 705-500 (1993) provides, in relevant part:

> (1) A person is guilty of an attempt to commit a crime if the person:
> . . . .
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.
> . . . .
> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

[5] HRS § 707-732(1)(b) (1993) provides that "[a] person commits the offense of sexual assault in the third degree if: The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person[.]" HRS § 707-700 (1993) defines "Sexual contact" as "any touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts."

(the CW), his then six-year-old granddaughter, all allegedly committed or attempted "[o]n or about the 5th day of September, 1997, to and including the 7th day of January, 1998[.]" Count 1 of the indictment charged that Rodriguez, "also known as 'Papa[,]'" committed sexual assault in the first degree by "inserting his penis into her vagina[.]" Count 2 charged Rodriguez with attempted sexual assault in the first degree, physical objective unspecified. Counts 3 and 4 charged that Rodriguez committed sexual assault in the third degree by "placing his hand on her buttock," and by "placing his hand on her vagina," respectively.

The indictment also leveled charges against Rodriguez's son, Joseph Rodriguez (Joseph), "also known as Joseph Vierra, 'Uncle Joey' and 'Uncle Joe[.]'" Joseph was indicted on nine counts of sexual assault upon the CW, all allegedly committed or attempted during the same time frame. Count 5 charged that Joseph committed sexual assault in the first degree by "inserting his penis into her vagina[.]" Count 6 charged Joseph with attempted sexual assault in the first degree, physical objective unspecified. Counts 7 and 8 charged that Joseph committed sexual assault in the third degree by "placing his hand on her buttock," and by "placing his hand on her vagina," respectively. Count 9 charged Joseph with sexual assault in the first degree, by

"inserting his finger into her vagina[.]" Counts 10, 11, 12 and 13 charged that Joseph committed sexual assault in the third degree by "placing his hand on her vagina," by "placing his penis on her vagina," by "placing his penis on her buttock," and by "placing his hand on her buttock," respectively. On March 16, 1999, pursuant to a plea agreement with the State, Joseph pled guilty as charged in counts 8, 10 and 11, and guilty to the lesser offense of sexual assault in the second degree in counts 5 and 9. He was convicted and sentenced on June 14, 1999.

On December 21, 1999, just before the start of Rodriguez's jury trial, the court heard motions *in limine*. During the course of that hearing, defense counsel raised the issue of the CW's competence to testify:

> [DEFENSE COUNSEL]: . . . . [B]efore [the CW] testifies, I'd like to have a separate hearing out of the presence of the jury to go over her competency.
>
> THE COURT: A separate hearing?
>
> [DEFENSE COUNSEL]: Well, just to go through that process first out of the presence of the jury.
>
> [DEPUTY PROSECUTING ATTORNEY (DPA)]: Well, Your Honor, basically [the CW] was qualified at the grand jury proceedings. I believe that the rules -- and I'm referring to rules of evidence -- deem basically all witnesses are deemed competent unless otherwise shown to be incompetent. She's now eight years old, but I'm not going to take a strong position on that because, you know, she is a child witness and to the extent that if there are issues that the defense wishes to address limited to solely the issue of competence, perhaps a 104 setting[6] might

[6] Hawaii Rules of Evidence Rule 104 (1993) provides:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (b). In making its determination the court is not bound by the rules of evidence except

be more appropriate, but I would defer to the Court on that.

I think that based upon my contact with her -- and certainly if I put her on the stand in front of the jury and I can't qualify her, then we will be dealing with it at that point as opposed to giving the defense an opportunity to -- what I'm concerned about, Judge, quite frankly, is that given the condition of this child, and I'm not saying she's going to come in here and be an emotional wreck, but it's going to be difficult enough to get her into court with [Rodriguez] in here to testify; and I'm just concerned that that process may be somewhat traumatic for her. So I would submit it on that basis and I will leave it to whatever the Court decides, Judge.

THE COURT: Let me do this. I am suggesting a compromise. We will not start out with another 104 hearing, but if it becomes apparent as the child is testifying that that is necessary, then we will take a break because, again, for a young child, it is an experience and I don't want multiple hearings to affect her ability to testify. So we will start without a 104 hearing and proceed, but if it becomes evident to Court and counsel, then we will do that. So that's the Court's suggestion.

[DPA]: [Defense counsel], are those the three matters that you wish to address?

[DEFENSE COUNSEL]: Yes.

[DPA]: If I understand that correctly, Judge, we've already dealt with the last issue, the competency.

(Footnote supplied.) Later in the hearing, while counsel and the court were discussing the possibility that the CW might, while testifying, blend her allegations against Joseph with those against Rodriguez, the DPA noted:

[DPA]: . . . . [The CW is] eight years old now. I've probably

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those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject oneself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

met with her, oh, gee, I don't know, at least half a dozen times over the past year-and-a-half for different purposes, initially to determine whether or not there were [(sic)] enough evidence to proceed, clarify certain issues as far as charging, and most recently to determine where she was at in terms of what she would relate as far as information concerning the offenses.

It became abundantly clear to me that she is, although eight years old, she does appear to have some sort of -- I don't want to say problems, but for all lack of a better way of putting it, Judge, I think what I referred to she appears to be somewhat developmentally delayed. In other words, she's an eight-year-old child, but to a certain extent when you review the evidence in the case and in particular some of the earlier stuff that we looked at in terms of the case, she didn't know how old she was at different points, she didn't know certain colors, basic concepts that you would expect a child of that age to know.

The reason why I'm spending a little bit of time in explaining that is that kind of, I think, results in very large difficulty in her being able to simply focus at her young age, given the nature of the crimes in this case and also the nature of the defense[, that the defense is blaming Joseph], to focus simply on what happened involving [Rodriguez].

. . . .

[DEFENSE COUNSEL]: My concern about [the CW] as to whether it's referred to as focus or inattention or what, the concern is really whether it draws to competency and if this should really become a matter and that was part of my concern.

THE COURT: Well, I haven't ruled out the 104 matter. We can always take a break. If she is not complying, we can take a break or something so the Court can control that part. If either side wants to give the Court a high sign or call for a bench conference, we can discuss it and take the appropriate steps at that time.

[DEFENSE COUNSEL]: All right.

In his opening statement, the DPA outlined the State's case for the jury:

Now very shortly you are going to get a chance to meet [the CW]. She's going to come to court and she's going to take the witness stand. She's not very tall so it's not real easy to see her hiding behind the slightly raised portion of the witness stand, but she's going to come here to court and she's going to tell you as best she can what this man did to her.

It's not going to be easy for a number of different reasons, one is because of her age. She has trouble explaining things. She's eight years old now. She also doesn't like to talk about things that make her feel sad. She doesn't like to talk about things that make her remember things that make her cry, but she's going to do the best she can and she's going to come in here and she will get confused. She will not be able to tell you every single detail that you might expect from somebody who, perhaps, you think has been sexually assaulted. She doesn't always know when things happened or even where, but she does know who sexually assaulted her and that's this defendant here, [Rodriguez].

She will come in, [the CW], and she will tell you what her grandpa did to her, how he would make her pull down her shorts, her panty, and touch her down there, and she point [(sic)] sometimes because as a little kid she feels shame when she talks about these things, and she will point to her vaginal area and to her behind, or her okole, and she will tell you that her grandpa used to touch her on her punani with his hand and on her okole with his hand. She will also tell you that basically this defendant -- excuse me -- she will tell you that it was sore. It was sore when you [(sic)] put his boto inside her punani, and it hurt and it was sore, ladies and gentlemen, when he would try to put his boto inside her okole. She's going to have a hard time.

You will also hear about some other people, ladies and gentlemen, that you are not going to like too much because you are also going to hear that during this same time period little six-year-old [CW] was abused sexually not only by [Rodriguez] but also by someone else that she knew, someone else that she trusted, somebody else who was in her home environment at the time. That individual is [Rodriguez's] son, Joseph Rodriguez, her Uncle Joey. And you will also hear that Uncle Joey, soon after [the CW] was able to tell somebody what had happened, was investigated by the police, was charged, and has been convicted for sexual assaults against [the CW].

Now this family's not your regular normal everyday family because you are going to hear about three other people. You will hear about [CW's] mom, Monica [Vierra (Monica)]. Not your average sort of mother doing the normal things that mothers do. She's a convicted felon, convicted of welfare fraud, theft, and was sentenced to probation, screwed up, and is now serving time at the women's correctional facility. You will also hear from and we expect to have [CW's] father, Peter Vierra [(Peter)], testify. He is also a convicted felon, convicted for welfare fraud. He is currently on probation. You will also hear from the child's grandmother, Grandma Donna, Donna Blakemore [(Donna)]. She is a convicted felon as well on probation.

Why is any of this important? Well, ladies and gentlemen, the simple fact that these individuals had obligations to court based upon their convictions is the reason why [the CW] was left in [Rodriguez's] care because as you will hear back in 1997 when these individuals were convicted and sentenced to probation, they were sentenced to a period of jail as part of their sentence. The father, [Peter], was sentenced to go to jail from September 5, 1997, up to January 7, 1998. The mother, Monica, her jail sentence was a little longer. Grandma Donna, she was sentenced to do jail on weekends.

Now when the parents ended up going to serve their jail time, those three children -- [the CW, her younger brother and her younger sister] -- were left in the care of the grandmother and that grandmother is [Donna], the mother's own mother. So that period of four months when the father was locked up, those children were left in the care of the grandma and in the grandmother's home is where Uncle Joey lived. But when grandma had to go do her weekends in jail, those three children were turned over to Papa, Grandpa Ray, on those weekends; and it was during those weekends, ladies and gentlemen, that [Rodriguez], the State would submit the evidence is going to show, sexually abused this child.

Now [Rodriguez], ladies and gentlemen, is the ex-husband of the grandmother. They've been divorced almost 20 years now, but the grandmother felt that the only place that she could leave the children

with was with him, so that's the reason why they ended up there. And it wasn't until really early in January when the father, Peter, got out of jail, when there was [(sic)] these rumblings because [the CW] had been saying some things and that's when he learned that she had been saying that her Papa had been touching her.

Initially that's all she said, that her Papa had been touching her. It wasn't until a little bit later that she made the disclosures about my Papa and also Uncle Joey. The father, [Peter,] notwithstanding the fact that he is not a model citizen, will tell you that he wasn't sure exactly what the heck to do. He didn't know what to believe; he didn't want to believe. What's going on? It shook up the whole family. And he may not have handled the situation like a lot of other people would have, immediately call 911, knew exactly what he had to do, but he handled the situation how he thought was appropriate.

Unfortunately, [the CW] as a result ended up being examined by a physician, who [(sic)] you will hear testimony from hopefully very shortly, Dr. [Victoria] Schneider [(Dr. Schneider)]. She works at Kapiolani Hospital. She is on staff there. She's also affiliated with the Sex Abuse Treatment Center that works out of Kapiolani in the emergency room. She's a physician that examined [the CW] because she had been complaining that her punani was sore. So when she went in and was examined, Dr. Schneider will tell you that among the findings that she made was this child on her vaginal exam, this child's vagina was not as it should be.

There was a small laceration to the portion of the vagina which should not have been, and she will tell you basically that's consistent with someone who has been sexually assaulted; in other words, penetration of the vaginal area.

. . . .

Based upon that, ladies and gentlemen, [Rodriguez] was charged with the four offenses that are before you today: Sexual Assault in the First Degree for inserting his penis into her vagina; Attempted Sexual Assault in the First Degree, Count 2, for inserting or attempted [(sic)] to insert his penis into her okole, her anus; Counts 3 and 4 basically touching her vaginal area and her buttocks with his hand.

Evidence adduced at trial was broadly consistent with the inculpatory facts proffered by the DPA in his opening statement. In his opening statement, defense counsel summarized Rodriguez's case:

. . . . [Rodriguez] does not live alone, he has a fiancé [(sic)], Lei Odani [(Lei)]. He and [Lei] in 1998 and '97 lived at Pokai Bay.

I'm going to work backwards just a little bit here. They moved into this Pokai Bay studio apartment, which is a very small apartment, out in Waianae. About the first week of November, 1997, they were there through January of 1998. Prior to that they stayed with a friend, Joanne Lucas, up through the earlier part of 1997. Also before that there was a period of time when they had stayed awhile with Cathy Vierra

[(Cathy)] except they had a falling out -- my client's fiancé [(sic)] having put up a car and then the money and the car kind of got kept by [Cathy] and there was a falling out, so [Rodriguez] and Lei moved out and they found someplace else to stay.

Now the key about this is in the timing throughout this time period that [Rodriguez] and [Lei] did not have their own place. They were not in a position to be around the grandchildren, and also throughout this time period [Rodriguez] worked so that when we talk about this September 5, 1997, through January 7, 1998, time period, much of that is a bit of a puzzle to [Rodriguez].

Now during the Christmas season, however, and as early a period of time around Thanksgiving in November of 1997, the children came over for awhile for Thanksgiving and the thing is in order for the children to come over, it had to be cleared with [Lei] because [Rodriguez] was working and he had other things and then when he wasn't working he would be with various of his friends either outside the apartment or going over to their place so that the baby-sitting or child-care giving was provided by [Lei], his fiancé [(sic)].

The major time that the children were dropped off came about during the Christmas vacation that they were dropped off over at Pokai Bay apartments with [Rodriguez] and his fiancé [(sic)]; and, again, during this time [Rodriguez] would work six days a week and he would be getting out 4:30, 5:00 in the morning, get himself ready and got to work.

Now he shared the studio apartment with Lei. There's one bed. There's not room for any other bed. When the children stayed there, [the CW and her younger brother] slept on the floor and there was a bed where Lei would have [the CW's younger sister] next to her and when [Rodriguez] went to bed he slept next to Lei.

And we anticipate the evidence will show that Lei, while the description may not be a light sleeper when she does sleep, she is aware of when [Rodriguez] comes in late after being out. She can hear him come in, and also because of her medical condition, she is up several times during the night. She has to get up and go to the bathroom; and this is a small studio apartment, the apartment not being too much larger than the area of where the jury is seated so that she was aware of when [Rodriguez] got home, went to bed, and also when he got up to go to work.

Throughout this time period there was no point in time where [Rodriguez] was alone with the children; and also the majority of the time that the children were there during this vacation period when the various other caregivers were all in jail, [Rodriguez] was out working.

Now it appears that the evidence will show that [Joseph], the son of [Rodriguez] and his former wife, [Donna], had apparently through this mentioned time period sexually assaulted [the CW]. This was at [Donna's] house, and the evidence will show that [Joseph] apparently lived at [Donna's] house and the children lived there also.

What the evidence will show is that when [the CW] apparently told anybody, it was at the end of this Christmas break when [Cathy] came over to [Rodriguez] and Lei's apartment and wanted to take the children for awhile right around January, the end of this vacation period. And it's expected that the evidence will show that [Cathy], who may be referred to as an auntie, but the evidence would show that she's really not blood relation, but, however, whether she is related she is

> oftentimes called Auntie Cathy, that she in talking with [the CW], having [the CW] and the other kids living for awhile at her place, at [Cathy's] place, then arrived at this allegation that [Rodriguez] has sexually assaulted [the CW] and that it was [Cathy] then who showed her there -- when [Peter] came out of prison relayed that information to Peter and other people.
>
> What the evidence is anticipated to show is that while it's alleged that [the CW] knows who -- that it was "Papa," that she apparently didn't know when or where. The when part, there's this broad period of four months that the allegation ranges through; and the where, it's anticipated that the evidence will show that [the CW] had stated earlier in the hearing that all these activities of having Papa's boto inserted in her punani, all touchings that were referred to, they occurred over at Grandma Donna's house -- Grandma Donna Blakemore's house.
>
> The evidence will show that [Rodriguez] didn't go over there. He didn't sleep over there; he didn't go over there. That's his ex-wife, and whenever [the CW] comes up with this information, it is unreliable as to how it happened, and as to the allegation that it was [Rodriguez who] apparently she refers to as Papa, that is incorrect. Either she's been coached or she's just confused, and it is true that [the CW] has difficulty learning, whether that's a learning deficit or whether that's sometimes referred to as being slow or retarded, she has a certain susceptibility throughout this time period and yet [Rodriguez] has pled not guilty and denies sexually assaulting his granddaughter. He's been as puzzled about this as a person can be, and at the end of the case we will be asking for a verdict of not guilty. Thank you.

Evidence adduced at trial was also broadly consistent with the exculpatory facts proffered by defense counsel in his opening statement. Hence, this case boiled down to credibility.

The jury retired to its deliberations at 12:51 p.m. on December 28, 1999. At 10:26 a.m. the next morning, the jury informed the court that it had reached verdicts on three of the four counts submitted to it, but that its members were irreconcilable on count 1. The jury returned verdicts of guilty as charged on counts 2, 3 and 4.

II. Discussion.

A. The CW's Competence to Testify.

On appeal, Rodriguez first contends the court erred when it denied his request for a hearing to determine whether the CW was competent to testify. "We . . . review the trial court's failure . . . to conduct a competency hearing as to the complainant, pursuant to [Hawaii Rules of Evidence (HRE) Rule] 603.1,[7] under the 'right/wrong' standard." State v. Kelekolio, 74 Haw. 479, 527, 849 P.2d 58, 80 (1993) (original footnote omitted).

On this point of error, Rodriguez relies exclusively upon Kelekolio, supra. There, the sexual assault complainant, who was afflicted with Down's Syndrome, exhibited the following:

> During the prosecution's case in chief, James Lomont, Ph.D (Lomont), a clinical psychologist who had previously examined the complainant, was called to testify. Lomont opined that the complainant had an intelligence quotient (IQ) of 43 and operated at the cognitive level of a four- to seven-year-old person. On cross-examination, Lomont expressed opinions that the complainant was intellectually capable of fantasizing, changing facts to avoid punishment, and augmenting and omitting facts regarding an event she had experienced.
>
> The prosecution later called the complainant as a witness. Having established her diminished level of cognitive functioning through Lomont, the DPA endeavored to lay a foundation for the complainant's

[7] HRE Rule 601 (1993) states that "[e]very person is competent to be a witness except as otherwise provided in these rules." HRE Rule 603.1 (1993) provides that "[a] person is disqualified to be a witness if the person is (1) incapable of expressing oneself so as to be understood, either directly or through interpretation by one who can understand the person, or (2) incapable of understanding the duty of a witness to tell the truth." "Not surprisingly, HRE [Rule] 603.1 is primarily applicable to youthful and mentally infirm witnesses." State v. Kelekolio, 74 Haw. 479, 524, 849 P.2d 58, 78 (1993) (internal quotation marks and citation omitted).

competency to testify via the following exchange:

> Q. [By the DPA:] [Complainant], is telling the truth good or bad?
>
> A. [By the complainant:] Good.
>
> Q. Is telling a lie good or bad? Is telling a lie good or bad?
>
> A. *Good*.
>
> Q. Okay. [Complainant], do you know you're testifying in court today. You know you're talking to everybody here today, right? You have to tell the truth, okay. You understand that?
>
> A. (Witness *shakes* head.)
>
> Q. You have to answer, yes or no. You cannot nod your head, because this man that's sitting right here has to take down everything that you say, okay. You know that you have to tell the truth today, [Complainant]?
>
> A. Yes.

(Emphasis added.)

The DPA then began her direct examination of the complainant. The complainant was unable to identify Kelekolio, who was present in the courtroom. She told the DPA that she was "very scared." The complainant eventually testified that Kelekolio had forced her to the back of the Handi-van, penetrated her vagina with his penis, instructed her not to tell anyone, and drove her to work at the Helemano Plantation. On cross-examination, she was unable to explain the meaning of "kidnapping" and "rape" - words that she had utilized in her testimony.

[The defense attorney] failed to object at any time to the complainant's competence to testify, and the trial court did not engage in an independent inquiry to establish competence.

Id. at 499-501, 849 P.2d at 68-69 (some brackets in the original; footnote omitted). On this record, the supreme court noted several factors that were significant in its decision to notice plain error[8] in connection with the complainant's competence to

[8] "This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system - that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes." Kelekolio, 74 Haw. at 515, 849 P.2d at 74-75 (citation omitted). "This court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999) (brackets, citation and internal quotation marks omitted). Hawai'i Rules of Penal Procedure (HRPP) Rule 52(a) (2000) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." HRPP Rule 52(b) (2000) provides that "[p]lain

testify:

> In the present case, the trial court either made no finding of competency or adjudged the complainant to be competent *sub silentio*. However, our *de novo* review of the record persuades us that there was an inadequate showing of competency for the following reasons: (1) when asked whether lying was good or bad, the complainant responded, "Good"; (2) the complainant was unable to identify Kelekolio, who was present in court, although she repeatedly referred to him in her testimony by name; and (3) the complainant did not appear to understand the meaning of particular sexual and other terms (*i.e.*, "rape" and "kidnap") that she employed in her testimony.
>
> We recognize that it is by no means certain that a competency determination by the trial court, pursuant to HRE [Rule] 603.1, would result in the complainant's disqualification to testify. For example, the court in State v. Gonsalves, 5 Haw. App. 659, 706 P.2d 1333 (1985), although utilizing an improper standard of review, held that it was not error to allow a mentally retarded twenty-eight-year-old sex assault complainant, who had an IQ of 40 and functioned cognitively at the level of a three- to four- year-old child, to testify. Id. at 666, 706 P.2d at 1339. Therefore, the question of testimonial competency must be determined on a case by case basis. We merely hold, on the record before us, that (1) the issue of the complainant's competency to testify was reasonably called into question; and (2) the trial court committed plain error in failing to engage in an independent inquiry and make an express finding as to whether the complainant was competent to testify before allowing her substantive testimony to be exposed to the jury.

Id. at 528-29, 849 P.2d at 80 (footnote omitted).

On this authority, Rodriguez argues as follows:

> Here, CW was eight years old at the time of trial, was developmentally delayed, didn't know her age at certain points, and didn't know certain colors and basic concepts one would expect a child of her age to know. During opening statement, the State informed the jury that CW has "trouble explaining things," that "she will get confused," and that she "doesn't always know when things happened or even where." When asked whether it would be right or wrong to say that she is a monkey, CW stated that it was wrong because she was not a monkey but a grown up. When asked whether it was good or bad to tell the truth, CW said it was bad and when asked if she was sure she said, "Yes." Finally, when asked at the end of her direct testimony if she was making all this stuff up, she said "yes" and that she was telling a "big story." Like the witness in Kelekolio, CW had a limited degree of knowledge and understanding and was limited in her ability to organize the experience cognitively and to differentiate it from the offenses committed by Uncle Joey. Under these circumstances, it was error to

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errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

deny [Rodriguez's] request for a competency hearing.

Opening Brief at 15. We put to one side the assertions contained in the first two sentences of this argument, culled as they are from statements made by the DPA, pretrial and during his opening statement, that are largely unsubstantiated in the balance of the record. Instead, we focus on the actual testimony of the CW at trial, which demonstrates that Rodriguez's assertions in this respect are, in the main, selective and slanted representations of the record. At the start of the CW's testimony, the following colloquy occurred:

EXAMINATION

BY [THE DPA]:
Q. Hello. Could you tell us your name.
A. [(CW states her given name.)]
Q. [CW], you have a last name?
A. [(CW states her surname.)]
Q. How old are you today?
A. Eight.
Q. Do you go to school?
A. Yes.
Q. Where do you go to school at?
A. By my house.
Q. By your house? Who is your teacher?
A. Ms. Castle.
Q. Do you like her?
A. Yes.
Q. Now what sort of things do you like to do at school?
A. Play toys.
Q. You play games over there?
A. Yes.
Q. What kind of games?
A. Write on the chalkboard.
Q. Write on the chalkboard. Do you know we are at court today, [CW]?
A. What my Uncle Joey them did to me.
Q. You mentioned something about what Uncle Joey did to you? Just hold on a second. Do you know that we are here at court today?
A. Yes.
Q. Now at school do you guys have some rules that you have to

follow?
A. Yes.
Q. It's the same kind of thing when we are here at court, we have some rules that we have to follow. Do you understand that?
A. Yes.
Q. If I were to say, Hey, [CW], you are a monkey, is that right or is that wrong?
A. Wrong.
Q. How come?
A. Because I'm not a monkey.
Q. Are you sure you are not a monkey?
A. No.
Q. What are you?
A. A grown up.
Q. A grown up? You are eight years old; right?
A. Yes.
Q. Now do you know what it means to make a promise, [CW]?
A. A promise means tell the truth.
Q. Tell the truth? Okay. If I were to say that you are a monkey, that's wrong; right?
A. Yes.
Q. Is that good or bad to tell the truth?
A. Bad.
Q. Bad to tell the truth? Are you sure about that?
A. Yes.
Q. Hold on. Let's back up a second. Okay.
When you are at home and you tell your mom, that's Ms. Maddie sitting over there, that's who you stay with?
A. Yes.
Q. You tell her I'm going to clean up my room. Are you supposed to do that?
A. Yes.
Q. If you don't do that, is that good or bad?
A. Bad.
Q. How come?
A. Because I didn't clean up my room.
Q. Now if I were to say that your name is [(CW's given name)] and you are eight years old and you have a pretty dress on today, is that right or wrong?
A. Right.
Q. Now here at court one of the rules that we have is that we have to tell the truth. Do you understand that?
A. Yes.
Q. Now do you know what happens if you tell a lie? Let me ask it to you this way. Now at school or at home if you tell a lie, do you get into trouble?
A. Yes.
Q. So if we use the same rule here at court, is that okay with you?
A. Yes.
Q. So can you promise everybody that's in here that whatever we talk about today --
A. Yes.
Q. -- that that's only going to be the truth?

A. Yes.
Q. You are sure about that?
A. Yes.
[THE DPA]: Your Honor, subject to any additional voir dire or objection, at this time I'd ask that the witness be sworn.
THE COURT: [Defense counsel], do you want a chance for voir dire?
[DEFENSE COUNSEL]: Yes.

VOIR DIRE EXAMINATION

BY [DEFENSE COUNSEL]:
Q. [CW], . . . Good afternoon. When you said that it's bad to tell the truth –
THE COURT: What did you say?
[DEFENSE COUNSEL}: Earlier she had said it's bad to tell the truth in response to the [DPA's] questioning.
THE COURT: I didn't hear that.
[DEFENSE COUNSEL]: Threw a monkey wrench in his questioning also, Your Honor.
BY [DEFENSE COUNSEL]:
Q. My question to you is you heard that question before today, didn't you, whether is it good or bad to tell the truth?
A. Bad -- good.
Q. It's good? All right. Now you've had practice with this kind of question before, like is your name [(CW's given name)]; yes or no?
A. Yes.
Q. And also questions like if I say you are a monkey, is that truth?
A. No.
Q. You had that kind of questions before, though; right?
A. Mmm-hmm.
Q. So you've had that kind of practice?
A. Yes.
[DEFENSE COUNSEL]: No further questions.
THE COURT: So no objection to this witness being sworn in as a witness in this matter?
[DEFENSE COUNSEL]: No objection.
THE COURT: [CW], would you stand up, please, and raise your right hand.

At the beginning of the CW's substantive testimony, she was able to identify her alleged assailant:

Q. All right. Do you know somebody named Papa?
A. Yes.
Q. Who is that?
A. My Grandpa Ray.
Q. Your Grandpa Ray? Do you see Grandpa Ray here in this room?
A. No.
Q. Now your grandpa, what does he look like?
A. (No response.)
Q. Is he a big person, little person?
A. Big person.

Q. Is he bigger than you? Is he bigger than you are?
A. Yes.
Q. I see you sort of looking over there off to one side. Are you looking at somebody?
A. Yes.
Q. Who are you looking at?
A. My Grandpa Ray.
Q. Your Grandpa Ray?
A. (Nods head.)
Q. So is Grandpa Ray, you see him right now?
A. (Nods head.)
Q. You are nodding your head. What does that mean? Is that "yes"?
A. Yes.
Q. Can you do me a favor, can you stand up and can you just point to where you see Grandpa Ray.
A. Over there. (Pointing.)
Q. There's two people over here, [CW]. Which person is your Grandpa Ray?
A. (Pointing.)
Q. Is it this man here?
A. That one. (Pointing)
Q. Is that man here; is that right?
A. (Nods head.)
Q. You are nodding your head. Is that "yes" or "no"?
A. Yes.
Q. You may sit down.
[DPA]: Your Honor, may the record reflect the identification of Defendant Rodriguez.
THE COURT: The record will reflect this witness had identified the defendant at this point.

At the end of the DPA's direct examination of the CW, the following transpired:

Q. And what you've told us here today, all these people over here, are you making all that stuff up?
A. Yes.
Q. You said yes?
A. Yes, that was true because that's what they did to me.
Q. Let me stop for a second. I just want to make sure we all understand, okay?
When you said that Grandpa Ray did those things to your punani and your butt, is that the truth?
A. Yes.
Q. Are you sure?
A. Yes.
Q. Are you telling a big story about that?
A. Yes.

On the true and much more developed record before us in this case, it is clear the CW here did not begin to approach the benighted state of the adult complainant in Kelekolio. On balance, "we [cannot] hold, on the record before us, that (1) the issue of [the CW's] competency to testify was reasonably called into question; and (2) the trial court committed plain error in failing to engage in an independent inquiry and make an express finding as to whether the complainant was competent to testify before allowing her substantive testimony to be exposed to the jury." Kelekolio, 74 Haw. at 528-29, 849 P.2d at 80 (footnote omitted; emphasis supplied).

We also cannot conclude, as Rodriguez urges, that "it was error to deny [his] request for a competency hearing." Opening Brief at 15. Although the court did not hold what was dubbed a competency hearing, the DPA questioned the CW extensively on the issue and the court allowed defense counsel to *voir dire* the CW on her competence to testify -- and to defense counsel's apparent satisfaction, for he did not then seek to disqualify CW as a witness; indeed, he expressed no objection to her being sworn as a witness before the jury. The procedure followed in this case was the functional equivalent of a competency hearing. And on the record before us, the fact that it was held in the presence of the jury did not constitute an

abuse of discretion. HRE Rule 104(c) (1993) ("Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests."); Kelekolio, 74 Haw. at 529 n.24, 849 P.2d at 80 n.24 ("In accordance with HRE [Rule] 104(c), whether a HRE [Rule] 603.1 hearing should be conducted *in camera* is a matter within the sound discretion of the trial court." (Citation omitted.)).

B. Dr. Schneider's Testimony.

Rodriguez next argues that

> [t]he court committed plain error when it permitted . . . Dr. Schneider to testify that she believed CW's statements. Although only qualified as an expert in pediatrics, the court [(sic)] allowed Dr. Schneider to venture an opinion as to the truthfulness of CW's sexual abuse allegations[.] The court also committed plain error when it failed to give a limiting instruction as to the purpose for which the expert testimony could be admitted, that is, to demonstrate that the CW's behavior was consistent with that of a sexual assault victim.

Opening Brief at 11 (citation to the record omitted).

Taking up the issue of Dr. Schneider's qualifications first, which we review for an abuse of discretion, State v. Rinehart, 8 Haw. App. 638, 643, 819 P.2d 1122, 1125 (1991) (concluding that the trial court's qualification of a witness as an expert in "sexual assault therapy" was not an abuse of discretion), we note that in addition to the stipulation of the parties that "Dr. Schneider is an expert and qualified in the

field of pediatrics[,]" Dr. Schneider testified that she is board-certified in pediatrics, and that "I don't work in general pediatrics; I work in child abuse and neglect, and as part of that I'm the medical director at the Kapiolani Child Protection Center and the medical consultant to the Sex Abuse Treatment Center." There was no abuse of discretion in connection with Dr. Schneider's qualification as an expert witness.

The issue of Dr. Schneider's qualifications is merely subsidiary, however, to Rodriguez's primary objection in this connection -- that Dr. Schneider ventured a direct opinion as to the CW's truthfulness. See State v. Batangan, 71 Haw. 552, 563, 799 P.2d 48, 54 (1990) (vacating a child sex abuse conviction because an expert in the treatment of sexually abused children implicitly opined that the complainant was believable and that she had been abused by the defendant). Rodriguez identifies the following testimony as such: "the facts of what happens I don't tend to doubt when they are given to me in detail[.]" Opening Brief at 19 (emphasis in the original). Here again, Rodriguez's representation of the record is selective and slanted. The true and complete record in this respect is as follows, and occurred during defense counsel's cross-examination of Dr. Schneider:

> Q. . . . . Are you aware that in January [1998] and certainly in February, this child did not go over to her Grandfather Raymond

Rodriguez's house?[9]

A. Well, you know, I have to frame my answer by saying that at this age we don't expect children to recall chronology very well, and some children will say many times and mean a hundred times and others will say many times and mean twice. Some will say a long time ago and mean last week, and others would say a long time ago and mean last year. So I never -- I didn't set much score by her saying that something had occurred specifically yesterday or last night at the grandma's house. I just wrote down what she told me, and I didn't go into the details with the social worker of where she had been staying.

Q. All right. You say you don't set much score by this because young children could be basically all over the board on their references?

A. With chronology, yes.

Q. Yet you earlier describe this child as being articulate and communicative and all of this?

A. Yes.

Q. Are you implying that she's a bright child?

A. I'm implying that she's an articulate child, but it's normal for a child her age to not have a -- developmentally six-years-olds [(sic)] cannot recall chronicity of events the way that an adult can, so events may be told out of order and that's normal. We expect that in a child that age. It doesn't reflect whether they are intelligent or not intelligent, it's just the way they are developmentally at that age.

Q. And locations?

A. Locations, you know, are usually -- the facts of what happens I don't tend to doubt when they are given to me in detail. Children who are six years old -- and I can't say all children, but I can say generally children who are six years old are able to tell you things that happened and they are pretty good at telling you where things happened, but it's the chronicity -- the chronology of the events that often confuses them.

Q. Let us separate the chronicity portion and just look at the location of where it's related, where it's supposed to have occurred.

A. Okay.

Q. And particularly when we are dealing with landmarks or places that the child is familiar with, such as a particular grandmother's house. Now you are saying that those types of details are -

A. Recalled much better.

Q. You consider that to be a good detail, then?

A. Yes.

(Emphasis and footnote supplied.)

[9] Dr. Victoria Schneider (Dr. Schneider) had testified, just before the quoted testimony, that her examination of the complaining witness (the CW) had taken place on February 7, 1998, and that the CW had informed Dr. Schneider that Rodriguez had touched her the night before at her grandmother's house, presumably the house of her grandmother Donna Blakemore.

Clearly, the purportedly exceptionable testimony was not an opinion as to the CW's truthfulness or credibility. In context, it addressed the general tendency of children that age to be relatively bemused as to quantity and time, yet relatively clear as to location. The testimony was not what Rodriguez says it was, and it was certainly not objectionable. Indeed, it was not harmful to Rodriguez. Defense counsel exploited the testimony in cross-examining Dr. Schneider, and now, Rodriguez seeks to turn it to his advantage on appeal, infra. This point of error has no merit. Rodriguez's remaining complaint in this connection -- the lack of a limiting instruction that would have warned the jury not to use Dr. Schneider's testimony as evidence of the CW's truthfulness or credibility -- is likewise devoid of merit.

C. Sufficiency of the Evidence.

For his final point of error on appeal, Rodriguez contends there was insufficient evidence to support his convictions. In considering whether evidence adduced at trial is sufficient to support a conviction, we are guided by the following principles:

> On appeal, the test for a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact. State v. Ildefonso, 72 Haw. 573, 576, 827 P.2d 648, 651 (1992); State v. Tamura, 63 Haw. 636, 637,

> 633 P.2d 1115, 1117 (1981). "'It matters not if a conviction under the evidence as so considered might be deemed to be against the weight of the evidence so long as there is substantial evidence tending to support the requisite findings for the conviction.'" Ildefonso, 72 Haw. at 576-77, 827 P.2d at 651 (quoting Tamura, 63 Haw. at 637, 633 P.2d at 1117). "'Substantial evidence' . . . is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion." See id. at 577, 827 P.2d at 651 (quoting State v. Naeole, 62 Haw. 563, 565, 617 P.2d 820, 823 (1980)).

State v. Matias, 74 Haw. 197, 207, 840 P.2d 374, 379 (1992). "Furthermore, it is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence." Tachibana v. State, 79 Hawai'i 226, 239, 900 P.2d 1293, 1306 (1995) (brackets, internal quotation marks and citation omitted).

On this point, Rodriguez reasons as follows:

> In the present case, the only evidence of [Rodriguez's] guilt was supplied by a witness whose competency was, at best, in question. That evidence took on the appearance of substance only because it was repeated over and over again by the State's witnesses. However, on closer examination, it is clear that the testimony is effectively indistinguishable from the allegations against Uncle Joey. CW testified that the offenses were all committed at Grandma Donna's house, where [Joseph] lived. [Rodriguez] and [Donna] had been divorced for ten years and there is no evidence that [Rodriguez] spent time or stayed at [Donna's] home. If Dr. Schneider is correct that children CW's age are reliable in recalling places, if not times or sequences, then CW's testimony suggests that it was Uncle Joey, not [Rodriguez], who assaulted her. As for her description of the alleged offenses, CW never defined "boto." Although she testified that [Rodriguez] touched her where she makes "doo-doo" with his boto, she admitted that she doesn't know where she makes doo-doo and that she was sleeping at the time. Absent the prejudicial statement by Dr. Schneider that made it clear she believed CW, there was not substantial evidence to enable a person of reasonable caution to fairly conclude that [Rodriguez], as opposed to Uncle Joey, was guilty beyond a reasonable doubt.

Opening Brief at 20-21. We disagree. First, we put to one side

Rodriguez's complaint about "the prejudicial statement by Dr. Schneider[.]" See discussion, supra. Second, we notice that the word "boto" is patois for "penis." And we have also discussed, supra, the issue of the CW's competence to testify. What we are left with, in distillate, is an argument that the jury should not have believed the CW.

On direct examination, the CW testified that "Grandpa Ray" touched her "punani" -- "where you go shi-shi from" -- with his hand, and did not stop when she told him to stop. The CW remembered that "Grandpa Ray" put his "boto" inside her "punani," that it hurt, and that, "The thing was bleeding and I started to go to doctors." Further, the CW said that "Grandpa Ray" touched her "butt" with his hand. The CW also recalled that "Grandpa Ray" touched her on the inside of her "okole" -- "where you make doo-doo" -- with his "boto," and that it hurt and made her feel sad and cry. The CW testified that "Grandpa Ray" did these things to her at "Grandma Donna's house[.]" The CW made similar allegations against "Uncle Joey." When asked why she told "Grandma Donna" about these things, the CW responded, "'Cause my private parts was hurting." On cross-examination, the CW confirmed her testimony on direct that the sexual abuse by "Grandpa Ray" happened while she was staying at Donna's house. At that time, her brother and sister, her cousins, and her "Uncle

Joey" were also living there. The CW remembered that she told "Cathy" about the abuse before she told Donna.

Taking the evidence in the light most favorable to the State, the foregoing testimony of the CW was, in and of itself, substantial evidence sufficient to support Rodriguez's convictions. Matias, 74 Haw. at 207, 840 P.2d at 379. As for Rodriguez's contention that the jury should not have believed it, that was a matter of credibility for the jury, and not one within our purview. Tachibana, 79 Hawai'i at 239, 900 P.2d at 1306.

III. Conclusion.

The March 13, 2000 amended judgment of the court is affirmed.

DATED: Honolulu, Hawaii, March 6, 2003.

On the briefs:

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Chief Judge

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