NO. 23949

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
STEVEN E. K. VILLA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 98-0540)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Watanabe, and Lim, JJ.)

Defendant-Appellant Steven E. K. Villa (Villa) appeals the November 15, 2000 judgment, entered upon a jury's verdict in the circuit court of the first circuit,[1] that convicted him of murder in the second degree, in violation of Hawaii Revised Statutes (HRS) § 707-701.5 (1993).[2]

Upon sedulous review of the record and the briefs submitted by the parties, and giving due consideration to the arguments advanced and the issues raised by the parties, we resolve Villa's points of error as follows:

(1) Villa first argues that the court erroneously admitted, under the hearsay rule exception contained in Hawaii

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[1] The Honorable Dexter D. Del Rosario, judge presiding.

[2] Hawaii Revised Statutes (HRS) § 707-701.5(1) (1993) provides, in relevant part, that "a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person."

Rules of Evidence (HRE) Rule 803(b)(3) (1993),[3] evidence of various statements made by Villa's girlfriend, the decedent, Jolene Shott (Shott).[4] There was no error in this respect. The statements were correctly admitted, under HRE Rule 803(b)(3), to show Shott's "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)," id., relating to her relationship with Villa, which in turn illuminated Villa's motive in killing her, see State v. O'Daniel, 62 Haw. 518, 525-26, 616 P.2d 1383, 1389 (1980) (holding that "[s]tatements made by a victim-declarant are admissible under the state of mind exception to the hearsay rule" to show the state of the marital relationship and thus, the defendant's motive or intent in killing his wife[5]); State v. Robinson, 79 Hawai'i 468, 470-71, 903 P.2d 1289, 1291-92 (1995) (citing O'Daniel, supra, and

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[3] Hawaii Rules of Evidence (HRE) Rule 803(b)(3) (1993) provides that "[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . . A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

[4] In this connection, Defendant-Appellant Steven E.K. Villa does not invoke or argue his constitutional right to confront the witnesses against him.

[5] See State v. O'Daniel, 62 Haw. 518, 525 n.6, 616 P.2d 1383, 1389 n.6 (1980) ("State's Exhibit 11, in evidence is a letter postmarked September, 21, 1976, from the deceased, Angela O'Daniel, to Gina Wolfe, a friend. In the letter, the deceased states her marriage is failing and that she will seek a divorce soon. The letter also states the deceased's impression that the appellant is opposed to the divorce or separation.")

holding that the murder victim's statements to the defendant (her live-in boyfriend) and a girlfriend, that the victim intended to leave the defendant and move to Las Vegas, were admissible under the state of mind exception to the hearsay rule and "relevant to prove that, when it became apparent to [the defendant] that his relationship with [the victim] had not improved, [the defendant] had a motive to kill her rather than lose her"), and thus tended to establish the material element disputed at trial -- the perpetrator's identity. See State v. Renon, 73 Haw. 23, 37, 828 P.2d 1266, 1273 (1992) ("Thus, proof of motive may be relevant in tending to refute or support the presumption of innocence." (Citation omitted.)).

In this case of circumstantial evidence, the statements were critical to the State in showing how and why a longstanding abusive and controlling relationship, which started in 1994, ended in the February 1998 homicide; in other words, in proving Villa's motive. Shott had in 1995 abandoned the relationship by returning to Pennsylvania, but had returned after three weeks of daily telephone calls from Villa. For the next two years or so, Shott had outwardly denied abuse despite frequent physical signs of abuse. The statements in question showed Shott's evolving acknowledgment of the fundamentally abusive and controlling nature of the relationship, her resulting termination of cohabitation and plans for a permanent return alone to Pennsylvania, and her alarm that Villa was becoming increasingly

apprehensive, abusive and controlling in reaction to her plans -- which plans, in turn, became increasingly imminent and adamantine. Villa's immediate motive -- "to kill her rather than lose her" forever, Robinson, 79 Hawai'i at 471, 903 P.2d at 1292 -- was thus revealed in much clearer relief than might have obtained in the bare juxtaposition of abusive relationship and homicide.

Assume, *arguendo*, that the statements here in question were "statement[s] of memory or belief to prove the fact remembered or believed[,]" HRE Rule 803(b)(3), and hence inadmissible hearsay, as Villa would have it. See State v. Canady, 80 Hawai'i 469, 476-77, 911 P.2d 104, 111-12 (App. 1996) (domestic abuse victim's statement to the investigating police officer, that she did not want to talk about the incident because she was afraid the defendant, who was outside the room, would come in and beat her up, was not evidence of a relevant state of mind of the victim and thus not admissible under the HRE Rule 803(b)(3) hearsay exception; rather, it was, in effect, inadmissible hearsay evidence of the abuse giving rise to her fear). In other words, assume, *arguendo*, that the statements in question were improperly admitted to prove the various instances of Villa's abusive treatment of Shott referred to or implied therein. But such evidence was merely incremental to direct, eyewitness -- and therefore non-hearsay -- testimony of such

abuse admitted at trial. Hence, our hypothetical query segues into Villa's second point on appeal, which we decide against him, infra.

(2) Villa's second point on appeal challenges the court's admission of evidence of his abusive treatment of Shott. This argument has no merit. As is evident from the preceding discussion, the court correctly determined the relevance of the evidence. HRE Rule 404(b) (Supp. 2001).[6] In addition, the court did not abuse its discretion in balancing the probative value of the evidence and the danger of unfair prejudice and the like, under HRE Rule 403 (1993),[7] pursuant to the factors set forth in State v. Castro, 69 Haw. 633, 644, 756 P.2d 1033, 1041 (1988) ("[i]n deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the

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[6] HRE Rule 404(b) (Supp. 2001) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the 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.

[7] HRE Rule 403 (1993) provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility" (citation and internal block quote format omitted; brackets in the original)).

In this connection, Villa seems most exercised by the court's allegedly overweening emphasis upon the State's need for the evidence, the lack of similarity between the prior abusive behaviors and the homicide, the admission of evidence of the most temporally remote abusive acts, and the cumulative prejudice engendered by the sheer number of prior abusive behaviors. However, as previously discussed, in this case of circumstantial evidence, it was necessary for the State to illuminate the progress of the abusive relationship through evidence of non-homicidal instances, both numerous and temporally remote, in order to limn Shott's evolution -- from denial and accommodation to acknowledgment and imminent escape -- that triggered Villa's homicidal intent. Cf. State v. Clark, 83 Hawai‘i 289, 299-303, 926 P.2d 194, 204-8 (1996) ("evidence of prior acts of domestic violence . . . is admissible, subject to the HRE [Rule] 403 balancing test, to show the jury the context of the relationship between the victim and the defendant, where the relationship is offered as a possible explanation for the complaining witness's recantation at trial").

We observe in this respect that the court cautioned the jury, during the presentation of evidence and during its general instructions, that it was not to utilize the prior bad act evidence as impermissible character evidence.[8] We presume the jury took heed. State v. Amorin, 58 Haw. 623, 629, 574 P.2d 895, 899 (1978).

(3) Villa next argues that the court erroneously rejected his request for an instruction on the mitigating defense of extreme mental or emotional disturbance (EMED).[9] The court

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[8] During the presentation of evidence, the court instructed the jury that

> during the course of this trial you may hear evidence that the defendant, Mr. Villa, at another time may have engaged in or committed other crimes, wrongs, or acts during his relationship with Jolene Shott. You must not use this evidence to determine that the defendant is a person of bad character and therefore must have committed the offense charged in the case. Such evidence may be considered by you only on the issue of defendant's motive and intent and for no other purpose.

In the course of its general instructions to the jury, the court again cautioned the jury that

> [y]ou have heard evidence that the defendant at another time may have engaged in or committed other crimes, wrongs, or acts during his relationship with Jolene Shott. You must not use this evidence to determine that the defendant is a person of bad character and therefore must have committed the offense charged in this case. Such evidence may be considered by you only on the issue of defendant's motive and intent and for no other purpose.

[9] HRS § 707-702(2) (1993) provides that "[i]n a prosecution for murder in the first and second degrees it is a defense, which reduces the offense to manslaughter, that the defendant was, at the time he caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believed them to be."

committed no error. In the case on point, State v. Moore, 82 Hawai‘i 202, 921 P.2d 122 (1996), the supreme court held that the trial court did not plainly err in not *sua sponte* instructing the jury on the mitigating defense of EMED because

> [o]nly two people had any knowledge of [the defendant's] state of mind at the time he fired the shots, and neither of them testified. Thus, there is no evidence of whether [the defendant] was under the influence of an EMED nor any evidence from which the jury could view the subjective, internal situation in which [the defendant] found himself and the external circumstances as he perceived them at the time, and assess from that standpoint whether the explanation for his emotional distress was reasonable.

Id. at 210-11, 921 P.2d at 130-31 (footnote, citation, internal quotation marks and some original brackets omitted; emphasis in the original). Here, "evidentiary support for the asserted defense . . . is clearly lacking, [and it was] not . . . error for the trial court . . . to refuse to charge on the issue[.]" Id. at 210, 921 P.2d at 130 (citations and internal quotation marks omitted). In any event, we question whether Villa's EMED defense, that he and Shott were drinking before the homicide, and that he "lost control as a result of his psychological inability to accept the fact of her departure[,]" Reply Brief at 7, is or should be a cognizable EMED defense "for which there is a reasonable explanation." HRS § 707-702(2) (1993).

(4) Villa's final argument is that the court erroneously admitted Dr. Goff's opinion with respect to time of death. This contention fails as well. First, there was no challenge below -- and there is none on appeal -- to the

certification of Dr. Goff as an expert in forensic entomology. Similarly, there was and is no challenge to the underlying principles of forensic entomology. "Once the basic requisite qualifications are established, the extent of an expert's knowledge goes to the weight rather than the admissibility of the testimony." Nielsen v. American Honda Motor Co., Inc., 92 Hawai'i 180, 189, 989 P.2d 264, 273 (App. 1999) (citation and internal quotation marks omitted). This being so, Villa's criticisms of Dr. Goff's assumptions regarding the ambient temperature of Shott's apartment and the rate of insect infestation of an upper-floor apartment go to the weight, rather than the admissibility, of Dr. Goff's testimony.

Therefore,

IT IS HEREBY ORDERED that the November 15, 2000 judgment is affirmed.

DATED: Honolulu, Hawai'i, July 2, 2002.

On the briefs:

David J. Gierlach,
for defendant-appellant.

Chief Judge

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge