

NO. 23991

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
BRIAN HISAO KAWAMOTO, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 99-0471(2))

MEMORANDUM OPINION

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

Defendant-Appellant Brian Hisao Kawamoto (Defendant or Brian) appeals from the November 28, 2000 Judgment entered in the Second Circuit Court by Judge Shackley F. Rafetto. We affirm.

On October 22, 1999, Defendant was charged with and, pursuant to a jury verdict on November 28, 2000, Defendant was convicted of the following:

Count 1, Abuse of Family/Household Member, Hawai'i Revised Statutes (HRS) 709-906(4) (Supp. 2001), on September 23, 1999.

Count 2, Violation of a Temporary Restraining Order for Protection, HRS § 586-4 (Supp. 1999).

Count 3, Terroristic Threatening in the First Degree, HRS § 707-716(1)(d) (1993), on September 23, 1999.

Count 4, Murder in the Second Degree, HRS § 707-701.5 (1993), on September 24, 1999.

Defendant was sentenced to incarceration for one year for each of Counts 1 and 2 and to life with the possibility of parole for Count 4. As to Count 3, the Judgment states in the section pertaining to the "FINAL JUDGMENT AND SENTENCE OF THE COURT," in relevant part, as follows:

Count 3 was extended to ten (10) years. All counts to run consecutively to each other for a total of life with the possibility of parole plus twelve (12) years. Credit to be given for time served. Defendant to pay the Crime Victim Compensation fee in the amount of \$500.00, with manner of payment to be determined by the Director of the Department of Public Safety.

In addition to Defendant, the following persons are relevant in this case: Defendant's victim and deceased wife, Bridget Kawamoto (Bridget); Bridget's daughter (Stepdaughter); Defendant and Bridget's daughter (Daughter) and son (Son); and Defendant's female friend, Davelynn Masanda (Davelynn).

As to Count 4, Defendant asserted a mitigation defense based on HRS § 707-702(2) (1993), which states, in relevant part, as follows:

In 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.

In his opening statement, defense counsel told the jury, in relevant part, as follows:

Brian killed Bridget. Nobody's trying to hide the ball. Brian killed Bridget because he was under extreme emotional disturbance.
. . .

. . . .

Like many marriages or more like marriage is stormy. They had there [sic] ups and downs. They really had their ups and downs, and slowly started to fall apart. The last straw was Brian reached the point where he couldn't get work as a mason any more.
. . . .

. . . .
By the time we get to the period we're talking about, Brian was living in his truck. He still was part owner of the house. He still considered it his house. He would go home every three days, shower, pick up clothes, whatever. This went on for awhile.

An incident happened, as [the prosecutor] has told you, on the 23rd, by which Brian was arrested. He spent the night in jail. He was told not to go back home. He wanted to go back home because it is his home.

He finally went back that morning, the morning of the 24th. Went into the house to get some things, as he's done many times in the past. This may sound petty, but it's not. What Brian noticed when he went in the house, all his bills, the ones that were behind, the bills that were behind, all his bills had been changed so it's not him and Bridget any more. It's just Bridget.

He was under a lot of stress that time. He just got out of jail the day before. He's filthy. . . .

. . . .
He waited till Bridget got home to say, what's this about. They hadn't filed for divorce. There hadn't been a legal separation. But they'd been basically apart for about a year with Brian coming home occasionally.

. . . He wanted to ask Bridget about the bills, to confront her. And when she came home, she took a shower. Brian confronted her.

Why are you taking me off the bills? Why you no let me come home? That's how it seemed to him. Her reply was, no criticism intending, you don't belong here. Get the F out of here. I'm going to call the cops.

At this point Brian went over the top. . . .

He grabbed the knife from under the bedroom bed, which is maybe 10 feet away, and he really lost it. And he stabbed her and stabbed her and stabbed her. Bridget died.

As stated in the following quotation from the opening brief, Stepdaughter's testimony described a different factual situation.

But in March of 1999, Brian met a woman named **Davelynn Masanda** (Davelynn) and he started staying away from home. At first, he would be out of the house 1 or 2 days a week. . . . By July 1999, Brian was out of the house about 4 days a week, and he was not home to celebrate the Kawamoto wedding anniversary on July 9th. When he did come home that day, he arrived with Davelynn. . . .

. . . .

On September 22, 1999, [Stepdaughter], [Daughter], and [Son] were at home when Brian arrived between 6:00 and 8:00 p.m. Brian told [Stepdaughter] that, "if we didn't side form [sic] him and make my mom look like the bad person, if police arrived at her house that evening he would come back and kill us." . . . When the police arrived, they issued Brian a citation that required Brian to stay away from the house for 24-hours.

. . . [O]n September 23, 1999, . . . [w]hen [Stepdaughter] arrived back home at about 4:30 p.m., Brian was there in the kitchen with a knife. Brian said to [Stepdaughter], "Why did you betray me?" She responded by saying that there was a TRO against him and that the neighbors would see that he was there and would call the police. Then Brian said, "I should kill you now," while pointing the knife at her.

(Emphasis in original, citations omitted.)

Davelynn testified that although Defendant would at times sleep over where she lived and that she would sometimes be with him when he slept in his truck, she and Defendant were never "intimate."

Bridget was stabbed six times: one stab penetrated only the surface of the skin of the chest; one punctured the right breast through the nipple and one punctured the left breast through the nipple but neither stab penetrated the chest wall; and three invaded the chest cavity, injuring the heart, lungs, and liver.

Evidence was presented that, after the stabbing, Defendant walked from the house, stopped at a house several blocks away and, while very calm, used the owner's cordless

phone. The numbers that the police found stored in the telephone's memory system were: "278-9011, 143, 143, 747, 111, 250-0293." The number "278-9011" is the number for the "pager" of Davelynn's sister. The number "143" is the numerical code for "I love you." The number "747" is the code Defendant would use when he wanted to reach Davelynn on her sister's pager. The number "111" was the code Defendant would use so that Davelynn would know it was him sending the message. The number "250-0293" is the number of the cellular telephone of Police Lieutenant Glenn Cuomo.

Defendant then picked up his truck, drove away, and parked on private property. The property owner instructed him that he could not park there. There was a cliff on one side of the property. On the following morning, Defendant was discovered in his truck which had gone one- to two-hundred yards over the cliff but had not reached the ground because "[i]t didn't go through the tree line."

In the closing argument, defense counsel told the jury, in relevant part, as follows:

Think about that. He is out of there. If it was partially of his own doing or not, he is out of the [sic] there. Marriage pau. House pau. Self-respect pau. All gone. He was in the process of losing everything he ever worked for, everything he ever got, including his children,

Now, what is the evidence of extreme emotional disturbance?

. . . .

We are talking about emotional state, not praising or justifying what Brian did. But it explains and it is reasonable.

. . . .

What does he do?

He commits suicide and it didn't work.

. . . .

. . . I'm asking you to bring back a verdict of guilty, ladies and gentlemen. That is right. Guilty of the crime of manslaughter based on the fact of extreme emotional disturbance.

In his first point on appeal, Defendant contends that error or plain error occurred when the court admitted into evidence certain photographs of Bridget's injuries, as they were irrelevant, cumulative, and/or unfairly prejudicial. He contends that the error occurred when the court admitted either exhibit 35e or 35f, probably exhibit 35f, and either exhibit 37g or 37d. He contends that the plain error occurred when the court admitted exhibits 35a, c, d; 36a, b, c, d, e; 37a, b, e, h; and 38a, b, c. Defendant argues that the photographs were irrelevant under Rule 401, Hawai'i Rules of Evidence (HRE), and inadmissible under HRE Rule 402 and/or HRE Rule 403. HRE Rule 403 states as follows:

Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although 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.

Defendant cites the precedent that "[i]n weighing probative value versus prejudicial effect . . . [,] a variety of matters must be considered, including . . . 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." State v. Edwards, 81 Hawai'i 293, 297-98, 916 P.2d 703, 707-8 (1996) (citations omitted). Defendant argues that:

(a) "there was no need for the photographs" because his attorney conceded in the opening argument that Defendant had committed the offense, and uncontested testimony proved both the *corpus delicti* of the murder charge, as well as the identity of the perpetrator;

(b) there was uncontested alternative proof entered through expert witness testimony; and (c) "[t]he photographs likely roused the jury to overmastering hostility[.]" Defendant asserts that the admission of the photos violated his "constitutional right to a fair and impartial trial under the Sixth Amendment of the United States Constitution and Article I, Sections 5 and 14 of the Hawai'i State Constitution. HRPP [Hawai'i Rule of Penal Procedure] Rule 52."

In his second point on appeal, Defendant contends that plain error occurred when the court admitted Stepdaughter's testimony of facts that showed "Bridget's 'endearing' qualities, and the emotional hardships [Bridget] suffered because of Brian's involvement with Davelynn Masanda." He argues that

[a]ll of this testimony simultaneously generated tremendous sympathy for Bridget and the three children, and tremendous hate, anger, and passion against Brian. This testimony should have been excluded from trial under HRE 403, because such evidence was irrelevant under HRE 401 and inadmissible under HRE 402, or, even if relevant, any probative value the testimony may have had was substantially outweighed under HRE 403 by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

We note that

[t]he Hawai'i Supreme Court has addressed the issue of the court's discretionary authority to admit or exclude photographs. In State v. Apao, the supreme court set forth the following test: "The test for determining whether photographs may be shown to the jury is not whether they are necessary, but whether their probative value outweighs their possible prejudicial effect." State v. Apao, 59 Haw. 625, 639, 586 P.2d 250, 260 (1978) (citations omitted), motion to amend denied, 693 P.2d 405 (1984).

State v. Brantley, 84 Hawai'i 112, 118, 929 P.2d 1362, 1368 (1996). In light of the language of HRE Rule 403, we suggest the question is whether the probative value of the photographs outweighs their possible *unfair* prejudicial effect. Similarly, the test for determining the admissibility of Stepdaughter's testimony is whether the probative value of Stepdaughter's testimony outweighed its possible *unfair* prejudicial effect.

In the instant case, the issue in dispute was whether, at the time he caused Bridget's death, Defendant was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The evidence challenged in this appeal was relevant to the issue in dispute. The question was whether the probative value of the evidence in question outweighed its possible unfair prejudicial effect. Considering the relation between the issue in dispute and the evidence challenged in this appeal, it is clear to us that the trial court did not abuse its discretion when it decided that the probative value of the evidence in question outweighed its possible unfair prejudicial effect.

Moreover, HRPP Rule 52 (2002) states as follows:

Harmless error and plain error.

(a) **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

In cases governed by HRPP Rule 52, the standard of review applicable to all trial errors is the "harmless beyond a reasonable doubt" standard. State v. Holbron, 80 Hawai'i 27, 32 n.12, 904 P.2d 912, 917 n.12 (1995). In this case, assuming the trial court erred when it admitted into evidence any of the testimony and challenged exhibits, we conclude that the error was harmless beyond a reasonable doubt.

Accordingly, we affirm the circuit court's November 28, 2000 Judgment.

DATED: Honolulu, Hawai'i, June 7, 2002.

On the briefs:

Edward K. Harada,
Deputy Public Defender,
for Defendant-Appellant.

Chief Judge

Simone C. Polak,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge