

NOT FOR PUBLICATION

NO. 24154

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
REVELATION ALO, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 00-1-0018)

MEMORANDUM OPINION

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

Defendant-Appellant Revelation Alo (Alo) appeals from the February 14, 2001 Final Judgment and Sentence of the Circuit Court of the First Circuit (the circuit court) entered by Judge Dan T. Kochi, convicting and sentencing Alo for committing two counts of Sexual Assault in the Third Degree, in violation of Hawaii Revised Statutes (HRS) § 707-732(1)(b) (1993), and one count of Unlawful Imprisonment in the Second Degree, in violation of HRS § 707-722 (1993).

The charges against Alo stemmed from an incident that occurred on December 21, 1999 at the Hō'ae'ae Community Park (the park) in Waipahu. On that day, an off-duty police officer (the officer) happened to be at the park teaching his five-year-old daughter to ride a bicycle. The officer noticed a parked sports utility vehicle (SUV) with its rear hatch door down and two pairs of legs (one male and one female) sticking out back. Thinking that the legs belonged to two teenagers "making out[,] " the

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officer approached the SUV with the intention of telling the occupants that their behavior was inappropriate for a public park. As the officer approached the SUV, he noticed an elderly man, subsequently identified as Alo, step out of the back of the SUV, turn around, position himself between two legs, and engage in a sexual motion, crotch to crotch, with a young girl, Complaining Witness (CW). When the officer asked CW how old she was and learned that she was twelve, the officer yanked Alo off of CW and called the police. Alo was subsequently indicted on three counts of sexual assault in the third degree and one count of kidnapping.

What happened prior to the officer's arrival at the SUV was the subject of dispute at trial. CW testified that she and a friend (Friend) had gone to the park because they were bored. Upon arrival, Friend noticed Alo's SUV in the parking lot and suggested that they "go say hi" to Alo, who was "[s]itting in his trunk . . . [r]eading a paper." Alo had been CW's volleyball coach the year before, and CW liked him "as a friend." In the past, CW had talked a lot with Alo about her personal problems and Alo had given her gifts, money, and lunch, as well as his home and cell phone numbers so she could call him when she needed to talk to someone about her problems.

After Friend had greeted Alo, she turned around and walked away. At that point, according to CW, Alo grabbed one of her arms, turned her around, and sat her down next to him. CW's

legs were dangling out of the SUV and CW and Alo were "[t]alking stories[,] " when Alo "pushed [CW] down," laid next to her, and started touching her and telling her he wanted to have sex with her. CW told Alo several times that she had to go home, but Alo continued to rub her breasts with his hands. CW called out Friend's name several times and tried to push Alo's hand away, but she wasn't strong enough to do so. Alo then stood up, "laid on [her] and . . . started humping [her]"; i.e., his penis was rubbing against her vagina slowly. It was at that point that the off-duty police officer arrived at the SUV and pulled Alo off of her.

Friend's testimony essentially corroborated CW's testimony. Friend stated that after she had greeted Alo, she walked across a sidewalk and proceeded to a grassy area where she sat down. She was playing with the grass when she heard her name being called. However, when she turned towards the SUV, she "didn't see anybody." Friend noticed CW's legs sticking out of the SUV, and about five minutes later, she observed a "guy coming from the basketball courts" and walking toward Alo's SUV. As Friend was looking at this man, who turned out to be an off-duty police officer, he looked at her and asked, "[A]re you part of them[?]" Friend said yes, walked to the SUV, and saw Alo's whole body on top of CW, stomach to stomach.

Alo completely denied CW's version of the facts at trial. He claimed that it was CW who entered the SUV, jumped

into his arms, and grabbed and kissed him. When she would not let him go, he turned to the side and tried to push her off of him. Just then, CW spread her legs and, as a result, Alo fell between her legs. Alo claimed that he was trying to extricate himself from CW when he was yanked by the officer. Alo also testified that CW had many problems at home and at school, craved attention, and called Alo's cell or home phone at all hours of the day and night to speak with him. Alo claimed that because he knew of her problems, he paid special attention to her. He admitted giving her money and gifts on occasion but claimed that he did that for a lot of the girls he coached.

Several defense witnesses testified that Alo was a kind, caring, and generous man who loved kids and was active in the Lions Club and other community activities. Other defense witnesses testified about CW's emotional needs and confirmed that in the past, CW had called Alo on his home or cell phone at all hours of the day and night.

After Alo was found guilty by a jury of two counts of sexual assault in the third degree and one count of unlawful imprisonment in the second degree, he filed this appeal.

Alo argues on appeal that the judgment against him should be vacated because the circuit court, Judge Frances Q. F. Wong presiding, abused its discretion when, prior to trial, it: (1) held that the records of CW's therapy sessions with a clinical social worker (social worker's records) were subject to

the victim-counselor privilege set forth in Hawaii Rules of Evidence Rule 505.5, without requiring proof that the social worker was a "victim-counselor" within the meaning of the rule; (2) failed to conduct an *in camera* review of the social worker's records to determine if the records contained any information that would implicate Alo's constitutional right to confront witnesses; and (3) refused to seal those records for appellate review.

On March 24, 2003, in light of the decision of the Supreme Court of Hawai'i in State v. Peseti, slip op. (No. 23345, Feb. 25, 2003), this court agreed with Alo's second and third contentions and entered an Order of Temporary Remand to the circuit court, directing that the record on appeal be supplemented with a copy of the social worker's records, sealed for appellate review.¹

¹ In our March 24, 2003 Order of Temporary Remand to the Circuit Court of the First Circuit (the circuit court), we stated:

Alo does not contest that the social worker's records are privileged but argues that this privilege should not "'stand in the way' of due process considerations, his right to confrontation, effective assistance of counsel or right to compulsory process[.]"

The foregoing statement is not entirely correct. On appeal, Alo does challenge the applicability of the victim-counselor privilege to communications between the complaining witness and her clinical social worker, arguing that no showing was made below that the social worker was a "victim counselor" within the meaning of Hawaii Rules of Evidence (HRE) Rule 505.5(b). However, at trial, Alo neither contested the circuit court's ruling on the applicability of the victim-counselor privilege nor argued that any exceptions to the privilege applied. Since no objection was made below to the circuit court's treatment of the clinical social worker as a "victim counselor" for purposes of HRE Rule 505.5(b), we will review the circuit court's action for plain error only. State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998) (citations omitted). An error is deemed to constitute plain error "[i]f the substantial rights of the defendant have been affected adversely[.]" Id. Further, the plain error standard of review will be applied "to correct errors which seriously affect the fairness, integrity, or public reputation of

Having now reviewed the record on appeal, as supplemented with the social worker's records, we conclude that the circuit court's error in failing to review the social worker's records and seal them for appellate review was harmless beyond a reasonable doubt. Essentially, the social worker's records are comprised of: (1) an "Intake Assessment," which describes the reason for CW's referral to the social worker; (2) correspondence and forms related to the obtaining of medical insurance coverage for the services provided to CW; (3) a "Child Recovery Index" with questions to, and answers circled by, CW regarding her feelings/reactions to two sexual assault episodes she allegedly had been subject to; and (4) the social worker's notes of her therapy sessions with CW, which essentially record CW's reports of her progress in school and at home, her feelings, and her relationships with friends, teachers, and family.

According to Peseti, a defendant seeking to adduce evidence of a privileged communication at trial must demonstrate that

(1) there is a legitimate need to disclose the protected information; (2) the information is relevant and material to the issue before the court; and (3) the party seeking to pierce the privilege shows by a preponderance of the evidence that no less intrusive source for that information exists.

Peseti, slip op. at 18. Despite Alo's allegations, nothing in

judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." Id.

Based on our review of the record, we are unable to conclude that the circuit court's error, if any, in treating the social worker as subject to the victim-counselor privilege, affected Alo's substantial rights.

the social worker's records suggested that CW had lied about the incident that led to Alo's arrest for the charges in this case, or that she recanted her allegations against Alo. Moreover, we could find no relevant or material information in the social worker's records that would implicate Alo's constitutional rights to due process, confrontation, effective assistance of counsel, or compulsory process.

We therefore affirm the February 14, 2001 Final Judgment and Sentence.

DATED: Honolulu, Hawai'i, April 28, 2003.

On the briefs:

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