

NOT FOR PUBLICATION

NOS. 24617 and 24618

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
PACIFICO CLARO, Defendant-Appellant

APPEAL FROM THE FIFTH CIRCUIT COURT
(CR. NOS. 00-01-0030 and 99-0195)

MEMORANDUM OPINION

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

Defendant-Appellant Pacifico Claro (Claro) appeals from the Judgment entered September 17, 2001 in the Circuit Court of the Fifth Circuit¹ (circuit court).

Claro was indicted in Cr. No. 99-0195 on December 20, 1999 for Sexual Assault in the Third Degree (Count I) and Sexual Assault in the First Degree (Counts II through VI). On February 28, 2000, Claro was indicted in Cr. No. 00-01-0030 for Continuous Sexual Assault of a Minor Under the Age of Fourteen Years² (Count I) and Sexual Assault in the First Degree (Counts II through IV).

¹/The Honorable Clifford L. Nakea presided.

²/Count I against Claro read as follows:

Count I: During the period of September 1997 to June 1998, in the County of Kauai, State of Hawaii, PACIFICO CLARO did either reside in the same home with [the Complainant], a minor under the age of fourteen years or had recurring access to her, and did engage in three or more acts of sexual penetration and/or sexual contact with [the Complainant] over a period of time, but while she was under the age of fourteen years, thereby committing the offense of Continuous Sexual Assault of a Minor Under the Age of Fourteen Years, in violation of 707-733.5 of the Hawaii Revised Statutes.

On April 20, 2000, the two criminal cases were consolidated. Jury trial commenced on June 20, 2001, and prior to the presentation of evidence, the circuit court confirmed that the State had dismissed Counts I and VI in Cr. No. 99-0195. Following the trial, Claro was convicted of Continuous Sexual Assault of a Minor Under the Age of Fourteen Years in violation of Hawaii Revised Statutes (HRS) § 707-733.5 (Supp. 2002).³ Claro was sentenced to a twenty-year term of incarceration and

³/HRS § 707-733.5 (Supp. 2002) provides as follows:

§707-733.5 Continuous sexual assault of a minor under the age of fourteen years. (1) Any person who:

- (a) Either resides in the same home with a minor under the age of fourteen years or has recurring access to the minor; and
- (b) Engages in three or more acts of sexual penetration or sexual contact with the minor over a period of time, but while the minor is under the age of fourteen years,

is guilty of the offense of continuous sexual assault of a minor under the age of fourteen years.

(2) To convict under this section, the trier of fact, if a jury, need unanimously agree only that the requisite number of acts have occurred; the jury need not agree on which acts constitute the requisite number.

(3) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section, unless the other charged offense occurred outside the time frame of the offense charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved, in which case a separate count may be charged for each victim.

(4) Continuous sexual assault of a minor under the age of fourteen years is a class A felony.

ordered, inter alia, to pay a \$100.00 Crime Victim Compensation Fee and a \$500.00 DNA Registry Special Fund Assessment.

On appeal, Claro contends the circuit court plainly erred by allowing Detective Pigao (the detective investigating the alleged incidents of sexual assault) to present opinion and hearsay testimony that improperly bolstered the credibility of the minor complaining witness (Complainant) in the absence of any attack on Complainant's credibility.

I. BACKGROUND

Claro was accused of having sexual contact with his girlfriend's niece (Complainant) on ten occasions between September 1997 and June 1998.

At the time of the trial, Complainant was thirteen and had just finished seventh grade. Complainant testified that between September 1997 and June 1998, she was a fourth grader who lived with her mother (Mother) and brother. She had a very close relationship with her mother's sister (Auntie) and slept at Auntie's house "on weekdays" "a lot." Auntie's house, which Auntie shared with Claro and his two sons, was seven houses down from Complainant's house. Complainant slept at Auntie's home because she "didn't know how to sleep by [herself] and [she] didn't want to." Complainant also stated that she did not like

it when Mother's boyfriend began staying over at Complainant's house because "my mom was still married to my dad."

Complainant testified that Claro subjected her to seven acts of digital penetration of her vagina between September 1997 and June 1998. All of the incidents occurred while Complainant was sleeping with Auntie and Claro. Four of the incidents occurred while Complainant was sleeping on the couch and Auntie and Claro were sleeping on the floor next to the couch, and three occurred while Complainant was sleeping on the floor with Auntie and Claro. Regarding each of the incidents, Complainant testified that Claro reached into her shorts, inserted a finger into her vagina, and then pulled his hand away once Complainant moved. Complainant further testified that she told her school friends about Claro touching her shortly after the touching incidents occurred; however, she did not report the incidents to the authorities until two years later, following a school assembly in which a speaker talked about being raped.

Under cross-examination, Complainant testified that she felt angry at Claro for touching her, was scared and confused following the incidents, and felt uncomfortable around Claro. While an alternative bedroom in Auntie's house was available to Complainant, she testified that she continued to sleep with Claro and Auntie five to six times a week.

Detective Pigao testified that at the time of trial he had been a Kaua'i police officer for approximately twenty-one years and was currently assigned to the juvenile section of the department, investigating child sexual assaults. Detective Pigao explained that when he first meets a child suspected of having been sexually abused, his procedure is as follows:

Normally what I do is I introduce myself. Of course I'm dressed in plain clothes, not in uniform. I explain to the child that my job is -- as an investigator is to investigate incidents involving children. And then -- and I do it all the time and I've talked to many -- a lot of child -- children before.

According to Detective Pigao, he was responding to a complaint call from a counselor at Complainant's middle school when he and met with Complainant and Mother at their home on September 28, 1999. The following exchange then occurred between the Deputy Prosecuting Attorney and Detective Pigao:

Q. [Deputy Prosecuting Attorney] Okay. So, when you talked to [Complainant] in the living room, what happened?

A. [Detective Pigao] You know, at that time, I explained -- at that time, I explained what -- what I would do as an investigator. Again, introduced myself, explained to her that, you know, I'm investigating a -- a case that she may be involved in. And that I -- this is what I do, I talk to children a lot and -- and things that happen to children and --

Q. You said that to her?

A. Yes. Something to that effect.

Q. And [Complainant] -- what else did you say to [Complainant]?

A. You know, that that -- at that time, you know I told her that -- that I had gotten some information that something may have happened to her in the past.

Q. And did --

A. And she --

Q. -- she -- did she deny that?

A. She didn't want to talk about it.

Q. She didn't want to talk about it.

A. Yeah.

Q. Okay. So, what happened after she said she didn't want to talk about it?

A. Well, I just keep explaining that, you know, it's okay, you know -- you know, I talk -- I try to make them feel comfortable, make children feel comfortable when I talk to them and try to get them to at least try to talk to me about what's going on. But at that time, she didn't want to talk to me.

Q. And how -- how did she appear -- how did she physically appear when she was in the living room and didn't want to talk?

A. She was a little upset.

Q. And then what happened??

A. And then I explained to her that, well, maybe later on if she thinks -- you know, when she's ready and she wants to talk to me, then she -- she can come back or have her mom call me, and then we can sit down and talk about what happened.

Q. And where did [Complainant] go?

A. She had left the room.

Q. Okay. And then what did you do?

A. I had asked [Mother] to get -- to come back in the room. And I wanted to talk to her about -- more about what had happened.

Q. Okay. And what did you tell [Mother]?

A. Well, I told [Mother] that, you know, I had a feeling that something had happened. But [Complainant], you know, didn't want to talk to me and that -- you know, I gave her my card, my calling card, and told her that at a later time if [Complainant] was ready to talk, then give me a call and we'll set a date and set an appointment with me so we can talk about what happened.

Q. And did [Mother] go someplace?

A. Yes.

Q. Where did she go?

A. She -- she had left the room, and -- and I was still in the living room talking with [Mother's boyfriend] at the time. He had had a lot of questions too about what was going on.

Q. Okay. And what happened while you were waiting in the living room?

A. Well, after a little while then I heard -- I heard a loud yell or scream coming out of, I guess was a bedroom. So I -- I kind of stood up, and as I was walking through the room, [Mother] was kind of walking out at the same time and she was very upset and crying.

Q. Um-hmm.

A. And at that time she told me, you better go talk to [Complainant], I think she was raped.

Q. Okay. And what did you do?

A. I went into the room and talked to [Complainant].

Q. Okay. And when you got into the room what did you say to [Complainant]?

A. What I did was set [Complainant] down on the bed and asked her, did something happen, something to that effect. And she nodded her head and said yes. So I told her, I said, do you going to talk to me tonight. And then at that time she decided yes, she wanted to talk.

Q. And you wanted to talk to her that night too, didn't you?

A. Yes.

Q. Okay. Why is it important for you to talk to her that night?

A. Well, it's important at the time to get good information, you know, initially in the case. Sometimes, you know, at a later date they get to talking with other people and, you know, stories start -- start to change. So initially it's important that we get the original statement which is clean and without any outside influences.

(Emphases added.)

Dr. Geri Young (Dr. Young) testified that as a pediatrician at Kaua'i Medical Clinic, she performed a general physical examination of Complainant on October 7, 1999, following Complainant's report of sexual assault. Dr. Young deferred the gynecological examination to Dr. Birchard, a gynecologist. Dr. Young reported that Complainant had "a completely normal physical exam" without any evidence of sexual molestation. Dr. Young stated that the lack of any visible injuries alone does not indicate whether sexual assault has occurred.

Testifying for the defense, Auntie stated that Complainant spent the night at her house "plenty times." Auntie sometimes slept on the living room floor with Claro close to her. Auntie described herself as a "light sleeper," who would wake up when Claro moved or she heard noises. Auntie testified that during the whole time Complainant spent the night at her house, she never noticed Claro do anything to Complainant.

Claro required an interpreter during trial. Claro testified that he was sixty-three years old at the time of trial, had moved from the Philippines to the mainland in 1992 and then to Kaua'i in 1994, and had never been arrested or in trouble prior to this case. When asked if he did what Complainant claimed he did, Claro testified,

"No, no, no, sir. No. God knows that, sir. I don't do that, sir. No.

. . . .

. . . Because I love her, I love my niece, my sister niece, yeah. I take care her (unintelligible) stay my girlfriend, I take care the family, the -- Glen, mother and the (unintelligible).

II. STANDARD OF REVIEW

Hawai'i Rules of Penal Procedure Rule (HRPP) 52(b) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Therefore, an appellate court "may recognize plain error when the error committed affects substantial rights of the defendant." State v. Davia, 87 Hawai'i 249, 253, 953 P.2d 1347, 1351 (1998) (internal quotation marks omitted).

The appellate 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) (internal quotation marks omitted).

III. DISCUSSION

A. Detective Pigao's Testimony that "I told [Mother] that . . . I Had a Feeling that Something Had Happened."

Claro contends the circuit court plainly erred when it improperly allowed Detective Pigao to opine "something had

happened" to bolster Complainant's credibility. Claro claims that the erroneous admission of this evidence violated his right to a fair trial under Article I, Section 5 of the Hawai'i Constitution⁴ and the Fifth and Fourteenth Amendments to the United States Constitution.⁵

Because Claro failed to challenge Detective Pigao's testimony at trial, the plain error analysis applies to this

⁴/Article I, § 5, of the Hawai'i Constitution provides:

DUE PROCESS AND EQUAL PROTECTION

Section 5. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

⁵/The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

court's review. The Hawai'i Supreme Court in State v. Kelekolio, 74 Haw. 479, 849 P.2d 58 (1993), stated:

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. Nevertheless, where plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial court.

Id. at 515, 849 P.2d at 74-75 (citation omitted).

Claro argues that "[t]he crucial issue was whether the jury determined [Complainant] or [Claro] to be more credible." Noting the absence of corroborating evidence for either witness, Claro argues that "[a]s a police detective with twenty-one years on the police force with experience in the investigation of numerous child sexual assault cases, Detective Pigao's testimony was significant and carried great weight in determining whether a case was meritorious or not."

Claro was indicted on December 20, 1999 and February 28, 2000 for alleged sexual assaults against Complainant during the period of September 1997 to June 1998 when Complainant was nine and ten years old. Complainant did not speak to Detective Pigao until September 28, 1999, two years after the sexual assaults allegedly began.

Detective Pigao's statement, "I had a feeling that something had happened," was in response to the prosecutor's question, "And what did you tell [Mother]?" Detective Pigao's

statement that it was "important at the time to get good information" was in response to the prosecutor's question, "Why is it important for you to talk to [Complainant] that night?" The prosecutor's opening and closing statements indicate this testimony was solicited from Detective Pigao to explain when Complainant's accusations against Claro first came to the attention of the police.

The following portion of the prosecutor's opening statement set the stage for Detective Pigao's testimony:

Now, it will be difficult for you at times to listen to [Complainant], it's going to be hard. Please remember how hard it is for you to listen and hear what she tells you. Remember that when you think about how hard it is for [Complainant] to tell you. [Complainant's] going to tell you about some personal things, some very personal things, things that she has had locked away deep in her memory.

After all of this happened, [Complainant] tried to keep it, keep it within -- keep it within her memory. And it wasn't until more than a year later that the police actually discovered what had happened to [Complainant]. [Complainant] kept that secret and she only shared it with a few or her -- her friends of her -- of her own age, at least until she spoke to the police. Now [Complainant's] finally going to come -- she's going to come to court and she's going to get some closure, she's going to tell you what happened.

. . . .

[Complainant] didn't tell. Didn't tell her mom, didn't tell her auntie, didn't say anything. She just endured it, put up with it. She did tell some of her friends at school, other little girls. Luckily for [Complainant], after fourth grade they moved, they left Pu'u Ka'a Street, they went to Kealia. So [Complainant] didn't stay at her [Auntie's] house anymore.

It wasn't until the sixth grade -- that was fourth grade -- sixth grade [Complainant] had an assembly at school. During that assembly one of the speakers triggered something in [Complainant], and it was this speaker that

gave rise to the disclosure and the police finding out about what happened.

(Emphases added.)

In closing argument, the prosecutor summarized Detective Pigao's testimony as follows:

So I want you to consider that when you consider what [Complainant] told you. Consider its credibility, how you weigh it. What motivation would [Complainant] have for accusing [Claro], her aunt's boyfriend? What did she have to gain? She didn't -- when Detective Pigao came to talk to her the first time, she wasn't too excited about talking to him. In fact, she initially says nothing happened. It was only after she talked to her mother that the detective was able to find out, take [Complainant] for that interview.

. . . .

I'd like you to consider the statements that [Complainant] has given. You heard about her talking to Detective Pigao. You heard about the circumstances of that night, that first interview with the police, the first disclosure to any adult. She had just finished talking to her mother. Her mother started crying immediately. [Complainant] starts crying. Policeman walks right in, needs to find out what's going on.

Policeman never met this -- never met this girl before, asks them to bring her to Lihue where he sits her down in a room with a video camera and asks her about some very intimate details about what happened to her. Now, [Complainant] was able to tell Detective Pigao about some of those details. Same -- or similar details that she told you here tonight. Today. I'm sorry. Or yesterday, here in this courtroom. Without addressing the sixth and seventh incident.

Does it make sense that maybe some additional details would spring forth, that she would remember them, considering that she had just for the first time talked about this with -- with an adult, first time she talked with a male, first time she talked wiht a stranger? And it's a strange policeman. However nice he appeared on the stand, it's still a stranger, she had never talked about it before with an adult.

(Emphases added.)

The context of Detective Pigao's testimony suggests the prosecutor solicited this testimony to bolster Complainant's

credibility and to explain any statement Complainant made to Detective Pigao that was inconsistent with subsequent testimony.

B. Admissibility of Detective Pigao's Testimony to Bolster Complainant's Credibility.

1. Hawai'i Rules of Evidence Rule 608(a)

Hawai'i Rules of Evidence (HRE) Rule 608(a), which is identical to the federal rule, governs the admissibility of opinion testimony and provides, in relevant part, as follows:

Rule 608 Evidence of character and conduct of witness. (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

- (1) The evidence may refer only to character for truthfulness or untruthfulness, and
- (2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(Emphases added.)

The commentary to HRE Rule 608 provides:

Subsection (a) . . . provides for admissibility of opinion or reputation evidence relevant to a witness' [sic] general character for veracity, and thus constitutes a specific exception to the general prohibition in Rule 404(a) of character evidence as proof of propensity or behavior in conformity with such character. In accordance with previous law on the subject, evidence of a reputation for truthfulness offered to bolster credibility is admissible only to rebut an attack on the witness' [sic] veracity. According to the rule, only a character attack "by opinion or reputation evidence or otherwise" will qualify. The Advisory Committee's Note to Fed. R. Evid. 608(a) points out: "Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence of misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not."

Consistent with this rule, the Hawaii courts have held that evidence of character for veracity must address itself

expressly to the character of the witness for truthfulness,
not to some collateral trait of character.

(Citation omitted.)

2. Character Evidence for Truthfulness

Claro relies on State v. Torres, 85 Hawai'i 417, 945 P.2d 849 (App. 1997), where this court articulated the framework for analyzing admissibility of character evidence under HRE Rule 608(a). By the express language of HRE Rule 608(a) and the Commentary to HRE Rule 608(a), the admissibility of HRE Rule 608 evidence is subject to the following limitations: (1) "the evidence offered may refer only to a witness's character for truthfulness or untruthfulness," and (2) "the evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Torres, 85 Hawai'i at 424, 945 P.2d at 856 (internal quotation marks omitted); HRE Rule 608(a).

Under Torres, this court adopted the following HRE Rule 608 analytical framework for analyzing character evidence for truthfulness:

[W]itness character evidence may be defined as evidence that directly relates to the general credibility of the witness, rather than the believability of specific testimony, and conveys some judgment about the ethics or moral qualities of that witness.

. . . .

This definition facilitates drawing distinctions between witness character evidence and other evidence pertaining to witness credibility. For example, evidence showing that the

witness suffers from a mental disease that makes it impossible to distinguish fact from fantasy usually is not character evidence since usually it does not make an ethical or moral judgment about the witness. Similarly, bias evidence indicating the witness has an interest in the outcome of the instant case usually should not be classified as character evidence because it usually says nothing general about credibility. For the same reason, evidence of a prior inconsistent statement or other evidence contradicting the witness usually is not character evidence. Inconsistencies or contradictions usually suggest only that the witness lied or was mistaken with respect to the specific facts described. The evidence usually implies no encompassing generalization about the credibility of the witness. Finally, evidence that a witness lacks certain knowledge or has acted in an unprofessional manner undermines his capacity to testify as an expert, but does not reflect on his general truthfulness.

85 Hawai'i at 425, 945 P.2d at 857 (quoting 28 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure: Evidence § 6113, at 43-44 (1993)).

Detective Pigao's testimony that he "had a feeling that something had happened" and the "original statement . . . is clean and without any outside influences" does not refer to Complainant's character for truthfulness or untruthfulness.

3. Whether Complainant's Character For Truthfulness Was Sufficiently Attacked

The second limitation on the admissibility of character evidence as expressly provided under HRE Rule 608(a) allows its introduction "only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." In Torres, this court recognized that

[t]here are certain categories of impeaching evidence, none of which are present in this case, which clearly constitute attacks on a witness's character for truthfulness. For example, HRE Rule 608(a) specifically provides that reputation or opinion evidence of a witness's untruthful character qualifies as an attack on a witness's character

for truthfulness, thus lifting the bolstering ban. The Commentary to HRE Rule 608(a) also recognizes that "evidence of misconduct, including conviction of crime, and of corruption" constitutes an attack on a witness's character for truthfulness.

85 Hawai'i at 425, 945 P.2d at 857.

This court went on to state that "the category of impeaching evidence employed to attack a witness's credibility is not determinative of whether the witness's credibility has been attacked," but rather

an evaluation must be made under the HRE Rule 608(a) analytical framework . . . to determine whether the impeaching evidence (1) relates directly to the general credibility of the witness rather than the believability of the specific testimony of the witness, and (2) conveys some judgment about the ethics or moral qualities of the witness.

85 Hawai'i at 425-26, 945 P.2d at 857-58 (citing 28 Federal Practice and Procedure: Evidence § 6116, at 68, 73).

In the present case, Claro contends the circuit court plainly erred by admitting Detective Pigao's testimony where Complainant's character was not sufficiently attacked to warrant lifting of the ban against bolstering. **OB at 18-19.**

Under cross-examination, Defense Counsel asked whether Complainant was testifying inconsistently with her grand jury testimony regarding whether or not she went to sleep after the second assault incident. The following exchange occurred:

Q. [Deputy Public Defender] You did not go back to sleep?

A. [Complainant] No.

Q. Okay. What did you do?

A. I stayed awake.

Q. So you lied at that Grand Jury hearing?

A. No. That's what I remembered then. And I remember that I stayed awake.

Q. Of course, that was a year and a half ago. Are you saying your memory is better now?

A. I don't know.

Defense Counsel also questioned Complainant regarding the number of times the assaults occurred, asking whether she told Detective Pigao five times as opposed to the seven times she testified to at the grand jury and during trial.

This court in Torres evaluated the types of impeaching evidence that characterize an attack on a witness's character for truthfulness, including contradiction evidence.

The Advisory Committee's Note to FRE Rule 608 states that whether evidence in the form of contradiction is an attack upon the character of the witness must depend on the circumstances. The reason for this is that in many circumstances, a witness's misstatements may be due to defects in memory or knowledge, or attributable to bias, rather than indicative of untruthfulness.

85 Hawai'i at 427, 945 P.2d at 859 (internal quotation marks and brackets omitted).

[E]vidence that contradicts a witness can be offered to prove his lack of credibility by showing the witness has flawed perceptual, recall, or narrative abilities. Because such evidence suggests the witness has committed only an honest mistake, it does not attack character for truthfulness. Further, contradiction evidence might be offered to prove the witness has intentionally lied, but for reasons that are case-specific and have nothing to do with general trustworthiness. Finally, contradiction evidence may be offered not to prove credibility but simply to show that the facts are as described by that evidence.

28 Federal Practice and Procedure § 6116, at 70 (footnotes omitted).

In determining whether a witness's general reputation for truthfulness has been impeached by the introduction of

the witness's prior inconsistent statements, therefore, a trial court must consider whether the particular impeachment for inconsistency or a conflict in testimony, or either of them, amounts in net effect to an attack on character for truth[.]

85 Hawai'i at 427, 945 P.2d at 859 (internal quotation marks omitted).

The impeaching evidence at issue in Torres involved inconsistencies in the complainant's grand jury and trial testimonies relating to whether Torres had bathed the complainant's entire body or just her private parts. During cross-examination, the complainant admitted that she lied before the grand jury. Under this circumstance, this court held that the complainant's general character for truthfulness was sufficiently attacked. 85 Hawai'i at 427, 945 P.2d at 859.

In the instant case, Defense Counsel's question related to inconsistent statements in Complainant's grand jury and trial testimonies. This testimony demonstrated Complainant's flawed recall ability, as evidenced by her response, "That's what I remembered then. And I remember that I stayed awake." When asked if she lied before the grand jury, Complainant responded, "No." Defense Counsel's question focused on the accuracy of Complainant's recall of the time period following the second alleged incident of abuse, rather than a general propensity for telling lies. The impeaching evidence challenged the believability of Complainant's specific testimony rather than her general credibility. Therefore, the net effect was not an attack

on Complainant's character for truthfulness, but rather exposed her flawed recall ability regarding one alleged incident.

Because such evidence suggests that Complainant committed only an honest mistake, it did not sufficiently attack her character for truthfulness for purposes of lifting the ban against bolstering.

Additionally, no jury instruction was given to the jury limiting Detective Pigao's testimony. The circuit court gave the following instruction relating to opinion testimony:

During the trial you heard the testimony of one or more witnesses who were described as experts. Training and experience may make a person an expert in a particular field. The law allows that person to state an opinion about matters in that field. Merely because such a witness has expressed an opinion does not mean, however, that you must accept this opinion. It is up to you to decide whether to accept this testimony and how much weight to give to it. You must also decide whether the witness' [sic] opinions were based on sound reason, judgment, and information.

Detective Pigao was not qualified as an expert.

Dr. Young was the only qualified expert to testify at trial.

Because the jury instruction refers to "one or more witnesses" described as experts, it is unclear whether the jury regarded Detective Pigao as an expert.

C. Admissibility of Hearsay Statement

Claro also contends that Detective Pigao's "testimony further bolstered that of [Complainant] when he was permitted to offer hearsay testimony that [Complainant's] mother told him immediately after she had spoken to [Complainant], '. . . you better go talk to [Complainant], I think she was raped.'" The

State contends that Mother's statement was offered to explain how Detective Pigao "obtained an interview with [Complainant]."

Hearsay is offered in evidence "to prove the truth of the matter asserted." HRE Rule 801(3). Detective Pigao's testimony that Mother said, "you better go talk to [Complainant], I think she was raped," was not offered to prove Complainant was raped, but, as the State contends, was offered to show how Detective Pigao obtained his interview with Complainant. Mother was called as a witness by the State after Detective Pigao's testimony. Mother was not asked about her statement to Detective Pigao. The prosecutor made no reference at any time to this statement of Detective Pigao.

IV. CONCLUSION

Detective Pigao's statements that "I had a feeling that something had happened" and "it's important at the time to get good information" did not, in themselves, rise to the level of plain error that "seriously affect the fairness, integrity, or public reputation of judicial proceedings." Vanstory, 91 Hawai'i at 42, 979 P.2d at 1068. Although these two statements together may have bolstered Complainant's credibility, it is clear from the record in this case that Detective Pigao's testimony, including these two statements, was offered to explain to the jury the delay from the time the sexual assaults allegedly occurred to the time Complainant brought it to the attention of

the police. Alone, these statements do not amount to plain error. Claro's conviction was based on the extensive testimony of Complainant, detailing the alleged sexual assaults and the circumstances surrounding them. The jury believed Complainant as opposed to Claro. We cannot conclude that Detective Pigao's two statements, "I had a feeling something was wrong" and "it's important at the time to get good information" denied Claro a fair trial.

Therefore the Judgment filed September 17, 2001 in the Circuit Court of the Fifth Circuit is affirmed.

DATED: Honolulu, Hawai'i, July 30, 2003.

On the briefs:

Joyce K. Matsumori-Hoshijo, Deputy Public Defender, for defendant-appellant.	Chief Judge
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Tracy Murakami, Deputy Prosecuting Attorney, County of Kaua'i, for plaintiff-appellee.	Associate Judge
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Associate Judge