NO. 24662

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
GARTH COLEMAN, Defendant-Appellant

APPEAL FROM THE THIRD CIRCUIT COURT
(CR. NO. 99-03K)

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

Defendant-Appellant Garth Coleman (Coleman) appeals from the September 14, 2001 Judgment[1] entered by the Circuit Court of the Third Circuit (circuit court).[2] Coleman was convicted of Sexual Assault in the First Degree in violation of Hawaii Revised Statutes (HRS) § 707-730(1)(b) (1993).[3]

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[1]Coleman was charged with Sexual Assault in the First Degree in violation of Hawaii Revised Statutes (HRS) § 707-730(1)(b), and the jury found Coleman guilty as charged. However, the September 14, 2001 Judgment fails to set forth the HRS section and subsection under which Coleman was charged and convicted. The circuit court is hereby ordered to file an Amended Judgment setting forth the particular HRS section and subsection of which Coleman was convicted.

[2]The Honorable Ronald Ibarra presided.

[3]HRS § 707-730 (1993) provides in relevant part:

> **§707-730 Sexual assault in the first degree.** (1) A person commits the offense of sexual assault in the first degree if:
> . . . .
> (b) The person knowingly subjects to sexual penetration another person who is less than fourteen years old; provided this paragraph shall not be construed to prohibit practitioners licensed under chapter 453, 455, or 460, from performing any act within their respective practices.
>
> (2) Sexual assault in the first degree is a class A felony.

On appeal, Coleman contends the circuit court erred by allowing the prosecutor to elicit inadmissable evidence during the minor victim's (Minor) direct examination, and by admitting hearsay statements through Wendy Dutton, portions of a videotaped interview with Dr. Terry Fujioka, hearsay statements through Kim Page, hearsay statements through Deanna Vance, and testimony from Dr. June Ching. Coleman also contends he was denied a fair trial because the prosecutor engaged in misconduct by asserting personal knowledge of a fact and by putting her own credibility at issue. We disagree with Coleman's contentions and therefore affirm.

I. BACKGROUND

The present case arose from an incident that occurred on October 28, 1997 in the County and State of Hawai‘i. At approximately 9:49 p.m. on that date, Minor arrived at the Kona Hospital emergency room to be treated for vaginal bleeding. Minor was five years old and was accompanied by her father (Coleman) and paternal grandmother (Grandmother). Minor's treating physician, who was qualified as an expert in gynecology, testified that Minor had a perforation at the top of her vagina into her abdomen. He performed surgery on Minor to repair the perforation. The physician testified he believed the perforation was caused by a blunt instrument and by something that actually

penetrated through the vagina; he did not believe the injury was caused by an external force. The physician also testified that he did a complete exam on Minor prior to surgery and did not observe any external injuries, bite marks, or scratch marks to her arms and legs or to her external genitalia.

Prior to the incident Minor resided with Coleman, Grandmother, Grandmother's husband, and Grandmother's teenage stepson in Grandmother's house. When the injury occurred to Minor, only Minor, Coleman, and Grandmother were home.

Minor testified that the injury occurred when Coleman "put his penis in [her] butt." Minor testified that she screamed, and Grandmother came into the room and was "mad." Grandmother said the bad word "bitch" to Coleman. Grandmother took Minor to the bathroom and put Minor in a bathtub with water. Minor testified that Grandmother put a "pad" "on my private."

Coleman testified that he and Grandmother found Minor with no underpants on, lying on her back on the lanai with their male dog, Dutch, standing right next to Minor. Grandmother testified that she and Coleman found Minor with no underwear on, lying on her back on the lanai with Dutch standing directly over Minor's body and Dutch's head "kind of close" to Minor's face. Both Coleman and Grandmother testified that Minor said "Dutch hurt me" and that when Minor stood up there was a trickle of

blood that ran down her leg. Grandmother answered "Yes" to the question, "You told your son that you thought the dog had popped [Minor's] cherry?" Minor testified that Dutch had never done anything to hurt her; Dutch had pushed her down once, but it was not on the night that she went to the hospital.

The State called a veterinarian as an expert witness. The veterinarian testified that she did not believe that dogs sexually penetrating children could happen. The veterinarian testified that the female dog "produces a specific scent called a pheromone, a specific chemical that's actually produced just by dogs that will attract male dogs." In order for intercourse to occur, the female dog must push her tail to the side to signal the male to mount her and then the female's vaginal muscles must clamp down on the penis to sustain the male dog's erection. The veterinarian testified that pheromone manipulation, training of the dog, and complete cooperation on the part of the human female are required to make bestiality movies.

Child Protective Services removed Minor from Grandmother's home on October 30, 1997, and Minor was placed in foster care at the home of Kim Page. On January 12, 1999, Coleman was charged with the offense of Sexual Assault in the First Degree.

II. STANDARDS OF REVIEW

A. Admissibility of Evidence

In State v. West, 95 Hawai‘i 452, 24 P.3d 648 (2001), the Hawai‘i Supreme Court stated:

> [D]ifferent standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard. However, the traditional abuse of discretion standard should be applied in the case of those rules of evidence that require a "judgment call" on the part of the trial court.
>
> Kealoha v. County of Hawaii, 74 Haw. 308, 319-20, 844 P.2d 670, 676, *reconsideration denied,* 74 Haw. 650, 847 P.2d 263 (1993). "[T]he trial court's determination of preliminary factual issues concerning the admission of evidence will be upheld unless clearly erroneous." State v. McGriff, 76 Hawai‘i 148, 157, 871 P.2d 782, 791 (1994) (citation omitted). Finally, "the interpretation of the HRE [Hawai‘i Rules of Evidence] entails a question of law reviewable de novo." State v. Gano, 92 Hawai'i 161, 166, 988 P.2d 1153, 1158 (1999).

95 Hawai‘i at 456-57, 24 P.3d at 652-53 (brackets in original).

B. Admissibility/Hearsay

"[W]here the admissibility of evidence is determined by application of the hearsay rule, there can be only one correct result, and the appropriate standard for appellate review is the right/wrong standard." State v. Moore, 82 Hawai‘i 202, 217, 921 P.2d 122, 137 (1996) (internal quotation marks omitted).

> The requirements of the rules dealing with hearsay are such that application of the particular rules can yield only one correct result. HRE Rule 802 (1993) provides in pertinent part that "hearsay is not admissible except as provided by these rules." HRE Rules 803 and 804(b) (1993) enumerate exceptions that "are not excluded by the hearsay rule." With respect to the exceptions, the only question for the trial court is "whether the specific requirements of the

> rule were met, so there can be no discretion." Kealoha v. County of Hawaii, 74 Haw. 308, 319, 844 P.2d 670, 675, reconsideration denied, 74 Haw. 650, 847 P.2d 263 (1993). Thus, where the admissibility of evidence is determined by application of the hearsay rule, there can generally be only one correct result, and "the appropriate standard for appellate review is the right/wrong standard." Id.

State v. Ortiz, 91 Hawai‘i 181, 189-90, 981 P.2d 1127, 1135-36 (1999) (brackets, and footnote omitted) (quoting State v. Christian, 88 Hawai‘i 407, 418, 967 P.2d 239, 250 (1998)).

C. Prosecutorial Misconduct

"Allegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of whether there is a reasonable possibility that the error complained of might have contributed to the conviction." State v. Rogan, 91 Hawai‘i 405, 412, 984 P.2d 1231, 1238 (1999) (internal quotation marks omitted) (quoting State v. Sawyer, 88 Hawai‘i 325, 329 n.6, 966 P.2d 637, 641 n.6 (1998)).

"Prosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a fair trial." State v. McGriff, 76 Hawai‘i 148, 158, 871 P.2d 782, 792 (1994). "In order to determine whether the alleged prosecutorial misconduct reached the level of reversible error, we consider the nature of the alleged misconduct, the promptness or lack of a curative instruction, and the strength or weakness

of the evidence against defendant." State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992).

III. DISCUSSION

A. Point of Error No. 1

(1) References to inadmissable hearsay evidence

Coleman contends the circuit court erred when it allowed the State to reference inadmissable hearsay evidence during the direct and redirect examination of Minor, thereby violating Coleman's constitutional rights to confront witnesses and have a fair trial. Specifically, Coleman asseverates three instances in which the circuit court allowed the State to improperly reference inadmissable hearsay. We resolve each point as follows:

(a) Coleman alleges the circuit court erred when it allowed the State to refer to Minor's videotaped interview with Wendy Dutton[4] because such videotape was never admitted into evidence. Coleman contends that since the videotape was inadmissable hearsay[5] under Hawaii Rules of Evidence (HRE)

[4]Wendy Dutton was a forensic interviewer at the Child Abuse Assessment Center, St. Joseph's Hospital, Phoenix, Arizona. On October 28, 1998, Ms. Dutton conducted a videotaped interview with Minor in which Minor stated that "pee" came out of Coleman's penis and the "pee" looked like "milk."

[5]Hawaii Rules of Evidence (HRE) Rule 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Rule 802,[6] reference to the videotape provided the jury with innuendo evidence that the State could not otherwise have produced, thereby violating his right to confront witnesses. We disagree. The requirements of a hearsay exception for a prior inconsistent statement (HRE Rule 802.1(1)[7]) were met, thereby rendering the hearsay statement (the pee looked like milk) admissible. State v. Zukevich, 84 Hawai'i 203, 210, 932 P.2d 340, 347 (1997).

Minor had been cross-examined concerning the subject matter of her statement prior to Ms. Dutton's testimony. In order to guarantee the trustworthiness of a prior inconsistent statement, it is paramount that the witness "be subject to cross-examination about the subject matter of the prior statement, that is, that the witness be capable of testifying

[6]HRE Rule 802 provides that "[h]earsay is not admissible except as provided by these rules, or by other rules prescribed by the Hawaii supreme court, or by statute."

[7]HRE Rule 802.1(1) provides in relevant part:

> **Rule 802.1(1) Hearsay exception; prior statements by witness.** The following statements previously made by witnesses who testify at the trial or hearing are not excluded by the hearsay rule:
>
> (1) Inconsistent statement. The declarant is subject to cross-examination concerning the subject matter of the declarant's statement, the statement is inconsistent with the declarant's testimony, the statement is offered in compliance with rule 613(b), and the statement was:
>
> . . . .
>
> (C) Recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement[.]

substantively about the event, allowing the trier of fact to meaningfully compare the prior version of the event with the version recounted at trial." State v. Canady, 80 Hawai'i 469, 480-81, 911 P.2d 104, 115-16 (App. 1996). While Minor did not remember the specifics of the ejaculation, she did remember the event and therefore could be cross-examined substantively about what occurred. The defense attorney did, in fact, extensively cross-exam minor about the incident and her injuries. Conversely, in Canady, the witness had no recollection whatsoever of the event. Id. at 116, 911 P.2d at 481. We note that "the rule was intended to exclude the prior statements of a witness who could no longer remember the underlying events described in the statement." Id. at 115, 911 P.2d at 480 (emphasis added).

Minor's prior statement that pee appearing like milk came out of Coleman's penis was inconsistent with Minor's testimony. At trial, Minor testified that she did not know if anything came out of Coleman's penis.

The prior statement was offered in compliance with HRE Rule 613(b),[8] as the circumstances of making it were brought to

[8]HRE Rule 613(b) provides:

> **Rule 613 Prior statements of witnesses.**
> . . . .
> (b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement of a witness is not admissible unless, on direct or cross-examination, (1) the circumstances of the statement have been brought to the attention of the witness, and (2) the witness has been asked whether the witness made the statement.

the attention of Minor and Minor was asked if she had made the statement. The State thus complied with HRE 613(b) before offering Minor's inconsistent statement into evidence.

It is not contested that the videotape recorded the statement in substantially verbatim fashion. Review of the recorded interview video supports the testimony of Dutton that Minor told her pee came out that looked like milk. Therefore we adduce that the statement was admissible.

(b) Coleman avers that error occurred when the circuit court allowed the State to repeatedly refer to the substance of the videotaped interview with Dr. Terry Fujioka[9] during Minor's redirect examination. Dr. Fujioka conducted videotaped interviews with Minor on October 31, 1997 and November 3, 1997.

This contention is not factually supported by the record. The circuit court sustained the objection to the initial leading question to which Coleman alludes:

> Q. [Deputy Prosecuting Attorney]: Now, when -- when Dr. Terry interviewed you, and Mickey Mouse was there, the big toy Mickey Mouse --
>
> A. Mm-hmm.
>
> Q. -- did you also say to Dr. Terry, "I don't want to tell"?

[9]Dr. Fujioka was a psychologist who served as a consultant to the Children's Advocacy Center in Kona, Hawai‘i.

> [Defense Counsel]: Objection, your Honor. Beyond the scope of cross, and improper --
>
> THE COURT: Sustained. Leading.

Subsequently, there is minimal reference to the substance of the interview. The references that do come out are proper responses by Minor during redirect examination, after defense counsel had raised the subject in its cross-examination.

(c) Coleman contends the circuit court erred when it allowed the State to make premature efforts to elicit statements Minor made to Edythe Maeda,[10] Dr. Terry Fujioka, and Deanna Vance.[11] We disagree. The efforts of the State were not premature. During his cross-examination of Minor, defense counsel posed questions inquiring if Minor remembered making certain statements in the recorded interviews to establish a foundation to facilitate the later admission of extrinsic evidence of Minor's prior inconsistent statements. To do so, defense counsel, in his questions, presented to the jury inferences that during the interviews Minor had made statements claiming the dog caused her injuries. The following questions

[10]Nothing is known about Edythe Maeda other than that Minor had met her "a couple times" prior to Minor's present trip to Hawai‘i for trial, Ms. Maeda was always very nice to Minor, and Minor was alone with Ms. Maeda on August 30, 1999 when Minor made the statement.

[11]Deanna Vance was a child and family therapist and play therapist at the Verde Valley Guidance Clinic who had had weekly therapy sessions with Minor for the past three and one-half years. The statement at issue was made to Ms. Vance by Minor on November 3, 1999.

and responses occurred between defense counsel and Minor during cross-examination.

> Q. [Defense Counsel:] Okay. And you told Dr. Terry that day that "Dutch knocked me down," that your bottom hurt, and the toilet paper had horrible blood on it. Do you remember telling that to Dr. Terry?
>
> A. [Minor:] Sort of.
>
> Q. Sort of do. Okay.
>
> . . . .
>
> Q. At that point you said, "Daddy didn't do anything bad to me. It was Duchess [sic]. Duchess [sic] put his private in my butt."
>
> Do you remember telling that to Edythe [Maeda]?
>
> A. No.
>
> . . . .
>
> Q. And you told her: "No one believes me that the dog did it. What happened, I took off my panties and Dutch put his thing in my butt. Doggies do that sometimes, you know." You told Deanna Vance that on November 3rd, 1999; am I correct?
>
> A. I don't know.

Given the inference raised by the defense that Minor claimed during the interviews that only the dog caused her injury, the State was justified in presenting contextual statements under HRE Rule 106.[12] The Hawai‘i Supreme Court previously noted that HRE Rule 106, derived from the Federal Rules of Evidence (Fed. R. Evid.) Rule 106, "is an expression of

[12]HRE Rule 106 provides:

> **Rule 106 Remainder of or related writings or recorded statements.** When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

the common law doctrine of completeness." Monlux v. General Motors Corp., 68 Haw. 358, 366, 714 P.2d 930, 935 (1986). This court has repeatedly noted that the purpose of Rule 106 is to ensure that a writing is considered as a whole when the thought, as it actually existed, is not ascertainable unless the utterance is compared with the successive elements and their mutual relations. State v. Corella, 79 Hawai‘i 255, 263-64, 900 P.2d 1322, 1330-31 (App. 1995).

While the literal reading of the rule gives the impression that the remainder of the statement must be immediately introduced, under the doctrine of completeness there is a universally conceded right of an opponent to introduce the remainder of the contemporaneously recorded statement. Monlux, 68 Haw. at 367, 714 P.2d at 935. The adversary has the right to introduce the remainder of the statement "to develop the matter on cross-examination or as part of [its] own case." Id. at 367, 714 P.2d at 935-36 (emphasis in original) (quoting Fed. R. Evid. Rule 106 advisory committee note). Ergo, it was proper for the State to elicit the remainder of the contextual statements during its redirect examination of Minor.

Additionally, Coleman contends that his right to confrontation was violated because the remainder of the statements the State sought to elicit were inadmissable hearsay. The Hawai‘i Supreme Court has specifically annunciated, with

respect to statements required to be introduced under HRE Rule 106, that it does not matter whether the remainder is otherwise inadmissable. Monlux, 68 Haw. at 367, 714 P.2d at 936.

(2) Prosecutorial misconduct

Coleman alleges he was denied a fair trial because the Prosecutor engaged in misconduct by asserting personal knowledge of a fact and by putting her own credibility at issue. Review of the record indicates that the nature of the alleged misconduct did not reach the level that would constitute reversible error.

"In order to determine whether the alleged prosecutorial misconduct reached the level of reversible error, we consider the nature of the alleged misconduct, the promptness or lack of a curative instruction, and the strength or weakness of the evidence against defendant." State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992). A new trial is required only when the conduct of the prosecution "caused prejudice to the defendant's right to a fair trial." State v. Sanchez, 82 Hawai‘i 517, 528, 923 P.2d 934, 945 (1996) (internal quotation marks omitted). To determine whether reversal is warranted "we apply the harmless beyond a reasonable doubt standard of review." Id. (internal quotation marks omitted); see also State v. Suka,79 Hawai‘i 293, 301, 901 P.2d 1272, 1280 (App. 1995).

Coleman contends it was error because the Prosecutor referenced the Minor's viewing of the videotapes in the

prosecutor's office, thereby putting the Prosecutor's own credibility at issue. While the Prosecutor's assertion of personal knowledge is error,[13] this error was harmless beyond a reasonable doubt. Whether viewed individually or in context, the Prosecutor's reference to the viewing of the videotape in her office did not prejudice any of Coleman's substantial rights when viewed with respect to the evidence presented. State v. Churchill, 4 Haw. App. 276, 285, 664 P.2d 757, 764 (1983). It is clear that the phrase was used merely to identify which viewing the question pertained to. The nature of the prosecutor's conduct did not manifest any indication of untowardness or attempt to influence the jury. Agrabante, 73 Haw. at 198, 830 P.2d at 502.

In addition, Coleman's argument that the physical demonstration by Minor of the position Coleman was in when he "put his penis in [Minor's] butt" placed the Prosecutor's credibility at issue is superfluous. The Prosecutor's request that Minor "[c]ome right out here close to me, if you would" is merely an indication of where Minor was to demonstrate the act. Nor is there significant impropriety in the Prosecutor's

[13]Hawaii Rules of Professional Conduct Rule 3.4(g) provides in relevant part:

> **Rule 3.4. Fairness to Opposing Party and Counsel.**
> A lawyer shall not:
> . . . .
> (g) in trial, . . . assert personal knowledge of facts in issue except when testifying as a witness[.]

prompting of Minor to come off the stand to demonstrate. In response to Minor's hesitation the Prosecutor asserted, "I know this is a hard part, but I think you can --" to encourage Minor to demonstrate the act. The Prosecutor was dealing with a young child and appears to be merely addressing Minor in a way that would encourage compliance. The nature of the demonstration itself, not the Prosecutor's encouragement to comply, was what made the event so alarming. There is no indication the Prosecutor was attempting to use improper methods that were calculated to produce a wrongful conviction. In light of the strength of the evidence against Coleman, the actions of the Prosecutor were unlikely to have changed the result of the trial. Agrabante, 73 Haw. at 200, 830 P.2d at 503 (internal quotation marks omitted).

Coleman relies on multiple cases to support his contention that prosecutorial misconduct resulted in his right to a fair trial being violated. However, the instances of misconduct in these cases that justified a new trial were significantly more grievous and can be differentiated from the case at hand. E.g., Sanchez, 82 Hawai‘i at 529-30, 923 P.2d at 946-47 (recognizing that it was misconduct when, while questioning witnesses, the prosecutor informed the jury of the prosecutor's version of what was said in out-of-court conversations by repeatedly contesting the witnesses' trial

testimony with references to the prior conversations); State v. Rulona, 71 Haw. 127, 131-32, 785 P.2d 615, 617-18 (1990) (prosecutor engaged in prolonged cross-examination fraught with assertions of personal knowledge of facts in issue with respect to an out-of-court conversation); Berger v. United States, 295 U.S. 78, 84, 55 S. Ct 629, 631 (1935) (record indicated prosecutor misstated facts in his cross-examination; put words in the mouths of witnesses; suggested through questions that out-of-court statements had been made to him, for which no proof was offered; pretended to understand that a witness had said something which the witness had not said and persistently cross-examined the witness upon that basis; assumed prejudicial facts not in evidence; bullied and argued with witnesses; and conducted himself in an indecorous and improper manner).

In the instant case, the Prosecutor's personal references were not remotely related to facts in issue and carried no weight against Coleman. The record contains significant evidence that supports Coleman's conviction. We are satisfied that the nature of any misconduct was not such that it denied Coleman a fair trial.

B. Point of Error No. 2

Coleman contends the circuit court erred in admitting the testimony of Minor's inconsistent statement through Wendy Dutton. Since we determined above that the foundation existed under HRE Rules 802.1(1) and 613(b) and was properly presented by

the State, we conclude that the testimony of Dutton was properly accepted as substantive evidence for purpose of impeachment. Zukevich, 84 Hawai‘i at 210, 932 P.2d at 347.

C. Point of Error No. 3

Coleman contends the circuit court erred in admitting State's Exhibit 2-AE, a portion of the videotaped interview between Minor and Dr. Fujioka, beyond what had been introduced by the defense. He asserts that the State's portion of the interview was not admissible under HRE Rule 106 and State v. Corella, supra, because Minor's statement about the dog was a "spontaneous utterance" without prompting questions and was completely self-contained; therefore, there was no need to resort to other information. We disagree.

Coleman's reliance on Corella is misplaced. In Corella, a preprinted portion of a criminal victim's compensation form, describing the form's purpose, was read to impeach the witness's testimony that she was unaware of what the form was for. 79 Hawai‘i at 263-64, 900 P.2d at 1330-31. It was used solely to establish that compensation was sought, and this court noted that the form's purpose was "unambiguously established by the first paragraph without resort to any other part of the document." Id. at 264, 900 P.2d at 1331. Therefore, this court recognized the lower court's error in allowing the content

portion of the victim's statement, detailing her fears and injuries, to be read. Id.

Conversely, Coleman introduced a portion of a recorded interview with Dr. Fujioka in which Minor stated that the dog had caused her injuries, but then objected to the State's introduction of portions of the same interview in which Minor repeatedly said she was not ready to say what had happened and indicated the questions were scary. While Coleman contends the reference to the dog causing the injuries was a spontaneous utterance and completely self-contained, the record does not support this assertion. When taken alone and out of context, this small segment of the interview suggests that Minor made an unequivocal statement that the dog caused the injury. Since a significant portion of the interview portrays Minor indicating both verbally and non-verbally that she is not ready to tell what happened, we determine that the State's Exhibit 2-AE was properly admitted under Rule 106 contemporaneous statement. Monlux, 68 Haw. at 365-67, 714 P.2d at 934-36; Corella, 79 Hawai‘i at 263-64, 900 P.2d at 1330-1331.

D. Point of Error No. 4

Kim Page[14] testified that on December 13, 1997 Minor stated, "Daddy put his penis in my butt, and it really really

[14]Kim Page (also referred to as "Auntie Mom" by Minor was the foster parent who cared for Minor for approximately six weeks after the incident.

hurt." Coleman contends the circuit court erred in admitting this prior consistent statement for the following reasons.

Coleman asserts that Minor was not subject to cross-examination concerning the subject matter of the December 13, 1997 statement because Minor "had no recollection of other statements to Kim Page." Regardless of Minor's recollection, or lack there of, of the specific conversation, Minor did remember and testified to the assault and surrounding occurrences. This was sufficient to satisfy the requirement of HRE 802.1(2) because Minor was capable of testifying substantively about the event. Canady, 80 Hawai‘i at 480-81, 911 P.2d at 115-16.

In addition, defense counsel specifically questioned Minor about other statements made to Kim Page, but failed to ask questions about the December 13, 1997 statement. Nor did the defense recall Minor for additional cross-examination after the December 13, 1997 statement was admitted into evidence.

Coleman also contends the December 13, 1997 statement was not admissible as a prior consistent statement because it was uttered after the Minor's very first initial inconsistent statement on November 3, 1997 to Dr. Terry Fujioka. He argues that proper interpretation of HRE Rules 802.1(2) and 613(c)[15]

[15]HRE Rule 613(c) provides in part:

> **Rule 613 Prior statements of witnesses.**
> . . . .
> (c) Prior consistent statement of witness. Evidence of a statement previously made by a witness that is consistent with the

requires any proffered prior consistent statement to have been uttered prior to the very first initial inconsistent statement. Coleman does not reference a single case to support his interpretation of the rule and exclusively relies upon the plain language of HRE rule 613(c)(1) that "the consistent statement was made before the inconsistent statement." The State avers that the plain language of the rule requires only that the prior consistent statement be made prior to a prior inconsistent statement that has been used against the declarant and that nowhere in the rule is a requirement that the prior consistent statement predate all similar prior inconsistent statements to be admissible. We agree with the State.

Coleman fails to provide any legal support for his assertion and this court, after extensive research, was unable to locate any cases that support Coleman's reading of the rule. In addition, he does not present any policy argument in support of his interpretation of the rule, but merely presents a blanket assertion that the plain language of the rule supports his reading. Coleman fails to acknowledge the first clause of the sentence which clarifies that the consistent statement must

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witness' testimony at the trial is admissible to support the witness' credibility only if it is offered after:

(1) Evidence of the witness' prior inconsistent statement has been admitted for the purpose of attacking the witness' credibility, and the consistent statement was made before the inconsistent statement[.]

predate the inconsistent statement that was "admitted for the purpose of attacking the witness' [sic] credibility." Therefore, the consistent statement need only predate the inconsistent statement being used to attack the witness's credibility and not all prior inconsistent statements.

Defense counsel introduced an inconsistent statement made by Minor through the testimony of Deanna Vance. Regarding the November 3, 1999 therapy session with Minor, Vance testified, "I can't remember [Minor's] exact words, but she took her underwear off and the dog put his thingy in her butt." In order to rehabilitate Minor's credibility, the State introduced, through the testimony of Kim Page, a prior consistent statement that Minor had made on November 10, 1997 that her father put his penis in her butt. The circuit court was correct in admitting the Page statement as a prior consistent statement under HRE Rule 802.1(2) and HRE 613(c).

E. Point of Error No. 5

Coleman argues that the circuit court erred in admitting, under HRE Rule 802.1(2), a prior consistent statement made by Minor to Deanna Vance. Minor's statement to Deanna Vance that "[m]y dad did it and that's the truth" was admitted not as a prior consistent statement, but as a contextual statement under HRE Rule 106 in response to testimony elicited by the defense from Deanna Vance that "the dog put his thingy in her butt."

After reviewing Deanna Vance's treatment record, the circuit court found that the time between which the statements were made was "one minute" and therefore the statement was admissible as a contextual statement. Coleman presents no argument that the statement was not admissible as a contextual statement under HRE Rule 106 and therefore has not met his burden of showing error. See, e.g., Bettencourt v. Bettencourt, 80 Hawai‘i 225, 230, 909 P.2d 553, 558 (1995); State v. Puaoi, 78 Hawai‘i 185, 189, 891 P.2d 272, 276 (1995).

F. Point of Error No. 6

Coleman asserts that the circuit court erred in admitting rebuttal testimony of Dr. June Ching, Ph.D, because her testimony was irrelevant under HRE 402 and not helpful to the jury under HRE 702, or, if relevant, the danger of prejudice outweighed the probative value. However, Coleman presents no arguments in support of his assertions. Since the judgment of the circuit court is presumptively valid, Coleman has not overcome, by positive showing, this presumption. Territory v. Kobayashi, 25 Haw. 762, 766 (1921); Kaehu v. Namealoha, 20 Haw. 350 (1911). Coleman must present "specific arguments which demonstrate to this court, why a particular viewpoint should be adopted. Anything less can only be an imposition upon the court." Ala Moana Boat Owners' Ass'n v. State, 50 Hawaii 156, 158, 434 P.2d 516, 518 (1967). Therefore, he has not met his

burden of showing error. See, e.g., Bettencourt, 80 Hawai‘i at 230, 909 P.2d at 558; Puaoi, 78 Hawai‘i at 189, 891 P.2d at 276.

IV. CONCLUSION

The September 14, 2001 Judgment of the Circuit Court of the Third Circuit is affirmed.

DATED: Honolulu, Hawai‘i, October 29, 2003.

On the briefs:

Edward K. Harada,
Deputy Public Defender,
for defendant-appellant.

Chief Judge

Linda L. Walton,
Deputy Prosecuting Attorney,
County of Hawai‘i,
for plaintiff-appellee.

Associate Judge

Associate Judge