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NO. 25265

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ALBERT B. M. PARKS, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-1798)

MEMORANDUM OPINION

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

Albert B. M. Parks (Parks or Defendant) appeals the July 22, 2002 judgment of the circuit court of the first circuit, the Honorable Karen S.S. Ahn, judge presiding. The judgment, based upon a jury's verdict, convicted Parks of unauthorized control of propelled vehicle (UCPV)¹ and sentenced him to a five-year, indeterminate term of imprisonment. We affirm.

I. Background.

On August 16, 2001, the grand jury returned a true bill against Parks:

On or about the 23rd day of January, 2001, in the City and County of Honolulu, State of Hawaii, ALBERT B.M. PARKS did

¹ Hawaii Revised Statutes (HRS) § 708-836(1) (Supp. 2003) provides that "[a] person commits the offense of unauthorized control of a propelled vehicle [(UCPV)] if the person intentionally or knowingly exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent or by changing the identity of the vehicle without the owner's consent." UCPV is a class C felony, HRS § 708-836(5) (1993), which carries a five-year, indeterminate term of imprisonment. HRS § 706-660(2) (1993).

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intentionally or knowingly exert unauthorized control over a propelled vehicle, by operating the vehicle without the consent of Douglas Chan, owner of said vehicle, thereby committing the offense of Unauthorized Control of Propelled Vehicle, in violation of Section 708-836 of the Hawaii Revised Statutes.

On December 10, 2001, the State moved, *in limine*,

to preclude the Defendant from addressing the disposition of any criminal matters with regard to Raenell Preston, aka Lisa Martin [(Preston)].

The State requests that the Defendant be precluded from questioning the State's witnesses about the disposition of criminal matters stemming from this incident with regard to [Preston]. [Preston] was a passenger in the vehicle with the Defendant on the date of the incident. Whether [Preston] was charged with the same offense is not relevant to this trial and should be excluded on the grounds of Hawaii Rules of Evidence [(HRE)] 402, 403.² Allowing this line of questioning would only serve to confuse the issues at trial.

(Footnote supplied.) The court heard motions *in limine* on December 19, 2001, the day before trial. On the State's Motion in Limine #2, quoted above, the following colloquy occurred:

THE COURT: Oh, I'm sorry, number two. Is there any objection to number two being granted?

[DEFENSE COUNSEL]: Your Honor, I do have some objection.

² Hawaii Rules of Evidence (HRE) Rule 402 provides:

All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

HRE Rule 401 provides:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

HRE Rule 403 provides:

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.

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My understanding is that at this point in time Ms. Preston is not available to testify, but if she is found and she does come in to testify, I do have a couple of objections on this issue.

I think it is fair and not so much a commentary upon Ms. Preston, but more along the lines of the police and what they've done in this case in charging my client with UCPV, to question whether she was charged or not. And the reason for that is this. Ms. Preston is in the front passenger seat of this van. My client is in the front driver's seat of the van. The van is not moving, it is parked on the side of the road, but the engine is running.

When the officers come, there's nobody driving the vehicle, there's really nobody in control of the vehicle or utilizing it in any shape or form. It's really two people sitting in the van and the engine is on. Now, when they make the arrest, they arrest both people, Ms. Preston and my client, Mr. Parks. However, Mr. Parks makes a statement at the scene that has been suppressed. Ms. Preston makes a statement to the detective later that's tape recorded basically saying that Mr. Parks had picked her up and was driving the vehicle and was doing all these other things.

Now, they didn't put her on a polygraph or anything of that nature, but utilizing what she gave them, they decided not to charge her, but instead charge Mr. Parks. So I think it's fair to question her, because my guess is if she is found and she comes in to testify, she is going to say what she told the police, that Mr. Parks had driven the van around and then picked her up, that sort of thing.

THE COURT: So you have no problem with State's motion in limine number two if she never appears in this case?

[DEFENSE COUNSEL]: Well, no, because it's moot at that point.

The next morning, during argument on another issue *in limine*, defense counsel informed the court:

Well, you know, one of the things, Your Honor, they found [Preston], by the way, so she's probably going to come and testify. What she told the police in her statement was eh, I was just sitting in the car and I didn't know it was stolen, I wouldn't have even gotten in if I knew, I don't even need a car, my sugardaddy gave me a car, et cetera, et cetera.

So is she going to be allowed to testify to that and I am then going to be precluded from cross-examining her about why she was not charged when she was just sitting in the car, when my client was charged and he was just sitting in the car?

No decision was rendered that day. The next morning, after jury selection and before the jury was sworn, the issue was again

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revisited in a prolonged discussion, during which the issue was further fleshed out but a decision deferred:

[DEFENSE COUNSEL]: Your Honor, the witness -- the State's witness, Ms. Preston, is present. And the Court was still discussing how it was going to rule on -- on her testimony.

THE COURT: That she wasn't charged?

[DEFENSE COUNSEL]: That she wasn't charged. But I would submit that it's integral to our cross-examination and it goes toward her credibility, because she was arrested, she was questioned by the detective, she gave a statement, and yet she was not charged.

. . . .

[DEFENSE COUNSEL]: Your Honor, this woman has a long record. She's been convicted of UCPV. She served five years. She received a five-year jail sentence for UCPV as well as numerous criminal offenses. She knows her way around the Criminal Justice System. And she knows what it means to be charged or arrested for UCPV and what she was facing.

THE COURT: That's not going to come in at this point.

[DEFENSE COUNSEL]: Well, I'm going to ask her that she was arrested for UCPV and she knew what that meant. She knew it was a felony offense. That goes to her bias and her self-interest in wanting to give a statement against my client. I'm not going to ask her that she was convicted of UCPV because the rules of evidence do not allow me to do so. But I can certainly ask her questions about her self-interest and her bias.

. . . .

[DEFENSE COUNSEL]: Now, I'm not asking her if she's been convicted, but I can ask her what she knows. And she knows what it means to be arrested for UCPV. She knows what the penalty is. That gives her a greater motivation to want to get out from under this.

. . . .

[DEFENSE COUNSEL]: Well, I'm not saying I'm going to get into her priors. I'm not at that point yet. But I think it's fair to ask her if she has knowledge about what UCPV means and what the penalty is for that, because if she had a plea agreement with the State to testify against my client and part of that deal was that she would be charged with this offense or not charged, that she was facing a penalty of five years for UCPV, but instead of facing that penalty she's going to be testifying against my client, I'd be able to cross-examine her on that point with the deal in my hand, waving it in front of her. There's no difference between this situation and that. She was arrested the same way my client was, transported. She was treated like a suspect, she was

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questioned like a suspect, and she gave answers that deflected guilt from her towards my client.

And so her knowledge of the process and her knowledge about what Unauthorized Control of Propelled Vehicle means and the penalty for that is relevant because it goes towards her bias, self-interest, and her motive to lie.

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[DEPUTY PROSECUTING ATTORNEY (DPA)]: You know, if he wants to ask her if she put the blame on him just because she wanted to put the blame on him, that's one thing. But this goes into her past, her prior bad acts. And it's obviously more prejudicial than probative. In addition, as far as her knowledge of a process, again there's no evidence that she has knowledge, that she was ever interviewed, this type of thing. The fact that she again was a suspect and she had the right to remain silent and didn't, that was her right to exercise. He shouldn't be able to now say that you knew that if -- it's very tangential. You knew that if you said this, then you would get off and he wouldn't. She was read the same rights that Mr. Parks was. There was no favors offered to her. No detective, no prosecutor, no [police] officer said, you know, if you put him in the driver's seat, you're free.

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THE COURT: Okay. This particular question . . . I'm going to take under advisement. I don't think you need it for opening [statements] very honestly.

[DEFENSE COUNSEL]: No.

Finally, just before Preston testified, the court resolved the issue:

THE COURT: The jury has left. Counsel and the defendant are present. I've been taking a look at Bowman's Treatise on the Rules of Evidence, giving some thought to [defense counsel's] arguments this morning. I am going to permit him to cross-examine the girl now that I've heard opening and some of the evidence on the fact that she was arrested but not charged.

Now, getting into her history though I think is another question. I think the -- at least at this point, there's a good deal of prejudice. And under [HRE Rule] 403, I think the jury gets the idea that if you're arrested and then charged, you're in big trouble. Obviously we're here for the same charge. At this point, I would see going into her prior arrests and/or convictions for UCPVs is -- is just unduly prejudicial at this point. All right? So that won't be permitted.

[DEFENSE COUNSEL]: Your Honor, one point of clarification then.

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THE COURT: Yes.

[DEFENSE COUNSEL]: I did not intend to ask her if she had been convicted of UCPV or that she served jail time for the UCPV because, of course, the rules of evidence preclude that. However, I think I should be allowed perhaps to ask her if she knew what UCPV or Unauthorized Control of a Propelled Vehicle was, that it was a felony, and that -- and that it was a five-year penalty.

THE COURT: Oh, no.

[DEFENSE COUNSEL]: Because I believe that that goes again to more of it's -- it's a question of degrees as far as making it more likely that she would want to shift the blame from herself or others towards Mr. Parks.

THE COURT: I could see if she were on probation. There's an added kind of interest or motive. But just, gee, you know, you could go to jail for 20 years for this -- I think it's -- I think the jury -- I think the jury gets the clear picture that being charged with this offense is big trouble. So I'm going to ask you to stay away from those specifics.

[DEFENSE COUNSEL]: Your Honor, then just for the record then, I'd like to place on the record the reason why I wish to ask these questions is I perceive this as a very similar situation to when a person is given a plea agreement by the State to come in and testify. And in those circumstances, we are then allowed to cross-examine the person about the State -- excuse me -- about the agreement that they have with the State which called for them to come and testify. And in those circumstances, we have been allowed -- I believe the Court has agreed that we have been allowed to cross-examine on what the person was facing, what the person was then given, including the reduction in penalties, the thought of being in jail, what it's like to be in jail, the fact that the person did not wish to go to jail and face that time and those circumstances. And even in cases where the person was originally charged with the same offense that the defendant has been charged with, we have been allowed to -- to question him.

In other words, if there was -- there were two people charged with murder or at least conspiring -- excuse me -- had committed murder together, one person testifies against the other, we've been allowed to question that person about the fact that they were facing a sentence of life imprisonment.

. . . .

[DEFENSE COUNSEL]: Correct. So what I'm doing is I'm saying that this situation is very similar. Although she was not given any sort of agreement, because of her history and her knowledge and her experience, she knew what she had to do to ensure herself not having to go back to jail for five years, because she had already done so on a UCPV.

THE COURT: Your record is made.

[DEFENSE COUNSEL]: Okay. Fine. Thank you.

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During the trial, Honolulu Police Department (HPD) officer Brant Pia (Officer Pia) testified that on January 23, 2001, at about three p.m., he was sent to Leolua Street in Waipahu to investigate a maroon van, described by dispatch as "an outstanding stolen vehicle." When Officer Pia found the van, it was parked with the engine running. Parks was sitting in the driver's seat and Preston was sitting in the front passenger's seat, both facing forward. Officer Pia drew his gun and ordered the pair out of the vehicle, hands up, and made them lie prone on the ground. At this point, other police officers began arriving. When Officer Pia looked into the van, he noticed that the ignition was "punctured. Partially stripped." Another police officer handcuffed the pair and placed Parks under arrest. Officer Pia remembered the van had "manufactured tint" windows, but that they were transparent.

On cross-examination, Officer Pia confirmed that dispatch had told him three people were in the van. He also remembered that Preston initially identified herself as "Lisa Martin." Officer Pia acknowledged that Preston was handcuffed and arrested "the same way Mr. Parks was[,]" and for the same crime, UCPV.

HPD officer Tay Deering (Officer Deering) was one of the police officers who arrived on the scene after Officer Pia. He inventoried the interior of the van. Among many other items Officer Deering found there, was a couch sitting lengthwise in

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the van facing the side door (two rows of bench seating had been removed). Also, a blue cell phone and a charger alongside a small backpack-type bag on the floor between the driver's seat and the front passenger's seat. The latter items were later claimed by Parks.

Preston testified that she called her friend Parks on his cell phone very early that morning, "before the sun came up." She asked him to pick her up. His friend Casey picked her up in a maroon van and drove her to Casey's apartment. Parks was there, along with another male. That afternoon, Parks received a call at the apartment from a girl, who asked him to collect her and her boyfriend. Parks asked Preston if she would like to go along, and she did, sitting in the front passenger's seat of the maroon van while Parks drove. Parks collected the couple, who then asked Parks to drive them to Waipahu. When they got there, the boyfriend left the van, and the three waited for him in the parked van for a long time. During the wait, Preston noticed a couch discarded on the street nearby. She retrieved it and put it in the back of the van. The girl then asked Parks to drop her off in front of some nearby apartments, so Parks drove there, dropped the girl off and returned to the same street where they had waited. Just as Parks parked the van, a police car arrived. At that point, Preston was sitting on the couch. She was not sure where Parks was sitting at the time, but she thought it was the driver's seat. Preston did remember that when the police

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officer ordered them out of the van, she exited through the front passenger's door, and Parks got out through the driver's door. Preston described how the police officer pointed his gun at them, and told them to put their hands up and get on the ground. Preston admitted giving a false name to the police officers at the scene. She was arrested and transported to the police station. There, she was read her rights by a detective and gave a tape-recorded statement. Preston confirmed that the detective did not force her to make the statement or offer her any special favor in return. She acknowledged that she was ultimately not charged with any crime.

On cross-examination, Preston confirmed that she was handcuffed, arrested for UCPV and taken to the police station. She acknowledged telling the police initially that she was "Lisa Martin." She also owned up to several other aliases. She admitted she gave the police her real name at the station only because she knew they would uncover it eventually. Preston admitted she knew, during the interview, that she was considered a suspect in a UCPV or stolen car case, and that she was "in some kind of trouble" and "in a jam[.]" She remembered telling the detective that he was making her feel like she stole the van. At the time, she "just really wanted to go home[.]" Preston confirmed that, although she was arrested, she was not charged with UCPV. She acknowledged that Parks was the only person with her when she was arrested and that he was the only other person

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arrested. The line of cross-examination led to this culminating exchange:

[DEFENSE COUNSEL]: So it's fair to say then that if it wasn't you that were [sic] driving the car or stole the car, since [Parks] was the only other one arrested, had to be him?

[PRESTON]: Bruddah, tell you the truth. I don't know who stole the car.

[DPA]: Objection, Your Honor.

THE COURT: Wait, wait, wait, wait.

[DPA]: Your Honor, objection. That calls for speculation.

[DEFENSE COUNSEL]: I don't have any further questions.

[PRESTON]: Thank you.

THE COURT: All right. Redirect.

Parks was the only witness in his defense. He remembered that he ended up in Waipahu at about three p.m. that day, after catching the wrong bus on his way to Nanakuli. While he was waiting at a bus stop for another bus, he saw the maroon van and in it, "an opportunity to get home." He recognized Preston in the van, whom he had met "about couple days ago in town." Parks did not know who was driving the van at the time, because the windows were tinted. "And the people go out of it. Went up to the front. There's some kind of buildings over there, like apartments or something." Preston told him the people were coming back. She said they could take him to Nanakuli if he had gas money. Parks agreed, and got into the van and sat on the couch he found there. He recalled that he had his backpack with him, and in his backpack his cell phone. His cell phone was dead, so he asked Preston, who was sitting in the front

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passenger's seat, if he could charge the battery. She said yes, so Parks sat sidesaddle in the driver's seat facing Preston, took his cell phone out of his backpack and started charging it. Parks did not know whether the van's engine was running, but he did know that his cell phone was charging. Almost immediately, a police officer had his weapon pointed at Parks. When asked how long he had been in the van at that point, Parks responded, "Not even three minutes." In a photo exhibit, Parks recognized as his, the bag, cell phone and charger that Officer Deering had recovered from between the driver's seat and the passenger's seat. Parks denied having had any intention of operating or driving that van.

During her closing argument, the DPA framed the case squarely as a credibility contest:

Now, what this case comes down to is credibility. Who you believe. And that's your job, to decide what happened in this case. Because there's two versions. And if you believe [Preston], you believe the defendant is guilty of this crime.

. . . .

So now what we're going to do is compare what [Preston] said versus what the defendant said. And the bottom line is [Preston's] story matches up with the evidence, and the defendant's story is filled with problems.

During his closing argument, defense counsel zeroed in on Preston's credibility:

So the mere fact that [Parks] was seated in the vehicle, regardless of whether the engine was running or not, is not evidence that he operated that motor vehicle. That's why the government relies so heavily upon the testimony of [Preston], because she is the only witness who came into this courtroom that brought forth any evidence, or even a suggestion, that my client, Mr. Parks, drove this vehicle or operated it.

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Because without Miss [Preston], they have no case. They do not have proof beyond a reasonable doubt that Mr. Parks drove that vehicle, or that he operated that vehicle. And that's why they rely so heavily on Miss [Preston].

Now, you notice the prosecutor didn't spend much time talking about Miss [Preston] in her closing argument. Instead, she wanted to focus on Mr. Parks. Why? Because she knows that Miss [Preston's] testimony is unreliable. You have a person here who came before you and testified, acting quiet, reserved, sad. And when I asked the first question that I asked, her personality changed.

And you can see that there is a difference there. And you can see the true nature of this person at that point in time.

Now, the prosecutor made an argument about the fact that I tried to do this, and I tried to do that. It's irrelevant. The truth of the matter is this person took the stand and testified. And this person is a readily admitted liar.

She told you, and she admitted to you, because she had to admit to you, that she gave a false name to the police when she was arrested; that she did not correct that until she got to the police station and realized that they would find out who she was. So she gave a correct name at that point in time. Yet, in the past, she's given numerous aliases and incorrect names to hide who she is.

She knew that she was a suspect in this case. Why? Because she was arrested in the same exact manner that Mr. Parks was. She was treated the same way. So for the prosecutor to say well, she had nothing to fear because she was just sitting in the passenger seat is not correct.

Because otherwise she would not have been arrested in the same manner, if she was not a suspect. And the detective would not have sat down with her and took a statement from her, or wanted to question her, if not for that fact. And as she had to admit, again, only upon being confronted with the truth, she had to admit that she said and felt that the detectives, the detective in this case, made her feel as if she had stolen this van.

And so when the prosecutor says there's no motive for her to lie, there's ample motive for her to lie. And it's clear that she wanted to protect herself, because that's the kind of person that she is. She will lie to get out of trouble. She tried to hide who she was. She wouldn't change that until she was confronted with the truth, or knew that they would find out the truth.

Why? Because she knew, she said, that they would take her fingerprint. And they would find out who she really was. Again, why? Because she was arrested. And she was a suspect. Because they don't fingerprint witnesses. They fingerprint only suspects.

She was in that van with two other people. And those people were the ones that were driving the van around. And they were her friends. And she did not want to get them into trouble. She

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didn't want to get herself into trouble either. So who would be the perfect person to put the blame on? Albert Parks.

Why? Because he was sitting in the driver's seat. He was arrested with her at the same time. The police didn't know anything about the other two people, because when they got there it was only her and Albert in the van. So the best thing she could do to get the blame off of herself, not to get her friends into trouble, is to blame Albert Parks. And that's exactly what she did in this case. It's almost perfect. Almost perfect.

The jury took less than three hours to return a verdict of guilty as charged. On August 15, 2002, Parks filed his timely notice of appeal of the July 22, 2002 judgment.

II. Discussion.

Parks raises but one point of error on appeal, the whole of which, we believe, is encompassed by the following excerpts:

The trial court erred in restricting and limiting the defense cross-examination of [Preston] regarding her knowledge of potential criminal penalties for the UCPV offense for which she was arrested but not charged -- the trial court precluded the defense from adducing evidence showing that [Preston] knew what the offense of [UCPV] was; that she knew it was punishable by up to five years [of] imprisonment; that she did not want to go to jail for five years; and that she did not want to go to jail for five years because she had already served five years in jail on a UCPV.

. . . .

The evidence sought to be elicited by the defense was relevant, probative, and admissible under HRE Rules 401 and 402 on the issue of [Preston's] credibility in general, and in particular, it went directly to her bias, interest, and motive to testify favorably for the State and adversely for the defense under HRE Rule 609.1,³ and were matters the jury was specifically allowed to consider under the instructions given to them.⁴ But

³ HRE Rule 609.1(a) provides:

The credibility of a witness may be attacked by evidence of bias, interest, or motive.

⁴ The court instructed the jury:

(continued...)

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such critical evidence was withheld from the jury by the court's ruling, which thereby violated [Parks'] constitutional rights to Due Process of Law, to a Fair Trial, and especially, to Confront witnesses against him under Article I, Sections 5 and 14, of the Hawai'i State Constitution, and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. State v. Balisbisana, 83 Hawai'i 109, 924 P.2d 1215 (1996), State v. Corella, 79 Hawai'i 255, 900 P.2d 1322 ([App.]1995); cf. People v. Bowman, 669 P.2d 1369 (Colo. 1983); see Commonwealth v. Britton, 251 Pa.Super. 335, 380 A.2d 897 (1977).

Opening Brief at 11-15 (footnotes supplied).

At the outset, we observe that defense counsel told the court, at several junctures below, that he had no intention of cross-examining Preston about her prior UCPV conviction or her incarceration for that conviction. For example, just before the court finally resolved the issue, defense counsel stated: "I did not intend to ask her if she had been convicted of UCPV or that she served jail time for the UCPV because, of course, the rules of evidence preclude that." Hence, we will not entertain a suggestion on appeal that the court committed error by precluding cross-examination on those particular subjects. Cf. Roxas v. Marcos, 89 Hawai'i 91, 124, 969 P.2d 1209, 1242 (1998) (the doctrine of judicial estoppel "prevents parties from playing 'fast and loose' with the court or blowing 'hot and cold' during the course of litigation" (citations and some internal quotation

⁴(...continued)

It is your exclusive right to determine whether and to what extent a witness should be believed and to give weight to his or her testimony accordingly. In evaluating the weight and credibility of a witness's testimony, you may consider . . . the witness's candor or frankness, or lack thereof; the witness's interests, if any, in the results of this case; the witness's relation, if any, to a party; the witness's temper, feeling or bias, if any has been shown; . . . and all other circumstances surrounding the witness and bearing upon his or her credibility.

marks omitted)). We redact the point of error on appeal accordingly:

The trial court erred in restricting and limiting the defense cross-examination of [Preston] regarding her knowledge of potential criminal penalties for the UCPV offense for which she was arrested but not charged -- the trial court precluded the defense from adducing evidence showing that [Preston] knew what the offense of [UCPV] was; that she knew it was punishable by up to five years imprisonment; that she did not want to go to jail for five years[.]

Opening Brief at 11. In other words, Parks complains that the court erred in not allowing him to cross-examine Preston on her understanding of the nature of UCPV and her knowledge that UCPV is a felony carrying a five-year prison term.

An accused's right to demonstrate the bias or motive of prosecution witnesses is protected by the sixth amendment to the United States Constitution, which guarantees an accused, *inter alia*, the right "to be confronted with the witnesses against him [or her.]" Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931); Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); Davis[v. Alaska], 415 U.S. 308, 94 S.Ct. 1105[, 39 L.Ed.2d 347 (1974)]; Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988) (per curiam). "Indeed, the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination[,] . . . [and] the exposure of a witness'[s] motivation in testifying is a proper and important function of the constitutionally protected right of cross examination." Van Arsdall, 475 U.S. at 678-79, 106 S.Ct. at 1434-35 (citations and internal quotation marks omitted) (emphasis in original).

Balisbisana, 83 Hawai'i at 115, 924 P.2d at 1221 (ellipsis and some brackets in the original; footnote omitted). "Article I, Section 14 of the Hawai'i Constitution contains a virtually identical provision, which this court has interpreted as also 'includ[ing] a right to appropriate cross-examination of the complaining witness.'" State v. Calbero, 71 Haw. 115, 124, 785 P.2d 157, 161 (1989)." Balisbisana, 83 Hawai'i at 115 n.3, 924

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P.2d at 1221 n.3 (brackets in the original).

In an appeal raising a single issue generally identical to the one we examine here, the Balisbisana court outlined the applicable standards of decision and review:

The only issue on appeal is the trial court's exclusion of [the complaining witness's] conviction for harassing Balisbisana, which Balisbisana contends violated his rights under the confrontation clauses of the Hawai'i and United States Constitutions. Violation of the constitutional right to confront adverse witnesses is subject to the harmless beyond a reasonable doubt standard. [Corella], 79 Hawai'i [at] 261, 900 P.2d [at] 1328 [] (citing State v. Liuafi, 1 Haw. App. 625, 630, 623 P.2d 1271, 1275 (1981)). "In applying the harmless beyond a reasonable doubt standard the court is required to examine the record and determine whether there is a reasonable possibility that the error complained of might have contributed to the conviction." State v. Holbron, 80 Hawai'i 27, 32, 904 P.2d 912, 917 (1995) (citations and internal quotation marks omitted).

Under HRE Rule 609.1[(a)] (1993), "[t]he credibility of a witness may be attacked by evidence of bias, interest or motive." [Footnote omitted.] The trial court's determination that the proffered evidence is probative of bias, interest or motive is reviewed under the right/wrong standard. See State v. Kupihea, 80 Hawai'i 307, 314, 909 P.2d 1122, 1129 (1996) (where admissibility is determined by relevance, ruling reviewed under right/wrong standard). See also State v. Estrada, 69 Haw. 204, 220, 738 P.2d 812, 823 (1987) ("error not to allow cross-examination to show possible bias"), reconsideration denied, 71 Haw. 665, 833 P.2d 899 (1990).

"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." HRE Rule 403. "The determination of the admissibility of relevant evidence under HRE Rule 403 is eminently suited to the trial court's exercise of its discretion⁵ because it requires a 'cost-benefit calculus' and a 'delicate balance between probative value and prejudicial effect.'" State v. Edwards, 81 Hawai'i 293, 297, 916 P.2d 703, 707 (1996) (citations, internal quotation marks, and brackets omitted). See also State v. Silva, 67 Haw. 581, 586, 698 P.2d 293, 297 (1985) ("Admission of such evidence [of bias, interest, or motive] rests in the discretion of the trial court under HRE

⁵ "The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." State v. Furutani, 76 Hawai'i 172, 179, 873 P.2d 51, 58 (1994) (citations and internal quotation marks omitted).

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Rule 403.").

"The scope of cross-examination is generally within the sound discretion of the trial court. While the right of cross-examination protected by the Confrontation Clause of the Sixth Amendment, 'may not be unduly restricted, . . . it has never been held that this right is absolutely without restriction.'" Corella, 79 Hawai'i at 260, 900 P.2d at 1327 (citations omitted). However, the trial court's discretion in exercising control and excluding evidence of a witness's bias or motive to testify falsely becomes operative only after the constitutionally required threshold level of inquiry has been afforded the defendant. "The Sixth Amendment is satisfied where sufficient information is elicited to allow the jury to gauge adequately a witness' credibility and to assess his [or her] motives or possible bias." United States v. Diaz, 26 F.3d 1533, 1539-40 (11th Cir. 1994), cert. denied, 513 U.S. 1155, 115 S.Ct. 1110, 130 L.Ed.2d 1075 (1995). "When the trial court excludes evidence tending to impeach a witness, it has not abused its discretion as long as the jury has in its possession sufficient information to appraise the biases and motivations of the witness." United States v. Easter, 66 F.3d 1018, 1022-23 (9th Cir. 1995) (citations omitted), cert. denied, 516 U.S. 1150, 116 S.Ct. 1026, 134 L.Ed.2d 104 (1996).

Balisbisana, 83 Hawai'i at 113-14, 924 P.2d at 1219-20 (ellipsis, original footnote and some brackets omitted; footnote supplied).

On the "constitutionally required threshold level of inquiry[," we are satisfied that "sufficient information [was] elicited to allow the jury to gauge adequately [Preston's] credibility and to assess [her] motives or possible bias." Id. at 114, 924 P.2d at 1220 (citation and internal quotation marks omitted; original brackets replaced). Officer Pia testified that he ordered Preston out of the van at gunpoint and put her prone on the ground. Cross-examination revealed that Preston was then arrested for UCPV and taken, handcuffed, down to the police station. Preston admitted to defense counsel that she knew the police suspected her of UCPV or stealing the van; in other words, that she was "in some kind of trouble" and "in a jam[.]" Preston acknowledged to defense counsel that all she wanted at the time

was to go home. She also confirmed that Parks was the only alternative suspect in hand. Finally, she agreed with defense counsel that, in the end, she was not charged. Cross-examination also revealed that Preston initially gave a false name to the police -- indeed, that she had a penchant for aliases.

The jury was thus presented, quite graphically, with the bracing reality of apprehension and arrest, and the following cloud of police suspicion and interrogation. Preston's resulting state of mind and desire to "just . . . go home[,] " combined with the circumstances in which the two were arrested, showed the jury quite clearly her possible motive for framing Parks. That possibility became direct accusation during defense counsel's closing argument. And as defense counsel pointed out, the goal of that motive -- escape from prosecution -- was apparently achieved. Add the evidence of and argument on Preston's use of aliases, and the jury had, we conclude, "sufficient information . . . to gauge adequately" Preston's credibility and possible motive to lie. Id. (citation and internal quotation marks omitted). Hence, the confrontation clauses were not offended.

Further, the court did not abuse its discretion in disallowing cross-examination of Preston on her knowledge of the potential UCPV charge and its penalty. Granted, that inquiry would have added a scintilla of weight to the defense attack on her credibility. HRE Rules 401, 402 & 609.1(a). We conclude, however, that the court did not abuse its discretion in

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disallowing the inquiry, under HRE Rule 403. Balisbisana, 83 Hawai'i at 114, 924 P.2d at 1220. The fact that Parks was being tried for the same offense gave rise to the danger of inappropriate and distracting jury speculation on what punishment he might receive should the jury convict.⁶ There would have been problematic implication of nefarious experience behind Preston's knowledge. See HRE Rule 609 ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is inadmissible except when the crime is one involving dishonesty."). And, along with revelation of Preston's experience and knowledge in this respect would have come parallel litigation about whether the evidence indicated, in the first place, that she was at all subject to a UCPV charge. On balance, the court did not abuse its discretion in concluding that the probative value of the proposed inquiry was "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." HRE Rule 403.

⁶ The court instructed the jury that, "You must not discuss or consider the subject of penalty or punishment in your deliberations of this case."

III. Conclusion.

Accordingly, the July 22, 2002 judgment of the court is affirmed.

DATED: Honolulu, Hawai'i, March 16, 2004.

On the briefs:

Edward K. Harada,
Deputy Public Defender,
State of Hawai'i, for
defendant-appellant.

Chief Judge

Associate Judge

Daniel H. Shimizu,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge