

NOT FOR PUBLICATION

NO. 25443

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
DAVID E. RIGAUD, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 02-1-0007)

MEMORANDUM OPINION

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

Defendant-Appellant David E. Rigaud (Rigaud) appeals from the Judgment entered by the Family Court of the First Circuit on October 7, 2002.¹ This appeal involves Rigaud's sixth conviction for abuse of a family or household member. Rigaud's wife, Heidi Rigaud (Heidi), was the complaining witness in each of these cases. Rigaud was charged as a repeat offender with physically abusing Heidi on February 15, 2002, in violation of Hawaii Revised Statutes (HRS) §§ 709-906(1) and (7) (Supp. 2001).²

¹ The Honorable Steven S. Alm presided over all proceedings pertinent to this appeal.

² Hawaii Revised Statutes (HRS) §§ 709-906(1) and (7) (Supp. 2001) provide in pertinent part as follows:

§ 709-906 Abuse of family or household members; penalty. (1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member

(7) For any subsequent offense occurring within two years after a second misdemeanor conviction, the person shall be charged with a class C felony.

At trial, Heidi recanted her complaint of physical abuse and testified that Rigaud had not hit her on the date of the charged offense. Plaintiff-Appellee State of Hawaii (the State) was permitted to introduce evidence of Rigaud's prior acts of physical violence against Heidi to explain her possible motive for recanting. The jury returned a guilty verdict and Rigaud was sentenced to five years imprisonment.³

On appeal, Rigaud contends that his conviction should be vacated because 1) the trial court erred in denying his request to continue trial; 2) the court erred in allowing the State to introduce evidence of his prior acts of violence against his wife without requiring expert testimony to explain the significance of that evidence; 3) the court erred in permitting the State to cross-examine him about two prior incidents of violence against his wife; and 4) the prosecutor's remarks in closing argument were improper. We affirm.

I. Background

As of February 15, 2002, Rigaud had been in a relationship with Heidi for six years and married to her for four years. Their relationship was marred by Rigaud's repeated acts of violence against Heidi. Rigaud had five prior convictions for

³ Defendant Appellant David E. Rigaud timely filed his notice of appeal on October 31, 2002. The appeal was assigned to this court on November 5, 2003.

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physically abusing Heidi for incidents which occurred between February, 1998 and November, 1999.

In the morning on February 15, 2002, Heidi called "911" and reported that her husband had attacked her and threatened to kill her. Officer Neal Pang was notified of the call at about 7:25 a.m. and arrived at the apartment shared by Heidi and Rigaud a short time later. Heidi was alone in the apartment. Her eyes were tearing and she appeared to be shaken up and fearful.

Officer Pang asked Heidi to prepare a written statement of what had happened. According to Heidi's written statement, Rigaud woke her up at 4:00 a.m. on February 15, 2002. Rigaud had been smoking "ice" and could not sleep. Heidi wrote that she threw an item, which she verbally told Officer Pang was an "ice" pipe, out the window. This upset Rigaud and he started to get violent. Rigaud threw Heidi on the floor and covered her face with a bath towel when she started to scream. Heidi got up and Rigaud followed her to the kitchen. Rigaud punched her eight to ten times in the head and twice in the left rib area with closed fists. Rigaud gathered some of his belongings and stormed out of the apartment. Before he left, he told Heidi that he would kill her or send someone to kill her. Heidi wrote that Rigaud had threatened her a number of times before, but that this was the most angry she had seen him. She reported pain in the area of

her left rib and head and stated that she was afraid for her safety.

Officer Pang photographed a bruise, which he estimated to be about one inch in diameter, on Heidi's left rib area. He did not notice any other visible injuries. Based on Heidi's complaint, Rigaud was arrested later that day.

II. Discussion

A. The Trial Court Did Not Abuse Its Discretion in Denying Rigaud's Request to Continue Trial.

The criminal complaint charging Rigaud with abuse of a family member was filed on March 4, 2002. The order appointing the Office of the Public Defender to represent Rigaud was filed on March 25, 2002. The trial was continued on several occasions based on requests by both the State and Rigaud. The case was eventually called for trial on July 30, 2002. On that morning, Rigaud's counsel asked to continue Rigaud's trial until August 1, 2002, because counsel was involved in the trial of another case and was scheduled to give closing argument in that case on July 31, 2002.

The trial court denied the request for a continuance. The court noted that the other trial was in recess and that it would only hear pre-trial motions and select a jury in Rigaud's case that day. The court delayed opening statements in Rigaud's

case until the afternoon on the following day, after Rigaud's counsel gave his closing argument in the other case.

Rigaud argues that the trial court abused its discretion in denying his request for a continuance. He contends that the continuance was necessary to permit his counsel to complete counsel's other trial and properly prepare and focus on Rigaud's case.

A trial court's denial of a request to continue trial is reviewed for abuse of discretion. State v. Pulse, 83 Hawai'i 229, 239, 925 P.2d 797, 807 (1996). A trial court does not abuse its discretion unless 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. Ganai, 81 Hawai'i 358, 373, 917 P.2d 370, 385 (1996) (quoting State v. Furutani, 76 Hawai'i 172, 179, 873 P.2d 51, 58 (1994)).

In denying Rigaud's request for a continuance, the trial court noted that the case had been continued several times and that both counsel had been ready for trial in the past. The record indicates that Rigaud's case involved a fairly routine charge, and that the deputy public defender appointed to represent Rigaud was an experienced attorney. Rigaud's counsel did not dispute the prosecutor's observation that Rigaud's counsel was experienced in selecting juries "in these types of cases" and "should be fully capable of handling jury selection at

this time." Rigaud also does not claim on appeal that his counsel's performance in selecting the jury or handling his trial was deficient. Given these circumstances, we conclude that the trial court did not abuse its discretion in denying Rigaud's motion to continue trial.

B. Expert Testimony Was Not a Prerequisite For Admitting Evidence of Rigaud's Prior Acts of Violence Against His Wife.

1. Trial Court Proceedings

Rigaud was charged as a repeat offender with abuse of a family member, in violation of HRS §§ 709-906(1) and (7). In order to prove that charge, the State had to establish that Rigaud had two prior misdemeanor abuse convictions, the most recent of which was within two years of the instant charge. The parties stipulated to the recidivist aspect of the charge and agreed that the State would not have to prove Rigaud's prior convictions to the jury.

Prior to trial, the State learned that Heidi intended to recant her complaint that Rigaud had physically abused her on February 15, 2002. The State, citing State v. Clark, 83 Hawai'i 289, 926 P.2d 194 (1996), argued that if Heidi recanted her complaint at trial, it was entitled to introduce evidence of Rigaud's prior violence against Heidi as a possible explanation for her recanting. It notified Rigaud of seven prior incidents of his abuse against Heidi that it intended to offer.

Rigaud conceded that under Clark, the State was permitted to introduce evidence of prior abuse to explain why a witness may recant. However, he argued that for evidence of the prior abuse to be admissible, the State must call an expert to explain why a victim of domestic violence may recant. The trial court rejected Rigaud's argument that expert testimony was required. It ruled that if Heidi recanted, the State could question her about six prior incidents of abuse by Rigaud, five of which had resulted in convictions. The court found that such evidence was admissible under Hawai'i Rules of Evidence (HRE) Rule 404(b) (Supp. 2003) and HRE Rule 403 (1993).

As anticipated, Heidi recanted her complaint of abuse by Rigaud at trial. She testified that on February 15, 2002, she called the police and made up a false complaint against Rigaud because she was mad at him. Heidi acknowledged that she had prepared a written statement reporting that Rigaud had punched her in the head and left rib. She testified, however, that her written statement was "falsified" and that the events she wrote about related to past incidents.

Before the State questioned Heidi about the six prior incidents of abuse, the court gave the jury the following limiting instruction:

You are about to hear evidence of prior acts of violence involving the defendant David Rigaud and Heidi Rigaud. This evidence is being offered by the prosecutor for a particular and limited purpose.

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You must not use this evidence to determine that the defendant is a person of bad character and therefore must have committed the offense charged in this case. Such evidence may be considered by you only for the particular and limited purpose of showing the context of the relationship between the defendant and Heidi Rigaud as a possible explanation for Heidi Rigaud's recantation; that is, change of story.

Heidi was evasive in responding to questions about the six prior abuse incidents. She acknowledged that on February 28, 1998, she reported to the police that Rigaud had punched her in the nose. She also admitted recalling an incident on September 20, 1999, when Rigaud struck her and fractured her eye socket. However, Heidi either denied or claimed she did not recall the other incidents of abuse.

The prosecutor asked Heidi if she would be willing to look at the written statements she had made in reporting the prior incidents of abuse to the police to help refresh her recollection about the incidents. Heidi refused to look at her statements, asserting that she did not want to hear about those incidents and that she tried to "block them out." She further testified that she had left those incidents behind so that she and her husband could "move on." The prosecutor then asked Heidi the following questions and received the following answers:

Q: And what you left behind you is a relationship with your husband where he has assaulted you on numerous occasions that we've discussed here in court --

A: Yes.

Q: -- and you've returned to him to live with him and reside with him and be with him, is that correct?

A: Yes because we overcame our problems.

At the conclusion of the prosecutor's questions, the court repeated its limiting instruction.

2. Rigaud's Claim on Appeal

On appeal, Rigaud contends that an expert on domestic violence was required to "lay the foundation" for the admission of evidence relating to Rigaud's prior abuse of Heidi. Because no domestic violence expert was called, Rigaud claims that the court erred in allowing the State to offer evidence of the prior abuse. In effect, Rigaud claims that evidence of the prior abuse was not relevant without expert testimony, a claim that we review de novo. See State v. St. Clair, 101 Hawai'i 280, 286, 67 P.3d 779, 785 (2003).

Rigaud notes that the Hawai'i Supreme Court and this court have both held that an explanation of why a victim of domestic violence may recant allegations of abuse is a proper subject of expert testimony. Clark, 83 Hawai'i at 299, 926 P.2d at 204; State v. Cababag, 9 Haw. App. 496, 507, 850 P.2d 716, 722, cert. denied, 74 Haw. 652, 853 P.2d 542 (1993). In Cababag, we found that expert testimony on the battered housemate/spouse syndrome was permissible because it involved specialized knowledge that may assist the jury in assessing the credibility of the recanting victim's testimony. Cababag, 9 Haw. App. at 507, 850 P.2d at 722. Rigaud contends that because expert testimony is permitted on why a victim of domestic violence may

recant, it is required before evidence of prior abuse can be admitted.

We disagree. The evidence of Rigaud's prior acts of violence against Heidi was relevant to show "the context of the relationship between [Heidi and Rigaud]" and provide "a possible explanation for [her] recantation." Clark, 83 Hawai'i at 302, 926 P.2d at 207. The relevance of this evidence did not depend on expert testimony. The relationship between a witness and a defendant is probative of the witness's credibility because it may reveal the witness's motives or bias in testifying. A pattern of violent abuse by the defendant against the witness affects the dynamics of their relationship, and may provide valuable insight into possible influences on the witness's testimony. The existence of a pattern of physical abuse is certainly probative of whether the witness's testimony may be motivated by fear. The jury is capable of assessing, without expert testimony, how fear or other potential reactions to domestic violence may affect the witness's credibility.

Testimony by a domestic violence expert may have served to deepen the jury's understanding of the psychological impact that Rigaud's prior acts of abuse may have had on Heidi.

However, the prior acts of abuse remained relevant to the jury's assessment of Heidi's credibility without expert testimony.⁴

The Hawai'i Supreme Court's analysis in Clark supports our conclusion that the evidence of prior abuse was admissible without expert testimony. In Clark, the defendant was convicted of attempted second-degree murder for stabbing his wife with a knife. Id. at 291-93, 926 P.2d at 196-98. The wife told the police that the defendant had stabbed her, but later recanted this claim at trial and testified that she had stabbed herself. Id. at 292-93, 926 P.2d at 197-98. The Hawai'i Supreme Court found that it was proper for the prosecution to question the wife about two prior incidents of violence by the defendant, and ruled that such evidence was admissible under HRE Rules 404(b) and 403. Id. at 299-302, 926 P.2d at 204-207. The court held that:

[W]here the complaining witness recants his or her pre-trial accusation against the defendant, evidence of prior acts of domestic violence involving the complaining witness and defendant is admissible, subject to the HRE 403 balancing test, to show the jury the context of the relationship between the victim and the defendant, where the relationship is offered as a possible explanation for the complaining witness's recantation at trial.

Id. at 303, 926 P.2d at 208.

⁴ Rigaud's insistence on the State calling a domestic violence expert is ironic because the testimony of such experts typically supports the prosecution's argument that the witness's testimony recanting her allegation of abuse at trial was false. For example, in State v. Clark, 83 Hawai'i 289, 298-99, 926 P.2d 194, 203-04 (1996), the domestic violence expert testified that victims of domestic abuse often recant allegations of abuse in order to protect the abuser. Rigaud was free to call his own domestic violence expert if he believed the expert's testimony would have bolstered his defense.

The court in Clark also upheld the prosecution's calling of a domestic violence expert. Id. at 298-99, 926 P.2d at 203-204. However, nothing in the court's analysis suggests that its holding on the admissibility of the prior acts of domestic violence depended upon the prosecution's calling of the expert. Significantly, the court cited Smith v. State, 669 A.2d 1 (Del. 1995), in support of its analysis. In Smith, the trial court allowed the prosecution to question the defendant's girlfriend, who had recanted her allegation of rape at trial, about five prior incidents of abuse to show lack of consent and to explain why she would recant. Id. at 5. The Delaware Supreme Court upheld the admission of the prior incidents of abuse, even though there was no mention in the opinion of a domestic violence expert having testified at trial. Id. The Hawai'i Supreme Court's reliance on Smith in its Clark decision reinforces our conclusion that expert testimony was not required for evidence of Rigaud's prior abuse of Heidi to be admissible.

**C. The Trial Court Did Not Reversibly Err in
Allowing the Prosecution to Cross-Examine Rigaud
About Two Prior Acts of Abuse.**

1. Trial Court Proceedings

Before calling Rigaud to testify, the defense advised the court that it planned to limit Rigaud's direct testimony to the events on February 15, 2002, the date of the charged offense.

The defense asked the trial court to preclude the State from asking questions about any prior incidents of abuse on the ground that such questions would be beyond the scope of the direct examination. The trial court ruled that it would allow the prosecution to cross-examine Rigaud about two of the six prior incidents of abuse. The two incidents about which the court permitted cross-examination were the ones that the court found Heidi had "essentially agreed with" during her testimony. Rigaud had been convicted of both these incidents, which occurred on February 28, 1998 and September 20, 1999.

On direct examination, Rigaud testified that he and Heidi had been arguing about money in the morning on February 15, 2002. He stated that "this isn't the first incident that this has happened." Rigaud claimed that he left the apartment because the argument was getting loud. He testified that at no time did the argument "turn physical." Rigaud denied punching his wife in the head or ribs. He also stated there was no "ice" pipe there that morning.

On cross-examination, Rigaud again denied that the argument with his wife on February 15, 2002 had gotten physical. He did, however, admit that he had "gotten physical" with his wife in the past. Rigaud acknowledged that he bloodied Heidi's nose on February 28, 1998, and that Heidi suffered a fractured eye socket during an argument in September of 1999. At the

request of Rigaud's counsel, the court repeated its limiting instruction after this testimony.

2. Rigaud's Claim on Appeal

On appeal, Rigaud claims that the trial court abused its discretion in allowing the State to cross-examine him about the two prior incidents of abuse. In his brief, Rigaud cites HRE Rule 611(b) (1993),⁵ but makes no argument based on that rule. Accordingly, he has waived any argument based on HRE Rule 611(b). Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7) (2001) ("Points not argued may be deemed waived."); Ditto v. McCurdy, 103 Hawai'i 153, 161-62, 80 P.3d 974, 982-83 (2003).

Rigaud argues that the State's cross-examination on the two prior incidents of abuse violated HRE Rules 403 and 404(b). The admissibility of evidence under HRE Rules 403 and 404(b) is reviewed for abuse of discretion. State v. Richie, 88 Hawai'i 19, 37, 960 P.2d 1227, 1225 (1998). Rigaud contends that because the State had already established the two prior incidents of abuse through Heidi's testimony, there was no need to question him about them. In effect, Rigaud claims that Heidi's testimony about the two prior incidents changed the prejudice-probative

⁵ Hawai'i Rules of Evidence (HRE) Rule 611(b) (1993) provides:

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

balance, rendering the State's cross-examination about the same incidents improper.

Rigaud does not challenge the State's questioning of Heidi about the two prior incidents of abuse under HRE Rules 403 or 404(b). Indeed, his argument assumes that the questioning of Heidi under these rules was proper. If the two prior incidents of abuse were admissible to explain Heidi's relationship with Rigaud and her possible motive for recanting, it is difficult to see how they became inadmissible through Rigaud simply because Heidi had acknowledged the incidents. We cannot say that the trial court abused its discretion in permitting the State to cross-examine Rigaud about the two incidents under HRE Rules 403 and 404(b).

Moreover, we conclude that any error in allowing such cross-examination was harmless beyond a reasonable doubt. Heidi was questioned about six prior incidents of abuse. She admitted that Rigaud had assaulted her on numerous prior occasions. As Rigaud acknowledges, proof of the two prior incidents the State cross-examined him about had already been introduced through Heidi. The evidence elicited through Rigaud did not reveal any new incidents of his abuse and was merely cumulative. Under these circumstances, there is no reasonable possibility that any error in permitting the State to cross-examine Rigaud about the two prior incidents of abuse contributed to the outcome of his

case. State v. Pauline, 100 Hawai'i 365, 378-79, 60 P.3d 306, 328-29 (2002).

D. The Prosecutor's Remarks in Closing Argument Did Not Constitute Plain Error.

Rigaud claims that certain remarks of the prosecutor in closing argument were improper because the prosecutor took a moral stand and appealed to the pity and passion of the jurors. Because Rigaud did not object to the prosecutor's remarks at trial, we review his claim under the plain error standard of review. State v. Hauge, 103 Hawai'i 38, 48, 79 P.3d 131, 141 (2003). This standard authorizes us to correct those errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings. State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999).

The fact that Heidi had recanted her allegations of abuse at trial and expressed her desire that Rigaud be acquitted presented obvious problems for the State. During closing argument, the prosecutor acknowledged these circumstances. He argued that Heidi's apparent reconciliation with Rigaud did not mean the jury should acquit Rigaud. Rather, the prosecutor urged the jurors to comply with their duties as jurors, to follow the law, and to convict Rigaud if they believed the evidence showed he committed the crime. He urged the jurors to do so even if Heidi did not appear to want Rigaud to be convicted.

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It was in this context that the prosecutor made the following statements, with the particular remarks Rigaud claims were improper denoted by the emphasis added:

Well, you know, ladies and gentlemen, sometimes your responsibility as jurors is very difficult because you're asked to take a stand for society. You're asked to look at a relationship, a closed environment, where people -- the people in the environment do not want any intervention. And you're asked to look into that environment and say to yourself did something happen?

Now it's easy to look the other way. It's easy to say you know what, they don't want to be here. Why should I get involved? That's the easy thing to do. But that's not your job. You see when each of you took that oath in this courtroom to follow the law, you have been told by the court and instructed now by the court that if the defendant abused his wife, you are required to find him guilty even if Heidi Rigaud has made every effort in this courtroom to dissuade you from doing that.

. . . .

Heidi Rigaud's choices in this case, ladies and gentlemen, may not be in the best interest of Heidi Rigaud. And while it may be easy for you to simply say, you know what, Heidi doesn't want me to convict him. Why should I do it? I would submit to you, ladies and gentlemen, you do it because you not only tell Heidi you believe this happened. You don't only tell Heidi but you tell the defendant, you tell everyone else out there that it's society's stand, that just because it happens in your home, just because you want to keep this private, it's not right. If you believe that this happened, you are obligated as citizens, as human beings to convict the defendant.

(Emphasis added.)

The thrust of the prosecutor's argument was that regardless of the result sought by Heidi, the jurors should follow the law and convict Rigaud if they believed the evidence showed he was guilty. That is a permissible argument. The prosecutor could have been more circumspect in his approach and our decision is not an endorsement of the words he chose.

However, his remarks, taken in context, do not rise to the level of plain error.

III. CONCLUSION

The October 7, 2002 Judgment of the Family Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, August 2, 2004.

On the briefs:

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Acting Chief Judge

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Associate Judge

Associate Judge