NO. 25452

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
ARTHUR MARCOS, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(FC-Cr. NO. 02-1-1147)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Lim and Nakamura, JJ.)

Arthur Roderick Marcos (Defendant or Marcos) appeals the September 25, 2002 judgment of the family court of the first circuit[1] that convicted him, upon a jury's verdict, of abuse of a family or household member, a violation of Hawaii Revised Statutes (HRS) § 709-906(1) (Supp. 2001). The conviction stemmed from an incident of abuse on the night of January 23, 2002.

Upon an arduous review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we resolve Defendant's points of error on appeal as follows:

1. Defendant first contends the family court erred in a constitutional dimension by barring him from cross-examining

[1] The Honorable Darryl Y.C. Choy, judge presiding.

the complaining witness (the CW) about one of her alleged motives to fabricate the abuse allegation against him, thereby violating his federal and State confrontation clause rights. Defendant's only specific argument on this point is, "that the Family Court barred Marcos from adducing *any* evidence showing that the complainant was trying to obtain custody of the child she had with Marcos and therefore had a motive to fabricate in order to enhance her chances of obtaining custody in another Family Court proceeding." Opening Brief at 28 (emphasis in the original). This argument is unavailing. A trial court does not violate a defendant's confrontation clause rights by barring evidence of the complainant's motive to bring false charges and testify falsely, if the trial court does not abuse its discretion in applying Hawaii Rules of Evidence (HRE) Rule 403 (1993) to the proffer, State v. Balisbisana, 83 Hawai'i 109, 114, 924 P.2d 1215, 1220 (1996), and so long as "the constitutionally required threshold level of inquiry has been afforded the defendant[,]" id. -- in other words, "as long as the jury has in its possession sufficient information to appraise the biases and motivations of the witness[,]" id. (citation and internal quotation marks omitted), absent the proffered evidence. Id. at 116, 924 P.2d at 1222. First, and to be clear, we observe that Defendant's trial counsel informed the family court that "Mr. Marcos on his own filed for paternity and for custody on February 13th[,]" some three weeks after the CW made her 911 call on the night of the

incident. This explains, perhaps, trial counsel's qualification that the motive in question applied not so much to the CW's original report of abuse, but to her alleged after-the-fact fabrication of evidence of a resulting injury:

> THE COURT: You're going to put your client on the stand and he's going to say he filed a complaint to establish paternity?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Okay. And to litigate the question of custody?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: And that's going to end it?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Okay. So how are you going to make that jump to show that her motives are improper?
>
> [DEFENSE COUNSEL]: The timing. Because this happened on [February] 4th.
>
> THE COURT: And then you're going to argue to the jury that because she filed this manner [sic; presumably, "matter"] after the filing of this paternity complaint therefor [sic] her motives --
>
> [DEFENSE COUNSEL]: No, no, no, no. It goes to the injury, Your Honor. The photograph was taken on the 5th. She was informed at the [February 4th] court hearing on [her] restraining order that he was going to be -- that -- with his attorney that they were going to be seeking paternity and custody. Because the Family Court judge wanted to know where this was all going.
>
> They said we're going to file it and they did file it on the 13th, a week and a half later or whatever. So my position is that she did not come up with this injury that the State has admitted a photograph of until the day after she was informed by Mr. Marcos' lawyer at court that he was going to be seeking custody of the child.

This qualification also better orients us as to the overall probative value of the proffer. On the other hand, we heed the family court's warning that if the custody issue were to be broached, it would open the door for the State to introduce evidence of numerous instances of prior abuse by the Defendant,

cf. State v. McElroy, No. 25190, slip op. at 9-11 (Haw. filed Sept. 23, 2004); State v. Pulse, 83 Hawai‘i 229, 242-43, 925 P.2d 797, 810-11 (1996), in order to alternatively explain the CW's contest of custody and thereby extrude Defendant's accusation of fabrication. And we share the family court's concern that, had custody become an issue, the abuse trial would have drowned in the vortex of a custody dispute detailing a stormy, nine-year relationship. Hence, we conclude the family court did not abuse its discretion in determining, as to the proffer, that "its probative value [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. As for the threshold level of inquiry required for confrontation clause compliance by the Balisbisana court, we observe that the family court allowed Defendant to introduce, and to argue upon, evidence of several other alleged motives of the CW to fabricate. Balisbisana, 83 Hawai‘i at 116, 924 P.2d at 1222 ("trial court's exclusion of evidence of witness's bias against Appellant not an abuse of discretion where other evidence of same witness's bias was admitted" (citing State v. Silva, 67 Haw. 581, 586, 698 P.2d 293, 297 (1985)).

2. Defendant next contends the family court erroneously rejected his proffer of the audiotape of the CW's 911 call, which purportedly would have demonstrated the CW's calm

demeanor at the time. This contention lacks merit. There was ample evidence already adduced tending to prove what Defendant sought to show -- the CW's demeanor during her 911 call. Thereupon, the family court invited defense counsel to argue to the jury that the CW was calm during the 911 call, and defense counsel accepted. Indeed, even the State's closing argument conceded there was evidence tending to show the CW's calm demeanor during her 911 call. Hence, if error there was in the family court's ultimate conclusion that the audiotape proffered for that purpose was inadmissible hearsay, the audiotape was cumulative, Pulse, 83 Hawai'i at 249, 925 P.2d at 817, and we are not convinced there was a reasonable possibility that such error could have contributed to Defendant's conviction. Id. at 248, 925 P.2d at 816.

3. Defendant next contends the family court erred in refusing to *voir dire* the jury to determine if any of the jurors had overheard unidentified bench conferences in which inadmissible evidence of prior bad acts had purportedly been discussed. As such, this point is clearly devoid of merit. Defendant did not below, and does not on appeal, identify the offending bench conferences nor the places in the record we may consult to consider them. See Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4)(ii) (2002). Indeed, our review of the whole record of the trial reveals only the one specific instance of juror eavesdropping identified by the family court,

which occurred during jury selection while a juror was lamenting the hardships imposed upon him by jury service. Under these circumstances, the family court did not err in refusing to voir dire the jury. State v. Blanding, 69 Haw. 583, 587-88, 752 P.2d 99, 101 (1988). At any rate, the family court gave the jury prophylactic instructions similar and in some instances virtually identical to those given by the trial court in Blanding, 69 Haw. at 587-88, 752 P.2d at 100, and like the Blanding court, we presume they were effective. Id. at 588, 752 P.2d at 101.

4. Finally, Defendant contends the family court erred in denying his motion for new trial and in failing to hold a hearing on the timeliness of the motion. Even assuming, *arguendo*, that the family court erred in holding the motion untimely, the family court at the hearing on the motion did indicate that it had considered the substance of the motion. We have already concluded above that three of the bases for Defendant's motion lack merit. As for the rest, Defendant failed to argue them on appeal and has thus waived them. HRAP Rule 28(b)(7) (2002). Accordingly, we conclude the family court did not abuse its discretion in denying Defendant's motion for new trial. State v. Furutani, 76 Hawai'i 172, 178-179, 873 P.2d 51, 57-58 (1994).

Therefore,

IT IS HEREBY ORDERED that the family court's September 25, 2002 judgment is affirmed.

DATED: Honolulu, Hawai'i, October 14, 2004.

On the briefs:

Earle A. Partington,
for defendant-appellant.

Mangmang Qiu Brown,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Chief Judge

Associate Judge

Associate Judge