

NO. 26335

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

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STATE OF HAWAII, Plaintiff-Appellee, Cross-Appellant,
v.
NORMAN TORRES, Defendant-Appellant, Cross-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-1347)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Foley, and Nakamura, JJ.)

Defendant-Appellant Norman Torres (Torres) appeals from the Judgment filed on November 26, 2003, in the Circuit Court of the First Circuit (circuit court).¹ After a jury trial, Torres was found guilty as charged of Terroristic Threatening in the First Degree (Terroristic Threatening I), in violation of Hawaii Revised Statutes (HRS) § 707-716(1)(d) (1993)² (Count 1), and

¹ The Honorable Derrick H.M. Chan presided.

² Hawaii Revised Statutes (HRS) § 707-716(1)(d) (1993) provides, in relevant part:

(1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:

. . . .

(d) With the use of a dangerous instrument.

HRS § 707-715 (1993), in turn, defines the offense of Terroristic Threatening, in relevant part, as follows:

A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony:

abuse of a family or household member, in violation of HRS § 709-906 (Supp. 2005)³ (Count 2). The circuit court sentenced Torres to concurrent terms of probation of five years on Count 1 and two years on Count 2, with a special condition that he serve a term of imprisonment of 90 days.

On appeal, Torres argues that: 1) the circuit court abused its discretion in not allowing evidence of drug use by the complaining witness (the CW); 2) the circuit court committed plain error in failing to strike evidence of Torres's prior bad acts, which were elicited during questioning by Torres's counsel; and 3) Torres was denied effective assistance of counsel when his trial counsel failed to move to strike testimony adverse to Torres. We disagree with Torres's arguments and affirm the circuit court's Judgment.

The State of Hawai'i (the State) cross-appeals, arguing that the circuit court erred in admitting portions of a police report because they constituted inadmissible hearsay. Because we affirm the Judgment, we do not address the State's cross-appeal.

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- (1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person

³ HRS § 709-906 (Supp. 2005) provides, in relevant part:

(1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member

For the purposes of this section, "family or household member" means . . . persons who have a child in common . . . and persons jointly residing or formerly residing in the same dwelling unit.

After a careful review of the record and the briefs submitted by the parties, we hold as follows:

I.

Prior to trial, the State moved *in limine* to exclude evidence that the CW possessed or used illegal drugs. Torres opposed the motion, arguing that the CW's alleged drug use was relevant to her ability to perceive and recollect the incident in question. Torres also argued that the CW's alleged drug use was relevant to show that certain marks on the CW's arms and legs, which were visible in photographs taken of her alleged injuries, were "tweak" marks from drug usage.

The circuit court found that Torres's offer of proof was not sufficient to lay a foundation that the CW was on drugs at the time of the incident, and it accordingly ruled that the CW's alleged drug use was not admissible to attack her ability to perceive or recollect the incident. The court, however, allowed Torres to revisit the issue if he could lay a proper foundation. The circuit court further ruled that Torres could not ask the CW if the marks on her arms and legs were related to drug use unless Torres first established a foundation for asking such questions at a hearing pursuant to Hawaii Rules of Evidence (HRE) Rule 104 (1993). The court permitted Torres to ask witnesses whether the CW's alleged injuries were self-inflicted, without referring to drug use.⁴

⁴ The Circuit Court of the First Circuit (circuit court) also granted the portions of the State of Hawai'i's motion *in limine* that requested the exclusion of evidence that the complaining witness (the CW) possessed or used

At trial, the CW testified that Torres, her former boyfriend, used a sledgehammer to smash open her front door and the door to her bedroom, choked her, threatened to kill her, grabbed her forearms, and forced her to the ground. She identified the areas of her body that had been injured during the incident, which mainly consisted of scratches to her neck and chest and bruises to her arms and knees.

Torres testified that he entered the apartment only to retrieve his car keys and did not threaten or try to punch or kick the CW. Torres stated that he saw the CW hit herself and fall to her knees, ostensibly to injure herself so that she could falsely accuse Torres of abuse. Torres asserted that any injuries the CW sustained were either self-inflicted or occurred while he was trying to defend himself.

During the trial, Torres did not attempt to lay a foundation that the CW had used drugs at or near the time of the incident or that any of the marks visible in the photographs of the CW's injuries were marks that were attributable to her drug use.⁵ We conclude that the circuit court did not abuse its discretion in excluding evidence relating to the CW's alleged drug use and in precluding Torres from questioning the CW on this

drug paraphernalia or associated with people who used drugs or drug paraphernalia. These aspects of the circuit court's ruling are not contested on appeal.

⁵ The CW testified that the bruises on her arms and legs depicted in the photographs were injuries caused by Defendant-Appellant Norman Torres (Torres) during the incident. The CW stated that the other marks shown in the photographs of her arms and legs were unrelated to the incident, except that certain marks on her right arm, which she could not specifically identify, may have been from scratches received from Torres during the incident.

subject. See HRE Rule 403 (1993); HRE Rule 611(a) (1993); United States v. Sampol, 636 F.2d 621, 667 (D.C. Cir. 1980); Blumhagen v. State, 11 P.3d 889, 892-94 (Wyo. 2000).

II.

During cross-examination, Torres's counsel elicited the following statements from the CW:

Q: Now, why wouldn't you open the door?

A: Why wouldn't I open the door?

Q: Because it was [Torres]?

A: I have been hit many times by [Torres].

(Emphasis added.) In addition, Torres testified on direct examination by his counsel as follows:

Q: [D]id you subsequently find out that the police were looking for you?

A: Yes. It was on the 18th, the day after.

Q: Okay. And how did you respond when you found that out?

A: Well, I was working, and my boss called me and said the police are here to arrest you. And, of course, I said, yeah, well nothing new. She always charge me with abuse, and I said okay.

And I called the police station, the Kalihi police station and told them who I was, and that I was going to turn myself in, if I can have a day to raise bail, and I asked them how much is the bail? They told me, 2,000, and I said, Okay. Can I turn myself in tomorrow, and the police officer said, okay, and I said, okay, fine.

(Emphasis added.)

We reject Torres's claim that the circuit court committed plain error in failing to strike the emphasized portions of the above testimony of the CW and Torres. The CW's testimony that she had been "hit many times" by Torres was elicited by Torres's counsel and was relevant to the CW's motive

for refusing to allow Torres to enter the apartment. See HRE Rule 404(b) (Supp. 2005). Torres's testimony that the CW "always charge me with abuse" was volunteered by him and implied that the arrival of the police was "nothing new" because the CW had falsely accused him of abuse in the past. Torres's testimony appears to have been in furtherance of his defense that the CW self-inflicted her injuries and falsely accused him of abuse. We conclude that the circuit court did not commit plain error in failing to strike the testimony challenged by Torres. See State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999).

III.

We reject Torres's claim that his trial counsel provided ineffective assistance by failing to move to strike the testimony described above as well as testimony by the CW on cross-examination that the resident manager told her that Torres was on the phone and wanted to apologize. The Hawai'i Supreme Court has held that "[s]pecific actions or omissions [of counsel] alleged to be error but which had an obvious tactical basis for *benefitting* the defendant's case will not be subject to further scrutiny." Briones v. State, 74 Haw. 442, 462-63, 848 P.2d 966, 976 (1993). It appears that the CW's testimony was elicited in the course of attempts by Torres's counsel to discredit the CW on cross-examination and that Torres's testimony was elicited in furtherance of his defense. Once the testimony was elicited, it was reasonable, and not ineffective, for counsel to decide not to highlight the testimony by moving to strike it.

In any event, assuming *arguendo* that counsel's performance was deficient in not moving to strike the testimony, Torres has not shown that counsel's errors resulted in the withdrawal or substantial impairment of a potentially meritorious defense. State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998). We hold that Torres is not entitled to any relief on his ineffective assistance of counsel claim.

IV.

IT IS HEREBY ORDERED that the November 26, 2003, Judgment of the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, November 21, 2006.

On the briefs:

Randal I. Shintani,
for Defendant-Appellant/
Cross-Appellee

Mark Yuen,
Deputy Prosecuting Attorney
City and County of Honolulu
(on answering brief of
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James M. Anderson,
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Corinne K.A. Watanele
Presiding Judge

Gene R. Foley
Associate Judge

Craig H. Nakamura
Associate Judge