

NO. 26753

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JEROME JACARO ARMSTRONG, Defendant-Appellant

K. HAMAKADO
CLERK, APPELLATE COURT
STATE OF HAWAI'I

2006 DEC 13 AM 9:48

FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 03-1-0500(2))

MEMORANDUM OPINION

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

Defendant-Appellant Jerome Jacaro Armstrong (Armstrong) appeals from the Judgment filed on July 15, 2004 in the Circuit Court of the Second Circuit^{1/} (circuit court). A jury convicted Armstrong of Criminal Property Damage in the First Degree (CPD1) in violation of Hawaii Revised Statutes (HRS) § 708-820(1) (Supp. 2005).

On appeal, Armstrong advances two points of error:

(1) The circuit court "erred in granting the State's request to offer, denying Armstrong's motion in limine to preclude, and ultimately admitting as [Hawaii Rules of Evidence (HRE) Rule] 404(b) evidence unspecified incidents of prior 'violence' and 'property damage' by Armstrong and conclusory characterizations that Armstrong's relationship with [Complainant

^{1/} The Honorable Shackley F. Raffetto presided.

Michele Lynn Goff (Goff)] was 'abusive' or 'violent' with 'escalating violence.'

(2) The circuit court "wrongly denied Armstrong's motion in limine to exclude evidence of the 'coroner' banner, boning knife embedded in wall, and handwriting on wall and plainly erred in subsequently admitting the photo and the detective's testimony on it, absent foundation, relevance, and in violation of HRE 404(b) and hearsay."

For the reasons discussed below, this court concludes that the circuit court committed error when it allowed the introduction of the photograph depicting the banner, knife, and handwriting on the wall as State's Exhibit 11 (Exhibit 11).

I. BACKGROUND

On October 8, 2003, the State filed a complaint against Armstrong, charging him with CPD1 for the destruction of Goff's 1988 Honda Prelude (Honda), thereby recklessly placing Julie Burnside, Glen Baca, Kristy Baca, and/or Jackie Montoya in danger of death or bodily injury.

On April 23, 2004, the State filed its Trial Memorandum Regarding the Admissibility of HRE Rule 404(b) Evidence (State's Memorandum), giving notice that it intended to rely on HRE Rule 404(b) material. The State's Memorandum did not set forth any particular dates or locations of particular events, but simply set forth the State's desire to introduce evidence concerning

Armstrong's "history of substance abuse and involvement in an abusive relationship" with Goff.

On April 26, 2004, Armstrong filed his Motions [sic] in Limine, in which he sought to exclude various evidence pursuant to, among others, HRE Rules 401, 403, 404 and 801. Specifically, Armstrong asked the circuit court to exclude, inter alia, (1) any mention of "escalating violence" between Armstrong and Goff, (2) an attempted temporary restraining order suggested or contemplated by Goff or Maui Police Department (MPD) officers, (3) any mention that MPD Officer Del Campo knew Armstrong from previous cases, and (4) hearsay statements made by Goff to any MPD officers.

On April 27, 2004, the circuit court heard Armstrong's motion in limine and the issues raised in the State's Memorandum. The State suggested that the circumstances surrounding Goff's relationship to Armstrong were relevant to show Armstrong's reason or motive to burn her car. The State argued that Goff was likely to recant when she testified and therefore her statements would be necessary to impeach her. The State set forth that if Goff recanted on the stand, the State would seek to admit statements made by Goff to police officers as to the volatile nature of her relationship with Armstrong. Armstrong countered and argued that Goff's statements did not set forth any specific incidents of violence and any statements concerning Armstrong's

drug use were irrelevant. Armstrong noted that in their respective police reports, Officer Del Campo wrote that Goff told him that she "had ended their relationship due to [Armstrong's] escalating violence towards her" and Officer Dadez wrote that "[t]here have been times that [Armstrong] armed himself with a knife, cut the fingers of the complainant, and stated next time it will be your throat" and "many more [instances] are all unreported."

The circuit court ruled that Goff's statements to police were admissible pursuant to HRE Rule 404(b) on the issue of Armstrong's motive to destroy Goff's property and found that, pursuant to HRE Rule 403, the relevancy of the statements was not outweighed by a danger of unfair prejudice. The circuit court noted that the evidence would still be subject to objection, as it was unclear exactly what Goff would say on the witness stand.

The circuit court also considered Armstrong's motion in limine to exclude a photograph the State sought to introduce. The photograph had been taken inside a garage bay at the premises where Armstrong had been living and showed a large cloth banner with lettering that read "coroner," a knife stuck into the wall next to the banner, and writing above the banner that read, "[n]o, my friend. Your [sic] done." The State conceded "I can't tie it. I have -- nobody saw [Armstrong] writing that; however, it was there in that particular . . . garage bay." The State

noted, referring to the garage where the photograph had been taken, that "[t]his couple [Armstrong and Goff] was living in this particular residence, and the garage is underneath their residence" and that Armstrong's knit cap had been found in that garage bay. The State argued that the message presented in the photograph served as an "indicator of some hostility between somebody and another individual, who they consider to be in a friendly relationship with." Armstrong's counsel noted that other people also lived at the premises, there was no writing sample to connect the banner to Armstrong, and the photograph was not relevant. The circuit court denied Armstrong's motion in limine to exclude that photograph.

On April 28, 2004, the State called Jackie Montoya (Montoya) as its first witness at trial. Montoya testified that on September 27, 2003, she and her boyfriend stopped at around 10:30 a.m. to visit some friends at the Kahana Outrigger Resort. From the parking lot, Montoya called up to her friends, Christy Baca (Baca) and Julie Burnsides (Burnsides), who were on an upstairs balcony, to come down. While Montoya, her boyfriend, Baca, and Burnsides were talking in the parking lot, Armstrong approached them from across the street and asked for a cigarette. Armstrong talked for a few minutes and returned back across the street. Montoya noted that Armstrong was wearing a brightly multicolored beanie cap. While the four were still talking,

Armstrong returned and asked to borrow Montoya's lighter. Armstrong was carrying a tea candle in a little metal cup in his hand. Montoya testified that Armstrong asked her, "Can you keep a secret?", and then walked off with the lighter. Moments later, Montoya heard a crash of glass and saw a car across the street engulfed in flames. She testified that Armstrong then came back across the street, returned her lighter, again asked her if she "Can keep a secret?", and walked off. Fire engines arrived on the scene shortly thereafter. Montoya did not smell alcohol on Armstrong's breath.

Burnsides and Baca testified and corroborated Montoya's testimony in all substantial respects.

Police Officer Corpuz, the responding MPD officer, described the search he conducted of Armstrong's residence upon arrival at the scene. Officer Corpuz testified that he retrieved from the garage at Armstrong's residence the knit cap identified by Montoya as belonging to Armstrong.

Prior to Goff's testimony, the circuit court again considered the Rule 404(b) question and ruled that evidence concerning Armstrong's drug use and prior acts of violence would be inadmissible. The circuit court further ruled that if Goff recanted, the State could use the police report to impeach her as to the relationship between Goff and Armstrong, but the court reserved ruling on any extrinsic evidence. The circuit court

also ruled that the State's notice was sufficient for purposes of Rule 404(b).

Goff testified that she and Armstrong had been going out for approximately two years as of September 2003. She and Armstrong lived in the upstairs portion of the house, and downstairs was a separate unit and garage. Goff owned the Honda allegedly burned by Armstrong. She stated that on the evening of September 26, 2003, Armstrong had been upset with her because she had been late arriving at a friend's house and she and Armstrong had argued. At the time of the fire, she had food, personal belongings, camping gear (including a canister of lantern fuel), and a can of butane in the Honda.

Goff testified that at the time of the incident, she and Armstrong were under a lot of stress because they were about to be homeless and they were arguing a lot; Goff denied that there was any violence between Armstrong and her during this time. Goff then conceded the occurrence of an incident involving a knife: she testified that she cut her finger when she grabbed the knife and admitted that Armstrong allegedly threatened to cut her throat after cutting her finger. Goff conceded the occurrence of "one or two" incidents of violence during the relationship and "quite a few arguments." She also admitted that on some of those occasions Armstrong had damaged her property.

On cross-examination, Goff explained the litany of problems she had with the Honda up until it was burned, including the existence of a cracked, plexiglass windshield that Armstrong had repeatedly attempted to repair in various ways. Goff also testified that she never wrote or signed a statement and never "adopted" any statement made by the police officer. On re-direct examination, Goff maintained that her relationship with Armstrong encompassed only two incidents of violence during which the police had been called.

After Goff's testimony, the circuit court gave a limiting instruction as to the prior bad acts of Armstrong testified to by Goff.^{2/}

Officer Del Campo testified that on September 27, 2003, he and Officer Corpuz responded to a report of a vehicle on fire. The circuit court allowed Officer Del Campo to testify to certain statements made by Goff after the incident and also to prior

^{2/} The full text of the instruction is as follows:

Ladies and gentlemen, I'm going to give you an instruction that is binding upon you. Now, the testimony of the witness you just heard -- you have received, you heard that the defendant at some other time, that is a time other than the alleged burning of the car in this case, that he may have engaged in other wrongful acts. And what you heard about was alleged prior acts of violence and some alleged prior damage to Ms. Goff's property.

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. That evidence may be considered by you only on the issue of defendant's motive and for no other reason or purpose. You may also consider inconsistencies in this witness' [sic] testimony about these matters, if there are any, on the issue of credibility, believability, or the weight to give her testimony.

incidents where MPD had responded to the Goff/Armstrong household for domestic violence calls. Officer Del Campo testified that Goff stated to him that she had ended her relationship with Armstrong due to his escalation of violent behavior towards her. He also testified that one of his four response calls to the Goff/Armstrong residence had involved violence between Goff and Armstrong and one had involved property damage to Goff's property by Armstrong. After Officer Del Campo's testimony, the circuit court gave a limiting instruction requiring the jury to consider those statements and incidents for purposes of assessing Goff's credibility and not for the truth of the matters asserted therein.^{3/}

Officer Dadez testified as to the results of his investigation into the Honda fire. The circuit court permitted Dadez to testify to a statement made by Goff to him characterizing her relationship with Armstrong as violent. He testified that Goff had told him about the incident involving Goff, Armstrong, and the knife. Officer Dadez described the picture he took of the cloth "coroner" banner and the knife stuck into the wall next to the banner. When the State introduced Exhibit 11 and asked Officer Dadez what was written on the wall

^{3/} The circuit court instructed the jury as follows: "Ladies and gentlemen, the officer testified on several matters about what Ms. Goff said or did not say to him. You may consider that testimony only upon her credibility, and not as to whether or not the contents of the statements were true."

above the banner, Armstrong's counsel objected on grounds of hearsay, but stated no further objection.

Armstrong testified that on the morning of the incident he had decided to repair Goff's windshield as an apology for their argument the night before. He explained that Goff's Honda had a temporary, improvised, plexiglass windshield with cracks in the center. He stated that he planned on using a tea candle as a heat source to melt the plastic to repair the cracks in the plexiglass windshield and had asked Montoya and her friends to borrow a lighter to light the candle. Armstrong testified that after lighting the candle, it fell between the seats of the Honda and subsequently ignited the blaze that destroyed the Honda.

On cross-examination, Armstrong testified that Goff was sleeping late and he did not want to wake her before working on the Honda, so she did not know he was going to fix the windshield. He stated that after bumming a cigarette off Montoya, he took off the knit cap (identified earlier by Montoya) and threw it into the garage. Armstrong testified that he did not remember saying "Can you keep a secret?" to Montoya or her friends. Armstrong said he avoided the police after the incident because he had been drinking and was embarrassed.

The State questioned Armstrong on prior incidents of violence in the relationship, purporting to show Armstrong's motive to destroy Goff's Honda. The circuit court again gave a

limiting instruction to the jury.^{4/} During jury instruction, the circuit court instructed the jury that it was not to consider evidence of prior bad acts for any purpose other than evaluating Armstrong's possible motive for burning the Honda.^{5/}

On May 12, 2004, the jury found Armstrong guilty as charged on the offense of CPD1. The circuit court sentenced Armstrong to ten years of incarceration and ordered him to pay a crime victim compensation fee of \$500. The circuit court filed the Judgment on July 15, 2004. On August 12, 2004, Armstrong timely filed his notice of appeal.

II. STANDARDS OF REVIEW

A. Evidentiary Rulings.

"We apply two different standards of review in addressing evidentiary issues. Evidentiary rulings are reviewed for abuse of discretion, unless application of the rule admits of only one correct result, in which case review is under the

^{4/} The circuit court instructed the jury: "Ladies and gentlemen, you have heard testimony just a couple minutes ago about, oh, a finger cutting, violence, and some abuse calls. You may consider that evidence only for purposes of evaluating this witness's credibility, and not for its truth."

^{5/} The circuit court instructed the jury as follows:

During the trial, you have heard evidence that the defendant, at a time other than the date of the burning of the car, may have engaged in other wrongs or acts, to-wit, prior acts of violence towards Michele Goff and/or prior damage to her property. 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 on the issue of the defendant's motive and for no other purpose.

right/wrong standard." State v. Ortiz, 91 Hawai'i 181, 189, 981 P.2d 1127, 1135 (1999) (internal quotation marks and citations omitted).

B. Abuse of Discretion.

"Generally, to constitute an abuse, it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State v. Crisostomo, 94 Hawai'i 282, 287, 12 P.3d 873, 878 (2000) (internal quotation marks, citations, and brackets omitted).

C. Harmless Error.

Hawai'i Rules of Penal Procedure (HRPP) Rule 52(a) provides, in relevant part, that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The Hawai'i Supreme Court has stated that "[s]uch error, however, should not be viewed in isolation and considered purely in the abstract. It must be examined in light of the entire proceedings and given the effect to which the whole record shows it is entitled." State v. Sprattling, 99 Hawai'i 312, 320, 55 P.3d 276, 284 (2002) (internal quotation marks, citation, and brackets in original omitted). Under the harmless error standard, this court "must determine whether there is a reasonable possibility that the error complained of might have

contributed to the conviction." State v. Pauline, 100 Hawai'i 356, 378, 60 P.3d 306, 328 (2002) (internal quotation marks and citation omitted). "If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside." State v. Gano, 92 Hawai'i 161, 176, 988 P.2d 1153, 1168 (1999) (internal quotation marks and citation omitted).

III. DISCUSSION

A. Prior Bad Act Evidence

Rule 404(b) (Supp. 2005) of HRE provides in relevant part:

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

. . . .

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial . . . of the date, location, and general nature of any such evidence it intends to introduce at trial.

Armstrong argues that the bad act evidence proffered by the State was improper for four reasons. This court considers each in turn.

1. Notice

Armstrong argues that the State failed to comply with the notice provisions in Rule 404(b) because it did not adequately provide Armstrong with the date, location, and general nature of each incident the State sought to introduce at trial. As Armstrong correctly notes, the State's Memorandum concerning HRE Rule 404(b) evidence specified no particular dates or locations of incidents the State wished to introduce, but simply set forth a general desire to introduce evidence of Armstrong's violent past involving Goff. However, at the April 27, 2004 hearing, the parties discussed explicitly the State's intent to impeach Goff's credibility through the use of statements made by Goff to police officers, and the State noted that reports of those statements had been provided to the defense. This issue is better phrased as one concerning a prior inconsistent statement of a witness for purposes of impeaching credibility, pursuant to HRE Rule 802.1, as the real act being questioned concerned Goff's verbal act of making the statement to police and not Armstrong's acts of violence per se.^{6/} Under these circumstances, this court

^{6/} Hawaii Rules of Evidence (HRE) Rule 802.1 provides in relevant part:

Rule 802.1 Hearsay exception; prior statements by witnesses. The following statements previously made by witnesses who testify at the trial . . . 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

(continued...)

cannot conclude that the circuit court abused its discretion in ruling that Armstrong received timely or sufficiently detailed notice of any prior bad act evidence, such that any existed.

2. Armstrong's Motion in Limine

Armstrong argues that the circuit court erred by denying his motion in limine to exclude, pursuant to HRE Rule 404(b), evidence of prior violence, property damage, and escalating violence. However, as the State correctly notes, denial of a motion in limine cannot, on its own, constitute reversible error. Lussier v. Mau-Van Dev., Inc., 4 Haw. App. 359, 393-94, 667 P.2d 804, 826 (1983). Generally, the party seeking to challenge the lower court ruling must renew his objection at the time the evidence is introduced during trial. Id. at 393, 667 P.2d at 826. However, if the denial of the motion in limine amounted to an unequivocal holding as to the admissibility of the evidence in question, then no renewal of the objection is necessary. Id. at 393-94, 667 P.2d at 826. Despite Armstrong's assertions to the contrary, the circuit court did not unequivocally deny his motion in limine, and therefore renewal of

§/ (...continued)

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[.]

his objection was necessary at the time of trial.^{2/} Later, when considering the same issue prior to Goff's trial testimony, the circuit court again noted that if Goff recanted, the State then had "fair game to impeach her with the report. As far as extrinsic evidence is concerned, we'll see whether we get to that, okay?" The circuit court did not unequivocally hold as to the admissibility of the evidence, and renewal of objections was therefore necessary. Lussier, 4 Haw. App. at 393-94, 667 P.2d at 826. Armstrong directs this court to no part of the record where such HRE Rule 404(b)-based objections were renewed, and thus the issue is deemed waived.

3. The Relevance of Goff's Statements Concerning Armstrong's Prior Bad Acts.

Armstrong asserts that evidence of his prior physically violent behavior toward Goff, prior damage to her property, and escalating violence toward Goff was not probative for any purpose allowed under HRE Rule 404(b) and was therefore inadmissible. A determination as to relevance in this context requires essentially a two-part analysis. The evidence of prior bad acts must not only be relevant and admissible within the context of

^{2/} The circuit court, in ruling on the Rule 404 issues associated with the prior incidents of violence, stated that the information was admissible, subject to objections: "[I]t's still subject to objection, and this is a kind of a situation where we're not sure exactly what's going to happen. So we can -- objections can be made at the time, and we'll see where we go from there." Later, in considering the same issue raised in Armstrong's motion in limine, the circuit court stated, with regard to the escalating violence: "I've already ruled that I'm going to allow that in the context that we discussed earlier, so I'm going to deny that."

Goff's testimony, it must somehow be probative of an essential fact in the case against Armstrong. HRE Rule 403. In this case, the evidence of escalating violence and prior property destruction passes the relevance test under either analysis. The statements made by Goff to police concerning the violent nature of her relationship with Armstrong were relevant not only to impeach her credibility, but also to demonstrate her motive to lie on the stand to protect Armstrong. The evidence of prior violence and property destruction was also relevant to demonstrate Armstrong's motive and lack of accident in destroying Goff's Honda. Evidence of prior bad acts may be introduced for reasons other than to prove character. State v. Clark, 83 Hawai'i 289, 301, 926 P.2d 194, 206 (1996).

In Clark, the complainant recanted her previous statement in which she had told police that Clark had stabbed her. Id. at 292-93, 926 P.2d at 197-98. The State questioned the complainant about prior violent incidents between Clark and her to show that as a victim in an abusive relationship, the witness would be naturally inclined to protect her abuser. Id. at 293 & 298, 926 P.2d at 198 & 203. This evidence also demonstrated an instance of the complainant changing her story to protect the defendant. Id. at 301, 926 P.2d at 206. The Hawai'i Supreme Court held that the prior bad act evidence was relevant

to establish the basis for the complainant's recantation. Id. at 302, 926 P.2d at 207.

The holding in Clark applies to the facts of this case, where the State expected (and was met with) a recanting witness and wished to show the witness's possible motive for recanting. Here, the context of Armstrong and Goff's relationship and any history of escalating violence was relevant to show Armstrong's motive to destroy Goff's property and also his lack of accident in doing so.

Moreover, the statements made by Goff to police were also admissible as prior inconsistent statements of a witness, pursuant to HRE Rule 802.1, which "provides for substantive use of most prior inconsistent witness statements." State v. Eastman, 81 Hawai'i 131, 136, 913 P.2d 57, 62 (1996). Therefore, in order for Goff's statements to police to be admitted, HRE Rule 802.1(1)(C) requires that the witness must testify about the subject matter of her prior statement so that she is subject to cross-examination concerning the subject matter of that statement, the witness's prior statement must be inconsistent with her testimony, the prior inconsistent statement must be recorded in substantially verbatim fashion by some means contemporaneously with the making of the statement, and the prior inconsistent statement must be offered in conformity with HRE

Rule 613(b).^{8/} Goff's prior statements to police complied with these requirements. The subject matter and the fact of Goff's statements were entirely relevant, and the circuit court did not abuse its discretion when it allowed Goff to be questioned on them.

4. HRE Rule 403 Balancing Test.

Armstrong argues that even if the prior bad act evidence were probative of any facts of consequence, the evidence was unduly prejudicial and therefore should have been excluded pursuant to the balancing test set forth in HRE Rule 403.^{2/} Once relevance is established, the court must then conduct the balancing test as set forth in HRE Rule 403 and find that the evidence is more probative than prejudicial. This determination is best suited to the circuit court's discretion. Sato v. Tawata, 79 Hawai'i 14, 19, 897 P.2d 941, 946 (1995). Where, as here, the evidence of prior episodes of violence are admissible to show the fact finder the nature of the relationship between Goff and Armstrong and where the relationship is relevant to explain a central and consequential fact (Goff's recanting on the

^{8/} "HRE Rule 613(b) . . . requires that, on direct or cross-examination, the circumstances of the prior inconsistent statements have been brought to the attention of the witness" and the witness must have been asked whether she "made the prior inconsistent statements." State v. Clark, 83 Hawai'i 289, 295, 926 P.2d 194, 200 (1996).

^{2/} 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."

witness stand), that evidence is not unduly prejudicial, and we will not disturb the ruling of the circuit court.

B. Exhibit 11 (Photograph).

Armstrong argues the circuit court erred by admitting Exhibit 11 (the photograph depicting the "coroner" banner, knife, and handwriting on the wall), in violation of HRE Rule 404(b) and the prohibition on hearsay testimony. The State disagrees, arguing that Armstrong failed to object to the exhibit's admission during trial. The State also notes that the circuit court gave a limiting instruction precluding the jury from considering the Rule 404(b) evidence for purposes of character. This court agrees with Armstrong that the circuit court erred in admitting Exhibit 11.

Armstrong argues that the circuit court failed to require the State to establish an adequate foundation for Exhibit 11 and that the evidence was entirely irrelevant to the case. Armstrong describes this error as the circuit court's denial of his motion in limine. However, the circuit court's denial of the motion in limine, while unequivocal in its terms, did not amount to an unequivocal ruling on the admissibility of the evidence itself, and thus Armstrong was required, as the State notes, to renew his objection to Exhibit 11 at the time of its

introduction. Lussier, 4 Haw. App. at 393, 667 P.2d at 826.^{10/} When the State initially asked Officer Dadez to identify and describe Exhibit 11, Armstrong objected on grounds of hearsay. The State contends that this objection was insufficient to preserve the foundational and relevance issues for appellate review. It is axiomatic that evidence to which no proper objection is made may be considered by the trier of fact and its admission will not amount to reversible error, and issues raised for the first time on appeal will not be considered by the reviewing court. State v. Naeole, 62 Haw. 563, 570, 617 P.2d 820, 826 (1980) This court concludes that the issues were properly preserved. Armstrong's hearsay objection sufficiently reflected his theory that the matters depicted in Exhibit 11 were not connected to him and reminded the circuit court of the arguments raised during motions in limine. This is not a case of an appellant inventing a new legal theory on appeal.

As to the foundational question, Armstrong correctly cites State v. Janto, 92 Hawai'i 19, 30, 986 P.2d 306, 317 (1999), in support of the proposition that "[p]roper identification and foundation are established when the prosecution shows that the exhibit is connected with the crime

^{10/} In ruling on Armstrong's motion in limine concerning State's Exhibit 11, the court simply denied the motion, rendering no unequivocal holding as to the admissibility of Exhibit 11.

and identified as such." As discussed earlier, the State offered no connection between Armstrong and the banner, knife, and handwriting above the banner, other than to note that Armstrong and Goff, among others living at the premises, had access to the garage where the photograph was taken. The State offered nothing connecting the exhibit to the crime, other than to note its generally intimidating tone. Officer Dadez offered no foundation either, other than noting that the photograph was taken in the garage. Nothing in the record on appeal connects the message embodied in Exhibit 11 to Armstrong, Goff, or the crime itself beyond the simple fact that Armstrong and Goff, among others, had access to the area where the photograph was taken. Such a flimsy foundation is insufficient, particularly when the matters sought to be introduced are of such a potentially prejudicial nature. The circuit court, in the absence of more, should not have admitted Exhibit 11. Nor can this court say that this error was harmless. The reasonable possibility exists that Exhibit 11, and the message of intimidation and violence contained therein, contributed to Armstrong's conviction, and thus the circuit court's decision to admit it constitutes reversible error.

Pauline, 100 Hawai'i at 378, 60 P.3d at 328.

Armstrong contends Exhibit 11 was irrelevant and should have been excluded. Armstrong also argues that the threatening images presented by the photograph constituted improper evidence

of prior crimes, wrongs, or bad acts, and was unduly prejudicial, and therefore should have been excluded pursuant to HRE Rule 404(b) and the balancing test set forth in HRE Rule 403. This court agrees that the photograph was irrelevant. The lack of proper foundation for Exhibit 11 renders it irrelevant. Hawaii Rules of Evidence Rule 401 defines relevant evidence as "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." In the absence of any foundation tying the items depicted in Exhibit 11 to Armstrong, the Exhibit is irrelevant and is probative of no fact in issue. If the State had been able to lay an adequate foundation to demonstrate a connection between Armstrong and the banner, knife and handwriting depicted in the photograph, then Exhibit 11 would be relevant pursuant to HRE Rule 404(b) (for the same reasons discussed earlier in this memorandum) as a demonstration of the context of Armstrong and Goff's violent relationship, as Goff's motive to recant, and as evidence of Armstrong's motive to destroy Goff's property and his lack of accident.

IV. CONCLUSION

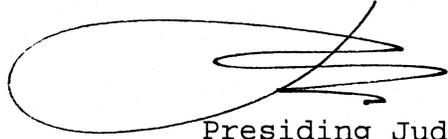
For the foregoing reasons, the Judgment filed on July 15, 2004 in the Circuit Court of the Second Circuit is

vacated, and this case is remanded to the circuit court for a new trial.

DATED: Honolulu, Hawai'i, December 13, 2006.

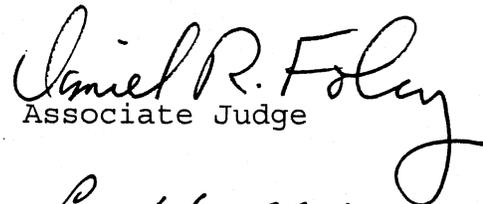
On the briefs:

Phyllis J. Hironaka,
Deputy Public Defender,
for Defendant-Appellant.



Presiding Judge

Arleen Y. Watanabe,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.



Associate Judge



Associate Judge