

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 26313

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
KEVIN DECANTO, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
(FC-CR. NO. 03-1-2052)

NORMA T. YARA  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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FILED

SUMMARY DISPOSITION ORDER

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

Kevin DeCanto (Defendant) appeals the December 5, 2003 judgment of the Family Court of the First Circuit (family court)<sup>1</sup> that convicted him, upon a jury's verdict, of abuse of a family or household member. Defendant was convicted for physically abusing his wife (Wife) on July 9, 2003.

After a painstaking 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 dispose of Defendant's points of error on appeal as follows:

1. In admitting evidence of the alleged September 23, 2001, December 31, 2001 and August 13, 2002 incidents of prior abuse of Wife by Defendant, the family court did not abuse its discretion, State v. Clark, 83 Hawai'i 289, 302, 926 P.2d 194, 207 (1996), and even if it did with respect to evidence of any particular incident, the error was harmless beyond a reasonable doubt. State v. Holbron, 80 Hawai'i 27, 32, 904 P.2d 912, 917

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<sup>1</sup>

The Honorable Reynaldo D. Gaulty presided.

(1995). Contrary to Defendant's averments on appeal,

- (a) the evidence of each of the three incidents, given by Wife at trial, (i) was admissible as present recollection refreshed, Rule 612(1), Hawaii Rules of Evidence (HRE), Chapter 626, Hawaii Revised Statutes (1993); and/or (ii) was admissible as past recollection recorded, HRE Rule 802.1(4) (1993); and/or (iii) was harmless beyond a reasonable doubt if *arguendo* inadmissible, Holbron, 80 Hawai'i at 32, 904 P.2d at 917, because such evidence was confirmed by Defendant in his trial testimony or innocuous in light of the other evidence properly admitted at trial,
- (b) Defendant's constitutional right to confrontation was not violated by the state of Wife's memory of the three incidents at the time of trial, State v. Fields, No. 25455, slip op. at 17 (Haw. App. filed May 31, 2005), cert. granted 108 Hawai'i 1, 116 P.3d 7,
- (c) Wife's trial testimony constituted a recantation, State v. Asuncion, 110 Hawai'i 154, 164-65, 129 P.3d 1182, 1192-93 (App. 2006), and evidence of the three prior incidents, which was "admissible to show the trier of fact [Wife's] relationship with [Defendant], where that relationship was

offered to explain a central fact of consequence -- [Wife's] recantation[,] " carried probative value that "far outweighs [sic] any prejudice that may result as a consequence of introducing this evidence." Clark, 83 Hawai'i at 303, 926 P.2d at 208 (internal quotation marks omitted); see also Asuncion, 110 Hawai'i at 166-67, 129 P.3d at 1194-95; HRE Rule 403 (1993), and

- (d) the testimony of a domestic violence expert witness is not a desideratum of Clark evidence. Asuncion, 110 Hawai'i at 166, 129 P.3d at 1194.

2. In refusing Defendant's proffer of evidence that Wife had previously attacked him, the family court did not abuse its discretion. Clark, 83 Hawai'i at 301-02, 926 P.2d at 206-07.

Therefore,

IT IS HEREBY ORDERED that the December 5, 2003 judgment of the family court is affirmed.

DATED: Honolulu, Hawai'i, January 30, 2007.

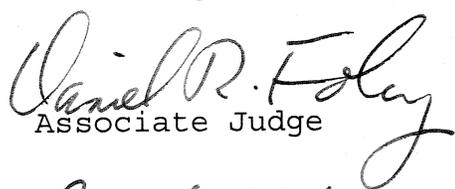
On the briefs:

Melissa W.H. Chee,  
Deputy Public Defender,  
for Defendant-Appellant.

James M. Anderson,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Plaintiff-Appellee.



Presiding Judge



Associate Judge



Associate Judge