NO. 27153

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
ALVIN PARK, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 04-1-0021)

MEMORANDUM OPINION
(By: Recktenwald, Chief Judge, Watanabe, and Nakamura, JJ.)

Defendant-Appellant Alvin Park (Park or Defendant) appeals from the Judgment filed on February 1, 2005, in the Circuit Court of the First Circuit (circuit court). Park was charged by complaint with first degree sexual assault, in violation of Hawaii Revised Statutes (HRS) Section 707-730(1)(a) (Supp. 2003)[1] (Counts 2 and 4); second degree sexual assault, in violation of Section 707-731(1)(a) (Supp. 2003)[2] (Count 1); and fourth degree sexual assault, in violation of HRS Section 707-

[1] Hawaii Revised Statutes (HRS) Section 707-730(1)(a) (Supp. 2003) provides:

> (1) A person commits the offense of sexual assault in the first degree if:
>
> (a) The person knowingly subjects another person to an act of sexual penetration by strong compulsion[.]

[2] HRS Section 707-731(1)(a) (Supp. 2003) provides:

> (1) A person commits the offense of sexual assault in the second degree if:
>
> (a) The person knowingly subjects another person to an act of sexual penetration by compulsion[.]

733(1)(a) (1993)[3] (Counts 3, 5, and 6). The complaining witness (CW) was Park's girlfriend. Park and the CW lived together and were in the process of breaking up when the alleged sexual assaults occurred. The complaint alleged sexual assaults committed on two separate occasions: Counts 1, 2, and 3 involved alleged sexual assaults committed on December 22 or 23, 2003; and Counts 4, 5, and 6 involved alleged sexual assaults committed on December 26, 2003.

After a jury trial,[4] Park was found guilty of Counts 4, 5, and 6. The jury was unable to reach a unanimous verdict on Counts 1, 2, and 3. The circuit court sentenced Park to concurrent terms of imprisonment of twenty years on Count 4, one year on Count 5, and one year on Count 6. The court dismissed Counts 1, 2, and 3 without prejudice.

On appeal, Park argues the circuit court erred in: 1) allowing the CW to testify that she did not immediately report the first incident of sexual abuse out of fear because Park had previously told her that he had broken his former girlfriend's jaw and sent the former girlfriend to the hospital; 2) denying Park's motion for a mistrial after the Deputy Prosecuting

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[3] HRS Section 707-733(1)(a) (1993) provides:

> (1) A person commits the offense of sexual assault in the fourth degree if:
>
> (a) The person knowingly subjects another person to sexual contact by compulsion or causes another person to have sexual contact with the actor by compulsion[.]

[4] The Honorable Lono J. Lee (Judge Lee) presided over the trial in this case.

Attorney (DPA), in his opening statement, allegedly violated the circuit court's *in limine* ruling by referring to Park's "broken jaw" statement to the CW; 3) permitting a doctor who examined the CW at the Sex Abuse Treatment Center to testify regarding statements the CW made to the doctor about the charged sexual assaults; and 4) limiting Park's cross-examination of the CW regarding her prior sexual history with Park, even though evidence of their past sexual behavior was admissible under Hawaii Rules of Evidence (HRE) Rule 412(b)(2)(B) on the issue of whether the CW had consented to the charged sexual acts. Park further argues that the DPA engaged in a deliberate course of misconduct that denied Park a fair trial.

We hold that the circuit court harmfully erred in unduly restricting Park's ability to elicit evidence of the CW's past sexual behavior with Park. Such evidence was admissible under HRE Rule 412(b)(2)(B) and was relevant to Park's defense that the CW consented to the charged sexual acts. Accordingly, we vacate Park's convictions and remand the case for a new trial.

BACKGROUND

The CW met Park in July of 2003, and she moved in with him a month later. They shared a room in a boarding house that had several other tenants. The CW was a fry cook for a Zippy's restaurant in Kaneohe, and Park did maintenance work for a realtor.

I. The Prosecution's Evidence

On December 2, 2003, Park went to Arizona in an effort to obtain custody of children he had fathered with his former girlfriend. The CW testified that she supported Park's trip to Arizona and helped arrange for him to stay at a hotel managed by her brother-in-law. After Park returned to Hawai'i on December 8, 2003, problems developed in the CW's relationship with Park.

The CW testified that she and Park got into a fight on December 12, 2003, and Park told her to pack her things and leave. On December 15, 2003, she told Park that she wanted to terminate their relationship. Park replied that this was fine because he was seeing someone else. The CW informed the landlord that she would be moving out at the end of the month. The CW's intention was to stay with friends in the meantime but to leave her belongings at the boarding house while she searched for a new place to live. From December 15, 2003, until December 22, 2003, the CW stayed at a friend's house, at her sister's house, and one night at the boarding house, where she slept on the floor of the room she shared with Park.

According to the CW, on either Monday, December 22, 2003, or Tuesday, December 23, 2003, she went to the boarding house after finishing work at four o'clock. She took a shower and dressed in an oversized T-shirt, shorts, and underwear. She noticed that Park was "all dressed" and appeared to be preparing to leave, so she assumed she would have the room to herself. The

CW felt tired, laid down on the bed, and fell asleep.

The CW woke up to find Park fondling her, with his hands in her shorts and his fingers in her vagina. She asked him, "[W]hat the fuck you're doing[?]" and told him to "leave me alone." Park ignored the CW and "kept on going." He took her clothes off and inserted his penis into her vagina from behind, despite her telling him that she "didn't want it" and to "get the fuck off of me." Park told the CW, "[T]his is what you want." Park's feet were wrapped around the CW's feet and he had one hand around her neck. Once the CW realized she couldn't fight him off, she "blanked out" and let him finish what he was doing. After Park "got satisfied[,]" he got off of the bed and left the room. The CW put her clothes back on and cried herself to sleep.

The CW went to work the next morning and did not return to the boarding house until December 25, 2003, to attend a Christmas party thrown by the landlord. Park was at the boarding house when the CW arrived at around noon, but Park stayed in their room, apparently because he felt sick. The CW made a plate of food for Park and brought it to him. The CW spent that night at her sister's house.

The following day, December 26, 2003, the CW went to the boarding house after work to pick up some extra clothes for the week ahead. Park was there. The CW took a shower and went into their room, at which point Park asked her to make him something to eat. She fixed him a plate of leftovers. It again looked to the CW that Park was getting ready to go somewhere, and

she was tired, so she lay down on the bed. The CW was wearing a T-shirt, shorts, and underwear. Park stood in front of her and told her that he "wanted to fuck [her]," a request he made a "couple times." Each time the CW said "No." Park then said, "I'm going to fuck you," and he touched her vagina and began removing her clothing. The CW told Park "No" and to leave her alone. Park lay on top of the CW so she could not move. When he put his penis inside her vagina, she "blanked out" and "just let him finish." While he was on top of her, he touched her breast and tried to kiss her. Park made sounds indicating that he had an orgasm and then he got off of the CW and threw something in the rubbish can. He appeared "happy, like I got you" and left the room. The CW felt sick, put her clothes back on, rolled up into a ball, and went to sleep.

The next morning at work, the CW told her friend, Marianne Pidad (Pidad), about what Park had done. She also mentioned what had happened to a police officer who was at the restaurant. The officer offered to assist the CW in making a report, but the CW declined the offer because she wanted to further discuss the matter with Pidad. After work, the CW and Pidad went to the police station where the CW made her report. The police referred her to the Sex Abuse Treatment Center at Kapiolani Hospital where she was examined by Dr. Steven Imura. Dr. Imura's examination did not reveal any evidence of physical injuries such as bruises or tears in the vaginal area. Dr. Imura's examination was inconclusive as to whether the CW had

consensual or non-consensual sexual intercourse or even as to whether the CW recently had sexual intercourse.

After Park was arrested, the CW accompanied a detective to the boarding house where the detective retrieved two condoms from the trash from the room. No semen secretions were detected on either condom. One of the condoms was found to have cells with DNA that matched Park's DNA. No cells with the CW's DNA were detected on either condom.

II. The Defense Case

Park testified in his own defense at trial. Park's account of how he met the CW and their moving in together was consistent with the CW's testimony. Their accounts diverged beginning with Park's trip to Arizona in early December 2003, to seek custody of his children. According to Park, the CW was "totally against" Park going to Arizona and expressed concern that Park might reunite with his ex-girlfriend. While Park was in Arizona, the CW called him ten to fifteen times every day.

Park returned to Hawai'i on December 8, 2003, after the Arizona court proceedings were continued to February 2004. Upon his return, Park's relationship with the CW was "just like one honeymoon all over again," except that the CW barraged him with questions about whether he planned to get back together with his ex-girlfriend. Park told the CW that he would do whatever it took to get custody of his kids, including getting back together with his ex-girlfriend. Park testified that the CW told him, "F, no. . . . [I]f I cannot have you, nobody going to have you."

In the wake of the CW's incessant questioning and accusations, Park told the CW to find her own place to live and that maybe they could remain friends, but they could not live together. The CW asked that she be allowed to stay until the end of the month, through the holiday season, and Park agreed. Despite their break-up, the CW continued to sleep on the bed with Park up through December 23, 2003. They even attended a baby shower together on December 20, 2003.

On December 23, 2003, Park was lying on the bed when the CW came home from work at about 6 or 7 p.m. and sat on the bed next to him. Park testified that they eventually began kissing and the CW asked Park to make love to her. The CW was still wearing her work clothes, and Park told her to take a shower first. After her shower, the CW came back to the room wrapped only in a towel. They kissed for a while and the CW asked Park to perform oral sex on her. She also reminded Park to use a condom because she had not been able to afford birth control that month. Park retrieved a condom, set it on the side of the bed, and gave the CW oral sex. He then disrobed, put on the condom, and engaged in consensual sexual intercourse with the CW in the "missionary position." After Park finished, he took the condom off and threw it in the trash can next to the bed. Park then took a shower and got something to eat. The CW showered as well, and the couple returned to bed and slept through the night.

The next day, December 24, 2003, Park exchanged gifts with the CW at about 5 or 6 p.m. after she returned home from work. The CW was so happy with her gifts that she joined Park on the bed and started kissing him. They engaged in oral sex and had intercourse, with Park using a condom, after which they both took a shower. On his way out of the house to distribute Christmas gifts, Park threw the used condom in the rubbish can in the kitchen of the boarding house.

The following day, December 25, 2003, the CW returned in the afternoon for a Christmas party at the boarding house after spending the night at her sister's house. Park wasn't feeling well and the CW fixed him a plate of food. The CW left the boarding house to attend a party at her sister's house and didn't return until the following evening.

On December 26, 2003, Park was lying on the bed when the CW arrived at around 6 or 7 p.m. The CW warmed some food for Park, and while he ate, she took a shower. She returned to their room dressed in jean shorts and an exercise tank top. The CW got "real close" to Park on the bed. The CW told him she had a difficult day at work. Park replied, "[S]o, I guess you like fuck then." The CW replied, "[W]hat[?]" and Park said, "I guess you want to fuck." The CW responded, "[I]f you want to take my pants off[.]" The CW unbuttoned her shorts and then Park pulled them off while she removed her tank top. The CW reminded Park that she was not using birth control, so Park grabbed a condom, which he testified was individually-wrapped and required two

hands to open. The CW did not struggle and Park did not force her to have sex with him on that date.

The defense also called Park's landlord, who lived on the second floor of the boarding house, and a boarding house tenant as witnesses at trial. They both testified that they were home on the dates of the alleged sexual assaults and did not hear any arguing, struggling, or unusual noises coming from the room Park shared with the CW.

DISCUSSION

I.

A.

We first address the question of whether the circuit court violated Park's right to present his defense by placing improper restrictions on Park's ability to present evidence of the CW's past sexual behavior with him. Park sought to adduce evidence of the CW's past sexual history with him in support of his defense that the CW had consented to the sexual acts for which he was charged. In particular, Park wanted to show that as a prelude to engaging in consensual sex, he and the CW had a routine practice in which the CW took a shower at Park's request, the CW then asked for and received oral sex from Park, after which they engaged in consensual sexual intercourse. Park contended that the circumstances surrounding the charged sexual acts were consistent with their routine practice and thus corroborated his consent defense.

To support the defense of consent, HRE Rule 412 (Supp. 2006) permits a defendant charged with sexual assault to introduce evidence of the alleged victim's "past sexual behavior" with the defendant. HRE Rule 412 provides in relevant part as follows:

> (a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of the sexual offense is not admissible to prove the character of the victim to show action in conformity therewith.
>
> (b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual offense, evidence of an alleged victim's past sexual behavior other than reputation or opinion evidence is not admissible to prove the character of the victim to show action in conformity therewith, unless the evidence is:
>
> . . .
>
> (2) Admitted in accordance with subsection (c) and is evidence of:
>
> . . .
>
> (B) Past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which sexual assault is alleged.
>
> (c)(1) If the person accused of committing a sexual offense intends to offer under subsection (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer the evidence not later than fifteen days before the date on which the trial in which the evidence is to be offered is scheduled to begin[.] . . .
>
> (2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subsection (b), the court shall order a hearing in chambers to determine if the evidence is admissible. At the hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subsection (b) of rule 104, if the relevancy of the evidence that the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for this purpose, shall accept evidence on the issue of whether the condition of fact

> is fulfilled and shall determine the issue.
>
> (3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence that the accused seeks to offer is relevant and that the probative value of the evidence outweighs the danger of unfair prejudice, the evidence shall be admissible in the trial to the extent an order made by the court specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.
>
> . . . .
>
> (h) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which a sexual offense or sexual harassment is alleged.

(Emphases added.)

More than fifteen days before trial, Park filed a motion for an order allowing introduction of evidence of the CW's past sexual behavior pursuant to HRE Rule 412(b)(2)(B). The motion was supported by the declaration of Park's counsel, which stated in relevant part as follows:

> 2. Defendant is alleged to have sexually assaulted [the CW] on two (2) occasions in the bedroom that they shared as roommates.
>
> 3. The first alleged sexual assault occurred on or about December 22, to and including December 23, 2003.
>
> 4. The second alleged sexual assault occurred on or about December 26, 2003.
>
> 5. Defendant Park and [the CW] were originally in a boyfriend and girlfriend relationship.
>
> 6. As boyfriend and girlfriend, Defendant Park and [the CW] had been having regular consensual sexual contact, including sexual intercourse.
>
> 7. On or about December 15, 2003, [the CW] had informed Defendant Park and their landlord that she would be moving out of the room that she shared with Defendant Park at the end of the month.
>
> 8. Subsequent to December 15, 2003, [the CW] and Defendant Park continued to engage in consensual sexual relations.
>
> 9. The consensual sexual relations continued even after the alleged sexual assault on December 22, 2003 and before the alleged sexual assault on December 26, 2003.

> 10. Defendant Park submits that evidence of a continuing consensual sexual relationship after the first alleged sexual assault casts doubt as to the sexual assaults alleged by [the CW].

Plaintiff-Appellee State of Hawai'i (the State) did not file any written objections to Park's HRE Rule 412 motion. On May 20, 2004, a hearing was held on the motion before the Honorable Michael A. Town (Judge Town). Judge Town apparently orally granted the motion at the hearing,[5] but did not sign a written order before he "left." A written order prepared by Park's counsel, which was approved as to form by the DPA, was signed by the Honorable Lono A. Lee (Judge Lee), who presided over Park's trial. The written order, without elaboration, stated "IT IS HEREBY ORDERED THAT Defendant's [HRE Rule 412] Motion is GRANTED."

During defense counsel's cross-examination of the CW at trial, the following exchange occurred:

> [DEFENSE COUNSEL:] Now, you're saying that on December -- that first incident, either the 22nd or the 23rd, that you were forced to, against your will, have sex; isn't that right?
>
> [THE CW:] Yes.
>
> Q. Isn't it true that's not the case, you and [Park] engaged in consensual sex; right?
>
> A. No.
>
> Q. In both instances, December 23rd or the 22nd, the first instance and the 26th, both times you took a shower before going on -- into the bed; right?
>
> A. Yes.
>
> Q. That's what you and [Park] normally do before sex, you take a shower; isn't that right?
>
> A. No.

[5] A transcript of the hearing was not included in the record on appeal.

> Q. And then as a prelude to sex, you ask him for oral sex; isn't that correct?
>
> A. I don't understand prelude.
>
> Q. Before having intercourse, you ask for oral sex; correct?
>
> A. You mean I ask for it?
>
> Q. Yes.
>
> A. Sometimes.
>
> Q. He always ask for you to take a shower; correct?
>
> [DPA]: Objection. I want to approach.

At sidebar, the DPA argued that defense counsel should not be permitted to question the CW about any sexual behavior with Park prior to December 15, 2003. The DPA interpreted Park's HRE Rule 412 motion as only seeking to adduce evidence of the CW's sexual practices with Park during the time period between December 15, 2003, and December 26, 2003, but not earlier. The DPA thus argued that the circuit court's order granting Park's HRE Rule 412 motion only allowed the defense to question the CW about her sexual practices with Park between December 15 and 26, 2003.

In response, defense counsel proffered the justification and need for evidence of the sexual practices of the CW and Park before December 15, 2003, as follows:

> Because in their practice, their sexual -- when they willingly engage in sexual conduct, [Park] asks [the CW] to take a shower and then she asks for oral sex. So, I can get into those questions about what happened at those times because it indicates, again, through cross-examination in both those specific incidents, she took a shower before, and that indicates that's going to support the defense's claims that because this was engaging in consensual sexual practice, because this is what they normally do when they engage in sex. This is not something outside the [HRE Rule] 412 motion.

Defense counsel further argued that "what they do in general determines what happened on these -- will have a bearing on what happened on those two specific instances, December 22 or 23rd and the 26th."

The circuit court sustained the DPA's objection and ruled that defense counsel could not ask the CW about her sexual practices with Park before December 15, 2003. Addressing Park's counsel, the court stated:

> [Y]ou can ask anything from the 15th to 22nd [sic].[6] Don't go outside about that, about the sex with the general sexual preferences before that time. Okay. So the shower is fine. Stay within the limitations of the Rules of Evidence.

(Emphasis added.)

Upon resuming his cross-examination, defense counsel questioned the CW as follows:

> [DEFENSE COUNSEL]: December 23rd or 22nd, the first incident; right?
>
> [THE CW:] Yes.
>
> Q. First incident, okay. You ask for oral sex; isn't that right?
>
> A. You're saying the first time it happened I asked for oral sex?
>
> Q. Yes.
>
> A. No.
>
> Q. The 26th, 2003, before having sexual intercourse, you ask for oral sex; right?
>
> A. Can you rephrase? When was this, before --
>
> Q. You say that you were assaulted on the 26th as well, right, that's the second time; right?
>
> A. Yes.

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[6] While the trial court said, "the 22nd[,]" we presume that it meant to say "the 26th." The parties apparently understood that the court meant the 26th because defense counsel proceeded to question the CW about her sexual practices on the 26th without objection.

Q. You took a shower first, right, and then you went on the bed; correct?

A. Yes.

Q. It's because you asked for oral sex; right?

A. No.

Q. [Park] had asked you to take a shower first; right?

A. No.

B.

On appeal, Park argues that the circuit court abused its discretion in precluding him from questioning the CW about her sexual practices with Park prior to December 15, 2003. We agree.

Through his cross-examination of the CW, Park sought to elicit evidence that would support his contention that they generally engaged in a routine pattern of activity as a prelude to consensual sexual intercourse. This included the CW's taking a shower at Park's request followed by Park performing cunnilingus on the CW before they engaged in sexual intercourse. Park proffered that he wanted to elicit evidence of their routine sexual practices to show that they acted in conformity with their routine during the charged incidents, which in turn would support his defense that the alleged sexual acts were consensual. Evidence of the CW's past sexual behavior with Park, including evidence of their routine sexual practices, was admissible under HRE Rule 412(b)(2)(B) for the purposes proffered by Park. See State v. Sanchez-Lahora, 616 N.W.2d 810, 817-20 (Neb. Ct. App. 2000); Minus v. State, 901 So.2d 344, 348-49 (Fla. Dist. Ct. App. 2005); League v. Commonwealth, 385 S.E.2d 232, 236-38 (Va. Ct.

App. 1989).

Even beyond HRE Rule 412(b)(2)(B), Park, as a criminal defendant, had a constitutional right "to appropriate cross-examination of the complaining witness." State v. Calbero, 71 Haw. 115, 124, 785 P.2d 157, 161 (1989). While the circuit court may impose reasonable limitations on the cross-examination of a witness, the court abused its discretion by restricting the scope of defense counsel's cross-examination of the CW about her sexual practices with Park to the period from December 15 until December 26, 2003. The CW denied that she had any consensual sexual intercourse with Park during this period. Defense counsel wanted to establish the CW's routine sexual practices with Park by asking the CW about their sexual practices before December 15, 2003 -- a time during which the CW concedes she and Park engaged in consensual sexual intercourse. By limiting defense counsel's questions to a time period when the CW denied any consensual sexual intercourse with Park, the circuit court effectively guaranteed that the defense would not be able to elicit the information it sought from the CW.

Moreover, the circuit court's ruling prevented Park from laying the groundwork for his consent defense though his own testimony. Because the circuit court had effectively ruled that only evidence of the CW's sexual behavior with Park between the 15th and 26th of December was admissible, Park could not relate to the jury the routine sexual practices he and the CW had developed during their relationship. Park was thus deprived of

the ability to provide a context for his claim that the charged sexual acts were consensual -- a context that may have enhanced the credibility of his claim. For example, with respect to the first charged incident, Park testified that the CW took a shower at his request, that she then asked for oral sex, and that he performed oral sex on her, after which they engaged in consensual sexual intercourse. Because of the court's ruling, however, Park was unable to tie his account of what happened to a sexual routine he and the CW had developed. The court's ruling also prevented Park from arguing that the CW's testimony that she took a shower before each of the charged incidents was consistent with his consent defense.

We conclude that the circuit court's evidentiary ruling was erroneous and imposed undue restrictions on Park's ability to present his consent defense. See State v. Vliet, 91 Hawai'i 288, 294 n.3, 983 P.2d 189, 195 n.3 (1999) (stating that an accused has a constitutional right to present a defense). We further conclude that under the circumstances of this case, the court's error was not harmless beyond a reasonable doubt. Accordingly, we vacate Park's convictions.

II.

We address the remaining issues raised by Park only to the extent necessary to resolve this appeal and to assist the circuit court on retrial.

A.

We conclude that the CW's testimony that Park had previously told her that he had broken his former girlfriend's jaw and sent the former girlfriend to the hospital was relevant and admissible to explain why the CW did not immediately report the first incident of alleged sexual abuse. Thus, the circuit court did not err in admitting the "broken jaw" statement.

The defense acknowledged before trial that the CW's delayed reporting was going to be a "big issue in this case." An alleged victim's delay in reporting a sexual assault almost inevitably leads to questions about the alleged victim's credibility. The State was entitled to address an inherent weakness in its proof by providing an explanation for the CW's delayed reporting of the alleged sexual abuse. See State v. Galloway, 984 P.2d 934, 936-37 (Or. Ct. App. 1999).

Park's "broken jaw" statement was admissible as an admission by a party-opponent under HRE Rule 803(a)(1) (1993). It was also admissible under HRE Rule 404(b) (Supp. 2006) because it was not offered to show Park's criminal propensity, but to explain the CW's delayed reporting. Indeed, the State sought admission of Park's statement not for its truth, but only to show the CW's state of mind. Assuming the State maintains this position on retrial, the circuit court should give the jury a limiting instruction along these lines to reduce the risk of any unfair prejudice.

B.

With respect to Park's claim that the DPA violated the circuit court's *in limine* ruling by referring, in opening statement, to Park's "broken jaw" statement, we do not agree with Park's suggestion that the DPA willfully violated the court's ruling. The limits the circuit court intended to impose by its oral *in limine* ruling were not entirely clear, and the record indicates that the DPA and Park interpreted the ruling differently. On retrial, any confusion can be avoided by the circuit court providing clear guidance to counsel on what evidence will be permitted.

C.

1.

Park argues that the circuit court erred in admitting the CW's statements to Dr. Steven Imura, who examined the CW at the Sex Abuse Treatment Center. The State offered the CW's statements to Dr. Imura pursuant to HRE Rule 803(b)(4)(1993) as statements made for purposes of medical diagnosis or treatment. The circuit court permitted Dr. Imura to testify about the CW's statements but gave a limiting instruction that the statements were not to be considered by the jury for their truth, but only as a foundation for Dr. Imura's examination.

> [THE DPA]: The statement that [the CW] made to you, was it a statement made for the purpose of medical diagnosis or treatment in describing medical history that would be reasonably pertinent to your diagnosis and treatment to her?
>
> [DR. IMURA]: Yes.
>
> [DPA]: Okay. Then my next question is going to be what is it that she told you?

THE COURT: And on overruling the defense's objection, it is not going for the truth of the matter asserted, however, it's foundation for the physician's exam.

. . . .

[DR. IMURA]: [The CW] stated that she came home from work. She was living with the alleged perpetrator, he is her ex-boyfriend. As she was dozing off on her bed, when he told the patient to get up, get up, I want to have intercourse with you. He fondled the patient's breasts and crotch and the patient, [the CW], told him no. He then took off her shorts and panties and put his finger into her vagina, as well as penis and ejaculated inside of her.

The alleged perpetrator then got up and left, and patient fell asleep after putting her clothes back on. And she talked to her girlfriend the next day, who urged her to report the incident.

2.

HRE Rule 803(b)(4) provides:

Rule 803 Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(b) Other exceptions.

. . . .

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The Commentary to HRE Rule 803 pertaining to HRE Rule 803(b)(4) states:

Paragraph (b)(4): This exception, which is identical with Fed. R. Evid. 803(4), liberalizes the common-law rule that admitted only statements made for the purpose of medical treatment, see, e.g., Cozine v. Hawaiian Catamaran, 49 H. 77, 412 P.2d 669 (1966). Statements made for purposes of treatment are admitted "in view of the patient's strong motivation to be truthful." Fed. R. Evid. 803(4), Advisory Committee's Note. Statements made for diagnostic purposes only, while not similarly motivated, would be recited in any event by a testifying physician under Rule 703. Were these statements not substantively admissible, a limiting instruction would be necessary, and "[t]he distinction thus called for [is] one most unlikely to be made by juries." Advisory Committee's Note, supra. This difficulty is avoided by providing for substantive admissibility of all "reasonably pertinent" statements made for purposes of treatment or diagnosis.

> On the question whether a statement is "reasonably pertinent to diagnosis or treatment," the Advisory Committee's Note to Fed. R. Evid. 803(4) suggests: "Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light."

Dr. Imura's testimony included statements made by the CW that do not appear to have been reasonably pertinent to the CW's diagnosis or treatment. For example, it is difficult to see how the CW's reference to her conversation with her girlfriend the day after the alleged sexual assault was admissible under HRE Rule 803(b)(4) as reasonably pertinent to the CW's diagnosis or treatment.

Statements qualifying under HRE Rule 803(b)(4) are admissible for their truth. On the other hand, the circuit court ruled that the CW's statements to Dr. Imura about the sexual assault were not being admitted for their truth, but only as a foundation for Dr. Imura's examination and presumably his expert testimony. See HRE Rules 703 and 705 (1993). In this case, Dr. Imura's examination was inconclusive regarding whether the CW had consensual sexual intercourse or non-consensual sexual intercourse or even regarding whether the CW had recently had any sexual intercourse.

On retrial, the circuit court should determine whether and to what extent the CW's statements to Dr. Imura were made for purposes of medical diagnosis or treatment and were reasonably pertinent to diagnosis or treatment.[7] The CW's statements are

[7] In making this determination, the trial court can consider, among other things, 1) the understanding of the complaining witness (CW) regarding the purpose of her examination and 2) the relationship between the information the CW provided and Dr. Steven Imura's diagnosis or treatment.

admissible for their truth only if they satisfy the requirements of HRE 803(b)(4). Moreover, even if the CW's statements satisfy HRE Rule 803(b)(4), the statements, or a portion thereof, are subject to exclusion pursuant to HRE Rule 403 (1993) if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.[8] See State v. Yamada, 99 Hawai'i 542, 556, 57 P.3d 467, 481 (2002). The circuit court should specify the evidentiary basis for any ruling that permits Dr. Imura to testify about the CW's statements.

D.

We reject Park's claim that the DPA engaged in misconduct that was so egregious that a retrial is barred by the double jeopardy clause of the Hawai'i and United States Constitutions.

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[8] The trial court should also conduct the balancing test under Hawaii Rules of Evidence (HRE) Rule 403 (1993) if the CW's statements to Dr. Imura are not offered for their truth, but to explain the basis for Dr. Imura's expert opinion pursuant to HRE Rules 703 and 705 (1993). See State v. Yamada, 99 Hawai'i 542, 556, 57 P.3d 467, 481 (2002).

CONCLUSION

We vacate the circuit court's February 1, 2005, Judgment and remand the case for a new trial.

DATED: Honolulu, Hawai'i, May 18, 2007.

On the briefs:

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Chief Judge

Associate Judge

Associate Judge