

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27239

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
JOSEPHINE K. HATORI, Defendant-Appellant

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FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 04-1-2359)

MEMORANDUM OPINION

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

Defendant-Appellant Josephine K. Hatori was found guilty after a jury trial of abusing her live-in boyfriend (Boyfriend). At trial, Boyfriend recanted his allegations of abuse. On appeal, Hatori argues that the trial court erred in permitting the prosecution: 1) to introduce statements Hatori made after the alleged abuse incident to show Hatori's mental state at the time of the alleged abuse; and 2) to reopen its case to impeach Boyfriend's testimony that he had been drinking at the time of the incident, after Hatori had unsuccessfully moved for judgment of acquittal and rested without introducing any evidence. We disagree with Hatori and affirm her conviction and sentence.

Hatori appeals from the Judgment entered on April 14, 2005, by the Family Court of the First Circuit (family court).¹ Hatori was convicted of abuse of a family or household member in violation of Hawaii Revised Statutes (HRS) § 709-906 (Supp.

¹ The Honorable Reynaldo D. Graulty presided.

2004).² The family court sentenced Hatori to a two-year term of probation, subject to various conditions including that she serve a thirty-day term of incarceration and undergo domestic violence intervention.

BACKGROUND

The prosecution called two witnesses in its case in chief: police officer John Bahng and Boyfriend. Officer Bahng testified that he was dispatched at 5:00 p.m. to the apartment shared by Hatori and Boyfriend in response to a domestic abuse call. When he arrived at the apartment ten minutes later, only Boyfriend was present. Boyfriend's lip was swollen and red, and there was dried blood outside his nostril and two lacerations to his stomach. Officer Bahng described the injuries as "fresh." Boyfriend informed Officer Bahng that Boyfriend had been involved in an argument with his girlfriend Hatori, and that Hatori had struck Boyfriend in the face with a cell phone and scratched him in the stomach with her fingernails. Boyfriend provided Officer Bahng with a written statement that documented these claims.

While Boyfriend was preparing his written statement, Hatori returned to the apartment. Hatori was very upset and yelled and cursed at Boyfriend. Officer Bahng testified that Hatori said things to Boyfriend like, "[F]uck you, you fucker, I know you was with that bitch, go back to that whore." Officer Bahng arrested Hatori.

When Boyfriend testified at trial, he recanted his allegations of abuse. Boyfriend stated that the injuries to his mouth and nose were caused by accident when Hatori tried to pass a cell phone to Boyfriend at the same instant that Boyfriend had

² At the time of the alleged offense, Hawaii Revised Statutes (HRS) § 709-906 (Supp. 2004) provided 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 jointly residing or formerly residing in the same dwelling unit.

turned to reach for his beer. Boyfriend claimed that as he was returning to his former position, his mouth and nose rammed into Hatori's hand. Boyfriend stated that the scratches on his body were not caused by Hatori but had been sustained earlier that day while he was performing his job as a stonemason. When confronted with his written statement, Boyfriend testified that the allegations in the statement that Hatori had abused him were false. The family court permitted the prosecution to introduce a redacted version of Boyfriend's written statement, which provided as follows:

[(redacted material)] [Hatori] started yelling and swearing and then hit me with my cell phone in my mouth. After she started to scratch and punch my face and chest. I just tried to block the punches. [(redacted material)] She also threaten to do me more harm later tonight if I don't leave the house. [(redacted material)] I also got scratches to my chest.

Boyfriend also testified that he began drinking beer in the afternoon on the day in question and was on his third beer when he sustained the accidental injuries to his mouth and nose. After Boyfriend testified, the prosecution rested. The defense moved for judgment of acquittal, which was denied. The family court called a recess to permit Hatori to discuss with counsel whether Hatori would testify. The proceedings resumed in the absence of the jury. The family court engaged Hatori in the colloquy required by Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995), and Hatori advised the court of her decision not to testify. The court then addressed the prosecution's request to recall Officer Bahng to impeach Boyfriend's testimony that Boyfriend had been drinking beer prior to sustaining the injuries to his mouth and nose.³ The prosecutor proffered that Officer Bahng would testify that he did not observe any indicia that Boyfriend had been drinking.

Over Hatori's objection, the family court ruled that it would permit the prosecution to recall Officer Bahng as a

³ The record suggests that during the prior recess, the prosecution alerted the defense and the trial court that it wanted to recall Officer John Bahng.

"rebuttal" witness. When the trial resumed, the defense rested without presenting any evidence. The prosecution then called Officer Bahng, who testified that while interacting with Boyfriend on the day in question, Officer Bahng did not detect any odor of alcohol on Boyfriend's breath or any other indicia that Boyfriend had been drinking.

DISCUSSION

I.

Over Hatori's objection, the family court permitted the prosecution to introduce evidence that after the alleged abuse incident and in the presence of Officer Bahng, Hatori yelled at Boyfriend, "[F]uck you, you fucker, I know you was with that bitch, go back to that whore." The family court ruled that Hatori's post-incident statement was admissible as a statement of Hatori's then existing mental or emotional condition under Hawaii Rules of Evidence (HRE) Rule 803(b)(3) (1993).⁴

On appeal, Hatori argues that the family court erred in admitting her post-incident statement. Hatori contends that the statement, which was made sixty-five minutes after the alleged abuse occurred, was not relevant to her state of mind at the time of the alleged abuse and was more prejudicial than probative.

⁴ Hawaii Rules of Evidence (HRE) Rule 803(b)(3) (1993) 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.

. . . .

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Although the family court relied upon the wrong evidentiary rule, we conclude that it properly admitted Hatori's post-incident statement. See Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 251, 948 P.2d 1055, 1092 (1997) (stating that where the lower court's decision is correct, it will not be overturned on the ground that the court gave the wrong reason for its ruling).

Hatori's statement was relevant to proving her state of mind at the time of the alleged abuse. It was not, however, "[a] statement of [Hatori's] then existing state of mind, emotion, sensation, or physical condition" under HRE Rule 803(b)(3). Examples of statements qualifying under HRE Rule 803(b)(3) are statements of a declarant such as, "I am depressed" and "I have a cold." Addison M. Bowman, Hawaii Rules of Evidence Manual § 803-3[3] (3d ed. 2006). On the other hand, a declarant's statement, "You are a jerk!" and profanity directed at another person, while indicative of the declarant's state of mind, are not statements of the declarant's state of mind.

Hatori did not declare in her statement that she was angry or that she wanted to assault Boyfriend, and thus her statement did not fall within the purview of HRE Rule 803(b)(3). Nevertheless, Hatori's statement was admissible as an admission by a party-opponent under HRE Rule 803(a)(1) (1993).⁵ Hatori's statement was also admissible for non-hearsay purposes because the fact that she made the statement, regardless of its truth, could be used as a basis for inferring her emotional condition,

⁵ HRE Rule 803(a)(1) (1993) 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:

- (a) Admissions.
 - (1) Admission by party-opponent. A statement that is offered against a party and is (A) the party's own statement, in either the party's individual or a representative capacity

mental state, and motives in committing the alleged abuse. The family court's ruling was therefore correct even though it relied upon the wrong evidentiary rule in admitting the evidence.

We reject Hatori's claim that the evidence regarding her statement was more prejudicial than probative. Hatori's statement was highly probative of her state of mind at the time of the alleged abuse. It tended to show that she remained extremely angry at Boyfriend over an hour after the incident, that she had a motive for assaulting him (because she "knew" he was fooling around), and that her striking him was intentional and not the result of an accident. We do not agree with Hatori's contention that her use of coarse language inflamed the jury against her. The family court did not abuse its discretion in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See HRE Rule 403 (1993).

II.

Hatori argues that the family court erred in permitting the prosecution to call Officer Bahng as a "rebuttal" witness to impeach Boyfriend's testimony that Boyfriend had been drinking beer prior to sustaining the injuries to his mouth and nose. The court allowed the prosecution to reopen its case with Officer Bahng's additional testimony after Hatori had unsuccessfully moved for judgment of acquittal and rested her case. It is true that the prosecution had no right to call a rebuttal witness; Hatori did not present any evidence before resting and thus there was no defense case for the prosecution to rebut. A trial court, however, has the discretion to permit a party to reopen its case to submit additional evidence. State v. Christian, 88 Hawai'i 407, 417, 967 P.2d 239, 249 (1998); State v. Fetelee, 114 Hawai'i 151, 159-60, 157 P.3d 590, 598-99, (App. 2007). We conclude that the family court did not abuse its discretion in permitting the prosecution to reopen its case to present Officer Bahng's testimony. See Fetelee, 114 Hawai'i at 159-60, 157 P.3d at 598-99; State v. Dunbar, 721 A.2d 1229, 1232-34 (Conn. App. Ct.

1998); United States v. Gray, 405 F.3d 227, 236-38 (4th Cir. 2005).

This case is unlike State v. Kwak, 80 Hawai'i 297, 909 P.2d 1112 (1995). In Kwak, the defense moved for judgment of acquittal on the ground that the prosecution had failed to prove venue. Id. at 304, 909 P.2d at 1119. The trial court, believing that the evidence on venue had been insufficient, permitted the prosecution to reopen its case to present additional evidence to overcome the perceived insufficiency of evidence. Id. at 305, 909 P.2d at 1120. The Hawai'i Supreme Court concluded that under these circumstances, the trial court abused its discretion in permitting the prosecution to reopen its case.⁶ Id. Under Kwak, a trial court abuses its discretion in permitting the prosecution to reopen its case to remedy the insufficiency of evidence on a required element of proof⁷ where the evidentiary deficiency is raised in, and made known to the prosecution through, a defense motion for judgment of acquittal. Id. at 304-05, 909 P.2d at 1119-20.

In Hatori's case, there was ample evidence to support the abuse charge without the additional testimony presented by Officer Bahng after the prosecution was allowed to reopen its

⁶ The Hawai'i Supreme Court ultimately held that the trial court's error in permitting the prosecution to reopen its case to introduce certified tax maps as evidence of venue was harmless because the trial court could have taken judicial notice of the maps instead of receiving them into evidence. State v. Kwak, 80 Hawai'i 297, 305-07, 909 P.2d 1112, 1120-22 (1995).

⁷ HRS § 701-114(1) (1993) requires the following to be proved beyond a reasonable doubt before a person may be convicted of an offense:

- (a) Each element of the offense;
- (b) The state of mind required to establish each element of the offense;
- (c) Facts establishing jurisdiction;
- (d) Facts establishing venue; and
- (e) Facts establishing that the offense was committed within the [applicable statute of limitations].

case. Officer Bahng's additional testimony was not necessary to remedy any insufficiency of evidence on a required element of proof raised by Hatori's motion for judgment of acquittal. Nor did the family court permit the prosecution to reopen its case for the purpose of overcoming a perceived deficiency in a required element of proof. Instead, the family court determined that Boyfriend's testimony about consuming beer was unanticipated and thus allowed the prosecution to recall Officer Bahng to impeach Boyfriend's testimony. The court did not abuse its discretion in so ruling.

We reject Hatori's suggestion that she suffered prejudice because the family court allowed Officer Bahng to testify after the defense had rested rather than before. Prior to resting her case, Hatori knew that the court had ruled that Officer Bahng would be permitted to give additional testimony and heard the prosecutor's proffer of the substance of that testimony. Hatori could have requested that Officer Bahng present his additional testimony before the defense rested if that would have made a difference. Hatori made no such request. Hatori also did not ask to present evidence after Officer Bahng completed his additional testimony. There is no indication that the family court would have refused such a request if it had been made.

CONCLUSION

We affirm the family court's Judgment entered on April 14, 2005.

DATED: Honolulu, Hawai'i, August 31, 2007.

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