NO. 27296

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
KENNETH PAUL PEELER, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 05-1-1049)

SUMMARY DISPOSITION ORDER
(By: Recktenwald, C.J., Foley and Fujise, JJ.)

Defendant-Appellant Kenneth Paul Peeler (Peeler) appeals from the Judgment filed on May 2, 2005 in the Family Court of the First Circuit (family court).[1]

Peeler was charged with two counts of Abuse of Family or Household Members, in violation of Hawaii Revised Statutes (HRS) § 709-906 (2002 Supp.).[2] The charges related to an incident involving Peeler and the complaining witness (CW) that occurred on January 15, 2005 (Count One), and another incident involving them on January 16, 2005 (Count Two). A jury could not reach a verdict on Count One, and the family court dismissed that count with prejudice; the jury found Peeler guilty on Count Two. The family court sentenced him to a two-year term of probation and imprisonment for 21 days.

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[1] The Honorable Patrick W. Border presided.

[2] Hawaii Revised Statutes (HRS) § 709-906 (2002 Supp.) provides in pertinent part:

> **§709-906 Abuse of family or household members; penalty.** (1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member or to refuse compliance with the lawful order of a police officer under subsection (4). The police, in investigating any complaint of abuse of a family or household member, upon request, may transport the abused person to a hospital or safe shelter.
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> For the purposes of this section, "family or household member" means . . . persons jointly residing or formerly residing in the same dwelling unit.

On appeal, Peeler argues that:

(1) The family court erred in admitting State's Exhibit 1, the CW's written statement, without a proper foundation as required by Rule 802.1(1)(B), Hawaii Rules of Evidence (HRE), Chapter 626, HRS.

(2) The family court abused its discretion when it admitted testimony by Honolulu Police Department (HPD) Officer Fred Rosskopf (Officer Rosskopf) concerning a statement by the CW to HPD Officer David Shabaz (Officer Shabaz) that Peeler "had physically abused her." Peeler contends that the family court admitted the testimony pursuant to State v. Feliciano, 2 Haw. App. 633, 638 P.2d 866 (1982), and that it was error for it to do so without also providing cautionary instructions to the jury.

(3) The family court abused its discretion when it allowed testimony by Officer Rosskopf about the CW's statement to Officer Shabaz regarding the incident on January 15, 2005, on the basis that the CW's statement was an excited utterance. Alternatively, Peeler argues that even if the CW's out-of-court statement was an excited utterance, the court should not have admitted it because it was unduly prejudicial under HRE Rule 403.

(4) The family court abused its discretion when it admitted testimony by Officer Shabaz regarding statements the CW made to him about the January 15, 2005 incident. Peeler contends the statements were inadmissible hearsay and were also cumulative.

(5) The family court erred when it permitted Officer Rosskopf to testify about whether there are visible injuries on victims in abuse cases, and specifically, in cases involving choking.

(6) The court abused its discretion when it denied Peeler's motion in limine to exclude irrelevant and prejudicial evidence regarding his overall demeanor at the time of his arrest. Peeler also contends that testimony by both Officers

Shabaz and Rosskopf on this issue was needlessly cumulative.

Peeler adds that the court's alleged errors individually and cumulatively resulted in insurmountable prejudice to him and denied him his right to a fair trial. Peeler also argues that, disregarding the various instances of testimony the family court erroneously admitted at trial, there was insufficient evidence to sustain a conviction against him. Accordingly, Peeler requests that we reverse his conviction or, in the alternative, vacate and remand for retrial.

After a careful review of the record and the briefs submitted by both parties, and having given due consideration to the arguments advanced, we resolve Peeler's points of error as follows:

(1) The family court did not err by admitting into evidence the CW's written statement, since the requirements of HRE Rule 802.1(1)(B) were met. HRE Rule 802.1(1)(B) provides:

> **Rule 802.1 Hearsay exception; prior statements by witnesses.** The following statements previously made by witnesses who testify at the trial or hearing are not excluded by the hearsay rule:
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> (1) Inconsistent statement. The declarant is subject to cross-examination concerning the subject matter of the declarant's statement, the statement is inconsistent with the declarant's testimony, the statement is offered in compliance with rule 613(b), and the statement was:
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> . . . .
>
> (B) Reduced to writing and signed or otherwise adopted or approved by the declarant[.]

The CW testified that the information on the statement was hers, and was written by her, in her own handwriting, on the date indicated. She also testified that it was her signature that appeared on the bottom of the statement. Thus, the elements of HRE Rule 802.1(1)(B) were fulfilled. Although the CW testified that some of the contents of the statement were not

accurate or were made at the urging of the police, that testimony did not make the statement inadmissible. Rather, it was for the jury to decide what weight to give to the statement in light of the CW's testimony.

(2) The family court did not abuse its discretion by allowing Rosskopf to testify about the CW's statement that Peeler had "physically abused" her. Contrary to the suggestion of Peeler, it is not clear that the family court allowed this statement under State v. Feliciano.[3] In any event, we find that the statement was admissible as an excited utterance since the incident involving the CW and Peeler on the morning of January 16, 2005 -- in which the CW was choked by Peeler -- was a startling event or condition; testimony regarding the CW's demeanor at the time of the statement showed that she was still under the stress of excitement caused by the incident; and the statement related, at least in part, to that incident.[4] HRE Rule 803(b)(2); State v. Moore, 82 Hawai'i 202, 219-20, 921 P.2d 122, 139-40 (1996). Since the statement was admissible as an excited utterance, a cautionary instruction limiting the use of the testimony was not needed under State v. Feliciano.

(3) The family court erred in admitting Rosskopf's and Shabaz's testimony about the CW's statements to them regarding the incident that occurred on the afternoon of January 15th. Although the CW was under the influence of a startling event at the time she made the statements, i.e., the incident that occurred on the morning of the 16th, her statements related to a

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[3] The transcript of the colloquy between the family court and counsel regarding objection to the statement is inaudible in several key portions; however, the court made comments the next day that suggest that the court admitted the statement as an excited utterance.

[4] While it could be argued that the statement may have also related to the events of January 15, 2005, viewed in context we believe that it related to the events of the morning of the 16th. In any event, even if it related to both incidents, the fact that it related at least in part to the incident that occurred immediately prior to the statement being made brings it within the scope of Rule 803(b)(2), Hawaii Rules of Evidence, Chapter 626, HRS.

different startling event that occurred the prior day. The excitement of that event had long since dissipated; indeed, the CW had gone out to a club after the incident on the 15th before returning home. Thus, her statements the next day to Officers Rosskopf and Shabaz concerning the incident of the 15th were not admissible as excited utterances. HRE Rule 803(b)(2); cf. State v. Machado, 109 Hawai'i 445, 452, 127 P.3d 941, 948 (2006).

Nevertheless, the admission of testimony about those oral statements of the CW was harmless beyond a reasonable doubt, since the CW's written statement (which we have found was properly admitted), in substance, covered the same ground as the oral statements. Cf. State v. Crisostomo, 94 Hawai'i 282, 290, 12 P.3d 873, 881 (2000). Moreover, the jury could not reach a verdict on Count One, which related to the January 15th incident, and that count was dismissed with prejudice.

(4) The family court did not err in allowing Officer Rosskopf to testify regarding the presence or absence of physical injuries on victims of abuse cases in general, or cases involving choking in particular. There was a sufficient foundation established regarding the basis for Rosskopf's testimony.[5] HRE Rule 602.

(5) Testimony concerning Peeler's demeanor at the time of his arrest was both relevant and not unduly prejudicial, and the family court accordingly did not err in admitting it. Although Peeler was arrested approximately 3 1/2 hours after the January 16th incident, the arrest was nevertheless close enough in time to be relevant to assessing his conduct at the time of the incident. Nor was his conduct so outrageous that testimony about it was likely to unduly inflame the jury. Thus, the

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[5] Peeler also contends that the family court improperly denied him the opportunity to create a record on this issue at sidebar. However, we believe that Peeler was able to create an adequate record, and the family court did not abuse its discretion in denying him a sidebar conference.

probative value of the testimony outweighed any possible prejudicial effect.

In view of our resolution of the foregoing issues, we reject Peeler's suggestion that the cumulative effect of the alleged errors prejudiced Peeler and denied him a fair trial, as well as Peeler's suggestion that there was insufficient admissible evidence to support his conviction.

Accordingly, the Judgment filed on May 2, 2005 in the Family Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, September 28, 2007.

On the briefs:

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for Defendant-Appellant.

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

Chief Judge

Associate Judge

Associate Judge