NO. 27549

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
JAMES MURRAY, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR NO. 05-1-0086(4))

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Fujise, JJ.)

Defendant-Appellant James Murray (Murray) appeals from the September 13, 2005 Judgment,[1] based on a jury's decision, finding him guilty of Abuse of Family or Household Members as a class C felony, Hawaii Revised Statutes (HRS) § 709-906(1) and (7) (Supp. 2005).[2] The Judgment also sentences Murray to probation for five years and to pay a $150 Probation Service Fee, a $105 Criminal Injuries Compensation Fee, and $500 or the actual cost of DNA analysis, whichever is less. The following is one of the conditions of the probation:

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[1] Judge Reinette W. Cooper presided.

[2] Hawaii Revised Statutes § 709-906 (Supp. 2005) states in part:

> 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 . . . .
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> For the purposes of this section, "family or household member" means spouses . . . .
>
> . . . .
>
> (7) For a third or any subsequent offense that occurs within two years of a second or subsequent conviction, the person shall be charged with a class C felony.

> C. You are hereby committed to the care and custody of the Dept. of Public Safety for a period of **SIX MONTHS**; PROVIDED, however that FIVE MONTHS shall be suspended for so long as you abide by these terms and conditions of probation. THIRTY DAYS shall be served in 15 consecutive weekends, from 6:30 pm Fridays through 6:30 pm Sundays; credit given for time served; Mittimus to issue SEPTEMBER 16, 2005 at 6:30 pm[.]

BACKGROUND

An Amended Complaint filed on February 9, 2005 charged Murray with violating HRS § 709-906 by causing physical abuse to his wife, Jennifer Murray, on or about January 18, 2005, "within two (2) years of a second or subsequent conviction of Abuse of Family or Household Member[.]"

When Murray's pre-trial motion in limine to exclude evidence of his prior criminal record was heard by the court on June 27, 2005, counsel for Murray stipulated to the fact of Murray's two prior convictions while "asking the Court to not allow the jurors to hear about the prior convictions and to only make the decision about whether or not [Murray] committed abuse against Jennifer Murray." The court responded: "I think the case law thus far is that [the] prosecutor has to accept a stipulation, but the jury must at least hear that stipulation[.]"

When the trial commenced, the deputy prosecuting attorney read the following stipulation to the jury:

> It is stipulated by the State and [Murray] being represented by Kirsten Giroux that in the County of Maui, State of Hawaii, on December 4, 1998 in Family Court Criminal Number 98-0836, [Murray] being represented by counsel was convicted for the charge of abuse of family and household member under Hawaii Revised Statutes section 709-906.

> It is also stipulated that on September 18, 2003 in Family Court Criminal Number 03-1-0199, [Murray] being represented by counsel, was convicted of abuse of family and household member under Hawaii Revised Statutes section 709-906."

When the court told the jury that it "will accept those statements as evidence by agreement of the parties," counsel for Murray informed the court that Murray was not waiving his objection to the introduction of the evidence of the prior convictions.

At the trial, Murray did not testify.

Although there is no indication in the record that the court ever told the jury that certain evidence was allowed into the trial for a particular and limited purpose, counsel for Murray requested the following standard jury instruction: "Several times during the trial I told you that certain evidence was allowed into this trial for a particular and limited purpose. When you consider that evidence, you must limit your consideration to that purpose." Prior to the time when the court instructed the jury, counsel for Murray withdrew her request for this instruction.

The court instructed the jury in part:

> Five: You must accept as conclusively proved any fact to which the parties have stipulated.
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> . . . .
>
> 17: [Murray] is charged with the offense of felony abuse of family or household member. A person commits the offense of felony abuse of family or household member if with (sic) within two years after a second or subsequent conviction for abuse of family or household member, he intentionally, knowingly, or recklessly physically abuses a family or household member.

> There are four material elements of the offense of felony abuse of family or household member, each of which the prosecution must prove beyond a reasonable doubt.
>
> These four elements are: One, that on or about January 18, 2005, in the County of Maui, State of Hawaii, [Murray] physically abused another person, to wit, Jennifer Murray.
>
> And two: That at the time Jennifer Murray was a family or household member.
>
> And three: That the defendant did so within two years of a second or subsequent conviction of abuse of family or household member.
>
> And four: That the defendant did so intentionally, knowingly, or recklessly as to each of the foregoing elements.

DISCUSSION

I.

Murray contends that HRS § 709-906 is a "recidivist" statute rather than a "separate offenses" statute, and thus the fact that the physical abuse occurred within two years of a second or subsequent conviction of abuse of family or household member is relevant to sentencing and should not be admitted at trial. This argument has no merit. In a related context, HRS § 134-7(b) (Supp. 2005) specifies that "[n]o person who . . . has been convicted in this State or elsewhere of having committed a felony, or any crime of violence, or an illegal sale of any drug shall own, possess, or control any firearm or ammunition therefor." In State v. Miyashiro, 90 Hawai'i 489, 494, 979 P.2d 85, 90 (App. 1999), this court decided that "[a] prior felony conviction is an essential element of the Felon in Possession of a Firearm offense."

In a jury trial of an HRS § 709-906(1) and (7) charge where (1) the prosecution clearly is able to prove that the alleged offense is the defendant's third or subsequent offense that occurred within two years of a second or subsequent conviction of abuse of a family or household member,[3] and (2) the defendant reasonably does not want the jury to be given any more information about the fact of the prior convictions than is necessary for the prosecution to prove that element and, therefore, has stipulated to that fact, the trial court is presented with the following possible courses of action:

A: preclude the giving of any information to the jury about that fact, or the defendant's stipulation of that fact;

B: tell the jury only that the fact of the prior convictions is a material element of the charged offense, and the defendant has stipulated to that fact;

C: permit the prosecution to present to the jury evidence of all of the details of the prior convictions; or

D: in addition to "B", or "C", instruct the jury not to allow it to influence its decision on the question of whether the prosecution has satisfied its burden of proof regarding the other material elements of the charged offense.

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[3] There are situations, especially those involving out-of-state prior convictions, when that material element is not easily proved by the prosecution.

Murray cites the following federal precedent in support of possible course of action "A":

> Subject to certain limitations, 18 U.S.C. § 922(g)(1) prohibits possession of a firearm by anyone with a prior felony conviction, which the Government can prove by introducing a record of judgment or similar evidence identifying the previous offense. Fearing prejudice if the jury learns the nature of the earlier crime, defendants sometimes seek to avoid such an informative disclosure by offering to concede the fact of the prior conviction. The issue here is whether a district court abuses its discretion if it spurns such an offer and admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction. We hold that it does.

Old Chief v. U.S., 519 U.S. 172, 174 (1997). This federal precedent is based on Federal Rule of Evidence Rule 403. The dissenting opinion further explains:

> The Court today announces a rule that misapplies Federal Rule of Evidence 403 and upsets, without explanation, longstanding precedent regarding criminal prosecutions. I do not agree that the Government's introduction of evidence that reveals the name and basic nature of a defendant's prior felony conviction in a prosecution brought under 18 U.S.C. § 922(g)(1) "unfairly" prejudices the defendant within the meaning of Rule 403. Nor do I agree with the Court's newly minted rule that a defendant charged with violating § 922(g)(1) can force the Government to accept his concession to the prior conviction element of that offense, thereby precluding the Government from offering evidence on this point. I therefore dissent.
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> I
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> Rule 403 provides that a district court may exclude relevant evidence if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice." Certainly, Rule 403 does not permit the court to exclude the Government's evidence simply because it may hurt the defendant. As a threshold matter, evidence is excludable only if it is "unfairly" prejudicial, in that it has "an undue tendency to suggest decision on an improper basis." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860; see, *e.g., United States v. Munoz,* 36 F.3d 1229, 1233 (C.A.1 1994) ("The damage done to the defense is not a basis for exclusion; the question under Rule 403 is 'one of "unfair" prejudice-not of prejudice alone'") (citations omitted), cert. denied *sub nom. Martinez v. United States,* 513 U.S. 1179, 115 S.Ct. 1164, 130 L.Ed.2d 1120 (1995); *Dollar v. Long Mfg., N. C., Inc.,* 561 F.2d 613, 618 (C.A.5 1977) ("'[U]nfair prejudice' as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually

> all evidence is prejudicial or it isn't material. The prejudice must be 'unfair'"), cert. denied, 435 U.S. 996, 98 S.Ct. 1648, 56 L.Ed.2d 85 (1978). The evidence tendered by the Government in this case-the order reflecting petitioner's prior conviction and sentence for assault resulting in serious bodily injury, in violation of 18 U.S.C. § 1153 and 18 U.S.C. § 113(f) (1988 ed.)-directly proved a necessary element of the § 922(g)(1) offense, that is, that petitioner had committed a crime covered by § 921(a)(20). Perhaps petitioner's case was damaged when the jury discovered that he previously had committed a felony and heard the name of his crime. But I cannot agree with the Court that it was *unfairly* prejudicial for the Government to establish an essential element of its case against petitioner with direct proof of his prior conviction.

Id. at 192-94.

"In differentiating between findings that must be made by the sentencing court and those that must be alleged in the indictment and found by the trier of fact during the trial," State v. Tafoya, 91 Hawai'i 261, 270, 982 P.2d 890, 899 (1999), the following is Hawai'i's precedent:

> In reviewing our previous case law, it is apparent that "intrinsic" factors, required to be pled in the indictment and found by the jury, are distinguishable in that they are contemporaneous with, and enmeshed in, the statutory elements of the proscribed offense. Contrarily, "extrinsic" factors are separable from the offense itself in that they involve consideration of collateral events or information. Occurrence at a prior time is indicative, although not dispositive, of a conclusion that a factor is "extrinsic." For example, HRS § 706-662(2)(a) (Supp.1997) provides that a defendant may be sentenced to an extended term of imprisonment upon a finding that "[t]he defendant is a professional criminal[.] The court shall not make this finding unless . . . the *circumstances of the crime* show that the defendant has knowingly engaged in criminal activity as a major source of livelihood[.]" (Emphasis added). Although this section refers to the "circumstances of the crime," and therefore implies consideration of information contemporaneous with the commission of the offense, this finding is nevertheless "extrinsic." A finding under this section is separable from the statutory elements of the offense in a manner qualitatively different from, for example, the "intrinsic" finding that the offender utilized a semiautomatic weapon in the course of committing the offense charged. Requiring the jury to make such a finding would require the admission of potentially irrelevant and prejudicial evidence and contaminate the jury's required focus on the specific elements of the offense charged, see further discussion of this point, *infra*.
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> . . . .

> . . . We hold that when a fact susceptible to jury determination is a predicate to the imposition of an enhanced sentence, the Hawai'i Constitution requires that such factual determinations be made by the trier of fact. The legislature may not dilute the historical province of the jury by relegating facts necessary to the imposition of a certain penalty for criminal behavior to the sentencing court. The jury is the body responsible for determination of intrinsic facts necessary for the imposition of punishment for an offense criminalized by the legislature. The analysis in [*State v.*]*Schroeder*[, 76 Hawai'i 517, 880 P.2d 192 (1994),] protects the jury's role by mandating that the determination of facts intrinsic to the offense be made by the trier of fact.
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> . . . .
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> However, certain findings that the legislature has determined may be utilized to impose an extended term of imprisonment are either not factual, and therefore inappropriate for jury determination, or would require the introduction of improper prior bad act evidence. For example, HRS § 706-662(2) provides that a convicted defendant may be subject to an extended term of imprisonment if:
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> > The defendant is a professional criminal whose imprisonment for an extended term is necessary for protection of the public. The court shall not make such a finding unless:
> >
> > (a) The circumstances of the crime show that the defendant has knowingly devoted oneself to criminal activity as a major source of livelihood; or
> >
> > (b) The defendant has substantial income or resources not explained to be derived from a source other than criminal activity.
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> If we were to require these findings to be made by the jury, this would entail collateral determinations unrelated to the jury's fundamental duty to focus on the evidence presented and determine whether the conduct of the defendant violated the statutory definition of the offense. Therefore, these "extrinsic" factors are properly within the province of the sentencing court.

Id. at 271, 273-4, 982 P.2d at 900, 902-3 (1999) (footnotes omitted). In other words, facts that the legislature has determined may be utilized to impose an extended term of imprisonment are either (a) "intrinsic facts" or (b) "extrinsic facts".

"Intrinsic facts" are facts related to the jury's fundamental duty to determine whether the conduct of the defendant violated the elements of the offense as defined by the applicable statute. Findings of "intrinsic facts" are properly within the province of the jury.

"Extrinsic facts" are facts unrelated to the jury's fundamental duty to determine whether the conduct of the defendant violated the statutory definition of the offense. Findings of "extrinsic facts" are properly within the province of the sentencing court.

HRS §134-7(b) provides that "[n]o person who . . . has been convicted in this State or elsewhere of having committed a felony, . . . shall own, possess, or control any firearm or ammunition thereof." Clearly, in the HRS § 134-7(b) situation, the fact that the accused is a convicted felon is an "intrinsic fact" that must be determined by the jury. Similarly, the fact that Murray committed his crime "within two (2) years of a second or subsequent conviction of Abuse of Family or Household Member" is an "intrinsic fact" that must be determined by the jury.[4] On the other hand, the admission of any further evidence of Murray's prior convictions would be unnecessary and excessive and would render the evidence "improper prior bad act evidence."

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[4] We do not reach the question of whether the prior convictions must have been counseled, as required when considering prior convictions for sentencing enhancement. See State v. Sinagoga, 81 Hawai'i 421, 918 P.2d 228 (App. 1996).

In light of the above, we affirm the circuit court's application of possible choice of action "B".

II.

Murray notes that (a) he has a constitutional right to have the jury determine each element of the crime beyond a reasonable doubt, State v. Carvalho, 101 Hawai'i 97, 63 P.3d 405 (App. 2002), (b) his counsel stipulated to the element of the two prior convictions, and (c) the court instructed the jury that "[y]ou must accept as conclusively proved any fact to which the parties have stipulated." Murray argues (1) that the combination of "(b)" and "(c)" resulted in a waiver of "(a)" as to the fact of the two prior convictions, and (2) that he did not personally knowingly, voluntarily, and intelligently waive his constitutional right to have the jury decide the fact of the two prior convictions, State v. Sadler, 80 Hawai'i 372, 910 P.2d 143 (1996).

A stipulation to all material elements of the crime is, in effect, a plea of guilty or no contest. Prior to accepting and approving a plea of guilty or no contest, the court must comply with the following requirements of Hawai'i Rules of Penal Procedure (HRPP) Rule 11 (2006):

> **(c) Advice to Defendant.** The court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and determining that he understands the following:
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> (1) the nature of the charge to which the plea is offered; and

> (2) the maximum penalty provided by law, and the maximum sentence of extended term of imprisonment, which may be imposed for the offense to which the plea is offered; and
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> (3) that he has the right to plead not guilty, or to persist in that plea if it has already been made; and
>
> (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and
>
> (5) that if he is not a citizen of the United States, a conviction of the offense for which he has been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.
>
> **(d) Insuring That the Plea Is Voluntary.** The court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from any plea agreement.

Where the crime charged is Abuse of Family or Household Members as a class C felony, HRS § 709-906(1) and (7) (Supp. 2005), may the court accept and approve the defendant's stipulation to the material element that the alleged offense is the third or subsequent offense that occurred within two years of a second or subsequent conviction of Abuse of Family or Household Members without complying with the requirements of HRPP Rule 11(c) and (d) as to that material element? In this situation where (a) that material element is a matter of public record easily provable by the prosecution and (b) the defendant reasonably desires to limit the knowledge the jury has about, and the consideration the jury gives to, that material element, the answer is yes. A stipulation of that fact does not violate the

defendant's due process rights by impermissibly lessening the prosecution's burden to prove that material element. Therefore, it is a tactical decision permissibly made by counsel for the defendant.

III.

Hawaii Rules of Evidence Rule 105, Chapter 626, HRS (1993) states what the court must do in certain situations "upon request": "**Limited admissibility.** When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Murray argues that the lower court erred in not giving a limiting jury instruction such as the one withdrawn by his attorney. Ultimately, the question is whether the court reversibly erred when it failed to take possible course of action "D" stated above.

The State cites State v. Adler, 108 Hawai'i 169, 175, 118 P.3d 652, 658 (2005) and argues that judicial estoppel bars Murray from raising this argument because he withdrew such a limiting jury instruction and failed to object to the fact that no such limiting instruction was given.

The Hawai'i Supreme Court has stated:

> The ICA [Intermediate Court of Appeals] previously attempted to implement its view of the consequences of the allocation of ultimate responsibility for jury instructions to the trial court in State v. Astronomo, 95 Hawai'i 76, 18 P.3d 938 (App.2001), concluding that "with respect to jury instructions, the

> distinction between 'harmless error' and 'plain error' is a distinction without a difference." Id. at 82, 18 P.3d at 944. Accord State v. Fields, No. 25455, --- Hawai'i ----, --- P.3d ----, ----, n. 7, 2005 WL 1274539, at 19 n. 7 (App. May 31, 2005) ("Now that this duty [to properly instruct the jury] has been imposed on the trial court, it is logical to conclude that erroneous instructions should be examined for HRPP Rule 52(a) 'harmless error' rather than HRPP Rule 52(b) 'plain error.' "), cert. granted 108 Hawai'i 1, 116 P.3d 7 (Haw. July 6, 2005). Based, however, on the perceived failure of this court in State v. Iuli, 101 Hawai'i 196, 203-04, 65 P.3d 143, 150-51 (2003), to approve Astronomo or affirmatively cite the duty of the trial court to properly instruct the jury, the ICA in the instant case took the view that the ultimate responsibility for jury instructions does not lie with the trial court and that it should thus apply a discretionary plain error standard of review to erroneous jury instructions. ICA's Opinion, 111 Hawai'i at 448-49, 142 P.3d at 312-13.
>
> We now acknowledge that the ICA's earlier view was correct and adopt the substance of Chief Judge Burns' analysis in Astronomo and Fields. Consequently, we hold that, although as a general matter forfeited assignments of error are to be reviewed under the HRPP Rule 52(b) plain error standard of review, in the case of erroneous jury instructions, that standard of review is effectively merged with the HRPP Rule 52(a) harmless error standard of review because it is the duty of the trial court to properly instruct the jury. As a result, once instructional error is demonstrated, we will vacate, without regard to whether timely objection was made, if there is a reasonable possibility that the error contributed to the defendant's conviction, i.e., that the erroneous jury instruction was not harmless beyond a reasonable doubt.

State v. Nichols, 111 Hawai'i 327, 336-37, 141 P.3d 974, 983-84 (2006) (footnote omitted).

The first question is whether an "instructional error" occurred when the court did not instruct the jury that it could not consider the fact that the alleged offense occurred within two years of a second or subsequent conviction of Abuse of Family or Household Members when deciding whether or not the other elements of the alleged offense occurred. If an "instructional error" did occur, the second question is whether there is a reasonable possibility that this "instructional error" contributed to Murray's conviction, i.e., was the failure to give

the jury the instruction harmless beyond a reasonable doubt. In this case, we conclude that an "instructional error" did not occur.

CONCLUSION

Accordingly, we affirm the September 13, 2005 Judgment.

DATED: Honolulu, Hawai'i, January 19, 2007.

On the briefs:

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