

NO. 27794

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

STATE OF HAWAI'I, Plaintiff-Appellee,

v.

WALTER HOLAU, Defendant-Appellant

EMRIMANDO
CLERK APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 05-1-2231)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Foley and Nakamura, JJ.)

Defendant-Appellant Walter Holau (Walter or Defendant) appeals from the February 6, 2006 Judgment of Conviction and Sentence (Judgment) filed in the Family Court of the First Circuit (family court). A jury found Walter guilty of Abuse of Family and Household Members, Hawaii Revised Statutes (HRS) § 709-906. The court^{1/} sentenced Walter to imprisonment for one year with credit for time served.

On November 14, 2005, the State of Hawai'i (the State) filed a Complaint charging Walter with violating HRS § 709-906, Abuse of Family and Household Members. The complaining witness was Defendant's mother, Mildred Holau (Mildred). On January 31, 2006, Walter filed a Motion in Limine requesting, inter alia, exclusion of "[a]ny prior documented or undocumented allegations of abuse or assault or harassment by Defendant against MILDRED

^{1/} Judge Patrick W. Border presided.

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HOLAU." During the court's hearing on this motion, nothing was said about Mildred's allegations of Walter's prior acts of abuse, assault or harassment against Mildred.

At the jury trial, only Mildred and Police Officer Leroy Conti testified.

At the time of trial, Mildred was 76 years old. Walter was in his 30s. Mildred testified that she lived in a two-bedroom apartment in Kane'ohe with two of Walter's brothers, Patrick and William, and that Walter lived with them "off and on." The entrance of the building was secured by an electrical gate located on the ground floor, which could be opened from Mildred's apartment. On direct examination, Mildred testified in part:

Q. Now on November 12, 2005, did anything happen that night?

A. Yes.

Q. Could you tell us what happened?

A. I was in the apartment and Walter came over and tried to make me open the electrical gate. I wouldn't do it. He was screaming and hollering and everything. Then I thought he was gone, so I went outside and I called the cops and everything. I told them to get down here because he's gonna hit me and everything. And when I turn around, I see him running in the back of me. I start trying to run even with a -- like this. He came so fast. He went like that. He hit me right in the neck. I even fell down on the sidewalk. . . .

. . . .

Q. Let me back you up for a little bit. You said Walter was outside banging on the gate,

. . . .

Q. Do you remember what he was yelling?

A. Open the gate you -- he was swearing at me and everything and pounding 'em and pounding 'em and so I told Patrick

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he's outside. He said let him in. I said no. no. no. Every time I let him in he go for me. He punch me, he hit me and knock me down. I know, I'm sorry.

Q. Just to back up. So at some point after he's pounding on the gate, you said he went?

A. Yes, because I didn't see him. He was gone.

Q. Okay. You said after that you went outside, why did you go outside?

A. I use my cell phone, I was going to call the cops, so I figure if he do anything, I run to the neighbors.

Q. Okay. So what happened once you got outside?

A. Hey, turn round. I look. I turned around, I looked, there he was. Get over here, yelling and screaming at me. So I pick up the phone, I call 911. I told them that you better get here fast because the boy is going to hurt me. And damn right he did, he came by me and boy he -- he gave one karate right in my left neck over here. I even wen' fall down.

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Q. Now, after Walter hit you in the neck, what did he do.

A. He started yelling, swearing and all of a sudden when he saw me down, he just took off. He ran away.

Q. Okay. So he hit you then before you called 911?

A. Yeah.

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Q. Okay. And then you called 911?

A. Yes, I told them I didn't want to get anymore lickin's that's why.

Defense counsel did not object to any of this testimony.

On cross-examination, Mildred testified in part:

Q. Okay. So he hits you about three or four times; right?

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A. No, he hit me only, what, one -- one and then he tried to hit again and he just ran 'cause he saw me with the phone on.

Q. Okay. But you told the 911 operator that he hit you three or four times; isn't that true?

A. Yeah, he usually do that. It's every day he do that.

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[DEFENSE COUNSEL]: Your Honor, I move to strike --

THE WITNESS: I'm sorry, Your Honor.

. . . .

[DEFENSE COUNSEL]: -- ask the jury to disregard.

THE COURT: Okay. The statement will be stricken. Jury is to disregard the contents of the last answer. It's not part of the evidence. Go ahead.

In closing argument to the jury, defense counsel stated
in part:

Reason and common sense tells you conflicting versions of events from Mildred Holau raises a doubt in your mind, Walter is not guilty. If reason and common sense tell you that Walter never hit his mother at all, then he is absolutely not guilty.

Now, we talked about some of it, there is reasonable doubt all over this case. Mildred never got her story straight. It changed every time. She couldn't remember the details of her lie time after time. At first it was inside, then it was outside. There were four hits, then two hits, then one hit. It was before the 911 call, then it was during the 911 call. She fell on the pavement, she fell in the grass. Listen to the 911 tape, she's calm, she's conversational, and this is right after this supposed traumatic event.

. . . The absence of evidence. Mr. Conti is trained to document these offenses. Not even redness to her neck that she was karate chopped like she says.

. . . State doesn't want you to consider her several versions of events that she talked about the event past tense, present tense, future tense. Never mind she has no injuries consistent with being hit three or four times and falling to the ground (indiscernible) to her neck. Never mind she said to the 911 operator, I ran from Walter, and she has an obvious disability. Never mind she calls 911 and she sounds calm and relaxed. The State wants you to forget all of that and say, well, every time there's a hit alleged it must have happened.

You might think to yourself, well, if she wasn't hit, this didn't really happen, why would she call 911? . . . We don't know. You don't know. I don't know. The State's reason is that he (sic) was hit but that doesn't hold water.

On February 1, 2006, the jury found Walter guilty as charged. On February 28, 2006, Walter filed a notice of appeal.

Walter argues that two statements made by Mildred during the trial regarding incidents of prior abuse had an unfair

prejudicial effect on the jury, in violation of Walter's right to a fair trial.

The first statement occurred when, during direct examination by the State, Mildred testified that "[e]very time I let him in he go for me. He punch me, he hit me and knock me down." Walter argues that the court *sua sponte* should have stricken the statement, as it communicates to the jury that Walter hit Mildred on a regular basis. Walter characterizes this first statement as an "evidential harpoon" that minimally requires a cautionary instruction. State v. Kahinu, 53 Haw. 536, 549-50, 498 P.2d 635, 643-44 (1972), cert. denied, 409 U.S. 1126 (1973) (internal citations omitted). Walter further argues that under Rules 403 and 404(b), Hawaii Rules of Evidence (HRE), Chapter 626, Hawaii Revised Statutes (HRS) (1993)^{2/}, this court

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Rule 403 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404 Character evidence not admissible to prove conduct; exceptions; other crimes. (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

- (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

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- (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible where such evidence is

should notice plain error.

The second statement occurred when, on cross examination, Mildred testified that "[i]t's every day he do that." Walter argues, in his opening brief, that Mildred's statements had the cumulative effect of "inflaming or inciting jurors to convict Holau based on inadmissible character evidence and sympathy for [Mildred][,]", and the family court's instruction to the jury was insufficient to cure the prejudicial effect.

Regarding the first statement, the State points out that the Hawai'i Supreme Court has stated:

It is the general rule that evidence to which no objection has been made may properly be considered by the trier of fact and its admission will not constitute ground for reversal. It is equally established that an issue raised for the first time on appeal will not be considered by the reviewing court. Only where the ends of justice require it, and fundamental rights would otherwise be denied, will there be a departure from these principles. [Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) (1994)]. . . .

State v. Naeole, 62 Haw. 563, 570-71, 617 P.2d 820, 826 (1980) (some citations omitted); see also *State v. Samuel*, 74 Haw. 141, 147, 838 P.2d 1374, 1378 (1992); HRE 103(a)(1) (1993).

State v. Wallace, 80 Hawai'i 382, 410, 910 P.2d 695, 723 (1996)

(brackets in original; footnote omitted).

probative of any other fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

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The State argues that the second statement was not reversible error because it is presumed that the jury followed the family court's instruction to disregard it.

A trial court has the discretion to determine whether the challenged statement "merits a mere prophylactic cautionary instruction or the radical surgery of declaring a mistrial." *State v. Kahinu*, 53 Haw. 536, 540, 498 P.2d 635, 644 (1972).

In determining whether improper remarks made by a witness constitutes reversible error, the appellate court will consider: (1) "the nature of the misconduct"; (2) "the promptness of a curative instruction, or lack of it"; and (3) "the strength or weakness of the evidence against the defendant." *State v. Samuel*, 74 Haw. 141, 148-48, 838 P.2d 1374, 1378 (1992) (internal quotation marks and citation omitted).

State v. Webster, 94 Hawai'i 241, 248, 11 P.3d 466, 473 (2000)
(internal citations omitted.)

Walter replies that Mildred's statements regarding prior abuse created a prejudicial effect, violating his due process guarantee of a fair trial. He contends that the State "attempted to capitalize on the momentum of the jury's sympathy for Mildred by articulating in the first sentence of its closing, '[t]here's no excuse for hitting [your] 76-year old mother.'" Walter asserts that "it is highly likely that the jury was moved by an obligation to find Walter guilty, regardless of the unreliability of the evidence on record." He reiterates that Mildred's statements concerned his prior "bad acts", and that the cautionary instruction to disregard them was insufficient to cure the "insurmountable prejudice" caused by them.

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs,

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and duly considering and applying the law relevant to the issues raised and arguments presented, we affirm the family court's February 6, 2006 Judgment of Conviction and Sentence.

DATED: Honolulu, Hawai'i, April 13, 2007.

On the briefs:

Lila C.A. King,
Deputy Public Defender,
for Defendant-Appellant.


Chief Judge

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


Associate Judge


Associate Judge