

NO. 27845

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,  
v.  
STEWART AMINA, Defendant-Appellant

E.M. RIMANDO  
CLERK APPELLATE COURTS  
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 03-1-0867)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Stewart Amina (Amina) was found guilty after a jury trial of three counts of first degree sexual assault for the alleged molestation of his niece, the Complainant, when she was between four and seven years old. The Circuit Court of the First Circuit (circuit court), the Honorable Steven S. Alm presiding, sentenced Amina to three consecutive terms of 20 years' imprisonment. The circuit court also imposed a mandatory minimum term of imprisonment of six years and eight months on Counts II and III due to Amina's status as a repeat offender. Amina appeals from the circuit court's Judgment filed on February 27, 2006.

On appeal, Amina argues that the circuit court: 1) committed plain error in allowing him to be convicted of three counts of first degree sexual assault, in violation of Hawaii Revised Statutes (HRS) § 707-730(1)(b) (1993),<sup>1</sup> instead of one count of continuous sexual assault of a minor under the age of

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<sup>1</sup> During the time period that the offenses charged in the indictment were alleged to have occurred, between June 25, 1992, and September 1, 1995, Hawaii Revised Statutes (HRS) § 707-730(1)(b) (1993) provided, in relevant part, that "[a] person commits the offense of sexual assault in the first degree if . . . [t]he person knowingly subjects to sexual penetration another person who is less than fourteen years old."

fourteen years, in violation of HRS § 707-733.5 (Supp. 1997);<sup>2</sup> 2) committed plain error in allowing "the introduction of evidence that he committed other acts of sexual assault against the same complainant, in violation of [Hawaii Rules of Evidence] HRE Rule 404(b) [(Supp. 2006)];" (3) abused its discretion in qualifying Dr. Alexander Bivens, a clinical psychologist, as an expert witness in the field of child sexual abuse; and (4) abused its discretion in admitting Dr. Bivens's testimony regarding the

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<sup>2</sup> HRS § 707-733.5 (Supp. 1997), the statute establishing the offense of continuous sexual assault of a minor under the age of fourteen years, was enacted in 1997, and provided:

(1) Any person who:

- (a) Either resides in the same home with a minor under the age of fourteen years or has recurring access to the minor; and
- (b) Engages in three or more acts of sexual penetration or sexual contact with the minor over a period of time, but while the minor is under the age of fourteen years,

is guilty of the offense of continuous sexual assault of a minor under the age of fourteen years.

(2) To convict under this section, the trier of fact, if a jury, need unanimously agree only that the requisite number of acts have occurred; the jury need not agree on which acts constitute the requisite number.

(3) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section, unless the other charged offense occurred outside the time frame of the offense charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved, in which case a separate count may be charged for each victim.

(4) Continuous sexual assault of a minor under the age of fourteen years is a class A felony.

HRS § 707-733.5(2) was held to be an unconstitutional violation of the defendant's due process rights in State v. Rabago, 103 Hawai'i 236, 238, 81 P.3d 1151, 1153 (2003). In 2006, HRS § 707-733.5 was repealed and then essentially reenacted as a new statute, which "shall take effect upon the ratification of constitutional amendments authorizing the legislature to define what behavior constitutes a continuing course of conduct in sexual assault crimes committed against minors under the age of fourteen." 2006 Haw. Sess. L. Act 60, §§ 6 & 9 at 92-93.

potential absence of behavioral problems in child sexual abuse victims.

For the reasons set forth below, we conclude that Amina's arguments are without merit and affirm the Judgment.

I.

Amina was the Complainant's uncle by marriage. While the Complainant was in kindergarten and the first grade, Amina was one of the adults who would pick up the Complainant from school and take her to her maternal grandmother's house, where the Complainant often spent the night. During portions of this time, Amina and his wife, the Complainant's aunt, lived in a bedroom in the grandmother's residence.

The indictment charged Amina with three counts of first degree sexual assault for subjecting the Complainant, when she was less than fourteen years old, to sexual penetration by inserting his penis into her mouth. At trial, the Complainant testified to sexual assaults committed by Amina in three different places: 1) Amina's bedroom at the grandmother's house, 2) the grandmother's kitchen, and 3) Amina's car while at a Manoa park.

The Complainant testified that she was in kindergarten or first grade the first time that Amina sexually assaulted her in his bedroom. Amina picked the Complainant up from school, took her to his room, showed her a pornographic video of a woman sucking on a man's penis, and told her to copy what was on the video or he would kill her aunt (his wife). Amina put his penis in the Complainant's mouth and told her to suck on it, and she complied. The Complainant testified that the same thing happened on other occasions in the bedroom, although Amina did not always use a pornographic video.

The Complainant testified that on one occasion while she was in kindergarten, Amina sexually assaulted her by putting his penis in her mouth while they were in her grandmother's kitchen. She also testified that Amina took her to a park in Manoa on a number of occasions and sexually assaulted her by

putting his penis in her mouth while they were in the front seat of Amina's black car.

According to the Complainant, Amina's sexual assaults stopped when she was in the second grade. Around this time, Amina moved out of the grandmother's house and separated from the Complainant's aunt. The Complainant did not disclose the sexual assaults until more than six years after the last incident. The Complainant testified that her disclosure was triggered by a disturbing encounter that she had with a man while riding the bus when she was in the eighth grade. The man sat next to her, put his hand on her leg, and began to rub it. The man's conduct shocked the Complainant and brought back memories of "everything that happened when [she] was younger." While talking to her grandmother about the bus encounter, the Complainant told her grandmother that Amina had molested her.

II.

A.

We reject Amina's claim that the circuit court committed plain error in allowing him to be convicted of three counts of first degree sexual assault (HRS § 707-730(1)(b)) instead of one count of continuous sexual assault of a minor under the age of fourteen years (HRS § 707-733.5). Amina contends that because both HRS § 707-730(1)(b) and HRS § 707-733.5 were in effect at the time he was indicted, the prosecution had the option of charging him under either statute. Amina further contends that because charging him with three counts of violating HRS § 707-730(1)(b) exposed him to stiffer sentencing possibilities than charging him with one count of violating HRS § 707-733.5, the prosecution, under the rule set forth in State v. Modica, 58 Haw. 249, 250-51, 567 P.2d 420, 421-22 (1977), should have been required to charge him with a single count of violating HRS § 707-733.5.

We disagree with Amina's analysis. Amina was indicted for offenses that were committed between 1992 and 1995. The offense of continuous sexual assault of a minor under the age of

fourteen years, HRS § 707-733.5, was enacted in 1997 and became effective on July 7, 1997, after Amina's alleged acts of sexual assault had been committed. 1997 Haw. Sess. L. Act 379, §§ 2 & 5 at 1192-93. HRS § 707-733.5 was not made retroactive to acts committed before its effective date. Id. at §§ 3 & 5 at 1193; see HRS § 1-3 (1993) ("No law has any retrospective operation, unless otherwise expressed or obviously intended."). Thus, Amina could not have been charged with violating HRS § 707-733.5. The fact that HRS § 707-733.5 was in effect when Amina was indicted is irrelevant, and Amina is simply wrong in contending that the prosecution had the option of charging him with violating HRS § 707-733.5. Because Amina could not have been charged with violating HRS § 707-733.5, it is unnecessary for us to address Amina's contention that charging him with three counts of violating HRS § 707-730(1)(b) instead of one count of violating HRS § 707-733.5 implicates the Modica rule.

B.

Amina argues that "the [C]omplainant's testimony that sexual assault occurred on occasions other than as [s]he described in the bedroom, kitchen or car amounted to other bad acts and were inadmissible under HRE Rule 404(b)." He further argues that the circuit court "plainly erred in admitting such highly prejudicial evidence." We disagree with Amina's arguments.

Amina was charged with three counts of first degree sexual assault, with each count alleging that the offense was committed within about a two-year or three-year span of time. The Complainant was not able to specify the particular dates of the sexual assaults, but described sexual assaults occurring in Amina's bedroom, in the kitchen, and in Anima's car between the time she was in kindergarten and the second grade. The Complainant testified that Amina sexually assaulted her on more than one occasion in the bedroom and in the car. In closing argument, the prosecutor linked the three counts to the three different locations where the Complainant testified she had been

sexually assaulted, and the jury was given a specific unanimity instruction.

We conclude that the Complainant's testimony challenged by Amina was not other act evidence under HRE Rule 404(b), but constituted direct evidence of the charged offenses. State v. Arceo, 84 Hawai'i 1, 27, 928 P.2d 843, 869 (1996). In Arceo, the Hawai'i Supreme Court stated:

[W]e hold as a threshold matter that, by virtue of the vulnerabilities to which child victims of repeated instances of sexual abuse are susceptible, the prosecution may, at its option, seek a single conviction by charging multiple acts, each of which constitutes a separate and distinct sexual assault, within a single count of an indictment or complaint. We therefore hold that, if the prosecution does so, then testimony regarding any or all of the multiple acts is direct evidence of the charged offense and does not implicate other crimes, wrongs, or acts with which HRE 404(b) is concerned. Thus, . . . we hold that the probative value of the testimony would outweigh the danger of unfair prejudice to the defendant and would survive a challenge under HRE 403.

Id. at 27, 929 P.2d at 869 (footnotes, citations, and internal quotation marks omitted).

Amina was charged with three counts of committing sexual assaults that occurred over spans of time. Under Arceo, the Complainant's testimony that sexual assaults took place in Amina's bedroom and in Amina's car on more than one occasion was admissible as direct evidence of the charged offenses. The circuit court did not err, much less plainly err, in admitting the Complainant's testimony.

C.

We conclude that the circuit court did not abuse its discretion in qualifying Dr. Alexander Bivens, a clinical psychologist, as an expert to testify about the dynamics of child sexual abuse, including late disclosure. Dr. Bivens had a Ph.D. in clinical psychology; had professional experience in counseling and treating children and adolescents, some of whom were victims of sexual abuse; had kept current on research and articles in the field of child sexual abuse; and had previously testified in Hawai'i courts as an expert in child sexual abuse and child memory. Dr. Bivens possessed sufficient skill, knowledge, and

experience in the field of child sexual abuse for the circuit court to qualify him as an expert. HRE Rule 702 (1993); State v. Fukagawa, 100 Hawai'i 498, 503-04, 60 P.3d 899, 904-05 (2002).

We also reject Amina's claim that the circuit court abused its discretion in allowing Dr. Bivens's testimony about the lack of behavior irregularities in child sexual abuse victims because it was not relevant and served only to bolster the Complainant's credibility. Amina had sought to impeach the Complainant's allegations of sexual abuse by pointing out that she appeared to be a well-adjusted child who did well in school and did not exhibit behavioral problems. Dr. Bivens testified on cross-examination that sexual assault can be a traumatic experience for children that may result in sleeping difficulties, irritability, anger, acting out sexual activities, "distress" of adults, and difficulty concentrating, among other things. He also opined on redirect examination that sexually abused children do not necessarily exhibit certain set behaviors, and there is no specific syndrome of symptoms that follow sexual abuse.

Amina argues that the circuit court erred in permitting Dr. Bivens to opine that sexually abused children do not necessarily exhibit behavioral irregularities. We disagree. The Hawai'i Supreme Court has recognized that "sexual abuse of children is a particularly mysterious phenomenon, and the common experience of the jury may represent a less than adequate foundation for assessing the credibility of a young child who complains of sexual abuse." State v. Batangan, 71 Haw. 552, 557, 799 P.2d 48, 51 (1990) (citations and quotation marks omitted). Therefore, expert testimony that helps the jury understand the behavior of child sex abuse victims is admissible. See id. at 557-58, 799 P.2d at 51-52. We conclude that Dr. Bivens's testimony properly focused on explaining the behavior of child

sex abuse victims, and it did not constitute an impermissible comment on the Complainant's credibility. See id.

III.

We affirm the February 27, 2006, Judgment of the circuit court.

DATED: Honolulu, Hawai'i, November 21, 2007.

On the briefs:

Karen T. Nakasone  
Deputy Public Defender  
for Defendant-Appellant

James M. Anderson  
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City and County of Honolulu  
for Plaintiff-Appellee



Chief Judge



Associate Judge



Associate Judge