

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. 28023

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
IFI SO'O, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR NO. 06-1-0088)

KHAMAKADO
CLERK, APPELLATE COURT
STATE OF HAWAII

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FILED

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Watanabe and Foley, JJ.)

Ifi So'o (So'o) was charged by written complaint with Abuse of Family or Household Member in violation of Hawaii Revised Statutes § 709-906 (Supp. 2006). The charge stemmed from a February 17, 2006 incident in which So'o and his girlfriend, Bodi Harris (Harris), had an argument in So'o's truck during which So'o allegedly struck Harris in the chest and pulled her hair. After a two-day bench trial, the Family Court of the Second Circuit (family court) found So'o guilty and sentenced him to, *inter alia*, one year of probation and 72 hours of imprisonment.¹ So'o now appeals from the Judgment entered by the family court on June 7, 2006.

In summary, So'o raises the following points of error on appeal:

(1) The family court "denied [So'o] his constitutional right of confrontation when it restricted his cross examination of [Harris's] violent and aggressive behavior and questioning on

¹ The Honorable Richard T. Bissen, Jr. presided.

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prior incidents." The family court further erred in finding that So'o could not testify as to Harris's allegedly violent or aggressive conduct on prior occasions. Moreover, "the cumulative effect of the exclusion of evidence[] undermined fundamental elements of [So'o's] defense."

(2) "Error occurred when the trial court issued it's [sic] decision and commented that the evidence of [Harris's] character, which it disallowed, would not have made a difference if it was admitted. Defense counsel did not object, but [So'o] asks this Court to find plain error and determine that such is a violation of the right of due process under the federal and state constitutions as the court is stating it's [sic] decision would stand, even if evidence it had excluded, were admitted. Such is an improper comment as the trial court can not [sic] 'weigh' evidence which it did not admit."

(3) So'o received "ineffective assistance of counsel . . . because [defense counsel] failed to adequately prepare for trial; failed to properly introduce evidence in support of the self defense claim; failed to cross exam [sic] witnesses Officer Yazaki and David Dodge effectively; and failed to call necessary supporting witnesses such as Bonnie and David; the Manager of Sansei (to establish that So'o was seeking his keys); So'o's ex-wife that [sic] had to bring him a spare truck key, to establish that the key was taken (with the inference that Harris had in fact taken it)[]; and Harris's day care provider to

establish that she moved a year earlier than [sic] the date of incident (for impeachment)."

After a careful review of the records and briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised, we resolve the points of error raised by So'o as follows:

(1) The family court did not abuse its discretion by precluding So'o from asking Harris during cross-examination about prior acts of violence or aggressive behavior by Harris. Defense counsel attempted to cross-examine Harris on that subject on two occasions. On the first occasion, the State of Hawai'i (State) objected and defense counsel withdrew the question before the family court ruled on the objection. Thus, there was no error by the family court at that point.

On the second occasion, the family court indicated that defense counsel needed to establish a foundation before the evidence could be admitted. Defense counsel responded:

[Defense Counsel]: I totally understand the Court. I prefer to call her as a rebuttal witness if the Court will allow me.

THE COURT: Yeah, that -- that's what I'm thinking of.

[Defense Counsel]: I agree, and I will be calling my client to establish his defense.

By finding Harris's testimony premature at that point in the trial, without precluding the defense from seeking to elicit the testimony during its case, the family court did not violate So'o's right to confrontation. Hawai'i Rules of Evidence

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(HRE) Rule 611(a); see State v. Maddox, 116 Hawai'i 445, 458, 173 P.3d 592, 605 (App. 2007). Moreover, although the defense did call Harris as a defense witness after So'o had testified, defense counsel did not then seek to elicit any testimony from Harris regarding her alleged prior instances of violent and aggressive conduct. In these circumstances, the family court did not err. See Maddox, 116 Hawai'i at 460, 173 P.2d at 607; State v. Brooks, 44 Haw. 82, 89, 352 P.2d 611, 616 (1960) ("The right to cross-examine a witness is fundamental and accepted as a right basic to our judicial system. When, however, a party fails to avail himself of the opportunity to cross-examine, he thereby forfeits such right."). So'o's argument that the family court violated his right to confrontation is thus without merit.

Additionally, the family court did not err in precluding So'o from testifying with regard to Harris's alleged violent or aggressive behavior. When defense counsel sought to elicit that testimony, he engaged in a lengthy colloquy with the court and the deputy prosecuting attorney. During that exchange defense counsel indicated that he was offering the testimony under HRE Rule 404(b), although some of defense counsel's arguments in support of admitting the evidence appeared to instead be based on HRE Rule 404(a). The family court ruled that it was "denying [defense counsel's] request as to 404(b)."

We conclude that the family court did not abuse its discretion in excluding the evidence under HRE Rule 404(b), since

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So'o failed to give reasonable notice of that evidence in advance of trial and failed to establish good cause for having failed to do so. HRE Rule 404(b).

Even assuming *arguendo* that So'o adequately raised HRE Rule 404(a) as an alternative basis for admitting the evidence, see HRE Rule 103(a)(2); State v. Wallace, 80 Hawai'i 382, 411 n.26, 910 P.2d 695, 724 n.26 (1996), the family court did not err in excluding the evidence. Prior to offering this evidence, So'o established no foundation that Harris was the initial aggressor in the incident or that So'o was acting in self-defense. See State v. Adam, 97 Hawai'i 413, 418, 38 P.3d 581, 586 (App. 2001); State v. Lui, 61 Haw. 328, 330, 603 P.2d 151, 154 (1979); Addison M. Bowman, Hawaii Rules of Evidence Manual § 404-2[2][A] (3d ed. 2006) ("The exemption of rule 404(a)(2) is limited to cases where proponents have sustained a burden of production of evidence of self-defense.") (citing Adam and Lui). Moreover, So'o's subsequent testimony failed to establish the necessary foundation. Cf. State v. Vinuya, 96 Hawai'i 472, 481, 32 P.3d 116, 125 (App. 2001) (in considering denial of motion to suppress evidence, it is appropriate for appellate court to consider the motion in light of evidence subsequently introduced at trial). In substance, So'o testified that he did not pull Harris's hair, and that if he did strike her chest, he did so inadvertently while struggling with her over his car key. Since So'o failed to establish the necessary foundation for the evidence, the family

court did not err in refusing to admit it.²

Because we conclude that the family court did not err in these evidentiary rulings,³ we reject So'o's suggestion that the cumulative effect of any error undermined his defense.

(2) The family court did not violate So'o's due process rights by stating that its conclusion that So'o was guilty would remain the same even if the excluded evidence had been admitted. The comment did not reflect any bias on the part of the family court judge, and in a bench trial "it is well established that a judge is presumed not to be influenced by incompetent evidence[,] "State v. Vliet, 91 Hawai'i 288, 298, 983 P.2d 189, 199 (1999) (citations and brackets omitted).

(3) With regard to So'o's claims that he received ineffective assistance of counsel, So'o has failed to establish that defense counsel was ineffective with regard to some of the alleged instances that he lists. Additionally, there is an insufficient record to evaluate the remaining alleged instances. The burden of establishing ineffective assistance of counsel

² Similarly, had the family court provisionally admitted So'o's proffered testimony about Harris's allegedly violent and aggressive behavior, it would have been justified in striking that testimony since the necessary foundation was not subsequently laid. Maddox, 116 Hawai'i at 458 n.8, 173 P.3d at 605 n.8.

³ So'o suggests, without providing any argument, that "[t]he evidence" would have been admissible under HRE Rule 609.1. As this contention is unsupported by reasoning, citations to the record, case law, or authority in violation of HRAP Rule 28(b)(7), and is raised for the first time on appeal, it is deemed waived. State v. Moses, 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2003); Taomae v. Lingle, 108 Hawai'i 245, 257, 118 P.3d 1188, 1200 (2005).

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rests upon the defendant. State v. Antone, 62 Haw. 346, 348, 615 P.2d 101, 104 (1980). To meet this burden, the defendant must establish (1) "specific errors or omissions of defense counsel reflecting counsel's lack of skill, judgment or diligence[,]" id., although "[d]efense counsel's tactical decisions at trial generally will not be questioned by a reviewing court[,]" id. at 352, 615 P.2d at 106, and (2) "that these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense[,]" id. at 348-349, 615 P.2d at 104.

In light of the lack of foundation for the testimony concerning Harris's alleged prior aggressive and violent behavior, So'o has not established that his trial counsel's failure to provide timely notice of that evidence under HRE Rule 404(b) or to explicitly advocate for its admission under HRE Rule 404(a) "resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Antone, 62 Haw. at 348-49, 615 P.2d at 104. Furthermore, defense counsel did not err in failing to cross-examine Harris about those alleged incidents based on her denial that she had previously been violent toward So'o, since such cross would have been inadmissible collateral impeachment. United States v. Lambert, 463 F.2d 552, 557 (7th Cir. 1972).

With regard to the other alleged instances of incompetence relating to cross-examination or "fail[ure] to get

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proper information into evidence," as well as the failure to call various witnesses, we affirm without prejudice to a subsequent Hawai'i Rules of Penal Procedure Rule 40 Post-Conviction Petition. State v. Silva, 75 Haw. 419, 864 P.2d 583 (1993). If such a petition is filed, defense counsel would then have the opportunity to explain the reasons he did not undertake that cross-examination, seek to introduce that evidence, or call those witnesses. Briones v. State, 74 Haw. 442, 463, 848 P.2d 966, 977 (1993). On the record that is before us, we will not speculate about whether there may have been legitimate tactical reasons for counsel's decision not to take those actions.

Accordingly, we hereby affirm the Judgment entered by the family court on June 7, 2006.

DATED: Honolulu, Hawai'i, April 30, 2008.

On the briefs:

Matthew S. Kohm
for Defendant-Appellant.

Gerald K. Enriques,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge