

NO. 28079

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
ROBERT MITCHELL, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CRIMINAL NO. 01-1-0020)

K. HAMAKAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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MEMORANDUM OPINION

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

Defendant-Appellant Robert Mitchell (Mitchell) appeals from the Judgment of Conviction and Sentence filed on July 5, 2006 in the Family Court of the First Circuit (family court).¹ After a bench trial,² the family court convicted Mitchell of one count of Sexual Assault in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 707-730(1)(b) (Supp. 2001).

On appeal, Mitchell contends the family court erred by

(1) not granting him a judgment of acquittal at the close of evidence when his trial counsel filed "a written closing argument that was the equivalent of a motion for judgment of acquittal";

(2) not ensuring that his waiver of his constitutional right to a jury trial was knowing and intelligent; and

(3) excluding critically important testimony by Dr. George F. Rhoades, Jr. (Dr. Rhoades), as manifested in the family court's granting of Motion in Limine No. 7 (Motion No. 7) filed by the State of Hawaii (State).

I. BACKGROUND

On September 6, 2001, the State indicted Mitchell, charging him with a single count of Sexual Assault in the First

¹ The Honorable Richard K. Perkins presided at sentencing and entered the Judgment.

² The Honorable Michael D. Wilson presided at trial.

Degree. The State alleged that Mitchell sexually assaulted his minor daughter (Minor) by inserting an object into her vagina on some date between April 7, 1999 and April 7, 2000.

On February 4, 2003, the State filed two motions in limine: State's Motion in Limine to Preclude Testimony that Violates the Psychologist-Client Privilege and the Victim-Counselor Privilege (Motion No. 8) and State's Motion in Limine to Preclude Inappropriate Expert Testimony and Enforce the Witness Exclusionary Rule (Motion No. 9).

In Motion No. 8, the State sought to preclude testimony that would violate the psychologist-client and victim-counselor privileges under Hawaii Rules of Evidence (HRE) Rules 504.1 (Supp. 2007) and 505.5, respectively. The State attached a Memorandum of Law and Exhibits A-H to its motion. None of the exhibits were sealed, and none had been redacted in any manner. The exhibits included:

Exhibit A, a Safe Family Home Report prepared for Child Protective Services (CPS) by Department of Human Services (DHS) Social Worker Hinda L. Diamond (Diamond) and signed by Supervisor Kayle M. Perez and marked "Confidential Report of the [DHS]".

Exhibit E, a September 5, 2000 report titled "Mitchell Family" prepared by Mary Lou Lomaka (Lomaka), "Therapist for [Mitchell's children]" and Director of Parents United Plus Program, and marked "CONFIDENTIAL Do Not Forward Without Prior Written Approval."

Exhibit F, a December 4, 2000 report titled "Mitchell Family" prepared by Lomaka and marked "CONFIDENTIAL Do Not Forward Without Prior Written Approval."

Exhibit G, an undated "Psychological Evaluation" report on Mitchell, Mitchell's Ex-Wife (Ex-Wife), and Minor prepared by John L. Wingert, Ph.D., for DHS. This report was not marked confidential.

Exhibit H, an April 26, 2000 letter to the family court from Dr. Rhoades, discussing his professional evaluation of Mitchell, Ex-Wife, and Minor over a period of four years and some

twenty evaluation sessions. His letter was not marked confidential.

In Motion No. 9, the State sought to prohibit at trial any expert testimony regarding the truthfulness or credibility of the allegations of sexual assault made by Minor or any prosecution witness and testimony from any witness who had read, viewed, or reviewed any pretrial statement from any prosecution witness, including Minor, and who sought to comment on such statement. Specifically, the motion sought to limit the testimony of Dr. Rhoades, who had provided psychological counseling to Mitchell, Ex-Wife, and Minor from 1996 to 2000. Dr. Rhoades had also testified (2001 testimony) at a 2001 family court custody adjudication hearing (FC-S No. 00-06656) (2001 hearing). The State attached a Memorandum of Law and Exhibits A-E to its motion. None of the exhibits were sealed, and none had been redacted in any manner. The exhibits included:

Exhibit C, a transcript of Dr. Rhoades' 2001 testimony.

Exhibit E, the same letter from Dr. Rhoades to the family court that was attached to Motion No. 8 as Exhibit H.

All of the above exhibits attached to Motions Nos. 8 and 9 became part of, and remain part of, the family court's public records of Mitchell's trial.

On July 29, 2004, the State filed its Motion No. 7, in which it sought, among other things, an order by the family court:

6. Psychologists

a. Excluding and precluding from use at trial any comment upon or reference to any psychological therapy, treatment, assessment, testing or diagnosis of any prosecution witness, including [Minor]. Any and all interactions that any prosecution witness, including [Minor], may have had with a psychologist constitute confidential communications under HRE Rule 504.1.

b. Excluding and precluding from use at trial any comment upon or reference to whether any prosecution witness, including [Minor], made or did not make any particular statement to any psychologist.

c. Specifically, the State seeks an order prohibiting the following psychologists from testifying:

- i. Marvin Acklin, Ph.D.
- ii. Arlinda Amos, Ph.D.
- iii. George Rhoades, Ph.D.
- iv. John Wingert, Ph.D.

At an August 17, 2004 hearing, the family court stated that Motions Nos. 7, 8, and 9 would be considered "closer to the trial during the normal motions in limine periods." Minor's guardian ad litem appeared at the hearing and invoked the psychologist-client privilege and victim-counselor privilege pursuant to HRE Rules 504.1 and 505.5, respectively. In the absence of Ex-Wife's counsel at the hearing, the State represented that Ex-Wife would be invoking the same privileges.

On November 16, 2004, Mitchell indicated to the family court that he would be calling Dr. Rhoades as an expert witness at trial and Dr. Rhoades would offer testimony "that will comport with the court's prior rulings."

On January 10, 2005, Mitchell waived his right to a jury trial. The family court engaged in a colloquy with Mitchell,³ during which Mitchell affirmed that if he did not understand something he would let the court know; he had reviewed the waiver form with his attorney; his attorney had reviewed with him the consequences and strategies involved in waiving his right to jury trial and answered any questions he had; he had decided to waive his right to jury trial based on that discussion; and he had signed the waiver form. Mitchell also acknowledged that he was 43 years old; had a bachelor of science degree; read, wrote, and understood English; had not taken any drugs or medication in the past 48 hours; was not under treatment for or suffering from any mental disease, condition, or disability or emotional problem; and had been in family court before. The family court advised Mitchell of the charges and explained the right to jury trial. Mitchell indicated that he understood and wanted to waive his right to jury trial. The family court found that Mitchell

³ The Honorable Karl K. Sakamoto presided.

had voluntarily, intelligently, and knowingly waived his right to jury trial and filed the waiver form on January 10, 2005.

The bench trial began on August 30, 2005. The family court heard Motion No. 7 and granted in part and denied in part the motion.⁴ The family court granted paragraph 6 of the motion, therefore excluding and precluding from use at trial: any comment upon or reference to any psychological therapy, treatment, assessment, testing, or diagnosis of any State witness, including Minor; any and all interactions that any State witness, including Minor, may have had with a psychologist that would constitute confidential communications under HRE Rule 504.1; and any comment upon or reference to whether any State witness, including Minor, made or did not make any particular statement to any psychologist. The family court denied Motion No. 7 as far as excluding Dr. Rhoades' testimony altogether, ruling that Dr. Rhoades could testify "as outlined in the motions in limine."

Although the family court noted in its August 17, 2004 hearing that it would be considering Motions Nos. 7, 8, and 9 closer to the trial date, there is no record of a hearing on Motions Nos. 8 and 9, except a reference by the family court on August 30, 2005 to all three motions in limine:

With respect to the motions in limine, motion in limine number 7 we discussed off the record. If it would be useful for you, we can finish up motion in limine number 7. Do you want to proceed with that or do you want to wait until Friday?

At trial, the State called Honolulu Police Department (HPD) Officer Kobayashi, who testified that he was dispatched to the Kapiolani Medical Center (KMC) on April 5, 2000. At KMC, he met with Ex-Wife and learned of the sexual assault allegedly committed by Mitchell, took Ex-Wife's oral statement, and initiated the case against Mitchell.

⁴ Most of the hearing was held in camera and off record. Judge Wilson summarized the in camera proceedings on the record in court.

HPD Evidence Specialist Shinsato testified that on November 11, 2000, she assisted in the scene processing for a search warrant on an Aipo Street residence by taking photographs and preparing a diagram. The photographs and diagram were stipulated into evidence as Exhibits 2-26.

Diamond testified that at the time of trial she was a supervisor at DHS's Child Welfare Services (CWS). She also testified as to her education and training and CWS's investigation procedures. Diamond stated that in 1996 DHS received an allegation that Mitchell had abused Minor, but the abuse was not confirmed because Minor could not verbalize who had been hurting her. The case was unconfirmed and closed.

Diamond testified that on April 4, 2000, DHS received another allegation of abuse involving Minor and she interviewed Minor six days later. Her interview with Minor was videotaped, and the recording was introduced into evidence as Exhibit 49. Diamond testified about the interview with Minor and about drawings that Minor brought to the interview depicting Minor on the bathroom floor. She also recognized pictures that Minor drew of "spoons," and the pictures were introduced into evidence as Exhibits 27 and 28. Diamond visited Minor at Minor's home on April 14, 2000 because Diamond had questions about the items Minor referred to as "spoons"; Minor said that these spoons were not for eating or keeping in the kitchen. On December 10, 2000, Diamond conducted a third interview of Minor. Diamond testified that Minor was twice examined at the Sex Abuse Treatment Center (SATC); the second time due to repeated complaints about pain inside her anus. Diamond also stated that even with the aid of Minor's drawings, she was unable to identify what objects Minor was referring to as "spoons." She suspected that Minor was actually referring to a vibrator or dildo.

Ex-Wife testified that she was married to Mitchell from 1992 until 1997, was single, and had Minor and a son, with Mitchell. She testified about the visitation schedule that she and Mitchell used to share custody of Minor and Minor's brother.

Ex-Wife stated that after Minor returned on April 2, 2000 from spending the weekend with Mitchell, Minor was rolling on the ground and holding her stomach and Minor cried all night. After speaking with Minor on the night of April 3, Ex-Wife made an appointment for April 5 with SATC to have Minor examined. Ex-Wife denied ever telling Minor what to draw in the drawings Minor took to her interviews with Diamond. Ex-Wife denied ever suggesting to Minor that Minor should fabricate or make up any allegations of sexual assault.

The family court found that Dr. Michels was qualified to testify as an expert in the areas of pediatrics and sex abuse treatment and identification. Dr. Michels testified that he examined Minor on April 5, 2000 and May 5, 2000. His examination on April 5, 2000 did not confirm or negate the allegations of sexual abuse. He conducted the second examination on May 5, 2000 based on the disclosure that the abuse had possibly involved a foreign object. Minor's description of the item caused Dr. Michels to suspect the use of a vibrator. Dr. Michels testified that his second exam of Minor was normal, although there was a small "divot or a little cut shaped thing" in the upper half of her otherwise normal hymen.

Detective Nakamura testified that he was the lead HPD investigator once CPS referred the case to HPD. He executed a search warrant on Mitchell's residence located on Aipo Street.

Minor then testified. She identified Mitchell as her father and stated that when she was five years old and slept over at Mitchell's house, he would do things to her that she did not like, including touching her in "the front and back private parts" with objects she referred to as "spoons." She testified that Mitchell would take her into the bathroom, remove her clothing including her underwear, and tell her to lie down on a rug on the floor. The bathroom door was closed when she and Mitchell were in the bathroom. She stated that the touching happened more than once, but she was not sure how many times it happened. Minor described the "spoons" as "like the kind use

spoon and the one that goes in front with tiny bits like a skinny and a bigger[.]" Minor testified that Mitchell put the spoon inside her front and her back "privates." Mitchell would be sitting on the toilet when he touched her "privates." Minor felt pain, but Mitchell told her not to scream.

Minor identified State's Exhibits 27 and 28 as drawings she made of the objects Mitchell put inside her. She testified that nobody told her to draw the pictures. Minor identified State's Exhibits 51, 52, and 55 as drawings she had done and Exhibit 53 as a letter she had written describing what she felt when her father had touched her. On cross-examination, Minor testified that her mother had not told her what to say in court.

After Minor testified, Mitchell moved for a judgment of acquittal, and the family court denied the motion.

The family court qualified Dr. Rhoades as an expert "in the field of clinical psychology trauma treatment including child sexual abuse and specifically the fields of coaching and false memory syndrome." Dr. Rhoades described "false memory coaching" as "being able to guide the person [to] be able to create false memories [of] something not necessarily true." Dr. Rhoades described how he evaluated a possible sexual abuse child victim and stated that there were two types of child sex abuse trauma: "type one trauma" and "type two trauma." He described "type one trauma" as "when there's been one situation of trauma [that] does not get repeated. That type of trauma [is] typically not forgotten by the child." Dr. Rhoades described "type two trauma" as a situation where abuse is repeated and the child develops amnesia in order to survive. He emphasized the importance of not coaching or leading the purported victim.

Dr. Rhoades testified that "research over the years [has] seen between 44 to 50 percent allegations of child sexual abuse during [divorce and/or custody] court proceedings actually not being supported by evaluation and by psychologists and/or CPS in that particular jurisdiction." He theorized as to possible

causes of false allegations, including a parent's sincere worry for a child and divorce-related bitterness.

On cross-examination, Dr. Rhoades stated that he had known Mitchell on a professional basis for a long time and he had met with Mitchell 46 times in a professional capacity prior to January 1, 2001.

Mitchell testified that he had two children, including Minor, with Ex-Wife and he was currently married with a daughter. He stated that Ex-Wife had accused him of molesting Minor in February 1996. Mitchell testified that SATC and CPS became involved, Minor was examined, and CPS dropped the case.

Mitchell testified about yeast infections suffered by Minor in October 1998, September 1999, and January 2000 that required him to apply medication to Minor's genital area. Mitchell denied that he ever molested or abused Minor. On cross-examination, Mitchell admitted that he never mentioned the yeast infections in the two April 2000 letters he wrote to CPS. He also stated that while he originally testified to not applying medication to Minor's genitals after January 31, 2000, he now revised that to indicate he may have applied the medication up until April 2, 2000.

On September 30, 2005, the parties filed their closing arguments. On October 21, 2005, the family court found Mitchell guilty as charged. On November 10, 2005, the family court filed its Findings of Fact, Conclusions of Law, and Verdict. On July 5, 2006, the family court sentenced Mitchell to twenty years of imprisonment and entered the Judgment. Mitchell timely filed his notice of appeal.

II. STANDARDS OF REVIEW

A. Motion for a Judgment of Acquittal

The standard to be applied by the trial court in ruling upon a motion for a judgment of acquittal is whether, upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. An appellate court employs the same standard of review.

State v. Hicks, 113 Hawai'i 60, 69, 148 P.3d 493, 502 (2006) (quoting State v. Maldonado, 108 Hawai'i 436, 442, 121 P.3d 901, 907 (2005)).

B. Plain Error/Rule 52(b)

Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Therefore, an appellate court "may recognize plain error when the error committed affects substantial rights of the defendant." State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999) (internal quotation marks and citation omitted).

The appellate court "will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999) (internal quotation marks and citation omitted).

This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system--that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes.

Id. (quoting State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993)).

C. Findings of Fact

It is for the trial judge as fact-finder to assess the credibility of witnesses and to resolve all questions of fact; the judge may accept or reject any witness's testimony in whole or in part. As the trier of fact, the judge may draw all reasonable and legitimate inferences and deductions from the evidence, and the findings of the trial court will not be disturbed unless clearly erroneous. An appellate court will not pass upon the trial judge's decisions with respect to the credibility of witnesses and the weight of the evidence, because this is the province of the trial judge.

State v. Eastman, 81 Hawai'i 131, 139, 913 P.2d 57, 65 (1996) (citations omitted). "A finding of fact is clearly erroneous

when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995) (internal quotation marks and citation omitted).

D. Harmless Error

[E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in light of the entire proceedings and given the effect to which the whole record shows it is entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction.

If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.

State v. Gano, 92 Hawai'i 161, 176, 988 P.2d 1153, 1168 (1999) (internal quotation marks and citations omitted; block quote format changed).

III. DISCUSSION

A. MITCHELL WAS NOT ENTITLED TO A JUDGMENT OF ACQUITTAL.

Mitchell contends the family court erred by not granting him a judgment of acquittal⁵ and "ignored or misapprehended important evidentiary aspects of this case, and thus reached the wrong result based on unreliable evidence."

Mitchell challenges the family court's Findings of Fact (FOFs) 3, 4, 10, 17, 23, 24 and 30. We conclude that none of the

⁵ At the outset, we note that while Mitchell orally moved for a judgment of acquittal at the close of State's evidence, he never renewed this motion after the defense rested. Mitchell instead argues that his written Closing Argument, filed on September 30, 2005, "was the equivalent of a motion for judgment of acquittal." This runs counter to HRPP Rule 47(a), which requires that "application to the court for an order shall be by motion." The State cites to State v. Pudiquet, 82 Hawai'i 419, 922 P.2d 1032 (App. 1996), for the proposition that "[i]t is well settled that when the defense presents evidence after a motion for judgment of acquittal made at the close of the prosecution's case, any error by the trial court in denial of the motion is waived by the defense." Id. at 423, 922 P.2d at 1036. However, the State misapprehends the rule stated therein; it applies only to jury trials and not bench trials, as in this case. State v. White, 10 Haw. App. 263, 265, 865 P.2d 944, 945 (1994).

family court's factual findings are clearly erroneous and thus Mitchell was not entitled to acquittal.

Mitchell contends FOF 3, which states that "[Ex-Wife] and [Mitchell] separated a month or so after [the birth of their son]" and that "[a]fter the separation, the children continued to visit [Mitchell]," was erroneous because it omitted Ex-Wife's 1996 allegations that Mitchell had abused Minor and thus obscured Ex-Wife's potential motive for influencing Minor to make false allegations. This alleged omission fails to undermine the family court's finding, however, and is really an attack on the family court's supposed failure to find additional facts. Ex-Wife did testify as to the separation after their son's birth and the visitation schedule observed by Mitchell and Ex-Wife. FOF 3 is therefore supported by substantial evidence.

Mitchell challenges FOF 4, which states that Mitchell "filed for divorce in 1996" and the "divorce was final on February 27, 1997." Mitchell argues FOF 4 fails to recognize that Ex-Wife was "frustrated" by the "difficult divorce." Again, this is better stated as a failure to find additional facts, not an attack on the FOF itself. Mitchell did testify that he and Ex-Wife filed for divorce in 1996, and Ex-Wife testified that the divorce became final on February 27, 1997. Therefore, FOF 4 rests upon substantial evidence.

Mitchell next challenges FOF 10, which states that "[Ex-Wife] did not know [Mitchell's] precise address in Hawai'i Kai. She never went to his home. Consequently, she did not know the layout or appearance of the home's interior." Mitchell argues that Ex-Wife could have learned the appearance of the home's interior from Minor or Minor's brother. Nonetheless, it was within the family court's purview to credit Ex-Wife's testimony that she did not know Mitchell's address and had not been inside his home, as well as Mitchell's own testimony that Ex-Wife had never been inside and would have no first-hand knowledge of the layout. Therefore, FOF 10 is supported by substantial evidence. State v. Pegouskie, 107 Hawai'i 360, 365,

113 P.3d 811, 816 (App. 2005) (trial judge may make reasonable and rational inferences).

Mitchell argues that FOF 17, which states that Dr. Michels "examined [Minor] at the [SATC] on April 5, 2000 and May 5, 2000," is erroneous because it "fails to recognize that Dr. Michels testified that when he examined [Minor's] genital area on April 5, 2000, all he found was some generalized symmetric redness." Nonetheless, this FOF is supported by substantial evidence; Dr. Michels testified as to the dates he examined Minor. Mitchell was free to argue the desired inferences he wished the family court to draw as to the results of those examinations, but those inferences are separate from the fact of the examinations, and the family court did not err in finding that Dr. Michels examined Minor on those dates.

Mitchell further argues that FOF 23, which states that "[o]ne of [Minor's] drawings, State's exhibit 55, is telling. It shows [Mitchell] looking back at [Minor] from the door of the bathroom to make sure she doesn't leave the bathroom as he walks out of the bathroom to attend to [Minor's brother]," was unsupported by substantial evidence because the family court should have drawn a different inference from the drawing. As we have already noted, it is the fact finder's job to draw inferences and reach conclusions from the evidence, Pegouskie, 107 Hawai'i at 365, 113 P.3d at 816, and on appeal, we will not second-guess the fact finder.

Mitchell challenges FOF 24, which states that "[Minor] drew pictures of the object [Mitchell] used to insert into her vagina." Mitchell argues the FOF "ignores the evidence that the pictures of the supposed 'spoons' that [Minor] drew 'didn't match spoons' or any other identifiable object when [Diamond] observed them." Again, Mitchell's argument about the inference the family court should have made is misplaced. Minor testified that Exhibits 27 and 28 depicted the objects Mitchell inserted into her. The FOF is therefore supported by substantial evidence.

Lastly, Mitchell challenges FOF 30, which states "that [Minor's] drawings were not influenced by [Ex-Wife]." Mitchell argues the FOF ignores "the important evidence that when [Diamond] first met [Minor] on April 10, 2000, [Minor] had brought along with her to the interview pictures that had already been drawn." However, Minor testified that no one had told or forced her to draw the pictures. Minor also testified that Exhibits 27 and 28 depicted the objects Mitchell inserted into her. Diamond testified that the exhibits depicted the objects described by Minor during the April 10, 2000 interview and that Minor made the drawings in her presence on April 14, 2000. Ex-Wife testified she did not tell Minor what to draw. Diamond also testified that she did not tell Minor what to draw in Exhibits 27 and 28 and with regards to Exhibit 31 had only asked Minor to "take a piece of blank paper and draw what had happened to her." FOF 30 is supported by substantial evidence, and the family court did not err in issuing it.

The family court did not err in denying Mitchell's motion for a judgment of acquittal. Viewing the evidence in the light most favorable to the State and in full recognition of the province of the trier of fact, a reasonable mind might fairly conclude Mitchell's guilt beyond a reasonable doubt.

B. THE VALIDITY OF MITCHELL'S WAIVER OF HIS RIGHT TO JURY TRIAL WAS NOT AFFECTED BY THE FACT THAT HIS CASE WAS TRIED BY A DIFFERENT JUDGE THAN THE ONE WHO CONDUCTED THE COLLOQUY AS TO THE WAIVER OF HIS RIGHT TO JURY TRIAL.

Mitchell contends "the [circuit court] erred by not ensuring that [Mitchell's] waiver of his constitutional right to a jury trial was knowing and intelligent." Mitchell claims that prior to waiving his right to jury trial, the Honorable Karl B. Sakamoto stated that he would be the judge at a bench trial; yet, the trial was actually presided over by the Honorable Michael D. Wilson. Mitchell argues that the switch of judges rendered his waiver invalid as the product of misinformation.

We note that Mitchell never objected to Judge Wilson's presiding over his trial, and thus we review only for plain error. State v. Sugihara, 101 Hawai'i 361, 364, 68 P.3d 635, 638 (App. 2003). We also note that Mitchell does not challenge the sufficiency of the colloquy given by Judge Sakamoto concerning Mitchell's waiver of his right to jury trial.

We decline to adopt Mitchell's suggestion that a judge's replacement by another judge amounts to misinformation of the type that would render an otherwise sufficient jury waiver invalid. In support of his theory, Mitchell cites to Bumper v. North Carolina, 391 U.S. 543, 548-50, 88 S. Ct. 1788, 1791-92 (1968); Guidry v. Dretke, 397 F.3d 306, 328-29 (5th Cir. 2005); and Hart v. Attorney General of Florida, 323 F.3d 884, 894-95 (11th Cir. 2003). All are easily distinguishable from the instant case; in each case the misinformation was intentional and its object was to coerce the defendant to waive a constitutional right. In Bumper, a consent to search was held invalid because of the coercive misinformation that an officer possessed a search warrant. 391 U.S. at 548-50, 88 S. Ct. at 1791-92. The police deceived Guidry into waiving his right to counsel by falsely telling him that his attorney had advised him to answer questions. Guidry, 397 F.3d at 311. Misinformation was used by the police to procure a waiver of Hart's Miranda rights. Hart, 323 F.3d at 894-95.

In the instant case, the record is devoid of even the slightest indication of any misinformation. Judge Sakamoto informed Mitchell that Mitchell's right to a jury trial was a constitutional right, the jury would be composed of twelve members from Mitchell's community who would hear all the evidence, and the jury could only convict him if they unanimously found him guilty beyond a reasonable doubt. Judge Sakamoto further stated to Mitchell: "And you understand that if you waive your right to trial by jury, you will have a bench trial where a judge, that would be me, would listen to all the evidence and I'll decide whether you are guilty or not guilty of the

offense charged[.]" Judge Sakamoto clearly described to Mitchell the difference between bench and jury trials. The record lacks any indicia that Judge Sakamoto or anyone else attempted to deceive or manipulate Mitchell into waiving his jury right, through misinformation or otherwise. We discern no error affecting the validity of Mitchell's waiver of his constitutional right to trial by jury.

C. THE PSYCHOLOGIST-CLIENT EVIDENTIARY PRIVILEGE.

Mitchell asks this court to recognize the family court's limitation of Dr. Rhoades' testimony as error.

We first note that Mitchell did not object on the record to the exclusion of Dr. Rhoades' testimony as to statements made by Minor and Ex-Wife to Dr. Rhoades and Mitchell made no offer of proof as to what Dr. Rhoades would testify as to those statements,⁶ except Mitchell's counsel's statement at a November 16, 2004 trial call that Dr. Rhoades would offer "testimony that will comport with the court's prior rulings."⁷ Thus we review only for plain error. HRPP Rule 52(b).

HRE Rule 504.1(b) provides:

Rule 504.1 Psychologist-client privilege.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the client's mental or emotional condition, including substance addiction or abuse, among the client, the client's psychologist, and persons who are participating in the diagnosis or treatment under the direction of the psychologist, including members of the client's family.

At the August 17, 2004 pre-trial hearing on the State's motions in limine, Minor's guardian ad litem invoked the psychologist-client privilege pursuant to HRE Rule 504.1 and victim-counselor privilege pursuant to HRE Rule 505.5 on Minor's

⁶ Mitchell asserts that he may have objected off the record, noting the family court's statement that it had discussed Motion No. 7 with the parties off the record. Mitchell's counsel on appeal was not his trial counsel.

⁷ Mitchell's counsel was responding to an objection by the State to Mitchell's announced intent to call Dr. Rhoades as an expert witness at trial.

behalf in regard to any statements or matters disclosed during psychological therapy sessions. The State represented that Ex-Wife would also invoke the relevant privileges.

Once a privilege holder has invoked a valid psychologist-client privilege, generally, the matters claimed under the privilege cannot be admitted in a judicial proceeding as evidence. HRE Rule 504.1. HRE Rule 511 provides an exception to a claim of privilege if the privilege holder voluntarily waives the privilege:

Rule 511 Waiver of privilege by voluntary disclosure.
A person upon whom these rules confer a privilege against disclosure waives the privilege if, while holder of the privilege, the person or the person's predecessor voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is a privileged communication.

It does not appear that Ex-Wife and Minor intended to waive the privilege. The fact that psychologist-client privileged matters at issue in this case were disclosed at the 2001 hearing is of no consequence in finding a voluntary waiver or destruction of the privilege. The 2001 hearing, at which Dr. Rhoades was allowed to testify about psychological statements and matters in his therapy sessions with Minor and Ex-Wife and psychological counseling and professional opinions he had formed regarding Mitchell, Ex-Wife, and Minor, was exempted from the psychologist-client privilege rule under HRS § 587-44 (2006 Repl.).⁸ Because there was no privilege available in the 2001 hearing, Ex-Wife and Minor did not waive the privilege at that hearing.

However, the State made the transcript of Dr. Rhoades' 2001 testimony a matter of public record when it attached a copy

⁸ HRS § 587-44 provides:

§587-44 **Admissibility of evidence.** The physician-patient privilege, the psychologist-client privilege, the spousal privilege, and the victim-counselor privilege shall not be available to exclude evidence of imminent harm, harm, or threatened harm in any proceeding under this chapter.

of the transcript as Exhibit C to Motion No. 9. The disclosed testimony included references by Dr. Rhoades to various statements made by Minor and Ex-Wife to Dr. Rhoades during therapy sessions and his professional opinion on matters concerning the mental health of Ex-Wife and Minor. The psychologist-client privilege that attached to matters testified to by Dr. Rhoades at the 2001 hearing and the confidentiality of the proceedings with respect to his testimony, see HRS § 571-84 (2006 Repl.), may have been destroyed when the State made the transcript of his 2001 testimony a matter of public record.

Whether the State's public disclosure of Dr. Rhoades' 2001 testimony destroyed the psychologist-client privilege requires a court to consider all of the circumstances surrounding the disclosure, specifically: "(1) the reasonableness of precautions taken to prevent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness." Save Sunset Beach Coalition v. City & County of Honolulu, 102 Hawai'i 465, 486, 78 P.3d 1, 22 (2003) (internal quotation marks and citation omitted). Because this issue was not addressed by the circuit court, we are required to remand this case for an evidentiary hearing to determine whether the State's public disclosure of Dr. Rhoades' 2001 testimony destroyed the psychologist-client privilege. See State v. Moses, 102 Hawai'i 449, 457, 77 P.3d 940, 948 (2003).

D. THE EXCLUSION OF DR. RHOADES' TESTIMONY.

The issues at trial in this case were similar to those in the 2001 family court custody adjudication at which Dr. Rhoades testified. His 2001 testimony was based on his treatment of Mitchell, Ex-Wife, and Minor. The family court excluded/precluded his 2001 testimony from the instant case under the conclusion that such testimony was covered by the psychologist-client privilege, not recognizing that the privilege

may have been destroyed when the State publicly disclosed Dr. Rhoades' 2001 testimony. Dr. Rhoades' treatment of Mitchell, Ex-Wife, and Minor led him to conclude that Mitchell did not sexually abuse Minor.⁹ Dr. Rhoades was not allowed to testify as to what led him to this conclusion. Although he was permitted as an expert to testify about coaching and false memory syndrome, he was precluded from testifying as to the information he garnered from Ex-Wife and Minor during therapy sessions that led to his conclusion that Mitchell did not sexually abuse Minor.

Dr. Rhoades' opinion was based on part on the following:

- 1. His opinion that a diagnosis of a histrionic personality disorder made in a report by another doctor was correct in Ex-Wife's case and what such a disorder meant in terms of the behavior of someone afflicted with that disorder was probative of the issue of coaching of the Minor.**

Dr. Rhoades testified at the 2001 hearing regarding a report by Dr. Wingert concerning Dr. Wingert's diagnosis of Ex-Wife having a histrionic personality disorder. In Dr. Rhoades' 2001 testimony, he confirmed that he had read Dr. Wingert's report containing the histrionic diagnosis and that he agreed with Dr. Wingert's diagnosis. When questioned in the 2001 hearing about the symptoms of a histrionic personality disorder and how they related to the ability of a person suffering that condition to tell the truth, Dr. Rhoades stated that "with those type of things¹⁰ you have the ability to exaggerate and believe something even if there's no facts behind it, and that's part of the definition of a histrionic person." Dr. Rhoades then gave his professional opinion on how this would likely affect children

⁹ Although Dr. Rhoades' opinion as to Mitchell's guilt would not have been admissible in Mitchell's criminal trial, evidence that led to that opinion may have been admissible. State v. Batangan, 71 Haw. 552, 799 P.2d 48 (1990).

¹⁰ "[T]hose types of things" referenced Dr. Rhoades' testimony that he asked Ex-Wife if Mitchell ever hit her and she said, "No, but I'm afraid he will."

of a person afflicted with a histrionic personality disorder:
"So as a result [of] continually talking that way with children,
that they will be damaged or hurt or even killed, is going to
lead to angst or fear for the children regarding the father and,
of course, regarding the fiancé, now the wife."

**2. Statements made by Minor during therapy sessions
regarding what Ex-Wife had told Minor about
truthfulness.**

According to Dr. Rhoades' 2001 testimony, Minor told
him at one therapy session that her mother had told her it was OK
to lie:

In one session that I noted in my report [Minor] said that
Mama told her that it was okay to lie and not to tell the
father. These are actual words that [Minor] made actually
in the session which I quoted in my notes as well as the
report. She went on to say not to tell [Mitchell] that she
was putting eye makeup on [Minor] as well as [Minor's
brother].

Dr. Rhoades' 2001 testimony also included his
professional review of video tapes of therapy sessions conducted
by Dr. Wingert with Minor. Dr. Rhoades describes a video tape of
a therapy session where Minor tells Dr. Wingert that her mom (Ex-
Wife) had told her "it's okay sometimes to lie."

**3. Evidence of possible improper influence on Minor
by Ex-Wife for the purpose of frightening Minor
into making incriminating statements against
Mitchell.**

Dr. Rhoades gave testimony at the 2001 hearing that
both Minor and her brother had told him of their fear that
Mitchell's fiancé/new wife would kill them:

In the interview where [Minor's brother] himself mentioned
. . . that he was concerned that he was gonna be killed, you
know, by the fiancé or the wife of [Mitchell], then you have
a concern that the things that are being said to the
children over the time period that the children reported to
me actually the children are now starting to say as facts.
. . . .

On the 21st of July is when [Minor] said that her mom
told her "Maria's going to kill dad and [Minor's brother]
and me and take dad's money." And we hear that statement
repeated very similarly by [Minor's brother] in his video
interview.

4. **A comment made by Ex-Wife at a therapy session conducted by Dr. Rhoades that a man she had been seeing might be a child abuser.**

In Dr. Rhoades' 2001 testimony, he related how Ex-Wife said to him during a therapy session that a "previous boyfriend would probably be a child abuser and thus she dropped him[.]" Dr. Rhoades went on to say that he asked Ex-Wife if "there [was] any possibility that the boyfriend had touched [Minor]?" He said Ex-Wife responded that she "did not think he did."

5. **Limitations placed upon Dr. Rhoades' testimony at Mitchell's family court trial.**

Even without an objection being made, it is clear that Dr. Rhoades was aware of the limitation that Motion No. 7 placed on the scope of his testimony at Mitchell's family court criminal trial. At one point, Dr. Rhoades asked the judge if he was allowed to answer a question:

Q. [Prosecutor] Now, again, I'm not asking what may or may not have transpired in these sessions. I just want to know how long you've known each other.

I'm showing you what's been marked for identification as State's Exhibit Number 44. You recognize this document?

A. [Dr. Rhoades] Before I go on, Your Honor, am I allowed to make comments regarding professional relationship [between Mitchell and Dr. Rhoades] in this case?

Dr. Rhoades and Mitchell's counsel were keenly aware that there were limitations placed on Dr. Rhoades' testimony by the family court and, even without objection by the State, Dr. Rhoades appears to have consciously limited the scope of his testimony.

We conclude that if the psychologist-client privilege had been destroyed, the limits the family court imposed on the testimony of Dr. Rhoades based on the conclusion that such testimony was barred by the psychologist-client privilege under HRE Rule 504.1 constituted plain error. The appellate court "will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice,

and to prevent the denial of fundamental rights." Vanstory, 91 Hawai'i at 42, 979 P.2d at 1068 (internal quotation marks and citation omitted).

If the psychologist-client privilege was destroyed, the exclusion/preclusion of Dr. Rhoades' testimony would have seriously affected the fairness and integrity of Mitchell's trial, entitling Mitchell to a new trial to serve the ends of justice and prevent a denial of his fundamental right to a fair trial.

E. THE STATUTORY PRIVILEGE CLAIMED BY EX-WIFE CAN BE OUTWEIGHED BY MITCHELL'S CONSTITUTIONAL RIGHTS.

The Hawai'i Supreme Court's holding in State v. Peseti, 101 Hawai'i 172, 181, 65 P.3d 119, 128 (2003), remains controlling in cases where a statutory privilege, which is in conflict with a defendant's constitutional rights, is invoked by a non-victim witness. In the instant case, the record is devoid of any indication that the family court applied or even considered Peseti in precluding, under HRE Rule 504.1, any cross-examination of Ex-Wife on matters pertaining to her "psychological therapy, treatment, assessment, testing or diagnosis."

Mitchell's case presents a situation that is analogous to the conflict at issue in Peseti between a witness's statutory privilege and a defendant's constitutional rights. In both the Peseti and Mitchell trials, the privilege holder was a witness and the privilege at issue conflicted with the defendant's right to present favorable evidence. In Peseti, the circuit court precluded the defense from cross-examining the witness on privileged matters under HRE Rules 504.1(b) or 505.5(b). Peseti, 101 Hawai'i at 177, 65 P.3d at 124. Similarly, at Mitchell's trial, the family court precluded Mitchell from comment or reference to matters privileged under HRE Rule 504.1 on cross-examination of any prosecution witness.

In Peseti, the conflict between the statutory privilege as it applies to a witness and the defendant's constitutional

right of confrontation was a case of first impression for the Hawai'i Supreme Court.

[W]e have yet to resolve a direct conflict between a criminal defendant's assertion of his constitutional right to cross-examine adverse witnesses and a witness'[s] invocation at trial of a statutory privilege appearing in the HRE. We now hold that, when a statutory privilege interferes with a defendant's constitutional right to cross-examine, then, upon a sufficient showing by the defendant, the witness'[s] statutory privilege must, in the interest of the truth-seeking process, bow to the defendant's constitutional rights.

Id. at 181, 65 P.3d at 128. After noting that the right of confrontation does not trump a statutory privilege in every case, the supreme court adopted the following test for determining when the statutory privilege must give way:

Although it stands to reason that the right of confrontation via cross-examination, as guaranteed by article I, section 14 of the Hawai'i Constitution, will not trump a statutory privilege in every case in which a conflict arises between the two, we believe that fundamental fairness entitles a defendant to adduce evidence of a statutorily privileged confidential communication at trial when the defendant demonstrates that: (1) there is a legitimate need to disclose the protected information; (2) the information is relevant and material to the issue before the court; and (3) the party seeking to pierce the privilege shows by a preponderance of the evidence that no less intrusive source for that information exists.

Id. at 182, 65 P.3d 129 (internal quotation marks and citation omitted).

In Mitchell's case, the conflict involves the same constitutional rights that were present in Peseti. The conflict is between Mitchell's constitutional right to cross-examine witnesses and the statutory privilege of a witness.

We recognize that since Peseti was decided, Article I, § 14 of the Hawai'i Constitution has been amended to provide that a victim (such as Minor) does not forfeit his or her statutory privilege if it conflicts with an accused's constitutional rights. Nevertheless, the Peseti holding, as it applies to a non-victim witness (such as Ex-Wife), was not overruled by the amendment. The Peseti decision has only been restricted by the constitutional amendment to § 14 to the extent that it applies to a victim-witness.

Under the Hawai'i Supreme Court's decision in Peseti, it was plain error for the family court to preclude all "comment upon or reference to" matters privileged under HRE Rule 504.1 as they pertained to Ex-Wife (a non-victim witness) without conducting the balancing test set forth in Peseti, 101 Hawai'i at 182, 65 P.3d at 129. Ex-Wife's possible bias and influence on Minor was a critical issue in the case. Minor was only five years old when the alleged sexual abuse took place. There was no physical evidence that substantially corroborated Minor's testimony, and there was uncertainty over Minor's description of the implement allegedly used by Mitchell to commit the abuse. Prior to the date of Minor's accusation, Mitchell and Ex-Wife had been involved in acrimonious divorce proceedings. Thus, evidence bearing on Ex-Wife's capacity, intentionally or unintentionally, to influence Minor in her accusation against Mitchell was critical to the defense.

IV. CONCLUSION

Based on the foregoing, we vacate the July 5, 2006 Judgment of Conviction and Sentence of the family court. However, rather than remanding for a new trial, we remand for an evidentiary hearing to determine whether the disclosure of Dr. Rhoades' 2001 testimony destroyed the psychologist-client privilege as to Minor and Ex-Wife. If the family court concludes the privilege was destroyed, Mitchell shall be entitled to a new trial. If the family court concludes the privilege was not destroyed, it shall then conduct the balancing test set forth in Peseti with respect to the psychologist-client privilege claimed by Ex-Wife. Mitchell shall be entitled to a new trial if the family court concludes that under the Peseti test, Mitchell's constitutional right of confrontation trumps the statutory privilege claimed by Ex-Wife in this case. If the family court concludes Mitchell is not entitled to a new trial, then it shall

enter a new judgment reinstating Mitchell's conviction and sentence.

DATED: Honolulu, Hawai'i, October 17, 2008.

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Chief Judge



Associate Judge



Associate Judge