

\*\*\*NOT FOR PUBLICATION\*\*\*

NO. 27252

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

IOKEPA WAIALAE, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT  
(FC-CR NO. 05-1-1016)NORMA T. YARA  
CLERK, APPELLATE COURTS  
STATE OF HAWAI'I

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FILED

SUMMARY DISPOSITION ORDER(By: Moon, C.J., Levinson, Nakayama,  
Acoba, and Duffy, JJ.)

Defendant-Appellant Iokepa Waialae (Defendant) appeals from the April 19, 2005 judgment (the judgment) of the family court of the first circuit<sup>1</sup> (the court) convicting him of Abuse of Family and Household Members, Hawai'i Revised Statutes (HRS) § 709-906 (Supp. 2005).<sup>2</sup> On appeal, Defendant contends that (1) the court improperly refused to admit evidence relating to a

<sup>1</sup> The Honorable Reynaldo D. Gaulty presided.

<sup>2</sup> Hawai'i Revised Statutes (HRS) § 709-906, entitled "Abuse of family and household members; penalty," states in relevant part:

(1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member, or to refuse compliance with the lawful order of a police officer under subsection (4). The police, in investigating any complaint of abuse of a family or household member may, upon request, transport the abused person to a hospital or safe shelter.

For the purposes of this section, "family or household member" means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

telephone message<sup>3</sup> left by the complaining witness (CW) for the Defendant and, thus, violated Defendant's right to a complete defense and his due process right to a fair trial under article I, sections 5 and 14 of the Hawai'i Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and (2) the court abused its discretion by admitting testimony that the CW obtained a temporary restraining order (TRO) after the alleged incident of abuse inasmuch as it was not probative of the issue of guilt and served only to unduly prejudice the jury against the Defendant.

Plaintiff-Appellee State of Hawai'i (the prosecution) answers that (1) the court properly excluded evidence of the message the CW left on Defendant's cellular telephone a few days before trial, (2) the court did not err in allowing the CW to testify that two days after the incident she obtained a TRO against Defendant, and (3) any error was harmless beyond a reasonable doubt.

As to Defendant's first issue, article 1, section 14 of the Hawai'i Constitution and the sixth amendment to the United States Constitution guarantee defendants, inter alia, the right

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<sup>3</sup> Defense counsel read a transcript of the message, which stated, in pertinent part:

You know what, fucking dummy, you gonna believe whatever you fucking think is fucking good for you cause you know what, from now on, you not going see your fucking kids, and Thursday, I don't know why the fuck I went lie for you, but now I gotta call the fucking prosecutor and fucking make up a whole big story that you wen threaten me for fucking tell them that. Fucking dumb bitch, and you not going to see your kids cause I don't need you fo' watch them, I can have somebody else fo' watch them.

to "be confronted with the witnesses against" him or her. See State v. Balisbisana, 83 Hawai'i 109, 114-15, 924 P.2d 1215, 1220-21 (1996) (holding that an accused's right to demonstrate the bias or motive of a prosecution witness is guaranteed by article 1, section 14 of the Hawai'i Constitution and the sixth amendment to the United States Constitution, and that "the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross examinatio[n]").

The court ruled that the message was inadmissible because it was not relevant and would be "very confusing" to the jury. However, based on the record, Defendant was denied the ability to effectively cross-examine the CW to establish "a record from which to argue why [the witness] might have been biased." Davis v. Alaska, 415 U.S. 308, 318 (1974). Whether the message established any bias, interest, or motive was properly for the jury to determine.

The court also ruled that the message was not relevant or admissible under Hawai'i Rules of Evidence (HRE) Rule 609.1 because (1) the message did not indicate bias, interest or motive that would have caused the CW to fabricate the charges, (2) the message was not relevant, and (3) even if the message was relevant, the message might be confusing to the jury. As Defendant asserts, the prosecution's case relied on the jury believing the CW's rendition of the events that transpired between her and Defendant and the cause of her injuries. The CW's credibility, then, was an issue in the case and the message was

relevant to that issue. The message revealed, at the very least, some animosity on the part of the CW towards the Defendant, which could certainly amount to "bias, interest, or motive" to fabricate. See supra note 3. The probative value of the phone call message was not substantially outweighed by confusion of the issues because the CW was available and testified at trial. The risk of confusing the jury was slight in that the prosecution, as it argued, would have had the opportunity to refute Defendant's view of the message or to explain the message or the context in which it was made.

As to issue two, Defendant argues that he was denied a fair trial because evidence that the CW obtained a TRO two days after the incident (1) was in violation of an in limine ruling, (2) was irrelevant, (3) was highly prejudicial, and (4) improperly bolstered the CW's credibility. Based on the record, it is concluded that testimony concerning the TRO was inadmissible.

As to the prosecution's third argument, viewing the record as a whole, either (1) the denial of Defendant's right of confrontation with respect to cross-examination of the CW concerning the message left by her or (2) admitting evidence that a TRO was obtained following the incident would establish "a reasonable possibility that error might have contributed to the

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conviction." State v. Haili, 103 Hawai'i 89, 100, 79 P.3d 1263, 1274 (2003). Therefore,

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the court's April 19, 2005 judgment, from which the appeal is taken, is vacated, and the case is remanded for a new trial.

DATED: Honolulu, Hawai'i, March 21, 2006.

On the briefs:

Stephen T. Niwa, Deputy  
Public Defender, for  
defendant-appellant.

Stephen K. Tsushima,  
Deputy Prosecuting Attorney,  
City & County of Honolulu,  
for plaintiff-appellee.

