

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

CONCURRING OPINION BY REIFURTH, J.

I write briefly in concurrence with the majority's disposition of the appeal brought by Defendant-Appellant Last Kony ("Kony"). While I agree with the majority's analysis as to Kony's first two points of error, I would resolve his final two points as having been waived.

Kony's third and fourth points of error address the potential for prejudice arising from "testi[mony] regarding the actions said to be performed by the so-called typical sexual abuser and the typical characteristics of a sexual abuser, i.e. 'profile evidence.'" See *State v. Transfiguracion*, SCWC-11-0000048, 2013 WL 1285112, at *5-13 (Haw. Mar. 28, 2013) (Acoba, J., dissenting from denial of certiorari). I share the concern, expressed by the dissenting judges in *Transfiguracion*, that such profile evidence may be unduly prejudicial. *Id.* at *9.

Respectfully, I read the majority's approach as too readily admitting expert testimony that may be unduly prejudicial profile evidence, so long as it may be deemed contextually relevant. See Majority Opinion at 5 (asserting grounds of contextual relevance and helpfulness to counter arguments as to prejudice). That is not the right measure. Rather, the potential prejudice of such evidence should be assessed against its probative value under Hawai'i Rules of Evidence Rule 403.

Here, however, the trial court did not have the opportunity to make such an assessment because Kony failed to object at trial to any testimony of Dr. Alex Bivens ("Dr. Bivens") as prejudicial. In ruling on Kony's motion in limine to preclude Dr. Bivens from testifying, the Circuit Court concluded that it would "allow the State to call [Dr. Bivens] on this issue of delayed reporting. . . . [T]hat's as far as I'm concerned what I'm going to allow as far as the testimony, and aside from that, we're just going to go question by question." During Dr.

Bivens's testimony, Kony objected several times regarding generalized evidence of victims' reactions, each time on relevance grounds; however, he objected just once to generalized evidence regarding offenders,¹ and then only on relevance grounds.

Kony had the opportunity to raise prejudice objections to alleged profile evidence—the trial court even encouraged him to "[k]eep objecting as to questions that come if you feel it's appropriate"—but he did not. He has therefore waived the opportunity to argue on appeal that the testimony should have been excluded as prejudicial. See *State v. Matias*, 57 Haw. 96, 101, 550 P.2d 900, 904 (1976) ("[T]here can be no doubt that the making of an objection upon a specific ground is a waiver of all other objections." (internal quotation marks omitted) (quoting *Choy v. Otaguro*, 32 Haw. 543, 556 (1932))). Nor would I reach the issue as plain error, in light of the Circuit Court's clear invitations to raise objections and Kony's near-silence throughout as Dr. Bivens described generalized offender characteristics and the offender's role in the abuse process.

I therefore respectfully concur in today's order.

¹ Kony objected to Dr. Bivens's testimony regarding the typical offender's role in one of "four primary modes of sexual molestations."