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NO. SCWC-10-0000141

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Respondent/Plaintiff-Appellee,

vs.

WILLIAM EUGENE MAHADY, Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. CAAP-10-0000141; FC-CR NO. 10-1-1471)

DISSENT BY ACOBA, J.

I would accept the application for writ of certiorari (Application) filed by Petitioner/Defendant-Appellant William Eugene Mahady, (Petitioner) inasmuch as I believe Petitioner's claim that his right to confrontation was violated merits further review.

I.

In this case, Petitioner appeals from his convictions for Abuse of Family or Household Members (Abuse), Hawai‘i Revised Statutes (HRS) § 709-906,¹ and Terroristic Threatening in the

¹ HRS § 709-906 (1999) provides in relevant part:

§ 709-906. Abuse of a family or household member. (1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member or refuse compliance with the lawful order of a police officer under subsection (4).

Second Degree (TT2), HRS § 707-717(1),² all allegedly taking place on April 13, 2010. Prior to trial, on August 9, 2010, Petitioner filed a Notice of Intent to Introduce Character Evidence (Notice) pursuant to Hawai'i Rules of Evidence (HRE) Rule 404(b),³ seeking to introduce evidence that, inter alia, (1) on or about April 25, 2010, Petitioner's wife, the complainant (Complainant) "looted" the residence of Petitioner and Complainant and (2) on June 15, 2010, Complainant appeared before the court for a hearing on her motion for an Order for Protection (TRO hearing) and admitted to the court that she "exaggerated [Petitioner's] weaponry, specifically his seven (7) switchblades and his attempt to obtain a handgun[,]" and that her assertion that Petitioner had attempted to obtain a handgun was "based . . . on a single instance of [Petitioner] glancing over a gun display at a sporting goods store."

² HRS § 707-717(1) (1993) provides :

(1) A person commits the offense of terroristic threatening in the second degree if the person commits terroristic threatening other than as provided in section 707-716.

³ HRE Rule 404(b) (1993) provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

(Emphasis added.)

There is no record of the court's ruling on Petitioner's Notice. Petitioner refers to the court as having made a "pretrial ruling[,]" but does not reference the court having held a hearing on his Notice. Respondent/Plaintiff-Appellee State of Hawai'i (Respondent) refers to "proceedings in which the parties' motions in limine were decided[,]" and alleges Petitioner failed to request the transcript of those proceedings. However, it would seem apparent that the court denied Petitioner's Notice. At trial, during direct examination of Petitioner, the following exchange took place:

[Trial counsel:] So did you return [to the house] and get your things out?

. . . .

[Respondent:] Objection, your honor. At this time this is going beyond the state of the reporting, and [Respondent] does not believe that it's relevant at this point.

[The court:] I'll allow this line of questioning, but, [trial counsel], you need to make it clear to us. It's not clear when any of this is happening through your questioning.

[Trial counsel:] . . . [I]t's my understanding from our pretrial that we are or we're not--defense is not allowed to get into anything related to the later TRO or the parking at the courthouse; is that correct?

[The court:] Yes. So not all that is beyond what we are talking about today.

(Emphases added.) In addition, in support of his request that mittimus be stayed pending appeal, trial counsel noted that the court's ruling precluding reference to Complainant's statements at the TRO hearing raised "issues that are worth review on appeal." Thus, the court's ultimate ruling denying use of the evidence listed in the Notice is clear from the record in this case.

The court convicted Petitioner on both counts charged, and entered findings of fact and conclusions of law that

essentially rested on assessing the credibility of Complainant and Petitioner.

FINDINGS OF FACT

. . . .

- 40. [Complainant's] testimony is reliable and credible.
- 41. [Petitioner's] testimony is unreliable.

. . . .

CONCLUSIONS OF LAW

. . . .

- 4. Through the credible and reliable testimony of [Complainant], [Respondent] has proven beyond a reasonable doubt each of the material elements of the offense of Abuse of Family or Household Members. . . .
- 5. Through the credible and reliable testimony of [Complainant], [Respondent] has proven beyond a reasonable doubt each of the material elements of the offense of [TT2].
- 7. [Petitioner's] testimony is unreliable.

(Emphases added.)

II.

In the Application, Petitioner maintains that the court erred in prohibiting cross-examination on the evidence set forth in his Notice. He contends that Complainant had a motive to fabricate her claims⁴ and was not credible pursuant to HRE Rules 404(b) and 609.1.⁵ According to Petitioner, he was thus denied his right to confrontation under the United States and Hawai'i

⁴ Petitioner asserts that without the evidence showing Complainant was biased and had a "motive to falsely accuse [Petitioner]," the court was left without the "key element of the defense[,]" i.e., "why [Complainant] would do so." (Citing State v. Estrada, 69 Haw. 204, 220, 738 P.2d 812, 823 (1987).) (Emphasis in original.)

⁵ HRE Rule 609.1 provides:

(a) General rule. The credibility of a witness may be attacked by evidence of bias, interest, or motive.

(b) Extrinsic evidence of bias, interest, or motive. Extrinsic evidence of a witness' bias, interest, or motive is not admissible unless, on cross-examination, the matter is brought to the attention of the witness and the witness is afforded an opportunity to explain or deny the matter

Constitutions. (Citing State v. Balisbisana, 83 Hawai'i 109, 115, 924 P.2d 1215, 1221 (1996); State v. Fields, 115 Hawai'i 503, 512, 168 P.3d 955, 964 (2007).)

A.

Petitioner maintains the alleged looting incident was relevant under HRE Rule 404(b), which allows evidence of prior "bad acts" to be admitted if probative of "motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident." HRE Rule 404(b). In his Application, Petitioner asserts that without evidence that Complainant had "looted the residence of [Petitioner's] belongings[,]" the court was left without any explanation as to "why" Complainant would fabricate the claims against him. Arguably, the looting incident may be relevant to proving a HRE Rule 404(b) "motive" to lie, in the instant case. However, "[b]ias, interest, or motive is always relevant under HRE Rule 609.1." Estrada, 69 Haw. at 220, 738 P.2d at 823.⁶

⁶ Petitioner's motion indicated that he was seeking to introduce the prior "bad acts" of Complainant pursuant to HRE Rule 404(b). As set forth previously, pursuant to HRE Rule 404(b), evidence of prior wrongs or acts of a witness may be admissible to establish something other than "the character of a person in order to show action in conformity therewith." Here, Petitioner asserts the said evidence was admissible to establish bias, interest, or motive on Complainant's behalf. Evidence of bias, interest, as well as motive is admissible under HRE Rule 609.1. Insofar as Petitioner did not expressly rely on HRE Rule 609.1 in his Motion, arguments pertaining to HRE Rule 609.1 were arguably waived. State v. Moses, 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2004) ("As a general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal[.]") (Citations omitted.) However, because as discussed herein, the court's error precluding Petitioner from cross-examining Petitioner regarding her potential motives to lie violated his substantial right of confrontation, such error may be noticed for plain error. See State v. Kassebeer, 118 Hawai'i 493, 516, 193 P.3d 409, 432 (2008) (holding that prohibiting a complainant from answering a defendant's question "inhibited [the defendant] from confronting the complainant" and therefore "adversely affected his substantial right to

(continued...)

The degree to which evidence might tend to show possible bias, interest, or motive is not the determining factor with respect to admissibility of evidence under HRE Rule 609.1. Rather, the relevant inquiry is whether such evidence has "any tendency to support an inference of the witness' disposition or tendency, consciously or unconsciously, to slant testimony, one way or the other, from the straight and true." Addison M. Bowman, Hawai'i Rules of Evidence Manual (HRE Manual) § 608-2[1][B] (2010-11 ed.) (emphasis added). Once evidence has been shown to be relevant to possible motive, interest, or bias, "it is error not to allow cross-examination to reveal possible bias." Estrada, 69 Haw. at 220, 738 P.2d at 823. Consequently, the court erred in not allowing Petitioner to at least cross-examine Complainant regarding the alleged looting incident in an attempt to establish that Complainant might have some "disposition or tendency, consciously or unconsciously, to slant [her] testimony" at trial.

In Balisbisana, the defendant appealed from his conviction of abuse of a family or household member, arguing that the exclusion of the complaining witness's conviction for harassing the defendant, which he had sought to admit pursuant to HRE Rule 609.1, violated his right to confrontation. 83 Hawai'i at 112, 924 P.2d at 1218. This court explained that although evidence of bias, interest, or motive "may be excluded [under

⁶(...continued)
confrontation") (emphasis added).

HRE Rule 403⁷] if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence[,]'” “the trial court's discretion in exercising control and excluding evidence of a witness's bias or motive to testify falsely becomes operative only after the constitutionally required threshold level of inquiry has been afforded the defendant.” Balisbisana, 83 Hawai'i at 114, 924 P.2d at 1220.

This court stated that the confrontation clause protects “[a]n accused's right to demonstrate the bias or motive of prosecution witnesses.” 83 Hawai'i at 115, 924 P.2d at 1221. It was further explained that “the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross examination.” Id. (quoting Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986)). Balisbisana thus held that the court's prohibition of all inquiry into the complaining witness' conviction was an abuse of discretion because in the absence of that evidence, the jury did not have a sufficient basis from which to make an informed appraisal of the complaining witness's alleged bias and motive. Id. at 116, 924 P.2d at 1222.

⁷ HRE Rule 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Similarly, in State v. Marcos, this court considered whether the defendant's right to confrontation and HRE Rule 609.1 were violated when he was barred from cross-examining the complainant about whether "she had a motive to see that Petitioner was convicted in order to assist her in a pending family court case concerning custody of the minor child of Petitioner and the complainant." 106 Hawai'i 116, 117, 102 P.3d 360, 361 (2004). Marcos stated that "[t]he appropriate inquiry is whether the jury had sufficient information from which to make an informed appraisal of [the complainant's] motives and bias, absent evidence of her conviction for harassing [the defendant]." Id. (quoting Balisbisana, 83 Hawai'i at 116, 924 P.2d at 1222)). According to Marcos, the jurors were entitled to have before them the "defense theory" and because the defendant was not given the opportunity to cross-examine the complainant regarding her motive to lie, the defendant's right to confrontation was violated. Id. at 122, 102 P.2d at 366.

On its face, the looting allegation evidences a basis for bias, interest, or motive affecting Complainant's credibility. The scope of cross-examination is generally within the sound discretion of the trial court. Marcos, 106 Hawai'i at 121, 102 P.3d at 365. However, as stated, "the trial court's discretion . . . excluding evidence of a witness's bias or motive to testify falsely becomes operative only after the constitutionally required threshold level of inquiry has been afforded the defendant." Id. (emphasis added).

Here, "defense counsel was not permitted to expose the fact from which the [fact-finder] could appropriately draw inferences relating to [Complainant's] motive or bias." Id. at 122, 102 P.3d at 366. The fact-finder was "'entitled to have the benefit of the defense theory before [it] so that [it] could make an informed judgment as to the weight to place on [Complainant's] testimony." Id. (quoting Davis v. Alaska, 415 U.S. 308 (1974) (emphasis omitted)). In this case, the court seemingly abused its discretion by prohibiting all cross-examination into the looting incident and, consequently, the court did not have a sufficient basis from which to make an informed appraisal of the complaining witness' alleged motives and bias. Balisbisana, 83 Hawai'i at 116, 924 P.2d at 1222.

B.

It must be observed that "[d]enial of a defendant's constitutionally protected opportunity to impeach a witness for bias, motive or interest is subject to harmless error analysis." Id. at 117, 924 P.2d at 1223. The harmless analysis "depends upon a host of factors," including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Id. (quoting Olden v. Kentucky, 488 U.S. 227 (1988)).

As to the first factor, "the importance of [Complainant's] testimony in the prosecution's case," Complainant was the only witness that testified on Respondent's behalf. Balisbisana, 83 Hawai'i at 117, 924 P.2d at 1223. Here, Petitioner completely denied that the incident occurred and, therefore, Complainant's credibility was crucial to his defense that Complainant was fabricating the allegations. As to the second factor, the looting evidence was not "cumulative" of any other evidence presented at Petitioner's trial. Id. As to the third factor, because of the lack of physical evidence to corroborate the alleged abuse at the time of trial and other witnesses on Respondent's behalf, there was an "absence of evidence corroborating or contradicting the testimony of [Complainant] on material points[.]" Id. As to the fourth factor, Petitioner was seemingly precluded from all inquiry into the looting incident. Finally, the "strength of the prosecution's case[.]" id., relied solely on whether the court found Complainant to be more credible than Petitioner as a witness.

Had the court allowed inquiry into the looting incident, the court may have disbelieved Complainant's accounts of the alleged abuse or terroristic threatening, and Petitioner would have been acquitted of one or of all of the charges. See id. at 117, 924 P.2d at 1223 (stating that if the complaining witness's conviction for harassing the defendant was admitted, "the jury would disbelieve [the complaining witness's] account of

the abuse by [the defendant] and believe, instead, that [the complaining witness] had fabricated the charges . . . to retaliate against [the defendant] for his part in her own conviction[;]" in turn, the defendant "would have been acquitted"). In light of the foregoing, the court's error in precluding Petitioner from cross-examining Complaint cannot be said to have been harmless beyond a reasonable doubt. Id.

III.

A.

Petitioner also sought to admit evidence that Petitioner "exaggerated [Petitioner's] weaponry, specifically his seven (7) switchblades and his attempt to obtain a handgun[,]" and that her assertion that Petitioner had attempted to obtain a handgun was "based . . . on a single instance of [Petitioner] glancing over a gun display at a sporting goods store[.]" Although the record does not indicate which ground of HRE Rule 404(b) would apply to this matter, arguably, the exaggeration episode may be relevant to prove a "motive," HRE Rule 404(b), to lie in the instant case. Again, HRE Rule 609.1 would seem to apply. As Petitioner states, Complainant's "admission that she was prone to making exaggerated/untrue statements regarding [Petitioner's] possession of knives directly contradicted the credibility of her claim that [Petitioner] had a knife in his possession" during the incident. In addition, such evidence "supported [Petitioner's] testimony that nothing of the sort had happened[, i.e., terroristic threatening,] and that the only

knives in his home were kitchen knives.” [Id.] Hence, according to Petitioner, “this evidence was directly relevant to [Complainant’s] credibility generally and the credibility of her specific allegations in this case[,]” namely her allegation that Petitioner brandished a knife at her. [Id.]

To reiterate, under HRE Rule 609.1, such evidence need not be highly probative of bias, interest, or motive, but only have “any tendency to support an inference” that the witness might “slant” his or her testimony, consciously or unconsciously. Addison M. Bowman, Hawai‘i Rules of Evidence Manual (HRE Manual) § 608-2[1][B] (2010-11 ed.) (emphasis added). Complainant’s admission that she had previously exaggerated claims pertaining to Petitioner’s ownership of switchblades and a gun in support of her prior TRO application is evidence that would have a tendency to support the inference that Complainant might have a “disposition or tendency, consciously or unconsciously, to slant testimony[,]” HRE Manual § 608-2[1][B], in favor of Respondent and against Petitioner. In other words, Complainant’s prior statements made to obtain a TRO against Petitioner evidence bias, interest, or motive that would affect an assessment of credibility.

As with the looting evidence, without the opportunity to inquire as to whether Complainant had previously lied regarding similar allegations, the trier of fact was left without “sufficient information from which to make an informed appraisal of [Complainant’s] motives and bias[.]’” Marcos, 106 Hawai‘i at

121, 102 P.3d at 365 (quoting Balisbisana, 83 Hawai'i at 116, 924 P.2d at 1222). In light of Petitioner's theory that Complainant was fabricating the claims against him, the defense should have been "permitted [the opportunity] to expose [] fact[s] from which the [fact-finder] could appropriately draw inferences relating to [Complainant's alleged] motive or bias." Id. at 122, 102 P.3d at 366.

Here, however "defense counsel was not permitted to expose the fact from which the [fact-finder] could appropriately draw inferences relating to [Complainant's] motive or bias." Id. at 122, 102 P.3d at 366. The fact-finder was thus left without evidence from which the fact-finder "could make an informed judgment as to the weight to place on [Complainant's] testimony." Id. (quoting Davis, 415 U.S. at 308 (emphasis omitted)). The court thus abused its discretion by prohibiting all inquiry regarding Complainant's alleged prior fabrication of claims against Petitioner inasmuch as such evidence would have a tendency to show a possible motive to lie in this case. See White v. Coplan, 399 F.3d 18, 26 (1st Cir. 2005) (concluding that although the "nature of the motive [to lie about sexual abuse in this case] may be unknown[;] . . . if the prior accusations are similar enough to the present ones and shown to be false, a motive can be inferred and from it a plausible doubt or disbelief as to the witness' present testimony" such that the defendant should have been to permitted to cross-examine on the witness's prior false accusations) (emphasis added).

B.

As to whether the court's error was harmless, as indicated, several factors must be considered. See Balisbisana, 83 Hawai'i at 117, 924 P.2d at 1223. As to the first factor, again, as stated, Complainant's testimony was critical to Respondent's case against Petitioner inasmuch as she was Respondent's sole witness. Specifically, because Petitioner denied having owned any knives other than kitchen knives and denied having brandished any knives at Petitioner, Petitioner's testimony to the contrary was crucial. As to the second factor, evidence of Complainant's prior exaggerations pertaining to Petitioner's alleged ownership of knives and attempt to obtain a handgun was not cumulative to any other evidence presented at trial. Id. As to the third factor, as discussed supra, there was an "absence of evidence corroborating or contradicting the testimony of [Complainant] on material points[.]" Id. As to the fourth factor, Petitioner was precluded from all inquiry into Complainant's prior exaggerations of claims against Petitioner. Finally, the "strength of the prosecution's case[.]" id., relied solely on whether the court found Complainant to be more credible than Petitioner as a witness.

To reiterate, had the court allowed inquiry into whether Complainant had previously fabricated claims against Petitioner or exaggerated claims against him, the court may have disbelieved Complainant's accounts of the alleged abuse and/or terroristic threatening and Petitioner would have been acquitted

of one or more of the charges. See id. at 117, 924 P.2d at 1223 (stating that if the complaining witness's conviction for harassing the defendant was admitted, "the jury would disbelieve [the complaining witness's] account of the abuse by [the defendant]" and in turn, the defendant "would have been acquitted"). Consequently, the errors cannot be said to have been harmless beyond a reasonable doubt. Id.

III.

Respondent posits that the evidence in this case may have been excluded by the court under HRE Rule 403. Although Respondent argues the HRE Rule 403 might apply, there is nothing cited as facts by Respondent to indicate the court did exclude the evidence on HRE Rule 403 grounds. As such, it would appear that Respondent is only speculating about what the court may have done and has not met its burden to establish its theory that the court excluded the evidence based on HRE Rule 403. Cf. State v. Hinton, 120 Hawai'i 265, 204 P.3d 484 (2009) (explaining that the prosecution had the burden of establishing an abuse of discretion where the court granted the defendant's motion to dismiss the indictment).

In any event, as stated, the trial court's discretion with respect to excluding evidence under HRE Rule 403 becomes operative only after it has been determined that Petitioner's constitutional rights have not been violated. See Balisbisana, 83 Hawai'i at 114, 924 P.2d at 1220. Because Petitioner's right

to confrontation was violated in this case, any HRE Rule 403 analysis would not control.

IV.

The court's decision was based solely on its assessment of the credibility of Complainant and Petitioner. However, the court prohibited Petitioner from cross-examining Complainant regarding her possible motives to fabricate the claims against him and denied questioning by him that might reveal Complainant's "disposition or tendency, consciously or unconsciously, to slant [her] testimony, one way or the other," HRE Manual § 608-2[1][B]. This infringed on Petitioner's right to confrontation, and substantially affected the court's assessment of credibility. Thus, I would thus accept Petitioner's Application.

/s/ Simeon R. Acoba

