IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee,

vs.

ROBERT JAMES BEHRENDT aka RUNNING BEAR,
Petitioner/Defendant-Appellant.

NO. 29191

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CR NO. 07-1-0061K)

AUGUST 19, 2010

MOON, C.J., NAKAYAMA, DUFFY, AND RECKTENWALD, JJ.;
WITH ACOBA, J., DISSENTING

OPINION OF THE COURT BY RECKTENWALD, J.

Defendant Robert Behrendt, also known as Running Bear, was convicted of sexual assault for conduct involving SI, a minor under the age of 16. We must decide whether evidence of sexual contacts between Behrendt and SI that occurred prior to the conduct charged in this case was admissible under Hawaiʻi Rules of Evidence (HRE) Rules 404(b) and 403, cited infra. For the reasons set forth below, we conclude that the Circuit Court of the Third Circuit[1] did not err in admitting that evidence.

SI grew up in Kona, Hawaiʻi, but moved to South Dakota when she was 11 to live with Behrendt and her sister, LI, who was

[1] The Honorable Elizabeth A. Strance presided.

married to Behrendt. The evidence presented by the State of Hawai i at trial established that after SI arrived in South Dakota, Behrendt suggested that SI shower with him when they were alone. SI refused initially, but subsequently agreed. Behrendt had SI touch him sexually during these showers, and also touched SI. Eventually, they began to have intercourse, and Behrendt told SI not to tell anyone. SI, who was confused and frightened by what was happening, complied with that request.

When SI was 14, she returned to Kona with Behrendt and LI. Behrendt and SI continued to have sexual relations. SI eventually broke off her sexual relationship with Behrendt, but did not report it to police until more than a year later. Behrendt was subsequently indicted for three counts of sexual assault in the first degree in violation of Hawai i Revised Statutes (HRS) § 707-730(1)(c) (Supp. 2006)[2] for the conduct which occurred in Kona. The indictment grouped the three counts based on the time periods in which SI lived at three different houses in Kona: (1) Count 1: the Kamani Trees house, covering the period from September 2002 through February 2003, (2) Count 2: the Aloha Kona house, covering the period from February 2003 through May 2004; and (3) Count 3: the Pumehana house, covering the period from May 2004 through August 2004. Behrendt was also

[2] HRS ÿÿ 707-730(1)(c) (Supp. 2006) provides that a person engages in first degree sexual assault when [t]he person knowingly engages in sexual penetration with a person who is at least fourteen years old but less than sixteen old; provided that: (i) The person is not less than five years older than the minor; and (ii) The person is not legally married to the minor; . . . .

indicted for kidnapping in violation of HRS § 707-720(1)(d) & (e) (1993)[3] (Count 4) with respect to an incident that occurred in January 2005.

Behrendt moved in limine to exclude testimony concerning the instances of sexual contact that occurred while SI was living in South Dakota.[4] The circuit court held that the evidence was probative of motive, opportunity and plan, and that its probative value was not outweighed by its prejudicial effect. A jury found Behrendt guilty of the lesser included offense of sexual assault in the third degree in violation of HRS § 707-732 (Supp. 2006)[5] on Counts 1-3, and the lesser included offense of unlawful imprisonment in the first degree in violation of HRS § 707-721 (1993)[6] on Count 4. In a summary disposition order (SDO), the Intermediate Court of Appeals (ICA) affirmed the

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[3] HRS § 707-720(1) (1993) provides, in relevant part, that [a] person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to: . . . (d) Inflict bodily injury upon that person or subject that person to a sexual offense; (e) Terrorize that person or a third person; . . . .

[4] There was also some evidence of sexual contacts which occurred while SI was traveling with LI and Behrendt elsewhere on the mainland, including Washington state. For ease of reference, we will refer to these events collectively as the South Dakota evidence.

[5] HRS ÿÿ 707-732(1)(c) (Supp. 2006) provides that a person engages in third degree sexual assault when [t]he person knowingly engages in sexual contact with a person who is at least fourteen years old but less than sixteen years old; provided that: (i) The person is not less than five years older than the minor; and (ii) The person is not legally married to the minor; . . . .

[6] HRS § 707-721 (1993) provides, in relevant part, that [a] person commits the offense of unlawful imprisonment in the first degree if the person knowingly restrains another person: (a) Under circumstances which expose the person to the risk of serious bodily injury; or (b) In a condition of involuntary servitude.

convictions on Counts 1, 2, and 4, but vacated the conviction on Count 3 because the circuit court did not properly instruct the jury on the law applicable to Count 3 at the time of the offense.

In his application for a writ of certiorari (application), Behrendt argues that the circuit court erred in admitting the South Dakota evidence. However, we agree with the circuit court that the evidence was probative of Behrendt s opportunity to commit the offenses in Hawai i without being detected. Moreover, the circuit court did not abuse its discretion in determining that the admission of the evidence would not unduly prejudice Behrendt.

Behrendt also argues that the circuit court erred in instructing the jury on the lesser included offense of sexual assault in the third degree, and that there was insufficient evidence to support the convictions on Counts 1-3 because the evidence referred only to sexual penetration, rather than sexual contact. However, for the reasons set forth below, we reject those arguments.

Accordingly, we affirm the ICA s November 24, 2009 judgment.

I. BACKGROUND

A. Pre-trial Proceedings Regarding Other Acts Evidence

The State filed a Notice of Intent to Use Specified Evidence, to give[] notice that the State intends to present evidence relating to [Behrendt s] pattern of threats to [SI], and

the grooming and ongoing nature/length of their relationship." The State attached police reports that contained allegations of sexual contacts in South Dakota. In response, Behrendt filed a motion in limine, arguing that the evidence was inadmissible under HRE Rules 401, 403 and 404. He also asserted that SI was fabricating the allegations because Behrendt and LI were in the middle of a divorce and custody dispute over their daughter.

The circuit court granted Behrendt s motion without prejudice, explaining that the State did not clearly identify all the prior bad act evidence it intended to offer in its case-in-chief or explain how it was relevant, and did not analyze the balancing of probative value versus prejudicial effect.

The State filed an amended notice and motion to reconsider. The State included detailed descriptions of the expected testimony of each proposed witness, and argued that the evidence of the prior acts was relevant to show the defendant s motive, purpose and intent; to show opportunity; and to show why [SI] did not, for years, disclose the abuse. Additionally, the State explained why each witnesses testimony was relevant, and analyzed its admissibility under HRE Rule 403. Behrendt filed an opposition arguing, inter alia, that there are 23 months of context in Hawaii, which is abundantly sufficient to establish context.

The circuit court granted in part and denied in part the State s motion for reconsideration. The circuit court

rejected the State s argument that prior bad act evidence is always relevant to explain the context of the relationship between the defendant and complaining witness, and concluded that the expected testimony of two of the State s witnesses[7] was not admissible because the probative value did not outweigh the prejudicial effect and the State s offer of proof was vague and cumulative. The circuit court s order additionally provided, in relevant part:

> The court grants that portion of State s Motion to Reconsider admission of testimony concerning other acts that allegedly occurred outside of the State of Hawaii as follows. The Court concludes that the issue of delayed reporting is squarely before the jury, as well as possible issues of consent concerning the kidnapping charge. The Court finds that the other bad acts allegedly committed outside of the State of Hawaii as described by [SI], [LI] and [LI s friend, Trista], are relevant to show motive, opportunity and plan.
>
> The court having concluded that the testimony is relevant, next balances whether relevant evidence should be excluded because its probative value is substantially outweighed by other factors, including danger of unfair prejudice, confusion of issues or misleading the jury, pursuant to Rule 403, [HRE].
>
> Specific factors that the court has considered in the Rule 403 analysis in deciding whether to admit other acts , include the strength of evidence of the prior act, the time elapsed between the prior and [sic] crimes charged, the need for the other acts, efficacy of alternative proof, and whether the other acts are likely to raise overmastering hostility. The Court concludes that the prejudice of admitting the testimony of [SI], [LI] and [LI s friend, Trista], does not outweigh the relevance, and that a cautionary instruction ameliorates any prejudice.
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> . . . .
>
> III. OTHER BAD ACTS OCCURRING IN HAWAII.
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> The court finds that most of the witnesses who

[7] The witnesses, cousins of SI and LI, were expected to testify that Behrendt, SI, and LI visited them in 2002 before their return to Hawaii, and [Behrendt] seemed unusually physical with [SI.]

> will testify to the relationship between the defendant and the complaining witness will present testimony that could be considered "other bad acts". Many are family and friends who may have been in close contact with the defendant and minor, several living in the same household. Some of the testimony describes acts, such as holding hands and kissing, that could be considered either innocent or a "bad act".
>
> The court finds and concludes that the testimony of the following witnesses concerning "other acts" or "bad acts" that happened in Hawaii is relevant to motive, opportunity, intent and plan[.] The court further finds that the probative value is not "substantially outweighed" by other factors, including danger of unfair prejudice, confusion of issues or misleading the jury. The court finds that a cautionary instruction ameliorates any prejudice. . . .

(Emphases added).

B. Trial

The relevant evidence at trial was, in summary, as follows.

1. State's Case

a. SI's Testimony

(1) South Dakota

In November of 1999, when SI was eleven years old, she moved out of her parents' home in Kona and went to live with LI and Behrendt in South Dakota.[8] SI testified that in South Dakota, Behrendt would take her to school every day, pick her up in the afternoon and take her back to the apartment, and they would talk and play video games while LI was still at work. Behrendt would talk with SI about "other boys" and said, "[y]ou'll soon have a boyfriend." After living there for a few

[8] Behrendt is twelve years older than SI, and LI is eleven years older than SI.

months, SI and Behrendt went to the pool one day, and when they got home [Behrendt] asked [her] to take off [her] clothes, and [] take a shower together[,] but SI refused. The next time they went to the pool, however, Behrendt told SI that it was okay for her to shower with him and that he had asked LI and that she said it was okay. After that, SI trusted him and showered with Behrendt while both of them were naked, and [Behrendt] would be erect sometimes, and he would tell me to grab onto him, grab onto his dick. SI testified that their showers eventually progressed to the point where Behrendt would touch SI s genitalia and insert his penis into her genitalia. She was afraid to tell him no [b]ecause he was an adult and had told her that it was okay. SI testified that she and Behrendt also had sexual contact elsewhere in the apartment, and that Behrendt showed SI a videotape of pornography. SI testified that they had sex [o]ften in South Dakota, and that she remembered it being more frequent than when they later returned to Hawai i.

During the first few months of these sexual encounters, SI felt like [she] loved [Behrendt] as a brother. But then [she] just . . . knew that there was something wrong. But [she] was confused and would push[] him off a lot and be rude to him. SI also testified that after about the tenth time she and Behrendt had sex, he told her not to tell LI and that if she told he would end up going to jail. SI testified it seemed like [Behrendt] was changing it to be like a relationship and was

thinking of [her] as a girlfriend but that she was annoyed by it and didn t want him.

SI also recalled a time when she attended a going-away party at the home of LI s friend Trista, and she and Behrendt were sitting outside when a boy walked by whom SI identified as her boyfriend and this made Behrendt mad. Later on she and Behrendt went into the bathroom together, and he kissed her. He said, [l]et s do it inside the bathroom, but SI told him no. Behrendt got upset and ended up head-butting the wall[.]

SI testified that she did not confide in her sister when they lived in South Dakota because she was scared and [LI] always seemed happy, so I also felt guilt that I would have ruined her life. SI recalled that LI had asked her if Behrendt was touching SI like their uncle had,[9] but SI just shook her head and said nothing.

(2) Return to Hawai i

Behrendt, LI and SI returned to Hawai i in September 2002, when SI was fourteen years old. SI testified that around that time, she started liking [Behrendt], because he was there for [her] and they had a [f]riendship where SI told him everything[,] he bought her things and would stick up for her. SI was home schooled in Hawai i, and Behrendt was the only person

[9] SI testified that when she was in 3rd or 4th grade, she told a teacher at school that her uncle had molested her when she was four or five. LI also testified that the same uncle molested LI when LI was six. After SI was molested, SI received counseling.

SI got along with because her family "was broken apart" and "didn't get along."

(a) Kamani Trees (Count 1)

SI, Behrendt and LI moved into the Kamani Trees house, along with SI's parents, her older brother (Brother) and Brother's children. During this time, SI slept in the same bed as LI and Behrendt. SI and Behrendt continued to have sexual intercourse approximately three to five times per month in both the bedroom and the bathroom. SI specifically recounted the first time they had intercourse at Kamani Trees, in which Behrendt "turned [her] around and [] had sexual intercourse with [her] in the back[,]" while LI slept next to them. SI also testified that they also had oral sex "[a]nytime [they] would have sexual intercourse[,]" where she "would just lick him or [] would suck on his dick."

(b) Aloha Kona house (Count 2)

SI, Behrendt, and LI next lived at the Aloha Kona house from February 2003 until April or May 2004, with SI's parents, Brother and Brother's children. SI's bedroom consisted of a curtained-off area of the living room. Behrendt would come into her bedroom early in the morning, SI would braid his hair, she and Behrendt would talk and he would tell SI "[h]ow much he loved [her]." They continued to have sexual intercourse once or twice a week in SI's curtained-off room and sometimes in the bedroom Behrendt and LI shared. Behrendt would also drive SI to a nearby

construction site and they had sex in the back of the car.

SI and LI hardly spoke because they were fighting [for] attention from Bear and [LI] had a feeling of something that was going on between the two of us. Behrendt, who was of Native American ancestry, told SI to call him [h]igna[,] which was the Lakota name for husband. Behrendt told SI that in his Lakota culture, they had two wives who were sisters. SI felt like that [Behrendt] could be my husband. That I loved him. And . . . I was confused.

After living in the Aloha Kona house, SI moved with her parents, LI and Behrendt to a house on Painted Church Road in Kona, and she and Behrendt had sexual intercourse in one of the rooms of the house.

(c) Pumehana House (Count 3)

In May 2004, when SI was fifteen years old, LI, Behrendt, and SI moved into the Pumehana House, along with SI and LI s parents, Brother, and Brother s children, and lived there until November 2004. SI and Behrendt continued to have sexual intercourse about once a month. Again, a curtained-off area served as SI s bedroom, and SI continued to braid Behrendt s hair and then he would want to have a quickie or something. They would also have sex in rental cars from Behrendt s workplace, SI s mother s car, and once at a storage place nearby where Behrendt had SI bent over the back seat[.] Also, about one month before SI s sixteenth birthday, Behrendt took her in a

rental car to a construction site in Kaloko, they had sexual intercourse, and Behrendt asked her if she wanted to have anal intercourse and she [s]hrugged. Behrendt then attempt[ed] it and put his penis in [her] anal, [her] butt.

(d) Gabby s House & Crazy Horse Apartments

SI testified that four or five months after she turned sixteen, she moved out of the Pumehana house and in with a friend, Gabby, and Gabby s father for a few months until her family drama cooled down. At this time, LI moved to the mainland, and Behrendt moved out of the Pumehana house and into the Crazy Horse Apartments in Kona. SI moved in with Behrendt, and started dating a boy named Brandon. She and Behrendt had arguments about Brandon because [Behrendt] didn t want [her] to be going out with [him].

(e) January 17, 2005 incident (Count 4)

SI testified that she had a disagreement with Behrendt on January 17, 2005 in the Crazy Horse apartment after SI told him that she didn t want to have sex with him anymore because she was dating Brandon. SI tried to get out of the apartment but Behrendt pulled [her] back and threw [her] to the ground and straddled [her] down. SI screamed and tried to break free, but Behrendt told her to [b]e quiet[,] slapped her on the face and arm, unzipped himself and [] took out his penis[,] and told SI he was going to get her pregnant. SI eventually ran out of the apartment, but Behrendt brought her back. They got into

Behrendt s car and continued to struggle, and Behrendt slapped her. SI testified that she was scared that Behrendt may kill her. Finally, Behrendt dropped SI off at Gabby s house, SI called Brandon to pick her up, and Brandon s parents called the police.

SI testified that the police arrived a day and a half later in response to SI being reported a runaway, and took SI to the station. She told police Behrendt hit her and that she had bruises on her arm and her ribs hurt, but did not tell them about their sexual relationship because she didn t want him to go to jail.

(f) Alleged abuse reported

On March 22, 2006, Behrendt came into Jamba Juice where SI worked, and when SI saw him, she became upset. SI s boss asked her what was wrong, and SI told her about her sexual history and relationship with Behrendt. SI next told LI, who went to the police.

b. LI s Testimony[10]

(1) South Dakota

[10] Prior to LI s testimony, which preceded SI s testimony, the circuit court gave the following cautionary instruction:

> Ladies and gentlemen of the jury, you are about to hear evidence that the defendant may have engaged in other crimes, wrongs, or acts. You must not use this evidence to determine that the defendant is a person of bad character and, therefore, must have committed the offenses charged in this case. Such evidence may be considered by you only on the issues of defendant s motive, opportunity, and intent and for no other purpose.

LI testified that Behrendt would spend time with SI at home until LI returned from work each day. Behrendt told LI that he took showers with SI at their apartment, and LI told him it was inappropriate for him to be doing that with her. Behrendt responded that it was okay. LI also observed SI and Behrendt horse-playing around one day at their apartment:

> [SI] ended up underneath him, and he was on top of her, with - you know, just the way how they were like looking at each other like made me kind of feel uncomfortable and that he was like - the way how he was stroking her hair back just made me very uncomfortable like, you know, why are they acting like that towards each other, you know.

LI did not confront Behrendt about this incident because she was scared.

LI recounted a time when they went to a party at her friend Trista s house and Behrendt all of a sudden [] just kind of got upset and was acting really jealous. Then he and SI went upstairs to the bathroom for about thirty minutes. After they came out, LI noticed that there was a hole in the wall in the bathroom, that SI had a red mark that looked like a hickey and was very upset. LI confronted Behrendt about it and he told her that he accidentally grabbed [SI] by the neck[.]

LI also recalled an incident when they were on their way back to Hawai i and staying at a cousin s house in Washington. LI testified that LI, Behrendt and SI were sleeping next to each other on the floor one night, and SI and Behrendt

> . . . started acting kind of weird with each other. So I kind of stayed up so where to see how they would act towards each other. And during this night I heard it was pitch black, and I heard him say get on top. And she s like, no. And I was just wondering like what are they talking about, you know.
>
> And then I saw her on top. And then I was like, what are they doing, you know. In my mind I was thinking like why are they what are they doing, you know. And so and then all I hear her say was ouch. And I m like, What s going on? So I put my arm around him, and so - and all he could do was like just move my arm[.]

LI did not confront Behrendt because she was scared of the fact of what was happening and didn t know what to do at that time[.] LI confronted SI the next morning, but SI told her that nothing was going on.

LI further testified that SI would call Behrendt higna, which meant husband in Lakota. When LI talked to Behrendt about his interactions with SI, he would yell at her and tell her that she was selfish and a bitch for interfering. LI testified that [Behrendt] told me a long time ago that when he gets married to me or if I had a sister or someone younger than I am, he would take em as a wife.

(2) Hawai i

LI testified that when she and Behrendt lived at the Kamani Trees house, SI would sleep in bed with them. [Behrendt] was starting to act very jealous and he and SI were always together and were still taking showers together. When LI talked to Behrendt about taking showers with SI, he got upset with me and grabbed me by the arm and started shaking me and telling me I was selfish and I was ruining everything [that] he

wanted to do. And I was interfering with both of them. LI also noticed that [t]hey started kissing and [Behrendt] started holding her hand, putting his arms around her and, you know, just like a boyfriend and girlfriend[.] LI testified that when she asked him about it,

> He just told me that he you know, it was his culture and that I was ruining his culture because he s Native American. And that in the mainland, they used to do that all the time, that they used to hold hands and nobody said anything. And now that we moved down here, that everybody s saying something and, you know, it was wrong for them to do it. . . .

When they moved to the Aloha Kona house, sometimes LI would wake up early in the morning and Behrendt would be in SI s curtained-off bedroom. Behrendt told her that SI was braiding his hair. Also, Behrendt would get upset when she or others in her family would say something to him about how he was acting towards [SI].

When they moved to the Pumehana house, Behrendt and SI got closer and [h]e was always around her all the time. . . . you couldn t separate them. They also started wearing rings together. LI and Behrendt had a daughter in June 2004, and Behrendt told LI that he wanted SI to be called mom also. LI tried to get Behrendt to move to the mainland, but he did not want to move unless SI moved with them.

In November 2004, LI moved to Washington and lived with her cousin for a few months. LI returned to Hawai i on January 11, 2005, and moved back in with Behrendt on the 23rd. Behrendt told LI that he and SI had gotten in a fight about

something when they were in the car and that he hit her with the back of his hand. After LI moved in, she never saw SI with Behrendt.

LI testified that SI told her about her sexual relationship with Behrendt in March 2006, and LI called the police. Afterwards, LI and her daughter moved back to the Pumehana house.

c. Testimony of Dr. Alexander Bivens

Dr. Alexander Bivens, Ph.D., testified for the State as an expert in the area of child and adolescent psychology, with a specialization in child sexual abuse. He testified that it is typical for a child who has been sexually abused to wait a very long time to tell anyone about it,[11] especially when they are assaulted by a family member,[12] and identified the methods typically used by an abuser to gain the trust of the child. These methods include spending a lot of time with the child, giving them attention, touching them non-sexually, telling them they are special, treating them like an adult, or tricking them into feeling safe with the abuser. Dr. Bivens also testified

[11] Dr. Bivens indicated that the reasons a child may not disclose the abuse include: fear for their own safety, feeling ashamed or blam[ing] themselves, trying not to think about the abuse, feeling like reporting would not help to end the abuse, or a fear of the impact on their family.

[12] Dr. Bivens testified that a brother-in-law living in the same home with, and abusing, the child victim would be considered an incest situation. He further indicated that some abusers sexually assault the child with another non-collaborating adult present in the same bed because [i]t help[s] the molester feel like a big guy, to be able to get away with it or because they are so sexually compulsive that they couldn t keep themselves from doing it.

about four primary processes abusers utilize: (1) seduction and testing, which involves taking normal adult-child touch, which would be a hug, a kiss, that sort of affectionate touching, . . . and slowly incorporating sexual touch ; (2) masking sex as a game, such as wrestling or tickling; (3) emotional-verbal coercion, in which the abuser talks about sex overtly or rewards for having sex, or tells the child that he or she will avoid punishment for other acts if the child has sex with the abuser; and (4) taking advantage of the child in a vulnerable position, such as approaching a child who is sleeping or who has just taken a bath.

d. State s Other Witnesses

The State s other witnesses included a nurse who examined Behrendt in order to confirm testimony by SI that Behrendt had a distinctive freckle and unusually thick circumcision scar on his penis.

2. Defense Case

a. Behrendt s testimony

Behrendt denied having had any sexual interactions with SI. He loved [SI] like a daughter and considered her [his] child. He would kiss SI (a peck) like he used to do with his family. Behrendt testified that when SI lived with him and LI in South Dakota, he would take her to and from school each day and help her with her homework when they got home. He and LI would take SI to the pool and LI always took SI to the girls showers.

Behrendt never took SI to the pool by himself, and the only time he showered with SI was at the beach in Hawai i with their swimsuits on.

Behrendt testified that he and LI decided to move back to Hawai i in the summer of 2002 to start a family. At the going away party at Trista s house, SI got upset after a boy walked by and went upstairs to the bathroom. He and LI went upstairs together to talk to her, and then Behrendt went back downstairs and LI stayed with SI. Trista later called them about a small hole in her bathroom wall, and even though Behrendt did not know how it got there, he fixed it for her.

Behrendt testified that when they returned to Hawai i, they moved in with SI and LI s family, who was like their own group and did their own thing. LI braided his hair until their daughter was born, and then SI took over. Behrendt would wake up at four in the morning for work, he would go into SI s room, open up the curtains, sit down on the bed and SI would braid his hair for ten minutes and then he would leave for work. He denied ever having a romantic liaison with SI or ever telling his daughter to call SI mom.

Behrendt testified that in August or September 2004, he and LI discussed moving to Washington, but he did not want to go because he didn t have any money because [LI] cleaned out his bank account. Behrendt was stressing out because their marriage [was] falling apart[,] and was extremely upset when

[LI] left. After LI moved out, her parents told him to leave their house. Behrendt then lived in his car for about a month, and moved into the Crazy Horse apartment on December 17, 2004.

Behrendt testified that SI never lived with him at the Crazy Horse apartment, and that he had never given her a key to the apartment. SI was dating Brandon at the time, and Behrendt was never jealous of Brandon. On January 15 or 16, 2005, LI and their daughter moved in with Behrendt, along with Behrendt s sister. Behrendt testified that he received a phone call from SI on January 17, 2005, they had a conversation, he talked to LI about it, and then he went back to sleep.

After his rental agreement terminated in June 2005, Behrendt moved to another place, and LI moved in with her parents. He and LI agreed that their marriage was over, and in November 2005, Behrendt started seeing another woman.

b. Other Defense Witnesses

The defense called several other witnesses, including Behrendt s mother and two sisters (one of whom lived with SI, LI, and Behrendt for eight months in South Dakota), who testified that they did not notice anything unusual about the way Behrendt treated LI or SI. Rather, Behrendt treated SI like his little sister and hugged and kissed her like he did with all his siblings. One of his sisters also testified that she had found portions of SI s journal which described some sexual incidents between SI and Behrendt at the Aloha Kona house, and that SI

subsequently told her that she made it all up to hurt LI. Additionally, a friend of Behrendt s testified that she became friends with SI, and that in November 2006, SI told her that she had lied in court about having sex with a guy named Running Bear.

C. Jury Instructions and Verdict

1. Jury Instructions

At the conclusion of trial, the circuit court instructed the jury with regard to the prior bad act evidence as follows:

> You have heard evidence that the defendant at another time, may have engaged in other wrongs or acts. You must not use this evidence to determine that the defendant is a person of bad character and therefore must have committed the offenses charged in this case. Such evidence may be considered by you only on the issue of the defendant s motive, opportunity, or intent and for no other purpose.

(Emphasis added).

The circuit court also instructed the jury on the offense of sexual assault in the first degree, HRS § 707-730(1)(c), and the lesser included offense of sexual assault in the third degree, HRS § 707-732(1)(c). Defense counsel did not object to giving the lesser included offense instruction, but did object that the instruction did not correctly set forth the state of mind requirement.

After the jury began its deliberations, it sent the circuit court the following question: What purpose do we put to the evidence and testimony from S. Dakota[?] The circuit court responded by referring the jury to the instruction involving the

prior bad act evidence referenced above.

2. Verdict and motion for judgment of acquittal

The jury returned a verdict finding Behrendt: (1) guilty of the lesser included offense of sexual assault in the third degree on Counts 1, 2, and 3; and (2) guilty of the lesser included offense of unlawful imprisonment in the first degree, HRS § 707-721, on Count 4.

Behrendt filed a Motion for Judgment of Acquittal and a Motion for New Trial, arguing that there was no evidence presented of sexual contact between Behrendt and SI with respect to Counts 1-3, but rather only sexual penetration. The circuit court denied the motion.

On April 16, 2008, the circuit court filed its Judgment, Guilty Conviction and Sentence, sentencing Behrendt to five years imprisonment.

D. ICA Appeal

On appeal to the ICA, Behrendt raised eight points of error (only three of which are raised in his current application): (1) that the circuit court erred in admitting character evidence in violation of HRE Rules 404(b) and 403; (2) that the circuit court erroneously admitted Dr. Bivens expert testimony; (3) that the circuit court erred in permitting LI to testify regarding entries in her diary and in admitting her diary into evidence; (4) that the circuit court erred in refusing to stay the trial for one day due to the birth of Behrendt s child;

(5) that the circuit court erred in instructing the jury on the lesser included offense of sexual assault in the third degree for Counts 1, 2, and 3 since there was no reasonable basis in the evidence to justify giving the instruction; (6) that the circuit court erred in providing the jury with an incorrect definition of sexual contact as to Counts 1, 2 and 3; (7) that there was insufficient evidence to support Behrendt s conviction for sexual assault in the third degree; and (8) that the circuit court s inclusion of the phrase exact date is not required in the jury instructions with regard to the incidents charged in Counts 1-4 amounted to plain error.

In its November 4, 2009 SDO, the ICA rejected Behrendt s argument with respect to prior bad act evidence, and concluded that:

> [] The circuit court properly admitted evidence of Behrendt s prior bad acts under HRE Rule 404(b) as evidence of delayed reporting, preparation, planning, and common scheme. Delayed reporting was an issue of consequence in the trial because [SI s] silence over a two-year period of sexual abuse raised a serious issue as to her credibility. Additionally, Behrendt insinuated that [SI] conveniently came forward to help [SI s] sister [] win custody of [LI] and Behrendt s child from Behrendt.[13] The prior-bad-act evidence also explained a unique household dynamic that helped the trier-of-fact understand allegations of abuse in Hawai i in general. The evidence was therefore relevant for a purpose other than mere propensity.
>
> The circuit court s limiting instructions on the admission of this prior-bad-act evidence ameliorated any prejudice it may have created. We accordingly find no abuse of discretion.

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[13] This is an apparent reference to defense counsel s closing argument, in which counsel suggested that SI and LI had lied about the incidents of sexual contact between SI and Behrendt so LI could obtain custody of her daughter.

(Citations omitted).

The ICA additionally rejected each of Behrendt s remaining points of error, with the exception of his sixth point regarding the definition of sexual contact. Specifically, the ICA recognized that the definitions of sexual contact and sexual penetration had been amended effective May 10, 2004, and therefore, as to Count 3, the circuit court had provided the jury with the pre-amendment definitions. The ICA held that this error was not harmless, and therefore vacated Behrendt s conviction with respect to Count 3. The ICA concluded that there was sufficient evidence to prove that Behrendt engaged in sexual contact as to Count 3, and therefore remanded for a new trial on that count.[14]

The ICA filed its judgment on November 24, 2009, and Behrendt timely filed his application on February 22, 2010.

E. Questions Presented

Behrendt s application presents the following questions:

> 1. Whether the ICA gravely erred in affirming Behrendt s convictions for Sexual Assault in the Third Degree and Unlawful Imprisonment[15] because:

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[14] The ICA also concluded that the circuit court had a rational basis to instruct the jury on the lesser included offense of sexual assault in the third degree, and that there was substantial evidence to support Behrendt's convictions for Counts 1 and 2.

[15] Although Behrendt provides extensive argument as to why his convictions for Counts 1, 2 and 3 cannot stand, he provides no further argument with respect to his conviction for Count 4. Therefore, Count 4 will not be further discussed. See Hawai i Rules of Appellate Procedure Rule 40.1(d)(1).

> a. At trial, the court erroneously admitted character evidence in violation of Hawaii Rule of Evidence (HRE), rules 404(b) and 403;
>
> b. The circuit court erroneously instructed the jury on the included offense of Sexual Assault in the Third Degree in Counts 1-3, where there was not reasonable basis in the evidence for these count [sic];
>
> c. There was insufficient evidence to sustain Behrendt s conviction for three counts of Sexual Assault in the Third Degree.

II. STANDARDS OF REVIEW

A. Admissibility of Evidence under HRE Rules 401, 403 & 404(b)

> Prior bad act evidence under [HRE] Rule 404(b) . . . is admissible when it is 1) relevant and 2) more probative than prejudicial. A trial court's determination that evidence is relevant within the meaning of HRE Rule 401 . . . is reviewed under the right/wrong standard of review. However, a trial court s balancing of the probative value of prior bad act evidence against the prejudicial effect of such evidence under HRE Rule 403 . . . is reviewed for abuse of discretion. An abuse of discretion occurs when the court clearly exceeds the bounds of reason or disregards rules or principles of law to the substantial detriment of a party litigant.

State v. Fetelee, 117 Hawai i 53, 62-63, 175 P.3d 709, 718-19 (2008) (citation omitted).

B. Jury Instructions

> The standard of review for a trial court s issuance or refusal of a jury instruction is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading. Erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial. In other words, error is not to be viewed in isolation and considered purely in the abstract.

State v. Kassebeer, 118 Hawai i 493, 504, 193 P.3d 409, 420 (2008) (quotation marks, citations, and brackets omitted).

C. Sufficiency of the Evidence

> [E]vidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; . . . . The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

State v. Richie, 88 Hawai i 19, 33, 960 P.2d 1227, 1241 (1998) (citation omitted). Substantial evidence as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. Id. (internal quotation marks and citation omitted).

III. DISCUSSION

A. General Principles Applicable to Admission of Evidence Under HRE Rule 404(b) and 403

HRE Rule 404(b) (Supp. 2007) provides:

> (b) Other crimes, wrongs, or acts. 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.

The rule prohibits the admission of evidence introduced for the sole purpose of establishing that a defendant possesses a criminal character and acted in conformity with that character. Although such evidence may not be used solely for the purpose of establishing criminal propensity, under certain circumstances it

may be offered to prove other facts of consequence. See State v. Kassebeer, 118 Hawai i 493, 506, 193 P.3d 409, 422 (2008). Such facts include, but are not limited to, motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. HRE Rule 404(b). The list of permissible purposes in Rule 404(b) is not intended to be exhaustive for the range of relevancy outside the ban is almost indefinite. State v. Clark, 83 Hawai i 289, 300-01, 926 P.2d 194, 205-06 (1996) (citation omitted); State v. Cordeiro, 99 Hawai i 390, 414, 56 P.3d 692, 716 (2002). Rule 404(b) was intended not to define the set of permissible purposes for which bad-acts evidence may be admitted but rather to define the one impermissible purpose for such evidence. . . . : a person who commits a crime probably has a defect of character; a person with a defect of character is more likely than people generally to have committed the act in question. Clark, 83 Hawai i at 301, 926 P.2d at 206 (citation and brackets omitted; emphasis in original).

When evidence is offered for substantive reasons rather than propensity, a trial court must additionally weigh the potential prejudicial effects of the evidence against its probative value under HRE Rule 403.[16] See Kassebeer, 118 Hawai i

[16] HRE Rule 403 states: Although 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.

at 507, 193 P.3d at 423; Commentary to HRE Rule 404 (stating that if offered for specified purposes other than mere character and propensity . . . other crimes, wrongs, or acts evidence may be admissible provided the Rule 403 test is met).

In State v. Castro, 69 Haw. 633, 756 P.2d 1033 (1988), this court discussed the dangers of admitting propensity evidence, and stressed the need for courts to apply this balancing test even when evidence is substantively relevant:

> The framers of the rule recognized that [c]haracter evidence is of slight probative value and may be very prejudicial. For [i]t tends to distract the trier of fact from the main question of what actually happened on the particular occasion. And [i]t . . . permits the trier . . . to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.
> . . . .
>
> Yet even when the evidence of other crimes, wrongs or acts tends to establish a fact of consequence to the determination of the case, the trial court is still obliged to exclude the evidence 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. [HRE Rule] 403. For the use of the word may in [HRE Rule] 404(b) was not intended to confer any arbitrary discretion on the trial judge but was rather designed to trigger the Rule 403 balance.

Id. at 643, 756 P.2d at 1041 (some brackets in the original; some internal quotation marks and citations omitted).

Therefore, we must determine (1) if the South Dakota evidence was probative of any fact of consequence other than character and propensity; and, if so, (2) whether the circuit court abused its discretion in determining that the probative value of the evidence substantially outweighed the danger of

unfair prejudice to Behrendt.[17] See Addison M. Bowman, Hawaii Rules of Evidence Manual § 404-3[1] (2008-2009 ed.) [hereinafter Bowman]; State v. Fetelee, 117 Hawai i 53, 62-63, 175 P.3d 709, 718-19 (2008) (Prior bad act evidence under HRE Rule 404(b) is admissible when it is 1) relevant and 2) more probative than prejudicial.) (citation, brackets and ellipses omitted); State v. Renon, 73 Haw. 23, 32, 828 P.2d 1266, 1270 (1992).

B. Evidence of Sexual Contacts in South Dakota Was Probative of Opportunity

The State s evidence[18] established that the first charged incidents of sexual assault in Hawai i occurred while SI, LI and Behrendt were living at the Kamani Trees house with SI s family. By that time, Behrendt and SI had been engaging in sexual intercourse for at least two years. The first sexual contact in Hawai i occurred one night while SI was sleeping in the same bed with LI and Behrendt, and Behrendt turned SI on her side and had vaginal intercourse with her from behind. They continued to have sexual intercourse about three to five times a

[17] In conducting this analysis, we note that there is some variation between the purposes identified by the circuit court in its written order (motive, opportunity and plan) and in its instructions to the jury (motive, opportunity and intent). However, since we conclude that the evidence was probative of opportunity, which was identified by the circuit court both in its order and its instruction, that variation is not material in the circumstances of this case.

[18] This court may use evidence adduced at trial in order to determine whether the circuit court abused its discretion in granting, in part, the State s motion to reconsider the circuit court s grant of Behrendt s earlier motion in limine. See, e.g., Miyamoto v. Lum, 104 Hawai i 1, 7, 84 P.3d 509, 515 (2004) (The denial of a motion in limine, in itself, is not reversible error. . . . the real test is not in the disposition of the motion but in the admission of evidence at trial.) (internal quotation marks and citation omitted).

month while living at that house.

The prior sexual contacts between SI and Behrendt in South Dakota were relevant to establish Behrendt s opportunity to engage in the sexual contacts in Hawaii without being detected. The evidence established how the relationship between Behrendt and SI had developed so that the sexual contacts in Kona could take place without SI reporting them. Absent that evidence, it would be implausible that Behrendt could suddenly engage in sexual intercourse with SI in a house they shared with her family while SI s sister slept in the same bed, without SI reporting it.

Specifically, the evidence from South Dakota established that Behrendt had initially explored SI s willingness to engage in sexual conduct by first suggesting that they take showers together, then having her touch his penis in the shower, followed by him touching her genitalia, and then progressing to sexual intercourse.

The State s expert witness on child sexual abuse, Dr. Bivens, testified about a study involving interviews of approximately thirty child sexual offenders, who identified seduction and testing as a method they used to accomplish the abuse:

> . . . Seduction and testing involves taking normal adult-child touch, which would be a hug, a kiss, that sort of affectionate touching, which I hope is happening between adults and children, and slowly incorporating sexual touch into.
>
> The classic example that s in the book is watching television, snuggling on the couch. And what the abuser will do is touch more frequently in more sexual ways. Now that s the seduction part. The

> testing part is that all the molesters reported that they were waiting and monitoring the reaction of the child. And what they reported was that they said that if the child was going to startle or somehow react in a way that let them know that they were going to get into trouble for it that they would have backed off completely.

The evidence also established that Behrendt developed a relationship of trust and control with SI in South Dakota. Behrendt was SI s primary caretaker when SI s sister was working, bought her things, and took her side when she had disagreements with her sister.[19] He assured her that their sexual touching was okay and that her sister said it was okay for them to shower together. Also, he showed her a pornographic videotape when they were alone together.[20]

After their relationship became sexual, SI testified that at first she was confused and occasionally acted rude to Behrendt to push[] him off. On those occasions, he would discipline her by putting her nose on the wall for a few minutes,

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[19] Dr. Bivens testified that abusers typically use various strategies to gain the trust of the child, such as spending a lot of time with the child, giving them attention, touching them non-sexually, telling them they are special, treating them like an adult, or tricking them into feeling safe with the abuser.

[20] Dr. Bivens also testified about the significance of the display of pornography to a child:

> Introduction to pornography usually is put under the category of emotional and verbal coercion. It is usually regarded as a form of sexual abuse in and of itself. It clearly raises the topic of sexuality with the child. It will very likely lead to more sexualized behavior by the child, perhaps get the child to become interested in sexuality and things like that. It would certainly be lots of negative effects. . . .

or he and LI would threaten to send her back to Hawai i.[21] Behrendt also repeatedly told SI that she could not tell about what was happening or he would be separated from her and would go to jail.

SI testified that by the time that SI, her sister and Behrendt returned to Kona, she had grown close to Behrendt and started liking him because he was there for her as a friend:

> . . . I told him everything. [He] [b]ought me stuff. If anytime there was an argument, like an argument between me and my sister or something, it seems like he stuck up for me. Or even when we got back to my parents, my parents - all of us, we would argue about something or just have a disagreement, and he was always sticking up for me, like he was there for me.

In sum, by the time that SI returned to Hawai i, SI had become acclimated to the sexual contact. Her relationship with Behrendt had developed from the early stages when she would occasionally act rudely and push him off, to the point where she had grown close to him and started liking him, because he was there for me. Thus, when Behrendt had sex with SI at Kamani Trees while her sister slept in the same bed, it was another contact in an established sexual relationship. SI s failure to cry out or tell anyone what had occurred that night and on the subsequent occasions of sexual contact in Hawai i was consistent with the relationship that had been established in South Dakota. Thus, the evidence of the sexual contacts in South Dakota was

[21] Dr. Bivens testified that emotional and verbal coercion is another common strategy used by child sexual abusers, in which the abuser will talk about rewards for having sex or withdrawal with punishment. I won t punish you for being late if you give me some sex, that type of thing.

relevant to show Behrendt s opportunity to commit the charged sexual assaults in Hawai i without being detected.

There are no Hawai i cases involving child sexual abuse that address the admissibility of the defendant s prior sexual interaction with the complaining witness. However, cases from other jurisdictions have held that such evidence is admissible under rules comparable to HRE Rule 404(b). See, e.g., State v. Cox, 169 P.3d 806, 813-14 (Utah Ct. App. 2007) (holding that evidence of an uncharged incident of sexual conduct was admissible to demonstrate an ongoing pattern of behavior by the defendant toward one particular victim) (citing State v. Reed, 8 P.3d 1025, 1030-32 (Utah 2000) (concluding that evidence of specific uncharged instances of the defendant s treatment of the child demonstrated the manner in which [the defendant] intensely pursued the victim over a three-and-a-half year period in order to gain opportunity to commit the unlawful sexual acts)); State v. Baptista, 894 A.2d 911, 915-16 (R.I. 2006) (holding that evidence of uncharged sexual assaults against defendant s step-daughter over a period of two and a half years was admissible to show the defendant s intent and lewd disposition toward the particular child victim); State v. Paul, 769 N.W.2d 416, 425-26 (N.D. 2009) (approving trial court s admission of evidence that defendant made complaining witness watch nasty movies and engaged in sexual conduct with her in another state prior to the

charged conduct as probative of plan and preparation).[22]

In sum, the State clearly articulated a legitimate purpose for the evidence, i.e., establishing Behrendt s opportunity to commit the offenses in Hawai i without being detected. Both the testimony of SI and the testimony of Dr. Bivens provided the evidentiary foundation for that non-character use of the evidence. Thus, this is not a situation where the state offered a pretextual reason for the admission of the evidence, but in fact appeared to be using it to establish the bad character of the defendant. Cf. Fetelee, 117 Hawai i at 82-85, 175 P.3d at 738-741 (in case of attempted murder, attempted assault and theft, concluding that evidence of an unrelated prior incident where the defendant entered his neighbor s apartment and punched a visitor would likely cause the jury to infer[] that [the defendant] was a violent person of bad character and was therefore not admissible under HRE 404(b)).

Accordingly, we conclude that the evidence of sexual contacts in South Dakota was relevant to establish opportunity.[23]

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[22] We note that some of the purposes identified by these courts are overlapping. Thus, when a defendant engages in behavior that culminates in a sexual relationship with a child, the evidence of that behavior could be admissible to show that defendant had a plan (to gain the child s trust and acquiescence), engaged in preparation (by seducing and testing the child) and did so in order to have the opportunity to engage in sexual conduct with the child without being detected.

[23] Since we conclude that the evidence was relevant to establish opportunity, we need not determine whether the other purposes identified by the circuit court were relevant in these circumstances. Cf. State v. Austin, 70 Haw. 300, 305-08, 769 P.2d 1098, 1101-02 (1989) (trial court instructed the jury that it could consider evidence of the defendant s prior uncharged acts for seven purposes delineated in HRE 404(b); this court concluded that the

(continued...)

C. The Probative Value of the Evidence of Sexual Contacts in South Dakota Was Not Outweighed by Any Prejudicial Effect

We next consider whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice to Behrendt. HRE Rule 403. When weighing probative value versus prejudicial effect in this context, a court must consider a variety of factors, including:

> . . . the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

State v. Renon, 73 Haw. 23, 38, 828 P.2d 1266, 1273 (1992) (citation omitted).

In the instant case, these factors weigh in favor of admission of the evidence. The strength of the evidence of the uncharged conduct is essentially the same as for the charged offenses, since the State relied primarily on the testimony of SI, together with the testimony of her sister and the observations of some other witnesses, to establish both the conduct in South Dakota and the conduct in Hawai i. Cf. Reed, 8 P.3d at 1030-32 (concluding that evidence of both charged and uncharged instances of the defendant s sexual contact with the child victim were essentially interchangeable, were of the same nature and character as the primary offense, and were carried out

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(...continued)
trial court properly admitted the evidence of prior uncharged offenses under HRE 404(b), analyzing two of the seven purposes).

on the same victim during the same uninterrupted course of conduct[,] and therefore the probative value of the evidence of the uncharged instances outweighed the prejudicial effect).

The similarities between the crimes were strong, since the conduct in South Dakota was in substance the same as that in Hawai i, i.e., alleged sexual contact between SI and Behrendt. And although the South Dakota conduct took place over a several-year period, it immediately preceded the conduct in Hawai i and thus was not remote in time. Cf. State v. Maelega, 80 Hawai i 172, 183, 907 P.2d 758, 769 (1995) (holding that the trial court did not abuse its discretion in concluding that prior bad act evidence was more probative than prejudicial; the trial court noted, inter alia, that very little time [] elapsed between the prior act evidence and the instant offense charged) (emphasis added).

There was also a substantial need for the evidence. We have previously emphasized the importance of the need factor, Clark, 83 Hawai i at 303, 926 P.2d at 208 (citations omitted), and one commentator has observed that in a case involving high relevance and strong need, the rule 403 balance will always favor admissibility. Bowman § 404-3[2][B]. Absent the evidence of sexual contacts between SI and Behrendt in South Dakota, the jury would have been left with the false impression that the sexual contact started at Kamani Trees. SI s failure to cry out when Behrendt had sexual intercourse with her the first time at Kamani

Trees, as her sister slept nearby, and her failure to report that incident as well as the subsequent incidents, would have been inexplicable, as would the fact that Behrendt would suddenly engage in such conduct after having lived in close proximity to SI for three years.

This court has previously recognized that testimony regarding a defendant s prior bad acts can be highly probative in understanding the conduct of a complaining witness in a sexual assault case. In State v. Iaukea, 56 Haw. 343, 537 P.2d 724 (1975), the complaining witness was a psychiatric social worker who was abducted and raped by the defendant. The complaining witness knew of the defendant s prior acts of violence and rape while treating him as part of her duties. Id. at 352, 537 P.2d at 731. She testified that she remained calm during the assault, both because of her training in how to deal with crisis situations, and because she was afraid of provoking the defendant to violence given what she knew about his past. Id. at 347, 537 P.2d at 728. This court held that her testimony about her knowledge of defendant s prior bad acts was relevant to show lack of consent, and noted that:

> The testimony of the complaining witness concerning the prior crimes which, to her knowledge, appellant had committed, credibly explained and placed in context many of her statements to and actions toward him. Her fear of the appellant was in part due to his past history of attacks on women. The complaining witness made every effort to remain calm and to refrain from screaming because of her training as a psychiatric social worker. In her judgment she had a better chance of avoiding serious bodily injury if she remained calm. She feared that he would cut her up if she tried to fight him.

> It was important that the jury know all of the facts involved so that they would not mistakenly construe the complaining witness s calm manner and lack of screaming as indicative of consent or lack of forcible compulsion.

Id. at 352, 537 P.2d at 731.

While the issue in Iaukea was lack of consent, and the issue here concerns SI s failure to promptly report the sexual contacts in Hawai i, nevertheless the underlying principle is the same: there is a substantial need for prior bad acts evidence when the exclusion of that evidence will create a false impression by the jury regarding the actions of the complaining witness.

The next Rule 403 factor, the efficacy of alternative proof, also weighs in favor of admitting the South Dakota evidence. There was no alternative way to establish the progression of Behrendt s behaviors, including his seduction and testing of SI and his development of a relationship of trust and control over her as their sexual relationship evolved. Although there was evidence that showed Behrendt s continued, and indeed, intensified efforts to maintain his relationship of trust and control with SI after they returned to Hawai i, that evidence would be likely to confuse rather than enlighten the jury absent the context provided by the prior conduct in South Dakota.

Finally, the evidence of the conduct in South Dakota was not likely to rouse the jury to an overmastering sense of hostility against Behrendt. The conduct in South Dakota was of the same general type and involved the same complaining witness

as the conduct in Hawai i. The jury heard testimony from SI about numerous sexual encounters between SI and Behrendt in Hawai i, including acts of sexual intercourse preceded on most occasions by SI licking Behrendt s penis to get it wet, and an occasion when Behrendt attempted to or did insert his penis in her anus. As the Court of Appeals of Utah noted:

> [T]he evidence was not unfairly prejudicial because [the complaining witness s] testimony regarding the [uncharged] sexual abuse that occurred in Wasatch County was essentially interchangeable with and of the same nature and character as her testimony regarding Defendant s [charged] conduct in Salt Lake County. Such evidence of multiple acts of similar or identical abuse is unlikely to prejudice a jury; jurors will either believe or disbelieve the testimony based on the witness s credibility, not whether the witness asserts an act occurred [an additional time].

Cox, 169 P.3d at 814 (quotations and citations omitted, some brackets in original and some added).

The primary difference between the sexual conduct in Hawai i and that in South Dakota was that the South Dakota conduct occurred while SI was several years younger, and, according to SI, occurred more frequently than in Hawai i. Those are relevant considerations which could, depending on the circumstances, provide a basis for limiting such evidence or excluding it altogether. However, we do not believe that they caused overmastering hostility in the circumstances of this case, particularly since the State did not argue in closing that SI s age at the time of the South Dakota contacts made Behrendt s conduct more culpable or reprehensible, and since there was evidence of a substantial number of contacts in Hawai i over a

period of about two years.

We further note that the potential for juror confusion here did not tip the balance against admission of the evidence. See HRE Rule 403. As noted above, the jury did send a question to the court regarding how to use the testimony and evidence from South Dakota. However, the court responded appropriately by referring the jury back to the court s limiting instruction regarding the permissible purposes for that evidence, and there were no further questions from the jury on that subject. The fact that the jury had a question, without more, does not establish that the jury was confused. To the contrary, it is not surprising that the jury asked for clarification, since the court s instruction did not specifically state that it was referring to the evidence from South Dakota. By referring the jury back to that instruction in response to its question, the court clarified that the instruction covered the South Dakota evidence, and there is no basis for concluding that the admission of the South Dakota evidence resulted in any prejudicial jury confusion.

In sum, this court has stated that the determination of the admissibility of relevant evidence under HRE 403 is eminently suited to the trial court s exercise of its discretion because it requires a cost-benefit calculus and a delicate balance between probative value and prejudicial effect. Clark, 83 Hawai i at 302, 926 P.2d at 207 (citations omitted). The

circuit court here carefully considered that balance. It required the State to give a detailed description of the evidence prior to trial, and refused to admit some of the proposed testimony.[24] We cannot say that the circuit court abused its discretion in concluding that the probative value of the evidence it admitted was not outweighed by its prejudicial effect.

D. There Was Sufficient Evidence to Instruct the Jury on the Lesser Included Offense of Sexual Assault in the Third Degree for Counts 1-3, and to Sustain Behrendt s Convictions

Behrendt argues that the circuit court erred in instructing the jury on the offense of sexual assault in the third degree because [t]he only evidence that was presented by the State in regard to sexual assault was evidence of repeated sexual penetrations, which would constitute first degree sexual assault. Behrendt similarly argues that there was insufficient evidence to support his convictions for Counts 1-3 and therefore the circuit court erred in denying his motion for judgment of acquittal.

HRS § 707-730(1)(c) provides that a person commits the offense of first degree sexual assault when [t]he person knowingly engages in sexual penetration with a person who is at least fourteen years old but less than sixteen years old; provided that: (i) The person is not less than five years older

[24] As noted above, the circuit court concluded that the testimony of two of the State s proposed witnesses was inadmissible because it would be cumulative and the prejudicial value would outweigh the probative value. See supra, part I.A. & note 7.

than the minor; and (ii) The person is not legally married to the minor; . . . . HRS § 707-732(1)(c) defines the offense of third degree sexual assault the same way as HRS § 707-730(1), except that a person commits the offense of third degree sexual assault by engaging in sexual contact rather than sexual penetration.

As noted above, part I.D, the ICA concluded that there was sufficient evidence to support Behrendt s convictions on all counts, but remanded for a new trial on Count 3 because of the circuit court s failure to properly instruct the jury on the amended definition of sexual contact.[25] The State

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[25] As explained by the ICA, the definitions of both sexual contact and sexual penetration were amended in 2004, in response to this court s holding in State v. Mueller, 102 Hawai i 391, 76 P.3d 943 (2003), which overruled this court s previous holding in State v. Rulona, 71 Haw. 127, 785 P.2d 615 (1990).

> Prior to 2004, sexual penetration was defined as:
>
> vaginal intercourse, anal intercourse, fellatio, cunnilingus, anilingus, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person s body; it occurs upon any penetration, however slight, but emission is not required.

HRS § 707-700 (Supp. 1986 & 1993).

> Sexual contact was defined as:
>
> any touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.

HRS § 707-700 (Supp. 1987 & 1993).

In Mueller, involving alleged acts of cunnilingus, this court held that the plain language of HRS § 707-700, specifically the phrase it occurs upon any penetration, however slight, mandates proof of penetration[,] in order to convict for sexual assault in the first degree for acts of cunnilingus. 102 Hawai i at 393, 76 P.3d at 945. Thereafter the legislature amended the definitions of sexual penetration and sexual contact in HRS §

(continued...)

did not appeal the ICA s conclusion with respect to Count 3, nor does Behrendt address it in his application. Therefore, we must determine whether there was a rational basis for the circuit court to instruct the jury on sexual assault in the third degree for Counts 1 and 2, see State v. Kinnane, 79 Hawai i 46, 49, 987 P.2d 973, 976 (1995) (in the absence of [] a rational basis in the evidence, the trial court should not instruct the jury as to included offenses) (emphasis omitted), and whether there was sufficient evidence to support Behrendt s convictions on all three counts. We conclude that there was, and therefore affirm the ICA.

The definition of sexual contact in HRS § 707-700

(...continued)
707-700, effective May 10, 2004, for the purpose of clarifying that the definition of sexual penetration would include cunnilingus and anilingus whether or not actual penetration occurred. 2004 Haw. Sess. Laws Act 61, § 2 at 302-03.

The definition of sexual penetration was therefore amended to read as follows:

> (1) Vaginal intercourse, anal intercourse, fellatio, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight, but emission is not required; or
> (2) Cunnilingus or anilingus, whether or not actual penetration has occurred.

HRS § 707-700 (Supp. 2004) (emphasis added).

The definition of sexual contact was amended to read as follows:

> any touching, other than acts of sexual penetration, of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.

HRS § 707-700 (Supp. 2004) (emphasis added).

(both the current definition, effective during the time period covering Count 3, and the definition prior to the 2004 amendments, effective during the time period covering Counts 1 and 2), states that sexual contact includes any touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts. HRS § 707-700 (1993 & Supp. 2004) (emphasis added).

SI testified that she and Behrendt repeatedly engaged in sexual intercourse over the time periods covered by Counts 1-3. SI also recounted some of the specific instances in which they had intercourse. For example, at a time when living at the Kamani Trees house (Count 1), SI testified that she was sleeping one night and Behrendt turned me around and he had sexual intercourse with me in the back. When living at the Aloha Kona house (Count 2), SI recounted a time when Behrendt asked her if she wanna do it and [Behrendt] just did sexual intercourse from behind where SI was over the bed, standing up, leaning over. Also while living at the Aloha Kona house, SI testified that Behrendt would take her to a construction site nearby and they would have sexual intercourse in the car, where he would have me sit on top of him, where he s behind me, or he would have me straddle him. SI also recounted a time when Behrendt took her to a nearby construction and had me in the car, in the back

seat, and I just . . . was . . . like bent over the back seat, and he was behind me[,] and then Behrendt inserted his penis into SI s vagina. SI also testified that Behrendt also took her in a rental car to a different construction site in Kaloko where they had sexual intercourse, and then Behrendt asked SI if she wanted to do anal and told her that it wouldn t hurt and other girls do it. The DPA asked SI if Behrendt attempt[ed] it and SI replied [y]es and that he put his penis in my anal, my butt.

Although this testimony indicates that there were incidents of sexual penetration between SI and Behrendt, which would support a conviction for sexual assault in the first degree, a rational juror could have inferred that there was sexual contact prior to the penetration, i.e., that there was touching of the sexual or other intimate parts of SI, such as SI s genitalia, buttocks, or other intimate parts, either directly or through clothing, or that SI touched Behrendt s sexual or other intimate parts. HRS § 707-700. This testimony, therefore, provided a rational basis to instruct the jury on sexual assault in the third degree, Kinnane, 79 Hawai i at 49, 987 P.2d at 976, and, when considered in the strongest light for the prosecution, was also sufficient to sustain Behrendt s convictions. Richie, 88 Hawai i at 33, 960 P.2d at 1241.

IV. CONCLUSION

The circuit court properly admitted the South Dakota

evidence because the evidence was probative of Behrendt s opportunity to commit the offenses in Hawai i without being detected, and its probative value outweighed any prejudicial effect.

We further hold that the circuit court did not err by instructing the jury on the lesser included offense of sexual assault in the third degree, and that there was sufficient evidence to support the convictions on Counts 1-3.

Accordingly, we affirm the ICA s November 24, 2009 judgment.

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