

Electronically Filed
Supreme Court
SCWC-30460
02-DEC-2011
03:23 PM

NO. SCWC-30460

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

JOHN APELE KALUAU, III, Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 30460; CR NO. 09-1-262K)

DISSENT BY ACOBA, J.

Respectfully, I would accept certiorari in this case because admission of Petitioner's two prior convictions for domestic abuse was not relevant and was prejudicial. The convictions were especially prejudicial because inter alia they were similar to the instant case. "The United States Supreme Court [has] recognized the potential prejudice of submitting evidence of the name and nature of the prior offenses[,]" State v. Murray, 116 Hawai'i 3, 15, 169 P.3d 955, 967 (2007) that is

similar to the charged offenses. See Old Chief v. United States, 519 U.S. 172, 185 (1997) (concluding the prior conviction of assault causing serious bodily injury was similar in nature and name to the charges in the instant case, of assault with a dangerous weapon and therefore, "would take on added weight from the related assault charge against" the defendant.)

The complainant in the instant case is Marjorie Kaluau. The two domestic abuse convictions involved the same complainant, Marjorie Kaluau. Both judgments on the prior convictions were entered on June 10, 2009, in cases FC-CR NO. 09-1-032K, and FC-CR NO. 09-1-072K. The judgments were entered during the same period that the present offenses charged allegedly occurred; Unauthorized Entry in a Dwelling on June 24, 2009 and Violation of an Order for Protection on May 3, 2009, June 22, 2009, June 24, 2009 (two), and June 26, 2009. Analogously, as Old Chief indicated, "where a prior conviction was for a . . . crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious. . . ." Id.

Plainly, the admission of these prior convictions into evidence was prejudicial because "such evidence could unduly influence a jury to conclude that the defendant is a 'bad person,' or more likely to have committed the offenses, leading it to improperly convict the defendant based on those considerations." Murray, 116 Hawai'i at 15, 169 P.3d at 971.

This court has recognized, that "[i]t is the law in virtually every state that evidence of prior convictions may not be admitted in order to show that the defendant has a criminal propensity and is likely to have committed the crime[s] charged." State v. Faafiti, 54 Haw. 637, 642 n.5, 513 P.2d 697 n.5 (1973). Inasmuch as the convictions and the instant case involved the same complainant and related offenses spanning a common period of time, admission of the convictions reasonably could have had an overweening influence, leading the jury to believe that Petitioner was likely to have committed the crimes charged in the instant case, irrespective of the evidence adduced.

Under these circumstances, admission of the prior convictions into evidence for consideration by the jury could not be said to be harmless beyond a reasonable doubt. Accordingly, this case merits further review and respectfully, certiorari should be accepted.

DATED: Honolulu, Hawai'i, December 2, 2011.

/s/ Simeon R. Acoba, Jr.

Associate Justice

