SCWC-11-0000048

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

FAUSTINO TRANSFIGURACION, Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000048; CR. NO. 09-1-00126K)

DISSENT BY ACOBA, J., WITH WHOM POLLACK, J., JOINS

Respectfully, in rejecting certiorari, the majority denies consideration on the degree of impact that a multitude of statistics has on the presumption of innocence, the standard of proof beyond a reasonable doubt, and the assessment of credibility by the factfinder. On its face, this case presents a significant issue regarding the use of statistics that has been reviewed in other jurisdictions and has yet to be addressed by this court,[1] and thus leaves the ICA and the trial courts bereft

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[1] Neither State v. Machado, 109 Hawaiʻi 424, 127 P.3d 84 (App. 2005) nor State v. Maelega, 80 Hawaiʻi 172, 907 P.2d 758 (1995) address the circumstances presented by the instant case. In Machado, the ICA held that it was not error to admit testimony that "ninety-five percent of domestic violence is male to female." 109 Hawaiʻi at 431, 127 P.3d at 91. However, the ICA also acknowledged that "if error there was, under the foregoing circumstances it was harmless beyond a reasonable doubt," because inter alia, the defendant was convicted of a misdemeanor and not the felony charged. Id.

of authoritative guidance. Inasmuch as we are the court of last resort under the Hawai‘i constitution, this court should grant certiorari because of the prior rulings and to fulfill our educative role. Accordingly, I disagree with rejection of the application for certiorari. In my view, certiorari should be granted for the reasons that follow, as factors that our courts may consider in this area.

I.

A.

This case involves allegations by five separate witnesses, "K.C.," "J.H.," "C.C.," "E.C.," and "D.C." (collectively, complaining witnesses) of varying degrees of sexual abuse by Petitioner. At trial, Respondent/Plaintiff-Appellee State of Hawai‘i (Respondent) elicited testimony from each witness that he or she was abused by Petitioner. Respondent also presented testimony from Dr. Alex Bivens (Dr. Bivens), who apparently testified for Respondent as an expert[2] in the field of child sexual abuse.

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at 435, 127 P.3d at 95. Moreover, the use of statistics in the instant case was far more extensive.

In Maelega, testimony regarding the typical actions of domestic batterers was admitted to rebut the defendant's Extreme Mental or Emotional Disturbance (EMED) defense. 80 Hawai‘i at 182, 907 P.2d at 768. In other words, the defendant in that case did not dispute that he committed the act in question, but argued that he was entitled to a mitigating defense due to his mental state. It may be permissible to introduce evidence regarding typical actions of batterers when the only issue is the defendant's mental state. See State v. Stafford, 957 P.2d 47 (Or. App. 1998) (discussed infra). However, in the instant case, the mental state of Petitioner/Defendant-Appellant Faustino Transfiguracion (Petitioner) was not at issue because Petitioner denied ever abusing the complaining witnesses. Hence, Maelega is inapposite. In sum, neither case justifies the rejection of certiorari in this case.

[2] Dr. Bivens was not explicitly qualified as an expert or qualified to render an expert opinion in a specialized area.

1.

K.C. explained that Leonida, her aunt, occasionally babysat her when she was younger. Petitioner was Leonida's husband at the time and present when K.C. went to Leonida's house. When K.C. was "probably six," and while Leonida was in the shower, Petitioner took off his pants and told K.C. to play with his penis. Petitioner "kept telling [her] it's all right" and "it's not bad." Petitioner then took K.C.'s hand and placed it on his penis.

2.

J.H. was eighteen at the time of trial. She recounted that when she had been at her Aunt Leonida's house, Petitioner touched her "legs, arms" and "vagina and breasts" from outside her clothing. Petitioner also touched her vagina over her clothing "more than three times." She did not remember how many times he touched her breasts. J.H. explained that "most of the times" Petitioner touched her, he would "sweet-talk" her by "mak[ing] promises" to "take [her] to the park" or "Fun Factory." He would also "tell [her] he loved [her]." She had seen Petitioner put his hands in C.C.'s pants, but could not remember seeing this occur more than once.

3.

Petitioner was never charged with any crime regarding M.H. M.H.'s testimony was introduced to prove an alleged prior bad act of Petitioner. However, M.H. was fourteen at the time of trial. She explained that C.C. was a year older than she was.

When she was five or six and C.C. was six or seven, she saw Petitioner grab C.C. by the waist and put his hand down C.C.'s pants. She stated that C.C. cried but that she could not remember what happened after that.

Following this testimony, Respondent requested that the court issue a limiting instruction because it was "going to go into [Petitioner] touching [M.H.]." Respondent requested the court to instruct the jury that the evidence may only be used for "motive, intent, opportunity, and lack of mistake." Respondent stated that the testimony demonstrated motive or opportunity because "it's another child who says there was the opportunity for [Petitioner] to touch them without anyone seeing it." The court allowed the testimony to show motive or opportunity.

M.H. then testified that when she was "between four to six," she was at C.C.'s house in the living room along with J.H., K.C., and C.C. M.H. stated that Petitioner told her to sit on his lap, and started rubbing her legs and back. She did not remember Petitioner telling her anything while he was rubbing her legs. She stated that she felt Petitioner's penis and it was "hard."

4.

Lourdes Hartmann (Lourdes) was the mother of J.H. and M.H., and the sister of Leonida. Lourdes recounted that when J.H. was between the ages of five and seven, her sister Leonida took care of J.H., picked her up from school, and took J.H. to

her house. She explained that Petitioner lived with Leonida at the time.

5.

C.C. testified that when he was "like eight" he was at Leonida's house and alone in the living room with Petitioner. C.C. stated that while he was sitting on the couch, Petitioner "pretend[ed] that he was hugging [C.C.]," and then reached "down [C.C.'s] pants." Petitioner "almost" touched his penis, but C.C. "push[ed] him away." This occurred "once or twice a month" when he was eight.

C.C. also related that Petitioner would touch his penis through his clothes "whenever [Leonida] wasn't . . . watching." This occurred "more than two [times]," but "less than five." He then recounted that "more than once," Petitioner reached his hand down C.C.'s pants and "just barely" touched "the top of his penis." Petitioner also touched him in C.C.'s own house in June of 2008, during a family gathering. C.C. was in the living room with Petitioner and walked past him when Petitioner grabbed C.C. and touched his penis over his clothes.

6.

E.C. testified that at some point prior to October, 2008, he was in Petitioner's truck with his brother and Petitioner. E.C. related that Petitioner was tickling him and then touched his penis over his clothes for less than three seconds. E.C. then told Petitioner to stop twice and after the second time, Petitioner stopped.

On recross-examination, E.C. testified that he had a "little bit" of a memory of the event and then stated that he "didn't really" have a memory of the event. On further redirect examination, E.C. testified that he knew Petitioner touched him because "he remember[ed]," but when asked again if he remembered, E.C. stated that he did not. He believed that Petitioner touched him in the truck because Petitioner "did it to the other people."

7.

D.C. testified that when he was six, he would go to his Aunt Leonida's house. He stated that when he was at Leonida's house, he was sitting on the couch and Petitioner touched his "balls" "like two times." Petitioner tickled D.C.'s feet before he touched him.

8.

Dr. Bivens provided extensive testimony regarding his credentials as an expert in the field of child sexual abuse. Defense counsel also conducted voir dire examination of Dr. Bivens and read from Dr. Bivens' CV. Dr. Bivens explained that he had not seen any information about this specific case, but that his intention was "to provide information about what the general science says about child sexual abuse."

First, Dr. Bivens discussed the phenomenon of "delayed disclosure," where victims of child sexual abuse do not report the abuse until well after the abuse occurred. He explained that in child sexual abuse cases, "the delay of disclosures is the rule, not the exception." According to Dr. Bivens, the reasons

that victims gave for delaying their disclosures were embarrassment, not wanting to hurt anyone, wanting to protect the abuser, and the fear of not being believed.

Dr. Bivens explained that "the closer the relationship" between the victim and the abuser, "the longer . . . for the child to disclose." Dr. Bivens explained that "it was also common for children who had delayed disclosure to require a trigger." He stated that the most common trigger for disclosures was "an anger-inducing event," and that under one study "about a quarter of the [disclosures] reported fell into that category."

Dr. Bivens also addressed the phenomenon of incomplete disclosures. He explained that in one study, children initially only reported "half the severity [of acts] and half of the number of acts that were actually committed," so that "when children tell us, they probably aren't telling us the whole story at once." Regarding children's memory, Dr. Bivens explained that due to a phenomenon he termed "tunnel memory," children "are pretty good at explaining the actual incident," but "not quite as good" at remembering peripheral details about the event.

Dr. Bivens then answered several questions from Respondent regarding the characteristics of child molesters:

> Q. Are there any studies concerning whether children are more likely to be abused by strangers or someone they know?
> A. So all of the studies that I've talked about today were identifying people who have been molested, have revealed a very consistent finding. Perhaps one of the most consistent findings in the field of child sexual abuse is that eighty-five percent of children or people who report being abused report that they had a preexisting relationship with their molester that was not based on sex, a preexisting, often trusting relationship.
> Q. I'd like to talk a little bit about the abuse process itself. Any studies on where abuse occurs, where sexual

abuse occurs?
A. Yes. There was a study of over a hundred child molesters, and it found that incest[3] molesters molested in their home and they endorsed doing so a hundred percent of the time. Non-incest molesters reported molesting in their own home about half the time and in the child's home about half the time. Doesn't mean the molestation wasn't taking place elsewhere, but it was endorsed by all of them that typically the child's home and their own home were the most common places.
Q. Are there any studies on whether or not persons molest in front of others?
A. Well, there is one study that gave a questionnaire to over a hundred convicted child molesters who were assured that answering these questions wouldn't get them into any additional trouble. And all the molesters did was fill out whether or not they endorsed this item or not. But a sizable percentage, over forty percent, of the child molesters said that they had molested with another child present who was not involved in the molestation. And about a quarter of them said that they molested in front of a non-participating adult who did not know about the abuse.
Q. When you say molested in the presence of a non-participating adult, what does that mean?
A. Well, it just means that they were involved in some kind of sexual touching while another adult was present and was not aware of it going on at that time.
Q. Did the -- and these are convicted --
A. They are convicted.
Q. -- child abusers?
A. Yes. Post-incarceration. So they've even served their time on the . . .
Q. Did they provide reasons for abusing children while others were present?
A. The reasons cited by the convicted child molesters were a sense of mastery and control, you know, having that sense of power over the child, and sexual compulsivity, just not being able to resist doing so. And twelve percent admitted to molesting a child while they were in the same bed as a non-participating adult.
Q. I'd like to turn to how abusers gain the trust of children. Is there literature on how, basically how abuse occurs?
A. Yes. And there's even a measure to determine what methods are used most frequently by child molesters.
Q. And what is that?
A. So it's something like the gaining-trust scale, or something like that.
Q. And what did they do to gain trust?
A. Well, treating them nicely, developing a loving relationship, touching them non-sexually, doing them favors, telling them they're special, these kinds of things.[4]
Q. Are there any studies that discuss whether or not a[n] average child molester is likely to have one or multiple victims?

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[3] "Incest" is defined as "sexual relations between family members or close relatives." Black's Law Dictionary 829 (9th ed. 2009) (emphasis added).

[4] The parties' briefs and cases from other jurisdictions refer to this as the "grooming" process.

> A. Yes.
> Q. What are those?
> A. So multiple victims are the rule, and not the exception. So the average number of victims per molester ranges from study to study between three to over eleven.

(Emphases added.)

B.

Petitioner denied the allegations of all of the complaining witnesses. He testified that when the complaining witnesses were watched by Leonida, there were times when the children were alone with him. He also acknowledged tickling the children, but denied touching their private parts.

C.

In Respondent's closing argument, Respondent made several references to Dr. Bivens' testimony. First, Respondent contended that Dr. Bivens' testimony regarding the relationship of the victim and the abuser was relevant to explain delayed disclosure:

> Relationship to the abuser. Again, the reason that Dr. Bivens -- that his testimony is relevant is because it contradicts all of the stereotypes that we hold. The stereotypes that we hold are that children don't know the people who abuse them. And the bottom line is that the child who knows the abuser is more likely never to disclose, ever, and to delay disclosure. And the bottom line is that the child who knows the abuser is more likely never to disclose, ever, and to delay disclosure.

Respondent also contended that the evidence at trial was consistent with Dr. Bivens' testimony regarding incomplete disclosures and child memory. Respondent then reminded the jury of Dr. Bivens' statements about a relationship of trust between children and abusers:

> Relationship of trust. 100 percent of incest offenders and a majority of other pedophile offenders were assaulted in their own homes. Again, [this] dispels the myth that persons are out there waiting to snatch kids. The kids walk into their homes. Things like being baby-sat by a trusted uncle. 44 percent also chose the child's home. You know, once you've abused a child in their own home, where, where would that child go to be safe?
> A majority molested with another child present. And this was the one that surprised me: 23.9 percent molested with a noncollaborating adult present. Again, at first it's hard to wrap your head around how that could happen, until you realize that motivations can be a lot of different things. Motivations can be increased excitement, sense of mastery, power over children, compulsion.

(Emphases added.)

II.

In his Application, Petitioner asked, first, whether the court and the ICA erred by allowing the testimony of Dr. Bivens, and second, whether the court and the ICA erred by allowing M.H.'s testimony as to a prior bad act.

III.

Regarding Petitioner's first question, Dr. Bivens' testimony can be divided into two categories. First, Dr. Bivens presented testimony regarding the reactions of child victims to sexual abuse. Dr. Bivens explained that abuse victims are likely to delay disclosure, that initial disclosure is likely to be incomplete, and that child witnesses may struggle to remember the peripheral details of events. Such testimony is admissible under this court's holding in State v. Batangan, 71 Haw. 552, 799 P.2d 48 (1990).

Second, however, Dr. Bivens also testified regarding the actions said to be commonly performed by the so-called typical sexual abuser and the typical characteristics of a sexual

abuser, i.e. "profile evidence," as exhibited in the "abuse process" and "grooming process" discussed infra.

IV.

Preliminarily, other jurisdictions and commentators have raised two objections to the use of statistics. First, it has been argued that the use of statistics is inherently prejudicial in a criminal trial. See generally Laurence H. Tribe, Trial by Mathematics: Precision and Ritual In the Legal Process, 84 Harv. L. Rev. 1329 (1971) (hereinafter Tribe, Trial by Mathematics) (arguing that the idea of reasonable doubt should not be quantified). Thus, it has been noted that "[c]ommentators have been virtually unanimous in their condemnation of the use of probability evidence on crucial points in criminal proceedings," because jurors are likely to be unable to appropriately analyze statistical evidence, such evidence would "overwhelm the jury," and such evidence is "incompatible with traditional notions of reasonable doubt." David McCord, Expert Psychological Testimony About Child Complainants In Sexual Abuse Prosecutions: A Foray Into the Admissibility of Novel Psychological Evidence, 77 J. Crim. L. & Criminology 1, 56-57 (1986) (hereinafter McCord, Expert Psychological Testimony).

Statistical evidence is incompatible with traditional notions of reasonable doubt for at least two reasons. First, statistical evidence necessarily implies a degree of error. This cannot be reconciled with a conception of reasonable doubt that "insists upon as close an approximation to certainty as seems

humanly attainable in the circumstances." Tribe, Trial by Mathematics, 84 Harv. L. Rev. at 1372-1377. Second, the idea of reasonable doubt requires proof connecting the defendant himself or herself to the crime, and not simply proof that a defendant is guilty because he may share characteristics with discrete and varied populations of individuals who may be guilty. See State v. Claflin, 690 P.2d 1186, 1190 (Wash. Ct. App. 1984) (addressing evidence that "43 percent of child molestation cases were reported to have been committed by 'father figures'" and holding that "[a]n opinion that the defendant statistically is more likely to have committed the crime because of his membership in a group -- in this case, his paternalistic relationship to the victims -- [was] inadmissible" because it was "extremely prejudicial"); cf. Tribe, Trial by Mathematics, 84 Harv. L. Rev. at 1376-77 (raising concerns that the use of statistical evidence will lead to the "dehumanization of justice").

V.

With respect to profile evidence, jurisdictions have considered some statistical evidence inherently prejudicial because of the possibility that jurors will misinterpret the statistical evidence offered. Some courts apparently reject "profile evidence," on this basis.[5] Courts have often held that profile evidence is "inherently prejudicial" because "of the

[5] "Profile evidence" generally "describes sets of observable behavioral patterns," which can be used "as a tool to identify crime suspects." Christopher B. Mueller and Laird C. Kirkpatrick, Evidence, § 7.22 (4th ed. 2009). "Profile evidence" is distinct from "syndrome" evidence, which generally involves a defendant's "psychological characteristics." Id.

potential [it has] for including innocent citizens as profiled [criminals]." United States v. Beltran-Rios, 878 F.2d 1208, 1210 (1989). Profile evidence "guide[s] the jury to the conclusion that a defendant is guilty because he fit[s] a particular profile," even though the profile itself "may be consistent with both innocent and guilty behavior." People v. Robbie, 92 Cal. App. 4th 1075, 1086-87 (2001).

In other words, testimony that a certain characteristic is commonly possessed by a certain type of criminal may suggest to the jury that an individual with that characteristic is guilty. However, such testimony actually has no probative value for that purpose, because it says nothing about how many innocent individuals also possess that characteristic.[6] Therefore, juries could use such testimony to draw the "unwarranted" inference that the defendant was more likely to be guilty because he possessed that characteristic. State v. Hansen, 743 P.2d 157, 176 (Or. 1987).

Petitioner's objection that Dr. Bivens' use of statistics had the effect of bolstering the complaining witnesses' testimony raises similar concerns. Here, potential

[6] For example, it has been noted that "carrying little or no luggage" is a common characteristic of a drug courier. See, e.g., United States v. Elmore, 595 F.2d 1036, 1039 n.3. However, even assuming, arguendo, that statistical evidence could be admitted to prove guilt in a criminal case, this evidence would have no probative value on the issue of a particular individual's guilt. The proper statistical evidence would be evidence of how many people who carry little or no luggage are drug couriers. Hypothetically, it may be true that 80% of drug couriers carry little or no luggage, but that only 3% of travelers with little or no luggage are drug couriers. Hence, informing the jury that 80% of drug couriers carry little or no luggage is seriously misleading.

prejudice would arise because the expert's testimony could "guide the jury to a conclusion" that the complaining witnesses were telling the truth by demonstrating that the details in their testimony matched the details in a typical child abuse case, even though fabricated testimony also may include such details. See State v. Petrich, 683 P.2d 173, 180 (Wash. 1984) (rejecting testimony that in "eighty-five to ninety percent of our cases, the child is molested by someone they already know," because it "invite[d] the jury to conclude that a defendant" was "statistically more likely to have committed the crime"); see also Hall v. State, 692 S.W.2d 769, 773 (Ark. App. 1985) (rejecting evidence that "in 75 [percent] to 80 [percent] of such cases the perpetrator is known to the children involved," and "50 [percent] of child sexual abuse cases occur in either the home of the child or the perpetrator" as tending "to focus the attention of the jury upon whether the evidence against the defendant matched the evidence in the usual case involving the sexual abuse of a young child."); Stephens v. State, 774 P.2d 60, 64 (Wyo. 1989) (noting that a "doctor advised the jury that statistically eighty to eighty-five percent of child sexual abuse is committed by a relative close to the child," and that it was "difficult [] to understand how statistical information would assist a trier of fact in reaching a determination as to guilt in an individual case.").

Even assuming, arguendo, that statistical evidence was admissible, whether or not the details of an individual

complainant's story matched the details in a common sexual assault case would have no bearing on whether the complainant was telling the truth. The proper statistical evidence for this purpose would be evidence demonstrating how many individuals whose testimony contained such details were testifying truthfully. However, this may not be apparent to the jury, and therefore statistics regarding the "typical" sexual abuse event are seriously misleading.

VI.

A.

With respect to "the abuse process," Dr. Bivens testified that "between thirteen and a half and seventeen percent of female adolescents and adults and maybe two and a half to six percent of adults and adolescent males will say they were sexually abused," that "eighty-five percent of children or people who report being abused report that they had a preexisting relationship with the molester," that "multiple victims were the rule, not the exception," that "100 percent of incest molesters do so in their own homes," and that "40 percent of molesters had done so with children present and that 25 percent had done so in front of a non-participating adult." Respondent urged that such testimony was relevant to "eliminate [] the [jurors'] preconcieved notions" concerning child sexual abuse.

Petitioner asserts that this testimony "relayed to the jury" that "the specific circumstances [alleged] by the complainants" were "the 'rule,' and [therefore] according to the

statistics and studies, the complainants were telling the truth." Petitioner also characterizes this evidence as impermissible "profile evidence," and thus the testimony regarding the abuse process was "unduly prejudicial."

B.

Several cases from other jurisdictions appear to support Petitioner's contention that Dr. Bivens' testimony regarding the abuse process was unduly prejudicial. In Robbie, the California Court of Appeals rejected expert testimony that demonstrated that a witness' recollection of a defendant's actions during a rape was consistent with conduct which is commonly reported in rape cases. In that case, the complainant's testimony established that the defendant had often acted friendly towards her during the alleged rape. 92 Cal. App. 4th at 1078. The State called an expert who, although not acquainted with the facts in the specific case, testified in response to hypothetical questions that the specific allegations of the complainant were "common" and that the behavior pattern described "was the most common type of behavior pattern" in cases with sex offenders. Id. at 1083.

As in this case, in Robbie, the State justified the use of the expert testimony as necessary to "disabuse the jury of common misperceptions about the conduct of a rapist." Id. at 1082 (internal quotation marks omitted). The California court noted that in a prior California case, the court had allowed testimony of an expert to disabuse a stereotype about the typical

child molester by explaining that "there is no profile of a 'typical' child molester." Id. at 1086. However, in Robbie, the State went further by "replacing the brutal rapist archetype with another image: an offender whose behavioral pattern exactly matched the defendant's." Id. at 1087 (emphasis added). Thus, the California court concluded that "the effect of [the expert's] testimony was not to help the jury objectively evaluate the prosecution evidence," but to "guide the jury to the conclusion that [the] defendant was guilty." Id.

Similarly, in Petrich, as a part of a statement explaining the extent of delayed reporting, the State's expert testified that in "'eighty-five to ninety percent of our cases, the child is molested by someone they already know.'" 683 P.2d at 180. That court held that the "potential for prejudice [was] significant compared to [the evidence's] minimal probative value, because it "invite[d] the jury to conclude that because of defendant's particular relationship to the victim, he is statistically more likely to have committed the crime." Id. Finally, in Hall v. State, the court rejected expert testimony because "much of the expert's testimony highlighted details [about the usual sexual abuse case] that were parallel to the details in the case at hand." 692 S.W.2d at 316 (emphasis added).

C.

Under the analysis suggested by Professor McCord, which compares the necessity of admitting expert testimony to the

"understandability" of the statistical evidence, see McCord, Expert Psychological Testimony at 32-33, it appears that Dr. Bivens' testimony regarding the abuse process was erroneously admitted. First, the necessity of introducing such testimony was low when compared to the necessity of introducing expert testimony to explain delayed disclosure or recantation. This court has approved the use of evidence about the "usual" response of a victim in rape cases to explain delayed disclosure or recantation. See, e.g., Batangan, 71 Haw. at 557, 799 P.2d at 52, see also State v. Clark, 83 Hawai'i 289, 299, 926 P.2d 194, 204 (1996) (allowing expert testimony stating that "victims of domestic violence commonly recant their allegations against their abuser"). In such cases, testimony about whether a scenario was "common" was necessary because without such testimony it was impossible for the jury to accurately assess the witnesses.

In the instant case, however, Respondent sought to admit the testimony regarding the abuse process to "rebut the myth that a sexual abuser tends to be someone who goes to the playground and snatches a kid." As said in Batangan, unless it was explained to the jury that delayed reporting and recantation were normal, "such behavior would be attributed to inaccuracy and prevarication," and the jury would likely conclude that the witness' testimony was fabricated. 71 Haw. at 557, 799 P.2d at 52. Unlike in the area of delayed reporting or recantation, such testimony will not necessarily be required to rebut the

circumstances posited by Respondent or similar alleged stereotypes.

It is not evident that contemporary jurors continue to possess the stereotypes attributed to them by Respondent. See United States v. Raymond, 700 F. Supp. 2d 142, 151 (D. Me. 2010) ("A jury in 2010 does not need expert testimony to help it understand that not every child abuser is a dirty old man in a wrinkled raincoat who snatches children off the street as they wait for the school bus."); but see United States v. Romero, 189 F.3d 576, 584 (7th Cir. 1999) (holding that testimony regarding the typical characteristics of sex abusers was "critical in dispelling from the jurors' minds [a] widely held stereotype"). Finally, it may have been possible to rebut the common stereotype Respondent attributed to the jurors without introducing evidence suggesting that the testimony of the complaining witnesses matched the "typical" sexual assault. See Robbie, 92 Cal. App. 4th at 1086-87. Thus, Dr. Bivens' testimony regarding the abuse process did not possess the same probative value as his testimony regarding delayed disclosure.

In contrast to the minimal probative value of Dr. Bivens testimony, as discussed supra, the potential for prejudice arising from the introduction of evidence regarding the abuse process was high. First, the abundance of statistics presented to the jury which suggested that the testimony of the complaining witnesses matched the "typical" sexual assault and that Petitioner possessed the characteristics of a "typical" sexual

offender could have "overwhelmed" the jury and led it to convict on a statistical basis. As discussed supra, this is inconsistent with the concept of proof beyond a reasonable doubt. Second, the statistics may have improperly bolstered the credibility of the complaining witnesses. The jury may have compared the extensive statistics provided regarding the typical perpetrator of sexual abuse and the typical sexual abuse event, and after comparing the statistics to the testimony of the complaining witnesses, used the statistics to conclude that it was likely that the complaining witnesses were telling the truth. However, as discussed supra, the statistics cited by Dr. Bivens provided no basis for that conclusion. See Hansen, 743 P.2d at 176; see also Hall v. State, 692 S.W.2d at 773 (holding that testimony that "highlighted details that were parallel to the case at hand" were "prejudicial and distractive"). Therefore, the statistics regarding a "typical" sexual abuse case would have inappropriately bolstered the complaining witnesses' credibility.

The ICA held that Dr. Bivens could not have bolstered the credibility of the complaining witnesses because he "had no knowledge about the facts of the case" and "was only there to give a general overview of the scientific literature on sexual abuse of children." Transfiguracion, 2012 WL 5897413 at *2. Dr. Bivens may not have been aware of the facts of the case, but Respondent was. By the nature of the questions asked, studies or statistics may be lined up with the testimony of the complaining witnesses. As discussed supra, such testimony would lead the

jury to improperly conclude that the complaining witnesses were more likely to be telling the truth based on the statistics concerning perpetrators that was provided by Dr. Bivens.

In sum, due to the low probative value of the evidence regarding the abuse process and the significant prejudicial potential of such evidence, substantial concern would arise that the admission of such evidence was erroneous.

VII.

A.

With respect to the "grooming process," Dr. Bivens testified that abusers often gain the trust of victims by "developing a loving relationship, touching them non-sexually, doing them favors, telling them they're special." Unlike the evidence regarding the abuse process, Respondent did not contend that this evidence was necessary to rebut a common stereotype. Instead, Respondent argued that the testimony regarding grooming (1) "help[ed] [to] explain delayed reporting," and (2) was relevant to show Petitioner's intent. (Citing State v. Stafford, 957 P.2d 47 (Or. App. 1998).)

1.

As to (1), the Oregon Supreme Court's decision in Hansen is instructive. In Hansen, a detective testified as an expert that "it was normal for child victims of sexual assault to deny that the abuse occurred because they felt guilty and embarrassed and, where they had an emotional tie to the abuser, because they wished to protect the abuser." 743 P.2d at 159.

The detective also testified regarding certain "methods an offender will use to get close to the victim." Id. He stated that "there is usually a lot of gift giving, a lot of affection, praising, rewards, anything to make the individual more comfortable . . . they often establish some emotional dependency." Id. at 160.

In evaluating the admissibility of the detective's testimony, the Oregon Supreme Court separated the detective's general testimony that children would not disclose when they had an emotional tie to the abuser from his testimony about the techniques used to gain trust. The Oregon court noted that in Oregon, it was permissible to allow testimony to explain "superficially bizarre behavior" of child sex abuse victims, such as a victims "initial denial." Id. (citing State v. Middleton, 657 P.2d 1215 (Or. 1983)). The Oregon court ruled that, therefore, the detective's testimony that sexually abused children are reluctant to admit the abuse because they were emotionally dependent on the abuser was admissible. Id.

However, Hansen found the testimony regarding "the specific techniques used by some child abusers" to be "irrelevant to the effect the dependence has on the child's willingness to implicate the abuser." Id. at 161. This was because "[i]t is the emotional dependence, and not the specific acts that produce it, that helps to explain the child's behavior." Id. at 161 (emphasis added).

The distinction drawn by the Oregon Supreme Court in Hansen applies to Dr. Bivens' testimony. At one point, Dr. Bivens explained one reason children would delay disclosure would be to protect the abuser. He further explained that "children who have a close relationship with the abuser were almost four times more likely to delay their disclosure beyond a month." Under the distinction drawn by Hansen, such testimony serves to explain the delayed disclosure and may have been admissible. Hansen, 743 P.2d at 159; see also Batangan, 71 Haw. at 556-58, 799 P.2d at 51-52.

However, Dr. Bivens also testified that abusers use tactics such as "treating them nicely, developing a loving relationship, touching them non-sexually, doing them favors, [and] telling them they're special" to gain trust. As explained by Hansen, the close relationship, "and not the specific acts that produce it," explain why the child would delay disclosure. Hansen, 743 P.2d at 160. Therefore, Dr. Bivens' testimony about the specific tactics of sex offenders was irrelevant to explain why the complaining witnesses in this case delayed disclosure. Therefore, that portion of Dr. Bivens' testimony should have been ruled inadmissible. Hansen, 743 P.2d at 160; cf. Petrich, 683 P.2d at 180 (holding that testimony that in "eighty-five to ninety percent of our cases, the child is molested by someone they already know" was inadmissible even though it was "made in the context of explaining the extent of delayed reporting in certain types of cases").

Respondent's argument that Dr. Bivens' testimony regarding tactics used to gain trust explained why delayed disclosure occurs misstates Dr. Bivens' testimony. According to Respondent, "Dr. Bivens explained that given the innocent nature of starting behavior, children often did not realize that the succeeding behavior was wrong until they had participated in it to the extent that they would feel guilty in reporting it."

Respondent's assertion contains no citation to any portion of Dr. Bivens' testimony. Respondent's questioning of Dr. Bivens demonstrates that his testimony about tactics used to gain trust was separate from his discussion about delayed disclosure. After explaining that a close relationship often leads to delayed disclosure, Dr. Bivens then discussed incomplete disclosure, child memory, the location where abuse occurs, and whether abuse occurs with others present, before turning to "how abusers gain the trust of children."[7] Nothing indicated that Dr. Bivens connected the methods used to gain trust to delayed disclosure. Contrary to Respondent's position, Dr. Bivens did

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[7] Dr. Bivens testified on this issue as follows:

> Q. I'd like to turn to how abusers gain the trust of children. Is there literature on how, basically how abuse occurs?
> A. Yes. And there's even a measure to determine what methods are used most frequently by child molesters.
> Q. And what is that?
> A. So it's something like the gaining-trust scale, or something like that.
> Q. And what did they do to gain trust?
> A. Well, treating them nicely, developing a loving relationship, touching them non-sexually, doing them favors, telling them they're special, these kinds of things.

(Emphases added.)

not testify that children delay disclosure because they are confused by the abusers' methods.

2.

As to (2), Respondent and the ICA both cited State v. Stafford, 957 P.2d 47 (Or. App. 1998), and Hernandez v. State, 973 S.W.2d 787 (Tex. App. 1998), as holding that testimony about the grooming process can be used to show intent. Both cases are distinguishable.

In Stafford, the defendant was not charged with sexual assault, but with attempted sexual assault. Id. at 48. Testimony by the complainant established that on several occasions, the defendant had placed his hand on the complainant's thigh for approximately five seconds on multiple occasions. Id. at 48. The defendant's position was that "his behavior had been misinterpreted by the children and was not related to any sexual gratification." Id. To rebut the defendant's argument, the state sought to introduce evidence that the defendant's actions constituted "grooming" and therefore the act itself constituted attempted sexual abuse. Id.

The Oregon Appellate Court distinguished Stafford from Hansen by explaining that "in Hansen, the relevance of the detective's testimony depended on whether the evidence about grooming could explain the student's initial denial of sexual relations with the defendant." Id. at 52. In contrast, in Stafford, "the evidence about grooming is the gravamen of the charges against defendant" because "[d]efendant's position that

his conduct was not intended as grooming behavior puts his intent directly in issue." Id. Therefore, the grooming evidence made it "more probable that defendant's motivation for his conduct was for his own eventual sexual gratification." Id.

Unlike in Stafford, in the instant case, Petitioner is not charged with attempted sexual assault, and there is no issue of whether or not his behavior prior to allegedly abusing the complaining witnesses was intended sexually. Instead, as in Hansen, "the relevance of the detective's testimony depended on whether the evidence about grooming could explain the student's initial denial of sexual relations with [Petitioner]." Id. Thus, Stafford is inapplicable.

Respondent and the ICA also cite Hernandez. In Hernandez, although the Texas court did refer to an expert's testimony on "grooming," there is no indication that the admissibility of the expert's testimony was at issue in the case. See id. at 790. Furthermore, the extent of the Texas court's analysis of the expert's testimony was the conclusory assertion that "taken with the expert's testimony on grooming behavior, the boy's testimony tends to make it more likely that Hernandez assaulted the victim." Id. Thus, Hernandez does not provide a persuasive rationale for admitting the testimony of Dr. Bivens.

Accordingly, Respondent offers no reason to suggest that Dr. Bivens' testimony about methods used to gain victims' trust was relevant to a fact at issue in the case. Hansen, 743

P.2d at 161. Hence, Dr. Bivens' testimony regarding grooming was irrelevant.

B.

Additionally, evidence regarding the grooming process likely prejudiced Petitioner. Petitioner points to J.H.'s testimony that Petitioner would offer "to take her to Fun Factory" or "tell her that he loved her," as examples of acts that the jury could have examined and "concluded that [Petitioner] must also be a sex offender" on the basis of Dr. Bivens' testimony that "touching [the children] non-sexually," and "telling them they're special," were among the "methods used most frequently by child molesters." Dr. Bivens' testimony therefore suggested that, based on the methods used by Petitioner, there was a "high probability" that Petitioner was a child molester. Testimony that such actions were used "most frequently" could have "overwhelmed the jury" and led the jury to convict on the basis of probabilistic evidence. Cf. McCord, Expert Psychological Testimony at 55-56 (arguing that testimony that an action is "rare" is likely to have "overbearing impressiveness.").

Moreover, as explained supra, expert testimony that certain actions match the actions of the "typical" sexual abuser can be misleading and may serve to impermissibly bolster the credibility of the complaining witnesses. The jury may use such testimony to infer that it is more likely that the complaining witnesses are telling the truth, even though testimony about the

"typical" sexual assault is actually irrelevant for that purpose. In the instant case, Dr. Bivens' testimony could have led the jury to draw the unwarranted inference that the complaining witnesses were likely telling the truth because their testimony about Petitioner's behavior matched the "typical behavior of a child molester." Consequently, even if Dr. Bivens testimony regarding the grooming process was relevant, its probity was outweighed by the danger that statistical evidence would overwhelm the jury and that the jury would improperly use the testimony as evidence that the complaining witnesses testified truthfully.

VIII.

As to his second question, Petitioner challenges the admissibility of M.H.'s testimony regarding the alleged prior bad act. Arguably, the court erred in admitting the testimony of M.H. to demonstrate motive or opportunity. As to motive, evidence of prior bad acts is inadmissible to show motive or intent when, as in the instant case, those issues are not disputed at trial. State v. Behrendt, 124 Hawai i 90, 117, 237 P.3d 1156, 1183 (2010) (Acoba, J., dissenting) (stating that "[motive and] intent [were] not a fact of consequence to the determination of whether the crimes in this case occurred," and therefore the jury should not have been allowed to "consider the evidence of prior bad acts for th[ose] purpose[s]."); see also Addison M. Bowman, Hawai'i Rules of Evidence Manual at 404-3[1][F] (noting that the intent exception could "swallow the

character exclusion," because intent is at issue in all cases, and therefore "without the need factor that arises when a [mens rea] defense is interposed to a criminal charge, admission of 'other crimes' to prove intent is strongly suspect") (emphasis added).

As to opportunity, even if M.H.'s testimony was relevant to show that Petitioner had the opportunity to abuse M.H., the testimony was inadmissible under State v. Pinero, 70 Haw. 509, 518, 778 P.2d 704, 711 (1989), because there was "no need for the evidence," and the record is replete with means of "alternative proof." Each of the complaining witnesses testified that they were babysat by Leonida, and that they spent time alone with Petitioner while at Leonida's house. Moreover, Lourdes acknowledged that Petitioner was present in the house when Leonida babysat the complaining witnesses, and Petitioner himself stated that he spent time with the complaining witnesses without any other adults around. Hence, there was no need for M.H.'s testimony to establish opportunity. However, even if M.H.'s testimony was admitted to demonstrate motive or opportunity, M.H.'s testimony regarding the prior bad act did not establish that Petitioner actually committed sexual abuse as alleged by the complaining witnesses.

IX.

There is a likelihood the court erred in allowing Dr. Bivens to testify regarding the characteristics of typical sexual abusers and the typical actions of sexual abusers. Given the

record, it cannot be said that these errors were harmless beyond a reasonable doubt. In that regard, this court has held that "where there is a wealth of overwhelming and compelling evidence tending to show the defendant guilty beyond a reasonable doubt, errors in the admission or exclusion of evidence are deemed harmless." State v. Veikoso, 126 Hawai'i 267, 277, 270 P.3d 997, 1007 (2011) (internal quotation marks and brackets omitted). In the instant case, it cannot be said that the evidence was overwhelming.[8] As to each count, there was no physical evidence supporting the testimony of the complaining witnesses. The case amounted to a credibility determination regarding the complaining witnesses and Petitioner. Additionally, the erroneously admitted testimony of Dr. Bivens undermined the presumption of innocence, the standard of proof beyond a reasonable doubt, and bolstered the complaining witnesses' credibility. Hence, it cannot be said that the errors were harmless.

DATED: Honolulu, Hawai'i, March 28, 2013.

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack

[8] Even including M.H.'s testimony, the evidence was not overwhelming, as indicated supra.