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IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII, Respondent/Plaintiff-Appellee,

vs.

ENRICO CALARA, Petitioner/Defendant-Appellant.

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SCWC-29550

FEBRUARY 14, 2014

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(ICA NO. 29550; CR. NO. 08-1-0977)

CONCURRING AND DISSENTING OPINION BY RECKTENWALD, C.J.,  
IN WHICH NAKAYAMA, J. JOINS

The majority concludes that the circuit court abused its discretion in allowing the State to offer evidence regarding two prior incidents in which defendant Enrico Calara made sexual advances toward CW.<sup>1</sup> Majority Op. at 27-34. In my view, the circuit court correctly concluded that the evidence was relevant,

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<sup>1</sup> Because the factual background on this issue is fully set forth in the majority's opinion, I do not repeat it here.

and did not abuse its discretion in concluding that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice to Calara. I therefore respectfully dissent.<sup>2</sup>

In general, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." HRE Rule 404(b); State v. Behrendt, 124 Hawai'i 90, 102, 237 P.3d 1156, 1168 (2010). In other words, HRE Rule 404(b) generally "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." Behrendt, 124 Hawai'i at 102, 237 P.3d at 1168. Such evidence, however, may be admissible "where [it] 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." HRE Rule 404(b); Behrendt, 124 Hawai'i at 102, 237 P.3d at 1168. As this court has recognized, "[t]he list of permissible purposes in Rule 404(b) is not intended to be exhaustive for the range of relevancy outside the ban is almost infinite." State v. Clark, 83 Hawai'i 289, 300, 926 P.2d 194, 205 (1996) (internal quotation

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<sup>2</sup> I concur with the majority's conclusions on the issues of Detective Denault's testimony regarding probable cause, questioning CW regarding her perception of the event, and CW's statement to her aunt. Majority Op. at 17-27.

marks and citation omitted).

To the extent evidence of crimes, wrongs, or acts is being offered for a permissible purpose, it is only admissible if the evidence is both relevant and its probative value is not substantially outweighed by its prejudicial effect. State v. Fetelee, 117 Hawai'i 53, 62-63, 175 P.3d 709, 718-19 (2008). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." HRE Rule 401. A trial court's determination that evidence is relevant is reviewed under the right/wrong standard of review. Behrendt, 124 Hawai'i at 102, 237 P.3d at 1168.

Here, the circuit court concluded that evidence of Calara's prior sexual advances toward CW was relevant to show Calara's state of mind and intent,<sup>3</sup> and CW's lack of consent. The circuit court explained that it was apparent from Calara's statements that CW became the "object of [Calara's] desire," and that "he had some sexual interest . . . in [CW]." Thus, the circuit court explained, the evidence was being offered to show Calara's intent. The circuit court further noted that the fact that CW rebuffed Calara's advances was relevant with respect to

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<sup>3</sup> This court has explained that "intent refers to the state of mind with which an act is done or omitted." Fetelee, 117 Hawai'i at 83, 175 P.3d at 739 (internal quotation marks, brackets, and citation omitted). Thus, I do not refer to intent and state of mind separately.

whether or not CW had consented to the touching. In my view, the circuit court correctly concluded that the evidence was relevant.

Calara was charged with committing Sexual Assault in the Fourth Degree. See HRS § 707-733(1)(a) (1993). The State therefore bore the burden of proving beyond a reasonable doubt that Calara "knowingly subject[ed] another person to sexual contact by compulsion." Id. Here, as the circuit court concluded, evidence of Calara's prior sexual advances toward CW was relevant with respect to Calara's intent, i.e., whether he acted "knowingly." As explained by the circuit court, evidence of the two prior incidents indicated that CW "became the object of [Calara's] desire," and that Calara "had some sexual interest . . . in [CW]." Thus, the prior acts evidence tended to show that Calara acted knowingly when he touched CW's breast.

The circuit court also correctly concluded that the evidence was relevant with respect to CW's lack of consent. In this regard, the evidence demonstrated that CW had recently rebuffed Calara's sexual advances on two separate occasions. Cf. State v. Jackson, 81 Hawai'i 39, 46, 912 P.2d 71, 78 (1996) (evidence that victim rebuffed defendant's sexual advances was sufficient to establish absence of consent and to establish the element of "compulsion" under HRS § 707-733(1)(a)). The evidence therefore tended to show that CW was not a willing participant to the touching.

Moreover, in addition to the reasons noted by the circuit court, the evidence was also relevant with respect to motive. As this court has stated, "evidence of motive is admissible to prove the state of mind that prompts a person to act in a particular way; an incentive for certain volitional activity." State v. Renon, 73 Haw. 23, 37, 828 P.2d 1266, 1273 (1992) (internal quotation marks and citation omitted). In other words, "proof of motive may be relevant in tending to refute or support the presumption of innocence." Id. Here, the evidence of Calara's prior sexual advances tended to show Calara's motive in touching CW. In these circumstances, the circuit court correctly concluded that the evidence was relevant.

The majority concludes that the evidence was not relevant because, according to Calara, he did not enter CW's room on the night in question. Majority opinion at 29-34. However, the State offered an entirely different account of the events of the early morning hours of March 13, 2007. Under the State's theory, while CW was sleeping, Calara entered through her locked bedroom door and began massaging and manipulating her breast. Given the State's theory of the case and its burden to prove the elements of the charged offense beyond a reasonable doubt, evidence of Calara's sexual advances toward CW and CW's rebuffing of those advances was clearly probative of Calara's intent and

motive, and CW's lack of consent.<sup>4</sup>

Having concluded that the evidence was relevant, the next question is whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice to Calara. HRE Rule 403; Behrendt, 124 Hawai'i at 103, 237 P.3d 1169. In weighing probative value versus prejudicial effect, this court considers a variety of factors, including the strength of the evidence, similarities among the incidents, the amount of time elapsed between the incidents, the need for the evidence, the efficacy of alternative proof, and the extent to which the evidence probably will rouse the jury to overmastering hostility. Renon, 73 Haw. at 38, 828 P.2d at 1273; Behrendt, 124 Hawai'i at 106, 237 P.3d at 1172. The circuit court's balancing of the probative value of prior bad act evidence against the prejudicial effect of such evidence is reviewed for an abuse of discretion. Behrendt, 124 Hawai'i at 102, 237 P.3d at 1168. "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." Id. (citation omitted).

Here, the circuit court concluded that the prejudicial

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<sup>4</sup> It is noteworthy that CW testified that when she awoke and screamed on the night in question, Calara jumped back and said that he was sorry. Based on that testimony, the jury might question whether Calara had the required intent to engage in non-consensual sexual contact with CW. The evidence of the two prior incidents would tend to establish that Calara did have the requisite intent and that CW did not consent.

effect of the evidence on Calara was low, noting that the incidents were "fairly close in time." Specifically, Calara had made sexual advances toward CW in January and February 2007, and he allegedly touched her in March 2007. The circuit court therefore concluded that the probative value of the evidence was not substantially outweighed by the prejudicial effect on Calara. The circuit court did not abuse its discretion in this regard.

As noted by the circuit court, a relatively short amount of time elapsed between Calara's sexual advances and the touching. There was also a substantial need for the evidence. Absent the evidence of Calara's prior sexual advances, the jury would have been left without an explanation as to why Calara would suddenly sexually assault CW. See Behrendt, 124 Hawai'i at 106, 237 P.3d at 1172 (noting that in a case involving high relevance and strong need, the HRE Rule 403 balance will always favor admissibility). Moreover, there appears to have been no alternative evidence probative of Calara's intent and motive, and CW's lack of consent. Finally, the evidence was not of the kind that would "rouse the jury to overmastering hostility." Renon, 73 Haw. at 38, 828 P.2d at 1273. The evidence related to two prior instances in which Calara told CW that he wanted to "take" her. Such evidence was not likely to "rouse the jury." Moreover, the evidence related to incidents involving the same parties, and did not relate to acts that were themselves criminal

in nature. In these circumstances, the circuit court did not abuse its discretion in concluding that the probative value of the evidence was not substantially outweighed by the prejudicial effect on Calara.

Pursuant to HRE Rule 105, "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." (Emphasis added). See State v. Cordeiro, 99 Hawai'i 390, 418-19, 56 P.3d 692, 720-21 (2002) ("The trial judge must consider on a case-by-case basis whether to issue a limiting instruction when HRE Rule 404(b) evidence is introduced and/or at the conclusion of the trial. There is no bright-line rule.") Here Calara did not request any limiting instruction and none was given. Nevertheless I would hold that on remand, the circuit court should, if requested, issue a limiting instruction to the jury identifying the permissible uses of the HRE Rule 404(b) evidence, and instructing the jury not to use the evidence for any improper purpose.

For the foregoing reasons, I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

