

NO. CAAP-13-0000386

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
MICHAEL SHIMABUKURO, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 11-1-1686)

MEMORANDUM OPINION

(By: Nakamura, Chief Judge, Leonard and Reifurth, JJ.)

Plaintiff-Appellee State of Hawai'i (State) charged Defendant-Appellant Michael Shimabukuro (Shimabukuro), a karate instructor, with four counts of sexually assaulting his karate student, while the student was a minor. The complaining witness (CW) was twelve to fifteen years old during the period when the alleged sexual assaults occurred. Shimabukuro was charged with two counts of first-degree sexual assault for engaging in sexual penetration by inserting the CW's penis into Shimabukuro's mouth (Counts 1 and 3) and two counts of third-degree sexual assault for causing the CW to have sexual contact with Shimabukuro by placing his hand on the CW's penis (Counts 2 and 4). A jury found Shimabukuro guilty of the included offense of third-degree sexual assault as to Count 1, guilty as charged of third-degree

sexual assault as to Counts 2 and 4, and not guilty on Count 3.¹ The Circuit Court of the First Circuit (Circuit Court)² sentenced Shimabukuro to concurrent five-year terms of imprisonment.

On appeal, Shimabukuro contends that his trial counsel provided ineffective assistance by: (1) failing to object to evidence of an incident where Shimabukuro placed a penis enlargement device on the CW; (2) opening the door to evidence that Shimabukuro placed the device on another karate student; (3) failing to prevent the prosecutor from eliciting demeanor testimony; (4) asking a witness whether she believed the CW; and (5) asking Shimabukuro's mother certain questions that supported the testimony provided by two of the State's witnesses. We affirm.

BACKGROUND

I.

Shimabukuro is a former Pan-American karate champion and karate instructor. Shimabukuro formed his own karate school, the Hawaii Karate Association (HKA), and his students trained at the Japanese Cultural Center of Hawai'i.

¹Shimabukuro was found guilty of violating Hawaii Revised Statutes § 707-732 (2014), which provides in relevant part:

- (1) A person commits the offense of sexual assault in the third degree if:
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- (b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person; [or]
- (c) The person knowingly engages in sexual contact with a person who is at least fourteen years old but less than sixteen years old or causes the minor to have sexual contact with the person; 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[.]

²The Honorable Randal K.O. Lee presided.

The CW first began studying karate at the age of six. Karate was his passion. The CW became highly skilled at karate and earned his black belt by the age of nine.

The CW began training with Shimabukuro when the CW was ten years old. The CW wanted to train with Shimabukuro because Shimabukuro was a Pan-American champion, and the CW aspired to be a champion. The CW trained diligently under Shimabukuro, two hours a day on weekdays and four to five hours a day during the weekend. The CW was a member of the HKA's competition team and was highly successful. He became a champion and won medals in national and international karate competitions. Based on his dedication and success, the CW became a senpai, or teacher's aid, and the CW was given the responsibility of teaching other students at Shimabukuro's HKA school.

As the head karate instructor, Shimabukuro was referred to as "sensei" and held a position of trust and authority over his students. When sensei Shimabukuro entered the dojo, the students would all stand up, face Shimabukuro, and bow to him. The CW was taught to respect and obey Shimabukuro. The importance of loyalty and discipline was also emphasized by Shimabukuro.

II.

According to the CW, the first incident of sexual assault occurred when the CW was about twelve to thirteen years old. The CW was training intensively in preparation for a national karate competition and was taking a nap before an afternoon training session on the floor of Shimabukuro's office. Shimabukuro woke the CW by tapping his shoulder, and when the CW turned over on his back, Shimabukuro touched and patted the CW's penis over the CW's clothes. Shimabukuro used his hand to touch and pat the CW's penis. The CW was shocked that Shimabukuro, whom he looked up to, would do that to him. The CW did not know how to react and "was afraid of what to say[.]" He did not tell anyone about the incident at that time.

Shimabukuro held sleepovers at the Japanese Cultural

Center for students training for national competitions to give them more time to train. Sleepovers occurred four over five times during the summer and two or three times during the rest of the year. Parents did not attend the sleepovers; it was just Shimabukuro and the students. The CW attended the sleepovers held at the dojo.

During the sleepovers, Shimabukuro provided his minor students with alcohol (beer and hard liquor), pornographic magazines, and sexual paraphernalia, such as a penis enlarger.³ The CW drank the alcohol provided by Shimabukuro and would get drunk.

The CW testified that during a sleepover when the CW was twelve to thirteen years old, Shimabukuro showed the CW a penis enlarger while they were in a storage closet in the dojo. Shimabukuro explained how the device worked and then coaxed the CW into using it. Shimabukuro gave the CW the penis enlarger. The CW took off his pants and put the device on, and Shimabukuro helped the CW use the pump for the device. R.C., another student of Shimabukuro, testified that he saw Shimabukuro place the penis enlarger on student B.N., while the CW, R.C., B.N., and Shimabukuro were in the storage closet, and that Shimabukuro later gave the device to the CW.

The CW testified that after becoming "really intoxicated" at night during a sleepover, he fell asleep in the storage closet. The CW awoke to find that his shorts were halfway down his legs and Shimabukuro's hand was on the CW's penis masturbating him. Shimabukuro also sucked on the CW's penis. Shimabukuro did this more than once to the CW.

The CW stated he was unsure of how many times Shimabukuro placed his hand on the CW's penis and masturbated the CW, but Shimabukuro engaged in such conduct at least once when the CW was twelve or thirteen and at least once while the CW was

³The penis enlarger was described during trial as a clear cylinder tube with a pump connected to it.

fourteen or fifteen. Similarly, the CW was unsure of how many times Shimabukuro sucked on the CW's penis, but Shimabukuro engaged in such conduct at least once when the CW was twelve or thirteen and at least once when the CW was fourteen or fifteen. These incidents occurred in the storage closet during sleepovers when the CW was intoxicated and had fallen asleep. The CW indicated that because of his intoxication, his young age, and Shimabukuro's position as the CW's teacher, the CW felt powerless and confused and did not feel as though he could tell Shimabukuro to stop.

III.

The CW testified that he did not tell anyone about Shimabukuro's sexual abuse "right away[,]" but that it took "a while[.]" The first person the CW told was his mother, after he got into a dispute with Shimabukuro. The dispute arose because the CW had just become a Pan American champion and wanted to take a break from training, but Shimabukuro wanted him to continue training and inspire other students at the dojo. To punish the CW, Shimabukuro took away the CW's black belt. The CW's mother testified that Shimabukuro also punished the CW by requiring him to sit facing the wall while other students trained.

Following these events, the CW told his mother that Shimabukuro had "touched" the CW. After learning of the abuse, the CW's mother took the CW to confront Shimabukuro. Mother allowed Shimabukuro to speak to the CW separately. The CW testified that Shimabukuro told the CW how sorry he was; then Shimabukuro broke down, began to cry, got on his knees, and asked the CW for forgiveness. The CW accepted Shimabukuro's apology. Shimabukuro told the CW that if Shimabukuro's father found out, the father would kill Shimabukuro, Shimabukuro's mother, and himself. The CW and Shimabukuro then gave each other a hug.

IV.

Mother did not call the police after the CW told her about the abuse and allowed the CW to continue to train with Shimabukuro. Although the CW reduced the frequency of his

training at Shimabukuro's dojo, he continued to train with Shimabukuro until he was sixteen or seventeen. While training with Shimabukuro, he won a gold medal at another national competition.

The CW's mother told the mother of another student, R.C., about the CW's report of sexual abuse by Shimabukuro. After R.C.'s mother found out about the CW's sexual abuse allegations, she spoke with the CW about the allegations. R.C.'s mother testified that the CW "was crying" and "was real upset and hysterical" when she spoke to him. R.C.'s mother then talked to R.C. who told his mother about the alcohol, pornography, and penis enlarger at the sleepovers.

About a week after speaking to R.C., R.C.'s mother and her husband confronted Shimabukuro. According to R.C.'s mother, she told Shimabukuro that "[the CW] is saying you molested him." In response, Shimabukuro said "he couldn't deny it because he was drunk all the time." R.C.'s mother had other meetings with Shimabukuro "under the same topic" in which Shimabukuro stated two or three more times that "he could not deny it." Shimabukuro also admitted that he served alcohol at the sleepovers. R.C.'s mother did not expeditiously report what she had learned to the police, but encouraged Shimabukuro to talk with his mother. R.C.'s mother also permitted her son to continue to train with Shimabukuro.

Russell Titus (Titus) was a karate instructor who had known Shimabukuro for at least fifteen years. Titus testified that Shimabukuro came to him and began the conversation by telling Titus, "[T]his is going to be bad." Shimabukuro told Titus that he had served alcohol to minors during sleepovers at the dojo and that he was being accused of sexual misconduct and sexual molestation. Titus also recalled the word "oral" being used. When Titus asked Shimabukuro if the sexual allegations were true, Shimabukuro responded, "I don't know, I can't remember."

Approximately two years after the CW first told her about the abuse, the CW's mother reported the allegations to the

police. R.C.'s parents also filed a report with the police around the same time, about two years after they learned of the CW's allegations.

V.

Shimabukuro's theory of defense at trial was that the alleged sexual abuse never occurred but was made up by the CW. In support of this theory, Shimabukuro's trial counsel emphasized problems with the CW's memory, his inability to recall dates for the alleged incidents of sexual abuse, and inconsistencies in the various statements the CW had made regarding the incidents. Shimabukuro's trial counsel also pointed to the failure of the CW's mother and R.C.'s mother to report the allegations to the police for a prolonged period of time and their continuing to allow their sons to train with Shimabukuro as proof that they did not believe the CW's allegations. Shimabukuro chose not to testify at trial.

VI.

As noted, the jury found Shimabukuro guilty of three counts of third-degree sexual assault. The Circuit Court entered its Judgment on February 5, 2013, and this appeal followed.

DISCUSSION

On appeal, Shimabukuro seeks to vacate his convictions on the ground that his trial counsel provided ineffective assistance. When a claim of ineffective assistance of counsel is raised, we examine "whether, viewed as a whole, the assistance provided [the defendant was] 'within the range of competence demanded of attorneys in criminal cases.'" State v. Antone, 62 Haw. 346, 348, 615 P.2d 101, 104 (1980) (citations omitted).

"[T]he defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227,

1247 (1998) (format altered; citation omitted).

"Counsel's assistance need not be errorless nor will it be judged ineffective solely by hindsight." Antone, 62 Haw. at 348, 615 P.2d at 104. Even performance that is "far from commendable" will not necessarily warrant a finding of ineffective assistance of counsel. See id. at 353, 615 P.2d at 107. We give wide latitude to lawyers to make on-the-spot strategic choices in trying cases, and "tactical decisions at trial generally will not be questioned by a reviewing court." Id. at 352, 615 P.2d at 106. "[M]atters presumably within the judgment of counsel, like *trial strategy*, will rarely be second-guessed by judicial hindsight." Richie, 88 Hawai'i at 39-40, 960 P.2d 1247-48 (1998) (internal quotation marks and citation omitted).

With these principles in mind, we examine Shimabukuro's claims of ineffective assistance of counsel.

I.

Shimabukuro contends that his trial counsel provided ineffective assistance by failing to object to evidence of Shimabukuro's involvement in having a penis enlargement device placed on the CW during a sleepover at the dojo. Shimabukuro contends that he received inadequate notice of this incident under Hawai'i Rules of Evidence (HRE) Rule 404(b) (Supp. 2014), and therefore, his counsel provided ineffective assistance by failing to object to this evidence on the ground of lack of adequate notice.⁴ We disagree.

Prior to trial, the State filed a "Notice of Intent to Use Evidence" (Notice) which advised Shimabukuro that pursuant to

⁴HRE Rule 404(b) provides, in relevant part: "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."

HRE Rule 404(b), the State would seek to introduce evidence, including:

a. During the time frame charged in the indictment . . . , [Shimabukuro] at the Dojo, plied the [CW] with alcohol, pornographic DVD's⁵ and sexual paraphernalia to release his inhibitions and to de-sensitize him to the sexual acts.

(Emphasis added.) Although the Notice did not further describe the "sexual paraphernalia" involved in the acts by Shimabukuro involving the CW, the Notice referred to a "penis pump" and a "rubber vagina" in describing various acts by Shimabukuro that involved the other students at the dojo. More importantly, the record clearly indicates that Shimabukuro's trial counsel knew that the references in the Notice to Shimabukuro using "sexual paraphernalia to release [the CW's] inhibitions and to de-sensitize [the CW] to the sexual acts" included the incident in which Shimabukuro was identified as being involved in having the penis enlargement device placed on the CW.⁶

Shimabukuro moved in limine to exclude the evidence disclosed by the State in its Notice. The Circuit Court indicated that it would permit evidence of Shimabukuro's other bad acts involving the CW, provided the State could lay a proper foundation, but would preclude evidence of other bad acts only involving the other students. As Shimabukuro acknowledges, the record suggests that counsel for both parties and the Circuit Court had off the record discussions regarding the motion in limine before the Circuit Court announced its rulings.

Shimabukuro also moved in limine to exclude oral statements he had purportedly made that the State had disclosed. In a hearing on this motion prior to trial, the parties discussed the statement: "He ordered us to drink . . . I have this thing you gotta check out." When the Circuit Court asked the

⁵The State filed an Amended Notice of Intent to Use Evidence which changed the reference to "pornographic DVD's" to "pornography."

⁶We note that the record does not include the discovery provided by the State to Shimabukuro, and thus we do not know whether such discovery contained additional details regarding the "sexual paraphernalia" allegedly used by Shimabukuro.

prosecutor to explain the context of the statement "I have this thing you got to check out," the prosecutor responded, "That's when he brought out the penis enlarger." Shimbukuro's counsel replied, "I'm going to object to that but I think that's res gestae[,] and the Circuit Court ruled, over objection, that it was "going to allow that." In opening statement, the prosecutor stated that during the sleepovers, Shimabukuro "brought pornographic magazines, and he brought a sex toy known as a -- what the boy -- what [the CW] will describe as a penis enlarger."

Also, prior to the first witness being called, Shimabukuro's trial counsel raised the subject of the penis enlarger. Apparently, the police had recovered a penis enlarger from another student at the dojo (not the CW), and DNA testing did not reveal Shimabukuro's DNA on the device. Shimabukuro's counsel indicated that if the CW testified about the incident involving the penis enlarger, then counsel may want to introduce evidence that a penis enlarger, without Shimabukuro's DNA, had been recovered from another student. The discussion regarding this issue strongly indicates that Shimabukuro's counsel was aware that the reference in the State's Notice to Shimabukuro's using "sexual paraphernalia to release [the CW's] inhibitions and to de-sensitize [the CW] to the sexual acts" included the incident in which the CW alleged that Shimabukuro had the CW use a penis enlargement device.

Because the record indicates that Shimabukuro's counsel knew in advance that the State intended to elicit evidence of the alleged incident in which Shimabukuro had a penis enlargement device placed on the CW, an objection to such evidence based on a lack of adequate notice under HRE Rule 404(b) would have been without merit. Accordingly, Shimabukuro has failed to show that his trial counsel was ineffective for failing to object on this basis.

II.

Shimabukuro argues that his trial counsel provided ineffective assistance by opening the door to evidence that

Shimabukuro placed the penis enlargement device on another karate student. During defense counsel's cross-examination of R.C., the following took place:

Q. You've never witnessed any inappropriate sexual contact between [Shimabukuro] and [the CW]; correct?

A. Yes

Q. You've never witnessed any inappropriate touching between [Shimabukuro] and any other student?

A. No.

The parties interpreted R.C.'s answers to mean that he had not witnessed any inappropriate sexual contact between Shimabukuro and the CW or any inappropriate touching between Shimabukuro and any other student.

The State, however, argued that defense counsel had opened the door to R.C. testifying that he observed Shimabukuro place the penis enlarger on B.N. Defense counsel countered that he had not opened the door to such evidence because he asked about inappropriate touching and having someone use the penis enlarger was not inappropriate touching.⁷ The Circuit Court ultimately ruled that defense counsel's question had opened the door to the State asking whether R.C. had witnessed Shimabukuro place the penis enlarger on B.N., and it permitted the State to make this inquiry. R.C. then testified that he had seen Shimabukuro, with the CW present, place a penis enlarger on B.N. in the storage closet during a dojo sleepover. R.C. stated that later that night, Shimabukuro gave the penis enlarger to the CW.

We conclude that defense counsel's questions involved a tactical decision that did not constitute ineffective assistance. Defense counsel's questions and R.C.'s answers were of benefit to Shimabukuro. They provided evidence that R.C., a student who

⁷Defense counsel also argued that the door had not been opened because the installation of a penis enlarger on someone else may or may not amount to inappropriate touching. Defense counsel further requested that if the Circuit Court believed the door had been opened, it strike R.C.'s answer to the inappropriate touching question instead of a permitting the State to adduce the proffered evidence.

spent a lot of time training at the dojo, had not witnessed any inappropriate sexual contact between Shimabukuro and the CW or any inappropriate touching between Shimabukuro and any other student. Defense counsel apparently made a judgment call that his question regarding inappropriate touching would not open the door to evidence about Shimabukuro having another student use the penis enlarger. While the Circuit Court ultimately disagreed with defense counsel's assessment, we cannot say that defense counsel's judgment call constituted ineffective assistance. See Antone, 62 Haw. at 352, 615 P.2d at 106 ("Lawyers require and are permitted broad latitude to make on-the-spot strategic choices in the course of trying a case."); Richie, 88 Hawai'i at 39-40, 960 P.2d at 1247-48 ("[M]atters presumably within the judgment of counsel, like *trial strategy*, will rarely be second-guessed by judicial hindsight." (internal quotation marks and citation omitted)).

III.

Shimabukuro argues that his trial counsel was ineffective for failing to prevent the prosecutor from eliciting certain demeanor testimony. The State elicited testimony from R.C.'s mother that when she spoke to the CW about the sexual abuse allegations, his demeanor was "[h]e was crying, and he was real upset and hysterical." Shimabukuro argues that his trial counsel should have objected on hearsay grounds to preliminary questions that led to R.C.'s mother's demeanor testimony.

We conclude that Shimabukuro's claim that his trial counsel was ineffective in this respect is without merit. R.C.'s mother's demeanor testimony was not hearsay and was admissible. See HRE Rule 801 (Supp. 2014) (defining hearsay). The objections Shimabukuro argues that his trial counsel should have made would not have prevented the State from presenting the demeanor testimony.

IV.

Shimabukuro argues that his trial counsel was ineffective for asking R.C.'s mother whether she believed the

CW's allegations. Defense counsel asked R.C.'s mother the following question and obtained the following answer:

Q. . . . isn't it true that at the time that you learned of the these allegations from [the CW], you didn't believe him?

A. No, absolutely not. Absolutely not. I believed him.

Shimabukuro's claim is without merit.

The record shows that Shimabukuro's counsel asked this question as a means of setting up the remainder of his cross-examination, which was directed at impeaching the claim of R.C.'s mother that she believed the CW.⁸ Defense counsel elicited testimony on cross-examination that R.C.'s mother did not report the allegations to the police for a prolonged period of time and that she permitted her son to continue training with Shimabukuro on a regular basis -- actions inconsistent with a belief that Shimabukuro was a child molester. The question challenged by Shimabukuro did not reflect trial counsel's lack of skill, judgment, diligence, or competence.

V.

Finally, Shimabukuro argues that his trial counsel provided ineffective assistance by asking Shimabukuro's mother certain questions in an attempt to provide context to testimony provided by Titus and R.C.'s mother regarding statements Shimabukuro had made to them. Defense counsel apparently sought to introduce evidence that Shimabukuro's demeanor and tone of voice when Shimabukuro discussed the allegations of sexual abuse with Titus and R.C.'s mother indicated disbelief and incredulity on Shimabukuro's part. When defense counsel asked Shimabukuro's mother about her son's tone and demeanor when he discussed the allegations of molestation with Titus and said "I don't know, I

⁸Moreover, if R.C.'s mother had answered yes to the question, in other words, that she did not believe the CW when she learned of the allegations, this would have benefitted Shimabukuro by casting doubt on the CW's credibility.

can't deny it,"⁹ Shimbukuro's mother testified that Shimabukuro's demeanor and tone was one of "disbelief." The Circuit Court, however, struck that testimony and limited defense counsel to eliciting testimony that Shimabukuro used a raised tone of voice. Shimabukuro's mother also testified that Shimabukuro did not tell Titus that Shimabukuro was "drunk all the time." Defense counsel elicited testimony from Shimabukuro's mother that when her son discussed the CW's allegations with R.C.'s mother and said things like "I can't deny it," he used a tone similar to the tone he used with Titus, which she described "[v]ery strong."

We reject Shimabukuro's claim that his trial counsel's questioning of Shimabukuro's mother constituted ineffective assistance. "The calling of witnesses is a strategic decision that is generally left to defense counsel." Richie, 88 Hawai'i at 39, 960 P.2d at 1247. Here, trial counsel had strategic reasons for calling Shimabukuro's mother. Although trial counsel may not have been as successful as desired in fulfilling his strategic plan, we cannot say that counsel's actions constituted ineffective assistance. See State v. Magsayo, No. 28578, 2012 WL 1071496, at *6 (Hawai'i App. Mar. 30, 2012) ("That trial counsel may not have been completely successful in achieving her purpose with this line of questioning is not sufficient to show that she provided ineffective assistance.")

CONCLUSION

Based on the foregoing, we affirm the Circuit Court's Judgment.

DATED: Honolulu, Hawai'i, November 30, 2015.

On the briefs:

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for Defendant-Appellant

Chief Judge

⁹Titus actually testified that Shimabukuro said, "I don't know, I can't remember."

Sonja P. McCullen
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City and County of Honolulu
for Plaintiff-Appellee

Associate Judge

Associate Judge