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IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII,
Respondent/Plaintiff-Appellee,

vs.

WALTER BROWN,
Petitioner/Defendant-Appellant.

SCWC-15-0000354

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-15-0000354; CR. NO. 13-1-1006)

JULY 25, 2019

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

Petitioner/Defendant-Appellant Walter Brown (Brown) was convicted by a jury of one count of assault in the second degree. Brown appealed his conviction and sentence to the Intermediate Court of Appeals (ICA). On appeal, he argued that the Circuit Court of the First Circuit (circuit court) violated his constitutional right to confrontation by refusing to allow him to

cross-examine the complaining witness (CW) regarding her misdemeanor assault charge arising from the same incident and her misdemeanor probation status. The ICA affirmed.

In vacating the ICA's judgment on appeal and remanding Brown's case to the circuit court, the Majority holds that the circuit court's error in refusing to allow cross-examination of CW on these topics was not harmless beyond a reasonable doubt. Majority at 17. I respectfully disagree. While it was error for the circuit court to preclude Brown from cross-examining CW regarding her assault charge stemming from the same incident and her probation status, two independent eyewitnesses testified that Brown had punched CW in the jaw. Additionally, Brown was able to cross-examine CW regarding her prior assault and harassment convictions, and thus introduced evidence demonstrating (1) that CW may have been the initial aggressor in the incident involving Brown; and (2) CW's bias, motive and interest to lie about the incident.

Based on the testimony elicited at trial, I cannot conclude that there is a reasonable possibility that the circuit court's refusal to permit cross-examination on the specific issues regarding CW's pending assault charge and her probation status might have contributed to Brown's conviction. Therefore, this error is, in my opinion, harmless beyond a reasonable doubt.

I would affirm the ICA's judgment on appeal, and respectfully dissent.

I. BACKGROUND

Respondent/Plaintiff-Appellee State of Hawai'i (the State) charged Brown with two counts of assault stemming from an altercation between his daughters (CW and Sister) and him in the Beretania Street McDonald's parking lot on February 20, 2013.

Before trial on his assault charges, Brown filed a Notice of Intent to Use Evidence (Notice of Intent) which sought to introduce evidence of CW's other crimes, wrongs, or acts. Brown sought to introduce, inter alia, (1) CW's 2013 harassment charge in an unrelated case; (2) CW's 2010 terroristic threatening charge for punching a screen door of her mother's (Mother) residence and yelling that she was going to kill her, and her subsequent no contest plea to a lesser charge of harassment; (3) CW's arrest and assault charge against Wife and Brown for conduct arising out of the same incident as Brown's assault charges; (4) CW's 2013 abuse of family or household member charge for allegedly striking her eight-year-old daughter's face, and her subsequent guilty plea to a lesser charge of assault; and (5) that CW was currently under misdemeanor probation supervision.

The circuit court held a pretrial hearing to address

Brown's Notice of Intent. Because it might demonstrate to the jury that CW was the first aggressor in the assault, the circuit court permitted Brown to introduce the following evidence of CW's prior acts: (1) her 2013 harassment charge in the unrelated case, provided that Brown could prove that CW had been convicted of the charge; (2) her no contest plea to the harassment charge stemming from CW's threats to Mother; and (3) her guilty plea to the assault charge stemming from the incident involving her daughter. The circuit court allowed Brown to introduce two of the three, concluding that introducing all three would be more prejudicial than probative of showing first aggression. With respect to CW's arrest for assault arising from the same incident, the circuit court denied the introduction of that evidence, stating that CW's arrest was "irrelevant to whether or not the State can make its burden of proof as to the material elements as to the defendant." Finally, the circuit court also denied Brown's request to introduce evidence that CW was currently on misdemeanor probation.

At trial, the State called CW to testify as to the events that occurred at the Beretania McDonald's on February 20, 2013. CW testified that on that date, CW and Sister entered the Beretania McDonald's intending to meet Mother to eat. Upon opening the door to the restaurant, CW saw her father, Brown, who

looked upset. CW testified that Brown immediately came toward CW and Sister and grabbed them while they were standing by the entrance. CW stated that Brown grabbed her by the neck, choked her, and made it difficult for her to breathe. CW opened the door to the restaurant and because they were going backwards, CW testified that she fell outside the restaurant. CW stated that while she was on the ground, she felt Brown step on her head while he was holding and shaking Sister.

CW tried to push Brown off Sister but was unsuccessful. CW testified that Brown punched her, and then he came after her when she backed away. CW ran to her vehicle in the parking lot, and when she stopped to turn around to see where Brown was, Brown punched her in the jaw. CW stated that she "got punched from the back up" and thought her tooth came out.

On cross-examination, CW stated that she also saw Brown's wife (Wife) with Brown when CW first entered the McDonald's. When asked by defense counsel whether she had punched Wife in the nose, CW responded that she did not.

Pursuant to the circuit court's previous instructions, defense counsel then elicited testimony regarding CW's abuse charge against her daughter and subsequent guilty plea to assault. CW stated that she remembered the incident and her plea. Defense counsel also questioned CW regarding the incident

in which she punched and kicked Mother's screen door and yelled at Mother through the door that she was going to kill her. CW acknowledged that she had pleaded no contest to a charge of harassment in that case. Finally, defense counsel questioned CW about a comment CW had posted on Mother's Facebook page regarding the February 20, 2013 incident: "Bahahahaha fckn silly girl gave birth. Now let's see who will laugh. Talk shit, get hit. I ain't scade Let's do it again, me and you, round two. Oh wait, round one wasn't finished." CW admitted to writing the post and that "silly girl gave birth" referred to Wife.

Two independent eyewitnesses also testified. First, a security guard who was working at the building directly behind the Beretania McDonald's stated that at 1:30 in the afternoon on February 20, 2013, he was informed that a fight was taking place outside the restaurant. When he arrived at the McDonald's parking lot, the security guard observed Brown and CW fighting and arguing with each other. The security guard stated that the two individuals were getting closer and closer to each other, "and then just as I thought it looked like the guy was going to hit her, he hit her, and it made a really loud pop sound." The security guard noted that the sound was "so loud, I could hear it. That's what surprised me the most." The security guard further stated that when CW tried to catch herself from falling

down, Brown hit her on her left side, and then hit her again on her butt or upper thigh. The security guard observed the fight from about 65 to 70 feet away. He did not see CW fight back or attack Brown in any way.

The security guard further testified that at this time, Sister got very upset with Brown, and told Brown "I can't believe you just did that, and you're walking away from her. . . . You can't just hit a girl like that and walk away." Brown then approached Sister, grabbed her, "and then immediately she was on the ground and he was on top of her." When it looked like Brown was about to hit her, a male driver who was sitting in his vehicle got out of the vehicle and "walked up and pushed [Brown] off [Sister]."¹ Brown then tried to tackle the male driver, and as they were circling each other, the police arrived. The security guard later observed CW holding her jaw and noticed a lot of blood coming out of her mouth.

Additionally, the McDonald's manager on duty at the time of the incident testified that at around 1:30 in the afternoon, there was a big commotion in the front of the restaurant and everybody started running outside. The manager

¹ Sister also testified. Her version of events is similar to the security guard's. Sister testified that after Brown had punched CW in the jaw, Brown came after Sister, who was hiding by CW's vehicle. Brown then slammed Sister into the ground. Sister stated that Brown only stopped "when the guy from McDonald's took him off of me."

followed. The manager testified that outside, he saw Brown attacking CW and punching her. He stated that CW was "trying to protect herself and at the same time yelling, you know, stop, stop, stop." The manager also noted that he observed a pregnant woman, Wife, who was "verbally abusing" CW. CW verbally responded, and then Brown "kinda grabbed [CW's] neck and punched her in the chin." CW then fell to the ground. The manager testified that at that point, everyone in the area was yelling "stop, stop, stop" The manager further stated that the "other girl," Sister, was also yelling at Brown to stop. Brown then "went after [Sister]," caught up to her, and began hitting Sister, until another man pushed Brown into the bushes.

Finally, the State called CW's emergency room physician to testify as to the injuries CW sustained. The physician stated that CW suffered "a mandible fracture, which is a jaw fracture." The physician continued, "[i]t was reported as a left jaw fracture somewhere roughly in this area, and her teeth were separated because of the jaw fracture." The physician stated that CW also "had some loose teeth around where the jaw fracture was, and then . . . she had things like scrapes and some swelling to her face."

Brown also testified, and recounted a very different set of facts. He stated that while he, Wife, and his children

were sitting down to eat at McDonald's, Mother confronted Wife. Brown told Mother to "leave [his] family alone." After Mother further insulted him, she left the restaurant. Brown testified that he and his family then sat down to eat, but Wife told him that they should leave. Brown agreed, picked up the packages of food, and made his way to the entrance of the restaurant.

At that point, CW and Sister entered the restaurant, saw Brown and Wife, and started yelling at Wife. Brown attempted to block them from approaching by backing them out the door. Brown observed CW slip, fall, and hit a table outside the restaurant near the entrance. Brown stated that CW fell and got up numerous times to attempt to pass him.

On cross-examination, Brown testified that when he attempted to force them out of the restaurant, CW and Sister were trying to get past him to attack Wife. Somehow, CW got past Brown and hit Wife. Brown then heard Wife say "[CW] hit me," and as Brown went back to Wife, he saw CW run to the other side of the parking lot. CW then returned to attack both Brown and Wife. She struck Brown in the face, turned around and went to the 'ewa end of the parking lot. Brown followed but never caught up to her.

Instead, Brown noticed that Sister was close to Wife, who had been standing next to Sister's vehicle. Afraid that

Sister would hurt Wife, Brown went back to stand by Sister. While he was standing next to Sister and attempting to block Sister's hands from trying to scratch him, Brown testified that a man pushed him into the nearby hedges. Brown stated that he didn't know who the man was or why he wanted to fight Brown. Brown said that he never hit CW, he never punched CW in the jaw, and he never slammed CW or Sister into the ground.

Before closing arguments, the jury was instructed on the elements required to convict Brown of assault in the second degree and the lesser included offense of assault in the third degree. The jury was also instructed on self-defense and defense of others as defenses to assault. The circuit court stated that the State had the burden to prove beyond a reasonable doubt that the force used by Brown was not justified.

The jury convicted Brown of assault in the second degree.

II. DISCUSSION

At oral argument, the State conceded that it was error for the circuit court to refuse to allow evidence of CW's assault charges stemming from the same incident and her probation status. Accordingly, we must decide whether the error was harmless beyond a reasonable doubt. The Majority concludes that the circuit court's error in precluding Brown from cross-examining CW with

this evidence was not harmless beyond a reasonable doubt.

Majority at 17.

I respectfully disagree. Here, the corroborative testimony of two independent eyewitnesses who saw and heard Brown punch CW in the jaw and the defense's otherwise extensive cross-examination of CW permitted the jury to evaluate CW's bias, motive and interest to lie about the events that occurred on February, 20, 2013. This leads me to conclude that there was no reasonable possibility that the circuit court's error might have contributed to Brown's conviction, and thus the error was harmless beyond a reasonable doubt.

In evaluating whether a denial of a defendant's constitutionally protected opportunity to impeach a witness for bias, motive or interest is harmless, we examine the entire record. State v. Levell, 128 Hawai'i 34, 42, 282 P.3d 576, 584 (2012). A host of factors may be considered, including

the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. (citing State v. Balisbisana, 83 Hawai'i 109, 117, 924 P.2d 1215, 1223 (1996)). It is true that no other witness testified as to CW's misdemeanor probation status or that she had also been charged with assault stemming from the same incident.

Accordingly, the testimony the circuit court restricted was not cumulative.

However, on the record before us, it is clear that the prosecution had a strong case that Brown assaulted CW (even if CW could have also assaulted Wife or Brown).

While CW's testimony was certainly important to the prosecution's case, the corroborating testimony from two independent eyewitnesses who clearly saw Brown punch CW in the jaw in the McDonald's parking lot lessens the impact of CW's testimony with respect to that incident.

We have previously concluded that forbidding evidence of a witness's bias or motive is not harmless beyond a reasonable doubt when there is no other evidence to corroborate the complaining witness's story. Levell, 128 Hawai'i at 42, 282 P.3d at 584. In Levell, we concluded that the circuit court's error in not permitting cross-examination of the witness regarding the defendant's accusation that the witness had stolen his credit cards was not harmless beyond a reasonable doubt. Id. But we did so in part because the complaining witness was the only witness that testified for the State. In Levell, "[t]here was no other evidence to directly corroborate Complainant's testimony, and therefore evidence of Complainant's bias or motive to lie would have been particularly helpful in assessing Complainant's

credibility." Id. The State's case was "essentially dependent on the credibility of Complainant, its only witness." Id.

We have similarly concluded in other cases that a circuit court's refusal to allow cross-examination of a witness regarding bias, interest or motive is not harmless when that witness's testimony is the only evidence against the defendant. See Balisbisana, 83 Hawai'i at 117, 924 P.2d at 1223 ("[CW] was central to the prosecution's case. She was the only witness to testify that Balisbisana had abused her."); State v. Acacio, 140 Hawai'i 92, 102, 398 P.3d 681, 691 (2017) ("The CW's testimony was crucial to the prosecution's case because she was the only eyewitness to Acacio's alleged threat and abuse against her").

In this case, however, CW was not the only witness to testify to Brown's assault in the McDonald's parking lot. Two independent eyewitnesses corroborated her testimony. First, the security guard testified that Brown punched CW in the jaw. He stated "just as I thought that it looked like [Brown] was going to hit [CW], he hit her, and it made a really loud pop sound." The sound was so loud that the security guard was surprised that he could hear it, even when he was 65 to 70 feet away. The security guard further stated that he later observed CW holding her jaw, and that "there was a lot of blood coming out of it." Additionally, the McDonald's manager testified that he and

multiple restaurant customers ran outside to witness the fight between Brown and CW, and that Brown grabbed CW's neck and punched her in the chin. He also stated that CW was "trying to protect herself and also at the same time yelling, you know, stop, stop, stop." The manager stated that bystanders about three to ten feet away from the incident were yelling at Brown to stop.

Accordingly, the record in this case provides additional evidence from two independent eyewitnesses who corroborated CW's testimony that Brown punched her in the jaw. The presence of testimony from other witnesses attesting to Brown's assault constitutes independent evidence that lessens the importance of CW's testimony. Accord State v. Liuaifi, 1 Haw. App. 625, 635, 623 P.2d 1271, 1278 (1981) ("The testimonies of the other witnesses . . . together with the physical evidence, constitute clear, independent, and overwhelming evidence of Liuaifi's guilt").

Further, the circuit court allowed extensive cross-examination of CW for bias, motive and interest. While the circuit court did not allow Brown to bring up CW's similar assault charge arising from the same incident or her probation status, Brown was able to question CW regarding her prior history of assault charges and convictions and CW's previous negative

comments to and regarding Wife, which could have allowed the jury to conclude that CW had been the first aggressor in the incident and that Brown was acting in self-defense. For example, CW admitted that she pleaded guilty to an assault charge arising out of an incident involving her daughter. CW also recalled that she pleaded no contest to harassment when she threatened to kill Mother and kicked the front door of Mother's house. Finally, CW admitted that the Facebook post, in which she wrote "silly girl gave birth Talk shit, get hit. I ain't scade. . . . Let's do it again, me and you, round two. Oh wait, round one wasn't finished[,]” pertained to Wife.

This testimony paints CW in a negative light and provides evidence that could have persuaded a jury that CW had punched Wife and had lied in her testimony. In my view, eliciting additional testimony regarding CW's assault charges from the same incident or her current probation status, where Brown had already introduced evidence that (1) CW had a history of assaulting family members, (2) CW had a reason and motive to assault Wife, and (3) Brown had sustained injuries from the incident, would not have had a reasonable possibility of changing the jury's verdict against Brown.

In order to prove that Brown had committed assault in the second degree, the State was required to prove that he

"recklessly cause[d] serious or substantial bodily injury to another." Hawai'i Revised Statutes § 707-711(1)(b) (Supp. 2011). While Brown was adamant that he did not punch CW, two independent eyewitnesses observed him do so.² CW's emergency medical physician testified that CW had suffered a jaw injury that loosened several teeth. This indicates to me that the State's assault case against Brown was strong, even without a complete cross-examination of CW.

III. CONCLUSION

Notwithstanding Brown's inability to cross-examine CW regarding her assault charge arising from the same incident or her probation status, the record in this case indicates to me that there was substantial and overwhelming evidence that Brown had committed an assault. Two independent eyewitnesses corroborated CW's testimony and vividly recalled that Brown hit CW multiple times and punched her in the jaw. Extensive cross-examination as to CW's prior conduct, including her prior assault charges and her antipathy towards Wife, painted a negative picture of CW to the jury and went to her bias, motive or interest in lying about whether she had initially punched Wife or

² While the Majority notes that the independent eyewitnesses did not see the entire interaction between Brown and CW, Majority at 18, the security guard was present to observe the events immediately preceding the punch. He testified that a verbal argument between Brown and CW had taken place, and specifically stated that CW had not attacked Brown.

assaulted Brown.

After being instructed on self-defense and defense of others, the jury nevertheless convicted Brown of assault. Based on the testimony elicited in this case, I cannot conclude that there is a reasonable possibility that the circuit court's failure to allow cross-examination with respect to other evidence of CW's bias, motive or interest might have contributed to Brown's conviction.

Therefore, I would hold that the circuit court's error was harmless beyond a reasonable doubt, and affirm the ICA's July 31, 2017 judgment on appeal.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

