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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

JOHN LESLIE GALLAGHER,
Petitioner/Defendant-Appellant.

SCWC-14-0001300

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-14-0001300; CR. NO. 13-1-0972)

MAY 15, 2020

DISSENTING OPINION BY NAKAYAMA, J.

Petitioner/Defendant-Appellant John Leslie Gallagher (Gallagher) was convicted by a jury of one count of criminal property damage in the second degree. The charge for which Gallagher was convicted stemmed from a 2013 incident in which Gallagher kicked a truck that belonged to the complaining

witnesses Jessica Norman (Ms. Norman) and Garron Norman (Mr. Norman) (collectively, the Normans) numerous times while it was parked in the Normans' driveway.

At trial, Ms. Norman testified that this event was not an isolated incident and described four prior incidents in which Gallagher harassed and threatened her in the six months leading up to the criminal property damage. Ms. Norman also testified that she was afraid of Gallagher and feared for her life.

The issue on appeal is whether the probative value of the prior acts evidence was substantially outweighed by the danger that it would unfairly prejudice Gallagher.

In vacating the ICA's judgment on appeal and remanding the case to the circuit court, the Majority holds that the circuit court abused its discretion in erroneously admitting unfairly prejudicial evidence of Gallagher's prior acts and that the admission of this evidence was not harmless beyond a reasonable doubt. I respectfully disagree.

The evidence of Gallagher's prior bad acts was highly probative of his state of mind at the time he attacked the Normans' truck and of his intent to cause, or knowledge that he was causing, more than \$1,500.00 worth of damage to the vehicle. By comparison, this evidence was not prejudicial because Gallagher's behavior, which involved screaming obscenities and making obscene gestures at the Normans' home, is not the type

that tends to "rouse overwhelming hostility in the minds of the jurors" and because the circuit court issued multiple instructions advising the jury that it could only use the evidence for a limited permissible purpose.

Based on the record of Gallagher's trial, I conclude that the circuit court correctly admitted evidence of Gallagher's prior bad acts, but that the circuit court erred in allowing Ms. Norman to testify about her fear of Gallagher. Ms. Norman's fear is not relevant to any element of the crime for which Gallagher was on trial, and therefore should have been excluded pursuant to Hawai'i Rules of Evidence (HRE) Rule 401¹. However, there is no reasonable possibility that the circuit court's admission of Ms. Norman's testimony that she was afraid might have contributed to Gallagher's conviction because it had no bearing on Gallagher's subjective intent to damage the vehicle - the main issue at trial. Therefore, this error is, in my opinion, harmless beyond a reasonable doubt.

Accordingly, I would affirm the ICA's judgment on appeal.

I. BACKGROUND

Respondent/Plaintiff-Appellee the State of Hawai'i (the

¹ HRE Rule 401 provides, "[r]elevant evidence' means evidence having 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."

State) charged Gallagher with criminal property damage in the second degree in violation of Hawai'i Revised Statutes (HRS) § 708-821(1)(b)² after a September 15, 2013 incident in which he kicked the Normans' vehicle multiple times while it was parked in the Normans' driveway. Gallagher pled not guilty.

Before trial, Gallagher filed a motion in limine seeking to preclude the State from introducing evidence of prior incidents involving Gallagher and the Normans. In response, the State filed a "Notice of Intent to Rely on Evidence Pursuant to Rule 404(b) [3] and Rule 608(b) [4] of the Hawaii Rules of

² HRS § 708-821(1)(b) provides, in relevant part:

A person commits the offense of criminal property damage in the second degree if by means other than fire: . . . The person intentionally or knowingly damages the property of another, without the other's consent, in an amount exceeding \$1,500.

³ HRE Rule 404(b) provides:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence 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. 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.

Evidence" stating its intent to raise the prior incidents. The prior incidents resulted in the creation of six police reports for harassment, harassment by stalking, trespass, criminal tampering, and disorderly conduct between March and September of 2013. At a hearing on the motion, the State argued that it intended to use the evidence of Gallagher's prior bad acts to show that Gallagher's attack of the Normans' vehicle was not an isolated incident, an accident, or a mistake, but that the prior bad acts culminated in Gallagher committing criminal property damage. The circuit court denied Gallagher's motion to exclude the evidence and held that the prior incidents were admissible pursuant to HRE Rule 404(b).

Trial began on August 25, 2014. During opening statements, the State described Gallagher's aggressive behavior

⁴ HRE Rule 608(b) provides:

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking the witness' credibility, if probative of untruthfulness, may be inquired into on cross-examination of the witness and, in the discretion of the court, may be proved by extrinsic evidence. When a witness testifies to the character of another witness under subsection (a), relevant specific instances of the other witness' conduct may be inquired into on cross-examination but may not be proved by extrinsic evidence.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

toward the Normans during the six months leading up to the criminal property damage incident. The State informed the jury that the Normans "had never seen [Gallagher] until one day he showed up unannounced at their house[,] " thus beginning "the six-month odyssey that, essentially, culminated on the night of September 15, 2013[.]" The State also explained that, as a result of Gallagher's behavior, the Normans filed numerous police reports, tinted the windows of their home, and installed an alarm and video surveillance system.

The State told the jury that the evidence would show that on September 15, 2013, Gallagher "charged up the driveway" swearing, then kicked the Normans' vehicle at least six times on the passenger side and several times on the driver's side.

In Gallagher's opening statement, he asserted that the only issue in dispute was the amount of damages that he intended to cause and that he did not intend to cause more than \$1,500.00 worth of damages.

The State then called Ms. Norman to testify. Ms. Norman testified that she first interacted with Gallagher on March 24, 2013. Gallagher renewed his HRE Rule 404(b) objection and a bench conference ensued. During the bench conference, the circuit court stated:

[I]n the Court's view, in light of the nature of the incident and the fact that a person who is not an acquaintance of the complaining witness appears and

damages one's property, the Court's view is the probative value of that far outweighs any prejudicial effect. Otherwise, there really would be no sense to this entire incident.

In the Court's view, if the fact - the only issue is one of intent, in terms of extent of damage. The prior instances are extremely highly probative in terms of one's intent to cause the kind of damage that was allegedly caused.

Also, it is argued that the other elements of the offense are not an issue here, and while the opening statements suggest that - that's not evidence - the prosecution bears the burden for each and every element. Each and every element of the offense must be proven beyond a reasonable doubt by the prosecution.

The circuit court then instructed the jury that it was only permitted to consider the evidence of prior incidents for a limited purpose. The circuit court cautioned the jury with the following statement:

Ladies and gentlemen of the jury, you are about to hear evidence that the Defendant allegedly at another time may have engaged in other acts, wrongs, or crimes. This evidence, if believed by you, may be considered only on the issue of the Defendant's motive to commit the offense charged, opportunity to commit the offense charged, intent to commit the offense charged, preparation to commit the offense charged, plan to commit the offense charged, and identity of the person who may have or allegedly committed the offense charged.

Do not consider the evidence for any other purpose. You must not use the evidence to conclude that because the Defendant allegedly at another time may have engaged in or committed another crime, wrong, or act, that he is a person of bad character and, therefore, must have committed the offense charged in this case.

In considering the evidence for the limited purpose for which it has been received - or will be received, I should say - you must weigh it in the same manner as you would all other evidence in the case and consider it along with all other evidence in the case, bearing in mind that the Court has admitted the evidence for a limited purpose and not for the

purpose of you concluding that the Defendant was a person of bad character and, therefore, must have committed the offense charged in this case, Criminal Property Damage in the Second Degree being the offense charged in this case.

Ms. Norman continued to testify, and recounted four previous interactions with Gallagher. First Ms. Norman testified that on March 24, 2013, the first interaction she ever had with Gallagher, he approached her house. She opened the door and asked if he needed help with anything, and Gallagher began screaming at her and being "frantic with his hands." Gallagher screamed "[y]ou're not going to have your job by next week. You hear me. You're not going to have your job[.]" Scared, Ms. Norman closed the door and called the police. She later filed a police report about the incident.

Ms. Norman stated that on May 9, 2013, she heard yelling from the street and noticed Gallagher yelling at her neighbor. When Gallagher saw Ms. Norman watching, he began screaming "Fuck you. Fuck you. Fuck you[.]" and ran toward her house. Ms. Norman again called the police.

Ms. Norman testified that on August 16, 2013, she looked out her window to see a car blocking her driveway. She noticed that the car's occupant was shaking his fist at her house and giving the house "the finger." As he sped off, Ms. Norman realized that it was Gallagher. Ms. Norman went to get her phone, and when she returned to the window, she saw that Gallagher had come back to the front of her house.

Finally, Ms. Norman recounted how, on September 4, 2013, Gallagher again blocked her driveway with his car, then "he backed up acting as if he was going to speed and just ram into the driveway with the cars, just kind of making erratic movements in the driveway." Gallagher continued to make strange movements with his car, then sped off. Ms. Norman testified that she made six police reports about Gallagher during the six-month period from March 2013 to September 2013.

Ms. Norman stated that the events she described had made her feel terrified, and that she and her husband were afraid for their lives. In response to Gallagher's actions, Ms. Norman testified that she and her husband installed alarm and surveillance systems and tinted the windows of their garage and the ground floor of their home.

Ms. Norman then described the events of September 15, 2013, the night of the incident at issue. She stated that she was watching television with her husband and their dog when the dog began to bark. She and Mr. Norman went to the lanai to see what was happening and saw Gallagher "running full speed towards the house screaming Fuck you. Fuck you, you son of a bitch. Fuck you." Ms. Norman testified that Gallagher "started wailing on the car" with his feet and hands, hitting it between fourteen and sixteen times, so hard that it sounded like Gallagher was using a baseball bat. Gallagher then "flipped the house the

bird" and left.

The State then published to the jury a video of the incident, in which Ms. Norman identified Gallagher as the perpetrator.

Next, the State called Ms. Norman's husband, Mr. Norman. Mr. Norman testified that he knew Gallagher "[f]rom a series of escalating events that were taking place at [the Normans'] residence."

Mr. Norman stated that on September 15, 2013, he heard the dog frantically barking and Ms. Norman told him that Gallagher was there. Gallagher began screaming obscenities at them and appeared to be coming to the front door. Mr. Norman recounted how he pulled Ms. Norman inside the house and locked the door, grabbed mace and a baseball bat, and instructed Ms. Norman to call the police. Mr. Norman then identified photos of his pickup truck, which depicted dents that were inflicted on the night of the incident. Mr. Norman described multiple large dents that were two to four inches deep, then testified that Gallagher had caused the damage. Mr. Norman explained that he eventually received \$2,536.26 from his insurance provider, including his \$500 deductible.

Gordon Yoshizawa, the owner of an auto repair shop, testified that he inspected the vehicle after the incident and estimated the repair cost to be \$4,583.04. Matthew Little, the

automotive damage specialist for the Normans' insurance company, testified that he also inspected the vehicle and estimated the repair cost to be \$3,036.26. The State rested.

Gallagher testified on his own behalf. Gallagher admitted that on the night of the incident, he "lost [his] composure" and kicked the Normans' truck. Gallagher stated that he was wearing cross-trainer sneakers at the time he kicked the truck. Gallagher asserted that he did not intend to do "extensive damage" to the truck and that he only kicked the truck a couple of times, with the inside of his foot. Gallagher testified that he "put a couple scuff marks in it." Gallagher explained that he has a degree in automotive technology and that he would estimate that he only did \$300 to \$400 worth of damage to the vehicle.

After the conclusion of evidence, the circuit court read the jury instructions. The circuit court again instructed the jury that "[s]everal times during the trial I told you that certain evidence was allowed into this trial for a particular or limited purpose. When you consider that evidence, you must limit your consideration to that purpose." The circuit court specified,

[y]ou have heard evidence that the defendant at another time may have engaged in other crimes, wrongs, or acts. This evidence, if believed by you, may be considered only on the issue of defendant's motive to commit the offense charged, opportunity to commit the offense charged, intent to commit the

offense charged, preparation to commit the offense charged, plan to commit the offense charged, or identity as to the person who committed the offense charged.

Do not consider this evidence for any other purpose. You must not use this evidence to conclude that, because the defendant at another time may have engaged in other crimes, wrongs, or acts, that he is a person of bad character and, therefore, must have committed the offense charged in this case.

The jury convicted Gallagher of criminal property damage in the second degree and the circuit court sentenced him to five years' imprisonment.

II. DISCUSSION

I disagree with the Majority's conclusion that the prejudicial effect of presenting evidence of Gallagher's prior acts substantially outweighed its probative value.

As a threshold matter, every element of the charged offense was "at issue" for purposes of its admission under HRE Rule 404(b) and the subsequent HRE Rule 403 balancing test. The Majority asserts that because "Gallagher's identity, actions, and general intent to do damage were not disputed[,] the prior acts were "relevant only to demonstrate the degree of Gallagher's hostility toward the Normans and thereby increase the likelihood that he intended to do significant damage to their property." Majority at 21-22.

I believe that this statement mischaracterizes the scope of the prosecutor's burden at trial and undermines the probative value of the past act evidence. As the ICA noted,

Gallagher did not stipulate to any element of the charged offense. Therefore, notwithstanding Gallagher's assertion that he would not contest certain elements, such as his identity, the State had the burden to prove each element beyond a reasonable doubt at trial. The only way to prove each element was by presenting evidence of each element, which was aided by the introduction of probative past act evidence. Therefore, I disagree with the Majority's repeated refrain that the only issue at trial was whether Gallagher intended to cause or was aware that he was causing more than \$1,500.00 of damage. Evidence of any element of the crime is probative for purposes of this analysis.⁵

⁵ The Majority notes that "other bad acts are not admissible to prove an element when the element is not disputed in the evidence of the case." Majority at 21 n.9.

I disagree with the Majority's proposition that issues like identity, to which Gallagher did not stipulate, were not disputed in evidence. An element of a crime is no longer at issue when a defendant stipulates to that element. See State v. Ui, 142 Hawai'i 287, 294, 418 P.3d 628, 635 (2018) (holding that a criminal defendant waives the right to have all elements of an offense proven beyond a reasonable doubt when the defendant stipulates to one or more elements).

The Majority asserts that Gallagher's identity was not at issue because Gallagher's defense attorney identified Gallagher as the assailant during opening statements, because the State presented a video of the vehicle being attacked, and because Gallagher admitted that he attacked the vehicle.

First, defense counsel's opening statement identifying Gallagher is not evidence. See State v. Greyson, 70 Haw. 227, 232 n.4, 768 P.2d 759, 762 n.4 (1989) ("The opening statement merely provides the opportunity to advise and outline for the jury the facts and questions to be posed during the trial but is not evidence.") (internal citations omitted). The State's burden to prove all elements remains, notwithstanding defense counsel's opening statements, in part because the prosecutor cannot know what evidence will be presented during the defense's rebuttal. At that point, the prosecutor cannot know whether or not the defendant will testify or what the defendant will say if the defendant does testify.

Here, identity was in dispute notwithstanding Gallagher's
(continued . . .)

In light of this, and even assuming that Gallagher's intent to cause \$1,500.00 in damage was the only element at issue, the circuit court did not abuse its discretion in admitting evidence of the four prior incidents because the danger of prejudice did not substantially outweigh the evidence's probative value. See State v. Cordeiro, 99 Hawai'i

admission because during the State's case-in-chief the prosecutor did not know if Gallagher would ultimately testify or what he would say if he took the stand. Gallagher could have, for example, taken the stand and denied having been the person who kicked the car.

Nor does video of the attack on the vehicle render the element of identity "not disputed." The video came from home surveillance footage that was taken at around 10:00 p.m. The jury could have determined that the person in the video was not Gallagher. Indeed, as the Chief Justice's dissenting opinion observes, the jury in this case questioned Gallagher's identity. Recktenwald Dissent at 5-6.

By concluding that the strength of the video evidence rendered a non-stipulated element established, the Majority improperly steps into the role of the fact finder, who was still tasked with determining, at the close of trial, whether the State did or did not prove the identity of the perpetrator. In light of the State's ongoing burden to prove every element of the crime to which Gallagher did not stipulate, those elements were at issue in evidence. In a criminal prosecution, it defies logic to require the State to prove certain elements while simultaneously considering them not at issue.

Moreover, even if those elements are not at issue, the prior acts evidence that was introduced in this case is distinguishable from the prior acts evidence discussed by the three cases to which the Majority cites because, in addition to showing identity, the prior act evidence in this case is highly probative of an issue that is in dispute - intent. Contra, Majority at 21-22 n.9, citing State v. Calara, 132 Hawai'i 391, 403, 322 P.3d 931, 943 (2014) ("In this case, the statements were not probative of any other fact that was of consequence to Calara's case."); State v. Veikoso, 126 Hawai'i 267, 270 P.3d 997 (2011) (holding that the ICA erred in determining prior act evidence was admissible to show identity and modus operandi because neither identity nor modus operandi were at issue); State v. Castro, 69 Haw. 633, 644, 756 P.2d 1033, 1041-42 (1988) (holding that prior act evidence was inadmissible to show identity because identity was not disputed, but that it was inadmissible to show intent because there was adequate alternative proof). In other words, the fact that one purpose for which the evidence is introduced is to prove an element not in dispute does not automatically render that evidence inadmissible if the evidence tends to prove another element that is in dispute, in this case, intent. A reason other than lack of dispute must exist to render the evidence inadmissible.

390, 404, 56 P.3d 692, 706 (2002).

Under HRE Rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" (emphasis added). We have also stated that, in weighing the probative value versus prejudicial effect in this context, a court must consider a variety of factors, including:

the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the needs for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

State v. Behrendt, 124 Hawai'i 90, 106, 237 P.3d 1156, 1172 (2010) (quoting State v. Renon, 73 Haw. 23, 38, 828 P.2d 1266, 1273 (1992)).

The Majority considers these factors and concludes that the prejudicial effect substantially outweighs the probative value. Respectfully, I disagree. All of the factors support the circuit court's determination that the past act evidence was more probative than prejudicial.

I agree with the Chief Justice that

[e]vidence of Gallagher's conduct was relevant to show the extent of his hostility toward the Normans, making it more likely that he intended to cause serious property damage when he kicked their vehicle. And, as no other evidence existed that demonstrated his extreme antagonism toward the Normans, there was a significant need for such evidence.

Recktenwald Dissent at 2. Accordingly, I believe that the circuit court correctly concluded that the probative value

outweighed the prejudicial effect and that the circuit court did not abuse its discretion.

First, I agree with the Majority that the first factor, the strength of evidence as to commission of the other crime, "does not weigh against admittance." Accord Majority at 21; see Behrendt, 124 Hawai'i at 106, 237 P.3d at 1172 ("The strength of the evidence of the uncharged conduct is essentially the same as for the charged offenses, since the State relied primarily on the testimony of [the complaining witness.]").

The second and third factors, which are often analyzed together, also indicate that the probative value of the past incidents evidence outweighs its potential prejudice. The Majority posits that, "the closeness in time and alleged similarity between the prior acts and the incident giving rise to this case is at most only marginally probative of this point." Majority at 23. Noting that the Majority admits that the closeness in time and similarity between the acts is probative of "the degree of Gallagher's hostility toward the Normans and . . . the likelihood that he intended to do significant damage to their property[.]" I disagree that these factors are only "marginally probative[.]" Contra Majority at 22-23.

The prior incidents are similar to the incident at issue because all were acts of extreme aggression that Gallagher

directed toward the Normans at their home. The Majority acknowledges these similarities, but asserts that because none of the prior incidents involved the destruction of property⁶, the prior incidents have no bearing on Gallagher's awareness or knowledge of the extent of the damage he was inflicting. Majority at 23. In my view, the prior incidents were clearly related to and exemplary of Gallagher's intent to seriously damage the Normans' vehicle on the night of the incident. The prior acts, which involved screaming obscenities at Ms. Norman, threatening Ms. Norman, running toward the house, making obscene gestures at the house, and making erratic movements with Gallagher's car, all demonstrate the degree of hostility Gallagher expressed toward the Normans. These events are highly probative of Gallagher's intent to cause serious damage to the Normans' truck because of this hostility. The prior incidents demonstrate that Gallagher's attack of the truck was not a random kick to a vehicle that happened to be in Gallagher's path at the moment he became upset, but was the culmination of an escalating pattern of extreme aggression toward a specific couple.⁷

⁶ Ms. Norman testified, however, that on September 4, 2013, Gallagher "backed up acting as if he was going to speed and just ram into the driveway with the cars[.]"

⁷ The prior acts evidence was not introduced to show Gallagher's character as a generally hostile person, as the circuit court instructed the
(continued . . .)

The third factor, the interval of time that has elapsed between the past acts and the incident at issue, also favors the probative value of the evidence. All six of the Normans' interactions with Gallagher took place over a six-month period, including the incident in which Gallagher attacked the Normans' truck. This indicates that the prior events were probative of Gallagher's intent at the time of the incident at issue, as opposed to unrelated, random events.

In fact, the Majority states that "a close connection in time and nature is highly probative only because it increases the likelihood that the same actor committed both instances of misconduct," Majority at 24 (emphasis added), but this proximity "may also increase the likelihood that a jury will consider the previous conduct to conclude that the defendant has a propensity for committing such acts, which is a prohibited inference." Majority at 24. Again, I disagree that a close connection in time and nature is only probative of identity. In this case, it

jury three times. The prior incidents show Gallagher's specific hostility toward the Normans, which is probative of his intent to cause serious damage to their property. Therefore, as noted throughout this opinion, the prior acts evidence is admissible for at least one of the permissible purposes set forth by HRE Rule 404(b).

The Majority observes that the Normans' testimony that the prior incidents were "a series of escalating events" that "could have been characterized by the prosecutor's questions as unwanted encounters, unprompted altercations, or any number of other terms" and implies that they should have been so characterized. Majority at 27. Though it is the trial court's duty to exclude unduly prejudicial testimony, neither the trial court nor the appellate court should dictate the exact wording of a complaining witness's testimony or reframe how the State presents its case.

is also probative of Gallagher's intent to cause serious damage to the vehicle. Gallagher's recent acts of aggression toward the Normans demonstrate his state of mind at the time he attacked their vehicle.

The high probative value of factors two and three is not negated by the potential for improper use by the jury because the circuit court gave multiple limiting instructions that specifically instructed the jury not to make a prohibited inference.⁸ We have held that "any harm or prejudice resulting to the defendant [from improper remarks] can be cured by the [circuit] court's instruction to the jury, because it will be presumed that the jury adhered to the circuit court's instructions." State v. Kassebeer, 118 Hawai'i 493, 519, 193 P.3d 409, 435 (2008) (quotations omitted) (brackets in original). This concept extends to a circuit court's limiting instruction as well, and we must therefore presume that the jury heeded the circuit court's limiting instructions in this case.⁹

⁸ The circuit court admonished the jury that it could not use evidence of Gallagher's prior bad acts to conclude that he is a person of bad character, and therefore guilty, at the beginning of Ms. Norman's testimony and twice after the conclusion of evidence.

⁹ The Majority states that reliance on the circuit court's limiting instruction to the jury is "misplaced" because that instruction was "plainly incorrect." Majority at 36, 38.

Respectfully, the circuit court's limiting instruction was not plainly incorrect. While the Majority notes that evidence of prior acts cannot be admitted for the sole purpose of proving issues that are not in dispute, prior act evidence can be admitted if it is relevant to and

(continued . . .)

In sum, the Majority's arguments with respect to factors two and three are unavailing, as those factors indicate that the prior incidents carry significant probative value and little danger of prejudice.

Factor four, the need for the evidence, supports the probative value of the prior acts evidence because the only evidence available to show Gallagher's intent to seriously damage the vehicle was the Normans' testimony regarding Gallagher's previous displays of hostility. The Majority argues that "the State could have elicited a much less elaborate recounting of the prior incidents, greatly limiting testimony to the aspects of the incidents that bore on Gallagher's state of

probative of an issue that is in dispute - here, intent. If, as the Majority contends, issues such as motive, opportunity, preparation, plan, and identity were not disputed, the jury's consideration of admissible prior act evidence for these purposes is harmless. The reason that prior bad act evidence is not admissible to prove issues not in dispute is that, in that instance, the evidence is not relevant but still prejudices the defendant. See Castro, 69 Haw. at 644, 756 P.2d at 1041. Here, the evidence is relevant to Gallagher's intent and has substantial probative value. Therefore, the prejudice to the defendant that exists whenever prior bad acts are introduced is outweighed by its probative value with respect to intent, and the jury's consideration of the evidence for issues not in dispute is harmless.

The Majority identifies no error in the portion of the jury instruction instructing the jury not to use the prior act evidence to infer that Gallagher was a person of bad character and therefore committed the crime. However, the Majority implies that because the first part of the instruction is, in the Majority's view, incorrect, we must disregard the effect of the entire instruction. Thus, the Majority appears to institute a new rule that if one part of a jury instruction is incorrect, the entire instruction must be disregarded. The Majority provides no support for this new rule. Therefore, even if the court's instruction that the jury could consider the prior act evidence for identity and other issues was wrong, as the Majority contends, we must presume that the jury adhered to the character evidence portion of the circuit court's instruction. See Kassebeer, 118 Hawai'i at 519, 193 P.3d at 435.

mind." Majority at 27. Further, the Majority contends that the circuit court should have limited the number of prior incidents to the "minimum sufficient" to obtain the probative value and that four prior incidents exceeded that minimum.¹⁰ Majority at 28.

The prior events were important to show context and to explain the intent behind Gallagher's conduct. This court analyzed the six balancing test factors in State v. Behrendt, and concluded that the probative value of prior, uncharged acts of sexual abuse which took place in South Dakota was not substantially outweighed by prejudicial effect in the trial over Hawai'i-based sexual assaults of the same complaining witness. 124 Hawai'i at 108, 237 P.3d at 1174. In analyzing the "need for the evidence" factor, this court held that there was a substantial need for evidence of Behrendt's sexual abuse of the complaining witness when they were living together in South Dakota because, without it, it would have been "inexplicable" to the jury that "Behrendt would suddenly engage in [sexual abuse] after having lived in close proximity to [the complaining witness] for three years." Id. at 106-07, 237 P.3d at 1172-73. Similarly, here the evidence that Gallagher engaged in

¹⁰ The Majority does not support its assertion that evidence of four prior incidents, in this case, exceeds the minimum number that would be sufficient.

increasingly hostile behavior toward the Normans in the months leading up to the incident at issue demonstrates that Gallagher's attack of the truck was not random - it was the culmination of an escalating pattern of extreme aggression toward the Normans. This context was critical to demonstrate to the jury that Gallagher intended to cause more than \$1,500.00 worth of damage as opposed to minimal damage.

The fifth factor, the efficacy of alternative proof, further weighs in favor of the prior acts' probative value. The Majority argues that the Normans' testimony about the attack, the video of the attack, and photographs of and testimony regarding the resultant damage provide alternative proof of Gallagher's intent to seriously damage the car. However, the Majority's proffered alternative proof is ineffective to show Gallagher's intent. First, Gallagher testified, in direct contradiction to the video, that he did not kick the vehicle hard or many times and that he did not intend to cause more than \$1,500.00 worth of damage.

Again, this court's analysis of the balancing test factors in Behrendt prove useful. There, analyzing factor five, this court held that "the efficacy of alternative proof [factor], also weighs in favor of admitting the South Dakota evidence [of sexual abuse]. There was no alternative way to establish the progression of Behrendt's behaviors[.]" 124

Hawai'i at 107, 237 P.3d at 1173. This court further explained that evidence of sexual abuse in Hawai'i "would be likely to confuse rather than enlighten the jury absent the context provided by the prior conduct in South Dakota." Id. Here too, Gallagher's prior acts provide critically important context, which could not be established by alternative proof, that shows the progression of Gallagher's behavior and his likely state of mind at the time he attacked the Normans' truck. Like in Behrendt, without evidence of Gallagher's prior hostility toward the Normans, the incident would not make sense to the jury and there would be little to indicate that Gallagher intended to seriously damage the vehicle.

The final factor, the degree to which the evidence probably will rouse the jury to overmastering hostility, does not tip the scales of the HRE Rule 403 analysis such that the prior acts evidence is unduly prejudicial. The Majority opines that "[t]he testimony was virtually certain to elicit from the jury strong sympathy for the Normans and animus toward Gallagher for the fear and unwarranted disruption Gallagher's ongoing behavior had caused in the Normans' lives[.]" Majority at 32. Evidence of prior bad acts will, without exception, portray the defendant in a negative light to the jury - that is the nature of such evidence. However, the circuit court's limiting

instructions explicitly instructed the jury not to consider the prior act evidence for the improper purpose of viewing Gallagher as "a person of bad character and, therefore, [a person who] must have committed the offense charged in this case."

Moreover, in addition to the circuit court's multiple limiting instructions, Gallagher's prior acts, which include cursing at, yelling at, and making obscene gestures at the Normans' home, are not the kinds of behaviors that seem in danger of rousing the jury to "overmastering hostility" toward the defendant. In Behrendt, for example, this court held that evidence that Behrendt sexually abused the complaining witness when she was between eleven and fourteen years old, while Behrendt was married to the complaining witness's sister, sometimes while Behrendt, the complaining witness, and her sister were sleeping together in the same bed, "was not likely to rouse the jury to an overmastering sense of hostility against Behrendt." 124 Hawai'i at 107, 237 P.3d at 1173. If repeated sexual abuse of a minor is not likely to rouse the jury to an overmastering hostility, it is significantly less likely that evidence of a man screaming obscenities at an adult witness will do so. Though Gallagher's behavior was of a distinctly different nature from the crimes perpetrated in Behrendt, comparison of the two cases demonstrates that the appellate court should not assume that the jury cannot face evidence of

bad behavior without being roused to overmastering hostility toward the defendant.

Each of the six factors weighs in favor of the circuit court's determination that the evidence of Gallagher's prior encounters with the Normans had probative value that was not substantially outweighed by the danger of unfair prejudice. Though the Majority roots its opinion in existing case law, the Majority's holding that the prejudicial effect of the prior act evidence substantially outweighs its probative value is essentially a judgment call. The fact remains that, as the Majority concedes, the prior act evidence was relevant to Gallagher's intent and had some degree of probative value. There is nothing to indicate that the admission of the prior act evidence in this case would rouse the jury to overmastering hostility.

In my view, the circuit court did not err in admitting evidence of Gallagher's prior aggression toward the Normans. I believe that the Majority did not afford the circuit court its due deference when it concluded that the circuit court abused its discretion. Rather than determining whether the circuit court abused its discretion, the Majority decided what it would have done sitting as the circuit court judge in this case.

The circuit court did err by allowing Ms. Norman to testify about her fear of Gallagher, but this error was harmless

beyond a reasonable doubt. "A defendant's conviction will not be overturned if a court commits an error that is harmless beyond a reasonable doubt. However, an error is not harmless if there is a reasonable possibility that [the] error might have contributed to the conviction." State v. Levell, 128 Hawai'i 34, 41, 282 P.3d 576, 583 (2012) (citations and quotations omitted) (brackets in original).

Ms. Norman's fear was neither relevant to nor probative of Gallagher's actions or intentions. Therefore, pursuant to HRE Rule 401, the circuit court erred in admitting this testimony. However, for this same reason, this error was harmless beyond a reasonable doubt, because there is not a reasonable possibility that it contributed to Gallagher's conviction. Gallagher's defense was that he did not intend to cause \$1,500.00 worth of damage. The Majority repeatedly asserts that Gallagher's intent was the sole issue at trial. Ms. Norman's fear of Gallagher had no bearing on Gallagher's intent to damage the vehicle, and her testimony about her fear did not weaken Gallagher's defense or detract from his credibility. To the extent that Ms. Norman's testimony could be taken by the jury to indicate that Gallagher is a person of bad character, the court issued multiple instructions cautioning the jury not to use Ms. Norman's testimony for that purpose. It is clear to me, therefore, that the circuit court's admission of

Ms. Norman's testimony concerning her fear of Gallagher was harmless beyond a reasonable doubt.

III. CONCLUSION

The Normans' testimony about four prior incidents in which Gallagher harassed and threatened them at their home was admissible under HRE Rule 404(b) as probative of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. These incidents, which represent a pattern of increasingly aggressive behavior, were highly probative of Gallagher's state of mind at the time he attacked the Normans' truck - namely, that he intended to cause or was aware that he was causing more than \$1,500.00 in damage to the truck.

I disagree with the Majority's opinion that the danger of unfair prejudice to Gallagher when the circuit court allowed the State to introduce evidence of the prior acts substantially outweighed its probative value. In my view, assessing the six factors a court must consider when weighing probative value versus prejudicial effect, the probative value of the prior acts evidence significantly outweighs its potential prejudicial effect.

While an appellate court can endeavor to reevaluate the effect of evidence presented at trial, the trial court is far better suited to make this determination, and its

determination will not be set aside absent abuse of discretion. See Cordeiro, 99 Hawai'i at 404, 56 P.3d at 706. In this case, I cannot agree that the circuit court abused its discretion in permitting the Normans to testify about Gallagher's prior acts.

I would hold that the circuit court's only error was allowing the State to elicit testimony of Ms. Norman's fear of Gallagher. However, as this error was harmless beyond a reasonable doubt, I would affirm the ICA's January 30, 2018, judgment on appeal.

/s/ Paula A. Nakayama

