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IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII
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(3))

MAY 15, 2020

DISSENTING OPINION BY RECKTENWALD, C.J.

The majority holds that Ms. Norman's testimony about the four prior incidents in which Gallagher aggressively confronted the Normans was "only marginally probative," and that the likelihood of unfair prejudice substantially outweighed its probative value, making the evidence inadmissible under Hawaii Rules of Evidence (HRE) 403. Majority at 26. I respectfully dissent.

I would hold, first, that testimony about what happened during the prior incidents was relevant and admissible. Second, while I agree with the majority that testimony about the impact of the incidents on the Normans - Ms. Norman's fear of Gallagher and the protective measures the Normans took ("the impact testimony") - was irrelevant and prejudicial, I conclude that Gallagher did not specifically object to that evidence and so any error is waived.

A. Testimony About Gallagher's Conduct During the Prior Incidents Was Admissible

The majority does not draw a distinction between testimony about Gallagher's conduct during the prior incidents and testimony about its impact on the Normans. Evidence 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.

The parties' dispute over Gallagher's intent was essentially one of degree - since Gallagher admitted that he intended to kick the Normans' truck, the only question was whether he intended to kick it so hard that it would cause over

\$1,500 in damage. As the defense suggested during opening statements:

The only thing that really is in dispute is the damages. What [Gallagher] - what was [Gallagher] thinking as far as the damages? What did he mean to do as far as the damages? What did he know?

And the evidence will show that [Gallagher] did not intend to cause of \$1,500 in damages to the truck, and the evidence will show that [Gallagher] was not aware and did not believe that the damage would be to that extent.

Gallagher testified that "I kicked the truck. I lost my composure. I kicked the truck. It's not something I normally do. . . . And my intentions were not whatsoever to go over there and do extensive damage to that truck." On cross-examination, Gallagher reiterated, "I kicked a couple scuff marks on his truck. . . . I did it. But not \$1500 worth of damage that's going to put me in prison for five years, because it's a Class C Felony. No possible way." Similarly, in closing, the defense argued:

[Gallagher] did not mean to cause over \$1,500 in damages. That was not his intent or goal.

. . . .

Now, in the beginning, I told you that there's not much in dispute. It's not disputed that [Gallagher] is the person in the video. It's not disputed that he went over to the Normans' residence. It's not disputed that he kicked the truck.

The only thing that is in dispute concerns the damages, the extent of damages to the truck. What was going on in [Gallagher's] mind, did he mean to, or was it his conscious object to cause over \$1,500 in damages, and did he know or believe that the amount of damage would be that much?

While other evidence at trial, including the surveillance video, demonstrated that Gallagher intended to cause at least some damage to the Normans' truck, no other evidence spoke directly to how much damage he intended to cause. As the circuit court explained, without evidence of Gallagher's prior aggressive conduct, "there really is no context whatsoever as to why someone would appear at someone's house and begin to damage one's vehicle to the extent it was damaged."¹

Moreover, the prior incidents were also relevant for establishing Gallagher's identity. As Justice Nakayama's dissent observes, because Gallagher did not stipulate to any elements, "the State had the burden to prove each element beyond a reasonable doubt at trial." Justice Nakayama's Dissent at 14. It is true that "whether or not the proffer survives the [HRE] rule 403 balance may well depend on whether or not the matter is in dispute[, which requires] consideration of the precise defensive claims being made in the case." Addison M. Bowman, Hawaii Rules of Evidence Manual § 404-3[3][D] at 4-60 (2016-2017 ed.). However, this does not mean that evidence relating to an

¹ The majority also contends, "assuming some probativeness of the prior misconduct, the number of prior incidents should have been limited to the minimum sufficient to obtain the asserted probative value the conduct offered." Majority at 28. However, the fact that Gallagher accosted the Normans at their home not once, but numerous times, was part of the evidence's probative value. As the State argued, Gallagher's conduct escalated with each prior incident. That inference would not be available if the circuit court admitted only one or two of the incidents.

undisputed element can never be admitted under HRE 403. Here, the jury in fact questioned Gallagher's identity, even though he did not dispute that he was the person who kicked the Normans' truck. When given the opportunity to ask Ms. Norman questions, the jury asked, "Can the Defendant be positively identified that it is really him?" In answering the question, Ms. Norman explained,

Yes, absolutely. I had seen the Defendant six different times over the previous five months. The first time being very close where I had opened the door and actually seen him and talked to him myself and asked him if he needed help.

I had seen him in cars. I had seen him from across the street. But as you can see, the street is not that wide, so every time I saw him, it was within 10 or 15 feet, and I am 100 percent confident that I could identify him each time, and particularly this night, there was no doubt in my mind.

Without Ms. Norman's testimony regarding the prior incidents, her positive identification of Gallagher would not have made sense. Because the State had the burden of proving Gallagher's identity, evidence of Gallagher's prior conduct towards the Normans was relevant and admissible.

I agree with the majority that a juror's question does not determine whether evidence is admissible. However, the question illustrates that in the absence of a stipulation, even seemingly undisputed elements can be in doubt, and therefore evidence that goes to those elements still retains probative value. Just as the jury's question about Gallagher's identity

is not dispositive of admissibility, neither is the fact that the defense did not actively contest identity. Identity was still an element the State had the burden of proving beyond a reasonable doubt, and the numerous encounters between Gallagher and the Normans were probative of that element.

Thus, I disagree with the majority that the circuit court abused its discretion in admitting evidence about Gallagher's conduct during his prior interactions with the Normans.

B. Gallagher Waived Any Objection to the Impact Testimony

In addition to the testimony about Gallagher's conduct during the prior incidents, as the majority notes, the State elicited "extensive surrounding details of the incidents," including "a range of highly prejudicial information that was lacking in probative value as to Gallagher's state of mind." Majority at 26. This impact testimony included:

the Normans' repeated calling of police regarding the incidents; their filing of six police reports involving harassment; the numerous protective measures installed in their home, including the tinting of windows and the installation of a surveillance system with seven video cameras and an alarm system; and - perhaps most prejudicial - the recounting of the Normans' ongoing fear of Gallagher and Ms. Norman's statement that the prior incidents terrorized her.

Id.

The majority characterizes this evidence as "highly

prejudicial.” Id. I agree.² However, in analyzing the prejudicial effect of the impact testimony, the majority makes a critical assumption: that Gallagher preserved his objection to this evidence. To the contrary, I would hold that Gallagher waived any objection to the impact testimony, and therefore that we should not reach this issue.

1. Gallagher’s Motion in Limine Was Insufficient to Preserve an Objection to the Impact Testimony

A defendant must make a prompt and specific objection at trial in order to preserve an issue for appeal. Addison M. Bowman, Hawaii Rules of Evidence Manual § 103-2[1] at 1-7 (2016-2017 ed.); see also 1 Kenneth S. Broun, et al., McCormick on Evidence § 52 (7th ed. 2016) (“[T]he general approach is that a failure to make a specific objection at the time the evidence is proffered, is a waiver for appeal of any ground of complaint against its admission.”). “[A]t a bare minimum, the objector must tell the trial judge ‘both what is objected to and why.’” 21 Charles Allen Wright, et al., Fed. Prac. & Proc. Evid. § 5036.1 (2d ed.).

² In particular, I agree with the majority 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 ostensibly bore on Gallagher’s state of mind,” Majority at 27, and that “any need to provide context as to Gallagher’s intent did not make it necessary to introduce evidence of . . . the Normans’ extreme fear, or the extensive countermeasures taken.” Majority at 29. As discussed below, I don’t agree that the “details of each of the four prior incidents,” Majority at 29, were inadmissible.

A motion in limine can be sufficient to preserve an objection to the admissibility of evidence, so long as "the trial court makes a definitive pretrial ruling that evidence is admissible[.]" Kobashigawa v. Silva, 129 Hawai'i 313, 321, 300 P.3d 579, 587 (2013). Thus, we must first determine whether the circuit court made "a definitive pretrial ruling" about the impact testimony. The circuit court did not do so here.

A ruling is definitive "when it 'leaves no question that the challenged evidence will or will not be admitted at trial.'" Id. at 329, 300 P.3d at 595 (quoting Quad City Bank & Trust v. Jim Kircher & Assocs., P.C., 804 N.W.2d 83, 90 (Iowa 2011) (alteration omitted). The key question is "what the trial court purported to do in its ruling." Id. (quoting Quad City, 804 N.W. 2d at 90). Here, the circuit court's ruling on Gallagher's motion in limine was not definitive as to the impact testimony because the motion never alerted the court to the possibility that the State would elicit such testimony from the Normans.

The parties' pleadings never discussed the impact testimony. Gallagher's Motion in Limine objecting to 404(b) evidence was extremely general: "Defendant requests an order excluding any testimonial or documentary evidence regarding alleged incidents involving the Complaining Witness and/or other

persons on May 9, 2013, August 30, 2013, and August 31, 2013, September 19, 2013[.]” A few days later, the State filed similarly-general Notices of Intent to introduce 404(b) evidence, disclosing the police report number for each prior incident. In its Notice, the State did not include any evidence about the Normans’ state of mind or the protective measures they took.

At the hearing on the defense’s motion in limine, the parties focused on Gallagher’s conduct during the prior incidents - not the impact of his conduct on the Normans. The majority contends that “[t]he State in fact expressly noted in the pretrial hearing that it intended to show ‘an escalating series of events’” that included the fact that the Normans had gotten a protective order and installed surveillance videos around their home. Majority at 41-42. Not so.

The circuit court asked the State to “elaborate specifically on [] the conduct alleged” and explain why it was admissible. Following the State’s general argument about escalating events, which the majority quotes, the State went through each prior incident explaining to the court the testimony it intended to elicit. For example:

March 24th, 2013. That was the initial incident, Your Honor. That was where our complaining witness is home; she hears something out on her front lawn; comes out; she sees - she plainly identifies the

defendant. He's out there. She doesn't know who he is. He yells at her that she's going to lose her job and all this other stuff because, apparently, they're - he believes that they're conspiring against him and hiding some sort of crime. He leaves. And that was March 24th. She calls in; reports harassment on that.

. . . .

Then on - it was May 9th, Your Honor. Again, complaining witness was Jessica Norman. She observes the defendant outside of her house again being aggressive, yelling profanities at her; claims that her family and her are CIA agents and are using space satellites to transmit LASER beams to control his brain. She reports again to the police that this is the same individual that had come by on March 24th. He leaves. She files a police report.

The State went through each of the separate incidents describing what Ms. Norman would testify to - and none of the facts included Ms. Norman's fear of Gallagher, or the Normans' protective measures, such as the surveillance cameras.

In response, the defense objected generally to evidence about what happened during the prior incidents, contending it was not relevant. Gallagher only specifically objected to testimony about his mental health, which the court agreed would be excluded. Following the parties' arguments, the circuit court ruled that defense counsel's motion in limine "will be denied in part, and granted in part. Denied as to the incidents in terms of conduct; granted in part . . . in terms of statements [about Gallagher's mental health.]" (Emphasis added).

At most, the circuit court's decision was a definitive ruling that evidence of Gallagher's prior conduct was

admissible, thereby preserving the defense's objection even in the absence of a contemporaneous objection at trial. However, the court never ruled on the admissibility of the impact testimony because it was not brought to the court's attention.

Thus, the defense's motion in limine did not preserve an objection to the impact testimony for appeal. See Craft v. Peebles, 78 Hawai'i 287, 295, 893 P.2d 138, 146 (1995) (holding motion in limine insufficient to preserve objection where "the court did not rule with certainty that the evidence concerning [a party's] criminal record and family problems would be allowed into evidence"); see also People v. Diaz, 930 N.E.2d 264, 269-70 (N.Y. 2010) (holding motion in limine did not preserve objection to testimony that "exceeded the scope of the [trial] court's ruling"); State v. Sulloway, 90 A.3d 605, 310 (N.H. 2014) (same).

2. Defense Counsel's "Running Objection" Did Not Preserve an Objection to the Impact Testimony

Even if the motion in limine was insufficient to preserve Gallagher's objection to the impact testimony, the issue might have been preserved had Gallagher timely and specifically objected during trial - but he did not do so.

"An objection must be made as soon as the ground of it is known, or could reasonably have been known to the objector[.]" 21 Charles Allen Wright, et al., Fed. Prac. &

Proc. Evid. § 5037.1 (2d ed.). Here, Gallagher should have objected as soon as the State asked Ms. Norman, "How did [the prior incidents] make you feel?" But not only did Gallagher fail to object to that question, he failed to object to Ms. Norman's answer that she was "terrified," and did not object to any of the State's follow-up questions regarding the Normans' protective measures. In fact, Gallagher never informed the trial court that the impact testimony implicated HRE 403, even when the State urged the jury to consider the impact testimony during closing arguments.

At the beginning of Ms. Norman's testimony, when the State began to elicit her statements about what happened during the prior incidents, Gallagher did object under 404(b) and asked for "a running objection under 404(b) regarding any prior incidents." However, the impact testimony was outside the scope of this "running objection."³ Accordingly, that objection failed to preserve the issue.

³ As a threshold matter, I note that the circuit court never granted Gallagher's "running objection." Trial courts have discretion over whether to grant a running objection, but the mere request for one is insufficient to preserve an objection for appeal. See Kang v. State, 393 Md. 97, 122, 899 A.2d 843, 857 (Md. 2006) (holding defendant could not rely on offer of a continuing objection; trial court had to explicitly grant a continuing objection for an issue to be preserved); cf. State v. Manewa, 115 Hawai'i 343, 347, 167 P.3d 336, 340 (2007) (noting trial court granted a running objection). Nevertheless, for the purpose of this analysis, I presume that the circuit court granted defense counsel's request for a running objection.

"A continuing objection that lacks the specificity required by Rule 103 will not preserve error." 21 Charles Allen Wright, Fed. Prac. & Proc. Evid. § 5036.4 (2d ed.). Specificity has two components: the objecting party must (1) identify the testimony being challenged and (2) state the grounds for the objection. Addison M. Bowman, Hawaii Rules of Evidence Manual § 103-2[1] at 1-7 (2016-2017 ed.). Here, Gallagher failed to satisfy the first component by not specifying the impact testimony as the subject of his objection.

Gallagher's running objection to 404(b) evidence focused on testimony about "any prior incidents," and defense counsel specifically noted that she was making the same objection raised at the hearing on Gallagher's motion in limine."⁴ Nothing in defense counsel's objection alerted the

4 Defense counsel told the court:

Judge, I would just object. I know this issue was raised at motions in limine, but I would just make an objection under 404(b). Your Honor, even assuming that these prior incidents are relevant, I believe the Court still has to determine whether there's unfair prejudice to my client and whether that's substantially - you know, or whether the need for it substantially outweighs any danger of unfair prejudice.

I would submit, you know, in this case, identification is not an issue. The prior incidents do not go to state of mind as far as knowing the amount of the damage. The facts are different, and I would submit that it would confuse the issue, mislead the jury.

And I would also submit that there's other evidence that can go towards the damages, so I would

(continued)

court to any additional problems not addressed during the prior hearing.⁵ Consequently, the circuit court's ruling only addressed evidence of "these prior incidents," without ruling on any evidence about the impact of Gallagher's conduct on the Normans. Indeed, the circuit court's limiting instruction, which, at the defense's request, was read to the jury immediately before the State elicited 404(b) testimony, addressed only Gallagher's conduct: "[Y]ou are about to hear evidence that the Defendant allegedly at another time may have engaged in other acts, wrongs, or crimes." (Emphasis added).

"It is not the judge's responsibility to sever the bad parts if some are good." 1 Kenneth S. Broun, et al., McCormick on Evidence § 52. Here, Gallagher only alerted the court that admitting the prior incidents might violate HRE 403 and 404(b) - not that he contested the admission of the Normans' reaction to

just ask for a running objection under 404(b) regarding any prior incidents.

⁵ The fact that Gallagher specifically objected to some other testimony tangentially related to what happened during the 404(b) incidents underscores the limited scope of the circuit court's ruling and demonstrates that had Gallagher objected, the circuit court may well have excluded the evidence. As noted above, at the motion in limine hearing, Gallagher specifically objected to the testimony about his mental health, and the court excluded it. Similarly, during opening statements, the State told the jury that the Normans obtained a protection order, and the defense promptly objected. The court sustained the objection and struck the State's comment. Had Gallagher made the same objection to the testimony about the Normans' fear and other protective measures, the circuit court would have had the opportunity to make a similar ruling.

Gallagher's conduct. This puts the impact testimony outside the scope of the circuit court's 404(b) ruling. "Thus even though the appellant has raised the proper ground, if the evidence he wishes to target on appeal is not the same evidence to which the objection was directed at trial, the objection is not preserved." 21 Charles Allen Wright, et al., Fed. Prac. & Proc. Evid. § 5036.6 (2d ed.).

Because Gallagher did not preserve his objection to the impact testimony, I disagree with the majority that any error in the admission of that testimony is grounds for reversal. Further, because I conclude that the only testimony Gallagher objected to - evidence of his conduct during the prior incidents - was admissible as probative of his intent and identity, Gallagher's conviction should be affirmed. Accordingly, I respectfully dissent.

/s/ Mark E. Recktenwald

