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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,  
Plaintiff-Appellee,

vs.

KOMA KEKOA TEXEIRA, JR.,  
Defendant-Appellant,

and

CLAYTON KALANI KONA,  
Defendant-Appellee.

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SCAP-18-0000632

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT  
(CAAP-18-0000632; CR. NO. 5PC161000398)

JUNE 19, 2020

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

I concur with the majority's holdings that the Circuit  
Court of the Fifth Circuit (circuit court) did not err by

admitting the defendant's confession letter and the DNA evidence. I write separately because I disagree that the circuit court erred by precluding the defendant from introducing third-party culpability evidence.

Twenty-five years ago, this court held that third-party motive evidence is relevant within the meaning of Hawai'i Rules of Evidence (HRE) Rule 401 only when the evidence has a legitimate tendency to show that a third person committed the crime, meaning that there is "some evidence linking the third person to the crime" besides motive. State v. Rabellizsa, 79 Hawai'i 347, 351, 903 P.2d 43, 47 (1995). We reasoned that, without evidence linking connecting a third person to the crime charged, evidence of third-party motive is irrelevant and collateral in nature. Id.

Here, as in this court's recent decision in State v. Kato, No. SCWC-15-0000329, at \*35 (Haw. June 18, 2020), the majority discards the requirement of a connection between the third person and the crime charged to establish relevance of third-party culpability evidence. I disagree and believe that evidence regarding a third person is only relevant under HRE Rule 401 when there is evidence connecting the third person to the crime charged. Because the defendant in this case sought to introduce evidence of third-party culpability, but his proffered

evidence failed to connect the third person to the crime charged, I would hold that the circuit court did not err in precluding the defendant from offering the evidence.

### **I. BACKGROUND**

On October 31, 2016, Jon Togioka (Togioka) was fatally shot in the head by a .22-caliber firearm near Burns Field in Hanapēpē, on the island of Kaua'i. Plaintiff-Appellee the State of Hawai'i (the State) indicted Defendant-Appellant Koma Kekoa Texeira, Jr. (Texeira) for murder in the second degree and various weapons charges in connection with Togioka's death. The State also charged Clayton Kalani Kona (Kona) with multiple offenses in the same indictment. Prior to trial, Kona entered into a plea agreement with the State, and he later entered guilty pleas to hindering prosecution in the first degree and ownership or possession of a firearm.

At Texeira's trial,<sup>1</sup> a witness testified that he was with Togioka and Texeira on October 31, 2016, and that the three of them drove out near Burns Field between 8:00 p.m. and 9:00 p.m. The witness sat in the passenger's seat of the parked car and waited while Texeira and Togioka got out of the car to talk. The witness heard a gunshot, then heard Togioka say,

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<sup>1</sup> The Honorable Randal G.B. Valenciano presided.

"[D]on't shoot me. Oh, you shot me." The witness next heard two or three more shots. The witness saw Togioka fall face-down on the ground approximately fifteen to twenty feet in front of the car. Right after hearing the gunshots, the witness saw Texeira return to the car with a gun, get into the car, and put the gun on the driver's side floor. The witness described the gun as a revolver with a long barrel.<sup>2</sup>

At trial, Texeira sought to introduce evidence that a third party committed the offense. Specifically, Texeira proffered evidence that Trish Mae Flores (Flores) (1) had a motive to harm Togioka because (a) Togioka falsely claimed to have had a sexual relationship with Flores and (b) Togioka got into a fight with Flores's friend a few days before the murder; (2) possessed .22-caliber bullets on the day of the murder and was arrested with five .22-caliber bullets two days after the murder; (3) had access to her friend Brandon Pagala's (Pagala) .22-caliber rifle; and (4) was acting strangely a day or two

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<sup>2</sup> Police later recovered a .22-caliber revolver owned by Texeira, which he hid on Kona's property after the shooting.

Police were unable to confirm that Texeira's .22-caliber revolver was the murder weapon. No shell casings were recovered from the crime scene and the murder weapon could have been either a rifle or a revolver. Police were unable to test fire Texeira's gun to obtain a test bullet because it jammed. Even if police had been able to obtain a test bullet from Texeira's .22-caliber revolver, it would have been impossible to compare it to bullet fragments recovered from Togioka's body because the fragments were "too distorted and disrupted."

after the murder.<sup>3</sup> The State argued that Texeira's proffered evidence regarding Flores was irrelevant because there was no evidence tying Flores to committing the offense or placing her at the scene.

After allowing the parties to file trial briefs and hearing arguments regarding the introduction of third-party evidence, the circuit court made its final ruling on the issue. The circuit court found that under Rabellizsa, Texeira's proffered evidence regarding Flores's alleged motive was irrelevant and collateral in nature because there was no connection between Flores and the crime. The circuit court stated:

You could argue that there's evidence of motive, but there's no link, there's no nexus to the crime charged that [Flores] was the one who pulled the trigger, that she was at the scene, that . . . it's remote, and because of that, the Court believes . . . the argument that she was the perpetrator somehow should be excluded as irrelevant and collateral in nature, similar to the finding in -- in Rabellizsa.

The jury found Texeira guilty of murder in the second degree and related weapons charges.

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<sup>3</sup> Kona's girlfriend testified that Flores and Pagala went to Kona's home at approximately 3:00 a.m. in the days after Togioka's death and that Flores "didn't seem herself . . . she was paranoid, quiet, really to herself[.]" Statements by Kona and Flores indicate that this occurred in the early morning hours of November 2, 2016 -- more than twenty-four hours after Togioka's murder.

## II. DISCUSSION

The majority holds that the circuit court erred by excluding evidence showing that Flores killed Togioka. Majority at 64. Notwithstanding the fact that the proffered evidence failed to connect Flores to the crime, the majority concludes that evidence of Flores's alleged motive and her actions in the days before and after the murder were relevant and admissible. Having untethered third-party motive evidence from the requirement that other evidence links the third person to the crime charged in Kato, the majority's decision here further erodes the criteria for establishing the relevance of third-party culpability evidence. Here, the majority allows a defendant to introduce third-party culpability evidence where the connection to the crime charged is purely speculative. I disagree with the majority's decision that the circuit court erred by excluding evidence of Flores's culpability. Evidence of third-party culpability, whether it is regarding an alleged motive or other evidence, is not relevant unless there is evidence linking the third person to the crime charged.

In Rabellizsa, 79 Hawai'i at 351, 903 P.2d at 47, this court held that third-party motive evidence is relevant within

the meaning of HRE Rule 401<sup>4</sup> only when there is "some evidence linking the third person to the crime" besides motive. While we did not adopt a rigid test for what type of connection is necessary to establish relevance, we concluded that the "'legitimate tendency' test comports with the relevance test set forth in HRE Rule 401." Id. Under this test, third-party motive evidence is admissible when there is evidence "which is not remote in time, place, or circumstance" that has a "legitimate tendency" to show that "the third person could have committed the crime." Id. at 350-51, 903 P.2d at 46-47 (quoting State v. Denny, 357 N.W.2d 12, 17 (Wis. Ct. App. 1984)). We reasoned that "[e]vidence that a third person had a motive to commit the crime, absent any evidence that links the third person to the commission of the crime, is irrelevant and collateral in nature." Id. at 351, 903 P.2d 47.

In Kato, No. SCWC-15-0000329, at \*34-35, the majority overruled the legitimate tendency test approved by this court in Rabellizsa because it misconstrued the test as creating a higher standard than HRE Rule 401. I disagreed with the majority's

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<sup>4</sup> HRE Rule 401 (2016) provides:

"Relevant 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.

decision to remove a workable test for determining the relevance of third-party motive evidence from the hands of trial courts and replace it with nothing. Kato, No. SCWC-15-0000329, at \*32 (Nakayama, J., dissenting). Our conclusion in Rabellizsa was based on the need to provide trial courts with guidance to determine when third-party culpability evidence is relevant. Rabellizsa provided a workable standard to trial courts for twenty-five years and the circuit court's application of Rabellizsa in this case bears that out.<sup>5</sup> Now, trial courts are left with nothing more than the spare language of HRE Rule 401 and their instincts to guide them in determining when third-party culpability evidence is relevant.

Here, as in Kato, the majority overlooks the fact that third-party culpability evidence is a different species than evidence of the defendant's own guilt. Whether an unrelated third person had animus towards a victim or exhibited strange behavior is relevant only when there is some connection between the third person and the crime charged. Absent some link or

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<sup>5</sup> Kato was wrongly decided. I dissented from the majority's decision in Kato and noted that the majority provided no valid justification for departing from our holding in Rabellizsa because our interpretation that a defendant must show a connection between a third person and the crime charged in order to admit evidence of the third person's motive was supported by the plain language of HRE Rule 401, the decisions of other jurisdictions, and the practical reasons for excluding evidence that is too remote or speculative. Kato, No. SCWC-15-0000329, at \*26-32 (Nakayama, J., dissenting).



nexus to the crime, evidence regarding a third person is collateral and irrelevant.

“‘Relevant 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.” HRE Rule 401 (emphasis added). Absent other evidence linking a third person to the crime charged, the fact that the third person had a motive to commit a crime is not “a fact that is of consequence to the determination[.]” Third-party motive alone is collateral and irrelevant, and thereby inadmissible pursuant to HRE Rules 401 and 402.<sup>6</sup>

Even if we do not apply the legitimate tendency test, it is generally accepted that third-party motive evidence, when offered alone, is not relevant unless there is some other evidence linking the third person to the crime charged. See, e.g., Smithart v. State, 988 P.2d 583, 586 (Alaska 1999) (third-party motive evidence is relevant and material only if the

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<sup>6</sup> HRE Rule 402 (2016) provides:

All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of [Hawai‘i], by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

defense produces other evidence directly connecting the third person with the crime); State v. Eagles, 812 A.2d 124, 128 (Conn. App. Ct. 2002) (third-party motive evidence is relevant "if other connecting evidence exists") (citing State v. Hill, 495 A.2d 699, 703 (Conn. 1985)); Winfield v. United States, 676 A.2d 1, 5 (D.C. 1996) (en banc) (concluding that third party-motive evidence is relevant only when there is a "link, connection or nexus between the proffered evidence and the crime at issue"); State v. Knox, 347 P.3d 656, 668 (Kan. 2015) ("[E]vidence of a third party's motive, on its own, will be excluded for relevance where nothing else connects the third party to the crime."); State v. Woodard, 942 N.W.2d 137, 142 (Minn. 2020) ("[E]vidence of motive alone does not have the inherent tendency to connect a third party to the commission of the crime.") (quoting Troxel v. State, 875 N.W.2d 302, 309 (Minn. 2016)); State v. Koedatich, 548 A.2d 939, 980 (N.J. 1988) (third-party motive evidence alone is insufficient without other evidence connecting the third person to the crime).

Here, Texeira sought to introduce evidence that Flores had a motive to murder Togioka. Texeira argued that Flores had "animus toward [Togioka]" because Togioka falsely claimed to have had a sexual relationship with Flores. The majority's conclusion that "evidence that Flores was angry with

Togioka . . . would tend to make it more probable that Flores had a motive to murder Togioka[]" misses the point.<sup>7</sup> Majority at

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<sup>7</sup> The majority's conclusion seems to place some weight on its assertion that Texeira proffered this evidence: "Flores, while on the phone with Kona two days before Togioka's death, made a comment about wanting to shoot Togioka[]" Majority at 54. The majority misstates the record. Texeira did not make this assertion in his Trial Memorandum regarding Flores – Texeira only stated that Kona and Flores spoke on the telephone. Nor did Texeira argue to the circuit court that Flores made this statement to Kona.

The majority cites Kona's November 6, 2016 statement to police as support for the claim that Flores told Kona that she wanted to shoot Togioka. Majority at 31. However, Kona did not explicitly tell police that Flores made such a statement. When the interviewing officer asked Kona if Flores "mention[ed] anything about wanting to shoot [Togioka,]" Kona stated that "[Flores] did say something there but I not really [sic] exact words," and that Flores was joking. Thus, the majority mischaracterizes Kona's statement as Flores telling Kona she "wanted to shoot Togioka[]" Majority at 54.

Similarly, the majority cites another witness statement alleging that Togioka owed Flores money and that Flores had previously tortured another debtor. Majority at 29. Texeira never made this assertion to the circuit court but merely attached the witness statement as an exhibit in support of his claim that Flores and Pagala possessed .22-caliber ammunition before the murder.

It is improper for the majority to rely on evidence that was only obliquely referenced in the 21 exhibits attached to Texeira's Trial Memorandum, especially when these exhibits exceeded 300 pages in length. Texeira never made these assertions below or drew the circuit court's attention to this proffered evidence when the circuit court was considering whether to admit evidence regarding Flores. Even if Kona had unequivocally told police that Flores said she wanted to shoot Togioka, by merely attaching Kona's statement to his Trial Memorandum as one of his 21 exhibits and citing the page number, Texeira would not have actually proffered the statement as evidence because he did not argue that Flores said she wanted to shoot Togioka. Instead, in Texeira's Trial Memorandum, he argued:

Also striking, is that after almost every incident with Jon Togioka, co-defendant [Kona] or someone with him immediately places a telephone call to Trish Flores or goes to see Ms. Flores. See Exhibit K, Statement of Clayton Kona taken on November 3, 2016 at 7p.m.: Pg. 5:186-190; P. 19:829-831; P. 19:853-855; P. 22:983-988; P. 23:992-993; P.23: 1021-22; P. 37:1642-1645. See also Exhibit O, Statement of Clayton Kona taken on November 6, 2016: P. 19:818; P. 20:883-885; P. 20:889- P. 21:922; P.21: 940; P. 24:1077; P.23:1093-1095; P. 29:1262-1269; P. 32:1432-1434.

(Emphasis added.) Merely stating that Kona telephoned Flores and referencing multiple page numbers cannot be construed as proffering evidence that Flores told Kona that she wanted to shoot Togioka. Moreover, Kona never explicitly

(continued . . .)

56. Flores's alleged motive is not relevant under HRE Rule 401 unless there is also evidence connecting Flores to Togioka's murder.

Aside from Flores's alleged motive, Texeira's proffered evidence fails to connect Flores to Togioka's murder. Texeira proffered that Flores (1) possessed .22-caliber bullets on the morning of the murder and two days later when she was arrested – the same caliber of bullets that were likely used to kill Togioka; (2) had access to a friend's .22-caliber rifle; and (3) went to Kona's home in the early morning hours of November 2, 2016, and was acting strangely.<sup>8</sup> The majority concludes that because this evidence has some tendency to show that Flores killed Togioka, it also makes it less probable that Texeira committed the crime and the evidence is therefore relevant under HRE Rule 401. Majority at 55-57.

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(. . . continued)

said that Flores made such a statement. Kona merely stated that "[Flores] did say something there but I not really [sic] exact words," and that Flores was joking.

<sup>8</sup> Texeira also asserted that Flores gave a fake alibi for the night of the murder. Texeira claimed that Flores told police that she went to McDonald's in Ele'ele, but when a police officer reviewed the surveillance footage for the night of October 31, 2016, it did not appear that Flores was there. However, Texeira misunderstood Flores's statement to police. Flores told police that she went to McDonald's in Ele'ele on the night of October 29 or 30, 2016, and that she was home with a friend on the night of October 31, 2016.

The majority misapprehends the fundamental difference between third-party culpability evidence and evidence of the defendant's own guilt. The very reason that most jurisdictions require a connection between the third person and the crime charged is to prevent the introduction of evidence regarding third parties that is remote, speculative, and irrelevant. See Winfield, 676 A.2d at 5 (internal citations and quotation marks omitted) ("Requiring a link, connection, or nexus between the proffered evidence and the crime at issue . . . insures the exclusion of evidence that is too remote in time and place, completely unrelated or irrelevant to the offense charged, or too speculative with respect to the third party's guilt.") "[E]vidence that simply affords a possible ground of suspicion against another person should not be admissible. Otherwise, a defendant could conceivably produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased – degenerating the proceedings into a trial of collateral issues." State v. Wilson, 864 N.W.2d 52, 73 (Wis. 2015) (Zeigler, J., concurring) (quoting Denny, 357 N.W.2d at 17).

None of Texeira's proffered evidence regarding Flores is relevant under HRE Rule 401 because Texeira did not establish any link between Flores and Togioka's murder. As with third-

party motive evidence, evidence of third-party culpability is generally only relevant when the evidence links the third person to the crime charged. See People v. Young, 445 P.3d 591, 614 (Cal. 2019) (explaining that third-party culpability evidence is relevant and admissible if it “demonstrate[s] that a reasonable doubt exists concerning [the defendant’s] guilt” and it “link[s] the third person either directly or circumstantially to the actual perpetration of the crime”) (internal citations and quotation marks omitted); State v. R.Y., No. 081706, 2020 WL 2182230, at \*9 (N.J. May 6, 2020) (“[T]he evidence a defendant seeks to admit in support of a third-party guilt defense must be capable of demonstrating some link between the [third-party] evidence and the victim or the crime. Put another way, [s]omewhere in the total circumstances there must be some thread capable of inducing reasonable men to regard the event as bearing upon the State’s case.”) (internal citations and quotation marks omitted) (alteration in original).<sup>9</sup>

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<sup>9</sup> The majority claims that the dissent improperly relies upon the standard for relevance of third-party culpability evidence from other jurisdictions, rather than the standard set forth in HRE Rule 401. Majority at 60 n.36. However, HRE Rule 401 is not unique in its language and parallels Rule 401 in other jurisdictions. Where a Hawai‘i rule is identical to the rule of other jurisdictions, the interpretations of other jurisdictions are highly persuasive. See Collins v. S. Seas Jeep Eagle, 87 Hawai‘i 86, 88, 952 P.2d 374, 376 (1997).

In addition to Flores's alleged motive, Texeira proffered the following evidence in an attempt to connect Flores to Togioka's murder. First, a witness saw Flores in possession of .22-caliber bullets the morning of Togioka's murder and when Flores and Pagala were arrested on November 2, 2016, Pagala was in possession of five .22-caliber bullets. Second, on November 2, 2016, Pagala had a .22-caliber rifle with him when Flores gave Pagala a ride home from Kekaha Harbor in Flores's vehicle. The fact that Flores – an unrelated third party who was never arrested for or charged with Togioka's murder or placed near the scene – possessed .22-caliber bullets and gave a ride to a friend carrying a .22-caliber rifle is unrelated to the crime charged and therefore irrelevant. Texeira's proffered evidence regarding the rifle and ammunition failed to connect Flores to the crime and could lead only to speculative inferences concerning her possible involvement.<sup>10</sup>

Finally, evidence was presented that Flores went to Kona's home in the early morning hours of November 2, 2016, and was acting strangely. The mere fact that Flores was "quiet" and

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<sup>10</sup> The majority cites two cases to bolster its claim that Flores's alleged possession of bullets and a rifle are relevant. Majority at 56-57 (citing People v. Brown, 697 N.Y.S.2d 892 (N.Y. App. Div. 1999) (mem.) and People v. Sheriff, 652 N.Y.S.2d 916, 917 (N.Y. App. Div. 1996) (mem.)). Even if these extrajurisdictional memorandum opinions had precedential value, neither stands for the proposition that a third person can be tied to a crime merely by possessing a weapon.

not "herself" two days after Togioka's murder does not make the fact that she killed him more or less probable. The majority cites cases from other jurisdictions to support its claim that Flores's demeanor two days after Togioka's murder makes it more probable that she killed Togioka. Majority at 57-58. However, the majority's cited authority only supports the proposition that a defendant's strange behavior is relevant under HRE Rule 401 – not that a third person's strange behavior is relevant. This demonstrates the majority's misconception that third-party culpability evidence and evidence of the defendant's own guilt are equally relevant. The majority's conclusion that Flores's demeanor two days after Togioka's murder makes it more probable that she killed Togioka has no basis in reality and is purely conjectural.<sup>11</sup>

Thus, Texeira's proffered evidence of Flores's alleged culpability in Togioka's murder is not relevant under HRE Rule 401, because Texeira failed to connect Flores to the crime charged. Flores's alleged involvement in Togioka's death is

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<sup>11</sup> Here, Flores admitted that she was an acquaintance of Togioka and that they were part of the same circle of friends. Thus, the fact that she appeared quiet – or even paranoid – after Togioka's murder is unremarkable. Under the majority's formulation, any mourner's grief would be relevant third-party culpability evidence.

However, as previously stated, the exact reason for Flores's strange behavior after Togioka's murder is irrelevant because Flores is a third person with no connection to the crime charged.



purely speculative. Thus, the circuit court properly excluded evidence regarding Flores as "irrelevant and collateral in nature[.]"

Because there was no direct or circumstantial evidence connecting Flores to the crime, I would hold that the circuit court did not err in precluding Texeira from introducing evidence of Flores's alleged culpability in Togioka's murder.

### III. CONCLUSION

For the reasons stated above, I respectfully dissent. In accordance with our decision in Rabellizsa and HRE Rule 104, I would hold that the circuit court did not err in precluding Texeira from offering evidence regarding Flores because there was no evidence tying Flores to the commission of the offense.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

