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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.

YOKO KATO,
Petitioner/Defendant-Appellant.

SCWC-15-0000329

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-15-0000329; CR. NO. 13-1-1641)

JUNE 18, 2020

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

In State v. Rabellizsa, 79 Hawai'i 347, 351, 903 P.2d 43, 47 (1995), this court concluded that third-party motive evidence is relevant within the meaning of Hawai'i Rules of Evidence (HRE) Rule 401, only when there is 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. We reasoned that evidence that a third person might have had a motive to commit a crime, offered alone, was irrelevant and collateral in nature. Id. Our interpretation was in line with the interpretations of other jurisdictions at the time, and still is.

On certiorari, the majority discards the requirement 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. The majority's departure from requiring a connection is premised on the claim that other jurisdictions have subsequently clarified or modified the holdings underlying our decision in Rabellizsa. Majority at 27-28. However, even when other jurisdictions have modified the formulation of what is necessary to show a connection between the third person and the crime, none have departed from the principle that third-party motive evidence is not relevant when offered alone. Indeed, since Rabellizsa, even more jurisdictions have adopted the requirement that there must be some evidence of a connection, link, or nexus between the third person and the crime before evidence of the third person's alleged motive is admissible.

Yet, the majority overrules Rabellizsa and holds that

"it is sufficient for relevancy considerations that the defendant has provided direct or circumstantial evidence tending to show that the third person committed the crime." Majority at 35-36. The majority's holding provides trial courts with scant practical guidance for determining when third-party motive evidence is admissible. This will allow criminal defendants to implicate a third person on the barest trace of evidence.

Accordingly, I dissent.

I. BACKGROUND

The complaining witness (CW), a twenty-seven-year-old woman, was stabbed multiple times in a dark parking lot. CW was stabbed in the abdomen, side, and in her right arm and her injuries were life-threatening. CW ran into a nearby coffee shop to get help and her attacker fled the scene.

On November 8, 2013, the State of Hawai'i (the State) charged Yoko Kato (Kato) by complaint with Attempted Murder in the Second Degree.

A. The Trial

1. The State's Witnesses

Kato's jury trial commenced on December 10, 2014.¹ CW testified through a Japanese interpreter. CW testified that she

¹ The Honorable Karen S.S. Ahn presided.

was twenty-eight years old and came to Hawai'i from Japan in 2013 to study English.

CW testified that on the night she was stabbed, she had gone to meet someone named Ai Akanishi (Akanishi). CW did not know Akanishi, who first contacted CW through the LINE application (LINE)² three days before the stabbing. Akanishi had sent CW a LINE message telling CW that she wanted to meet for a drink. CW believed Akanishi was a female based on her name and the content of the message. Akanishi told CW that she had obtained CW's LINE I.D. from unnamed mutual friends from school. CW and Akanishi agreed to meet for drinks at 9:00 p.m. on October 25, 2013, at Akanishi's boyfriend's home. Akanishi gave CW an address in Honolulu, between Waikīkī and Diamond Head.

At approximately 9:45 p.m., CW arrived by bicycle at the address that Akanishi gave her. CW saw a person sitting on the sidewalk who she described as a brown-skinned Asian man. CW could not see his face, but he was wearing long pants, a t-shirt, and a baseball cap, and she at first assumed it was Akanishi's boyfriend. CW testified that the man appeared to be Asian, medium build, and no more than ten centimeters taller than CW.

² The LINE application is a social media application that allows users to send text and photo messages to other users via the user's "LINE I.D." The Line application is similar to email, and the LINE I.D. is comparable to an email address.

The man, speaking Japanese, asked "are you [CW];"³ CW answered "yes" and asked where she could park her bicycle. The man, speaking Japanese again, said "there." CW testified that she turned around to walk her bike and park it while the man followed her and then "I got stabbed." CW was stabbed five times in her abdomen, side, and arm. After the first stab, CW "saw him holding a knife in his hand." The attacker made a noise while stabbing her that CW described as "like 'Woo,' as if a person would utter when a person is trying to do something with his force." CW described her attacker as a person with black hair that "was a bit long for a man," with no facial hair and a "brownish" neck.

CW testified that the attacker never grabbed or restrained her, so she was able to run away. As CW ran, she saw that the attacker was chasing her. CW ran to the coffee shop around the corner to get help. From there, CW was taken to the hospital.

When police detectives questioned CW in the days after the attack, CW gave Kato's name to detectives because "[Kato] is the person I could think of[]" based on the fact that CW was lured to the place where she was attacked through LINE messages,

³ CW described the speaker's Japanese as "Japanese spoken by a nonnative speaker." However, it bears noting that CW based her assessment of the attacker's Japanese language skills based solely on the four words the attacker uttered.

Kato had CW's LINE I.D.,⁴ and Kato was the ex-girlfriend of David Miller (Miller). CW had stayed with Kato for two nights – October 12th and 13th – because she needed a place to stay before CW's parents arrived for a visit from Japan.⁵ CW was dating Miller at the time she stayed with Kato, and CW believed that Miller had contacted Kato to arrange for CW to stay with her. During CW's stay with Kato, the two women talked about various things: school, food, and Kato's relationship and breakup with Miller. CW testified that she never told Kato that she was dating Miller.

When asked to describe Miller's appearance, CW testified that Miller is Caucasian and about thirty centimeters taller than CW, so she had to look up to Miller. CW and Miller usually conversed in English, but they occasionally spoke Japanese and Miller's Japanese was "very good." CW began dating

⁴ CW testified that Kato was one of only two people who had CW's LINE I.D., and that without her LINE I.D., it was not possible to contact CW through the LINE application. CW's usual practice was to never give out her LINE I.D., but to enter it into a friend's phone herself, thus keeping her LINE I.D. secure. CW had only given her LINE I.D. to one friend (Miho) who, with CW's permission, gave it to Kato. Kato contacted CW in August 2013 regarding Miller's bicycle, because Kato borrowed the bicycle from Miller and left her bicycle lock on the bicycle, but CW was borrowing it at the time.

Other than the messages from Akanishi, CW was never contacted through LINE by anyone that she did not personally know. After the stabbing, CW never received another message from Akanishi.

⁵ CW had no permanent address in Hawai'i. When she first arrived in Hawai'i in April 2013, she stayed with a host family for three months. After staying with the host family, CW stayed with Miller for one month, and then with various friends.

Miller in August 2013, but the two of them had limited contact after October 13, 2013, and then broke up. CW stated that Miller did not have a LINE account, a computer, or a smart phone when she knew him. When asked if Miller stabbed her, CW said "[n]o, I don't think so[,] " because Miller's "physical shape is completely different" and, to her knowledge, Miller had no reason to want to stab her.

On cross-examination, CW admitted that on October 27, 2013, she told a detective that her attacker was a man. However, CW testified that on October 28, 2013, she told the detective it could have been a female because the attacker was relatively small. CW testified that Kato was not her attacker. When asked four times if she ever told the police officers who questioned her at the coffee shop or the hospital that her attacker was a Caucasian man, CW answered four times: "I didn't say that."⁶

Emiko Morie (Morie) testified⁷ that she lived across the street from where the stabbing occurred. On the night of the stabbing, Morie was in her garage smoking a cigarette when

⁶ CW testified that she was speaking English when questioned at the coffee shop and Japanese and English at the hospital. A coffee shop employee also testified that when CW came in seeking help, CW told her that the attacker was a man. Given that CW was not a native English speaker, it seems plausible that the police officers and coffee shop employee might have misunderstood her.

⁷ Morie is originally from Japan and testified through a Japanese interpreter.

she saw "a boy [who] looked exactly like [her] son" across the street. Morie described the "boy" as having the same body shape as her twenty-two-year-old son. Morie explained that "[the boy's] physical silhouette or shape was exactly like my son[]" because he had "small buttock" and was "skinny."

Morie could not see his face because it was dark. Morie saw a girl arrive on a bicycle and talk to the boy, and then she saw them go into a "darker bushed area." Morie went into her garage, but then she heard a girl's scream, so she moved towards the sidewalk in order to see the street. Morie saw the girl run into the street with the boy chasing her. The boy almost reached the girl, but then he fell down.⁸ Morie went to the street looking for the girl, but she could not see her. As she walked back, Morie saw the boy reappear, get on the girl's bike, and ride away.

Morie noticed a flip-style cell phone with a charm on it on the road where the boy fell down. Morie opened the phone and called "the person who was on the history of recent calls." Morie recalled that the name in the call history was David,

⁸ Another witness who was in the area around the time of the stabbing also testified that he heard a woman scream, then saw a girl running down the street with "a person" chasing after her. The witness saw the person, who was about 5'6" to 5'8" with medium build, fall down "onto their stomach." The witness described the person as a man based on the person's build, but saw no other distinguishing male characteristics and admitted that the person could have been a woman.

testifying that "[his] name appeared many times. And a man answered." Morie told the man, in English, that she found the phone, and he replied that he knew who the phone belonged to and would come pick it up in thirty minutes.

Morie left to pick up her twenty-two-year-old son from work and returned home about twenty minutes later. When she arrived, Morie was unable to get to her house because the police were there and had blocked off the area with yellow tape. When Morie realized that "something happened," she decided that she should not return the phone to its owner, but should give it to the police. Morie told a police officer how she found the phone on the ground, in the spot where a boy chasing a girl fell down. At that point, a woman approached Morie and told her that "there is a man over there by the bush crying" and saying the phone belonged to him, so "[the woman] should take the phone to that person." Instead of letting the woman take the phone, Morie gave it to a police officer. According to Morie, the woman seemed very nervous and concerned about the phone. Morie told the police officer the woman's story about the man crying about the lost phone, which Morie described as "a little fishy," but when police officers went to look near the bushes, they found no one there. Although Morie gave the phone to a police officer, she later saw the woman holding the phone, so she took the phone

away from the woman. Morie opened the phone again and saw that the call history was deleted. Morie explained what happened to a different police officer and gave the phone to him.⁹

Morie described the woman as Japanese, middle-aged, "[n]ot too skinny, not too fat[,] and a "little on the darker side." Morie identified Kato as the woman who had tried to take the phone from her.

Honolulu Police Department (HPD) Officer William Ellis (Officer Ellis) testified that he arrived at the coffee shop while CW was being treated by paramedics. While Officer Ellis secured the scene with crime scene tape, he was approached by a woman who handed him a flip-style cell phone with a beaded charm. Officer Ellis held onto the phone and was later approached by a second woman, who told him that she lost her phone earlier that evening at about 5:00 p.m., but offered no explanation for how she had lost it. Officer Ellis described the woman as approximately 5'7", Japanese, with "pimple-ish features on her face" and "brownish-blackish wavy hair." Because the woman described the phone and was able to unlock it, Officer Ellis

⁹ Morie's twenty-two-year-old son Hayato Yoshida (Yoshida) testified that he helped his mother speak to the police officers that night because she speaks mainly Japanese. Yoshida testified that Morie showed a police officer the phone and that a middle-aged Japanese woman, who was about the same height as Yoshida, approached to say the phone belonged to someone else and tried to take the phone away. Yoshida identified Kato as the woman who took the phone. Yoshida is 5'6" tall.

gave it to her. The woman told Officer Ellis that (1) her name was Yuri Mochizuki; (2) she lived at 1710 Young Street, Apartment 105; and (3) her date of birth was March 14, 1969.¹⁰ Officer Ellis identified State's Exhibit 54 as the phone.

Officer Ellis testified that after he gave the woman the cell phone, she told him that she had to use the restroom. Officer Ellis suggested to the woman that there might be a restroom in the Aloha gas station¹¹ nearby and asked her to return after she used it. The woman left the area and did not return.

Mochizuki testified that she was Kato's roommate in September and October of 2013. During that time, Kato told Mochizuki that she still had feelings for her ex-boyfriend, whom Kato frequently talked about. Mochizuki stated that while CW stayed with Kato, Kato, her ex-boyfriend, and CW had dinner together one night at their apartment.

Mochizuki testified that, on the night of the stabbing, Kato and her ex-boyfriend were drinking beer at Kato and

¹⁰ Although Officer Ellis wrote down the name "Yuri Mochizuki," Yui Mochizuki (Mochizuki) was Kato's roommate at the time of the stabbing and 1710 Young Street, Apartment 105 was their address. March 14, 1969 is Kato's date of birth.

¹¹ State's witness Christopher Lam, who worked at the Aloha gas station, later identified Kato in court as the woman who came into the gas station between 10 p.m. and 11 p.m. on the night of the stabbing and asked to use the restroom.

Mochizuki's apartment when Mochizuki left to go to a party about 7:30 p.m. When Mochizuki came home from the party at 1:30 a.m., Kato told Mochizuki that she lost her cell phone. Kato told Mochizuki that earlier that day, Kato found a letter written in Japanese with \$60 on their front door. Mochizuki did not see the letter, but Kato told her the letter instructed Kato to take the money, buy something, and bicycle to a location near a specific coffee shop in the Diamond Head area at 9:00 p.m. Kato told Mochizuki that she followed the instructions in the letter, and that when she arrived at the specified location, Kato was pushed, dropped her phone, heard a scream, and saw many police officers arrive. Kato told Mochizuki that she suspected that her ex-boyfriend might have written the letter, but that the Japanese was too good for him to have written it.

HPD Detective Roy Nakama (Det. Nakama) testified that he was assigned to investigate the case. Det. Nakama initially was looking for a male suspect with a slim build, who was between 5'5" and 5'9" tall, based on the police reports that he reviewed. However, Kato became the focus of the investigation after Det. Nakama interviewed CW. Det. Nakama began to focus on Kato as a suspect for the following reasons: (1) "[CW] stated, when she was asked who might have done this to her . . . [it] might have been her ex-boyfriend's girlfriend[;]" (2) CW told

Det. Nakama that Kato had access to her LINE I.D.; (3) the surveillance video at the Aloha gas station placed Kato near the scene immediately after the stabbing; (4) the attacker fell while chasing CW and another officer observed that Kato had a knee abrasion;¹² and (5) Kato retrieved the cell phone that was found at the scene but gave Officer Ellis the name of her roommate.

Det. Nakama stated that he recovered an iPod and a flip-type cell phone¹³ at Kato's apartment, but that he never recovered the knife. Because CW described the knife as having a serrated edge on top, Det. Nakama checked stores near Kato's home and school that sold knives similar to the one CW described. In one of the stores he visited, the Security Equipment Corporation¹⁴ on Young Street, Det. Nakama saw knives that came

¹² Det. Nakama was referring to a photograph taken by another detective who assisted in the investigation. This other detective surveilled Kato after the stabbing and testified that he took a photo of her with a bandage visible on her right knee.

¹³ State's Exhibit 54 was a photograph of Kato's cell phone after it was recovered from her apartment.

¹⁴ The State called three witnesses who worked at Security Equipment Corporation (collectively "knife store employees") around the time of the stabbing. The first knife store employee identified Kato as visiting the store before Halloween in 2013 looking for a knife, but he could not remember whether Kato purchased anything.

The second knife store employee recalled seeing an Asian woman in her thirties or forties in the store in October or November of 2013, who spent about thirty minutes looking at small or medium-sized Kershaw brand pocket knives. This employee was also unable to recall whether the woman purchased anything.

The third knife store employee met with detectives after the stabbing

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closest to CW's description. Det. Nakama testified that he obtained a list of knives sold by Security Equipment Corporation, during the month of the stabbing, which matched the description provided by CW.

Det. Nakama described Kato as about 5'7", with a slim build and tan skin. Det. Nakama stated that Kato's build matched Morie's description of the suspect, who Morie said looked like her son. When Det. Nakama spoke to Morie's son, he noticed Morie's son was about 5'6" or 5'7", with a slim build. During one of Det. Nakama's interviews with CW, without prompting, CW told him that "on second thought," the attacker could have been a woman.

Det. Nakama testified that he attempted to locate the person identifying herself as "Akanishi" by contacting her through her school, sending her an email message, and checking to see if anyone named Ai Akanishi had ever obtained a Hawai'i State identification card or driver's license.¹⁵ However, none of these attempts were successful and Det. Nakama found that the

and was able to identify Kato from a photo lineup as the woman who was in the store in the later part of October 2013 and spent about thirty minutes looking at knives before purchasing one with cash. Based on inventory records, this employee determined that a serrated knife was purchased with cash on October 16, 2013, but he could not say for certain that Kato bought that knife.

¹⁵ A special agent with Homeland Security Investigations testified that, at Det. Nakama's request, he conducted an unfruitful search to determine whether anyone named Ai Akanishi entered the United States from any country since the late 1990s.

school Akanishi claimed to attend did not exist.

On cross-examination, Det. Nakama testified that he had interviewed Miller as a witness, but that Miller was not a suspect.

HPD Detective Taro Nakamura (Det. Nakamura) testified that he assisted in the investigation. At Det. Nakama's request, Det. Nakamura emailed CW photos of two knives, one serrated and one smooth, and CW selected the serrated knife. CW told Det. Nakamura, "she couldn't be sure, but it looked like the knife that was used on October the 25th."

Kristen Hamamoto, a digital forensics examiner employed by HPD, testified that she examined Kato's Apple iPod, which is similar to an Apple iPhone, except that it does not have cellular capabilities. Hamamoto found that the iPod had been used to communicate with CW using the LINE app, and that

there was a LINE user creation of - by the name of Ai Akanishi on a specific date. October 28, 2013. At 1958 hours.

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Q: Thank you. Now, what does that mean, a user was created on October 28th?

A: Not necessarily that the user was created, but that entry was created. So it would be hard to say. It could be both, or neither. Or had to be one, obviously. But I'm not sure which one that was.

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Q: So what - would it be safe to say then that you're not saying that the user I.D. was created on that day. You're just saying that something relative to that name, Ai Akanishi, was created in the LINE

App.

A: On that particular device. It's possible to, you know, have your [LINE] account on multiple devices.

Hamamoto also found "a search hit for the term Akanishi" in the email folder and the SMS folder, which indicated that there was recent messaging either to or from the Akanishi email address¹⁶ on the iPod.

2. The Defense

The defense called Miller as an adverse witness.¹⁷

Miller began to testify about his relationship with CW, but the State objected based on relevance when defense counsel asked Miller whether he was "aware if [CW] was dating other men[.]" At the bench, defense counsel argued that he should be permitted to elicit testimony of Miller's motive to harm CW. The State argued that, under State v. Rabellizsa, 79 Hawai'i 347, 903 P.2d

¹⁶ The contact information for Ai Akanishi included the number 440314, and an email address. The State later noted that the number 440314 is relevant because Kato was 44 years old at the time of the stabbing and her date of birth is March 14.

¹⁷ Prior to trial, Kato filed a notice of intent to introduce evidence that Miller (1) physically abused Kato in May 2013; (2) was arrested for abuse of a family or household member after an incident with Kato on June 24, 2013; and (3) forced Kato to write a letter recanting her abuse allegations. The circuit court conducted a pretrial hearing, pursuant to HRE Rule 104, to determine whether defense counsel would be allowed to question Miller regarding these alleged incidents. The defense argued that this evidence was relevant to show that Miller had a motive to "set up" Kato and that Miller was involved with the stabbing. The defense planned to adduce testimony that, after Miller was arrested for the earlier incidents, Miller told Kato that "she ruined his life" and threatened to get revenge against Kato. The circuit court took the matter under advisement.

The charges against Miller stemming from the incidents with Kato were lowered to harassment and later dismissed without prejudice.

43 (1995), defense counsel could not bring up Miller's motive because there was no "nexus" connecting Miller to the crime. Defense counsel argued that he would establish through Kato's testimony that Miller was upset that CW was dating other men and that Miller told Kato that he "went through" CW's phone and saw the names of other men. The circuit court ruled that the defense could not attempt to elicit motive testimony from Miller because there was "no nexus" to the crime, but that defense counsel could ask Miller if he had stabbed CW.

Defense counsel next asked Miller, "[w]hile you were dating [CW], you ever see her with other men?" Miller's court-appointed Fifth Amendment counsel¹⁸ signaled to Miller that he

¹⁸ Miller was appointed Fifth Amendment counsel because the State chose not to call Miller as a witness and declined to offer him immunity from prosecution. The prosecution informed Kato on December 9, 2014, that Fifth Amendment counsel was being appointed for Miller. The State averred to the circuit court that Miller still faced potential prosecution for temporary restraining order (TRO) violations and the harassment charge which was dismissed without prejudice.

The circuit court held a Rule 104 hearing on December 15, 2014, to determine whether Miller would assert his Fifth Amendment privilege with respect to certain lines of questioning. At the hearing, Miller asserted his Fifth Amendment privilege on all questions about his arrest for abuse of a family or household member, any questions about contact that he had with Kato between June 26, 2013, and December 23, 2013, the time during which the TRO was pending, and any questions about his whereabouts on the night of the stabbing.

At the Rule 104 hearing, Miller testified, *inter alia*, that (1) he dated CW from late August 2013 until October 18, 2013, when she stopped contacting him; (2) Miller loved CW and wanted to marry her, but they never discussed marriage; (3) Miller had no knowledge of her dating other men during their relationship or after; (4) the reason CW had stopped staying with him was because his landlord refused double occupancy; (5) Miller is 5'10" in height; (6) Miller carries a knife for work that has a four-inch blade, which he described as "one of those safety knives that breaks the car window, cuts the seat belt, quick release[;]" and (7) Miller had never used

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should ask for a break and not respond. Outside of the jury's presence, Miller's counsel explained that he advised Miller not to answer the question. Miller's counsel argued that, because the defense was trying to "point the finger to [Miller]," Miller was entitled to assert his Fifth Amendment privilege to questions that "would arguably give [Miller] motive to assault [CW]." Defense counsel argued that Miller had answered those questions at the earlier Rule 104¹⁹ hearing without asserting his Fifth Amendment privilege.

The circuit court excused the jury and conducted a second Rule 104 hearing to determine whether defense counsel could question Miller about his motive to harm CW. Defense counsel argued that he should be permitted to ask Miller about statements that Miller allegedly made to Kato about seeing CW with other men. The circuit court stated that, under Rabellizsa, "motive is not really relevant, because you can't point the finger at somebody else." The circuit court observed that "there's really nothing to tie [Miller] to the stabbing" because "nobody saw him near the scene[,] [n]obody says it was a Caucasian[,] and Miller is 5'10" tall. Defense counsel argued that CW told two police officers that the suspect was a

or seen the LINE application.

¹⁹ See supra n.18 for a summary of Miller's testimony at the first Rule 104 hearing.

Caucasian man and that "perception of height" was an issue. When asked if there was any evidence other than motive that provided a nexus between Miller and the crime, defense counsel stated that the defense planned to elicit testimony that Miller told Kato on October 23, 2013, that he (1) found evidence that CW was dating other men; (2) went through CW's cell phone and saw phone numbers of numerous men; and (3) believed CW was having sex with other men and was unhappy about it. The circuit court stated that these were all evidence of motive and ruled that because there was no nexus linking Miller to the crime, under Rabellizsa, defense counsel was not permitted to introduce evidence of Miller's motive.

The circuit court permitted Miller to assert his Fifth Amendment privilege on "motive related questions." After the hearing adjourned, defense counsel argued that Miller's assertion of his Fifth Amendment privilege harmed the defense and that the defense would not have called Miller as a witness if it had known Miller would assert his Fifth Amendment privilege to questions about his relationship with CW. The circuit court stated that it "assume[d] that virtually all of this information that he took the Fifth for can come out through [Kato]," who had already indicated that she planned to testify. Defense counsel argued that much of Kato's testimony might be

excluded as hearsay but was unable to tell the circuit court which specific statements he was concerned about. The circuit court offered to strike Miller's testimony.

At Kato's request, Miller's testimony and appearance were stricken when court reconvened the following day.

Kato exercised her right not to testify.

B. Jury Instructions

During the settling of jury instructions, the circuit court stated on the record that after taking a close look at Rabellizsa and reviewing its notes, the circuit court could not find any evidence, other than a possible motive, tying Miller to the crime "that is not remote in time, place or circumstances."²⁰ Accordingly, the circuit court ruled that Kato could not argue in closing that Miller committed the crime. However, the defense could argue generally that someone other than Kato was the attacker – just not Miller specifically.

The circuit court gave the jury written instructions on Attempted Murder in the Second Degree, the offense with which Kato was charged. The jury was also instructed on the lesser included offenses of Assault in the First Degree, Assault in the

²⁰ Prior to closing arguments, the State asked the circuit court to confirm that the defense was precluded from "arguing motive and trying to pin this case on Mr. Miller" during closing arguments. The circuit court took the matter under advisement, saying that it wanted to look at Rabellizsa again.

Second Degree, and Reckless Endangering in the Second Degree (reckless endangering).

The reckless endangering instruction stated,

If, and only if, you find the Defendant not guilty of the included offense of Assault in the Second Degree (reckless serious bodily injury), or you are unable to reach a unanimous verdict as to this offense, then you must consider whether Defendant is guilty or not guilty of the included offense of Reckless Endangering in the Second Degree.

A person commits the offense of Reckless Endangering in the Second Degree if she engages in conduct which recklessly places another person in danger of death or serious bodily injury.

There are two material elements of the offense of Reckless Endangering in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt.

These two elements are:

1. That, on or about October 25, 2013, in the City and County of Honolulu, State of Hawai'i, the Defendant engaged in conduct which recklessly placed [CW] in danger of death or serious bodily injury; and
2. That the Defendant did so intentionally, knowingly, or recklessly.

Neither party requested an accomplice liability instruction, nor was one given.

C. Jury Deliberations and Verdict

During jury deliberations, the jury asked the circuit court two questions. First, the jury asked "[c]an we consider whether someone else aided [Kato]?" The circuit court answered, "[d]uring this trial, you received all of the evidence which you may consider to decide this case. You must follow all of the Court's instructions to you."

The second jury communication asked:

After deliberating yesterday afternoon + all morning, we are still hung almost 50/50. One major point of confusion is how we interpret the legalese of the charge itself on page 23 of our instructions.²¹ Some of us feel that [Kato] is not guilty because there is reasonable doubt whether [Kato] actually held the knife and stabbed [CW]. Others feel that there is proof beyond a reasonable doubt that [Kato] took actions to lead [CW] to Kaunaoa St where someone was waiting to stab [CW].

Our question is, in layman's terms, does the charge include [Kato] intentionally conspiring to have [CW] stabbed without actually being the stabber?

The circuit court answered, "[n]o." Twelve minutes later, the jury informed the circuit court that it had reached a verdict. The jury found Kato guilty of reckless endangering.

II. DISCUSSION

Third-party motive evidence is irrelevant unless there is some evidence connecting the third person to the commission of the offense. The majority misconstrues Rabellizsa as creating a heightened standard for third-party motive evidence beyond what the Hawai'i Rules of Evidence require. See Majority at 40 n.29. However, to say that Rabellizsa created a heightened standard is a misinterpretation of the case. In Rabellizsa, this court interpreted when third-party motive evidence is relevant evidence, within the meaning of HRE Rule 401,²² to assist trial courts in determining admissibility. Here,

²¹ The jury question referred to page 23, which provided the instructions for the offense of Attempted Murder in the Second Degree.

²² HRE Rule 401 provides that "[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

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the circuit court did not err in precluding Kato from offering evidence that Miller might have had a motive to commit the crime, because absent other evidence connecting Miller to the crime, his motive was not relevant.

A. Rabellizsa did not create an evidence rule beyond what the HRE requires but interpreted when third-party motive evidence is relevant and admissible.

In Rabellizsa, 79 Hawai'i at 350, 903 P.2d at 46, this court considered the question of when evidence of a third party's motive to commit a crime is relevant within the meaning of HRE Rules 401 and 402.²³ Because it was a matter of first impression, this court looked at other jurisdictions for guidance on when third-party motive evidence is relevant, and hence, admissible. Id. We observed that in a number of jurisdictions, evidence that a third-party had a motive to commit a crime was not relevant when offered by itself. Id. Rather, each of these jurisdictions held that third-party motive evidence is relevant only when something more²⁴ is presented as

without the evidence." (Emphasis added.)

²³ HRE Rule 402 provides that "[a]ll 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."

²⁴ Courts refer to the necessary relationship between the third person and the crime charged as either a nexus, clear link, or connection. See infra Part II(B).

evidence. See id. (citing People v. Hall, 718 P.2d 99, 104 (Cal. 1986) (requiring "direct or circumstantial evidence linking the third person to the actual perpetration of the crime."); Winfield v. United States (Winfield I), 652 A.2d 608, 612-13 (D.C. 1994) (holding that third-party motive evidence is deemed relevant and admissible only when there is a clear link or nexus connecting the third-party to the crime charged); Spence v. State, 795 S.W.2d 743, 754-55 (Tex. Crim. App. 1990) (disallowing third-party motive evidence unless the defendant can connect the third-party to the crime); State v. Denny, 357 N.W.2d 12, 17 (Wis. Ct. App. 1984) (allowing third-party motive evidence when there is a legitimate tendency to show that "the third person could have committed the crime[,]" meaning there is some evidence directly connecting the third person to the crime charged "which is not remote in time, place or circumstances[.]") (internal quotation marks omitted)).

Thus, we reached the conclusion that "there must be some evidence linking the third person to the crime in order to admit evidence of the third person's motive." Rabellizsa, 79 Hawai'i at 351, 903 P.2d at 47. Although the Rabellizsa court noted that Denny's "legitimate tendency" test comported with HRE Rule 401's standard for relevant evidence, we did not apply any rigid formulation of that test. Id. Instead, we considered

whether there was any evidence linking the third person to the crime and concluded that because no such evidence existed in the record, "[e]vidence that a third person had a motive to commit the crime . . . is irrelevant and collateral in nature." Id.

B. There is no valid justification for departing from our requirement that evidence besides motive connect the third person to the crime charged.

Our holding in Rabellizsa regarding third-party motive evidence is still supported by the plain text of HRE Rule 401, the decisions of other jurisdictions, and practical reasons for excluding evidence that is too remote or speculative. Simply put, nothing has changed since we decided Rabellizsa that justifies departing from the requirement that a third person must be connected to the crime charged by more than a possible motive.

A third person's alleged motive to commit the crime is not relevant within the meaning of HRE Rule 401 absent evidence connecting the third person to the crime. "'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." Haw. R. Evid. 401 (emphasis added). Thus, evidence is only relevant when it tends to prove or disprove a fact that is of consequence. By its very nature, whether a third person

might have had a motive to commit a crime is not a "fact that is of consequence to the determination" unless there is some other evidence linking the third person to the crime. See Haw. R. Evid. 401. Third-party motive evidence alone is irrelevant, and thereby inadmissible pursuant to HRE Rule 402.²⁵ Accordingly, Rabellizsa merely interpreted when third-party motive evidence is relevant evidence under HRE Rule 401. 79 Hawai'i at 351, 903 P.2d at 47.

The majority justifies overruling Rabellizsa based on the claim that since it was decided, "almost all of the decisions underlying our holding in Rabellizsa have been clarified or modified by subsequent caselaw in those jurisdictions." Majority at 27-28. This reasoning is disingenuous and ignores the fact that since our holding in Rabellizsa, numerous jurisdictions have concluded that third-party motive is relevant only when there is additional evidence connecting the third person to the crime. See Smithart v. State, 988 P.2d 583, 586 (Alaska 1999) (third-party motive evidence is relevant and material only if the defense produces other evidence directly connecting the third person with the crime charged); State v. Eagles, 812 A.2d 124, 128 (Conn. App. Ct. 2002) (citing State v. Hill, 495 A.2d 699, 703 (Conn. 1985)

²⁵ See supra n.23 for the text of HRE Rule 402.

(third-party motive evidence is relevant "if other connecting evidence exists")); 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)). Thus, Rabellizsa's holding that third-party motive evidence is relevant within the meaning of HRE Rule 401 only when there is "some evidence linking the third person to the crime" is in line with the interpretations of numerous other jurisdictions. See Rabellizsa, 79 Hawai'i at 351, 903 P.2d at 47.

In regard to the fact that some decisions underlying our holding in Rabellizsa have subsequently been "clarified or modified," Majority at 27, none of the cited jurisdictions have departed from the principle that third-party motive evidence is not relevant when offered alone.

For instance, when Winfield was reheard en banc, the D.C. Court of Appeals adopted the "reasonable possibility" standard, holding that third party-motive evidence is relevant when there is a "link, connection or nexus between the proffered evidence and the crime at issue." Winfield v. United States

(Winfield II), 676 A.2d 1, 5 (D.C. 1996) (en banc) (internal quotation marks and citation omitted). Moreover, the Winfield II court reaffirmed²⁶ “that a defendant’s proffer of evidence that other individuals had even stronger motives to murder the victim than the accused [is] insufficient, without more, to establish the [required] link to the offense charged.” Id. (quoting Winfield I, 652 A.2d at 612).

Similarly, when the California Supreme Court changed its articulation of what kind of evidence is required before third-party motive evidence is deemed relevant, it did not throw open the floodgates to admit all evidence that a third person might have a motive. Rather, third-party evidence must be “capable of raising a reasonable doubt of defendant’s guilt” to be relevant. Hall, 718 P.2d at 104. The California Supreme Court stated:

At the same time, we do not require that any evidence, however remote, must be admitted to show a third party’s possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant’s guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.

Id. (emphasis added). Thus, while the California Supreme Court rejected a heightened standard for the admission of third-party

²⁶ Winfield II reaffirmed the holding of Beale v. United States, 465 A.2d 796, 803 (D.C. 1983), cert. denied, 465 U.S. 1030 (1984), as summarized in Winfield I. Winfield II, 676 A.2d at 5.

evidence, it still requires something more than motive alone – it requires evidence linking the third person to the crime. See id.

After our decision in Rabellizsa, the Wisconsin Supreme Court revisited the legitimate tendency test and explicitly reaffirmed Denny:

We ratified the Denny test in [State v. Knapp, 666 N.W.2d 881, 918-19 (Wis. 2003)], noting the constitutional underpinnings of the standard in United States Supreme Court precedent. Indeed, since Knapp, the Supreme Court has gone on to cite the Denny case with approval. See Holmes v. South Carolina, 547 U.S. 319, 327-28 n. *, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). We now reaffirm that the Denny test is the correct and constitutionally proper test for circuit courts to apply when determining the admissibility of third-party perpetrator evidence.

State v. Wilson, 864 N.W.2d 52, 64 (Wis. 2015) (internal citation omitted). The Wisconsin Supreme Court provided additional guidance on how to apply the legitimate tendency test, explaining that it requires a court to consider three prongs before admitting third-party culpability evidence: motive, opportunity, and a direct connection between the third person and the crime. Id. at 64-65. In regard to a direct connection, Wisconsin courts are to consider whether there is “evidence that the alleged third-party perpetrator actually committed the crime, directly or indirectly[.] . . . Logically, direct connection evidence should firm up the defendant’s theory of the crime and

take it beyond mere speculation.”²⁷ Id. (emphasis added).

Requiring a connection between a third person and the crime charged before motive evidence is deemed relevant serves two important purposes. First, it excludes evidence that is purely speculative in nature. Requiring a link, connection, or nexus between the proffered evidence and the crime charged “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

²⁷ The majority contends that the Wisconsin Supreme Court has “curtailed” the legitimate tendency test in other contexts. Majority at 32. The majority cites State v. Richardson, 563 N.W.2d 899, 903 (Wis. 1997), which held that the legitimate tendency test does not apply to the introduction of frame-up evidence. According to the majority, Richardson would apply in Kato’s case because “Kato’s defense was that Miller committed the crime and framed her by luring her to the crime scene by the note left at her door.” Majority at 33 n.24. Notwithstanding the fact that Wisconsin caselaw is merely persuasive authority, Richardson would not apply in this case because the evidence that Kato was precluded from introducing was regarding Miller’s alleged motive. Kato was not precluded from introducing testimony about the note she claimed to receive or even the note itself, and in fact did adduce testimony about the note through Mochizuki.

The majority also cites Michael R.B. v. State, 499 N.W.2d 641, 646 (Wis. 1993) where, prior to Wilson, the Wisconsin Supreme Court stated that proffered evidence regarding a third person must “connect that person to the crime, either directly or inferentially.” Majority at 32-33. The majority’s emphasis on the word “inferentially” ignores the preceding sentence in Michael R.B., which states that the proffered evidence “must do more than simply afford [] a possible ground of suspicion against another person.” Id. While an inferential connection is permissible, a speculative connection is not, as the Wilson court later explicitly stated. See Wilson, 864 N.W.2d at 64-65 (“[D]irect connection evidence should firm up the defendant’s theory of the crime and take it beyond mere speculation.”) (emphasis added).

The majority’s reliance on the Wisconsin Supreme Court’s interpretations regarding relevancy of third-party culpability evidence is surprising, given that the general rule in that jurisdiction is that third-party culpability evidence is inadmissible unless there is a “direct connection between the third party and the perpetration of the crime. See id. at 67.

guilt.” Winfield II, 676 A.2d at 5 (internal quotation marks and citation omitted). Second, it allows the factfinder to focus on issues that are actually relevant and not collateral. “[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.” Wilson, 864 N.W.2d at 73 (Zeigler, J., concurring) (quoting Denny, 357 N.W.2d at 17).

The majority overrules Rabellizsa’s interpretation that third-party motive evidence is relevant, within the meaning of HRE Rule 401, only when there is 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. See 79 Hawai‘i at 351, 903 P.2d at 47. However, the majority offers little guidance to trial courts other than HRE Rule 401 itself. Majority at 34-36. Under the majority’s new standard for relevancy of third-party culpability evidence, the defendant need not show any direct link between the third person and the crime charged. Majority at 35. Even worse, the majority states that “it is sufficient for relevancy considerations that the defendant has provided direct or

circumstantial evidence tending to show that the third person committed the crime." Majority at 35-36 (emphasis added). Arguably, any piece of evidence could meet this flimsy standard of circumstantial evidence "tending to show that [a] third person committed the crime." See Majority at 36. As a result, a defendant may be able to implicate scores of other persons with a possible motive to commit the crime. See Wilson, 864 N.W.2d at 73 (Zeigler, J., concurring). The majority leaves trial courts with no practical guidance to determine when third-party motive evidence is inadmissible, which will undoubtedly lead to confusion of the issues for jury.

Thus, our holding in Rabellizsa is still squarely supported by the definition of relevant evidence in HRE Rule 401,²⁸ the interpretations of other jurisdictions that something more than third-party motive evidence alone is required to establish relevancy, and sound reasons for requiring a connection between the third person and the crime charged.

C. The circuit court did not err in precluding Kato from offering evidence that a third person might have had a motive to commit the crime.

In this case, there was no evidence connecting Miller to the crime charged and the circuit court properly excluded

²⁸ See supra n.22 for the text of HRE Rule 401.

Kato from offering evidence that Miller might have had a motive to commit the crime. As the circuit court observed, no witness saw Miller near the scene or testified that the suspect was Caucasian, and Miller, at 5'10", is much taller than the suspect.²⁹ The mere fact that Miller is a non-native Japanese speaker who carries a safety knife for work³⁰ does not tie him to

²⁹ The majority states that Kato's proffered evidence "had a tendency" to connect Miller to the crime "either directly or circumstantially[.]" Majority at 37. To the extent that the defense connected Miller to the crime, it was only by Kato's proffered evidence regarding Miller's alleged motive rather than other evidence that was presented.

No witness was able to identify any distinctly male characteristics, such as facial hair or an Adam's apple. CW initially told police that her attacker was a man, based solely on body type. CW later told Det. Nakama, without prompting, that it could have been a woman. Morie described the suspect as a "boy" based on the fact that the suspect's build was similar to her son's, who has "small buttock" and is "skinny." The other eyewitness also described the suspect as a man based on build and admitted that it could have been a woman.

No witness who saw the suspect ever said that the attacker was Caucasian and CW emphatically denied ever saying that her attacker was a Caucasian man. The fact that a police officer with no firsthand knowledge thought he heard CW say in English that it was a Caucasian man is of little value, given that English is not her native language. CW described the attacker as Asian with brown skin but described Miller as "white."

CW testified that the attacker was no more than ten centimeters taller than her, and that CW herself is 157 centimeters. By CW's own estimate, then, her attacker was about 5'5" tall. See Office of Weights and Measures, Approximate Conversions from Metric to U.S. Customary Measures, <https://www.nist.gov/pml/weights-and-measures/approximate-conversions-metric-us-customary-measures>. CW testified that she provided a police officer with the attacker's height in centimeters and the officer converted it himself. The majority misstates CW's testimony and implies that CW knew that the officer converted the attacker's height to 5'9" and agreed to that conversion. See Majority at 5.

CW testified that she did not believe that Miller was the attacker because his "physical shape is completely different." In contrast to her shorter attacker, CW testified that Miller was thirty centimeters taller than CW and she had to look up to Miller. The other two witnesses at the scene saw the attacker from a distance and estimated the suspect's height as between 5'6" and 5'8".

³⁰ The fact that Miller admitted that he carries a safety knife for work does not "indicate[] his access to and familiarity with knives[,]" as the

(continued . . .)

the crime. Neither does Morie's testimony that she spoke to a man, who was likely Miller, on the flip phone that she found when she called the person listed numerous times on the call history.³¹ Indeed, this ties Kato to the crime, because it was Kato who returned to the area a short time later to retrieve her cell phone.³²

After the circuit court noted that there was no evidence connecting Miller to the crime charged, the circuit court repeatedly asked the defense to proffer evidence other than motive that connected Miller to the crime. In response, defense counsel recited only the testimony that he hoped to

majority speculates. See Majority at 36. Any person who cooks, hunts, or fishes would have the same level of familiarity with knives as Miller. This wild inferential leap by the majority underscores the dearth of evidence tying Miller to the crime.

³¹ The majority concludes that "Kato established her suspicions that Miller arranged to have her near the crime scene through the note she believed he had written." Majority at 36. The fact that Kato herself told her roommate a story about a letter that no one else ever saw which purportedly directed Kato to the crime scene does not connect Miller to the crime. Like the lost cell phone, it only ties Kato to the crime.

³² The majority also speculates that the fact that Kato returned to the crime scene to retrieve her phone, after Miller told Morie that he would retrieve it, "gives rise to a strong inference that Miller was in direct contact with Kato shortly after the CW was stabbed." Majority at 37. However, this ignores a more obvious possibility: Kato realized that her phone was missing and returned to the last place she had been to retrieve it. This explanation seems even more likely in light of the fact that when Kato retrieved her phone from Officer Ellis, she lied about her identity – using the name of her roommate – and lied about when she lost the phone, saying that it was lost about 5:00 p.m., even though she told her roommate she lost it about 9:00 p.m.

elicit regarding Miller's alleged motive.³³ Accordingly, the circuit court ruled that Kato had not established a sufficient connection between Miller and the crime to introduce evidence of Miller's alleged motive.

Because there was no direct or circumstantial evidence connecting Miller to the crime, I would hold that the circuit court did not err in precluding Kato from eliciting evidence of Miller's alleged motive to commit the crime.³⁴

III. CONCLUSION

For the reasons stated above, I respectfully dissent. In accordance with our decision in Rabellizsa and HRE Rule 401, I would hold that the circuit court did not err by precluding Kato from offering evidence of Miller's alleged motive to commit the crime because there was no evidence tying Miller to the

³³ The majority cites defense counsel's argument in support of Miller's alleged motive, which the majority claims meets the legitimate tendency test, even though Miller testified to the contrary on several points and no other witness testified to these matters. See Majority at 37, 40. For example, Miller testified at the first Rule 104 hearing that (1) Miller and CW never spoke about marriage; (2) when CW stopped contacting Miller, he was not angry; and (3) Miller had no knowledge that CW was seeing other men during or after their relationship. The majority also ignores CW's testimony that Miller had no reason to want to harm her.

³⁴ I also disagree with the majority's claim that the circuit court and the ICA improperly weighed the evidence offered by the defense. Majority at 40-45. As previously noted, the majority misstates the evidence presented regarding the suspect's description. See supra n.29. The majority also relies heavily on defense counsel's argument at the bench, rather than on witness testimony. See Majority at 37. Because the record does not actually contain the evidence that the majority claims Kato adduced or proffered, I disagree with the majority's conclusion that the circuit court and the ICA selectively credited the State's evidence.

commission of the offense.

Consequently, I would affirm the ICA's April 18, 2019 Judgment on Appeal, issued pursuant to its March 19, 2019 Memorandum Opinion, and the circuit court's March 11, 2015 Judgment of Conviction and Sentence.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

