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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.

KEVIN LORA,
Petitioner/Defendant-Appellant.

SCWC-18-0000548

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-18-0000548; CR. NO. 1CPC-17-0000561)

JUNE 16, 2020

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

I. INTRODUCTION

I disagree with the majority that testimony regarding the nature of the sexual assault examination was inadmissible. The complaining witness (CW) was impeached by prior inconsistent statements, and so her emotional frame of mind and an explanation of the trauma she experienced were relevant to explain the inconsistencies. I also disagree with the majority's conclusion that the erroneous admission of other

irrelevant evidence requires this court to vacate Lora's conviction. Viewing the evidence in this case as a whole - which included DNA evidence recovered from the CW's breast that matched defendant Kevin Lora, physical evidence of trauma on the CW's body, and her undisputed statements immediately after the assault that she was raped - the erroneous admission of irrelevant testimony was harmless beyond a reasonable doubt. I also do not find the circuit court's comments at sentencing, when read in context, to be problematic. I would affirm Lora's conviction and sentence,¹ and I therefore respectfully dissent.

II. DISCUSSION

A. The CW's Testimony Regarding the Physical Examination was Relevant to Explain her Prior Statements

The admission of the description of the physical examination was relevant regardless of whether the historical exam preceded it. We review the relevance of evidence de novo, State v. Cordeiro, 99 Hawai'i 390, 404, 56 P.3d 692, 706 (2002), and "it is well-settled that 'an appellate court may affirm a judgment of the lower court on any ground in the record that supports affirmance.'" State v. Fukagawa, 100 Hawai'i 498, 506, 60 P.3d 899, 907 (2002) (quoting State v. Dow, 96 Hawai'i 320,

¹ I do not find Lora's other claims of error availing either. Nonetheless, because the majority does not consider them, I will not address them further.

326, 30 P.3d 926, 932 (2001) (brackets omitted)). The defense attacked the CW's credibility by calling attention to the discrepancies between her trial testimony and her statements made shortly after the rape, including to Detective David Yamamoto, who interviewed her the day after the rape and a few short hours after the sexual assault examination. The testimony about the duration and nature of a highly intrusive sexual assault examination was relevant to explain the inconsistent statements to the Detective. Indeed, the CW testified that she spoke to him "after an incredible amount of trauma." It was also relevant to explain the overall trauma that she experienced on the day of the sexual assault and how that trauma may have impacted her perception and memory of the events, up to and including at trial. Because the defense impeached the CW by prior inconsistent statements which she testified were affected by trauma, testimony as to the nature of that trauma was relevant.

Moreover, the defense's theory of the case was that the CW lied: "[I]t's a lie. Her story that she was sexually assaulted by [Lora] is a lie. It's just a plain and simple lie." If that was the case, the CW endured an invasive and degrading sexual assault examination in order to sustain the lie. In other words, the description of the examination and the trauma the CW experienced because of it were relevant to undermine the

defense's contention that she lied by bringing to light the great personal cost of reporting a sexual assault. The jury may consider whether someone would put themselves through such an experience in order to keep up a lie when that person's credibility is attacked, and the State argued as much during its rebuttal. See Tackett v. Commonwealth, 445 S.W.3d 20, 33-34 (Ky. 2014) (holding that the victim's testimony about his "unpleasant" experience participating in a forensic interview examination at a child advocacy center was admissible to support his credibility when the defendant had "made [the victim's] credibility an issue"); Schreibvogel v. State, 228 P.3d 874, 884 (Wyo. 2010) (holding that a victim's testimony regarding her change in "work habits, sleeping patterns, and other behaviors was relevant to prove she had undergone a traumatic experience" because the defendant argued that the victim was lying); cf. State v. Long, 975 A.2d 660, 672 (Conn. 2009) (permitting the prosecution to argue that a CW's willingness "to undergo an uncomfortable medical examination" undermined her motive to lie).²

I therefore respectfully disagree that this testimony was irrelevant.

² The majority cites an American Law Reports article in support of the principle that "[n]umerous cases" from other jurisdictions have held that testimony about the "impact of an alleged offense merely to bolster the credibility of a complainant whose credibility has been impeached" is inadmissible. Majority at 29 n.14 (citing Kimberly J. Winbush, Admissibility of Victim Impact Evidence in Noncapital State Proceedings, 8 A.L.R. 7th Art.

B. The Admission of Other Irrelevant Testimony was Harmless Beyond a Reasonable Doubt

The State conceded that the admission of testimony about the CW's regrets was irrelevant and thus should not have been admitted. In my view, admission of this testimony was harmless beyond a reasonable doubt. In applying the harmlessness standard to the erroneous admission of evidence, we have stated the following:

[E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in light of the entire proceedings and given the effect to which the whole record shows it is entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction. If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.

6 (2016)). Indeed, many of the cases described by that article stand for the opposite proposition. See, e.g., State v. Thomas, 636 P.2d 1214, 1216 (Ariz. 1981) (in banc) (permitting testimony about the victim's "marked personality changes after the incident" because "any evidence which substantiates the credibility of a prosecuting witness on the question of guilt is relevant and material"); Colon v. State, 619 S.E.2d 773, 777 (Ga. Ct. App. 2005) (holding that the admission of testimony regarding a victim's hospitalization and suicide attempt was proper because "[t]he record shows that [the defendant] attacked the credibility and mental stability of [his] victim"); People v. Williams, 585 N.E.2d 1188, 1193 (Ill. App. Ct. 1992) (holding that testimony about "the adverse effects [the victim] suffered following the sexual assault" was "material and relevant to the issue of consent" when the defendant "attempted to discredit [her] version of events by claiming that the sexual encounter was consensual"); State v. Phillips, 670 S.W.2d 28, 32 (Mo. Ct. App. 1984) (holding that testimony regarding "the mental trauma of the victim" of rape was relevant to, inter alia, "the lack of consent thereof"); Brown v. State, 757 S.W.2d 739, 740 (Tex. Crim. App. 1988) (en banc) (concluding that evidence about the complainant's "emotional difficulty after the rape" was irrelevant because the defendant did not dispute that a rape occurred; but "[i]f the facts were such that consent had in reality been a contested issue the court of appeals would have undoubtedly been correct in [determining the evidence to be relevant]").

State v. McCrory, 104 Hawai'i 203, 210, 87 P.3d 275, 282 (2004) (emphases omitted) (quoting State v. Gano, 92 Hawai'i 161, 176, 988 P.2d 1153, 1168 (1999)).

Viewing the record as a whole and the irrelevant testimony in context, I do not believe there is a reasonable possibility that the CW's challenged testimony contributed to Lora's conviction. This is not merely a case of one person's word against another's, as the majority implies. And by characterizing it as such, the majority's analysis elides the statement of this court in McCrory and other cases that error should not be viewed in the abstract.

While the CW's testimony was central to the State's case, her account was corroborated. Most notably, the majority ignores that the State presented DNA evidence from the CW's breast that matched Lora. The defense argued that the DNA evinced a consensual sexual encounter between the CW and Lora that she lied about in order to obscure her infidelity to her fiancé. However, it is undisputed that when Larry Macri - Lora's own witness - met the CW, she was distraught, crying, and immediately told him, "Oh my God, oh my God, . . . I've been raped." That the CW immediately told a stranger she had been raped does not comport with the theory that the encounter between the CW and Lora was consensual, nor does it comport with the story that the CW alleged rape in order to explain her

appearance to Haley Harlow and the CW's sister. In short, DNA evidence confirmed a sexual encounter between the CW and Lora, and the defense's version of events lacked support in the evidence.

In addition, Dr. Wayne Lee's testimony about the CW's genital trauma, and her physical and emotional state during the sexual assault exam, corroborated the CW's account of the rape: Dr. Lee testified that the CW had pain in the back of her head, pain in her lower back and pelvic area, pain on urination, and pain in her vaginal area. He testified that during the exam, the CW presented as "very disheveled, with sand on her body," and "she was teary eyed. . . . [W]hen [he] saw her, she had bloodshot eyes and was occasionally sobbing"; the police officers who saw the CW that morning also testified that she was distraught. Dr. Lee further testified that she had bruises on her extremities and back, her vaginal entrance had lacerations that were only a few hours old, and her genitals were sandy. Moreover, looking at the error "in the light of the entire proceedings," the irrelevant testimony constituted a small part of the CW's testimony and of the State's case as a whole. Id.

Although the CW's testimony was controverted in some ways, see Majority at 34 n.18, the State's case was strong, and the majority has wrongly portrayed this case to singularly depend on the CW's uncorroborated testimony. In my view, there

is no "reasonable possibility" that the admission of the irrelevant testimony, given the rest of the CW's lengthy testimony and the entirety of the evidence, "contributed to" the verdict. Id. Accordingly, I would hold that this error was harmless beyond a reasonable doubt.

C. The Circuit Court Made an Individualized Determination when Sentencing Lora

The majority faults the circuit court for "[c]ategorically excluding defendants convicted of a crime involving violence from being sentenced as a young adult" under Hawai'i Revised Statutes (HRS) § 706-667 (2014). Majority at 38. But the majority has taken the circuit court's comment that it "divide[s] the world into two camps" out of context. The entirety of the circuit court's statement at sentencing made clear that the court exercised its discretion not to sentence Lora as a young adult defendant based on the circumstances of this case. Although the circuit court said that it distinguished between violent and non-violent offenders, it also based Lora's sentence on the particularities of the crime beyond its violence: the court pointed to, among other things, that the CW was someone who was "no match" for Lora's physical strength, he "preyed upon this woman," he "treated her like a piece of garbage, and [he] left her there on the beach to try to pull together the pieces." It also acknowledged Lora's "redeeming

qualit[ies],” like his military service and his strong family ties. The court emphasized that his conviction did not “typify how [Lora has] lived the rest of [his] life,” but stressed that he made a very bad choice that caused a lot of harm.

Thus, while the violence of the crime certainly informed the circuit court’s decision not to apply the young adult defendant statute, the entirety of the circuit court’s sentencing decision makes clear that its determination was individualized, not the mere application of an “idiosyncratic rule” utterly precluding a lesser sentence, as Lora argues and as the majority holds. The circuit court made a carefully-reasoned decision, taking many factors into consideration – including the violence of the crime, which speaks directly to the “protection of the public,” as required by the young adult defendant statute. HRS § 706-667(3). Viewing the whole of the circuit court’s explanation, I therefore disagree with the majority that the circuit court erred in any respect at sentencing.

III. CONCLUSION

For the foregoing reasons, I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

