

DISSENTING OPINION BY LEONARD, J.

Respectfully, I dissent. As discussed in the Majority's disposition, Defendant-Appellant Allan Michael G. Feliciano (**Feliciano**) contends that the Family Court of the Third Circuit (**Family Court**) erred in allowing the State to adduce evidence of a prior bad act that he allegedly committed in February 2016 - eleven months prior to the alleged incident underlying the abuse charge against Feliciano - when he allegedly pushed his wife, the complaining witness (**CW**), out of a chair. Roughly four months after the alleged chair incident, CW temporarily moved out of the couple's home. After the Family Court ruled that it would allow the State to ask Feliciano whether CW moved out because he pushed CW out of a chair in the prior February, he denied it. The State was then allowed on rebuttal to ask CW whether she moved out because Feliciano pushed her out of a chair in February of 2016, and she said yes.

I. The Opened-the-Door Rulings

In the first instance, the Family Court allowed the alleged-chair-incident evidence to be introduced because Feliciano "opened the door." The State made no argument just prior to the Family Court's ruling, but subsequently argued that it was calling CW in rebuttal for "the self-defense, whether or not she was pushing him, and the chair incident." When discussing the potential rebuttal testimony of CW, the court stated: "So the only incident for which the prosecutor is going to seek rebuttal is why she moved out and it is because of the

chair because you raised that and he denied it, not any other reasons." The prosecutor then clarified: "I'm not going to ask her why she moved out at all. I'm going to ask her about the chair incident." The Family Court later explained that the alleged-chair-incident evidence was made relevant "because the defendant testified on the relationship between the parties by saying she used drugs or marijuana and that -- well, the relationship was raised and that the inference also was left that she moved out for different reasons." The Family Court further stated that it had "also looked at the [Hawai'i Rules of Evidence (**HRE**) Rule] 403 balancing factor[s], prejudicial versus probative, and [found the alleged-chair-incident evidence to be] more probative than prejudicial."

On appeal, as the Majority explains, the State argues that Feliciano opened the door to the alleged-chair-incident evidence by testifying that CW's marijuana usage had led to the deterioration of their relationship.

Citing State v. Lavoie, 145 Hawai'i 409, 422, 453 P.3d 229, 242 (2019), the Majority recognizes that the opening-the-door doctrine is a rule of "expanded relevancy." Under the opening-the-door doctrine analyzed in Lavoie, when one party introduces inadmissible evidence, that evidence may be countered by inadmissible evidence from the opposing party. Id. (citing State v. Fukusaku, 85 Hawai'i 462, 497, 946 P.2d 32, 67 (1997)). The supreme court pointed out that this doctrine does not allow

inadmissible evidence to be admitted to rebut inferences raised by the introduction of admissible evidence. Id. at 422-23, 453 P.3d 242-43 (citation omitted).¹

On appeal in this case, the State does not argue that Feliciano introduced inadmissible evidence, and therefore opened the door to the State's introduction of inadmissible evidence. Instead, the State now argues that Feliciano's strategy was to portray CW as a person of bad character, *i.e.*, someone who smoked a lot of marijuana and might have been unfaithful to her husband. However, at trial, the fact that CW smoked marijuana was raised in the State's direct examination of CW, where it was described as medical marijuana for back pain. Similarly, the fact that Feliciano found CW sleeping next to his friend was raised in the State's direct examination of CW, where she explained that she fell asleep on the couch first and only discovered the friend next to her when Feliciano woke her up. On appeal, the State further argues that Feliciano brought up the issue of the prior separation to induce sympathy for him and to attack CW's credibility. However, before the Family Court, the State posited that "I'm not going to ask her why she moved out at all. I'm going to ask her about the chair incident."

¹ In Lavoie, the supreme court recognized that *other jurisdictions* have held that admissible evidence that is false or misleading in isolation may open the door to inadmissible evidence that clears up a false impression or clarifies misleading evidence. 145 Hawai'i at 424, 453 P.3d at 244. However, the supreme court in Lavoie further stated that it "may have implicitly rejected [this proposition] in Fukusaku," before noting that such a rule would not apply in the case before it even if the court were to adopt it. Id. (citation omitted).

The State cites State v. Kazanas, 138 Hawai'i 23, 375 P.3d 1261 (2016), for the proposition that the defendant in that case opened the door to one incident of prior-bad-acts evidence that was necessary to counter his testimony that he could not have attacked the complaining witness because he was physically unable to attack a person, *i.e.*, Kazanas denied that he was the attacker and therefore it was necessary to establish his identity as the perpetrator. Here, however, Feliciano did not deny that he struck CW; Feliciano testified that he struck CW prior to Family Court's ruling on the alleged-chair-incident evidence. Instead, he characterized his actions as self-defense.

Feliciano did state that he did not want CW to move out and that she wanted to separate and she initiated the move-out. This did not open the door to prior-bad-acts testimony, without regard to the probative nature and prejudicial effect of the testimony. The Family Court's explanation to the jury, that the alleged-chair-incident evidence was to be considered "on the issue of the relationship of the parties," is unrelated to any purported opening by Feliciano that was countered or clarified by the alleged-chair-incident evidence. Feliciano's testimony did not open the door to an allegation that Feliciano committed another act of abuse eleven months earlier, which allegedly led to CW's leaving him four months later.

Finally, as noted above, Hawaii's opening-the-door doctrine is a rule of expanded relevancy. Even if Feliciano's

testimony made the reasons for CW's departure from the couple's home more relevant pursuant to the opening-the-door doctrine, absent clear precedent to the contrary, I cannot conclude that the opening-the-door doctrine obviates the need to balance the probative value of the evidence against its potential prejudice.² The reason for CW's move-out was not a fact of consequence to the determination of whether Feliciano committed the charged offense. Thus, the admissibility of the testimony regarding Feliciano's alleged prior bad act must be evaluated on its own merit pursuant to HRE Rules 403 and 404(b).

II. HRE Rules 403 and 404(b)

Generally, under HRE Rules 401, 403, and 404(b), evidence of a criminal defendant's prior bad acts is admissible only where it is relevant and necessary to establish an element of the State's case. See generally State v. Gallagher, 146 Hawai'i 462, 463 P.3d 1119 (2020). Relevance is defined in broad terms as "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. Evidence of a defendant's prior bad acts "may [] be admissible where such evidence is probative of another fact that is of consequence to the determination of

² Although the Family Court later stated that the court balanced the prejudicial nature of the alleged-chair-incident against its probative value, the court allowed the State to pursue questioning in front of the jury about whether CW moved out because of something Feliciano did to her, and then whether he pushed her out of a chair because he was upset about something to eat, before ruling on the issue of prejudice.

the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident." HRE Rule 404(b). Here, the Family Court did not admit the prior-bad-acts evidence for any of these purposes.

More importantly, prior-bad-acts evidence may not be used to "prove the character of a person in order to show action in conformity therewith." Id. Such evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." HRE Rule 403. Admissibility of prior-bad-acts evidence is therefore limited and circumscribed by the demonstrable need for such evidence. Gallagher, 146 Hawai'i at 472-73, 463 P.3d at 1129-30. This condition serves to protect a defendant from improper jury bias and engendered hostility by limiting the State's case to the bounds of facts that bear on the defendant's culpability for the alleged crime at bar, rather than based on considerations that are independent of the charged offense. Id. at 481, 463 P.3d at 1138.

Determining whether to admit prior-bad-acts evidence thus requires balancing the probative value and necessity of the evidence to the State's case with its potential prejudicial effect against the defendant. As the supreme court has held, and repeatedly affirmed, this balancing test requires a trial judge to consider the following factors:

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

Id. at 470, 463 P.3d at 1127 (quoting State v. Behrendt, 124 Hawai'i 90, 106, 237 P.3d 1156, 1172 (2010) (quoting State v. Renon, 73 Haw. 23, 38, 828 P.2d 1266, 1273 (1992))).

Fundamentally, these factors are to be "considered in light of the purpose for which the evidence [is] offered." Id.

Turning to the case at bar, we analyze the Family Court's application of the balancing test factors under the abuse of discretion standard. See State v. Acker, 133 Hawai'i 253, 274, 327 P.3d 931, 952 (2014); see also Gallagher, 146 Hawai'i at 470, 463 P.3d at 1127. Where an abuse of discretion is found, this court must vacate the defendant's conviction unless the error is harmless beyond a reasonable doubt. See Gallagher, 146 Hawai'i at 470, 463 P.3d at 1127 (citation omitted).

In Gallagher, the defendant was charged and convicted of criminal property damage in the second degree. Id. at 464, 463 P.3d at 1121. The alleged property damage occurred after a "series of escalating events" involving four prior incidents of "aggressive and erratic behavior by the defendant directed at the complaining witnesses and their home." Id. at 464, 463 P.3d at 1121. Gallagher sought to exclude evidence of these prior bad acts on the grounds that they were irrelevant and unfairly prejudicial under HRE Rules 404 and 403. Id. at 469-70, 463 P.3d

at 1126-27. On review, the supreme court held that the trial court abused its discretion in admitting the evidence, concluding that the "risk of unfair prejudice posed by the introduction of the four prior incidents substantially outweighed their limited probative value." Id. at 464, 463 P.3d at 1121. The Court further held that the error was not harmless beyond a reasonable doubt and therefore vacated the conviction. Id. at 481-82, 463 P.3d at 1138-39.

In this case, the disputed evidence adduced at trial is purported to provide context about the relationship between Feliciano and CW, in the lead up to the offense of Abuse of a Family or Household Member, of which Feliciano was convicted. The alleged-chair-incident evidence, although relevant to why CW moved out, is also relevant to whether the parties had a frayed and physically abusive relationship. Evidence concerning the couple's relationship could bear on whether it was more or less probable that Feliciano either struck CW in the face with his fist on January 14, 2017, as CW testified, or that Feliciano slapped CW in self-defense on the morning in question. Nevertheless, marginally probative evidence of prior abuse has a great potential for unfair prejudice. See Lavoie, 145 Hawai'i at 426, 453 P.3d at 246 (in light of the stigma attached to domestic abusers, evidence of prior abuse is highly likely to rouse a jury to overmastering hostility against a defendant charged with domestic abuse) (citations omitted).

The first factor to be considered in determining whether the Family Court abused its discretion in admitting the alleged-chair-incident evidence is the strength of the testimony. Unlike in Gallagher, where the offered testimony was a series of escalating and undisputed events attested to by multiple witnesses, Gallagher, 146 Hawai'i at 464, 463 P.3d at 1121, Feliciano testified that the chair incident did not happen. CW's testimony was quite narrow, attesting only that she moved out of their home because Feliciano pushed her out of a chair in February of 2016. This testimony is arguably weakened by the delay between the alleged chair incident and her move out months later. Although the testimony in question arguably falls within the scope of its purpose of providing context regarding the nature of the parties' relationship, it is in dispute and uncorroborated, and it addresses an issue that is only peripherally related to the alleged offense. See Lavoie, 145 Hawai'i at 426, 453 P.3d at 246 ("evidence of Lavoie's prior abuse had little, if any, probative value as to his state of mind at the time of the shooting or to its reasonableness"). The strength of this evidence weighs against admittance.

Likewise, the alleged-chair-incident evidence relates to an isolated incident that is separated by nearly a year from the charged offense under consideration. In contrast, in Gallagher, the four prior bad acts took place over a six-month period culminating eleven days prior to the property damage at

issue. See 146 Hawai'i at 471, 463 P.3d at 1128. Here, there are no intervening events linking the two alleged acts. In fact, the only thing that appears to link these events is that they both involve allegations that Feliciano abused his wife. The distance in time, and limited relevance (except for propensity, of course), of the alleged-chair-incident evidence to the offense thus limits the permissible probative value that can be derived from admitting the testimony.

On the other hand, the similarities between Feliciano's alleged actions cannot be overlooked. Pushing an adult out of a chair is a physical and aggressive act, much like striking someone in the face. While the effect or specific intent of a slap or punch may differ in degree, the abusive quality is rather similar.

Although similarity can be used to confirm identity or establish voluntariness vis-à-vis common methodology, a close connection in the nature of prior and current misconduct "may also increase the likelihood that a jury will consider the previous conduct to conclude that the defendant has a propensity for committing such acts, which is a prohibited inference." Id. at 472, 463 P.3d at 1129 (citing HRE Rule 404(b)); accord State v. Murray, 116 Hawai'i 3, 20, 169 P.3d 955, 972 (2007). Where identity, or another core issue, is not in dispute, such evidence could confuse or mislead the jury. See Gallagher, 146 Hawai'i at 476, 463 P.3d at 1133. Even though the similar nature of the

acts here suggests some probative value, prudential concerns animating the prohibition on propensity evidence lead to the conclusion that the alleged-chair-incident evidence is highly prejudicial to Feliciano and militate against admission.

The fourth factor of the balancing test is the need for the proffered evidence. Considering the permissible consideration of the evidence, as explained to the jury - to elicit context about the couple's relationship - it appears from the record that ample evidence had already been introduced regarding the frayed nature of the marriage and establishing that Feliciano and CW had a difficult relationship. There was evidence that Feliciano was critical of CW's marijuana consumption; there was also evidence that CW was critical of Feliciano's alcohol consumption. It does not appear to me that there is a "demonstrable need to introduce evidence of prior bad acts" to consider the issue of the relationship of the parties in this case. See id. at 473, 463 P.3d at 1130. This factor weighs against admittance.

I recognize that there was no alternative evidence of Feliciano's alleged prior misconduct available to the jury to negate the "necessity" of alleged-chair-incident evidence and the Family Court allowed no prejudicial details of the alleged earlier incident. Unlike in Gallagher, where there was lengthy testimony, multiple witnesses, and photographic evidence of the extent of the property damage, the permitted testimony was

limited to Feliciano's denial that the incident took place and CW's testimony that the incident was the reason that she moved out. See id. at 474, 463 P.3d at 1131. This dearth of alternative evidence weighs in favor of admitting the chair-incident testimony.

The ultimate factor of the balancing test is whether the evidence is highly prejudicial, often stated as whether the evidence has "the potential to rouse the jury to overmastering hostility" against a defendant. Id. at 470, 463 P.3d at 1127 (citation omitted). Evidence of prior bad acts can engender an emotional response in the jury and tend to suggest decision on an improper, often emotional, basis. This is the axiom of prejudice prohibited by HRE Rules 403 and 404(b). See id. at 476-77, 463 P.3d at 1133-34. Here, although there was limited presentation of a single prior bad act, CW's testimony retained the potential to inspire ill-will and hostility toward Feliciano as an abusive husband based on the prior alleged incident. The bare fact that CW allegedly moved out of their home because of an alleged prior incident of abuse carries a high risk of a prejudicial inference that he did abuse her before and therefore he probably abused her again. This is the prototype of propensity evidence that should be allowed only when the probative value concerning an element of the offense or the defendant's defense is high.

In light of these considerations, the potential for unfair prejudice substantially outweighed the evidence's

probative value and the Family Court abused its discretion when it overruled Feliciano's objections and allowed the alleged-chair-incident evidence.

The Family Court's limiting instruction attempted to minimize the prejudicial effect of the alleged-chair-incident evidence by limiting the jury's consideration to the rather vague issue of "the relationship of the parties." While the Majority disposition correctly cites Hawai'i cases holding that the jury is presumed to follow the trial court's instruction, I conclude that this vague instruction is prejudicially insufficient to prevent the jury from, for example, concluding from the alleged-chair-incident evidence that the relationship was an abusive one and therefore Feliciano is more likely to have committed the charged offense. This insufficiency was later compounded by the Family Court's inconsistent and confusing instruction that the evidence of the alleged-chair-incident evidence could be only considered on the issue of the defendant's motive. When read and considered as a whole, the Family Court's jury instructions pertaining to the alleged-chair-incident evidence were "prejudicially insufficient, erroneous, inconsistent, or misleading." See generally State v. Nichols, 111 Hawai'i 327, 334, 141 P.3d 974, 981 (2006). On the record in this case, the Family Court's jury instructions failed to mitigate the prejudicial effect of the alleged-chair-incident evidence.

Finally, it is necessary to consider whether the Family Court's error was harmless beyond a reasonable doubt. The harmless beyond a reasonable doubt standard requires us to "examine the record and determine whether there is a reasonable possibility that the error complained of might have contributed to the conviction." Gallagher, 146 Hawai'i at 481, 463 P.3d at 1138 (citation omitted). Although the impermissible evidence at issue here was limited, the fact remains that prejudice can spring from even the smallest inference. On the other hand, the undisputed evidence at trial included that Feliciano struck his wife and the only disputed issue was whether it was abuse or self-defense. It cannot be ruled out that, based on the alleged-chair-incident evidence, the jury would have viewed Feliciano's conduct as part of a pattern of abuse and convicted Feliciano out of a desire to relieve CW of the burden of this hardship. Thus, there is a real possibility that the error contributed to Feliciano's conviction, and I cannot conclude that the error was harmless beyond a reasonable doubt.

Accordingly, I would vacate the Family Court's June 2, 2017 Judgment and remand this case to the Family Court for a new trial.

/s/ Katherine G. Leonard
Presiding Judge