

Electronically Filed
Supreme Court
SCWC-18-0000505
17-MAR-2021
08:55 AM
Dkt. 18 OPD

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,
Respondent/Plaintiff-Appellee,

vs.

BENITO MARROQUIN, III aka BENNY MARROQUIN,
Petitioner/Defendant-Appellant.

SCWC-18-0000505

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-18-0000505; CR. NO. 3PC16100117K)

MARCH 17, 2021

DISSENTING OPINION BY WILSON J.

- I. The trial court failed to determine whether the eyewitness' out of court statement was a statement of recent perception admissible as a hearsay exception pursuant to Rule 804(b)(5) of the Hawai'i Rules of Evidence.

In his third motion in limine ("MIL") Marroquin noticed his intent to introduce the hearsay statement of an eyewitness. This eyewitness watched the altercation between

Marroquin and the complaining witness ("the CW"), which corroborated Marroquin's defense that the CW choked him before he struck the CW. Specifically, Marroquin noticed his intent to introduce the eyewitness' statement through the testimony of Officer Aloy as a statement of recent perception under Hawai'i Rules of Evidence ("HRE") Rule 804(b)(5),¹ Rule 804(b)(8), and Rule 803(b)(24).² Thus, the trial court was required to: (1) determine whether the facts surrounding the eyewitness' description of the incident qualified it as a statement of recent perception admissible pursuant to HRE Rule 804(b)(5); (2)

¹ HRE Rule 804(b)(5) provides:

Statement of recent perception. A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear[.]

(emphasis added).

² HRE Rule 804(b)(8) and HRE Rule 803(b)(24) both provide:

Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

determine whether the facts pertaining to the statement bespoke "circumstantial guarantees of trustworthiness" requiring admission pursuant to HRE Rule 804(b)(8) and Rule 803(b)(24); and, finally, (3) apply HRE Rule 403 to determine if the probative value of the statement "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See HRE Rule 403.

The trial court failed to apply the above analysis that Marroquin's motion in limine required. Instead, it mistakenly considered whether the public records hearsay exception of HRE Rule 803(b)(8) applied to the eyewitness' statement. The trial court denied Marroquin's third MIL on the sole basis that the eyewitness' statement to Officer Aloy was "akin to State v. Jhun" where this court found the HRE Rule 803(b)(8) public record hearsay exception did not apply to statements recorded by police.³

³ In State v. Jhun, this court held:

Although the police officer's testimony about the absent witness's statements constituted hearsay, the ICA held that it was presumptively admissible pursuant to Hawai'i Rules of Evidence (HRE) Rule 803(b)(8)(C) (1993), the public records and reports exception to the hearsay rule. In response to the State of Hawai'i's (the prosecution) petition, we

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Notwithstanding the court's in limine ruling, defense counsel attempted to elicit the eyewitness' statement at trial during cross examination when he asked Officer Aloy, "did [the eyewitness] inform you that he saw [the CW] put his hand around Benny's neck?" The trial court sustained the State's hearsay objection, stating that there was "nothing new" for the court to consider. Thus, the court relied on the same rationale—HRE Rule 803(b)(8) and Jhun—that it previously used to deny the pretrial motion in limine. The only finding on which the court appears to have based its ruling on the hearsay objection and denial of Marroquin's third MIL was: "[t]his is a statement given to a police officer - - well, not even a verbatim statement taken by the police officer. Like, uh, this scenario's more akin to State v. Jhun. So the motion is denied."⁴

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granted certiorari to review the ICA's holding, and, for the reasons set forth below, we hold that the trial court did not err in concluding that the police officer's testimony about the absent witness's statements constituted inadmissible hearsay.

83 Hawai'i 472, 473, 927 P.2d 1355, 1356 (1996).

⁴ During trial the judge also incorrectly recalled that he made a previous finding that the eyewitness' statement was unreliable and untrustworthy: "the Court already determined those, uh, statements made by [the eyewitness] was not reliable[.]" However, in reviewing the record, it is apparent that the court never made a finding that the eyewitness' statement was unreliable. Although the State raised questions about the

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II. The exclusion of the eyewitness' statement was not harmless beyond a reasonable doubt.

In support of his claim of self-defense, Marroquin offered the eyewitness' statement for two purposes: (1) to impeach the CW's testimony and (2) to establish that the CW grabbed Marroquin by the throat prior to Marroquin punching him.

A defendant in a criminal trial has a constitutional right to impeach a witness. "A trial court's denial of a defendant's constitutional right to impeach a witness . . . is subject to the harmless beyond a reasonable doubt standard."

State v. Brown, 145 Hawai'i 56, 62, 446 P.3d 973, 979 (2019).

"This standard is applied by 'examin[ing] the record and determin[ing] whether there is a reasonable possibility that the error complained of might have contributed to the conviction.'"

Id. "If there is such a reasonable possibility . . . 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." State v. Gano, 92 Hawai'i 161, 176, 988 P.2d 1153, 1168 (1999).

In determining "whether a violation of the constitutional right to impeach might have contributed to the

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"trustworthiness and reliability . . . [of the eyewitness'] statement[,]" the court did not make any finding or rule definitively on that basis.

conviction[,]” it is important to consider “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.” Brown, 145 Hawai‘i at 62, 446 P.3d at 979 (quoting State v. Balisbisana, 83 Hawai‘i 109, 117, 924 P.2d 1215, 1223 (1996)).

It is undisputed that Marroquin hit the CW three or four times, causing the CW serious injury. The main question of fact that is in dispute is whether the CW choked Marroquin before Marroquin hit him. In that regard, Marroquin’s and the CW’s recollections of those moments differ greatly, with each blaming the other for starting the incident. According to the CW, Marroquin slapped him, punched him multiple times, kicked him in the face, and did not stop until Marroquin knocked him out and broke his cheek-bone. The CW claimed he never touched Marroquin but conceded on cross-examination that he did not really remember everything and admitted that he “had a slight quick thought that [he] should just grab [Marroquin] and end this madness.” On the other hand, according to Marroquin, the CW got in his face and then grabbed him by the neck and pressed him up against the wall, choking him. Marroquin claims to have

escaped the choke-hold by throwing his right arm over the CW's hands (that were around his neck), then punching the CW in self-defense.

The only person who saw the start of the altercation was the eyewitness. The eyewitness said he saw Marroquin take a swing at the CW and miss before the CW put his hands around Marroquin's neck, and then Marroquin started hitting the CW in the face. Although the eyewitness also told Officer Aloy that Marroquin swung first and seemed to be the aggressor in the situation, the eyewitness' statement is the only evidence corroborating Marroquin's claim that the CW choked him. It also directly impeaches the CW's version of events.

As the only independent evidence corroborating Marroquin's claim that the CW grabbed him by the neck and impeaching the CW's claim that he never touched Marroquin, the improper exclusion of the eyewitness' statement cannot be considered harmless. See Brown, 145 Hawai'i at 63, 446 P.3d at 980 (holding that the improper exclusion of a statement that impeached the testimony of the complaining witness was not harmless beyond a reasonable doubt because the "[i]mpeachment of such an important witness might have affected the jury's decision as to whether to credit Brown's assertion of self-defense."). There is a "reasonable possibility" that the trial court's denial of Marroquin's multiple attempts to introduce the

eyewitness' statement contributed to his conviction. Therefore, it cannot be concluded beyond a reasonable doubt that the exclusion of the eyewitness' statement did not affect the jury verdict.

III. Conclusion

The failure of the trial court to address Marroquin's request to admit the eyewitness' hearsay statement pursuant to HRE Rule 804(b) (5), Rule 803(b) (8), and Rule 803(b) (24) deprived Marroquin of his right to a fair trial. Accordingly, his request for a retrial should be granted.

/s/ Michael D. Wilson

