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SCWC-19-0000666

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

LAMA LAUVAO
Respondent/Defendant-Appellant, and
WESLEY SAMOA; NATISHA TAUTALATASI,
Respondents/Defendants-Appellees.
(CAAP-19-0000666)

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

vs.

NATISHA TAUTALATASI,
Respondent/Defendant-Appellant, and
WESLEY SAMOA; LAMA LAUVAO,
Respondents/Defendants-Appellees.
(CAAP-19-0000689)

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

vs.

WESLEY SAMOA,
Respondent/Defendant-Appellant, and
LAMA LAUVAO; NATISHA TAUTALATASI,
Respondents/Defendants-Appellees.
(CAAP-19-0000692)

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-19-0000666; CAAP-19-0000689; CAAP-19-0000692;
CR. NO. 3CPC-18-000724)

DISSENTING ORDER

(By: Nakayama, J., with whom Recktenwald, C.J., joins)

I would accept the application for writ of certiorari filed by the State of Hawai'i on January 5, 2023 and thus respectfully dissent. This is a case where three defendants, Lama Lauvao, Natisha Tautalatasi, and Wesley Samoa, beat a security guard who was over 60 years old to the point that he became a quadriplegic. Tautalatasi and Samoa were convicted of Attempted Murder in the Second Degree in violation of Hawai'i Revised Statutes (HRS) §§ 705-500 and 707-701.5. Lauvao was convicted of Assault in the First Degree in violation of HRS § 707-710(1).

Currently at issue is whether the Circuit Court of the Third Circuit's (circuit court) admittance of Exhibit 45A into evidence under Hawai'i Rules of Evidence (HRE) Rule 403 was an abuse of discretion, and whether this alleged error was harmless beyond a reasonable doubt. Exhibit 45A consists of two short videos taken in December 2018 (approximately three months after the September 17, 2018 beating) that show the victim, John Kanui, in a rehabilitation hospital. The videos are one minute and nine seconds long, and one minute and twenty-six seconds long, respectively. One video shows Kanui doing a bicep relaxation exercise and controlling a wheelchair with lifting

capability and the other video shows Kanui being lifted from his bed by a motorized hoist into a wheelchair.

Before the circuit court, Lauvao moved for the court to prohibit admission of the victim's post-incident videos on the grounds that the videos are "not relevant, are cumulative, may cause confusion to the jury as to the issues of the case, prejudice to the defense, and may cause undue delay in the trial." On appeal to the Intermediate Court of Appeals (ICA), the ICA determined the circuit court abused its discretion in admitting Exhibit 45A. The ICA then vacated the convictions after determining that the error was not harmless beyond a reasonable doubt.

Evidentiary decisions based on HRE Rule 403, which require a "judgment call" on the part of the trial court, are reviewed for an abuse of discretion. The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.

Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 351, 944 P.2d 1279, 1294 (1997) (internal quotation marks and citations omitted) (quoting State v. Arceo, 84 Hawai'i 1, 11, 928 P.2d 843, 853 (1996)).

Under this standard, I believe the ICA erred in concluding the circuit court abused its discretion in admitting Exhibit 45A: the circuit court neither exceeded the bounds of reason nor disregarded the law to the substantial detriment of a

party litigant. Rather, the ICA appears to have substituted its own judgment for that of the trial court judge.

HRE Rule 403 provides: "Although relevant, 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In weighing the probative value versus prejudicial effect of proffered evidence under HRE Rule 403, courts analyze various factors, including "the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence will rouse the jury to overmastering hostility." State v. Renon, 73 Haw. 23, 38, 828 P.2d 1266, 1273 (1992).

The ICA noted the State had already presented evidence on "the degree, nature, prognosis and permanence of Kanui's injuries," and then determined Exhibit 45A had minimal probative value. The ICA then determined the potential for unfair prejudice was substantial, because the videos would evoke emotional and sympathetic responses in the average viewer. I disagree.

First, Exhibit 45A is probative of the severity of Kanui's injuries and of the defendants' intent. The lack of intent was the gravamen of the defense. In my view, the extent of the injuries is germane to the determination of intent. See,

e.g., H. G. Hirschberg, Admissibility, in Prosecution for Assault or Similar Offense Involving Physical Violence, of Extent or Effect of Victim's Injuries, 87 A.L.R. 2d 926

(Originally published in 1963, updated weekly) ("In a number of cases the courts have held that evidence as to the extent or effect of the injuries of the victim of a criminal assault or similar crime of violence is admissible to prove the a[c]cused's criminal intent, particularly where he was charged with an offense in the nature of aggravated assault, such as assault with intent to kill or murder.")

The defendants beat and kicked Kanui in the head and neck. Lauvao testified he then checked to see if Kanui was still breathing. After a pause during which Kanui remained motionless, Tautalatasi kicked his face. As a result of the beating, Kanui sustained injuries to his head, neck, and spine, and none to the rest of his body. The injuries rendered Kanui quadriplegic.

Evidence of Kanui's lasting injuries after the attack is probative of the severity of the beating and the defendants' intent. In State v. Edwards, 81 Hawai'i 293, 299, 916 P.2d 703, 709 (1996), this court held that photographs of a murder victim's entire nude body were properly admitted into evidence, because the photos "demonstrate the overall severity of the injuries to the decedent." This court noted that though the

photographs of the decedent's nude body were "gruesome" and the court was "concerned about the number of photographs of the decedent's body that were admitted into evidence," the photographs were "not unfairly prejudicial" and the circuit court did not abuse its discretion in admitting them. Id.; see also State v. Molina, 47 Haw. 391, 403-05, 390 P.2d 132, 139-140 (1964) (noting a photograph of injuries may be properly admitted to allow the jury to "see and understand the atrociousness of the crime" and the severity of the beating, which was material to whether the murder was committed with extreme atrocity or cruelty to qualify as murder in the first degree). Thus, Exhibit 45A was properly admitted into evidence in order to demonstrate the extent and severity of Kanui's injuries, which is probative of the defendants' intent.

Further, to prove Assault in the First Degree (a lesser included offense of Attempted Murder in the Second Degree, for which Lauvao was convicted), the State's burden was to prove serious bodily injury, defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." HRS § 707-700 (2014). Evidence of Kanui's protracted impairment of the function of any bodily member is particularly relevant because the severity of

Kanui's injuries was drawn into question by Samoa's counsel. In opening statement, Samoa's counsel stated:

You will find that there is going to be competing testimony from doctors who treated Mr. Kanui. Depending on which doctors the Government calls, you may hear evidence that one doctor who testified in this case said there were no life threatening injuries. And subsequently that doctor changed her testimony to claim that there were life threatening injuries.

Thus, the lasting nature of Kanui's injuries, evidenced by Exhibit 45A, was at issue and probative of serious bodily injury.

Jennifer Farrell, Kanui's daughter, was the only witness who testified from personal knowledge regarding Kanui's condition more than a week after the beating. Farrell testified to Kanui's condition in October and November 2018 while at the rehabilitation hospital. Farrell described Kanui's limited ability to move with the assistance of a motorized hoist from bed into a motorized wheelchair and Kanui's physical therapy bicep-relaxation exercise. Three doctors testified to Kanui's condition immediately following the attack, and one testified to Kanui's prognosis. However, the latest that any of the three testifying doctors saw Kanui was six days after the beating.

Therefore, Farrell's testimony regarding Kanui's condition while at the rehabilitation hospital is probative of the "protracted loss or impairment of the function of any bodily member or organ." Exhibit 45A could properly be admitted in order to assist the jury in understanding Farrell's testimony

regarding Kanui's limited ability to move part of his bicep and inability to get out of bed without assistance. See Molina, 47 Haw. at 403-04, 390 P.2d at 139-140 (noting a photograph of injuries may be properly admitted in addition to other photographs of decedent's injuries as a testimonial aid to help the jury understand medical testimony); Territory v. Josiah, 42 Haw. 367, 385 (1958).

Second, in my view, the ICA erred in determining that Exhibit 45A's potential for unfair prejudice was substantial. See H. G. Hirschberg, Admissibility, in Prosecution for Assault or Similar Offense Involving Physical Violence, of Extent or Effect of Victim's Injuries, 87 A.L.R. 2d 926 ("It is well established that in prosecutions for assault in various degrees or forms or similar offenses involving physical violence, evidence as to the extent or effect of the injuries received by the assaulted party is admissible as being relevant or material to an issue of the case [here intent and serious bodily injury] . . . and defendant's contention in these cases that the admission of such evidence was prejudicial in that it tended to arouse the jury against him has generally been denied by the courts.") Whether evidence inflames the jury to the extent the jury is diverted from its objective considerations is considered in light of the whole record. See State v. Uyesugi, 100 Hawai'i 442, 460, 60 P.3d 843, 861 (2002). While video of an injury may

evoke in some viewers a more sympathetic reaction than words describing the same injury, the potential for unfair prejudice from Exhibit 45A was minimal in light of the whole record. First, the video did not appear intended to evoke emotion: there was no music, overlaid narration, montages of a day in the victim's life, or other common cinematic strategies intended to garner sympathy. Second, in the context of the entire record, the two short videos of Exhibit 45A, in my view, had much less potential to arouse sympathy from the jury in light of the twenty-five-minute video depicting the entire confrontation between the parties and the violent beating of Kanui, which continued even after Kanui became unresponsive. As in Edwards, and in light of all the evidence on the record, the footage of the victim's injuries was not unfairly prejudicial and the circuit court did not abuse its discretion in admitting Exhibit 45A.

Because I disagree with the ICA's analysis of the probative and prejudicial value of Exhibit 45A, and, more fundamentally, because an appellate court should not disturb a circuit court's evidentiary ruling under HRE 403 absent an abuse of discretion, I would uphold the circuit court's decision to admit Exhibit 45A into evidence. "Under an abuse of discretion standard, it is understood that reasonable judges may disagree, but the task of an appellate court is to defer to the judgment

call of the trial court judge unless that judge 'bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" Marvin v. Pflueger, 127 Hawai'i 490, 504, 280 P.3d 88, 102 (2012) (quoting UFJ Bank Ltd. v. Ieda, 109 Hawai'i 137, 142, 123 P.3d 1232, 1237 (2005)). Because the circuit court did not base its admission of Exhibit 45A into evidence on an erroneous view of the law or a clearly erroneous assessment of the evidence, I would defer to the judgment of the circuit court judge.

Moreover, even assuming the circuit court erred in admitting Exhibit 45A, such an error would be harmless beyond a reasonable doubt. "In evaluating whether an erroneous admission of evidence is harmless, this court has explained that":

[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.

State v. McCrory, 104 Hawai'i 203, 210, 87 P.3d 275, 282 (2004) (emphasis omitted) (quoting State v. Gano, 92 Hawai'i 161, 176, 988 P.2d 1153, 1168 (1999)). "Where there is a wealth of overwhelming and compelling evidence tending to show the defendant guilty beyond a reasonable doubt, errors in the admission or exclusion of evidence are deemed harmless." State

v. Rivera, 62 Haw. 120, 128, 612 P.2d 526, 532 (1980). In the context of the entire proceedings and particularly in light of the twenty-five-minute video depicting the victim's ruthless beating, there is no reasonable possibility that Exhibit 45A contributed to the defendants' convictions. Accordingly, in my view any error in the admission of Exhibit 45A was harmless.

I would accept the application for writ of certiorari and affirm the circuit court.

DATED: Honolulu, Hawai'i, February 15, 2023.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

