

NO. 22516

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
BENJAMIN WHITFIELD, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(FC-CRIMINAL NO. 98-2535)

MEMORANDUM OPINION

(By: Burns, C.J. Watanabe and Lim, JJ.)

Defendant-Appellant Benjamin T. Whitfield (Defendant) appeals the April 26, 1999 judgment of the first circuit court, that convicted him, upon a jury verdict, of one of two counts of the offense of violation of an order for protection, and sentenced him to one year of imprisonment.

Defendant presents the following two issues on appeal: (1) Defendant contends the trial court abused its discretion by conditioning the admission of evidence, which he intended to introduce to show a complaining witness's bias, on the subsequent admission of allegations by the complaining witness that Defendant had previously assaulted her son. (2) Defendant also complains that the court abused its discretion in denying the two motions for mistrial he made because both complaining witnesses testified that he had previously hit one of them.

We disagree with Defendant's contentions and affirm the judgment of the court.

I. BACKGROUND.

On September 29, 1998, Defendant was charged with two counts of violation of an order for protection, in violation of Hawai'i Revised Statutes (HRS) §§ 586-5.5 and 586-11.¹ The order for protection was issued in response to a family court petition filed by Defendant's sister, Martha Brovelli (Martha).² The complaint read as follows:

¹ Hawai'i Revised Statutes (HRS) § 586-5.5 (Supp. 1997) provided, in pertinent part:

If after hearing all relevant evidence, the court finds that the respondent has failed to show cause why the [temporary restraining] order should not be continued and that a protective order is necessary to prevent domestic abuse or a recurrence of abuse, the court may order that a protective order be issued for such further period as the court deems appropriate, not to exceed three years from the date the protective order is granted.

The protective order may include all orders stated in the temporary restraining order and may provide such further relief as the court deems necessary to prevent domestic abuse or a recurrence of abuse[.]

HRS § 586-11 (1993) provided, in pertinent part:

Whenever an order for protection is granted pursuant to this chapter, a respondent or person to be restrained who knowingly or intentionally violates the order for protection is guilty of a misdemeanor.

² At trial, both parties stipulated State's exhibits number 15 (a certified copy of the July 1, 1997 family court restraining order issued by Judge Darryl Y.C. Choy in FC-DA No. 97-0769) and number 16 (a certified copy of the acknowledgment of service of the restraining order upon Defendant) into evidence.

Count I: On or about September 17, 1998, in the City and County of Honolulu, State of Hawaii, BENJAMIN T. WHITFIELD did intentionally or knowingly violate the Order for Protection issued in FC-DA No. 97-0769 on July 1, 1997 by the Honorable Darryl Y.C. Choy, Judge of the Family Court of the First Circuit, State of Hawaii, pursuant to Chapter 586 of the Hawaii Revised Statutes, thereby committing the offense of Violation of an Order for Protection in violation of Section 586-5.5 and Section 586-11 of the Hawaii Revised Statutes.

Count II: On or about September 12, 1998, in the City and County of Honolulu, State of Hawaii, BENJAMIN T. WHITFIELD did intentionally or knowingly violate the Order for Protection issued in FC-DA No. 97-0769 on July 1, 1997 by the Honorable Darryl Y.C. Choy, Judge of the Family Court of the First Circuit, State of Hawaii, pursuant to Chapter 586 of the Hawaii Revised Statutes, thereby committing the offense of Violation of an Order for Protection in violation of Section 586-5.5 and Section 586-11 of the Hawaii Revised Statutes.

(Underlining and typesetting in the original). Martha was the complaining witness in Count I. Martha's 16-year-old son, Asa Brovelli (Asa), was the complainant in Count II.

In its case-in-chief, the State called Martha as its first witness. She identified Defendant as her brother and testified that the restraining order, effective for three years, prohibited Defendant from contacting her or her two sons in any way.

Martha remembered that on September 17, 1998, she and Asa were eating lunch at Hall Saimin, a restaurant. Shortly

after their arrival, Defendant walked in. When asked what happened next, Martha responded:

A [MARTHA]. He approached me with his hands in a fist to hit me like always.

[DEFENSE COUNSEL]: Objection, Your Honor.

[THE COURT]: Sustained. And the "like always" portion will be stricken, and the jury will be instructed to completely disregard that portion of the response.

During a bench conference following this testimony, Defendant moved for a mistrial. The court denied the motion, citing its striking of the objectionable phrase and its instruction to the jury to disregard the stricken evidence.

Continuing, Martha testified that Defendant approached within three feet of her and appeared angry. When she told Defendant she had a restraining order against him, he cursed at her, "thought twice," turned around and left the restaurant.

Martha did not report the September 17 incident to the police until several days later, on September 22, 1998, because she claimed she was busy caring for her mother. When she met with the police, Martha also reported a separate incident that occurred on September 12, 1998, involving Defendant and Asa. She had learned of the September 12 incident when Asa paged her that day.

Asa testified next. He acknowledged that Defendant is his uncle. On September 12, 1998, he was standing at an Aala

Park bus stop on his way to go ice skating at the Ice Palace. While he was standing there, the traffic light next to the bus stop turned red, "[a]nd all these cars stopped." Then he noticed a gray "Jeep 4-Runner" move from the far lane of traffic to the lane closest to him, and stop about three to four feet away from him. Defendant's girlfriend, Marcella Johns (Marcella), was driving and Defendant was in the passenger seat. Defendant looked at Asa, pointed at him and said, "I'm going to kick your ass." When the traffic light turned green again, the car drove away. Asa was scared and went back home instead of to the Ice Palace. He called his mother and told her what had happened.

With respect to the September 17, 1998 incident in the restaurant, Asa testified that he was eating lunch with his mother when Defendant entered the restaurant and approached them. When asked what happened next, Asa testified, "I think he said something to my mom, and his fists were closed, yeah, like raised to hit, yeah, because he has hit my mom in the past." Defendant objected. The court immediately responded, "I'm going to strike that response, and the jury will be instructed to completely disregard that response."

At the conclusion of Asa's testimony, Defendant again moved for a mistrial, this time based on Asa's improper testimony. The court denied Defendant's motion because it had stricken the testimony and instructed the jury to disregard it.

After calling two police witnesses, the State rested. Defendant then moved, unsuccessfully, for a judgment of acquittal.

In his defense, Defendant testified that the restaurant incident occurred on July 26, 1998, not on September 17, 1998 as Martha had testified, when he went to pick up a shirt left for alterations at a tailor shop located on the second floor above the ground-floor restaurant. The door to the tailor shop was locked, so he went back down to the restaurant to ask the cook how to get into the shop. Defendant admitted he encountered Martha and Asa inside the restaurant, but explained that as soon as he noticed them, he went straight upstairs to the tailor shop. Defendant produced the July 26, 1998 receipt for the tailoring. Defendant then testified that he reported to Melvin Higuchi (Higuchi), his parole officer, that he had come into contact with Martha and Asa. He did this as soon as he got home from the tailor shop.

Later, on cross-examination, Defendant claimed that on September 17, 1998, at about noon, he had been with Alphonso Velasquez (Alphonso).

With respect to the September 12, 1998 incident involving Asa, Defendant testified on direct examination that he was driving Marcella's car when he noticed Asa at a bus stop. Defendant pointed him out to Marcella. After he was stopped there by a red light, Defendant moved the car slightly forward so as to

get out of Asa's way and avoid a confrontation. Defendant drove away from the bus stop when the light turned green.

Alphonso, Defendant's next witness, testified that he has known Defendant for 25 years and plays in a musical band with him. He further testified that he picked Defendant up at about 10:45 a.m. on September 17, 1998. They were together that morning as they waited for a 12:30 p.m. rehearsal.

Defendant then called Higuchi to the witness stand. Higuchi testified that on July 26, 1998, he received a telephone message from Defendant indicating that he had seen Martha at a restaurant. Higuchi spoke to Defendant the following day and documented the encounter, as reported by Defendant. Higuchi also remembered that Defendant called on September 23, 1998 and reported that the police were looking for him because of the restraining order violations.

At the conclusion of Higuchi's testimony, Defendant rested. The State presented two rebuttal witnesses to conclude the evidence.

On April 26, 1999, the jury found Defendant not guilty on Count I (involving Martha) and guilty as charged on Count II (involving Asa). The court sentenced Defendant to one year in prison, to run concurrently with a term in another case, with credit for time served.

Before trial, Defendant had filed a motion in limine to exclude evidence relating to "any prior allegations of criminal

acts by Defendant including but not limited to an alleged attack on the complaining witness [Martha] on April 19, 1997 and allegations that Defendant has sexually molested family members."

During the hearing on the motion, the State asked the court to reserve ruling on the motion, because the allegations were relevant to explain Martha's tape-recorded telephone call to Frank Verece (Frank) at Frank's home. Defendant proposed to introduce the audio tape into evidence. Frank is stepfather to Defendant and Martha, and lives with their incapacitated mother.

Defendant argued that the telephone call was relevant to Martha's credibility -- specifically, her bias against Defendant -- because in that call, Martha threatened to sue Frank.

The State objected to admitting the audio tape into evidence because Martha therein addressed only Frank by name, and not Defendant. The State averred that "[t]here's a great deal of conflict between [Martha] in this case and her mother's husband, Frank." Hence, the State argued, the audio tape had no relevance to any bias Martha may have had against Defendant.

Defendant's attorney explained to the court how Martha's telephone threat against Frank could be construed as a threat against Defendant:

[DEFENSE COUNSEL]: Judge, there are two statements. One statement is directed at Frank. The other statement is directed at "you guys." [Defendant] -- my offer of proof is that [Defendant] . . . he's the guardian for the mother, Your Honor. And as such, he's at the house a lot. When [Martha] called and

left these messages on the machine, she's directing it to "you guys." One of them specifically "you guys," which [Defendant] took as meaning himself, threatening to bury him . . . threatening to bring him down . . . [a]nd it shows -- Your Honor, it just goes to show the state of mind.

. . . .

And basically, things like "I'm going to bury you. I'm going to -- I'm not playing games. I'm going to hire a lawyer," to that effect, Your Honor.

Defendant argued that the case was part of a protracted feud between the siblings, and that he had "documentation that [Martha] has threatened, not only [Frank], but [Defendant], also." It is not clear whether Defendant was referring to documentation other than the audio tape, and Defendant did not attempt to introduce any. Defendant concluded that Martha's threats to sue him supported his defense that she fabricated the restraining order violations because she had "an axe to grind with [him]."

The State maintained its contention that the audio tape was not relevant to show that Martha was biased against Defendant, but argued in the alternative that if the court allowed the audio tape into evidence to impeach Martha's credibility, then the State was entitled to introduce evidence explaining the reasons for Martha's threats of litigation:

[PROSECUTOR]: Your Honor, there's a lot of history with this family, most of it is ugly. [Martha], if questioned as to why she's suing [Frank], and she will testify that the calls [sic] were to [Frank]. I think in Defense counsel's statement, the phrase was

"[Defendant] is at the house a lot." He does not live there. This telephone call is made to Frank's house, not to [Defendant's] home, and it was directed at Frank. However, she will testify that most of the animosity with [Frank] has to do with her mother, the beatings of her mother, the abuse of herself, and the sex assault of the nephew and the family. I believe the nephew's name is . . . who just came back from a sex abuse center in California.

THE COURT: Who sexually assaulted the nephew?

[PROSECUTOR]: [Defendant], I believe, and [Frank]. That will be the -- that will be the substance of why [Martha] has such animosity towards these individuals.

Defendant could not nail down the date of Martha's telephone call. He maintained, however, that the audiotape was made sometime during the one-year period preceding the two incidents in question in this case.

Apparently, the incidents charged in this case were part and parcel of a family feud -- "a fairly long and tortured family history, [involving] many different family members." According to the State, "[t]here is intense conflict within this family, there's a whole history of animosity between different individuals." And this family imbroglio reached far into the past. The prosecutor asserted that "it's almost generational when you actually question them as to who did what when. They go back 30 years, Your Honor."

There were sources of tension in addition to the various assaults that were alleged to have occurred among the various

family members. Martha had engaged in litigation with Defendant and Frank over a guardianship of the person of her mother.

The court indicated initially that it would prefer to exclude the audio tape, but that if Defendant brought in the tape to impeach Martha's credibility, the State could have her explain what she was referring to on the tape. Early on, the court made what appears to be a ruling on the audio tape issue:

THE COURT: All right. The Court is ruling that, if the tapes come in, the State can introduce evidence with respect to what [Martha] was referring to.

However, after a fairly extended exchange with counsel, the court deferred decision on the issue:

THE COURT: Okay. Well, I understand. But the issue now is her state of mind as to what she was referring to when she was making these alleged statements on the tape. All right. So I would prefer to keep it all out. I don't really want to get into all these tangential issues frankly. But if the tape is going to come in to basically impeach her in terms of her bias, her motive, etc., then I think she has a right to explain what she was talking about in those tapes. And so then we'd get into this whole can of worms. I'd prefer not to get into it frankly. Why don't you folks think about it? We'll address it again. Obviously, none of this is to be mentioned until we rule further.

When the court had almost finished hearing the various motions in limine, it revisited the issue of the audio tape and made a formal ruling:

THE COURT: All right. Based on Rule 403 considerations then, the Court is going to exclude this evidence, and accordingly, the

Court will not allow usage of [sic] the
Defense of this tape.

Just before the start of trial the next day, the court
reiterated the circumstances leading up to its ruling on the audio
tape issue:

THE COURT: All right. And the record
should be clear, also. I was thinking about
it. You know, [Defense Counsel] had wanted to
introduce the tape, which is marked as Defense
Exhibit A, and the Court had indicated that if
the Defense admits -- if the Court allows
Defense to admit A, then the Court would then
allow the State to explain away why she made
the comments said in A, which includes all
this past history of prior bad acts regarding
mainly [Frank], but perhaps also including
[Defendant]. [Defense Counsel] indicated
that, if I was going to let all those other
things in, then he did not want to bring in
the tape. Is that correct?

[DEFENSE COUNSEL]: That is correct, Your
Honor.

During the hearing on the various motions in limine the
day before trial commenced, the court admonished counsel that they
were to instruct their respective witnesses regarding its rulings
in limine. Perhaps because of the extensive family disputes
revealed during the hearing, the court saw fit, further along in
the hearing, to again admonish counsel to instruct their
respective witnesses about relevant rulings in limine. And near
the end of the hearing, the court went so far as to personally
instruct Martha not to testify about issues rendered off limits by
its rulings in limine:

THE COURT: [A]ll you're going to be able to testify to in this case is with respect to what happened on the -- with respect to the alleged restraining order violations, the fact that a restraining order was issued and how it was allegedly violated. I'm excluding -- basically, we're not going to get into any problems involving family. Neither side is going to be getting into problems involving the family, anything that [Defendant] may have done in the past, any convictions he may have in the past, any problems involving your mother and, you know, allegations about -- I understand there have been various allegations with respect to what he may or may not have done against your mother or what your stepfather may have done against your mother. Anyway, it's all being excluded. None of this being -- coming into evidence, all right. So I just want to make sure that you understand that you are not to mention anything that [Defendant] may have done wrong other than how he allegedly violated the restraining order on the dates in question.

II. DISCUSSION.

A. *The Audio tape of Martha's Telephone Call.*

Defendant argues that the court abused its discretion in "conditioning the admission of taped statements of threats made by [Martha] on the subsequent admission of allegations that [Defendant] had previously assaulted [Martha]'s son."

We do not agree with Defendant's proposition.

First, as a matter of accuracy, the sexual assault allegation involved Martha's nephew and not either of her sons.

Also, although the court at various points indicated that it would allow Martha to explain her statements upon admission of the audio tape, it did not at any point say that it would *ipso facto* admit evidence of that particular sexual assault allegation.

Second, we do not agree that the court "conditioned" the admission of the audio tape upon the subsequent admission of evidence about Defendant's misdeeds. The court instead excluded the audio tape based upon Hawai'i Rules of Evidence (HRE) Rule 403:

THE COURT: All right. Based on Rule 403 considerations then, the Court is going to exclude this evidence, and accordingly, the Court will not allow usage of [sic] the Defense of this tape.

Defendant's argument on this point of appeal relies upon two of the court's other pronouncements regarding the audio tape issue, in which the court indicated an inclination to allow Martha to explain her statements if the audio tape were admitted.

The first pronouncement does indeed appear to be a ruling on the audio tape issue:

THE COURT: All right. The Court is ruling that, if the tapes come in, the State can introduce evidence with respect to what [Martha] was referring to.

However, it is clear that after benefit of further argument, the court reconsidered and reserved its ruling on the issue:

THE COURT: Okay. Well, I understand. But the issue now is her state of mind as to what she was referring to when she was making

these alleged statements on the tape. All right. So I would prefer to keep it all out. I don't really want to get into all these tangential issues frankly. But if the tape is going to come in to basically impeach her in terms of her bias, her motive, etc., then I think she has a right to explain what she was talking about in those tapes. And so then we'd get into this whole can of worms. I'd prefer not to get into it frankly. Why don't you folks think about it? We'll address it again. Obviously, none of this is to be mentioned until we rule further.

The court's second pronouncement on the issue came after it had made its ruling on the issue based on HRE Rule 403. It is evident from the record that this second pronouncement was simply a recapitulation of the circumstances facing the court and the parties surrounding the audio tape issue:

THE COURT: All right. And the record should be clear, also. I was thinking about it. You know, [Defense Counsel] had wanted to introduce the tape, which is marked as Defense Exhibit A, and the Court had indicated that if the Defense admits -- if the Court allows Defense to admit A, then the Court would then allow the State to explain away why she made the comments said in A, which includes all this past history of prior bad acts regarding mainly [Frank], but perhaps also including [Defendant]. [Defense Counsel] indicated that, if I was going to let all those other things in, then he did not want to bring in the tape. Is that correct?

[DEFENSE COUNSEL]: That is correct, Your Honor.

In any event, the court was correct in its assessment of the circumstances, because both the HRE and Hawai'i case law provide that a witness should be afforded an opportunity to

explain any evidence proffered to impeach the witness's credibility on the basis of bias, interest or motive, before such evidence is admitted.

HRE Rule 609.1(a) (1993) provides that "[t]he credibility of a witness may be attacked by evidence of bias, interest, or motive."

The Hawai'i Supreme Court has declared that "[b]ias, interest, or motive is always relevant under HRE Rule 609.1. So long as a proper foundation is laid, bias can be raised at any time by the witness's testimony or other evidence." State v. Estrada, 69 Haw. 204, 220, 738 P.2d 812, 823 (1987) (citation omitted).

However, with respect to the required foundation for such evidence, HRE Rule 609.1(b) (1993) goes on to provide that "[e]xtrinsic evidence of a witness' bias, interest, or motive is not admissible unless, on cross-examination, the matter is brought to the attention of the witness and the witness is afforded an opportunity to explain or deny the matter."

In State v. Murphy, 59 Haw. 1, 575 P.2d 448 (1978), the Hawai'i Supreme Court held, in consonance with HRE Rule 609.1(b), that

before any bias of a witness can be introduced, a foundation must first be laid by cross-examining the witness regarding the facts which assertedly prove the bias. Two reasons were recognized . . . for such a preliminary foundation. First, the foundational cross-examination gives the

witness a fair opportunity to explain statements or equivocal facts which, standing alone, tend to show bias. Second, such cross-examination lends expediency to trials, for if the facts showing bias are admitted by the witness, the introduction of extrinsic evidence becomes unnecessary.

Id. at 18, 575 P.2d at 459-60 (footnote omitted).

Hence, it was not the court that "conditioned" the admission of the audio tape upon Martha's opportunity to explain her statements in the audio tape. It was HRE Rule 609.1(b) and Hawai'i case law that mandated a fair opportunity for her to explain the evidence that tended to show her bias, interest or motive, before such evidence was admitted.

Defendant sought to introduce the audio tape in which Martha allegedly made threats to sue Frank, and perhaps Defendant. Defendant's argument was that the threats revealed Martha's bias, interest and motive in fabricating the restraining order violations. The State's countervailing argument for allowing Martha to explain her statements was that they were not evidence of an impetus for fabrication, but evidence of her intention to take legitimate legal recourse for various assaults upon her and her relatives. Admitting the audio tape evidence without affording Martha an opportunity to explain her statements would have contravened the evidentiary rules and established Hawai'i case law.

As we have discerned, however, the court excluded the audio tape outright, based upon HRE Rule 403. In this the court was well within its discretion.

HRE Rule 403 (1993) provides that 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."

Admission of evidence of a witness's bias, interest or motive under HRE Rule 609.1 rests in the discretion of the trial court under HRE Rule 403. State v. Silva, 67 Haw. 581, 586, 698 P.2d 293, 297 (1985); State v. Balisbisana, 83 Hawai'i 109, 114, 924 P.2d 1215, 1220 (1996). Moreover, "[a] trial court's decision to exclude impeaching evidence will not be reversed absent a showing of abuse." Coyle v. Compton, 85 Hawai'i 197, 210, 940 P.2d 404, 417 (App. 1997) (citations omitted). A 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. Kealoha v. County of Hawai'i, 74 Haw. 308, 318, 844 P.2d 670, 675 (1993).

In exercising its discretion under HRE Rule 403, the trial court must weigh the probative value of the evidence against the negatives detailed in the rule, "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or . . . considerations of undue delay, waste of time, or needless

presentation of cumulative evidence.” Balisbisana, 83 Hawai'i at 114, 924 P.2d at 1220.

In this case, we believe the court properly concluded that the danger of confusion of the issues or misleading the jury, along with considerations of undue delay and waste of time, substantially outweighed the probative value of the audio tape.

The probative value of the audio tape was, in the first place, dubious. “[P]robative value’ is a compound concept, comprising the degree of relevance to prove one or more disputed facts plus the element of need.” Addison M. Bowman, *Hawaii Rules of Evidence Manual* § 403-2B(1) (2d ed. 1998).

First of all, Defendant could not venture an estimate of the date of the telephone call closer than “between September ’97 and September ’98.”

Further, by Defendant’s admission, the first of Martha’s two statements on the audio tape was directed, not at Defendant, but at their stepfather, Frank, with whom Martha also shared a stormy relationship. The telephone call was made, after all, to the residence Frank shared with the incapacitated mother of Defendant and Martha.

The second statement was directed at the anonymous “you guys.” Defendant contended that the plural could include himself, but reached this conclusion only by way of the rather tenuous

argument that he is the guardian of his mother and is therefore "at the house a lot."

Being of speculative relevance at best, and at worst wholly unrelated to any hostility Martha may have harbored against Defendant, the audio tape evidence offered slim probative value indeed.

In any case, we question whether there is any further need for evidence of bias, interest or motive on the part of a complainant who has obtained a restraining order against the defendant. Lesser need for the evidence negatively impacts its probative value. State v. Clark, 83 Hawai'i 289, 303, 926 P.2d 194, 208 (1996); State v. Castro, 69 Haw. 633, 644, 756 P.2d 1033, 1041 (1988).

On the negative side of the scales, the opportunity to explain her statements on the audio tape, afforded to Martha by the mandate of HRE Rule 609.1(b), carried with it the potential for "undue delay [and] waste of time," HRE Rule 403, in dealing with evidence of a bitter and protracted family feud. This was apparently an extremely tangled web, woven over a period of thirty years, involving numerous family members, various charges of assault and sexual assault, and court battles over the care of the incapacitated mother. Clearly, spinning this tale at trial would have exposed the jury to "the danger of . . . confusion of the issues, or misleading the jury[.]" Id. The court can hardly be

faulted for using HRE Rule 403 to prevent the jury from being ensnared in this evidentiary web.

Of course, the court would have been obligated, under HRE Rules 404(b)³ and 403, to control the content of Martha's explanation. Clark, 83 Hawai'i at 299-300, 926 P.2d at 204-05 (under HRE Rule 404(b), evidence of a defendant's other bad acts is admissible for a relevant purpose, other than propensity, but the trial court must first subject such evidence to the balancing test under HRE Rule 403). However, such control would have only lessened, not eliminated, the court's concern over "the danger of . . . confusion of the issues, or misleading the jury," and "considerations of undue delay [and] waste of time[.]" HRE Rule 403.

We observe, in this connection, that despite HRE Rule 403's guarantee of a controlled explanation, Defendant agreed that he did not want to get into the explanation required by HRE Rule 609.1(b). No wonder, since the explanation included evidence of various kinds of assaults he allegedly perpetrated upon Martha and

³ Hawai'i Rules of Evidence Rule 404(b) (Supp. 1999) provides, in relevant part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

other family members, and it was probably prudent not to test the efficacy of HRE Rule 403 in front of the jury. In a way, the court also protected Defendant's interests in excluding the audiotape *ab initio*.

We conclude that the court did not abuse its discretion in excluding the audio tape from evidence. Cf. Coyle, 85 Hawai'i at 210, 940 P.2d at 417 (as in this case, defendant's evidence of bias, interest or motive on the part of plaintiff was properly disallowed (1) because the defendant did not adhere to the impeachment procedure mandated by HRE Rule 609.1(b), and (2) because the evidence "would lead to undue delay or a waste of time" under HRE Rule 403) (brackets, citations and internal quotation marks omitted)).

Even if we assume, *arguendo*, that it was error for the court to exclude the audio tape from evidence, it is difficult to discern what harm came of the error. Cf. State v. Gano, 92 Hawai'i 161, 176, 988 P.2d 1153, 1168 (1999) (a judgment of conviction need not be set aside if, viewing the record in its entirety, the erroneous admission of evidence was harmless beyond a reasonable doubt).

Defendant was acquitted of the charge involving Martha (Count I). The charge he was convicted of involved Asa (Count II). Defendant nevertheless argues that the exclusion of evidence

of Martha's bias, interest or motive hurt the defense against Asa's accusations in Count II.

This contention involves, however, a clever but overly involved chain of inference, bordering on the speculative, with no direct support in the record, which fails to convince us. From Defendant's Opening Brief, at 22-23:

The instant tape is also relevant to establish [Asa's] motive for fabricating the September 12, 1998 charge involving the incident at the Kalihi bus stop. [Asa] is a minor, 16 years of age, under the care of his mother, [Martha]. As such, a reasonable inference may be made that he is aware of the strained relations between [Martha] and [Defendant]. [Asa] was instructed by the State not to testify as to any past incidents between [Martha] and [Defendant]. Yet, at the identical moment in testimony regarding [Defendant] approaching [Martha and Asa] with fists, [Asa] provided the identical type of improper testimony as [Martha], that [Defendant] had "hit [his] mom in the past." Thus, a reasonable inference may be made that [Martha] influenced [Asa's] testimony. [Martha's] motive and bias to testify falsely may be imputed to her son, [Asa]. The taped statement demonstrating [Martha's] motive and bias to provide false testimony becomes relevant to demonstrate [Asa's] motive and bias to provide false testimony.

B. The Two Motions For Mistrial.

Next, Defendant contends the court erred by denying his two motions for mistrial, one made after Martha testified that he had previously hit her, the other made after Asa testified to the same assault.

Defendant argues that these deliberate and unresponsive injections of irrelevant references to his prior bad act -- an "evidentiary harpoon" that was willfully jabbed into the him -- generated insurmountable prejudice to him, which the court could not cure by striking the offending testimony and instructing the jury to disregard it.

We decide that the court did not abuse its discretion in denying Defendant's two motions for mistrial.

As a general rule, it is for the circuit court to determine whether improper testimony "merits a mere prophylactic cautionary instruction or the radical surgery of declaring a mistrial." State v. Kahinu, 53 Haw. 536, 549-50, 498 P.2d 635, 644 (1972) (citation omitted). This determination involves an exercise of the court's discretion. State v. Webster, 94 Hawai'i 241, 248, 11 P.3d 466, 473 (2000).

In deciding whether improper remarks made by a witness require that a criminal conviction be vacated, we must consider "the nature of the misconduct, the promptness of a curative instruction or lack of it, and the strength or weakness of the evidence against the defendant." State v. Samuel, 74 Haw. 141, 148, 838 P.2d 1374, 1378 (1992) (citation omitted).

Hence, we first consider the nature of the misconduct. In this case, presumably both Martha and Asa were instructed by the prosecutor not to mention prior bad acts of the Defendant, pursuant to the two admonishments delivered to the prosecutor by

the court. In addition, Martha was personally instructed by the court to refrain from any such mention.

To be fair to Martha, however, the court did not instruct her with respect to the specific assault she suffered at the hands of Defendant. That assault was merely one of a myriad of pejorative allegations conceivably covered by the general warning she received from the court. Moreover, the court's advisement stressed Defendant's alleged transgressions against their mother, and not his alleged conduct toward Martha.

We are cognizant of the striking similarity between Martha's improper testimony and Asa's improper testimony, and between the circumstances in which the two were elicited. The similarities raise, at the very least, the suggestion of planned and deliberate misconduct.

Again, however, to be fair to both Martha and Asa, who are after all both laypersons, the offending testimony flowed as naturally from the relevant testimony as an assault follows a threat, raising at least the countervailing suggestion of spontaneity.

As a final note on the nature of the misconduct, we observe that the record is devoid of any hint that the prosecutor solicited the improper testimony, or that she neglected her duty to instruct her witnesses pursuant to the court's two directives.

In any event, in Samuel, the Hawai'i Supreme Court encountered a knife-murder case in which an expert witness for the

State mentioned -- despite being warned by the State not to -- the defendant's "criminal history summary record of offenses in California and Hawaii[,] " as well as her "history of -- of a similar experience." Samuel, 74 Haw. at 147, 838 P.2d at 1378 (emphasis and internal quotation marks omitted).

A pretrial motion in limine brought by the defendant, a prison inmate at the time of the offense, specifically mentioned an allegation that she had committed another murder in a mainland prison. Id. at 146, 838 P.2d at 1377.

Despite the arguably more egregious misconduct and prejudice involved in Samuel, the supreme court held that the court's immediate response of striking the offending testimony from the record and instructing the jury to disregard it was sufficient prophylaxis. Id. at 149, 838 P.2d at 1378.

Samuel involved what the supreme court described as "an overzealous witness for the prosecution[.]" Id. at 148, 838 P.2d at 1378. Thus, even if this case did indeed involve planned and deliberate misconduct on the part of Martha and Asa, or either of them, the curative power of the court's instruction was not thereby derogated.

In connection with its holding in Samuel, the supreme court noted the presumption that the jury adhered to the court's instructions:

"[E]ven though a prosecutor's remarks may have been improper, any harm or prejudice resulting to the defendant can be cured by the court's

instructions to the jury. In such cases it will be presumed that the jury adhered to the court's instructions." **State v. Amarin**, 58 Haw. 623, 629, 574 P.2d 895, 899 (1978) (citation omitted). The same holds true with respect to a witness for the prosecution.

Id. at 149 n.2, 838 P.2d at 1378 n.2 (typesetting in the original).

The power of the presumption has been borne out in numerous other cases involving misconduct. See, e.g., State v. Cavness, 46 Haw. 470, 473, 381 P.2d 685, 686 (1963) (in holding that improper closing argument by the prosecutor was cured by the court's instruction to disregard, the supreme court applied "the ordinary presumption that the jury abided by the court's admonition"); State v. Kahalewai, 55 Haw. 127, 129, 516 P.2d 336, 338 (1973) (citing the presumption and holding that the cumulative effect of numerous instances of prosecutorial misconduct, though grave, was cured by "the prompt action of the trial court" in sustaining defense objections, striking statements from the record and instructing the jury to disregard); State v. Sawyer, 88 Hawai'i 325, 329 n.6, 966 P.2d 637, 641 n.6 (1998) (citing Samuel, supra, and holding that the prosecutor's statement, which could be construed as urging the jury to disregard the court's instructions in favor of common sense, was "improper in the extreme" but nonetheless cured when the court sustained the defendant's objection and immediately instructed the jury to the contrary); Webster, 94 Hawai'i at 247-49, 11 P.3d at 472-74 (citing the

presumption and holding that a detective's testimony implying that his informant had passed a polygraph examination was cured when the court struck the testimony and instructed the jury to disregard, even though the defendant's motion for mistrial and the court's responses were not contemporaneous with the offending testimony); but see State v. Marsh, 68 Haw. 659, 660-62, 728 P.2d 1301, 1302-03 (1986) (prosecutorial misconduct involving numerous expressions of personal belief and opinion during closing argument "here overcomes the presumption that the court's instructions to the jury rendered it harmless" (citation omitted); though the trial court several times instructed the jury that "the arguments of counsel are not evidence[,] " it failed to issue a specific instruction regarding the improper arguments).

Therefore, in considering "the promptness of a curative instruction or lack of it" in this case, Samuel, 74 Haw. at 148, 838 P.2d at 1378, we are mindful of the strength and resilience of the presumption that the jury adheres to the court's instructions. We note in this respect that the court immediately struck both instances of improper testimony and instructed the jury to disregard them. We observe, in addition, that at the end of the case, the court again instructed the jury that "[y]ou must disregard entirely any matter I ordered stricken."

Thus, when we consider the final factor in our analysis, "the strength or weakness of the evidence against the defendant[,] " id., and note the ample evidence to convict

Defendant, including his own partial admission of the violation in Count II, we are constrained to conclude that the court did not abuse its discretion in denying Defendant's two motions for mistrial. Cf. Webster, 94 Hawai'i at 249, 11 P.3d at 474 (the testimony of eyewitnesses and the defendant's admission that he shot at the victims constituted "ample evidence" under the supreme court's Samuel analysis).

III. CONCLUSION.

For the foregoing reasons, we affirm the April 26, 1999 judgment of the first circuit court.

DATED: Honolulu, Hawaii, January 12, 2001.

On the briefs:

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Chief Judge

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Associate Judge

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