IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

KALSON DULEI,
Appellant,
v.
REPUBLIC OF PALAU,
Appellee.

Cite as: 2017 Palau 29
Criminal Appeal No. 16-003
Appeal from Criminal Case No. 16-019

Decided: August 17, 2017

Counsel for Appellant .....Danail M. Mizinov
Counsel for Appellee .....Timothy P. Zintak

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
R. BARRIE MICHELSEN, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Associate Justice, presiding.

OPINION

PER CURIAM:

[¶ 1] Kalson Dulei appeals his conviction for two counts of Sexual Assault in the First Degree (17 PNC § 1603), two counts of Sexual Assault in the Third Degree (17 PNC § 1605), two counts of Sexual Assault in the Fourth Degree (17 PNC § 1606), and one count of Indecent Exposure (17 PNC § 1609). Based upon the evidence admitted at trial, the court below was entitled to find the following facts: that on December 11, 2015, Dulei forcibly kissed the minor victim ("the minor") on the mouth, rubbed her vagina over her clothing, pulled down his pants, grabbed the back of her head and forced his penis into her mouth. At that time, Dulei was twenty-six years old and the minor was thirteen.

[¶ 2] During the bench trial, the Trial Division sustained the Republic's objections to questions asked during the cross-examination of Dulei's

girlfriend,[1] who was also a cousin of the minor, regarding the details of a pre-trial interview with the prosecution team. It also sustained the same objection to similar questions asked of the police investigator in this case regarding that pre-trial interview. On appeal, Defendant argues that sustaining these objections violated his constitutional right under Article IV, § 7 to "be permitted full opportunity to examine all witnesses," because they prohibited him from cross-examining these witnesses regarding what he refers to as "an undisclosed witness interview conducted by the government."

[¶ 3] The Trial Division also sustained the Republic's objections to Dulei asking his girlfriend whether the minor has "ma[de] up stories in the past." On appeal, Defendant argues he should have been able to ask his girlfriend about the minor's general character for truthfulness and specific instances of untruthfulness under ROP R. Evid. 608, and that sustaining this objection also violated his constitutional right under Article IV, § 7 because it effectively placed a "total prohibition [on inquiry] into the victim's truthfulness."

[¶ 4] On the basis of these alleged errors, Dulei asks the court to reverse his conviction and remand this matter for a new trial. We affirm the conviction.

STANDARD OF REVIEW

[¶ 5] A trial court's decisions concerning the admission of evidence are reviewed for abuse of discretion. *Kumangai v. ROP*, 9 ROP 79, 82 (2002). Under this standard, "a trial court's decision will not be overturned unless the decision was arbitrary, capricious or manifestly unreasonable, or because it stemmed from an improper motive." *Remengesau v. ROP*, 18 ROP 113, 118 (2011).

DISCUSSION

[¶ 6] Dulei contends that the Trial Division violated his rights under Article IV, § 7's Examination Clause to "be permitted full opportunity to

[1] According to her trial testimony, she was his girlfriend at the time of the incident and remained so at the time of trial.

examine all witnesses" by sustaining the Republic's objections to several of his questions on cross-examination because doing so prevented him from "meaningfully cross-examining" his girlfriend and the police investigator. The arguments presented by Dulei and the Republic rely entirely on United States case law to define the scope of Dulei's right to effectively cross-examine the Republic's witnesses. We have previously noted that the Examination Clause of Article IV, § 7 is "sufficiently similar" to the United States's Confrontation Clause "to make it worthwhile to look to U.S. authority" when considering arguments that this right has been violated. *Ngiraked v. ROP*, 5 ROP Intrm. 159, 170-71 (1996). Neither party argues that the differences in phrasing between these two clauses would affect the outcome of this case.

[¶ 7] United States court decisions in "Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination." *Delaware v. Fensterer*, 474 U.S. 15, 18 (1985). "Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 US 308, 316 (1974). "So essential is cross-examination to this purpose that the absence of proper confrontation 'calls into question the ultimate integrity of the fact-finding process.'" *U.S. v. Riggi*, 951 F.2d 1368, 1376 (3rd Cir. 1991) (*quoting Ohio v. Roberts*, 448 U.S. 56, 64 (1980)). However, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 US 673, 679 (1986).

I. QUESTIONS REGARDING THE PROSECUTION'S PRE-TRIAL MEETING WITH THE DEFENDANT'S GIRLFRIEND

[¶ 8] Dulei asserts that there was a "possible violation" of ROP Rule of Criminal Procedure 16(a)(1)(E) because the Republic did not provide a written summary of a meeting between the prosecutor, the police investigator, and his girlfriend which took place shortly before trial. Rule 16(a)(1)(E)

requires the government to provide the defendant the opportunity to inspect and copy:

> The name and address of any person whom the [prosecution] intends to call as a witness at trial or at any hearing, and the statements and the record of any felony convictions of such proposed witnesses. As used in this subdivision, a "statement" of a witness means:
>
> (i) a written statement made by the witness that is signed or otherwise adopted or approved by the witness; or
>
> (ii) a substantially verbatim recital of an oral statement made by the witness that was recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or transcription thereof.

[¶ 9] Defendant appears to have taken the position at trial that this rule required the Republic to prepare and provide the Defendant with written summaries of all "witness interviews," including those conducted by the Republic in preparation for trial. On appeal, Defendant acknowledges that the rules "do not require the prosecution to memorialize witness interviews to writing," but argues it should have been permitted to ask the participants of said meeting whether any such written summary was prepared. The Trial Division sustained the Republic's objection to this line of questioning on relevance grounds after the Republic represented that no such written summary was prepared. Defendant now argues on appeal that prohibiting this line of questioning violated his Examination Clause rights.

[¶ 10] As Defendant now acknowledges, Rule 16(a)(1)(E) does not require the Government to prepare written summaries of any interactions between the Republic and potential witnesses. Furthermore, Rule 16(a)(1)(E) does not even require the disclosure of any written summaries which are prepared, only the "statements" of proposed witnesses, which must either be (i) signed, adopted, or approved by the witness, or (ii) a "substantially verbatim recital" which was "recorded contemporaneously." A written summary prepared by the prosecution team is unlikely to fall into either of these categories, and so is unlikely to fall under Rule 16(a)(1)(E)'s disclosure

obligation.[2] *See Goldberg v. United States*, 425 U.S. 94, 122 n.9 (1976) (Powell, J, concurring in judgment) ("Counsel rarely take down verbatim what witnesses say in [pretrial] conferences. Consequently, prosecutors' notes may be expected to meet the requirements of ['substantially verbatim statements'] very infrequently.").

[¶ 11] In short, Dulei fails to show any reasonable basis for believing there were any discovery violations by the Republic. Therefore, Dulei's questions about the Republic's pre-trial meetings were not even marginally relevant to his guilt or innocence of sexual assault, and the Trial Division's prohibition on these questions during cross-examination could not have violated his Examination Clause rights.

II. QUESTIONS REGARDING WHETHER THE MINOR VICTIM HAD MADE UP STORIES IN THE PAST

[¶ 12] Dulei also asserts that he should have been permitted to ask his girlfriend whether she "knew of [the minor] making up stories in the past." The Trial Division initially overruled the Republic's objection to this question, but sustained that objection after a sidebar conference[3] where the Republic argued that it was improper for Dulei to ask his girlfriend about the minor's credibility or about specific instances of conduct. Dulei argues that the Trial Court abused its discretion by imposing a "wholesale prohibition of

---

[2] Of course, there are other discovery obligations which require the Republic to disclose information learned in witness interviews to the defense, whether or not a written statement was made by the witness. For example, the Republic has an affirmative obligation under the Due Process clause of Article IV, § 6 of our Constitution to turn over any exculpatory evidence upon request by the defendant. *Ngiraked*, 5 ROP Intrm. at 172 (adopting the rule of *Brady v. Maryland*, 373 US 83 (1963)). But Dulei admits he is not aware of anything exculpatory that was learned in the pre-trial meeting with his girlfriend, and he points to no other basis on which he believes the substance of the Republic's pre-trial meeting with his girlfriend should have been disclosed.

[3] This sidebar conference created difficulties in the record, because the recording devices are not set up for sidebar conferences. When it is necessary to conduct a conference outside the hearing of a witness or jury, the better practice is to excuse the witness or jury and avoid substantive sidebar conferences.

[Dulei's] efforts to impugn the credibility of the victim through a third party," and that these questions should have been allowed under Rule of Evidence 608. He also asserts that this ruling prevented "a meaningful cross-examination of the witness" in violation of his Article IV, § 7 rights.

A. ROP Rule of Evidence 608

[¶ 13] ROP Rule of Evidence 608, which is identical to U.S. Federal Rule of Evidence 608, places clear limitations on a litigant's ability to use one witness to provide evidence about the general credibility of another witness, providing in relevant part that:

> (a) . . . [T]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but . . . the evidence may refer only to character for truthfulness or untruthfulness . . . [and]
>
> (b) . . . [S]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

[¶ 14] "This rule of evidence has not been considered by this Court. Accordingly, we turn the United States law interpreting the identical Federal Rule of Evidence for guidance." *Temaungil v. ROP*, 9 ROP 139, 141 (2002). "Fed. R. Evid. 608(b) allows a party to attack the credibility of a witness by cross-examining [that witness] on specific instances of past conduct." *United States v. Whitmore*, 359 F.3d 609, 618 (D.C. Cir. 2004). The Rule is not a basis to allow a witness to be cross-examined on specific instances of past conduct of some other witness.

[¶ 15] Therefore the question of whether Dulei's girlfriend "knew of [the minor] making up stories in the past" is not permitted under Rule 608. To the extent that this question is seeking an opinion on the minor's general credibility, it violates 608(a)'s restriction that the question "refer only to character for truthfulness or untruthfulness," not be about specific conduct by

the minor that would have contributed to his girlfriend's opinion that the minor was generally truthful or untruthful. To the extent that this question is attempting to elicit specific instances of the minor "making up stories," it runs afoul of Rule 608(b)'s restriction that questions regarding specific instances of conduct can only be asked (1) of the witness whose credibility is being attacked or (2) of a different witness who has provided an opinion (as permitted under Rule 608(a)) that the witness whose credibility is being attacked is a truthful person. Dulei's girlfriend did not offer an opinion as to the minor's general character for truthfulness on direct examination, so Rule 608 does not permit questions about specific instances of the minor being untruthful on cross-examination.

B. Examination Clause

[¶ 16] Finally, the trial court's Rule 608(b) ruling was not a "wholesale prohibition of [Dulei's] efforts to impugn the credibility of the victim through a third party." Dulei was not restricted in introducing evidence admissible pursuant to Rule 608, and he offered no such evidence.

CONCLUSION

[¶ 17] For the foregoing reasons, Dulei's conviction is **AFFIRMED**.

SO ORDERED, this 17th day of August, 2017.