Temaungil v. ROP, 9 ROP 139 (2002)
FRANCIS ALBERT TEMAUNGIL,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 01-07
Criminal Case Nos. 00-236, 00-265, 00-299

Supreme Court, Appellate Division
Republic of Palau

Decided: June 28, 2002[1]

[1] **Appeal and Error:** "Anders" Briefs; **Criminal Law:** "Anders" Briefs

Counsel should move to withdraw and file an "Anders" Brief only when he believes that any arguments offered are frivolous, and that no colorable argument for reversal is available.

[2] **Appeal and Error:** Standard of Review; **Evidence:** Admissibility

Determinations of the admissibility of evidence are in the discretion of the trial judge and will not be reversed by an appellate court unless there is an abuse of discretion.

[3] **Evidence:** Hearsay

A witness's former testimony is admissible if the party against whom the testimony is now offered had an opportunity and similar motive to develop testimony by direct, cross, or redirect examination.

[4] **Evidence:** Hearsay

Similar motive does not mean identical motive, and the inquiry into the similarity depends in part on the similarity of the underlying issues and on the context of the questioning.

[5] **Evidence:** Hearsay

In determining whether a similar motive exists, the availability of foregone cross examination questions is one question to consider but is not conclusive because examiners will frequently be able to suggest lines of questions that were not pursued at a prior proceeding.

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[1]Upon reviewing the briefs and the record, the panel finds this case appropriate for submission without oral argument pursuant to ROP R. App. Pro. 34(a).

Temaungil v. ROP, 9 ROP 139 (2002)

Counsel for Appellant: James Hollman

Counsel for Appellee: Imelda Nakamura

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable R. BARRIE MICHELSEN, Associate Justice, presiding.

PER CURIAM:

Three informations were filed against Francis Albert "Snow" Temaungil ("Appellant"). After separate trials, the trial court consolidated the cases for sentencing. Appellant was sentenced in Criminal Case No. 00-236 for assault and battery; in Criminal Case No. 00-265 for grand larceny; and in Criminal Case No. 00-299, for assault ⊥140 and battery.[2] Appellant argues that the trial court erred in Criminal Case No. 00-236 when it admitted into evidence under ROP R. Evid. 804(b)(1) the former testimony of Teslim Abid Ullah. Appellant also claims that had Ullah's testimony been suppressed, there was insufficient evidence in Criminal Case No. 00-236 to find Appellant guilty of assault and battery beyond a reasonable doubt. For the reasons stated below, we affirm the trial court.

BACKGROUND

In December 2000, the trial in Criminal Case No. 00-299 began. In that case, Appellant was charged with, among other things, striking Roberto Padron, a Filipino worker at the Airai View Hotel, several times in the face. The trial court admitted into evidence the testimony of Ullah, who was the victim in Criminal Case No. 00-236, under ROP Rules of Evidence 404(b) as evidence of a common plan or scheme.

In July 2001, the trial for Criminal Case No. 00-236 began. In that case Appellant was charged with, among other things, entering the HANPA Shopping Center and striking Ullah, who was working as a security guard there, several times in the face. Ullah's contract had expired and he left Palau, rendering him unavailable to testify at trial. The government moved for, and was granted, permission to allow Ullah's former testimony that was given in Criminal Case No. 00-299 as evidence in Criminal Case No. 00-236 under ROP R. Evid. 804(b)(1).

[1] In September 2001, the trial court sentenced Appellant to three separate, yet suspended sentences. Thereafter, the trial court granted Appellant permission to file an untimely appeal on the grounds of excusable neglect. Appellant's attorney filed an "Opening Anders Brief," setting forth Appellant's two arguments on appeal.[3] The government responded.

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[2]Appellant challenges no aspect of the convictions and sentences in Criminal Case Nos. 00-265 and 00-299. Accordingly, they are summarily affirmed.

[3]The Opening Brief was mislabeled. If Appellant's counsel believed that the issues raised in his brief were not frivolous, then he should not have called it an " *Anders* Brief". If, on the other hand, counsel

DISCUSSION

[2] "Determinations of the admissibility of evidence are in the discretion of the trial judge and will not be reversed by an appellate court unless there is an abuse of discretion." *United States v. Miles*, 290 F.3d 1341, 1351 (11th Cir. 2002) (citations omitted).

[3-5] Appellant appeals the trial court's admission of Ullah's prior testimony. Under ROP R. Evid. 804(b)(1), a witness's former testimony is admissible if the party against whom the testimony is now offered had an ⊥141 opportunity and similar motive to develop testimony by direct, cross, or redirect examination.[4] 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. In *United States v. Salerno*, the Supreme Court of the United States held that a party may not introduce former testimony under Rule 804 without showing a similar motive. 112 S. Ct. 2503 (1992). Because similar motive does not mean identical motive, this inquiry is inherently factual, depending in part on the similarity of the underlying issues and on the context of the questioning. *Id.* at 2509. While the availability of foregone cross-examination opportunities is one factor to consider, it is not conclusive because examiners will frequently be able to suggest lines of questioning that were not pursued at a prior proceeding. *See United States v. DiNapoli*, 8 F.3d 909, 914 (2d Cir. 1993).

Here, Appellant's barely audible argument is that "[a]lthough some courts have held that the requisites of the Confrontation Clause are met by having a 'similar motive and opportunity to cross-examine,' and accordingly allow into evidence prior testimony as a hearsay exception, this new panel of the Appellate Division is urged to take a more restrictive approach to the summary granting of forms of perpetuation of hearsay testimony." This argument is half hearted and unpersuasive.

Ullah was no longer in Palau and, thus, unavailable during the trial of Criminal Case No. 00-236, satisfying the first requirement of Rule 804(b). In Criminal Case No. 00-299, Ullah's

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believed that the arguments offered were frivolous, and no colorable argument for reversal was available, then he should have moved to withdraw pursuant to *Anders v. California* , 87 S. Ct. 1396 (1967), as adopted in *Orrukem v. ROP*, 5 ROP Intrm. 256 (1996). The U.S. Supreme Court in *Anders* found that in order to protect a defendant's constitutional right to appellate counsel, courts must safeguard against the risk of granting attorney withdrawal requests where an appeal is not actually frivolous. An *Anders* brief should contain "anything in the record that might arguably support an appeal." 87 S. Ct. at 1400. The appellate court then considers the *Anders* brief and decides whether to allow appellate counsel to withdraw. The defendant may then proceed *pro se* or often the government moves for summary affirmance.

[4]Rule 804(b) reads in relevant part:

> *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding . . . if the party whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

testimony was admitted under ROP R. Evid. 404(b) as character evidence to show a common plan or scheme. However, Appellant's motive to cross-examine Ullah's testimony was the same in both cases. The transcript reveals that in Criminal Case No. 00-299, Appellant's attorney was attacking the veracity of Ullah's account of his altercation with Appellant. In Criminal Case No. 00-236, Appellant was charged with assault and battery on Ullah, who had he been present would again give an account of his altercation with Appellant. Appellant had precisely the same interest in attacking Ullah's testimony, demonstrating a similar motive and the opportunity to cross-examine Ullah, and thus, satisfying the requisites of the Confrontation Clause. The trial court did not abuse its discretion in admitting Ullah's former testimony. Because we find that the evidence was properly entered, we need not address Appellant's sufficiency of the evidence argument.

CONCLUSION

For the reasons stated above, Appellant's convictions and sentences are affirmed.