NO. 23683

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Plaintiff-Appellee

vs.

FLAVIAN FUJIMOTO, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND COURT
(FC-CR. NO. 00-1-0299)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama,
Ramil, and Acoba, JJ.)

Defendant-Appellant Flavian Fujimoto (Defendant) appeals from a July 26, 2000 judgment of conviction and sentence of the family court of the second circuit (the court)[1] of one count of harassment by stalking, Hawai‘i Revised Statutes (HRS) § 711-1106.5(1) (1993),[2] and nine counts of violation of an order

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[1] The Honorable Eric G. Romanchak presided over the trial proceedings discussed herein.

[2] HRS § 711-1106.5(1) provides:

> (1) A person commits the offense of harassment by stalking if, with intent to harass, annoy, or alarm another person, or in reckless disregard of the risk thereof, that person pursues or conducts surveillance upon the other person:
>
> (a) Without legitimate purpose; and
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> (b) Under circumstances which would cause the other person to reasonably believe that the actor intends to cause bodily injury to the other person or another, or damage to the property of the other person or another.

(continued...)

for protection in favor of Defendant's former girlfriend, Sherry Freitas (Petitioner), HRS § 586-11 (Supp. 1999).[3] For the reasons stated herein, we affirm the judgment.

Defendant was charged as follows:

> COUNT ONE:
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> Tha[t] on or about April 21, 2000, through April 23, 2000, inclusive, in the County of Maui, State of Hawaii, [Defendant] did, with intent to harass, annoy, or alarm another person, or in reckless disregard of the risk thereof, pursue or conduct surveillance upon the other person without legitimate purpose and under circumstances which would cause the other person to reasonably believe that the actor intended to cause bodily injury to the person or another by harassing [Petitioner] by stalking her on more than one occasion for the same or similar purpose, thereby committing the offense of Harassment by Stalking in violation of Section 711-1106.5(1) of the Hawaii Revised Statutes.
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> COUNT TWO:
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> That on or about the 21st day of April, 2000, in the County of Maui, State of Hawaii, [Defendant], [the] Respondent and party to be restrained under the Order for Protection in FC-DA No. 99-0370, knowing of said Order for Protection issued to Petitioner, . . . pursuant to Chapter 586, Hawaii Revised Statutes, did intentionally or knowingly violate said Order for Protection by contacting Petitioner by writing, in a manner prohibited by said Order for Protection, thereby committing the offense of Violation of an Order for Protection in violation of Section 586-11 of the Hawaii Revised Statutes.
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> COUNT THREE:
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> That on or about the 21st day of April, 2000, in the County of Maui, State of Hawaii, [Defendant], [the] Respondent and party to be restrained under the Order for Protection in FC-DA No. 99-0370, knowing of said Order for Protection issued to Petitioner, . . . pursuant to Chapter 586, Hawaii Revised Statutes, did intentionally or knowingly violate said Order for Protection by contacting Petitioner by recorded message, in a manner prohibited by said Order

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[2](...continued)

(Emphasis added.)

[3] HRS § 586-11 provides in pertinent part that, "[w]henever 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."

> for Protection, thereby committing the offense of Violation of an Order for Protection in violation of Section 586-11 of the Hawaii Revised Statutes.
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> [Counts Four, Five, Six, Seven, Eight, and Nine are identical to Count Three, except that Counts Four through Six allegedly occurred on April 22, 2000, and Counts Seven through Nine allegedly occurred on April 23, 2000.]
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> COUNT TEN:
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> That on or about the 23rd day of April, 2000, in the County of Maui, State of Hawaii, [Defendant], [the] Respondent and party to be restrained under the Order for Protection in FC-DA No. 99-0370, knowing of said Order for Protection issued to Petitioner, . . . pursuant to Chapter 586, Hawaii Revised Statutes, did intentionally or knowingly violate said Order for Protection by contacting Petitioner by telephone, in a manner prohibited by said Order for Protection, thereby committing the offense of Violation of an Order for Protection in violation of Section 586-11 of the Hawaii Revised Statutes.

(Emphases added.)

On appeal, Defendant alleges (1) that there was no evidence to convict Defendant of contacting Petitioner via written instrument in violation of an order for protection, (2) that the court erred in admitting into evidence the copy of a tape recording of Defendant's messages left on Petitioner's brother's telephone answering machine, and (3) that defense counsel was ineffective in assisting in Defendant's defense.

"[W]hen the appellate court passes on the legal sufficiency of trial evidence to support a conviction[,] the test is . . . whether there was substantial evidence to support the conclusion of the trier of fact." State v. Kalama, 94 Hawai'i 60, 67, 8 P.3d 1224, 1231 (2000) (internal quotation marks, citation, brackets, and ellipses points omitted). Substantial evidence existed to sustain Defendant's conviction as to Count

II, that is, that he contacted Petitioner by writing, in violation of the order for protection, because: (1) Defendant knew Petitioner was living at her brother's house because she had informed him of her intended move; (2) a twenty-nine page letter addressed to Petitioner was found in her truck, which was parked outside her residence; (3) Petitioner recognized the handwriting and signature on the twenty-nine page letter as Defendant's, as she had become familiar with his handwriting over their three-year relationship; and (4) Defendant told the arresting officer that he wrote "those letters" in order to express his feelings for Petitioner. The court could reasonably infer from the evidence that Defendant had placed the letter in the truck or had someone else place it there for him.

With respect to Defendant's objection, as to Counts III through IX, to the receipt in evidence of a microcassette tape recording of eight messages allegedly from Defendant, "[a] duplicate [of a recording] is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Hawai‘i Rules of Evidence (HRE) Rule 1003 (1993). Although Defendant asserts that the microcassette is a "duplicate of a duplicate," the court did not abuse its discretion in admitting the microcassette into evidence, because it qualifies as a

duplicate, that is, "a counterpart produced by the same impression as the original, . . . or by . . . electronic re-recording, . . . or by other equivalent techniques which accurately reproduce the original." HRE Rule 1001(4) (1993). There is no reason to doubt that the counterpart is not "the product of a method which insures accuracy and genuineness." Bank of Hawai'i v. Shaw, 83 Hawai'i 50, 60, 924 P.2d 544, 554, reconsideration granted, 80 Hawai'i 497, 911 P.2d 132 (App.), cert. denied, 83 Hawai'i 409, 927 P.2d 417 (1996) (citations omitted).

No question was raised as to the authenticity of the original recording, and it was not shown that it would be unfair to admit the duplicate in lieu of the original. See HRE Rule 1003. Petitioner and her brother testified that the answering machine had been working properly during the time that Defendant allegedly left the messages, that Petitioner copied the messages onto the microcassette received in evidence, and that the microcassette tape was a true and accurate copy of the contents of the original recording on the answering machine. There was no evidence to the contrary. Thus, the court did not abuse its discretion in admitting the microcassette into evidence. See Shaw, 83 Hawai'i at 60-61, 924 P.2d at 554-55. Because the microcassette tape was admissible as a duplicate, HRE

Rule 1004 (1993)[4] was not the required basis for admission of the microcassette, as contended by Defendant.

To prevail on his claim of ineffective assistance of counsel, Defendant must establish: "1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Janto, 92 Hawai'i 19, 31, 986 P.2d 306, 318 (1999) (citations omitted). There was no ineffective assistance in trial counsel's failure to move for a judgment of acquittal on Count II because substantial evidence, as summarized supra, supported the court's determination that Defendant contacted Petitioner by writing. Second, ineffective assistance of counsel did not result from counsel's failure to

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[4] HRE Rule 1004 provides as follows:

> The original or a duplicate is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
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> (1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
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> (2) Original Not Obtainable. No original can be obtained by available judicial process or procedure; or
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> (3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the content would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or
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> (4) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

object to the admission of the twenty-nine page letter or the microcassette into evidence. As to the twenty-nine page letter, the court could infer from the evidence that either Defendant or someone at his behest placed the letter in Petitioner's truck. Also, as explained previously, the microcassette was properly admitted as a duplicate. Third, no prejudice resulted from Defendant's counsel's reference to the fact that Defendant had pled no contest to other violations of orders for protection. Defense counsel was referring to violations other than those dealt with in the instant case, when he mentioned that Defendant had pled no contest in the "past." Therefore,

IT IS HEREBY ORDERED that the court's July 26, 2000 judgment of conviction and sentence is affirmed.

DATED: Honolulu, Hawai'i, September 25, 2001.

On the briefs:

Georgia K. McMillen for
defendant-appellant.

Glenn Pesenhofer, Deputy
Prosecuting Attorney,
County of Maui, for
plaintiff-appellee.