

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

NESTOR DAGDAG, Defendant-Appellant.

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT,
(FC-CR NO. 00-1-0894(2))

MEMORANDUM OPINION

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

The defendant-appellant Nestor Dagdag appeals from the family court of the second circuit's judgment, the Honorable Reinette Cooper presiding, convicting him of and sentencing him to probation for the offense of abuse of a family or household member, in violation of Hawai'i Revised Statutes (HRS) § 709-906 (Supp. 2001),¹ filed on May 17, 2001. On appeal, Dagdag's sole

¹ HRS § 709-906 provides in relevant part:

Abuse of family or household members; penalty. (1) It shall be unlawful for any person, singly or in concert, to physically abuse a family member or household member or to refuse compliance with the lawful order of a police officer under subsection (4). The police, in investigating any complaint of abuse of a family or household member, upon request, may transport the abused person to a hospital or safe shelter.

For purposes of this section, "family or household member" means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

point of error is that the family court erred by not advising him of his right to testify on his own behalf and/or by failing to obtain a waiver of that right on the record. The State of Hawai'i [hereinafter, "the prosecution"] concedes the point as plain error. We agree, pursuant to Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995), that the family court plainly erred and hold that the error affected Dagdag's substantial rights and was not harmless beyond a reasonable doubt. Accordingly, we vacate the family court's judgment of conviction and probation and remand this matter for a new trial.

I. RELEVANT BACKGROUND

On November 13, 2000, Dagdag was charged by complaint with a single count of abuse of a family or household member, in violation of HRS § 709-906, see supra note 1. Dagdag pled not guilty and waived his right to a jury trial.

Dagdag's bench trial commenced on May 17, 2001. At trial, the prosecution called two witnesses,² and Dagdag informed the court that he had "possibly one" defense witness. After the prosecution rested its case-in-chief, Dagdag moved for a judgment of acquittal, which the family court denied.

The family court then inquired of Dagdag's counsel whether he intended to call any witnesses. After conferring with Dagdag, defense counsel responded in the negative and rested. Immediately thereafter, without advising Dagdag of his right to testify on his own behalf and obtaining an on-the-record waiver, the family court requested that the parties proceed with their oral arguments, after which the family court found Dagdag guilty

² Yvonne Lyon, the complainant, and Maui Police Department Officer Richard Suapaia testified on behalf of the prosecution.

as charged.

The family court sentenced Dagdag to one year of supervised probation, including a minimum forty-eight hours of incarceration at the Maui Community Correctional Center, less fourteen hours of credit for time served. The family court stayed the sentence pending the filing of a notice of appeal. On June 15, 2001, Dagdag filed a timely notice of appeal, and the family court stayed the execution of sentence.

II. STANDARD OF REVIEW

"We may recognize plain error when the error committed affects substantial rights of the defendant." State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997) (citations and internal quotation signals omitted). See also Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) (1993) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

State v. Jenkins, 93 Hawai'i 87, 101, 997 P.2d 13, 27 (2000) (quoting State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999) (quoting State v. Maumalanga, 90 Hawai'i 58, 63, 976 P.2d 372, 377 (1998) (quoting State v. Davia, 87 Hawai'i 249, 253, 953 P.2d 1347, 1351 (1998))))).

III. DISCUSSION

Dagdag contends that the trial court erred by failing both to advise him of his constitutionally protected right to testify on his own behalf at trial and to obtain an on-the-record waiver of that right, as mandated by this court's decision in Tachibana, 79 Hawai'i at 236, 900 P.2d at 1303. We agree.

In Tachibana, this court adopted the "colloquy approach," summarizing as follows:

[W]e hold that in order to protect the right to testify under the Hawai'i Constitution,^[3] trial courts must advise criminal defendants of their right to testify and must obtain an on-the-record waiver of that right in every case in which the defendant does not testify.

79 Hawai'i at 236, 900 P.2d at 1303. We also clarified that "the ideal time to conduct the colloquy is immediately prior to the close of the defendant's case." Id. at 237, 900 P.2d at 1304.

Both Dagdag and the prosecution agree that the family court failed to advise Dagdag of his right to testify. As the trial transcript unambiguously reflects, Dagdag elected not to testify, but the family court failed to obtain an on-the-record waiver of his constitutionally protected right to do so. As such, the family court plainly erred and substantially affected Dagdag's rights under the Hawai'i Constitution.

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[A] defendant's right to testify in his [or her] own defense is guaranteed by the constitutions of the United States and Hawai'i. . . .

The right to testify in one's own behalf arises independently from three separate amendments to the United States Constitution. It is one of the rights guaranteed by the due process clause of the fourteenth amendment as essential to due process of law in a fair adversary process. . . .

The right to testify is also guaranteed to state defendants by the compulsory process clause of the sixth amendment as applied through the fourteenth amendment. . . .

Lastly, the opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony, since every criminal defendant is privileged to testify in his [or her] own defense, or to refuse to do so.

Because the texts of sections 5, 14, and 10 of article 1 of the Hawai'i Constitution parallel the fourteenth, fifth, and sixth amendments to the United States Constitution, . . . the right to testify is also guaranteed by these parallel provisions of the Hawai'i Constitution. . . .

Tachibana, 79 Hawai'i at 231, 900 P.2d at 1298 (quoting State v. Silva, 78 Hawai'i 115, 122-23, 890 P.2d 702, 709-10 (App. 1995) (citations, quotation marks, footnote, and emphasis omitted)) (some ellipsis points added and some in original) (brackets in original).

IV. CONCLUSION

In light of the foregoing analysis, we vacate the family court's judgment of conviction and sentence of probation, filed on May 17, 2001, and remand this matter for a new trial.

DATED: Honolulu, Hawai'i,

On the briefs:

Mark Graven, for
the defendant-appellant,
Nestor Dagdag

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