

NO. 25619

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

ASHFORD MONTALVO, Defendant-Appellant.

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR. NO. 01-2-0910(1))

SUMMARY DISPOSITION ORDER

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

Following a jury-waived trial, defendant-appellant Ashford Montalvo appeals from the judgment of conviction and sentence entered on January 8, 2003 by the Family Court of the Second Circuit, the Honorable Mary Blaine Johnston presiding, adjudging him guilty of and sentencing him for abuse of a family or household member, in violation of Hawai'i Revised Statutes (HRS) § 709-906 (Supp. 2002).¹ On appeal, Montalvo contends that

¹ HRS § 709-906 provides in relevant part:

(1) It shall be unlawful for any person, singly or in concert, to physically abuse a family 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 the 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.

the circuit court abused its discretion in receiving an audio tape recording of a 911 call [hereinafter, 911 tape] into evidence on redirect examination because it went beyond the scope of cross-examination. Montalvo also asserts that the introduction of the 911 tape into evidence violated this court's holding in State v. Duncan, 101 Hawai'i 269, 67 P.3d 763 (2003) (stating that, generally, a party cannot "offer in rebuttal evidence which was proper or should have been introduced in chief").

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the issues raised and the arguments presented, we hold that, inasmuch as Montalvo objected to the introduction of the 911 tape based on foundational and hearsay grounds, which are not raised on appeal, he waived the evidentiary objections that he now advances in this appeal.² See State v. Matias, 57 Hawai'i 96, 101, 550 P.2d 900, 904 (1974). Accordingly,

² Assuming, arguendo, that the evidentiary objections were properly preserved, we note that, inasmuch as Montalvo raised the matter of Welch's 911 call for the first time on cross examination, the prosecution was entitled, on redirect examination to develop the circumstances surrounding Welch's statement to the responding police officer. See State v. Jackson, 81 Hawai'i 39, 47, 912 P.2d 71, 79 (1996); Hawai'i Rules of Evidence Rule 611 (1993). Moreover, Montalvo's reliance on Duncan in support of his contention that the 911 tape constituted improper rebuttal evidence is misplaced. Because the prosecution offered the disputed evidence in its case-in-chief (as opposed to after the close of its case-in-chief as was the circumstance in Duncan), the prosecution did not violate the general rules regarding rebuttal evidence. See Duncan, 101 Hawai'i at 276, 67 P.3d at 775.

***** NOT FOR PUBLICATION *****

IT IS HEREBY ORDERED that the family court's January 8, 2003 judgment of conviction and sentence is affirmed.

DATED: Honolulu, Hawai'i, November 16, 2004.

On the briefs:

Edward K. Harada,
Deputy Public Defender,
for defendant-appellant

Artemio C. Baxa,
Deputy Prosecuting Attorney,
for plaintiff-appellee