

NO. 22889

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
CECILIA TONGA, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR NOS. 99-0456(1) and 99-0511(1))

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Cecilia Tonga (Tonga) was charged with and convicted of two counts of Abuse of a Family Household Member in violation of Hawai'i Revised Statutes (HRS) § 709-906 (Supp. 1999).¹ Tonga was sentenced to two days incarceration for count I, thirty days incarceration for count II, and one year probation and was ordered to contact the Family Peace Center within three days after release from incarceration to schedule a program intake interview. Tonga appeals from the September 29, 1999, judgment of conviction and sentence. Tonga contends the trial court erred in finding that her actions did not fall under

¹ HRS § 709-906 (Supp. 1999) provides in relevant part as follows:

§709-906 Abuse of family or household members; penalty. (1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member

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 defense of parental discipline pursuant to HRS § 703-309(1) (1993) because the evidence did not prove beyond a reasonable doubt that Tonga was not justified in using reasonable force to discipline her fourteen-year-old daughter, Tuilokomana Vi (Tui). We disagree with Tonga's contentions and affirm the September 29, 1999, judgment of conviction and sentence.

I. BACKGROUND

The two counts reflect two separate incidents that were consolidated for trial. On July 15, 1999, Tonga was charged by Complaint with one count of Abuse of a Family Household Member, in violation of HRS § 709-906. The Complaint alleged that on or about July 1, 1999, Tonga physically abused Tui. On August 5, 1999, Tonga was charged by Complaint with one count of Abuse of a Family Household Member, in violation of HRS § 709-906. This second complaint alleged that on or about June 24, 1999, Tonga physically abused Tui.

Tonga lived at home with her father, her husband, their two daughters, and her niece (Baby), Baby's boyfriend, and their child. Tui testified that on June 24, 1999,² she went out with her adult cousin (Baby), Baby's son Joseph, and Baby's boyfriend (the group). After attending a baseball game, going shopping, and seeing a movie, the group returned home at 1:00 a.m. Tonga

² The September 29, 1999, transcript appears to contain an error by the court reporter. Page 8, line 19, refers to "June 4, 1999," which should read "June 24, 1999."

came home a few minutes later. Tonga called Tui to Tonga's room, sat Tui down, and started yelling at her. Tonga was angry at Tui for not calling to say she was coming home late. Tui had an 8:00 p.m. curfew. While scolding Tui, Tonga got a cable TV wire and started hitting Tui on the arms, legs and back with it. Tui testified that it "stinged and was painful" and she sat and cried for about 10 to 15 minutes afterward. Tonga told Tui to go to her room and sleep. Tui went into her room to lay down and Tonga came in still angry. Tui testified that Tonga "got the hanger and started whacking me with it." Tonga hit Tui several times on her arms, and Tui described being hit with the hanger as "painful." Tui's left arm was scratched or cut and bleeding slightly. She testified that there was a lasting mark on her arm "shaped like an L," and it hurt for three or four days. Tui testified that on September 29, 1999, the scar on her left arm was still present.

Tui testified that during the afternoon of July 1, 1999, she was in her room when Tonga told her to go read her books. Tui had borrowed books from the public library to read over the summer. Tui testified that while she was reading she was falling asleep. Tonga came in to Tui's room and told her to get up and finish reading the book so she could return all the books to the library. The books were five days overdue. Tonga was angry at Tui for being "irresponsible" and not taking care of

her things. Tonga was in her room and found Tui's library books between Tonga's bed and desk. Tonga asked Tui whether she (Tui) returned the books. Tui said she forgot and asked Tonga, "why didn't you remind me?" Tui asserted that Tonga "got mad . . . and got the broom and started hitting [her] with it." Tonga stated that "[b]ecause of the way she was and her attitude, I grabbed the broom and I hit her." Tui blocked the broom with her arms, and Tonga hit her on the wrists. Tonga hit Tui four or five times with the broom on both her right and left wrists. Tui testified that her wrists were swollen and that the pain lasted about two weeks.

On the following day, July 2, 1999, Tui called Tonga to tell her she (Tui) planned to live with her auntie, but Tonga said she was too young to make choices about where she would live. Tui testified that she called the police and stated, "I am a runaway and my mother is coming to pick me up and I'm scared that she might do something to me." Tonga testified that she had also called the police at about 9:30 p.m. to tell them that Tui was not home. When the police arrived, they told Tui that they were going to take her home; Tui told them she didn't want to go back. Tui told the police about the incidents of June 24, 1999, and July 1, 1999.

After a non-jury trial, Tonga was found guilty on both counts of Abuse of Family and Household Member. Her timely appeal followed.

II. STANDARDS OF REVIEW

A. Sufficiency of the Evidence. In deciding whether to uphold the family court decision, we must review the evidence adduced in the family court "in the strongest light for the prosecution" when evaluating the "legal sufficiency of such evidence to support a conviction." State v. Batson, 73 Haw. 236, 248, 831 P.2d 924, 931, reconsideration denied, 73 Haw. 625, 834 P.2d 1315 (1992). The test on appeal "is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact." Id. "'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to support a conclusion." Id. at 248-49.

B. Use of Force Defense. Whether the force used was reasonably related to the welfare of the minor involves the trial court's evaluation of mixed questions of law and fact; therefore, the trial court's conclusions of law on this issue are reviewed under the clearly erroneous standard. State v. Furutani, 76 Hawai'i 172, 180, 873 P.2d 51, 59 (1994). Under the clearly erroneous standard, a trial court's decision will not be vacated

unless, based upon the entire evidence in the record, the appellate court is left with the definite and firm conviction that a mistake has been made. Id. at 179, 873 P.2d at 58.

C. Disproving Defense. The prosecution disproves a defense when it "prove[s] beyond a reasonable doubt facts negating the defense." State v. Tanielu, 82 Hawai'i 373, 377, 922 P.2d 986, 990 (1996) (citation and internal quotation marks omitted).

III. DISCUSSION

A. Parental Use of Force Defense

Tonga does not challenge the sufficiency of the evidence establishing a violation of HRS § 709-906, but disputes the trial court's rejection of her parental use of force defense under HRS § 703-309 claiming there was insufficient evidence to support a finding that she was not justified in her use of force against Tui. Hawai'i Revised Statutes § 703-309(1) (1993) reads as follows:

§703-309 Use of force by persons with special responsibility for care, discipline, or safety of others.

The use of force upon or toward the person of another is justifiable under the following circumstances:

- (1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor, or a person acting at the request of the parent, guardian, or other responsible person, and:
 - (a) The force is employed with due regard for the age and size of the minor and is reasonably related to the purpose of safeguarding or

promoting the welfare of the minor,
including the prevention or
punishment of the minor's
misconduct; and

- (b) The force used is not designed to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.

Tonga argues the trial court erred in finding that her actions did not fall under the defense of parental discipline pursuant to HRS § 703-309(1) because the State failed to prove beyond a reasonable doubt that Tonga was not justified in using reasonable force to discipline fourteen-year-old Tui.

In order to properly invoke the defense of justifiable use of force under parental discipline pursuant to HRS § 703-309(1), Tonga is required to make a showing of evidence to satisfy the following four-part test: "(1) [she is] a parent, guardian, or other person as described in HRS § 703-309(1); (2) [she] used force against a minor for whose care and supervision [she] was responsible; (3) [her] use of force was with due regard to the age and size of the recipient and reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of misconduct; and (4) the force used was not designed to cause, or known to create a risk of causing, substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage." State v. Crouser, 81 Hawai'i 5, 10-11, 911 P.2d 725,

730-31 (1996); see State v. Kaimimoku, 9 Haw. App. 345, 349-50, 841 P.2d 1076, 1079 (1992).

Conversely, the State "had the burden of disproving beyond a reasonable doubt the justification evidence that was adduced, or proving beyond a reasonable doubt facts negating the justification defense."³ Crouser, 81 Hawai'i at 11, 911 P.2d at 731. The requirements of HRS § 703-309(1) are set out in the conjunctive, rather than the disjunctive; therefore, "the prosecution needed only to disprove one element beyond a reasonable doubt to defeat the justification defense." Crouser, 81 Hawai'i at 11, 911 P.2d at 731.

B. Tonga Fails to Meet Parts Three and Four of the Test

- 1. The use of force was not reasonably related to the purpose of safeguarding or promoting Tui's welfare, including the prevention or punishment of misconduct.**

Tonga argues the family court's conclusion that her use of force was not reasonably related to the purpose of safeguarding or promoting Tui's welfare was clear error. We disagree. We conclude there was substantial evidence to support a conclusion that Tonga's use of force was so excessive that it

³ The Hawai'i Supreme Court cites State v. Kaimimoku, 9 Haw. App. 345, 841 P.2d 1076 (1992), for this proposition, but the citation in Kaimimoku reads as follows:

When evidence of justification is adduced at trial, the burden is on the prosecution to disprove the justification evidence that was adduced or to prove facts negating the justification defense, and to do so beyond a reasonable doubt.

Id. at 350, 841 P.2d at 1079.

was not reasonably related to the purpose of safeguarding or promoting the welfare of Tui.

The use of physical force for teaching discipline must be reasonably related to that purpose. Crouser, 81 Hawai'i at 12, 911 P.2d at 732. Punishing misconduct is a statutorily permissible use of force under HRS § 703-309. In order to be "reasonably related" to the purpose of punishing misconduct (the relevant legitimate purpose at issue in this case), "use of force must be both reasonably proportional to the misconduct being punished and reasonably believed necessary to protect the welfare of the recipient." Id. The testimony regarding the June 24, 1999, incident established that after Tui violated the rules of her curfew agreement, she was called into Tonga's room and was physically disciplined with a cable TV wire. Evidence was established that Tui was hit by Tonga on the arms, legs, and back with the cable TV wire. Tui described the beating as "painful" and "stinging." Tui then cried for 10 to 15 minutes afterward. Tonga then directed Tui to go into Tui's bedroom to go to sleep. After Tui went to bed, Tonga came in to Tui's room "still mad" and proceeded to beat her further with a plastic hanger. It was this second beating on June 24, 1999, that left a scar on Tui's arm. Any disciplinary value that may have been sought was achieved in the first punishment when Tonga caused Tui significant pain as evidenced by Tui's sustained crying. The

second beating with the plastic hanger related more to Tonga's desire to vent her anger than to the punishment of Tui's misconduct.

The family court considered Tui's age and size relative to Tonga's and the testimony that the force was excessive enough to (1) cause the hanger to break, (2) cause pain lasting for three or four days, and (3) leave a permanent scar on Tui's left forearm. The family court concluded that the discipline endured by Tui was not reasonably related to the purpose of safeguarding her welfare. We conclude the family court did not clearly err in finding that Tonga's physical discipline of Tui on June 24, 1999, became so excessive that it failed to be reasonably proportional to the misconduct being punished and was no longer reasonably related to safeguarding her welfare.

Tonga also contends the July 1, 1999, incident involved a permissible use of force under HRS § 703-309(1) that was reasonably related to the purpose of punishing misconduct. During this incident, Tonga confronted Tui regarding her failure to return library books on time. Tonga discovered the misplaced library books between her bed and desk and confronted Tui. The following testimony was elicited from Tonga:

A: [Tonga] So I picked them [the books] up and I asked her, did you remember to turn in the books. And she said, oh, I forgot. And I asked her, where are the books. She didn't even know where the books were until I gave it to her. And I also explained it to her that if she doesn't turn in the books we will be charged (inaudible) the problem

that I hate. That's not the point, but for her to, you know, really be responsible and do things for herself.

. . . .

Q: [Deputy Public Defender] Okay. Now, what happened with the broom?

A: I was -- I guess -- I think the way she was answering -- my daughter has an attitude. She was answering me, oh well, I forgot. Why didn't you remind me? I don't know. And that's when I -- the broom was right next to me.

Q: Okay. So, you got the broom?

A: Because of the way she was and her attitude, I grabbed the broom and I hit her.

Tui testified that she was hit with the broom "four or five times." The force of the beating caused swelling and caused pain that lasted "for about two weeks." Tonga argues that her "attempts at verbal discipline were ineffective" and "Tui's insolent 'attitude' exacerbated an already tense and emotional situation." Tonga argues therefore that the "physical force used by [her] was reasonably related to Tui's misconduct." Tonga's testimony at trial shows she responded to Tui's question "[w]hy didn't you remind me?" by grabbing the broom and hitting her. There was no discussion or verbal discipline about Tui's "attitude." It is unclear whether Tui was being physically disciplined for allowing the books to become overdue, for asking her mother why she didn't remind her once Tonga became aware they were overdue, or for Tonga's perception of Tui's "attitude." The purpose of the physical force by Tonga was unexpressed to Tui and failed to be reasonably related to the prevention or punishment of misconduct.

The trial court's conclusions that Tonga's use of force on June 24, 1999, and July 1, 1999, was not reasonably related to the purpose of safeguarding or promoting Tui's welfare, including the prevention or punishment of misconduct, were not clearly erroneous.

Consequently, Tonga's argument that "[t]he evidence elicited at trial was insufficient to prove beyond a reasonable doubt that the force used by [Tonga] was not 'reasonably related' to the prevention or punishment of Tui's misconduct" is without merit.

2. Tonga's beating of Tui was designed to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.

Tonga contends the family court failed to make a general finding that her use of force was designed to cause or known to create a risk of causing substantial bodily injury. Tonga also contends the family court failed to make a specific finding that the injury sustained by Tui was "major" and that her injuries rose to the "substantial bodily injury" threshold. Such findings of a "controlling question" are not required in a jury-waived trial absent a request from defendant. State v. Wells, 7 Haw. App. 510, 514, 780 P.2d 585, 588 (1989). Tonga made no request for such a finding and did not raise this issue as a point of error in her opening brief as required by HRAP 28(b)(4).

Tonga argues the State failed to prove that Tonga's use of force was designed to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage to Tui.

"Substantial bodily injury" is derived from HRS § 707-700 (1993). Crouser, 81 Hawai'i at 13, 911 P.2d at 733. Hawai'i Revised Statutes § 707-700 (1993) provides in relevant part that "'[s]ubstantial bodily injury' means bodily injury which causes: (1) [a] major avulsion, laceration, or penetration of the skin[.]" "Bodily injury" is defined in HRS § 707-700 (1993) as "physical pain, illness, or any impairment of physical condition." In Crouser, the Hawai'i Supreme Court recognized that "extreme pain [lasting] for days" falls within the statutorily forbidden result. 81 Hawai'i at 13, 911 P.2d at 733.

With regard to the June 24, 1999, incident, the evidence at trial established that Tui suffered a permanent scar on her left forearm as a result of Tonga's beating her with a plastic hanger. The family court's finding that this use of force falls within the statutorily forbidden injuries was not clearly erroneous.

With regard to the July 1, 1999, incident, the evidence established at trial that Tui suffered pain and swelling that lasted "two weeks" as a result of Tonga's beating her with a broom. The family court's finding that this use of force falls

within the statutorily forbidden injuries was not clearly erroneous.

We hold that (1) the family court's conclusions that Tonga's use of force against Tui did not fall under the parental discipline defense pursuant to HRS § 703-309(1) were not clearly erroneous; and (2) there was substantial evidence to support Tonga's conviction.

IV. CONCLUSION

The September 29, 1999, judgment of conviction and sentence is affirmed.

DATED: Honolulu, Hawaii, December 29, 2000.

On the briefs:

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Chief Judge

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