

NO. 23050

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
KAREN WARD, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR NO. 99-0525)

MEMORANDUM OPINION

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

Defendant-Appellant Karen Ward (Ward) was charged and convicted at a bench trial of Abuse of Family and Household Member in violation of Hawai'i Revised Statutes (HRS) § 709-906 (Supp. 1999). Ward was sentenced to 48 hours of incarceration, probation for one year and a \$50.00 fine, referred to the Family Peace Center, and ordered to participate in substance abuse assessment and treatment at the request of her probation officer. Ward appeals the November 18, 1999, judgment, contending the family court erred: by convicting her without a specific finding of a culpable mental state; in finding that her self-protection defense was disproved beyond a reasonable doubt; in finding that Christopher Shaw ("Shaw") was a household member under HRS § 709-906 and concluding the court had subject matter jurisdiction; and

in abusing its discretion by denying admission of opinion testimony of Shaw's character. We disagree with Ward and affirm the November 18, 1999, judgment of the family court.

I. BACKGROUND

Ward and Shaw had known each other for some time and were living in the same residence on August 4, 1999. Shaw testified that although he also maintained a separate residence, he had stayed primarily at Ward's residence for three to four months. Ward also testified that Shaw started staying at her apartment around four months before the incident. During that time, Shaw stayed at Ward's seven days a week, slept there, prepared meals there, stored clothes there, used dishes there, and did his laundry there. Shaw did not pay rent, but instead had an agreement with Ward in which he was allowed to stay at her residence in exchange for doing work on the apartment.

Although Ward and Shaw disagree as to the length and extent of their relationship, they agree that at some point they were romantically involved. Ward asserts that she demanded Shaw leave her home at least a dozen times before the August 4, 1999, incident, but that she "could not get him to leave."

Ward was set to leave for the East Coast on August 5, 1999, to take care of her ailing father. Ward was out running errands the day before her planned departure, and Shaw was

working around the building. When Ward returned home on August 4, 1999, a little after 5:00 p.m., the parties had a verbal altercation. Shaw was seated at the computer in a spare bedroom when Ward came in.

According to Shaw, Ward was screaming about wanting money and wanting Shaw out of the house. According to Ward, Shaw reacted violently and threatened to use force against her when she demanded that he leave her home. Ward testified that she was petrified and she believed Shaw was about to hit her. Ward slapped Shaw on the ear with her left hand. Shaw testified he felt excruciating pain, suffered equilibrium loss and ringing in his ear, and had a small amount of blood come out of his ear.

II. STANDARDS OF REVIEW

A. Sufficiency of Evidence

The standard of review on appeal for sufficiency of the evidence is substantial evidence.

"We have long held that evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or a jury. 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. Indeed, even if it could be said in a bench trial that the conviction is against the weight of the evidence, as long as there is substantial evidence to support the requisite findings for conviction, the trial court will be affirmed."

"'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 person] of reasonable caution to support a conclusion. And as trier of fact, the trial judge is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence."

State v. Pone, 78 Hawai'i 262, 265, 892 P.2d 455, 458 (1995) (quoting State v. Batson, 73 Haw. 236, 248-49, 831 P.2d 924, 931 (1992), reconsideration denied, 73 Haw. 625, 834 P.2d 1315 (1992)) (brackets in original); see also State v. Reed, 77 Hawai'i 72, 81-82, 881 P.2d 1218, 1227-28 (1994); In re John Doe, Born on January 5, 1976, 76 Hawai'i 85, 92-93, 869 P.2d 1304, 1311-12 (1994); State v. Silva, 75 Haw. 419, 432, 864 P.2d 583, 589-90 (1993).

State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996).

B. Subject Matter Jurisdiction

Subject matter jurisdiction is reviewed under a clearly erroneous basis. State v. Alagao, 77 Hawai'i 260, 262, 883 P.2d 682, 684 (App. 1994).

"A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." State v. Wilson, 92 Hawai'i 45, 48, 987 P.2d 268, 271 (1999) (internal quotation marks omitted).

C. Admission of Opinion Testimony

"[A]dmission of opinion testimony is a matter within the discretion of the trial court, and only an abuse of that

discretion can result in reversal." State v. Toyomura, 80 Hawai'i 8, 23-24, 904 P.2d 893, 908-09 (1995) (internal quotation marks and brackets omitted). "The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." State v. Ganal, 81 Hawai'i 358, 373, 917 P.2d 370, 385 (1996) (internal quotation marks omitted).

D. Self-Protection Defense

In our appellate review of the family court's finding that the State disproved beyond a reasonable doubt Ward's self-protection justification, we apply the substantial evidence standard. 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. Indeed, even if it could be said in a bench trial that the conviction is against the weight of the evidence, as long as there is substantial evidence to support the requisite findings for conviction, the trial court will be affirmed.

"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. And as trier of fact, the trial judge is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence.

Batson, 73 Haw. at 248-49, 831 P.2d at 931 (citations omitted).

III. DISCUSSION

A. Culpable Mental State

Ward contends the family court committed plain error by convicting her of Abuse of Family Member, HRS § 709-906, without making a specific finding of a culpable mental state. There is no state of mind specified under HRS § 709-906. However, this court has held the requisite state of mind attendant to the offense of physical abuse of a household member is established if a person acts intentionally, knowingly, or recklessly. State v. Canady, 80 Haw. 469, 475, 911 P.2d 104, 110 (App. 1996); cf. State v. Holbron, 78 Hawai'i 422, 424, 895 P.2d 173, 176 (1995). Definitions of states of mind are defined, in relevant part, in HRS § 702-206 (1993):

§702-206 Definitions of states of mind.

- (1) "Intentionally."
 - (a) A person acts intentionally with respect to his conduct when it is his conscious object to engage in such conduct.
 - (b) A person acts intentionally with respect to attendant circumstances when he is aware of the existence of such circumstances or believes or hopes that they exist.
 - (c) A person acts intentionally with respect to a result of his conduct when it is his conscious object to cause such a result.
- (2) "Knowingly."
 - (a) A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature.
 - (b) A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist.
 - (c) A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

- (3) "Recklessly."
 - (a) A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature.
 - (b) A person acts recklessly with respect to attendant circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances exist.
 - (c) A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.
 - (d) A risk is substantial and unjustifiable within the meaning of this section if, considering the nature and purpose of the person's conduct and the circumstances known to him, the disregard of the risk involves a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation.

Ward acknowledges that she slapped Shaw to "snap him to his senses." "This court has held that to 'physically abuse' someone is to 'maltreat in such a manner as to cause injury, hurt or damage to that person's body.'" Canady, 80 Hawai'i at 474, 911 P.2d at 109 (internal quotation marks omitted). In the instant case, the family court held that Ward intentionally slapped Shaw to get his attention and that the intentional slap constituted abuse. This family court finding constituted a finding of culpable intent and was based on substantial evidence in the record.

B. Self-Protection Defense

The self-protection defense is defined by HRS § 703-304 (1993), in relevant part, as follows:

§703-304 Use of force in self-protection. (1) [T]he use of force upon or toward another person is justifiable

when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.¹

Ward intentionally slapped Shaw. She testified she did so because it was necessary to prevent Shaw's threatened physical attack on her.

The family court found that Ward was angry at Shaw and her statement that "I wanted to get his attention to get him to leave and I slapped him" clearly indicated "that the slap in this case was not a reasonable belief that she was in any fear of being immediately harmed by him, that that force was not necessary to defend herself, but rather, she was angry, wanted to get his attention to get him to leave" Since Ward "did not act as a result of feeling the need to protect herself," the family court found that the State disproved Ward's self-protection defense beyond a reasonable doubt. The family court's finding was based on substantial evidence in the record.

¹ HRS § 703-300 (1993) provides the definitions relating to justification as follows:

"Believes" means reasonably believes.

"Unlawful force" means force which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or would constitute an offense except for a defense not amounting to a justification to use the force.

C. The Family Court Had Subject Matter Jurisdiction

Under HRS § 571-14 (Supp. 1999), the family court had original subject matter jurisdiction to try violations of HRS § 709-906 (Abuse of Family and Household Members).

Shaw was a "household member" as defined by HRS § 709-906 (Supp. 1999): "persons jointly residing or formerly residing in the same dwelling unit." Since Ward and Shaw were "persons jointly residing or formerly residing in the same dwelling unit" at the time of the offense, Shaw was a "household member" under HRS § 709-906. State v. Archuletta, 85 Hawai'i 512, 514, 946 P.2d 620, 622 (App. 1997).

Shaw testified that although he also maintained a separate residence, he had stayed primarily at Ward's residence for three to four months. During that time, he stayed at Ward's house seven days a week, slept there, prepared meals there, stored clothes there, used dishes there, and did his laundry there. Shaw did not pay rent, but instead had an agreement with Ward to do work on the apartment. Ward testified that Shaw started staying at her house on April 15 or 18, 1999, and that he "never left."

The family court did not err in concluding that Ward and Shaw were household members under HRS § 709-906.

D. Opinion Testimony

Ward contends the family court was wrong to deny admission of opinion testimony of a defense witness that would have been relevant to Shaw's character. Ward's counsel alleges he attempted to introduce the opinion and reputation testimony of Julie Parker (Parker) to show Shaw's character for untruthfulness under Rule 608 of the Hawai'i Rules of Evidence (HRE).

Rule 608 (1993) provides, in relevant part:

Rule 608 Evidence of character and conduct of witness. (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

- (1) The evidence may refer only to character for truthfulness or untruthfulness, and
- (2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking the witness' [sic] credibility, if probative of untruthfulness, may be inquired into on cross-examination of the witness and, in the discretion of the court, may be proved by extrinsic evidence. When a witness testifies to the character of another witness under subsection (a), relevant specific instances of the other witness' [sic] conduct may be inquired into on cross-examination but may not be proved by extrinsic evidence.

Although Ward's counsel contends Parker's testimony was to be offered under Rule 608(a) and that he read 608(a) into the record, it is in fact Rule 608(b) ("specific instances of

conduct") that counsel read into the record. Ward's counsel stated:

Ms. Julie Parker is a former employer of Mr. Shaw. She'd be able to testify that, while an employee, that Mr. Shaw absconded with funds of the company on more than one occasion which required her to make a police report. We're offering that evidence under Rule 404² in conjunction with Rule 608.

Parker's testimony about specific instances of conduct wherein Shaw allegedly stole money from her company would have been evidence proffered under Rule 608(b) not Rule 608(a). Rule 608(b) required Ward's counsel to first cross-examine Shaw on these specific instances of conduct prior to offering Parker's testimony on the same. Ward's counsel had the opportunity to question Shaw about specific instances of conduct on cross-examination, but chose not to do so. The trial court did not abuse its discretion in excluding Parker's testimony.

² HRE Rule 404 (Supp. 1999) provides in relevant part:

Rule 404 Character evidence not admissible to prove conduct; exceptions; other crimes. (a) Character evidence generally. Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

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- (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, 609, and 609.1.

IV. CONCLUSION

The November 18, 1999, judgment of the family court is affirmed.

DATED: Honolulu, Hawai'i, January 5, 2001.

On the briefs:

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County of Maui, for
Plaintiff-Appellee.

GEORGIA K. MCMILLEN
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Associate Judge