

NO. 23411

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
RUBEN G. NAVARRO, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR. NO. 00-2-0047(2))

MEMORANDUM OPINION

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

Defendant-Appellant Ruben G. Navarro (Navarro) was charged by complaint filed on January 20, 2000, with the following:

Count One, Abuse of Family [or] Household Member[s], in violation of Hawaii Revised Statutes (HRS) § 709-906 (Supp. 2000); and

Count II, Abuse of Family [or] Household Member[s], in violation of HRS § 709-906(4) (Supp. 2000).¹

¹ HRS § 709-906 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 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.

(2) Any police officer, with or without a warrant, may arrest a person if the officer has reasonable grounds to believe that the person is physically abusing, or has physically abused, a family or household member and that the person arrested is guilty thereof.

(3) A police officer who has reasonable grounds to believe that the person is physically abusing, or has physically abused, a family or household member shall prepare a written report.

(4) Any police officer, with or without a warrant, may take the following course of action where the officer has reasonable grounds to believe that there was physical abuse or harm inflicted by one person upon a family or household member, regardless of whether the physical abuse or harm occurred in the officer's presence:

- (a) The police officer may make reasonable inquiry of the family or household member upon whom the officer believes physical abuse or harm has been inflicted and other witnesses as there may be;
- (b) Where the police officer has reasonable grounds to believe that there is probable danger of further physical abuse or harm being inflicted by one person upon a family or household member, the police officer lawfully may order the person to leave the premises for a period of separation of twenty-four hours, during which time the person shall not initiate any contact, either by telephone or in person, with the family or household member; provided that the person is allowed to enter the premises with police escort to collect any necessary personal effects;
- (c) Where the police officer makes the finding referred to in paragraph (b) and the incident occurs after 12:00 p.m. on any Friday, or on any Saturday, Sunday, or legal holiday, the order to leave the premises and to initiate no further contact shall commence immediately and be in full force, but the twenty-four hour period shall be enlarged and extended until 4:30 p.m. on the first day following the weekend or legal holiday;
- (d) All persons who are ordered to leave as stated above shall be given a written warning citation stating the date, time, and location of the warning and stating the penalties for violating the warning. A copy of the warning citation shall be retained by the police officer and attached to a written report which shall be submitted in all cases. A third copy of the warning citation shall be given to the abused person;
- (e) If the person so ordered refuses to comply with the order to leave the premises or returns to the premises before the expiration of the period of separation, or if the person so ordered initiates any contact with the abused person, the person shall be placed under arrest for the purpose of preventing further physical abuse or harm to the family or household member; and
- (f) The police officer may seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of an offense under this section.

The complaint alleged under Count One that on or about January 5, 2000, Navarro did intentionally, knowingly, or recklessly engage in and cause physical abuse of a family or household member, to wit, his granddaughter Alea Keomaka (Alea), in violation of HRS § 709-906; and under Count Two, that on or about January 8, 2000, through January 10, 2000, Navarro returned to the premises before the expiration of an extended and enlarged period of separation as ordered by a police officer, in violation of HRS § 709-906(4). A bench trial before Judge Eric G.

(5) Abuse of a family or household member and refusal to comply with the lawful order of a police officer under subsection (4) are misdemeanors and the person shall be sentenced as follows:

- (a) For the first offense the person shall serve a minimum jail sentence of forty-eight hours; and
- (b) For a second offense and any other subsequent offense that occurs within one year of the previous offense, the person shall be termed a "repeat offender" and serve a minimum jail sentence of thirty days.

Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.

(6) Whenever a court sentences a person pursuant to subsection (5), it also shall require that the offender undergo any available domestic violence intervention programs ordered by the court. However, the court may suspend any portion of a jail sentence, except for the mandatory sentences under subsection 5(a) and (b), upon the condition that the defendant remain arrest-free and conviction-free or complete court-ordered intervention.

. . . .

(14) When a person is ordered by the court to undergo any domestic violence intervention, that person shall provide adequate proof of compliance with the court's order.

Romanchak of the Family Court of the Second Circuit (the family court) was held on March 30, 2000.² Navarro was found guilty as charged and sentenced to two days of imprisonment for Count One, thirty days of imprisonment for Count Two (to run concurrently to the term set in Count One), and one year of probation per count (to run concurrently). Navarro was ordered to pay a Criminal Injuries Compensation Commission fee of \$100.00 and to participate in the Child and Family Services program. The "Judgment of Probation" was entered on March 30, 2000, and the sentence was stayed pending this appeal of the judgment.

Navarro contends the family court erred: (1) in ruling that when he spanked³ Alea a second time, his conduct was physical abuse and was not justified as parental discipline under HRS § 703-309; (2) in convicting him in Count Two of violating the warning citation; and (3) in sentencing him as a repeat offender under HRS § 709-906(5) (b). We agree there was insufficient evidence to disprove Navarro's parental discipline defense beyond a reasonable doubt. Additionally, we agree that the warning citation was unsupported by substantial evidence to support the family court's finding that there was reasonable grounds to believe that there was probable danger of future

² Volumes 1 and 2 of the trial transcripts are erroneously dated "March 31, 2000"; the transcripts should reflect the trial date of "March 30, 2000."

³ The terms "spank," "slap," and "hit" are used interchangeably to define the same action by Navarro.

physical abuse being inflicted by Navarro upon Alea. We reverse the family court's March 30, 2000, "Judgment of Probation."

I. BACKGROUND

Germaine Kalani Navarro (Germaine) testified that she resides with her husband, Navarro (collectively, "the Navarros"), their daughter (Candace), and Candace's three children in Kahalui, County of Maui, State of Hawai'i. Candace's three children, eight-year-old Alea, six-year-old Kamalani, and one-year-old Casey Lynn (collectively, "the children") live with Candace in the back portion of the Navarro's residence. Candace shares joint legal and physical custody of Alea and Kamalani (collectively, "the girls") with her ex-husband Lancen Keomaka (Lancen). The girls stay with Candace from Sunday until 2:00 Friday afternoon, when they go to Lancen's house to stay with him and his wife Leonora Keomaka (Leonora) until 5:00 p.m. Sunday.

Germaine testified that on January 5, 2000, the Navarros were caring for the children while Candace was on vacation in Las Vegas from January 1 until January 7. The Navarros were responsible for the children while Candace was away. Sometime between 5:40 and 6:00 p.m. on January 5, 2000, Germaine, Navarro, Alea, and Casey Lynn were in the TV room in Candace's portion of the house. Germaine and Navarro sat on adjoining couches watching television while Casey Lynn crawled around on the floor. Alea came in the room and sat down on the

floor in front of Germaine and kind of facing Navarro. Alea dumped a bag of marsh pens⁴ on the floor and began coloring. Germaine told Alea not to color on the floor because Casey Lynn was crawling around and would pick up the pens and put them in her mouth. Alea did not pay attention to Germaine and continued coloring.

Germaine testified that within five minutes, Casey Lynn grabbed a pen and put it in her mouth. Germaine screamed, "Alea," and grabbed Casey Lynn and took the pen away from her. Germaine heard Navarro ask Alea, "what did your mama say?" Navarro then hit Alea with a stick as she sat kneeling on the floor, bent over. Navarro hit Alea on the left leg⁵ with a stick that had been in the corner of the house "for the longest time." It was a stick Navarro used for carving earrings. Whenever the children were naughty, Navarro would say "[y]ou don't listen dada's⁶ going to get the stick," or the children would say to each other, "I'm going tell dada get the stick." The stick is a symbol of authority and punishment, although it

⁴ The term "marsh pens" is used interchangeably throughout the transcripts with "colors" and "crayons."

⁵ Germaine testified that Alea was hit on her left thigh. Alea testified that she was hit by Navarro on her right thigh. Navarro testified that he did not know on what part of Alea's body he hit, "[m]aybe first one I went hit the head the next one I hit the okole side, I don't know."

⁶ The record indicates that Navarro was called "Dada" by his grandchildren.

had never been used to physically punish the children prior to that day.

Germaine testified that Alea reacted to being hit by Navarro by giving him "a very angry, dirty look." Germaine described Alea as "angry the whole week" and looking angry and defiant after being hit, as though she was "trying to toughen herself." Navarro then said to Alea, "you don't look at me like that." Navarro then hit Alea a second time on the same leg. Alea then picked up all of the crayons "so fast and threw it in a bag and ran out." Alea started to cry after being hit the second time.

Alea testified that she is nine years old and in the fourth grade. Alea remembered coloring in the parlor in Navarro's house on the day of the incident. Alea was sitting on the ground in front of the two couches where Germaine and Navarro sat. Alea heard Germaine tell her to pick up the coloring pens before Casey Lynn put them in her mouth. Alea did not listen to Germaine and kept drawing. The pens were all over the floor, and Casey Lynn put one in her mouth. Alea stated that the pens were on the floor because she was using them and did not put them "back where it supposed to be."

Alea testified that after she told Germaine that she did not need any help, Navarro went to go grab the stick. After returning with the stick, Navarro stood in front of her and

"whacked" her with the stick two times on the right thigh. Alea did "nothing" after Navarro whacked her the first time except lift up her head and look at him. Before Navarro hit Alea the first time, he told her to put away the pens. After being hit the first time, Alea took her time and put the pens away slowly, one at a time, because she was mad at Navarro for telling her what to do. Alea gave Navarro a mean look after he hit her the first time. After Navarro hit her a second time, Alea put the pens away.

Alea testified that she felt "sore" after being hit with the stick the first time. After being hit the second time, Alea described the pain as, "a little sore." Comparing the pain after each hit, Alea described it as "about the same." She could not recall how long her leg remained sore after being hit. Alea described the pain as hurting only at the time Navarro hit her. Alea testified that there is no remaining mark where Navarro hit her. The court asked Alea to point to where she was hit with the stick, and the court noted the absence of any residual mark.

Alea testified that at the time of the incident she missed Candace. Alea had wanted to go with Candace to Las Vegas and was mad that she was not able to go. The day before the incident with the pens, Alea had spit in her cousin's food.

Leonora testified that she is married to Lancen. Leonora picked up Alea on Thursday, January 6, 2000; Alea made no

mention of the incident with Navarro. On Saturday, January 8, 2000, Leonora first became aware of the incident when she was helping Alea and Kamalani get dressed, noticed that Alea's legs were dry, and asked Alea to put lotion on her legs. When Alea sat down and folded her legs, Leonora noticed a tennis ball-sized bruise on Alea's inner right thigh, about two to three inches down from Alea's crotch. The bruise was "blue, black, red, and there was a cut." Lancen and Leonora asked Alea where she got the bruise, and then they went down the police station to make a report.

A photograph depicting Alea's injury as it appeared to Leonora on Saturday, January 8, 2000, was admitted into evidence. A photograph taken on January 20, 2000, at the prosecuting attorney's office, depicting a scar on Alea's leg as it appeared to Leonora on January 20, was also admitted into evidence.

Maui County Police Department Officer David Wikoli (Officer Wikoli) testified that on January 8, 2000, he was called to the Wailuku police station (the police station) to investigate a walk-in abuse case. The court admitted Officer Wikoli's testimony for the limited purpose of establishing whether reasonable grounds existed for the issuance of the warning citation under HRS § 709-906(4). Officer Wikoli testified that when he arrived at the police station, he came in contact with Lancen, Leonora, Alea, and Kamalani. Leonora explained to

Officer Wikoli that she and Lancen have physical custody of the girls on weekends and that while bathing Alea, Leonora noticed a bruise on Alea's inside right leg area. When Leonora asked Alea how she got the bruise, Alea said that her grandfather struck her with a stick.

Officer Wikoli testified that he spoke with Alea in the presence of Lancen and Leonora. Alea told Officer Wikoli that while playing with her half-sister Casey Lynn in her family's parlor on January 5, 2000, they got into some sort of disagreement and Navarro told them that if they could not play nicely then Alea was to put the pens away. Alea was putting the pens away, but was not putting them away quickly enough and her grandfather got angry at her and hit her with a stick. During the course of the interview, Officer Wikoli observed a tennis ball-sized bruise about six inches below Alea's crotch on the inner side of Alea's right thigh.

Officer Wikoli testified that Lancen explained to him the custody agreement Lancen shares with Candace. Lancen told Officer Wikoli that on Sunday afternoons the girls return to Navarro's residence.

Officer Wikoli testified that his partner in the investigation was Officer Paul Bailey (Officer Bailey). Officer Wikoli spoke with Officer Bailey on the telephone briefly about "basic details of where [Officer Bailey] was going and what the

necessary -- you know, what the necessities of the follow-up was and what was to happen." Officer Wikoli also talked with Officer Bailey about the facts of the incident and the custody arrangements between the parties.

Officer Bailey testified that on January 8, 2000, he was called by the police station receiving desk to assist Officer Wikoli on a walk-in abuse case. Officer Wikoli told Officer Bailey that he was investigating an abuse case where a male identified as Navarro had hit his granddaughter with a stick. Officer Wikoli told Officer Bailey that the action had caused injury and requested Officer Bailey go to the house to "make checks for the responsible." Officer Bailey did not recall Officer Wikoli telling him when the incident occurred. Officer Bailey then went to Navarro's residence.

Officer Bailey testified that the first person he noticed upon arriving at the property was Navarro, whom Officer Bailey identified in court as the defendant. Officer Bailey identified himself to Navarro, informed Navarro of the investigation, and asked Navarro for the stick he used to strike Alea. After Navarro provided the stick, Officer Bailey informed Navarro that he was going to be placed under arrest for abuse of a family or household member. After arresting Navarro, Officer Bailey transported Navarro to the police station for processing. At the police station, Officer Bailey gave Navarro a warning

citation ordering Navarro to observe an enlarged cooling-off period by not returning to his residence until after 4:30 p.m. on January 10, 2000.

Officer Bailey testified that he explained the contents of the warning citation to Navarro before issuing it, and Navarro seemed to understand the explanation. Navarro refused to initial the warning citation. Navarro told Officer Bailey that he should not be issued the warning citation to stay away from the residence because Alea could go stay with other family members instead of him leaving the house. Officer Bailey explained to Navarro that under the terms of the warning citation, he would be arrested if he returned to the residence before its expiration on January 10, 2000, at 4:30 p.m.

Under cross-examination, Officer Bailey testified that prior to issuing the warning citation, he did not inquire about when the alleged abuse took place.

At the close of the State's presentation, the defense moved for a judgment of acquittal as to Count II. The family court denied the motion.

Navarro testified on his own behalf. Navarro testified that he was in the TV room when Alea came in and began coloring with crayons on the floor. Navarro was concerned because "the little sister was crawling around" and "babies will put anything in the mouth." Navarro heard Germaine warning Alea to be careful

because the baby would put the crayons in her mouth. Navarro saw Alea continue coloring until Casey Lynn put a crayon in her mouth. Germaine then became angry, grabbed Casey Lynn, and told Alea to put the crayons away. Navarro testified, "[a]nd me, if I hear too many times this telling things to the kids then I get, you know, maybe angry then I start yelling at Alea to put the pens away." Navarro then went "inside the parlor in the other house and took the stick."

Navarro testified that the stick is "an authority thing" that he uses to discipline the children, although he "hardly use 'em." After getting the stick, Navarro heard Germaine telling Alea a second time to put the crayons away. Navarro said, "hey, put away the thing now." Then he spanked Alea once. Alea gave Navarro "one dirty look." Alea was putting the crayons away slowly. Navarro testified that, "then she looked at me the first time I hit 'em and then I told -- you know, and then I hit her a second time." Navarro testified that he did not hit her hard. Navarro intended to discipline Alea and to make her hurry up. Navarro testified that Alea had been acting up because the mother went to Las Vegas on New Year's Day. Alea tried to call her mother in Las Vegas, but Navarro stopped her. Alea became mad. Regarding his concern for Casey Lynn, Navarro testified that he would rather discipline Alea than have

to "rush one one-year-old baby to the hospital for take things out from her mouth."

Under cross-examination, Navarro testified that he is sixty-one, is five feet, eight inches tall, and weighs one hundred eighty pounds. Navarro is right-handed.

Navarro testified that he heard Germaine tell Alea to pick up the pens after Casey Lynn had one in her mouth. After Navarro heard Germaine tell Alea a second time to pick up the pens, he decided to go get the stick. Navarro described the stick as approximately two feet long and three to three-and-a-half inches wide. He thinks that the stick weighs less than a pound. Navarro testified that when he returned to the parlor with the stick, he showed the stick to Alea and told her to pick up the crayons. Navarro spanked Alea the first time after Germaine told her to pick up the pens and Alea responded by slowly picking them up. After Navarro hit Alea the first time, she stopped picking up the pens for a little while and gave Navarro a mean look. Navarro stated that the look "probably" made him mad. Holding the stick in his right hand, Navarro hit Alea a second time a couple of seconds later.

Navarro testified that he has had the stick since 1993, but has never physically used it on anyone beyond showing it to the children as a symbol of authority. Navarro maintains discipline with the children when family members say, "Dada going

get the stick." Navarro testified he "can't believe" he caused the bruise to Alea's leg because he "didn't spank her that hard."

II. STANDARD OF REVIEW

Sufficiency of the Evidence.

Regarding appellate review for insufficient evidence, the Hawai'i Supreme Court has repeatedly stated:

[E]vidence 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 the conviction; the same standard applies whether the case was before a judge or 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.

State v. Quitog, 85 Hawai'i 128, 145, 938 P.2d 559, 576 (1997) (quoting State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996)) (emphasis omitted). "'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." Eastman, 81 Hawai'i at 135, 913 P.2d at 61.

State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998).

III. DISCUSSION

A. The Use of Force

Navarro argues the family court erred in concluding that when Navarro spanked Alea the second time, his conduct was "physical abuse" not justified as parental discipline under HRS § 703-309(1) (1993), which 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.

Navarro bore the burden of presenting facts necessary to trigger a defense under HRS § 701-115 (1993) of parental discipline.⁷ The defense is available to Navarro provided that some evidence was adduced, "no matter how weak, inconclusive, or unsatisfactory" it might be. State v. Lee, 90 Hawai'i 130, 137

⁷ **§701-115 Defenses.** (1) A defense is a fact or set of facts which negatives penal liability.

(2) No defense may be considered by the trier of fact unless evidence of the specified fact or facts has been presented. If such evidence is presented, then:

- (a) If the defense is not an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in the light of any contrary prosecution evidence, raises a reasonable doubt as to the defendant's guilt; or
 - (b) If the defense is an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in light of any contrary prosecution evidence, proves by a preponderance of the evidence the specified fact or facts which negative penal liability.
- (3) A defense is an affirmative defense if:
- (a) It is specifically so designated by the Code or another statute; or
 - (b) If the Code or another statute plainly requires the defendant to prove the defense by a preponderance of the evidence.

n.6, 976 P.2d 444, 451 n.6 (1999) (internal quotation marks omitted). Navarro presented evidence that (1) Navarro was a guardian of Alea while her mother was away; (2) Navarro used force against a minor for whose care and supervision he was responsible; (3) the force employed by Navarro was employed with due regard for the age and size of the minor; (4) the force was reasonably related to the purpose of safeguarding or promoting Alea's welfare, including the prevention or punishment of Alea's misconduct; and (5) 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. HRS § 709-309(1); see State v. Crouser, 81 Hawai'i 5, 10-11, 911 P.2d 725, 730-31 (1996); see also State v. Kaimimoku, 9 Haw. App. 345, 349-50, 841 P.2d 1076, 1079 (1992).

Once Navarro met his burden of producing evidence regarding the parental discipline defense, the burden shifted to the State to disprove "beyond a reasonable doubt the justification evidence that was adduced, or prov[e] beyond a reasonable doubt facts negating the justification defense."⁸

⁸ 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.

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.

The family court stated in its oral findings that (1) "Navarro was a guardian, in this case a grandparent who at that time was responsible for the general care and supervision of Alea," (2) "the force used when the grandfather struck this child on both cases was not severe with a heavy blow, all out," and (3) "there was reason to discipline and to punish here." The family court stated that the "critical thing in this case" was that although "the first slap was reasonably related, . . . [t]he second . . . I would not -- find was reasonably related to punishment or discipline." In other words, the family court determined that a second slap was not reasonably related to Alea's misconduct. We hold that the family court's finding is unsupported by substantial evidence.

Navarro argues the family court's finding that Navarro's conduct was not justified was based on the erroneous conclusion that the use of force, when accompanied by anger, cannot be justified as discipline or punishment. Navarro points to the family court's conclusion that the second slap was not justified because Mr. Navarro was angry when he slapped Alea the

second time: "He didn't like the fact that she didn't speed it up, that she made an angry face at him." The family court concluded that "when a parent gets angry that goes beyond punishment."

The State argues that the family court's finding that the second spank was improper was not solely because it was done in anger, but that it was for "retribution," -- a getting even for Alea's dirty look and slowness in picking up the pens -- and served no further purpose.

The Hawai'i Supreme Court construes "reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of misconduct"⁹ as:

Although we have found no other statute employing the identical language, it seems clear that to be "reasonably related" to the purpose of punishing misconduct, use of force must be both reasonably proportional to the misconduct being punished and reasonably believed necessary to protect the welfare of the recipient. Subsection (b) of HRS § 703-309(1) defines the maximum degree of force that is justifiable under the statute. Subsection (a), as amended, makes clear that physical discipline may be so excessive that it is no longer reasonably related to safeguarding the welfare of the minor, even if it does not exceed the bounds set in subsection (b).

Crouser, 81 Hawai'i at 12, 911 P.2d at 732.

The family court described its understanding of the facts relevant to the "reasonably related" determination as follows:

⁹ Crouser, 81 Hawai'i at 10-11, 911 P.2d at 730-31.

[The Court] Next. And is reasonably related to the purpose of safeguarding, promoting the welfare, et cetera, including the prevention or punishment. Well, I would find that yes, there was reason to discipline and to punish here. The child was not listening, didn't pick up the pens at first when she was asked to do that. When she started to pick them up it was slow. She just wasn't doing what she'd been asked to do. In fact, by not doing it apparently did result in exactly the thing that they were trying to prevent here, and that was the baby picking up the pen.

Next. The Court in listening to the evidence, is it reasonably related to, as I -- we -- I've said, discipline or punishment. And I think this is the critical thing in this case. I would find that the first slap was reasonably related. But I guess in this case I draw the line. The second -- I do not find at that point -- and I've done this in other cases, but in this case I would not -- find was reasonably related to punishment or discipline.

Mr. Navarro got angry. He didn't like the fact that she didn't speed it up, that she made an angry face at him. And he said it got him angry. And when a parent gets angry that goes beyond punishment. And I don't believe a parent would be justified under this statute to hit again because they're angry, and I think that's what happened. The second hit went over the line. And in all these cases that's what I do, I draw the line. All right? And I find from the facts in this case that that's where the line had to be drawn in this case.

And for that reason, I find that the state has satisfied me and disproved that the second hit here was for purposes of discipline, punishment. It certainly wasn't for any other reason. And therefore, I find that 703-309 would not apply as to Count 1. Therefore, I find Mr. Navarro guilty of abuse of a family or household member as set forth in Count 1 of the complaint.

Although the family court found that Alea continued to engage in misconduct after being hit by Navarro the first time -- "she didn't speed it up" and she made an angry face at Navarro -- the family court nevertheless determined that Navarro's second hit was not reasonably related to Alea's misconduct. However, the State failed to present any evidence that the second hit was not discipline reasonably related to Alea's continued misconduct. Therefore, the family court's finding is unsupported by

substantial evidence. Accordingly, we reverse the family court as to Count One.

B. Violation of the Warning Citation

Navarro was charged with failure to comply with the lawful order of a police officer under HRS § 709-906(4). Navarro argues that there were insufficient grounds to sustain the conviction in Count Two for violation of the warning citation pursuant to HRS § 709-906(4). Specifically, Navarro contends that Officer Bailey did not have reasonable grounds to believe that Navarro had physically abused Alea and that there was probable danger of further physical abuse inflicted by Navarro upon Alea.

Navarro relies on State v. Kapela, 82 Hawai'i 381, 922 P.2d 994 (App. 1996), where this court stated:

To sustain a conviction for this offense, the State was required to prove beyond a reasonable doubt the following four elements:

(1) that a police officer had reasonable grounds to believe that there was recent physical abuse or harm inflicted by Defendant upon Complainant, a family or household member;

(2) that the officer had reasonable grounds to believe that there was a probable danger of further physical abuse or harm being inflicted by Defendant upon Complainant;

(3) that the officer issued a written warning citation to Defendant, ordering him to leave the home for a cooling-off period of twenty-four hours or a specified enlarged period if the incident occurred after 4:30 p.m. on any Friday, or on any Saturday, Sunday or legal holiday; and

(4) that Defendant returned to the home before the expiration of the cooling-off period.¹⁰

Id. at 387, 922 P.2d at 1000.

Under the reasonable grounds standard articulated in Kapela, the State was required to prove that Officer Bailey had reasonable grounds to believe that Navarro had physically abused Alea and that there was a probable danger of further physical abuse or harm being inflicted by Navarro upon Alea. "[A] warning citation cannot be issued purely on a complainant's claim that he

¹⁰ Since Kapela was decided, the legislature amended § 709-906(4) by removing the word "recent" (in subsection (1) above) from the law governing when physical abuse or harm must occur before a police officer can issue a warning citation. 1998 Haw. Sess. L. Act 172, § 8 at 645-46. The House Judiciary Committee, in proposing the amendment to remove the requirement that abuse be "recent" in order for police to order a period of separation, stated:

This bill also removes "recent" from the law governing the police issuance of twenty-four hour warnings. Under current law, if a police officer has reasonable grounds to believe that there was recent physical abuse or harm, the officer may order the abuser to leave the premises for a cooling off period of twenty-four hours. Your Committee finds that police officers responding to a domestic violence complaint have to make quick decisions on whether or not to remove an abuser from a home. This decision is often delayed because an officer has to interpret how "recently" the physical abuse occurred. Deleting this ambiguous term would result in more twenty-four hour warnings, thereby protecting more victims of domestic abuse.

Hse. Stand. Comm. Rep. No. 578-98, in 1998 House Journal, at 1264.

Furthermore, by 1998 Haw. Sess. L. Act 172, § 8 at 645-46, the phrase "cooling-off period" became "period of separation." The House Judiciary Committee, in proposing the amendment, stated:

H.B. 2666 substitutes the term "period of safety" for "cooling off period." The intent of this amendment is to emphasize that by removing a domestic abuser from a premises after an incident, the concern is for the victim rather than the aggressor. However, the term "period of safety" may mislead a victim into believing that the victim is actually safe from further abuse. In order to avoid this problem, your Committee recommends changing the phrase to "period of separation." Hse. Stand. Comm. Rep. No. 578-98, in 1998 House Journal, at 1264.

or she was beaten or abused. There must be other objective facts and circumstances which would warrant a reasonable police officer to believe the complainant's claim." Id. at 393, 922 P.2d at 1006.

When HRS 709-906 was originally enacted, the House Judiciary Committee amended the original form to accommodate instances where the alleged abuse did not take place in the police officer's presence. The House Judiciary Committee stated, in part, as follows:

The bill as amended provides that the officer is to make reasonable inquiry as to whether further, substantial, physical harm is likely to occur. If he should ascertain that such likelihood exists, the police officer is empowered to require the other spouse to leave the premises for a cooling-off period of at least three hours.

Hse. Stand. Comm. Rep. No. 657, in 1973 House Journal, at 1065.

Evidence was elicited at trial that Officer Wikoli interviewed Lancen, Leonora, and Alea at the police station after Lancen and Leonora alleged Alea was abused by Navarro. Alea explained that she was hit with a stick by her grandfather after he became angry that she was not putting away the pens quickly enough. Officer Wikoli observed a tennis ball-sized bruise on Alea's right thigh.

Officer Wikoli's partner in the investigation was Officer Bailey. Officer Wikoli explained to Officer Bailey the "basic details" of the investigation and what the "necessities of the follow-up was and what was to happen." Officer Wikoli

requested that Officer Bailey go to Navarro's residence to "make checks for the responsible." Officer Bailey went to Navarro's residence, asked for the stick Navarro used to strike Alea, and placed Navarro under arrest for violating HRS § 709-906. At the police station, Officer Bailey issued a warning citation to Navarro ordering him to observe an enlarged period of separation by leaving his residence until 4:30 p.m. January 10, 2000. Officer Bailey testified that he did not make any inquiry about the specifics of the incident or when the abuse allegedly took place.¹¹

Assuming arguendo that Officer Bailey had reasonable grounds to believe Navarro physically abused Alea, we conclude the warning citation was unsupported by substantial evidence to support the finding of the family court that there was probable danger of further physical abuse being inflicted by Navarro upon Alea. Accordingly, we reverse the judgment of the family court as to Count Two.

¹¹ No reasonable investigation took place between Officer Wikoli and Lancen and/or Leonora regarding whether Alea was expected to return to the Navarro residence before the expiration of the period of separation or whether convenient alternative custody arrangements were in place. It was possible that she would not return before 4:30 p.m. on January 10, 2000. Even if we assume that Alea would return to the Navarro residence before the expiration of the enlarged period, and consider the evidence presented in the light most favorable to the State, there was insufficient evidence that the officers had reasonable grounds to believe that there was probable danger of further physical abuse.

IV. CONCLUSION

Accordingly, we reverse the March 30, 2000, family court "Judgment of Probation."

DATED: Honolulu, Hawaii, September 26, 2001.

On the briefs:

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Acting Chief Judge

Richard K. Minatoya,
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Associate Judge

Associate Judge