NO. 23599

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI I

STATE OF HAWAI I, Plaintiff-Appellee, v.
JEFFREY NAKAYAMA, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR NO. 99-2917)

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

Defendant-Appellant Jeffrey Nakayama (Defendant) appeals the June 20, 2000 Judgment of the Family Court of the First Circuit, entered by Judge I. Norman Lewis, convicting him of Abuse of Family and Household Members, Hawaii Revised Statutes (HRS) § 709-906 (1993). Defendant was sentenced to probation for two years, prohibited from consuming alcohol, sentenced to prison for ninety days and, pursuant to HRS § 351-62.6(a)(2) (Supp. 2000), ordered to pay a $50 Crime Victim Compensation Fee. We affirm.

FAMILY COURT DECISION

At the conclusion of the evidence, the family court decided as follows:

> The court has heard the evidence presented by [Plaintiff-Appellee State of Hawai i (the State)] and the defense, the State by and through its witnesses, defendant on his own behalf and by and through his witnesses. Of course, in this case, a lot turns on credibility in this particular case. And based upon what the court perceives the credibility of the witnesses to be and based upon what this court has learned and heard in this particular case, the court finds the State has proven its case beyond a reasonable doubt. The court will find the defendant guilty as charged.

POINT ON APPEAL

Defendant's sole point on appeal is that the court's decision is "against the clear weight of the evidence that showed [the alleged victim] to be suffering from dissociative disorder on November 19, 1999 that resulted in her making inaccurate statements about that night."

STANDARD OF REVIEW

A trial court's findings of fact are reviewed under the "clearly erroneous" standard of review. Dan v. State, 76 Hawai i 423, 428, 879 P.2d 528, 533 (1994). This is true of both implicit and explicit findings.[1] "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. Okumura, 78 Hawai i 383, 392, 894 P.2d 80, 89 (1995) (citations and internal quotation marks omitted).

The first half of the clearly erroneous test requires substantial evidence. On that issue, the Hawai i Supreme Court has stated as follows:

1/ Hawai i Rules of Penal Procedure Rule 23(c) states:

> In a case tried without a jury the court shall make a general finding and shall in addition, on request made at the time of the general finding, find such facts specially as are requested by the parties. Such special findings may be orally in open court or in writing at any time prior to sentence.

> 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[2] 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. Batson, 73 Haw. 236, 248-49, 831 P.2d 924, 931 (1992), *reconsideration denied*, 73 Haw. 625, 834 P.2d 1315 (1992) (citations omitted) (footnote added).

When applying the "clearly erroneous" test, it must be remembered that

> [i]t is for the trial judge as fact-finder to assess the credibility of witnesses and to resolve all questions of fact; the judge may accept or reject any witness's testimony in whole or in part. As the trier of fact, the judge may draw all reasonable and legitimate inferences and deductions from the evidence, and the findings of the trial court will not be disturbed unless clearly erroneous. An appellate court will not pass upon the trial judge's decisions with respect to the credibility of witnesses and the weight of the evidence, because this is the province of the trial judge.

State v. Eastman, 81 Hawai i 131, 139, 913 P.2d 37, 65 (1996) (citations omitted).

[2/] In light of the precedent that "[i]t is for the trial judge as fact-finder to assess the credibility of witnesses and to resolve all questions of fact[,]" State v. Eastman, 81 Hawai i 131, 139, 913 P.2d 57, 65 (1996), we question the presence of the word "credible" in this standard of review.

EVIDENCE

Carolyn Garcia (Garcia) testified that on November 19, 1999, at about 4:00 p.m., she left Queen's Hospital after a failed suicide attempt the day before. In her suicide attempt, Garcia had ingested about 50 Klonopin, a long-acting sedative. When she left the hospital, she may have had half of the level of Klonopin in her system. A medical doctor testified that "the effect of [Klonopin] on the brain is similar to the effect of alcohol, except that it lasts a lot longer." Garcia's best friend, Terrance Kamisato (Kamisato), picked her up from the hospital and took her to a Zippy's Restaurant bar, where she consumed three double vodka tonic drinks. Then, on their way to the apartment where Garcia and Defendant lived, Kamisato stopped at a liquor store and bought Garcia a 375-milliliter bottle of "alcohol." After Kamisato walked Garcia to her second floor apartment, he left. Garcia blacked out as soon as she entered the apartment and does not recall anything until the next morning when she woke up and saw Kamisato. During these blackout or dissociative states, Garcia talks to dead people, thinks that her father is hurting her again, and thinks that people and demons are in the room and no one is there. Garcia has scars on her arms and stomach from previous attempts at suicide. Garcia recalled the police at her apartment taking photographs of the scars on her arm. Garcia admitted that the photographs showed

bruises on her arm. She believed that the bruises originated when she was taken to the hospital on November 18, 1999. This was due to the fact that whenever the police restrained her, the police usually left bruise marks. She could not recall calling 911 but admitted that it was her voice on a tape of the call. On the tape, Garcia stated, "He already slammed me down and threw me down against the ground. He knocked me against the wall." When asked, "Who are you fighting with[,]" she responded, "Jeff. Jeff Defendant. He's trying to kill me." Garcia stated that she was still living with Defendant, she bailed him out after he was arrested, and that she did not want to get him into trouble "for something he didn't do." When asked, "If you have your choice, this case would just be dropped, wouldn't it[,]" she answered, "I think you should put me on trial."

Police Officer Glen Yagyagan (Officer Yagyagan) testified that he was dispatched at around 6:30 p.m. on November 19, 1999, to a South Beretania Street address. It was there that he found Garcia upset, crying, and cradling her arm. Garcia told Officer Yagyagan that Defendant had pushed her against the wall, shoved her against a marble table, and struck her in the left temple area, causing Garcia pain. Officer Yagyagan noted that he did not smell any alcohol on Garcia's breath and did not observe anything that would lead him to

believe that Garcia was under the influence of alcohol. Officer Yagyagan noticed Garcia's visible injuries and photographed them.

Officer Yagyagan arrested Defendant. At that time, Defendant appeared to be intoxicated and very angry. His eyes were red, the smell of an alcoholic beverage was on his breath, and he was yelling.

At the close of the State's evidence, Defendant's motion for a judgment of acquittal was denied.

Dr. Stephen Kemble, a psychiatrist, testified that he had been treating Garcia for over ten years for depression, alcohol abuse, and personality disorder with frequent self-destructive episodes, suicidal behavior, and dissociative episodes. He defined "dissociative state" as meaning the "person thinks they are in a time and place other than the present, confused about what reality they're in, maybe a flashback to a past experience." The main problem he was concerned about was Garcia's drinking "because when she drinks, it's anything-can-happen time." On November 20, 1999, Garcia was admitted into Queen's Hospital because she had tried to jump off the balcony after getting intoxicated. Her blood alcohol level was 0.27.

Dr. Kemble did not see Garcia until November 30, 1999, and based his opinion on Garcia's pattern and on what Garcia and the emergency room doctor who had admitted Garcia told Dr. Kemble. According to Dr. Kemble, Garcia's pattern was that, once

she started drinking, she would drink heavily until she reached a very high blood alcohol level and then would commonly dissociate. Dr. Kemble opined that, at the time of the alleged crime, "[Garcia] was intoxicated and that it's likely she was in a dissociative state where she was confused about whether she was in the past or the present." When Garcia is in this dissociative state, "she will think something is going on which is not actually going on or will be exaggerating something that's going on."

Kamisato verified Garcia's testimony of the facts except he testified that when he and Garcia got to the apartment, Defendant left to buy a pack of cigarettes and, at Garcia's request, Kamisato and Garcia went to buy the liquor for Garcia. Kamisato then took Garcia back to her apartment and left.

Defendant testified that he was at the apartment when Garcia returned with the liquor. Defendant left to get a pack of cigarettes and then returned. Garcia drank and started to get upset and into her dissociative state. As he had done the prior evening, when she went for the bathroom, Defendant hid the razors from her so she would not cut herself. When "she went straight for the kitchen" to get a knife, he blocked her way. By that time, Garcia was angry. She picked up a drink, threw it in his face, and told him she was going to call the cops on him. Defendant went and sat on the balcony and waited for the police.

He was not worried about Garcia going for the knife in the kitchen because, by that time, "[s]he was going for the phone already." He denied striking or shoving her or doing anything to her that would cause her to say to the police that he was trying to kill her.

POINTS ON APPEAL

Defendant contends there is clear evidence that Garcia was suffering from a dissociative disorder at the time of the alleged incident and was not abused by Defendant and, therefore, that the court's findings were made against the clear weight of the evidence.

DISCUSSION

As noted above, an appellate court will not pass upon the trial judge's decisions with respect to the credibility of witnesses and the weight of the evidence because this is the province of the trial judge. Defendant contends that the trial court's finding that Garcia's statements to the 911 operator were credible and that Defendant's denials were not credible are against the weight of the evidence. In other words, Defendant asks us to do what we are not authorized to do, i.e., change the trial judge's decisions with respect to the credibility of the witnesses and the weight of the evidence.

CONCLUSION

Accordingly, we affirm the family court's June 20, 2000 Judgment convicting Defendant-Appellant Jeffrey Nakayama of Abuse of Family and Household Members, HRS § 709-906 (1993).

DATED: Honolulu, Hawai i, October 2, 2001.

On the briefs:

Frank M. Fernandez
for Defendant-Appellant.

Chief Judge

Caroline M. Mee,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge