NO. 24021

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
KEITH M.K. LUPENUI, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR NO. 00-1-1892)

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

Defendant-Appellant Keith M. K. Lupenui (Lupenui) appeals from the Order for Presentence Order and Report filed November 3, 2000 and the Judgment filed December 19, 2000 in the Family Court of the First Circuit (family court).

On May 31, 2000, Lupenui was charged, pursuant to Hawaii Revised Statutes (HRS) §§ 586-5.5 (Supp. 2000) and 586-11 (Supp. 2002),[1] with thirty-six counts of Violation of an Order

[1]/HRS § 586-5.5 (Supp. 2000) reads as follows:

> **§586-5.5 Protective order; additional orders.** (a) If after hearing all relevant evidence, the court finds that the respondent has failed to show cause why the order should not be continued and that a protective order is necessary to prevent domestic abuse or a recurrence of abuse, the court may order that a protective order be issued for such further period as the court deems appropriate, not to exceed three years from the date the protective order is granted.
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> The protective order may include all orders stated in the temporary restraining order and may provide for further relief as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation and custody with regard to minor children of the parties and orders to either or both parties to participate in domestic violence intervention services. If the court finds that the party meets the requirements under section 334-59(a)(2), the

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for Protection for telephoning the complaining witness in violation of the Order for Protection (Order). Following a jury trial,[2] Lupenui was convicted of twenty-three counts.[3]

On appeal, Lupenui contends that we should dismiss the guilty verdicts against him or, in the alternative, vacate the guilty verdicts and remand for a new trial, based on the following grounds: (1) the trial judge should have recused

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[1/](...continued)
court further may order that the party be taken to the nearest facility for emergency examination and treatment.

(b) A protective order may be extended for a period not to exceed three years from the expiration of the preceding protective order. Upon application by a person or agency capable of petitioning under section 586-3, the court shall hold a hearing to determine whether the protective order should be extended. In making a determination, the court shall consider evidence of abuse and threats of abuse that occurred prior to the initial restraining order and whether good cause exists to extend the protective order.

The extended protective order may include all orders stated in the preceding restraining order and may provide such further relief as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation and custody with regard to minor children of the parties and orders to either or both parties to participate in domestic violence intervention services. The court may terminate the extended protective order at any time with the mutual consent of the parties.

HRS § 586-11 (Supp. 2002) reads in relevant part as follows:

§586-11 Violation of an order for protection. (a) Whenever an order for protection is granted pursuant to this chapter, a respondent or person to be restrained who knowingly or intentionally violates the order for protection is guilty of a misdemeanor. A person convicted under this section shall undergo domestic violence intervention at any available domestic violence program as ordered by the court.

[2/]The Honorable Michael D. Wilson presided.

[3/]The first page of the November 3, 2000 Order for Presentence Order and Report omitted Count 28 from among the counts Lupenui was found guilty of. The verdict form confirms that the jury found Lupenui guilty of committing Count 28.

himself from presiding over Lupenui's trial, and his failure to do so denied Lupenui a fair trial; (2) the family court failed to instruct the jury on the "ignorance-or-mistake-of-fact" defense; and (3) the jury rendered inconsistent verdicts in finding Lupenui guilty of violating the Order on some counts and not guilty of violating the Order on other counts. Upon careful review of the record of the proceedings, we disagree with Lupenui's contentions and affirm.

Lupenui contends that the trial judge erred in denying his motion for judicial disqualification under HRS § 601-7(a) (1993).[4] However, Lupenui has not shown actual bias because he

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[4]/HRS § 601-7 (1993) reads as follows:

> **HRS §601-7 Disqualification of judge; relationship, pecuniary interest, previous judgment, bias or prejudice.** (a) No person shall sit as a judge in any case in which the judge's relative by affinity or consanguinity within the third degree is counsel, or interested either as a plaintiff or defendant, or in the issue of which the judge has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which the judge has been of counsel or on an appeal from any decision or judgment rendered by the judge.
>
> (b) Whenever a party to any suit, action, or proceeding, civil or criminal, makes and files an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against the party or in favor of any opposite party to the suit, the judge shall be disqualified from proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one affidavit; and no affidavit shall be filed unless accompanied by a certificate of counsel of record that the affidavit is made in good faith. Any judge may disqualify oneself by filing with the clerk of the court of which the judge is a judge a certificate that the judge deems oneself unable for any reason to preside with absolute impartiality in the pending suit or action.

failed to demonstrate that the trial judge's adverse rulings showed "marked personal feelings on both sides inflicting lingering personal stings". State v. Ross, 89 Hawai‘i 371, 378, 974 P.2d 11, 18 (1998). Also, in the absence of actual bias, Lupenui's contention that the trial judge made numerous erroneous rulings against Lupenui, without more, is not enough. Ross, 89 Hawai‘i at 379, 974 P.2d at 19.

Despite having been granted six extensions of time to supplement the record, Lupenui requests that this court judicially notice assertions made in documents not in the record. To be judicially noticed, however, such "adjudicative" facts must be generally known within the jurisdiction or "capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy," which is not the case here. State v. Puaoi, 78 Hawai‘i 185, 189-90, 891 P.2d 272, 276-77 (1995) (internal quotation marks omitted); HRE Rule 201. Moreover, a court "may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it". State v. Kotis, 91 Hawai‘i 319, 342, 984 P.2d 78, 101 (1999) (quoting M/V American Queen v. San Diego Marine Const., 708 F.2d 1483, 1491 (9th Cir. 1983)).

In contrast to Lupenui's claim that he was denied a fair trial due to judicial misconduct during trial, the record

does not reveal that the judge was not impartial. Peters v. Jamieson, 48 Haw. 247, 262-64, 397 P.2d 575, 585-86 (1964). Regarding a note that the defense wanted admitted at trial, the record reflects the family court held an extensive colloquy with the parties before defense counsel finally stated that he was "really not asking to introduce it into evidence." Moreover, defense counsel extensively cross-examined the complaining witness about an array of topics relating to her potential biases and financial motives, including family finances and vacation funds. See Bright v. Shimoda, 819 F.2d 227, 228-29 (1987) ("we are reluctant to set aside a conviction when the defendant has enjoyed substantial cross-examination"). Lupenui's laundry list of adverse rulings, without more, does not advance Lupenui's claim that he was denied a fair trial. Peters, 48 Haw. at 264, 397 P.2d at 586.

Contrary to Lupenui's assertion, we conclude that the family court did not err in refusing to give the jury Lupenui's proposed ignorance-or-mistake-of-fact instruction.[5] Our review

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[5/] Lupenui states in his opening brief that his proposed ignorance-or-mistake-of-fact instruction read as follows:

> In the prosecution for violation of an order for protection, it is a defense that [Lupenui] engaged in the prohibited conduct under ignorance or mistake of fact if:
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> The ignorance or mistake negatives the state of mind required to establish an element of the offense, in this case, if [Lupenui] ignorantly or mistakenly believed he was entitled to communicate with [the complaining witness] for purposes of custody, visitation, or matters dealing with their divorce

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of the record reveals no evidence supplied by either the State or defense witnesses to support the claim of Lupenui that he was mistaken or ignorant as to what contacts with the complaining witness were prohibited. Accordingly, Lupenui failed to meet his threshold burden of introducing evidence to support the giving of an instruction as to the ignorance-or-mistake-of-fact defense. State v. Locquiao, 100 Hawai'i 195, 206, 58 P.3d 1242, 1253 (2002).

Finally, Lupenui contends that the fact that he was convicted of twenty-three counts and acquitted of the remaining counts reveals factual inconsistencies in the jury's understanding of the case. Jury verdicts are not inconsistent when they "are reconcilable with the relevant statutory provisions and the evidence adduced at trial". State v. Senteno, 69 Haw. 363, 367, 742 P.2d 369, 372 (1987). Here, the family court charged the jury to view each count as factually separate from the rest. Likewise, both the State and defense introduced evidence about the individual facts surrounding each telephone

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[5/](...continued)
proceedings. HRS section 702-218(1).

This proposed jury instruction is not in the record on appeal. What is in the record before this court is Lupenui's counsel's statement, which reads as follows:

> [Defense counsel]: . . . "In any prosecution for an offense, it is a defense that the accused engaged in the prohibited conduct under ignorance or mistake of fact if: (1) the ignorance or mistake negatives the state of mind required to establish an element of the offense."

call. "It has long been the approved practice to charge, by several counts, the same offense as committed in different ways or by different means[.]" State v. Caleb, 79 Hawai‘i 336, 339, 902 P.2d 971, 974 (1995). Thus, the separate verdicts were not inconsistent.

For the aforementioned reasons, the Order for Presentence Order and Report filed November 3, 2000 and the Judgment filed December 19, 2000 in the family court are affirmed.

DATED: Honolulu, Hawai‘i, February 11, 2003.

On the briefs:

Matthew S.K. Pyun, Jr.,
Harrison K. Kawate,
for defendant-appellant.

Chief Judge

Mangmang Qiu Brown,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge