NO. 24334

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
GEOFFREY WELSH, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-Cr. No. 00-1-1002(1))

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

Defendant-Appellant Geoffrey Welsh (Welsh) appeals from the Judgment of Probation entered by the Family Court of the Second Circuit (the family court)[1] on May 29, 2001, convicting and sentencing him for Abuse of Family or Household Member, in violation of Hawaii Revised Statutes (HRS) § 709-906 (Supp. 2000).[2] Welsh contends that:

(1) The family court erred when it denied his motion for a mistrial and dismissal, or, alternatively, for a continuance, where, during presentation by Plaintiff-Appellee

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[1] Judge Eric G. Romanchak presided.

[2] At the time Defendant-Appellant Geoffrey Welsh was alleged to have violated Hawaii Revised Statutes (HRS) § 709-906 (Supp. 2000), the statute provided, in relevant part, as follows:

> **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.

State of Hawai‘i (the State) of its case, a police officer testified that he destroyed photographs that had not been previously disclosed to Welsh;

(2) The family court violated Welsh's constitutional right to confrontation when it allowed into evidence the complaining witness's prior out-of-court statements to a paramedic; and

(3) There was insufficient evidence to prove that Welsh had the requisite state of mind to sustain the conviction.

We agree with Welsh's second contention. Accordingly, we vacate the Judgment and remand for further proceedings consistent with this opinion.

BACKGROUND

Pursuant to a Complaint filed on December 14, 2000, the State charged that "on or about the 5th day of December, 2000, in the County of Maui, State of Hawaii, [Welsh] did intentionally, knowingly or recklessly engage in and cause physical abuse of a family or household member, to wit, Huanani Chandler [(Chandler).]" The family court subsequently granted the State's oral motion to amend the complaint to substitute "Haunani" for "Huanani."

At Welsh's bench trial held on May 29, 2001, Chandler did not testify. The State's evidence revealed that at about 12:50 a.m. on December 5, 2000, a Maui Police Department (MPD) dispatcher answered a 911 telephone call in which Welsh identified himself, stated his address, and engaged in the following colloquy with the dispatcher:

> [WELSH]: . . . I just was in a fight with my girlfriend and I've tried to hurt her and I would like to turn myself in for abuse of a family member.
>
> . . . .
>
> [DISPATCHER]: Where is your girlfriend now?
>
> [WELSH]: She's right here.
>
> [DISPATCHER]: Does she need a medic?
>
> [WELSH]: Uh, do you need a medic?
>
> [WELSH]: No.
>
> . . . .
>
> [DISPATCHER]: Is your girlfriend injured?
>
> [WELSH]: Uh, can't tell.
>
> [DISPATCHER]: Okay, we'll have --- have the ambulance just come over and meet with you guys okay?
>
> [WELSH]: Okay.

MPD officers Asbel Polanco (Officer Polanco) and Paul Bailey (Officer Bailey) were dispatched to respond to Welsh's 911 call.

Officer Polanco testified that when he arrived at Welsh's residence, Welsh reported that "he just abused his girlfriend" and "wanted to be arrested". After entering Welsh's residence, Officer Polanco went into the bedroom and saw Chandler sitting on the bed crying. Officer Polanco observed that Chandler had redness around the middle of her neck "coming forward to the front of the throat area on both sides" and was complaining of pain to her neck and throat. Over Welsh's objection, Officer Polanco testified that because Chandler stated that she had "passed out[,]" a paramedic was called to look at her.

On cross-examination, Officer Polanco mentioned that he had taken one or two photographs of Chandler's injuries with a Polaroid camera while standing within two feet of Chandler.

However, because the room was not well lit, the photographs did not capture the redness on Chandler's neck. Officer Polanco further testified that because the photographs were blurry and were not a fair and accurate representation of Chandler's injuries, he threw them away. Welsh's counsel then requested a continuance so that he could research the issue of destruction of evidence. Welsh's counsel argued:

> I had no idea that these photographs were destroyed. All it says is, "No photos of the injury could be obtained." And so I assumed they didn't have a camera.
>
> But I had no idea that they actually destroyed evidence. The fact that he says they don't show injury is favorable to my case. And that's clearly exculpatory evidence.

The family court denied the motion, holding that a police officer was not required to preserve as evidence photographs that did not accurately portray the redness observed by the officer. The family court noted that the discarded photographs could not have been received into evidence because there would be no way to establish a foundation that it accurately depicted Chandler's injuries.

Officer Bailey testified that when he and Officer Polanco arrived at Welsh's residence, Welsh "came out to talk to us" and said that "he had choked his girlfriend, and . . . he wanted to be arrested for abuse." The police subsequently arrested Welsh, and at the police station, Welsh handwrote and signed a statement in which he explained, in relevant part, as follows:

> On the morning of 120500 at approximately 0045 after days of trying to talk to [Chandler,] who lives at my house despite repeated requests on my part to leave, I asked her once again why she wanted to live in my house if she would not talk w/me or spend time w/me. She then informed me that, I could not make her leave. With no intent to cause harm or

> physical damage to her person I grabbed her in a manner to move her up (she was lying down) as I began to realize the fact that I was actually trying to control my girlfriend physically. I then saw fear in her eyes and became aware of the fact that I was actually hurting her. It was at that point that I let her go. I then told [Chandler] that I should call the police and turn myself in because I had scared her and hurt her and I wanted her to be safe. I then called 244-6400, asked for Lahaina dispatch and requested that officers come to my residence. At the time the officers arrived I was still very scared and concerned because I hadn't realized [Chandler] was actually hurt. . . .
>
> I never intended to cause any physical damage or harm or any damage in any sense of the word to [Chandler].

Paramedic Alfred Layer (Layer) testified that at about 1:11 on the morning of December 5, 2000, he responded by ambulance to Welsh's residence, where he was met by "[p]olice officers and a lady[, subsequently identified by Layer as Chandler,] who had been hurt." Layer observed "some red marks about [Chandler's] neck" and asked Chandler how she had received those red marks in order "[t]o determine how she had been injured." Layer testified that he documented "everything [he] did" in response to the emergency call in a written report. Over Welsh's objection, the family court admitted Layer's written report, which included statements by Chandler, as a "statement . . . for medical diagnosis and treatment" and a business record, pursuant to the hearsay exceptions set forth in Hawai‘i Rules of Evidence (HRE) Rule 803(b)(4) and (6).

When the deputy prosecutor continued with her examination of Layer, the following colloquy occurred:

> Q. You stated that you had spoken to [Chandler]; correct?
>
> A. Yes.
>
> Q. And you -- and you asked her how she received the redness around her neck?
>
> [WELSH'S COUNSEL]: Objection, leading.

[DEPUTY PROSECUTOR]: This is all -- it's just getting back on where we were, your Honor. It's just --

THE COURT: Overruled. I'll allow it. What is your question?

BY [DEPUTY PROSECUTOR]:

Q. Okay. What did she tell you?

A. She stated that she had been choked with hands about her neck.

Q. Okay. Did she say how it felt?

A. She said she lost consciousness briefly.

Q. Did she say anything else about how it felt?

A. Well, she stated that it felt swollen in her throat.

[WELSH'S COUNSEL]: Your Honor, I'm going to object. Again, I need to object to all of this testimony in as much as, you know, denies [Welsh] right to confrontation because they don't have [Chandler] here.

And I have no one to cross-examination [sic] [Chandler], and so above and beyond the hearsay rule, it denies [Welsh's] right to confrontation. And that's exactly what's happening here.

So I'd be objecting to all this testimony regarding what [Chandler] said in this case because I have no opportunity to cross-examine her because for some unknown reason they don't have her here.

[DEPUTY PROSECUTOR]: Your Honor, this is a hearsay exception where our availability of the -- of the declarant is immaterial.

[WELSH'S COUNSEL]: It's a different issue.

[DEPUTY PROSECUTOR]: Your Honor, for purposes of this -- for purposes of the hearsay rule, unavailability is not required in the medical diagnosis and treatment. She did not -- the rationality [sic] behind it is if [Chandler] is being treated, she has no reason or motive to lie about how she got her injuries.

She needs to be treated for what had happened. And her saying something else happened would just not be in her best interest.

The paramedic is here for cross-examination about how she told this to him and the circumstances it was told to him, but it is admissible hearsay testimony.

[WELSH'S COUNSEL]: Your Honor, the issue is not -- is not specifically the hearsay issue. It's a confrontation issue. In other words, my client has no right to confront and cross-examine the complaining witness in this case, and they're introducing their case through a third party, and that denies [Welsh's] right to confrontation.

[DEPUTY PROSECUTOR]: Your Honor, in any case that the -- that there is not a victim, in a murder case or whatever, the doctors, paramedics would be able to testify. This is case --

THE COURT: We've had case law on this, haven't we?

[WELSH'S COUNSEL]: I don't know with regards to right to confrontation about this specific issue, your Honor.

THE COURT: I believe we have.

[DEPUTY PROSECUTOR]: And I believe that it's allowed, and again, your Honor, this case would be no different than in a murder case.

We don't have a complaining witness because we were not able to serve her. We have no idea where her whereabouts are, but that's immaterial here.

This witness is testifying as a medical professional who treated her at the scene of an incident.

[WELSH'S COUNSEL]: Your Honor, the fact is the complaining witness is out there. They haven't served her. They want to introduce this through a third party, which we don't have.

Yeah, we can -- we can cross-examine him. But I can't cross-examine him about what was in her mind. I can't cross-examine him about why she -- why she lied. I can't cross-examine him about any of that stuff. I can ask him, "What was her pulse?"

I can ask him, "Did she say it?" He's going to say, "Yeah, that's why I wrote it down." But I can't -- I have no way to confront the base of what she's saying regarding this incident.

And based on that, your Honor, I think my client's due process rights are being violated at this point.

THE COURT: Well, cite me the case law that says this rule requires the right of confrontation where the witness is not available.

[WELSH'S COUNSEL]: It's not -- I don't think this rule is what is in question here. The constitution is what's in question here. It's my client's right to confront and cross-examine witnesses, which is guaranteed him [sic] in the United States and Hawaii state constitution, and he does not have the right to confront the complaining witness in this case if you allowed this in.

[DEPUTY PROSECUTOR]: Well, your Honor, I mean, Supreme Court has (inaudible) versus Illinois. This is the hearsay exception had been -- have been found not to violate the right to confrontation if firmly rooted in hearsay exception such as medical diagnosis and treatment. This is not a confrontation -- it has been held not to be a confrontation violation.

. . . .

THE COURT: Unless you can cite me authority, the objection is overruled. Okay.

> . . . .
>
> . . . I want to know if you have any authority, case law authority, that says that even where the rule is clear that the issue of the availability of witnesses is not required in the criminal case, that the rule isn't as stated.
>
> [WELSH'S COUNSEL]: Shouldn't it be, though, no rule can supercede [sic] -- no court rule can supercede [sic] the constitution, your Honor? So the burden shouldn't be upon me.
>
> THE COURT: That's the argument at this point. I believe that the statute and the rules have been interpreted under these circumstances to be allowed in criminal cases. If you can cite me authority to the contrary, I'd like to hear it. If you don't --
>
> [WELSH'S COUNSEL]: I don't have it with me right now, your Honor.
>
> THE COURT: Well, then, let's proceed. The objection is overruled.

Upon further examination, Layer testified that he was told by Chandler that "there was slight pain on swallowing." Layer also stated that he did not treat Chandler because Chandler "refused treatment. There was nothing that was life threatening at the time. No treatment that I could do to alleviate her problem at the time."

Welsh, the only defense witness, testified last. Welsh stated that Chandler was his girlfriend "up until the night of the incident in question." Chandler had a key to his residence, kept some of her clothing and other personal effects there, and slept there periodically. However, he wanted to end the relationship because Chandler would do whatever she pleased and he would never know what she was doing or where she was. Welsh had previously asked Chandler to return the key to his residence, but Chandler claimed that she had lost the key.

According to Welsh, Chandler entered his apartment through an unlocked door during the evening hours of December 5, 2000. He assumed that she came to discuss their relationship,

but she did not want to talk. He asked her to leave, but she did not leave. After again telling Chandler that she had to leave because he was going to sleep, he went to his bedroom to lie down and try to sleep. About a half hour later, he could still hear Chandler "just drinking beer and watching TV, acting like she just belongs there even though I asked her to leave." Then, Chandler came into the bedroom and "laid down [on the bed] like she ran the place." Welsh asked Chandler what she was doing and reiterated that she had to leave. However, Chandler responded in a taunting voice, "You can't make me leave. I'm not going anywhere."

Afraid that if they continued to argue, a fight would break out, Welsh decided that one of them had to leave. He did not want to be the one to leave because he was afraid, based on past experience, that if he left Chandler alone in the apartment, she would break, destroy, or steal his property. Because Chandler would not leave, Welsh decided to physically remove her. He put his hand on her back near her neck to make her stand up. He then pushed her toward the door. As a former police officer, Welsh acknowledged that he had learned "come[-]along or wrist[-]lock or joint[-]lock" methods of forcing someone to do something. However, he testified that he consciously avoided using any such techniques because they were "based on what's called pain compliance, and it's obvious that you're going to hurt someone if do you [sic] that. And I had absolutely no intention of hurting her."

According to Welsh, when Chandler realized that she was being forced to leave, she resisted, started swearing, and threatened to tell people that he was hurting her. At some point, Chandler "started acting strangely." Afraid that he was hurting her, he stopped pushing her. Feeling terrible, he asked Chandler whether he should call the police. Initially, Chandler did not want to involve the police because she thought Welsh was going to tell them that she wouldn't leave his apartment. However, he convinced her that the police should be called and that he would tell them that she was in danger and he had tried to hurt her.

Welsh testified that after he was arrested, he felt

> [e]xhausted, confused, hopeless. There was nothing -- no matter what I tried to do, nothing could -- you know, I couldn't get this person to love me the way I loved her. But on the other hand, I can't even make her leave. I can't -- I can't love her. I can't break up with her. She just does whatever she wants.
>
> And just I said you know what, guys, this is -- I don't know what to do, just lock me up, whatever. We'll figure this out later.
>
> Because I knew then at least they took me away that she would feel like uh oh, you know, something bad happened. And that it would prevent her from trashing my place because it would already be on record what was going on.

On cross-examination, Welsh admitted that he had been drinking on the night in question, denied that he had grabbed Chandler's neck with both his hands, and denied that Chandler ever lost consciousness.

At the close of the State's evidence, Welsh's counsel orally moved for a mistrial and dismissal based on Officer Polanco's destruction of exculpatory evidence, i.e., the photographs of Chandler. In the alternative, Welsh's counsel

orally moved for additional time to research the issue. The family court denied both motions.

Following closing arguments, the family court found Welsh guilty as charged, sentenced Welsh to one year of probation, with certain conditions, and ordered Welsh to pay a criminal injuries compensation fee of $50 and a probation services fee of $75. Welsh filed a timely notice of appeal on June 4, 2001.

DISCUSSION

A. Whether the Discarding of the Photographs of Chandler's Injuries Violated Welsh's Constitutional Rights to Due Process and a Fair Trial

"Central to the protections of due process is the right to be accorded 'a meaningful opportunity to present a complete defense.'" State v. Matafeo, 71 Haw. 183, 185, 787 P.2d 671, 672 (1990) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). "[T]he suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material to guilt or punishment, regardless of the good faith or bad faith of the prosecution." Matafeo, 71 Haw. at 185, 787 P.2d at 672 (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)). "However, in order to establish a *Brady* violation, an appellant must make a showing that the suppressed evidence would create a reasonable doubt about the Appellant's guilt that would not otherwise exist." State v. Okumura, 78 Hawai‘i 383, 402, 894 P.2d 80, 99 (1995) (internal quotation marks and brackets omitted). Furthermore, "under the United States Constitution, where the state destroys evidence that has only a potential

exculpatory value, due process is not offended unless the defendant can demonstrate that the state acted in bad faith." Id. (internal quotation marks and brackets omitted).

In this case, Welsh contends that his constitutional rights to due process and a fair trial were violated when the police discarded the blurry photographs of Chandler's neck. Welsh argues that since the photographs of Chandler's neck failed to show the alleged red marks, the photographs provided exculpatory evidence that Welsh did not injure Chandler. Therefore, Welsh maintains, the family court should have granted his motion for dismissal or mistrial, or, alternatively, for a continuance when it was revealed during trial that the police had destroyed photographs of Chandler's neck. We disagree.

Officer Polanco candidly testified that he threw the photographs away because they were blurry and did not fairly and accurately depict the red marks that he saw on Chandler's neck. Welsh presented no other evidence to prove that Officer Polanco destroyed the photographs in order to hide evidence from the defense or for any other sinister purpose. Based on our review of the record, we cannot conclude that the destruction of the photographs constituted an act of bad faith.

Additionally, Welsh had the opportunity to thoroughly cross-examine Officer Polanco about the discarded photographs and to pursue "a relevant line of defense that might tend to favor him." Matafeo, 71 Haw. at 188, 787 P.2d at 674. Since the overwhelming testimony at trial was that there were red marks on Chandler's neck, we cannot conclude that the discarded

photographs, which were blurry and failed to capture these red marks, would have created "a reasonable doubt about [Welsh's] guilt that would not otherwise exist." Okumura, 78 Hawai‘i at 402, 894 P.2d at 99 (internal quotations marks omitted).

Accordingly, no violation of Welsh's due-process right to a fair trial occurred when the photographs of Chandler were discarded, and the family court did not err in denying Welsh's motion for dismissal or mistrial, or, alternatively, for a continuance, when it learned during trial that the police had destroyed photographs of Chandler.

B. Whether the Admission of Chandler's Prior Out-of-Court Statements to Layer Violated Welsh's Constitutional Right to Confrontation

At the time of Welsh's trial, HRE Rule 803(b)(4) and (6) (1993) provided:

> **Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (b) Other exceptions.
>
> . . . .
>
> (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
>
> . . . .
>
> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made in the course of a regularly conducted activity, at or near the time of the acts, events, conditions, opinions, or diagnoses, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other

> circumstances indicate lack of trustworthiness.

(Emphasis added.) The family court incorrectly determined that notwithstanding Welsh's federal or state constitutional rights to confrontation,[3] as long as Chandler's statements to Layer were made for the purpose of medical diagnosis or treatment or as a record of a regularly conducted business, the statements were properly admissible, pursuant to the literal language of HRE Rule 803(b)(4) and (6), underscored above.

The Hawai‘i Supreme Court has recognized that while "[t]he hearsay rules of evidence and the confrontation clauses of our constitutions . . . are generally designed to avoid similar evils[,] . . . the overlap of the two doctrines of law is [not] so complete that the confrontation clause is nothing more than a codification of the hearsay rules of evidence." State v. Faafiti, 54 Haw. 637, 639, 513 P.2d 697, 700 (1973) (footnote omitted). "The right of confrontation affords the accused both the opportunity to challenge the credibility and veracity of the prosecution's witnesses and an occasion for the jury to weigh the demeanor of those witnesses." State v. Ortiz, 74 Haw. 343, 360, 845 P.2d 547, 555, *reconsideration denied*, 74 Haw. 650, 849 P.2d 81 (1993). "Thus, chief among the interests secured by the confrontation clause is the right to cross-examine one's accuser." State v. McGriff, 76 Hawai‘i 148, 155, 871 P.2d 782, 789 (1994) (citing Ohio v. Roberts, 448 U.S. 56, 63 (1980)).

[3] The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [or her.]" Article I, Section 14 of the Hawaii Constitution similarly provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against the accused[.]"

In McGriff, the Hawai‘i Supreme Court followed the United States Supreme Court's lead in refusing to apply the confrontation clause literally to bar all out-of-court statements from being admitted into evidence:

> Although recognizing the fundamental nature of the right, the United States Supreme Court has refused a strict, literal application of the sixth amendment confrontation clause:
>
> > While a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as "unintended and too extreme." Rather, we have attempted to harmonize the goal of the Clause--placing limits on the kind of evidence that may be received against a defendant--with a societal interest in accurate factfinding, which may require consideration of out-of-court statements.
>
> *Bourjaily v. United States*, 483 U.S. 171, 182, 107 S.Ct. 2775, 2782, 97 L.Ed.2d 144 (1987) (internal citation omitted).

McGriff, 76 Hawai‘i at 155-56, 871 P.2d at 789-90. In attempting to balance a criminal defendant's constitutional right to confront witnesses with society's interest in accurate factfinding, the Hawai‘i Supreme Court adopted a two-part test for analyzing the admissibility of out-of-court statements:

> First, the prosecution must either produce, or demonstrate the unavailability of, a declarant whose statement it wishes to use against a defendant. Second, upon a showing that the witness is unavailable, only statements that bear adequate indicia of reliability are admissible.

Id. at 156, 871 P.2d at 790 (quoting Ortiz, 74 Haw. at 361, 845 P.2d at 555-56, *reconsideration denied*, 74 Haw. 650, 849 P.2d 81 (1993)). The supreme court further explained:

> With regard to the first requirement, we have remained resolute that under the confrontation clause of the Hawai‘i Constitution, "a showing of the declarant's unavailability is necessary to promote the integrity of the fact finding process and to ensure fairness to defendants." *Ortiz*, 74 Haw. at 362, 845 P.2d at 556. . . .
>
> With regard to the second requirement, "reliability is shown 'if the evidence falls within a firmly rooted hearsay exception' or 'upon a showing of particularized guarantees of trustworthiness.'"

McGriff, 76 Hawai‘i at 156, 871 P.2d at 790 (internal brackets omitted).

As to the first unavailability requirement, the Hawai‘i Supreme Court has stated:

> To demonstrate the unavailability of a declarant at trial, the prosecution must show that it made a good faith attempt to secure his or her presence. To establish this good faith attempt, the prosecution must confirm on the record at the time of trial both the declarant's unavailability and that vigorous and appropriate steps were taken to procure the declarant's presence at trial.

Ortiz, 74 Haw. at 363, 845 P.2d at 556-57 (citations omitted). The supreme court has also stated:

> Whether the prosecution has made an adequate showing of the "unavailability" of a witness--for the purpose of satisfying the confrontation clauses of the United States and Hawai‘i Constitutions--is, at the first level of analysis, a question of fact for the trial court to decide, involving a determination of the nature of the prosecution's "good faith" efforts to secure the witness's presence at trial. Findings of fact are reviewed under the clearly erroneous standard. *State v. Ganal*, 81 Hawai‘i 358, 368, 917 P.2d 370, 380 (1996); *Tachibana v. State*, 79 Hawai‘i 226, 231, 900 P.2d 1293, 1298 (1995); *State v. Furutani*, 76 Hawai‘i 172, 179, 873 P.2d 51, 58 (1994). A finding of fact is clearly erroneous when, despite evidence to support the finding, the appellate court is left "with the definite and firm conviction that a mistake has been committed." *Ganal*, 81 Hawai‘i at 368, 917 P.2d at 380; *Tachibana*, 79 Hawai‘i at 231, 900 P.2d at 1298; *Furutani*, 76 Hawai‘i at 179, 873 P.2d at 58.
>
> At the second level of analysis, we ask whether the facts as found amount to a legally adequate good faith effort to confront the defendant with his accusers. This is a question of federal and/or state constitutional law, and we answer it by exercising our own "'independent constitutional judgment based on the facts of the case.'" *Crosby v. State Dep't of Budget & Fin.*, 76 Hawai‘i 332, 341, 876 P.2d 1300, 1309 (1994) (quoting *Connick v. Myers*, 461 U.S. 138, 150 n. 10, 103 S.Ct. 1684, 1692 n. 10, 75 L.Ed.2d 708 (1983)), *cert. denied* 513 U.S. 1081, 115 S.Ct. 731, 130 L.Ed.2d 635 (1995).

State v. Sua, 92 Hawai‘i 61, 68, 987 P.2d 959, 966 (1999) (quoting State v. Lee, 83 Hawai‘i 267, 273, 925 P.2d 1091, 1097 (1996)) (internal brackets omitted).

In this case, even if Chandler's statements to Layer qualified as an exception to the hearsay prohibition, the State

was required to demonstrate that Chandler was unavailable and that a good-faith attempt had been made to secure Chandler's presence at trial before such statements could be admitted into evidence. Ortiz, 74 Haw. at 363, 845 P.2d at 556-57. To establish this good-faith attempt, the State was required to "confirm on the record at the time of trial both [Chandler's] unavailability and that vigorous and appropriate steps were taken to procure [Chandler's] presence at trial." Id. at 363, 845 P.2d at 557.

The deputy prosecutor stated at trial: "We don't have a complaining witness because we were not able to serve her. We have no idea where her whereabouts are, but that's immaterial here." Except for this statement, there is no evidence in the record of the steps, if any, that were taken by the State to locate Chandler and secure her presence for trial. The record does not indicate, for example, that a trial subpoena was issued to secure the presence of Chandler but was returned by the serving officer due to Chandler's unavailability.

Because the State failed to offer evidence that Chandler was unavailable to testify at trial, the family court improperly allowed Welsh to testify about Chandler's out-of-court statements.

C. Whether the Evidence Was Sufficient to Establish that Welsh "Intentionally, Knowingly or Recklessly" Abused Chandler

Pursuant to HRS § 702-204 (1993), the minimum state of mind required for conviction under HRS § 709-906 is recklessness. HRS § 702-204 (1993)[4]; State v. Eastman, 81 Hawai'i 131, 140, 913 P.2d 57, 66 (1996). HRS § 702-206(3) (1993) defines "[r]ecklessly" as follows:

> **Definitions of states of mind**. . . .
>
> (3) "Recklessly."
>
> (a) A person acts recklessly with respect to his [or her] conduct when he [or she] 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 [or she] consciously disregards a substantial and unjustifiable risk that such circumstances exist.
>
> (c) A person acts recklessly with respect to a result of his [or her] conduct when he [or she] consciously disregards a substantial and unjustifiable risk that his [or her] 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 [or her], 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.

Welsh argues that insufficient evidence was adduced by the State to prove that he acted with the requisite state of mind

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[4] HRS § 702-204 (1993) states:

> **State of mind required**. Except as provided in section 702-212, a person is not guilty of an offense unless the person acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense. When the state of mind required to establish an element of an offense is not specified by the law, that element is established if, with respect thereto, a person acts intentionally, knowingly, or recklessly.

for conviction under HRS § 709-906. More specifically, Welsh contends:

> The evidence adduced regarding Welsh's conduct demonstrates that Welsh did not act with the criminal state of mind to physically abuse his girlfriend [Chandler]. Welsh never intended nor knew that attempting to get [Chandler] off the bed (i.e., "conduct") would cause an injury to [Chandler] (i.e., "result"). Certainly, it was not Welsh's conscious object to hurt [Chandler]. Nor was Welsh practically certain that his conduct would injure [Chandler]. It is undisputed that Welsh was simply trying to get [Chandler] off the bed and out of the apartment. Welsh was not trying to hurt or injure [Chandler]. As Welsh indicated in his written statement, he never intended to cause any harm to [Chandler].

The Hawai‘i Supreme Court has stated, however, that

> it is not necessary for the prosecution to introduce direct evidence of a defendant's state of mind in order to prove that the defendant acted intentionally, knowingly or recklessly. Given the difficulty of proving the requisite state of mind by direct evidence in criminal cases, proof by circumstantial evidence and reasonable inferences arising from circumstances surrounding the defendant's conduct is sufficient. The mind of an alleged offender may be read from his acts, conduct and inferences fairly drawn from all the circumstances.
>
> Moreover, we have held that persons of ordinary intelligence would have a reasonable opportunity to know that causing physical injury by punching someone in the face would constitute physical abuse. Absent a legal justification or excuse, a slap on the side of the head involves, at a minimum, a substantial and unjustifiable risk, i.e., "a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation." HRS § 702-206(3)(d) (1993).

Eastman, 81 Hawai‘i at 140-41, 913 P.2d at 66-67 (citations omitted). In addition, the supreme court has instructed 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 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. Richie, 88 Hawai‘i 19, 33, 960 P.2d 1227, 1241 (1998) (internal brackets omitted).

In this case, the family court found that Welsh's act of grabbing Chandler's neck in order to lift her from his bed and

to remove her from his house constituted reckless conduct. Welsh admitted to an MPD dispatcher that he "tried to hurt [Chandler] and . . . would like to turn [himself] in for abuse of a family member." Welsh also informed police officers responding to his 911 call that "he just abused his girlfriend[,]" and "had choked his girlfriend, and . . . wanted to be arrested for abuse." Additionally, Welsh admitted in a handwritten statement that he "grabbed" Chandler to move her and

> I began to realize the fact that I was actually trying to control my girlfriend physically. I then saw fear in her eyes and became aware of the fact that I was actually hurting her. It was at that point that I let her go. I then told [Chandler] that I should call the police and turn myself in because I had scared her and hurt her and I wanted her to be safe. . . . At the time the officers arrived I was still very scared and concerned because I hadn't realized [Chandler] was actually hurt.

In light of the record, including Welsh's admissions, there was clearly substantial evidence in the record from which the family court could infer that Welsh physically abused Chandler with the minimum requisite state of mind, i.e., recklessness.

CONCLUSION

In light of the foregoing discussion, we vacate the family court's May 29, 2001 judgment and remand this case for a new trial.

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