NOT FOR PUBLICATION

NO. 24488

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
REGINALD WELLS, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(FC-CR NO. 01-1-1822)

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

Defendant-Appellant Reginald Wells (Reginald) appeals from the circuit court's July 26, 2001 Judgment following a jury verdict finding him guilty as charged of a Violation of Temporary Restraining Order, Hawaii Revised Statutes (HRS) § 586-4 (Supp. 2002). We affirm.

BACKGROUND

On May 4, 2001, the family court entered a Temporary Restraining Order (May 4, 2001 TRO) in Wells v. Wells, FC-DA No. 01-1-0780, First Circuit Court, State of Hawaiʻi, and it was served on Reginald on May 4, 2001. This May 4, 2001 TRO instructed Reginald to "not have contact with" his wife, Joanne M. Wells (Joanne), or any of their seven children.

After May 4, 2001, but prior to the alleged offense on May 24, 2001, Reginald obtained a temporary restraining order barring Joanne from having any contact with him.

On May 17, 2001, the family court entered an "Order Continuing Hearing and Amending Temporary Restraining Order." It stated, in relevant part, as follows:

> Both parties shall submit to urinalysis by May 18, 2001 at 4:00 pm. Parties shall return for a review hearing on June 18, 2001 at 1:00 pm. [Joanne] shall have temporary legal and physical custody of the parties' minor children until further order of the court. [Reginald] may have visitation at PACT [Parents And Children Together] visitation center. Parties shall contact PACT within one week. [Reginald] shall pay service fee.

The alleged offense occurred on May 24, 2001. The Complaint was filed on May 25, 2001. On July 25, 2001, after a trial, a jury found Reginald guilty as charged. The Judgment entered by Judge Michael D. Wilson on July 26, 2001, sentenced Reginald to two years' probation subject to the following conditions: serve six months in prison with credit for time served; participate in domestic violence intervention, substance abuse assessment, and parenting intervention; and pay a $150 fine and a $50 Criminal Injuries Compensation Commission fee. The mittimus stated that it was effective on August 24, 2001. Reginald filed his notice of appeal on August 15, 2001.

FIRST POINT OF ERROR

In his first point of error, Reginald contends that "[t]he State did not present evidence of sufficient quality and probative value to establish that Reginald intentionally or knowingly violated the temporary restraining order not to have contact with his children."

STANDARD OF REVIEW

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 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.
>
> "'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.

State v. Richie, 88 Hawai‘i 19, 33, 960 P.2d 1227, 1241 (1998) (citations and block quotation format omitted).

DISCUSSION

At the trial, Joanne testified that she and Reginald had been married for ten years and had seven children as follows: Child age 14, Child age 11, Child age 9, Child age 7, Child age 6, Child age 5, and Child age 2.

Joanne's friend, Vanphet Mekdara (Mekdara), age 19, testified that at around 3:00 p.m. on May 24, 2001, she was walking with Child age 7 and Child age 6 to Mekdara's apartment at "2123 Ahi Street, Apartment 17E." While they were walking, Child age 7 said, "If we see our dad, we're not supposed to say anything[.]" As they were walking past an apartment building, Mekdara looked up to a second floor apartment and saw Reginald looking down at them. Mekdara could see Reginald from the waist up. The remainder of his body was hidden by a wall. Reginald

yelled down to her, "What, she's having you pick up her kids for her now?" Mekdara further testified, in relevant part, as follows:

> Q. And did you do anything in response to him saying that?
>
> A. No.
>
> Q. Did you stop walking at any time?
>
> A. We just kept walking, and he continued saying, like, How she's brainwashing the kids, and I just kept walking.
>
> Q. You said he said brainwashing the kids, did he say that to you?
>
> A. He said that to me, and then he looked at the kids and said, Yeah, your mom is brainwashing you guys for not, for no talk to me.
>
> . . . .
>
> Q. And his tone of voice that he was yelling at you guys, what was that like? . . .
>
> . . . .
>
> A. It was -- I don't know, to me, I wasn't afraid. But the boys just started letting go of my hand and ran to my house first.

After testifying that he would be entering the third grade, Child age 7 testified that when they were walking with Mekdara, he told Child age 6, "Don't talk to dad." Child age 7 further testified, in relevant part, as follows:

> Q. Okay. What is the first thing [Reginald] said to you?
>
> A. Your mother make me -- his mom making you . . . pick up the kids?
>
> Q. You talking about his mom is making you pickup the kids?
>
> A. Yes.
>
> Q. Who is he talking to?
>
> A. [Mekdara].

. . . .

Q. Did [Mekdara] say something?

A. No.

. . . .

Q. Did he say anything else?

A. Yes.

Q. What did he say?

A. Mom brainwashing us so you guys not talk to me.

Q. And when he said that, was he yelling that?

A. Yeah.

. . . .

Q. So after he said your mom is brainwashing you, what did you do?

A. Walked to [Mekdara's] house fast.

In contrast, Reginald testified that while sitting on the porch at his sister's second floor apartment at 2111 Ahi Street, he saw Child age 7 and Child age 6 walk by with Mekdara, and he said hello to Mekdara. When he saw "[Mekdara] grabbing [his children's] heads and push down, push their heads down so they won't look at [him,]" he "called [his] niece out, and told [his] niece, Try look, looks like they're brainwashed." He further testified, in relevant part, as follows:

Q. Okay. Now, [Reginald], did you talk to [Child age 7] or [Child age 6] on that day?

A. Not at all.

Q. Was your intent to talk to [Child age 7] or [Child age 6] . . . that day?

A. No, not at all.

. . . .

> Q. You decided to say hello to [Mekdara], even though your boys were right there; is that correct?
>
> . . . .
>
> A. Yes

In closing argument to the jury, defense counsel stated, in relevant part, as follows:

> Now, [Reginald] did not intentionally or knowingly violate the TRO. He had no intention of violating the TRO. He was talking to his niece. He was with them at the apartment before [Mekdara] and the kids got there. He was out on the porch. He was having a nice day. He had no intention of doing anything in regard to that TRO.

The jury disagreed with defense counsel. Based on the record, we conclude that substantial evidence supports the jury's verdict.

SECOND POINT OF ERROR

HRS § 702-236 (1993) states as follows.

> (1) The court may dismiss a prosecution if, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct:
>
> (a) Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the offense; or
>
> (b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
> (c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.
>
> (2) The court shall not dismiss a prosecution under subsection (1)(c) of this section without filing a written statement of its reasons.

In his opening brief, Reginald contends that

> 2. The lower court committed plain error in failing to sua sponte dismiss the charge against Reginald on the grounds that the conduct, if any, constituted a de minimus infraction.

> In this case, even if there was contact, the evidence indicates that the conduct engaged in, if any, did not actually cause or threaten the harm or evil sought to be prevented by HRS § 586-4. There was no evidence of violence or abuse, or threats of violence or abuse, by Reginald against [Child 7] and [Child 6], much less [Mekdara].

HRS § 586-4 (Supp. 2002) states, in relevant part, as follows:

> (a) Upon petition to a family court judge, an ex parte temporary restraining order may be granted without notice to restrain either or both parties from contacting, threatening, or physically abusing each other, notwithstanding that a complaint for annulment, divorce, or separation has not been filed. The order may be granted to any person who, at the time the order is granted, is a family or household member as defined in section 586-1 or who filed a petition on behalf of a family or household member. **The order shall enjoin the respondent or person to be restrained from performing any combination of the following acts:**
>
> (1) Contacting, threatening, or physically abusing the protected party;
>
> (2) **Contacting, threatening, or physically abusing any person residing at the protected party's residence;** or
>
> (3) Entering or visiting the protected party's residence.
>
> . . . .
>
> (c) The family court judge may issue the ex parte temporary restraining order orally, if the person being restrained is present in court. The order shall state that there is probable cause to believe that a past act or acts of abuse have occurred, or that threats of abuse make it probable that acts of abuse may be imminent. The order further shall state that the temporary restraining order is necessary for the purposes of: preventing acts of abuse or preventing a recurrence of actual domestic abuse; and ensuring a period of separation of the parties involved. The order shall describe in reasonable detail the act or acts sought to be restrained. **Where necessary, the order** may require either or both of the parties involved to leave the premises during the period of the order, and also **may restrain the party or parties to whom it is directed from contacting**, threatening, or physically abusing **the applicant's family or household members**. The order shall not only be binding upon the parties to the action, but also upon their officers, agents, servants, employees, attorneys, or any other persons in active concert or participation with them. **The order shall enjoin the respondent or person to be restrained from performing any combination of the following acts:**
>
> (1) Contacting, threatening, or physically abusing the protected party;

(2) **Contacting, threatening, or physically abusing any person residing at the protected party's residence**; or

(3) Entering or visiting the protected party's residence.

(d) When a temporary restraining order is granted and the respondent or person to be restrained knows of the order, a knowing or intentional violation of the restraining order is a misdemeanor.

(Emphases added.)

Based on the record, we decide that there is evidence that Reginald actually caused or threatened the harm or evil sought to be prevented by HRS § 586-4 and that Judge Wilson did not commit plain error in failing to sua sponte dismiss the charge against Reginald on the grounds that the conduct constituted a de minimus infraction.

CONCLUSION

Accordingly, we affirm the circuit court's July 26, 2001 Judgment.

DATED: Honolulu, Hawai‘i, March 19, 2003.

On the briefs:

Linda C. R. Jameson,
Deputy Public Defender,
for Defendant-Appellant. Chief Judge

Mark Yuen,
Deputy Prosecuting Attorney,
City and County of Honolulu, Associate Judge
for Plaintiff-Appellee.

Associate Judge