

NO. 24645

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

STATE OF HAWAI`I, Plaintiff-Appellee, v.
GILBERT J. PACHECO, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR NO. 01-1-1769)

MEMORANDUM OPINION

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

Defendant-Appellant Gilbert J. Pacheco (Gilbert) appeals from the August 27, 2001 Judgment, entered in the Family Court of the First Circuit, upon a jury verdict, convicting Gilbert of Violation of an Order for Protection, Hawaii Revised Statutes (HRS) § 586-11 (Supp. 2001).¹ The August 27, 2001 Judgment sentenced Gilbert to two years of probation, with special conditions of 103 days of incarceration, domestic violence counseling, and a substance abuse/mental health assessment and treatment. We affirm.

There is evidence that Romina Fukumoto (Romina) had been married to Gilbert but that they had divorced and, on January 2, 2001, Romina had obtained an Order of Protection, valid until January 2, 2004, prohibiting Gilbert from being within 100 feet of Romina.

¹ Circuit Court Judge Steven S. Alm presided in this case.

The May 17, 2001 complaint charged Gilbert with Count I, Abuse of Family and Household Members, HRS § 709-906, and Count II, Violation of an Order for Protection, HRS § 586-11. The offenses allegedly occurred on May 16, 2001.

After hearing evidence on July 11, 2001, a jury acquitted Gilbert of Count I and convicted him of Count II.

Gilbert testified, in relevant part, as follows:

A. At Burger King where I have coffee and newspaper every morning.

. . . .

A. Romina approached me at Burger King and said she was going to get the order removed. At this time I got up and removed myself at that -- on that day.

. . . .

A. After that, a period of a few days, she approached me again at Burger King and she had a document from the family court and it was filled out. She said [it] was a statement to removed (sic) the [Temporary Restraining Order] so we were allowed to see each other.

Q. Okay. Now, Gilbert, did you get a chance to take a look at it or did you take her word for it that it was removing the order?

A. I took a brief look at it, and it was completely filled out, the blanks.

. . . .

A. I did not take possession of the order.

. . . .

Q. You have no knowledge of what it takes to make an order official; is that correct?

A. No, sir, I don't know much about the law, much at all.

Q. And what did Romina tell you about this piece of paper she showed you?

A. That it was a removal of a TRO and that we were allowed to see each other.

. . . .

Q. Now, this happened . . . before May 16th, 2001?

A. Yes, sir, it did.

In her testimony, Romina told a different version of the facts.

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

Now, in regard to protective order violations, it is a crime only if the defendant acted intentionally or knowingly. . . .

. . . .

Romina told [Gilbert] that she was going to get the order removed. She comes back a couple days later with an official looking paper. Now, Gilbert is not a lawyer. He doesn't know if this is really a valid order removing the protective order, but he assumes that it is. She's got a piece of paper there.

. . . He doesn't know. He doesn't know whether or not this order is valid, but he believes her. She tells him -- she tells him that the order has been removed, and he believes her.

. . . Well, Gilbert doesn't know that his conduct is violating the order because he thinks the order has been removed. She went there; she told him she removed the order, and he believed her. He trusted her.

The court instructed the jury that one of the facts Plaintiff-Appellee State of Hawai i was required to prove beyond a reasonable doubt was that Gilbert intentionally or knowingly engaged in conduct prohibited by the Order of Protection.

Gilbert contends that

[t]he trial court committed plain error in failing to instruct the jury on the defense of mistake of fact under HRS §702-218 and the affirmative defense of mistake of law under HRS §702-220. Under HRS §701-115, the mistake defenses apply if there was a rational basis in the evidence supporting those defenses. . . . At trial [Gilbert] testified that [Romina] told him she obtained an order cancelling the Order of Protection, and she showed him a document,

which he briefly examined. Thereafter he mistakenly believed the order of protection was no longer in effect because the document [Romina] showed him cancelled it. At trial the defense did not request and the Court did not give a jury instruction on the defenses of mistake of fact and mistake of law. It was prejudicial error to omit these instructions.

(Record citation omitted.)

We conclude that the evidence did not authorize the giving of a mistake-of-fact instruction. The authorized mistake-of-fact defense is described in HRS § 702-218 (1993). The Commentary to HRS § 702-218 states, in relevant part, as follows:

This section of the Code deals with ignorance or mistake of fact or law, but is not intended to deal with the limited problem of the defense afforded a person who engaged in conduct under the mistaken belief that the conduct itself was not legally prohibited. That problem is dealt with exclusively by §702-220.

Therefore, the HRS § 702-218 mistake-of-fact defense does not apply in this case.

We likewise conclude that the evidence did not authorize a mistake-of-law instruction. In relevant part, HRS § 702-220(2) (1993) requires

that the defendant engaged in the conduct . . . under the belief that the conduct or result was not legally prohibited when the defendant acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in: . . . [a] judicial . . . judgment[.]

Gilbert testified that he relied on Romina's representations.

There is no evidence that Gilbert acted "in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in: . . . [a] judicial . . . judgment[.]"

Accordingly, the August 27, 2001 Judgment convicting Defendant-Appellant Gilbert J. Pacheco of Violation of an Order for Protection, HRS § 586-11 (Supp. 2001), is affirmed.

DATED: Honolulu, Hawaii, September 25, 2002.

On the briefs:

Mary Ann Barnard
for Defendant-Appellant.

Chief Judge

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

Associate Judge

Associate Judge