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NO. 25063

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
CHARLES MONROE GONSALVES, II, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR. NO. 01-1-0948(3))

MEMORANDUM OPINION

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

Charles Monroe Gonsalves, II (Gonsalves) appeals the March 21, 2002 judgment of the family court of the second circuit, the Honorable Ruby A. Hamili, judge presiding, that convicted him of abuse of family and household member, a violation of Hawaii Revised Statutes (HRS) § 709-906 (1993 & Supp. 2002).¹ We affirm.

¹ Hawaii Revised Statutes (HRS) § 709-906(1) (1993 & Supp. 2002) provides, in pertinent part, that "[i]t shall be unlawful for any person, singly or in concert, to physically abuse a family or household member[.]" See also HRS § 702-204 (1993) ("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."); State v. Eastman, 81 Hawai'i 131, 140, 913 P.2d 57, 66 (1996) (pursuant to HRS § 702-204, "the requisite state of mind for a violation of HRS § 709-906(1) is that of acting intentionally, knowingly, or recklessly"); State v. Tomas, 84 Hawai'i 253, 257, 933 P.2d 90, 94 (App. 1997) ("to 'physically abuse' someone under HRS § 709-906(1) means to maltreat in such a manner as to cause injury, hurt or damage to that person's body" (citations and some internal quotation marks omitted)).

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I. Background.

On October 23, 2001, Gonsalves was charged, via complaint, as follows:

That on or about the 22nd day of October[], 2001, in the County of Maui, State of Hawaii, CHARLES GONSALVES did intentionally, knowingly or recklessly engage in and cause physical abuse of a family or household member, to wit, Jessica Ino, thereby committing the offense of Abuse of Family and Household Member in violation of Section 709-906 of the Hawaii Revised Statutes.

A bench trial on the complaint was held on March 21, 2002.

Complainant Jessica Ino (Ino) testified that she and her ex-boyfriend, Gonsalves, have two children, Brandy Gonsalves-Ino (Brandy), who was nine years old, and Christian Gonsalves-Ino (Christian), who was twenty-three months old. Ino and Gonsalves had apparently broken up shortly before the October 2001 incident.

Ino remembered that, sometime during the late evening of October 22, 2001 or the wee hours of October 23, 2001, she went to Gonsalves' "present girlfriend's house" to drop off the children and Gonsalves' belongings. Still angry about the breakup and Gonsalves' new attachment, Ino began to toss Gonsalves' belongings -- bags, woks, fishing poles and a metal cot -- onto the front yard. Ino was making a racket, and Gonsalves came out of the house in the middle of it. Gonsalves kicked Ino in her left shin as she was passing Christian to him. The kick hurt but did not cause visible injury. Ino maintained

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that the kick occurred after she had tossed the items and after Gonsalves had taken a wok away from her. She denied that the kick occurred while Gonsalves was attempting to wrest the wok from her hands.

Earlier that evening, Ino had gone to Polli's restaurant, where Gonsalves worked as a cook, ostensibly to get some money from him and to make arrangements to drop the children off later that night. Ino took Gonsalves' paycheck and ATM card, deposited the check and took some cash out of the ATM, and returned with his card and pay stub. Ino allowed that she "may have" told Gonsalves to "kiss his check goodbye[.]" Ino also admitted that Gonsalves asked her more than once "to just get out of there[,]" and that at some point the police were called. The police took Ino aside and spoke to her, after which she left the restaurant. During her discussion with the police, Ino told them she wanted to drop the children off with Gonsalves that night. Ino maintained that she was supposed to go to Gonsalves' girlfriend's house and drop the children off after Gonsalves finished his work shift. At about 11:30 that night, Ino called Gonsalves and told him she was coming over with the children and his personal belongings. Gonsalves told her not to bring his belongings over that night.

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Brandy testified that her mother drove her and Christian to "my dad's girlfriend's house." There, as Brandy watched from inside the car, Ino began "dropping off" Gonsalves' belongings, making a loud noise. As Ino was doing this, Gonsalves came out of the house. Brandy remembered that Ino and Gonsalves started arguing about who owned the car Ino was driving, and that "[m]y dad got so mad that she said that the car belonged to her that he kicked her." The kick was to the lower part of Ino's left leg. Brandy did not remember her mother and father struggling over what defense counsel described as "a pan, a big, giant pan[.]" Brandy did recall that her mother exclaimed, "Ow, you kicked me[.]" Brandy stated that she and her father have liberal visitation each week, and that she last visited him the morning of the trial.

In his defense, Gonsalves first called police officer A. Delara (Officer Delara). Officer Delara related that he went to the scene of the incident that night and met with Ino. Ino complained of pain in her left shin, but did not exhibit any injury consistent with her complaint.

Gonsalves' girlfriend, Jolene Utt (Utt) also testified for the defense. Utt, a waitress at Polli's restaurant, first saw Ino early that evening outside the screen door of the restaurant's kitchen. Utt claimed that Ino was outside the

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kitchen "bugging us pretty much the whole entire night." When Ino actually entered the restaurant, Gonsalves called the police. As for the ruckus at her residence, Utt acknowledged that she stayed in her house the whole time, such that she heard, more than saw, what happened. She remembered, however, that Ino had brought Christian into the house before either of the throwing of things or the altercation began.

Gonsalves also called Ino to testify. Ino acknowledged that she had Gonsalves' permission to use the car that night because she was taking the children to school. Thereupon, defense counsel queried, "And the issue of the car wasn't in dispute that night, correct?" Ino responded, "Not at all."

Gonsalves testified in his own defense. He remembered that he called Ino at about 11:30 that night to let her know he was home to receive the children. Ino told him she was also going to "grab all [his] things and just drop it off." Gonsalves rejoined, "you can drop off the kids but not my stuffs." Apparently, Gonsalves had spoken with the police at the restaurant, and they had informed him that they would escort Ino to Gonsalves' residence when she dropped off the children, but that delivery of his personal belongings should not take place at the same time. "They said, yeah, just call us when you get home." Gonsalves rued, "My mistake was not calling them first."

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Ino arrived shortly after their telephone conversation. Gonsalves started walking out the door because he knew that Ino would need help with the children, "then I heard this big crashing things." Gonsalves remonstrated, "what the hell are you doing, this is 12:00 at night." Gonsalves approached and saw some of his belongings on the ground. He grabbed onto a wok that Ino was about to throw, and a scuffle ensued. Gonsalves acknowledged that Ino cried, "ah, you kicked me[,] " but denied that he did. Gonsalves explained that during the scuffle, "we was bumping and rubbing," and "[a]ll parts of our body made contact."

In his closing argument, defense counsel argued, *inter alia*, that if any contact occurred, it was inadvertent, and in any event justified as defense of property, pursuant to HRS § 703-306 (1993),² in order to prevent Ino's commission of

² HRS § 703-306 (1993) provides, in pertinent part:

(1) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:

. . . .

(c) To prevent theft, criminal mischief, or any trespassory taking of tangible, movable property in the actor's possession or in the possession of another person for whose protection the actor acts.

(2) The actor may in the circumstances specified in subsection (1) use such force as the actor believes is necessary to protect the threatened property, provided that the actor first requests the person against whom force is used to desist from the person's interference with the property, unless the actor believes that:

(a) Such a request would be useless; or

(b) It would be dangerous to the actor or another person to make

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"criminal mischief" to his belongings.

The Court found Gonsalves guilty as charged:

THE COURT: With respect to this complaint that was filed October 23rd, year 2001, this Court, having the benefit of the evidence presented in its totality and also having the discretion to determine and give weight where due based on credibility, what we have here is a classic, classic domination and control case.

Although the injury does not appear to be as clear where an officer can see any breaking of the skin, bruising, what this Court is looking at are the facts. We've got behavior on the part of the witness, Ms. Ino, the State attends [(sic)] -- as correctly pointed out by the Defense, minimizes it, say so what, so what about this behavior.

The behavior was criminal. It began at 6 p.m. that day. It warranted police action. It warranted a police report being prepared. Whether it amount [(sic)] to a harassment or a disorderly, nevertheless, the action -- the action, the activity was criminal.

What occurred later that day was an exercise of dominion and control. The victim in this case, that's in quotes, Ms. Ino, had a relationship with this particular Defendant and it was one that was not resolved. And the emotional state, the other partner who has left the relationship is not conscious of that state, state of mind.

As they describe her, she's out of control. She goes to the workplace and she has inappropriate behavior, clearly. Police are called. Agreements are made. And we've got children here that are involved in this relationship. There's an arrangement so that Mr. Gonsalves can see his children. It's been indicated that he hadn't seen his children for a while. Ms. Ino indicates that she's more than willing to have him visit his children. And they supposedly set up an agreement with the police being present.

Now, given all that previous activity, what should occur did occur that evening, given no precautions taken. The police offered their assistance. Clearly it was told to Mr. Gonsalves that if there were to be arrangements made and the parties were to meet again, either being a drop-off for visitation, that they would be there to supervise the (inaudible). Why? Because Mr. Gonsalves and Ms. Ino couldn't control themselves, they couldn't control each other's behavior.

Who called Ms. Ino over? Mr. Gonsalves.

The credible witness is the child sitting in the car who does not display any emotion or irrational behavior. Her statements are corroborated given the testimony that she told the officer the father kicked (inaudible). Today in this courtroom, after several visits -- she continues to spend overnight visits with her father -- no change in testimony.

This Court does find the State has proved its case beyond a reasonable doubt given the reckless state of mind.

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- (c) the request; or
Substantial harm would be done to the physical condition of the property which is sought to be protected before the request could effectively be made.

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[DEFENSE COUNSEL]: Your Honor, I'm going to ask the Court for specific findings with respect to the criminal mischief to his personal property. I don't think the Court's addressed that issue. And I do want that as part of the record because I do intend to, once judgment is imposed here, to take this one to the Appellate Court.

THE COURT: With respect to the issue as indicated by [defense counsel], the offering of the justification, this Court does find that there is no justification for the behavior given the situation he placed himself in.

II. Discussion.

On appeal, Gonsalves contends the court erred in convicting him because the force he used to prevent Ino from damaging his property was justifiable under HRS § 703-306(1)(c). Gonsalves argues, in particular, that

the court did not reject Gonsalves's defense because it did not believe that he had satisfied [the] elements [of the defense]. The court recognized the "criminal" nature of Ino's behavior. Instead, the court mistakenly believed that the defense was not available to Gonsalves because he had "placed himself in [the situation]" by allowing Ino to come over without police supervision. HRS § 703-306 contains no such exclusion from the availability of this defense. Although HRS § 703-310 (1993)³ precludes the use of the defense by a person [who] is reckless in having such a belief that the use of force is necessary or reckless in failing to acquire any knowledge or belief which is material to the justifiability of the person's use of force, that was not the situation in this case. Gonsalves might have exercised poor judgment in allowing Ino to come over without first calling the police, but . . . his belief that the use of force was necessary was reasonable, not reckless, and there was no knowledge or belief that he had failed to acquire that would have been material to the justifiability of his use of force.

³ HRS § 703-310(1) (1993) provides:

When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under sections 703-303 to 703-309 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of the actor's use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

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Opening Brief at 18 (some brackets in the original; footnote supplied). With respect to this particular argument, we agree that the court misapprehended the HRS § 703-310(1) exception to the HRS § 703-306 justification defense of use of force for the protection of property. While Gonsalves may have been unwise in not taking advantage of the proffered police escort, it is a defendant's fault in assessing the necessity of using force that is exceptionable, and not his or her fault in entering into the situation.

The court's misapprehension was, however, immaterial. At bottom, Gonsalves' argument on appeal is that the evidence adduced at trial was insufficient to support his conviction. See HRS § 702-205 (1993).⁴ Under the standard of review for sufficiency of the evidence,⁵ the evidence adduced at trial --

⁴ HRS § 702-205 (1993) provides:

The elements of an offense are such (1) conduct, (2) attendant circumstances, and (3) results of conduct as:

- (a) Are specified by the definition of the offense, and
- (b) Negative a defense (other than a defense based on the statute of limitations, lack of venue, or lack of jurisdiction).

(Emphasis supplied.)

⁵ The test on appeal for a claim of insufficient evidence is "whether, viewing the evidence in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact." State v. Ildefonso, 72 Haw. 573, 576, 827 P.2d 648, 651 (1992) (citations omitted). "Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion." Ildefonso, 72 Haw. at 577, 827 P.2d at 651 (citation, internal quotations marks and ellipsis omitted). "An appellate court will not pass

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taken in the light most favorable to the State, State v. Ildefonso, 72 Haw. 573, 576, 827 P.2d 648, 651 (1992), and in light of the prerogative of the trial judge in the sphere of witness credibility and weight of the evidence, State v. Eastman, 81 Hawai'i 131, 139, 913 P.2d 57, 65 (1996) -- showed that Gonsalves did not kick Ino during or as a result of an altercation over his personal belongings. Hence, his use of force could not have been immediately necessary for the protection of his property. HRS § 703-306. Indeed, in its ruling, the court identified Brandy as "[t]he credible witness[,]\" and according to Brandy's testimony, the scuffle over the wok simply did not occur, much less occur as the occasion for Gonsalves' use of force. "[W]e have consistently held that where the decision below is correct it must be affirmed by the appellate court even though the lower tribunal gave the wrong reason for its action." State v. Taniguchi, 72 Haw. 235, 240, 815 P. 2d 24, 26 (1991) (citing State v. Rodrigues, 68 Haw. 124,

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." Eastman, 81 Hawai'i at 139, 913 P.2d at 65 (citations omitted). "It matters not if a conviction under the evidence as so considered might be deemed to be against the weight of the evidence so long as there is substantial evidence tending to support the requisite findings for the conviction." Ildefonso, 72 Haw. at 576-77, 827 P.2d at 651 (citation and internal quotation marks omitted).

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134, 706 P.2d 1293, 1300 (1985) (citing Agsalud v. Lee, 66 Haw. 425, 430, 664 P.2d 734, 738 (1983))).

III. Conclusion.

Accordingly, we conclude that Gonsalves' arguments on appeal lack merit, and we affirm the March 21, 2002 judgment of the court.

DATED: Honolulu, Hawaii, August 21, 2003.

On the briefs:

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defendant-appellant.

Acting Chief Judge

Richard K. Minatoya,
Deputy Prosecuting Attorney,
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Associate Judge

Associate Judge