

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 26486

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
THOMAS SCHMIDT, Defendant-Appellant

NONNA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(FC-CR. NO. 03-1-266K)

SUMMARY DISPOSITION ORDER

(By: Lim, Presiding Judge, Foley and Fujise, JJ.)

Defendant-Appellant Thomas Schmidt (Schmidt) appeals from the judgment entered on March 11, 2004 by the Family Court of the Third Circuit (family court),¹ after a jury found Schmidt guilty of violating an order of protection. After a careful review of the issues raised, the arguments made and authority cited by the parties, and the record below, we resolve Schmidt's points on appeal as follows and affirm.

1. In his first two points on appeal, Schmidt argues that the family court committed plain error in making various evidentiary rulings. These points challenge the family court's rulings with regard to the testimony of the complaining witness, Virginia Cho (Cho), and the testimony of other witnesses, including himself, respectively. However, they are in violation of Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4)(A) insofar as they fail to include "the full substance of the

¹ The Honorable Ronald Ibarra presided.

evidence admitted or rejected."² See also, Hawai'i Rules of Evidence (HRE) Rule 103(a)(2) (1993).³ Instead, Schmidt attaches sixty-three pages of transcript without identifying which of the family court's rulings he now finds objectionable.

To the extent Schmidt complains that these rulings prevented him from introducing evidence of Cho's bias, interest or motive, his complaint fails as most of the objections were (1) to the form or lack of foundation for his questions and (2) based on relevance, as Schmidt asked about events that (a) took place years before the date of the offense, (b) had no bearing on the

² Hawai'i Rules of Appellate Procedure Rule 28(b)(4) provides:

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:

(A) when the point involves the admission or rejection of evidence, a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected;

. . . .

Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

³ **Rule 103 Rulings on evidence.** (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:

. . . .

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

charge, or (c) were not in fact probative of any bias, interest or motive. Moreover, the family court allowed Schmidt to question Cho about a number of possible bases for bias. Advising Schmidt at the end of the first day of trial that his questioning on the subject of bias had gone beyond what was necessary and had "become a waste of time," the court was within its discretion to limit Schmidt's questioning to "conviction for truth and veracity, any false swearing" and to exclude collateral matters, such as the disagreements between the parties. HRE Rule 403 (1993).

2. The court did not plainly err in its instructions to the jury as the challenged instruction⁴ was a correct statement of the elements of the offense. State v. Sugihara, 101 Hawai'i 361, 68 P.3d 635 (App. 2003). Moreover, that it did not specify the provision of the protective order Schmidt was charged with violating nor define "personal contact" was harmless beyond

⁴ The challenged instruction, as read to the jury, stated,

A person commits the offense of Violation of an Order for Protection if he knowingly or intentionally violates the order for protection.

There are three material elements of the offense of Violation of an Order for Protection, each of which the prosecution must prove beyond a reasonable doubt. These three material elements are:

Number one, on or about September 9, 2002, in Kona, County and State of Hawaii, the defendant Thomas Schmidt intentionally or knowingly engaged in conduct prohibited by the order for protection; and,

Number two, the defendant acted intentionally or knowingly that his conduct would result in a violation of the order for protection; and,

Number three, the defendant acted knowingly that the order for protection issued by a judge in the family court was in effect.

a reasonable doubt. Moreover, Schmidt's defense at trial was that he did not engage in the conduct testified to by Cho and others, not that this conduct did not constitute "personal contact." Finally, Schmidt admitted at trial that, had he engaged in the alleged conduct of stopping and talking to Cho, it would have constituted a violation of the protective order.

3. Next, Schmidt charges, again by way of plain error, prosecutorial misconduct based on unspecified "improper cross-examination" and "objection to Defendant's cross-examination" as well as final argument. Insofar as Schmidt relies on the designation, in his first two points on appeal, for the "improper" objections referred to in this fifth point, this part of his fifth point is similarly defective and will not be considered.

As to his claim of "improper cross-examination," relying on State v. Sanchez, 82 Hawai'i 517, 528-32, 923 P.2d 934, 945-49 (App. 1996), Schmidt first claims the deputy prosecutor used argumentative and compound questions "to cast the testimony of James Wodehouse (Wodehouse) in bad light because he was corroborating the Defendant's version that Defendant did not talk with Ms. Cho." A close examination of this questioning reveals that Schmidt's reliance on Sanchez is misplaced. Here, the deputy prosecutor engaged in proper bias, interest and motive cross-examination of defense witness Wodehouse.

Similarly, Schmidt's claim that the presentation of the testimony of the state's investigator, Steven Vendt (Vendt), was

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a violation of HRE Rule 613(b) and State v. Duncan, 101 Hawai'i 269, 277-78, 67 P.3d 768, 776-77 (2003), is also unfounded. The record clearly reveals that the prosecution examined Wodehouse regarding his statement to investigator Vendt before the latter's rebuttal testimony regarding the conversation.

Finally, Schmidt fails to establish that the deputy prosecutor engaged in misconduct during her closing argument. Contrary to the closing arguments in Sanchez, upon which Schmidt relies, the statements Schmidt refers to here were based on the evidence presented, did not inject personal opinion and were all related to the credibility of the witnesses and the guilt of the defendant. State v. Cordeiro, 99 Hawai'i 390, 425, 56 P.3d 692, 727 (2002).

Therefore,

The Family Court of the Third Circuit's March 11, 2004 judgment is affirmed.

DATED: Honolulu, Hawai'i, November 29, 2006.

On the briefs:

R. Steven Geshell,
for Defendant-Appellant.



Presiding Judge

Dale Yamada Ross,
Deputy Prosecuting Attorney,
County of Hawai'i,
for Plaintiff-Appellee.



Associate Judge



Associate Judge