

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27541

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'ISTATE OF HAWAI'I, Plaintiff-Appellee,
v.
EDWIN AKAHI, Defendant-AppellantK. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR NO. 05-1-0290)MEMORANDUM OPINION

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

Defendant-Appellant Edwin Akahi (Akahi) appeals from the September 12, 2005 judgment entered in the Family Court of the Second Circuit,¹ after a jury-waived trial, finding him guilty as charged of two counts of Abuse of a Family or Household Member, Hawaii Revised Statutes (HRS) § 709-906(1) and (4) (Supp. 2005). Specifically, Akahi was found guilty of violating the following part of HRS § 709-906(1): "It shall be unlawful for any person, . . . to refuse compliance with the lawful order of a police officer under subsection (4)." HRS § 709-906(4) states in part:

(4) Any police officer, with or without a warrant, may take the following course of action where the officer has reasonable grounds to believe that there was physical abuse or harm inflicted by one person upon a family or household member, regardless of whether the physical abuse or harm occurred in the officer's presence:

- (a) The police officer may make reasonable inquiry of the family or household member upon whom the officer believes physical abuse or harm has been inflicted and other witnesses as there may be;

- (b) Where the police officer has reasonable grounds to believe that there is probable danger of further physical abuse or harm being inflicted by one person upon a family or household member, the police officer lawfully may order the person to leave the premises for a period of separation of twenty-four hours, during which time the person shall not initiate any contact, either by telephone or in person, with the family or household member; provided that the person is allowed to enter the premises with police escort to collect any necessary personal effects[.]

Akahi was sentenced to probation for two years, subject to various conditions that included paying a \$110 Criminal Injuries Compensation fee and a \$150 probation services fee, and being confined for sixty days, credit given for time served, with "[m]ittimus stayed until a hearing on October 14, 2005 at 8:00 a.m." We reverse.

STATUTE AND PRECEDENT

As interpreted by this court's opinions in State v. Kapela, 82 Hawai'i 381, 922 P.2d 994 (App. 1996) and State v. Cordero, 106 Hawai'i 381, 105 P.3d 258 (App. 2004), HRS § 709-906(1) and (4) require the State to prove beyond a reasonable doubt the following four elements:

One: That a police officer had reasonable grounds to believe that, at some time in the past,² defendant had inflicted physical abuse or harm upon a family or household member;

² Act 172, Session Laws 1998, amended Hawaii Revised Statutes (HRS) Section 709-906(4) to delete the word "recent" from the words "where the officer has reasonable grounds to believe that there was recent physical abuse or harm inflicted by one person upon a family or household member" because it was an ambiguous term that inhibited achieving the primary purpose of protecting more victims of domestic abuse.

Two: That the officer had reasonable grounds to believe that there was a probable danger of further physical abuse or harm being inflicted by defendant upon a family or household member;

Three: That the officer issued a written warning citation to the defendant, ordering the defendant to leave the premises for a cooling-off period of twenty-four hours or a specified enlarged period if the incident occurred after 4:30 p.m. on any Friday, or on any Saturday, Sunday or legal holiday, during which time the defendant shall not initiate any contact,³ either by telephone or in person, with the endangered family or household member; and

Four: That the defendant intentionally, knowingly or recklessly returned to the premises, or initiated contact with the endangered family or household member, before the expiration of the cooling-off period.

We interpret the "reasonable grounds to believe" language in (HRS) § 709-906(4) (Supp. 2005) as imposing a probable case standard, rather than a less stringent reasonable

³ Prior to its amendment in 1997, HRS § 709-906(4)(b) authorized the police officer to "lawfully order [the alleged abuser] to leave the premises for a cooling off period of twelve hours[.]" Act 323, Session Laws 1997, amended HRS section 709-906(4) by authorizing the police officer to "order the person to leave the premises for a period of separation of twenty-four hours, during which time the person shall not initiate any contact, either by telephone or in person, with the family or household member[.]" The 1997 House Judiciary Committee's Standing Committee Rep. 1481 on S.B. No. 293 (1997 House Journal 1687) states that the success of the prior statute was "limited in part by the fact that the protection extends only to the premises and not to the victims themselves or to other locations that might be important to the victim, such as their place of employment."

suspicion standard. State v. Cordero, 106 Hawai'i 381, 388-89, 105 P.3d 258, 264-65 (App. 2004) (Nakamura, J. concurring).

BACKGROUND

Akahi and his girlfriend Kuulei Kubo (Kubo) lived at 53 Nakea Way. Kubo's father lived at 163 Namaau Street. On Sunday morning, May 8, 2005, Akahi and Kubo had argued at their 53 Nakea Way residence and Kubo had decided to go to her father's residence and stay there until the next day. Akahi did not want Kubo to leave the 53 Nakea Way residence. The only evidence in support of element One was the following exchange between the prosecutor and the police officer:

Q. And based on your interview with [Kubo], did you make a determination if a cooling-off warning would be issued in the case?

A. Yes, I asked her if police had to come before for them, and she said yes, Mr. Akahi had a 24-hour citation.

The record does not indicate that the officer ever verified that a 24-hour warning citation previously had been issued to Akahi. The warning citation issued by the officer to Akahi in this case ordered Akahi to

leave the premises located at: 163 Namaau [sic] St. Kihei for a cooling off period which expires on 05/09/05 at 04:30 PM; provided that he/she will be allowed to enter the premises with police escort to collect any necessary personal effects.

You are not to initiate any contact either by telephone or in person with the victim.

(Emphasis and large font size in the original.)

Later that Sunday evening, Akahi twice was observed on the roof of the 163 Namaau Street residence and each time

departed after being told to do so.⁴ The next morning, after Kubo went to the residence of Akahi's sister, Akahi arrived, entered his sister's residence, and initiated a conversation with Kubo.⁵

Regarding element One, did the police officer have probable cause that, at any time in the past, Akahi had inflicted physical abuse or harm upon a family or household member? The answer is no. All the police officer had was a statement by Kubo that, at some time in the past, a police officer issued a 24-hour citation to Akahi. In the view of the prosecutor, "the fact that Akahi was previously issued a 24-hour citation, logically suggests that another police officer determined from an objective standpoint, that reasonable grounds existed to believe that there was physical abuse or harm inflicted upon [Kubo] by Akahi." In our view, more evidence is necessary to provide the police officer with probable cause that, at any time in the past, Akahi had inflicted physical abuse or harm upon a family or household member.

⁴ Count One charged in part "[t]hat on or about the 8th day of May, 2005, . . . EDWIN AKAHI did return to the premises at 163 Namaau Place, Kihei, Hawaii, and/or made contact with Kuulei Kubo, before expiration of the period of separation[.]"

⁵ Count Two charged in part "[t]hat on or about the 9th day of May, 2005, . . . EDWIN AKAHI did make contact with Kuulei Kubo, before expiration of the period of separation[.]"

We do not answer the following questions:

(1) Regarding element Two, whether there was evidence that the current episode had involved any physical abuse or harm or any threat thereof such that the police officer had reasonable grounds to believe that there was a probable danger of further physical abuse or harm being inflicted by Akahi upon a family or household member?

(2) Whether HRS § 709-906 applies to situations where the protected party wants to leave the residence to go stay at her father's residence and, although the ordered party is not going with her, the police officer orders the ordered party "to leave" the protected party's father's residence "for a cooling off period"?

(3) Whether the order described in "(2)" above is the lawful order of a police officer under HRS § 709-906(4)(b)?

Accordingly, the September 12, 2005 judgment is reversed.

DATED: Honolulu, Hawai'i, January 4, 2007.

On the briefs:

Dawn M. Nekoba,
Deputy Public Defender,
for Defendant-Appellant.

Peter A. Hanano,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.


Chief Judge



Associate Judge


Associate Judge