NO. 27771

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
DAVID ACKERMAN, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 05-1-2218)

SUMMARY DISPOSITION ORDER
(By: Watanabe, Presiding Judge, Foley, and Nakamura, JJ.)

Defendant-Appellant David Ackerman (Ackerman) appeals from the Judgment filed on January 18, 2006, in the Family Court of the First Circuit (family court).[1] Following a bench trial, Ackerman was found guilty of harassment of his wife, Jenny Ackerman (Jenny), in violation of Hawaii Revised Statutes (HRS) § 711-1106(1)(a) (Supp. 2006).[2] The family court sentenced Ackerman to six months of probation.

On appeal, Ackerman argues that: 1) there was insufficient evidence to show that he acted with the requisite intent to harass, annoy, or alarm Jenny, and that the family court erred in making numerous findings of fact and conclusions of law in support of its guilty verdict; 2) there was insufficient evidence to disprove his self-defense claim; and 3)

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[1] The Honorable Russel S. Nagata presided.

[2] Hawaii Revised Statutes (HRS) § 711-1106(1)(a) (Supp. 2006) provides as follows:

> (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:
>
> (a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]

he was deprived of his right to the effective assistance of trial counsel. For the reasons discussed below, we affirm.

I.

The crux of Ackerman's challenge to the sufficiency of the evidence is that the trial court should have believed his testimony over that of his wife Jenny. However, it is the province of the trier of fact, not the appellate courts, to determine the credibility of witnesses and the weight of evidence. State v. Aki, 102 Hawai'i 457, 460, 464, 77 P.3d 948, 951, 955 (App. 2003). The testimony of a single witness, if found credible by the trier of fact, is sufficient to support a conviction or findings of fact. State v. Eastman, 81 Hawai'i 131, 141, 913 P.2d 57, 67 (1996); In re Doe, 95 Hawai'i 183, 196-97, 20 P.3d 616, 629-30 (2001).

Ackerman challenges ten of the family court's findings of fact (FOF).[3] The family court credited Jenny's testimony and used it to support its FOF. With one exception, we conclude that the FOF challenged by Ackerman were supported by substantial evidence in the record and were not clearly erroneous. The sole exception is FOF No. 9 which states: "As Jenny moved toward the front door [Ackerman] bumped Jenny's chest with his stomach causing pain." Jenny, however, testified that the stomach bump did not cause her physical pain and was more of an annoyance. Thus, the family court clearly erred in finding that the stomach bump caused Jenny pain.

This error, however, was harmless beyond a reasonable doubt. Jenny testified and the family court found that Ackerman had engaged in offensive physical contact with Jenny that caused her pain in ways besides the stomach bump. This included Ackerman's grabbing Jenny by a backpack she was wearing and

[3] Defendant-Appellant David Ackerman (Ackerman) erroneously characterizes the trial court's finding that "[Ackerman] acted with the intent to harass, annoy, or alarm his wife, Jenny Ackerman" as a conclusion of law. This finding is a finding of fact, not a conclusion of law, and will be treated as a finding of fact in our discussion.

swinging her into a closet, causing pain to her back, and his grabbing Jenny's left forearm and pushing her into the closet, causing pain and redness to her left forearm. We therefore conclude that there is no reasonable possibility that the family court's error with respect to FOF No. 9 might have contributed to Ackerman's conviction. State v. White, 92 Hawai'i 192, 198, 205, 990 P.2d 90, 96, 103 (1999).

We reject Ackerman's claim that the family court erred in finding and concluding that "[the prosecution] has proved beyond a reasonable doubt that . . . [Ackerman], with the intent to harass, annoy, or alarm Jenny Ackerman, did strike, shove, kick, or touch Jenny Ackerman in an offensive manner or subject Jenny Ackerman to offensive physical contact." We conclude that there was sufficient evidence to support Ackerman's conviction. The family court chose to credit Jenny's testimony over Ackerman's. Jenny's testimony along with the other evidence adduced by the prosecution provided substantial and sufficient evidence to support the family court's determination that Ackerman was guilty as charged.

II.

We conclude that the prosecution disproved Ackerman's self-defense claim beyond a reasonable doubt. The prosecution essentially disproves the defendant's claim of self-defense "when the trier of fact believes its case and disbelieves the defense." In re Doe, 107 Hawai'i 12, 19, 108 P.3d 966, 973 (2005). Here, the family court believed the prosecution's case, as it credited and relied on Jenny's version of events in finding Ackerman guilty. Jenny's testimony constituted substantial evidence to disprove Ackerman's self-defense claim beyond a reasonable doubt.

III.

Ackerman's claim that his right to effective assistance of trial counsel was violated is without merit. Ackerman contends that: 1) his trial counsel "admitted" being unprepared for trial when counsel asked for a continuance to investigate discovery material recently received from the prosecution; 2)

counsel's unpreparedness showed when he "opened the door" to damaging evidence in cross-examining Jenny; and 3) counsel failed to call any witness besides Ackerman after the court recessed the trial for a month to permit the defense to prepare its case. Ackerman did not meet his burden of demonstrating: "1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998).

The claim of being unprepared by Ackerman's counsel was tied to counsel's late receipt of discovery. The family court, however, recessed the trial for one month to permit counsel to investigate the discovery material and prepare the defense case. This served to cure any claimed unpreparedness by counsel due to his late receipt of discovery. When trial resumed, counsel did not contend that he had been prejudiced by the late receipt of the discovery materials.

We are not persuaded by Ackerman's claim that his counsel was ineffective for "opening the door" to adverse testimony during counsel's cross-examination of Jenny. Counsel may have had strategic reasons for asking the challenged questions. See Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (holding that actions or omissions of counsel that had "an obvious tactical basis for *benefitting* the defendant's case will not be subject to further scrutiny"). In any event, we conclude that counsel's questions were "within the range of competence demanded of attorneys in criminal cases," State v. Antone, 62 Haw. 346, 348, 615 P.2d 101, 104 (1980), and did not rise to the level of ineffective assistance of counsel.

Finally, we reject Ackerman's claim that counsel's failure to call any witnesses besides Ackerman demonstrates that counsel was ineffective. Ackerman does not identify the additional witnesses his counsel should have called or how their testimony would have helped Ackerman's defense, much less provide

sworn statements of what these witnesses would have said. Ackerman therefore has not established any valid basis for claiming ineffective assistance on the ground that his counsel failed to call additional witnesses. Richie, 88 Hawaiʻi at 39, 960 P.2d at 1247.

IV.

The January 18, 2006, Judgment of the family court is affirmed.

DATED: Honolulu, Hawaiʻi, November 29, 2007.

On the briefs:

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Corinne K.A. Watanabe
Presiding Judge

Daniel R. Foley
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