

NO. 27498

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
LEONORA KAMAI, Defendant-Appellant

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APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CRIMINAL NO. 05-1-1419)

MEMORANDUM OPINION

(By: Nakamura, Presiding Judge, Fujise, and Leonard, JJ.)

Defendant-Appellant Leonora Kamai (**Mother**) appeals from the Judgment of Conviction and Sentence entered on September 12, 2005 by the Family Court of the First Circuit (**Family Court**) for the offense of Abuse of Family or Household Members, in violation of Hawaii Revised Statutes (**HRS**) § 709-906 (Supp. 2004).¹ Plaintiff-Appellee State of Hawai'i (**State**) instituted criminal proceedings against Mother when she allegedly abused her twelve-year-old daughter (**Daughter**) at their home on April 26, 2005 by punching and slapping her, and pulling her hair. A jury trial commenced on September 8, 2005, with a guilty verdict reached on September 9, 2005.

Background

On April 26, 2005, Mother was fifty-eight years old and had been married for thirty-six years to David Kamai (**Father**). Mother and Father have five children, a biological daughter who is thirty-one years old, and four adopted children, including Daughter. At the time of the incident, Daughter was twelve years old, approximately four feet and seven inches (4'7") in height, and weighed approximately seventy pounds on April 26, 2005.

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The Honorable Reynaldo D. Graulty presided.

Mother stood five feet and six inches (5'6") tall, and weighed approximately 300 pounds.

Mother testified about the incident as follows: On the evening of April 26, 2005, she finished her dinner and excused herself from the dining table to finish making ribbon leis in her bedroom. Daughter entered Mother's room to talk about her volleyball game which took place earlier in the day. Mother told Daughter to help her siblings with the chores, but Daughter became angry and "dropped her eyes to the floor." Mother asked Daughter, "[W]hat's your problem? Do you have a problem in doing your chores? All you got to do is the dishes, wipe, and put it away." Then, Daughter got off the chair she was sitting on, stomped her feet, and started to walk out of the room. Daughter's back was to Mother when Daughter "mumbled something under her breath[,] " and Mother saw Daughter "shaking" her body. Mother called Daughter to come back to the bed. Daughter told her that she did not have to do her chores. Mother then asked Daughter to come closer to her and tell her to her face what Daughter had earlier said. Daughter moved closer and Mother hit Daughter with her hand quickly on the mouth once, and did not hit her again. Mother explained that she hit to discipline her. Then, Daughter turned and stomped out of the room.

Mother stayed in the room and continued making leis. Mother did not see Daughter until the next morning before she left to go to school. Daughter went into Mother's bedroom and "said bye mom like nothing happened and kissed me and went."

Daughter's testimony of the events on the evening of April 26, 2005 differed significantly from Mother's testimony. Daughter stated she ate dinner in the parlor with her two brothers, sister, and Father, and Mother ate dinner in her bedroom while watching television. After Daughter finished her dinner, she entered Mother's bedroom to talk about school. Mother was sitting on the bed watching television when Daughter

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entered the room and sat down on a chair. Mother asked Daughter what she was doing in her room. Before Daughter could answer, Mother told Daughter to get out of the room, at which time Daughter started to walk toward the door. When Daughter reached the door, Mother asked Daughter why she was facing her back to Mother. Daughter did not respond, and Mother called her to come to the bed. Daughter walked over to Mother. Daughter testified, "She grabbed me by my hair and started slapping me and punching me." Daughter pointed to the top right side of her head where she indicated that Mother grabbed her hair. Daughter testified that Mother continued to grab Daughter's hair while "[w]hacking" her "[u]ntil she was finished[,] and had pulled her head "close." Daughter pointed to the area underneath her right eye, close to her cheekbone level, where she indicated Mother punched her. Although Daughter did not remember how many times Mother hit her, she remembered Mother punching her two times and that Mother slapped her on the left side of her face. After the incident, Daughter left the room and cried. Later, she looked in the bathroom mirror and saw a red mark on the left side of her face and a bruise on the right side. On a scale of one to ten, Daughter described the pain from the first slap as a nine, the second slap as a ten, and the subsequent punches as a ten.

Daughter testified that she did not remember if she got in trouble that day for not doing her chores. She also testified that before Mother hit her, she did not stomp her feet, did not speak in a sassy manner, did not mutter anything under her breath, did not huff at Mother, and was not ignoring Mother. Daughter testified that Mother hit her because she was facing her back to Mother.

After looking at her face in the mirror, Daughter went into the parlor to help the others clean up. Her two brothers, sister, and Father were in the parlor. They did not say anything to her nor did she to them. Daughter testified that Father did

not look at her face; he was still eating and kept his head lowered. After Daughter finished her chores in the kitchen, she took a shower and went to bed. She slept through the night, got up, and got ready for school. She did not see Mother in the morning because Mother was still sleeping. She left with her sister to go to school, and Father stood by the kitchen door when she left. Father did not say anything to her about her face. Daughter walked to school with her sister, but they did not talk about what happened the night before, and her sister did not ask any questions.

During recess at school, Daughter went to see her school counselor and reported the events of the night before, "'Cause [she] didn't want to get hit anymore." A policeman came to the school and spoke to Daughter. He took down notes and took photographs of Daughter in the counselor's office.

The officer, Officer Yiu K. Chan of the Honolulu Police Department (**Chan**), testified that he obtained a written statement from Daughter and also observed a slight discoloration, redness, and a little bit of swelling under her right eye. Chan testified that, after he took photographs of Daughter, he took her into protective custody, contacted Child Protective Services (**CPS**), and transferred custody of Daughter to CPS worker, Amphay Champathong (**Champathong**). In a motion in limine, defense counsel had sought to exclude all testimony regarding the removal of the Daughter, and her siblings, from Mother's custody.

Champathong testified that he was a case manager for the Leeward Child Welfare Services Unit of the Department of Human Services, State of Hawai'i (**DHS**). He described his duties, in part, as providing services "to address safety concerns that's been reported to the department." In response to questioning as to how he knew Daughter, Champathong initially testified that he "was assigned to the Kamai case on September 7, 2004," eight months prior to the April 26, 2006 incident. As reference to

prior allegations had been ruled inadmissible, after a bench conference, the prosecutor elicited testimony from Champathong suggesting that his "assignment" stemmed from the fact that the Kamai children were adopted out of foster care. Defense counsel continued to object, pointing out that Champathong's job was abuse cases.

Champathong's testimony included:

A. I met with [Daughter] and her counselor in the counselor's room, and then at that time I proceeded to actually interview her and just find out, you know, what had happened.

Q. Okay. And after the interview, what steps did you take?

A. We - the police had taken [Daughter] into police protective custody and, in doing so, had transferred temporary custody to the Department based on what was reported by [Daughter]. And also what was -

At that point, there was a bench conference and a recess to discuss, *inter alia*, objections to Champathong's testimony. When trial was reconvened, Champathong's continued testimony was as follows:

Q. Mr. Champathong, in January of 1998, did DHS place [Daughter] into the Kamai home with [Father and Mother] as foster parents?

A. Yes.

Q. In December of 1998, did [Father and Mother] complete adoption of [Daughter]?

A. Yes.

Q. Because of the adoption, has DHS been involved with the Kamais?

A. Yes.

Q. Based on [Daughter's] April 27, 2005 report, were the children then removed and placed into foster care?

A. Correct.

At that point, the prosecutor stated she had no further questions, except to confirm that Champathong's testimony referred to events that took place in the City and County of Honolulu.

The State also called Dr. Victoria Schneider (**Schneider**) to testify as an expert witness. The State first proffered Schneider as an expert in child abuse and for the proposed testimony that Mother's conduct was not reasonably related to safeguarding Daughter's welfare, and thus did not permit the justification defense of parental discipline. Defense counsel objecting, arguing that the proposed testimony would invade the province of the jury as a trier of fact, and improperly bolster the accuracy of Daughter's testimony. The Family Court agreed that Schneider could not testify on Daughter's credibility, but added that she could testify as to statements made for the purpose of medical treatment or diagnosis under Hawaii Rules of Evidence (**HRE**) Rule 803(b)(4).² It was stipulated and approved that Schneider would be qualified to testify as an expert in pediatrics only.

Notwithstanding this clear limitation, during direct examination, Schneider introduced herself as a "child abuse pediatrician at Kapiolani Medical Center[,] " at which time defense counsel objected. After a bench conference and further cautionary direction to the prosecutor, Schneider testified that she was board certified in the area of pediatrics. The following colloquy then took place:

Q: And what are your professional memberships and associations?

A: Well, I'm a fellow in the American Academy of Pediatrics, and I'm a member of their section on child abuse and neglect. I'm also a member of the International Society on Child Abuse and Neglect and the American Professional Society on the Abuse of Children. I'm also a member of the Hellfer Society, which is a society of child abuse medical professionals which is -- limits its membership to people who have been in the field for a certain amount of time and

² "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception and general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment," are an exception to the hearsay rule. HRE 803(b)(4).

have been recognized by their peers as being an expert in that area.

Q: And what is your current association with Kapiolani Medical Center?

A: Well, I'm the founder and the director of our Child At Risk Evaluation Program there. I'm also the medical director of our Child Protection Center, and I'm also a [sic] examining director with our Sex Abuse Treatment Center.

After further objections by the defense, and further testimony on Schneider's qualifications, upon the stipulation of the parties, the Family Court qualified Schneider as an expert in the field of pediatrics. Schneider testified that she examined Daughter, which included a review of her past medical history, taking a medical history from her, examining her, and making recommendations to child welfare services.

During the examination, Daughter told Schneider that Mother punched her, pulled her hair, and hit her. Daughter also told Schneider that Father slapped her as well, but did not specify which side he hit her. Schneider testified that she carefully examined Daughter's scalp and the other skin surfaces of her body, and then performed an examination of everything else as normally done in a pediatric examination from head to toe. Schneider noted tenderness when she pressed on the sore spot of Daughter's scalp. Schneider did not see bruising, discoloration, or swelling on Daughter's scalp. However, she observed a mild degree of swelling over Daughter's right cheek, which was "definitely swollen in comparison to the left side." Daughter complained of tenderness over that right cheekbone and "there was about a one centimeter area of discoloration or very faint bruising over that area as well." Dr. Schneider did not see anything else on Daughter's face indicating injury. Dr. Schneider also took photographs of Daughter's face.

The prosecutor asked Schneider if, based on her findings, the injuries she observed were consistent with someone grabbing Daughter by the hair and punching her in the face twice

and slapping her twice. Schneider answered that the injuries she found on the scalp and the right cheek were consistent with Daughter's report that she was punched and that her hair was pulled. In response to being asked whether the injuries were consistent with being backhanded once, Schneider responded, "One backhand would not cause tenderness in two separate areas, so no."

Points on Appeal

Mother raises the following points on appeal:

(1) that the Family Court reversibly erred when it admitted irrelevant, unduly prejudicial, and misleading evidence regarding the DHS's removal of Daughter and her three siblings from Mother's home based on Daughter's report of abuse;

(2) that the Family Court reversibly erred when it failed to strike the evidence or give any curative instructions after the State committed prosecutorial misconduct by eliciting testimony establishing an expert witness's qualifications in the area of child abuse, as well as pediatrics, the only purported area of expert testimony;

(3) that the Family Court reversibly erred when it allowed the expert witness to offer her opinion as to the consistency between the Daughter's injuries and the hearsay statements made by Daughter to her, the effect of which was the same as giving her opinion on the believability and/or truthfulness of the Daughter; and

(4) there was insufficient evidence at trial to disprove beyond a reasonable doubt Mother's justification defense of parental discipline.

Discussion

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Mother's points of error as follows:

(1) Testimony re Removal of Children. Mother asserts that Champathong's testimony was irrelevant, unduly prejudicial, misleading and "amounts to that of an 'expert' in the area of child abuse . . . [and] his conclusions that [Mother's] conduct warranted removal of the children from her home impermissibly directed the jury 'as to what result to reach' in violation of State v. Batangan, 71 Haw. 552, 799 P.2d 48 (1990)." The Family Court's rationale for allowing the testimony was as follows:

With regard to the any [sic] reference to the Child Protective Service investigation being initiated in the instant case, the position of the defense is that this is a parental discipline defense, and therefore, the reference to Child Protective Service in the balancing between what is more probative than prejudicial or whether it's more prejudicial than probative is altered in some way, and it's kept in favor of it being more probative than prejudicial because the Child Protective Services may invade the province of the jury if there were -- if this were a case where the discipline is being -- or the defendant is denying that the child was in any way abused by him or her, therefore, the Court is going to deny the request that the reference to Child Protective Service investigation being initiated be precluded.

With reference to any reference to findings, conclusions made pursuant to such investigation, likewise, in balancing whether it's more probative than prejudicial, the Court is going to find that it is more probative than prejudicial as to what exactly the Child Protective Services' investigation might have concluded.

After carefully considering the record below, including the prosecutor's offer of proof for Champathong's testimony, we conclude that the only arguable relevance of his testimony regarding his after-the-fact decision to remove the Kama'i children from the home based on Daughter's report was the inference that he, a child abuse professional, believed Daughter's account and concluded that the incident constituted abuse warranting the removal of four children from their home. It was not probative of any other fact or circumstance or issue in the case. There were no instructions to the jury to mitigate that prejudicial bolstering of Daughter's testimony. The Family Court, therefore, abused its discretion in allowing Champathong's testimony.

We must, therefore, consider whether this error requires reversal of Mother's conviction. The Hawai'i Supreme Court has said:

Even if the trial court erred in admitting evidence, a defendant's conviction will not be overturned if the error was harmless beyond a reasonable doubt:

[T]he error is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction.

State v. Machado, 109 Hawai'i 445, 452-53, 127 P.3d 941, 948-49 (2006) (quoting State v. Heard, 64 Haw. 193, 194, 638 P.2d 307, 308 (1981)).

[T]here will be no reversal where on the record as a whole, no prejudice to appellant has resulted. The decision depends upon the nature and quantum of proof deduced and the type of error committed.... Where there is a wealth of overwhelming and compelling evidence tending to show the defendant guilty beyond a reasonable doubt, errors in the admission or exclusion of evidence are deemed harmless.

State v. Rivera, 62 Haw. 120, 127-28, 612 P.2d 526, 531 (1980) (citations omitted).

The evidence in this case was compelling. Mother admitted striking Daughter in the face and, in light of the testimony of Daughter, Chan, and Schneider, and the photographic evidence, there is no reasonable doubt that the blow or blows to Daughter's face caused visible injury. Mother's testimony that she only struck Daughter once on the mouth was completely inconsistent with the swelling and bruising high on Daughter's right cheekbone. Even accepting Mother's version of the preceding events, there was overwhelming evidence for the jury to conclude that Mother's actions were not justified as allowable parental discipline. See also discussion below regarding Mother's parental discipline defense. We also note that, although Champathong's testimony was erroneously admitted, the prosecutor did not further inflame the prejudicial effect by commenting on it during closing argument. On the contrary, no mention was made of his testimony. In light of these

circumstances, and the record as a whole, we hold that the error in allowing Champathong's testimony was harmless beyond a reasonable doubt.

(2&3) Schneider's Testimony Re Her Child-Abuse Qualifications. We are cognizant of the potentially prejudicial impact of the recitation of Schneider's many child-abuse-related credentials. However, the Family Court clearly indicated that Schneider was only qualified to testify as a pediatrician and Schneider's testimony regarding her examination of Daughter was appropriately restrained. In addition, the Court gave the following instruction:

[D]uring the trial you heard the testimony of a witness who was described as an expert. Training and experience may make a person an expert in a particular field. The law allows that person to state an opinion about matters in that field. Merely because such a witness has expressed an opinion does not mean, however, that you must accept this opinion. It is up to you to decide whether to accept this testimony and how much weight to give it. You must also decide whether the witness's opinions were based on sound reasons, judgment, and information.

In light of the limited scope of Schneider's testimony, the instructions given to the jury, the standard applicable to our review, and the totality of record related to this evidence, we conclude that the Family Court did not abuse its discretion in failing to strike Schneider's testimony regarding her child-abuse-related qualifications. Indeed, even assuming that the prosecutor erred in soliciting these qualifications, there is no reasonable possibility that the error complained of might have contributed to the conviction, given Schneider's limited testimony.

Additionally, we find no error in Schneider's expert testimony that Daughter's injuries were: (1) consistent with Daughter's report that she was punched and that her hair was pulled; and (2) inconsistent with being backhanded once. Schneider's testimony did not rise to the level of a statement that Daughter was telling the truth or the Daughter had been

abused. See State v. Mars, 116 Hawai'i 125, 140-41, 170 P.3d 861, 876-77 (App. 2007) (holding that substantially similar medical testimony was permissible).

(4) Parental Discipline Defense. Mother argues that the State failed to disprove beyond a reasonable doubt that her conduct satisfied the elements of the parental discipline defense under HRS § 703-309(1) (1993), which provides:

§ 703-309 Use of force by persons with special responsibility for care, discipline, or safety of others. The use of force upon or toward the person of another is justifiable under the following circumstances:

- (1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor, or a person acting at the request of the parent, guardian, or other responsible person, and:
 - (a) The force is employed with due regard for the age and size of the minor and is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; and
 - (b) The force used is not designed to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.

Since the defense of parental discipline is not an affirmative defense, the prosecution bears the burden of disproving beyond a reasonable doubt the justification evidence that was adduced, or proving beyond a reasonable doubt facts negating the defense. State v. Thate, 106 Hawai'i 252, 265, 103 P.3d 412, 425 (App. 2004) (citations omitted). "When a question of parental discipline is raised, the prosecution must prove beyond a reasonable doubt that the parent's . . . conduct did not come within the scope of parental discipline as prescribed in HRS § 703-309(1). State v. Matavale, 115 Hawai'i 149, 164, 166 P.3d 322, 337 (2007) (citation omitted). "Because the requirements of HRS § 703-309(1) are set out in the conjunctive, rather than the disjunctive, the prosecution needed only to disprove one element beyond a reasonable doubt to defeat the justification defense." State v. Crouser, 81 Hawai'i 5, 11, 911 P.2d 725, 731 (1996).

Here, the evidence adduced at trial showed that Daughter sustained redness, swelling, tenderness, and bruises. Daughter testified that she experienced severe pain. Chan testified that he observed Daughter's injuries on her face, and Schneider testified that she also found tenderness on Daughter's scalp. The punching and slapping was precipitated by Daughter allegedly refusing to do her chores. The difference in size and age between Mother and Daughter was significant. The prosecution only had to show that the force employed, with regard to age and size of the minor, was not reasonably related to safeguarding the minor or punishing the minor for her misconduct, in order to defeat the justification defense. See Crouser, 81 Hawai'i at 11, 911 P.2d at 731. Considering the evidence in the strongest light for the prosecution, we conclude that substantial evidence existed for the jury to find that Mother's conduct was not reasonably proportional to Daughter's alleged misconduct. See Matavale, 115 Hawai'i at 164, 166 P.3d at 337 (citation omitted). Therefore, we hold that the State adduced sufficient evidence to disprove beyond a reasonable doubt Mother's parental discipline defense.

For the foregoing reasons, we affirm the Family Court's Judgment of Conviction and Sentence entered on September 12, 2005.

DATED: Honolulu, Hawai'i, May 21, 2008.

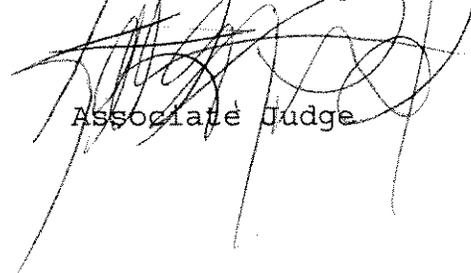
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Presiding Judge


Associate Judge


Associate Judge