NO. 28683

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
JERRY A. ROBERTSON, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CRIMINAL NO. 06-1-2332)

MEMORANDUM OPINION
(By: Nakamura, C.J., Watanabe, and Fujise, JJ.)

Defendant-Appellant Jerry A. Robertson (Robertson) was convicted of abuse of a family member for using a belt to discipline his stepson. We hold that the prosecution failed to introduce sufficient evidence to disprove Robertson's justification defense of parental discipline, as set forth in Hawaii Revised Statutes (HRS) ÿÿ 703-309(1) (1993)[1], and we reverse his conviction.

Robertson appeals from the Judgment filed on July 9, 2007, in the Family Court of the First Circuit (family court).[2] Plaintiff-Appellee State of Hawai i (State) charged Robertson by complaint with one count of abuse of a family or household

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[1] HRS ÿÿ 703-309(1) provides:

> 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.

[2] The Honorable Patrick W. Border presided over the proceedings relevant to this appeal.

member, in violation of HRS ÿÿ 709-906 (1993 & Supp. 2006)[3]. After a jury trial, Robertson was found guilty as charged. The family court sentenced Robertson to a two-year term of probation subject to the condition that he serve a ten-day term of imprisonment.

STATEMENT OF FACTS

Robertson and his wife, Kikumbile Robertson (Mother), were both staff sergeants in the United States Marine Corps. At the time of the charged incident, Robertson's stepson (Child) was eight years old and in the second grade. Robertson and Mother (collectively, "Parents") married in 2002, and Child is the biological son of Mother. Child has a minimal relationship with his biological father. Robertson has acted as a parental figure for Child since Child was three years old, and the bond between Robertson and Child resembles a father-son relationship. Child calls Robertson "dad."

Child was sent home from school with a note from his teacher in his notebook describing his misbehavior at school. Child had misbehaved in class, had failed to complete his schoolwork, and was therefor prevented from participating in recess. Child's teacher communicated daily with Parents through Child's notebook, including whether Child had a "good" or "bad" day. An example of a bad day for Child would be where he was disrespectful to the teacher and refused to do his work. This was not the first bad-day note brought home by Child; Child's teacher had sent multiple notes home for Child's misbehavior during that school year.

When Child arrived home, he lied to Parents by saying he had a "good day," and he did not tell them about the negative note in his notebook. Robertson soon discovered the negative note as well as an accumulation of other recent negative notes in the notebook of which Robertson had not previously been aware. In the past, Robertson and Mother had disciplined Child for his

[3] HRS ÿÿ 709-906 provides, in relevant part, as follows:

> (1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member . . . .

misbehavior at school by means other than corporal punishment, such as by taking away Child's privileges relating to the enjoyment of TV, toys, allowance, and sports. However, Child's misbehavior had persisted, and Robertson instructed Child in this instance to go to another room, with the intention of disciplining Child by "spanking." Robertson asserted that it was important for Child to behave in school and receive a "proper education."

Robertson told Child to drop his shorts. That was the way Robertson had been disciplined by his parents. Robertson first explained to Child the reason Child was going to be spanked and gave Child a chance to respond. Robertson then proceeded to spank Child with a belt, for a period of between one and two minutes. Robertson testified that he attempted to hit Child with the belt between ten to fifteen times, but estimated that only eight of his strikes actually made contact because Child did not remain still and was "jumping around" during the spanking. Child stated that he thought Robertson hit him with the belt more than five times. Robertson believed the strikes made contact with Child's buttocks, but conceded that it was possible that the belt could have hit Child on other areas of his body because of Child's movement. While disciplining Child, Robertson intermittently stopped the spanking and talked to Child, explaining to Child why Child was being punished.

In his written statement to the police, Robertson described the force he used in spanking Child as "about a quarter of strength," and he testified that it "wasn't a lot of force." Robertson was six feet, four inches tall and weighed two hundred and thirty pounds, and Child was approximately four feet tall and weighed about fifty pounds. Child testified that when Robertson spanked him, it made Child feel "sad," Child cried, and Child was jumping around in order to avoid being spanked.

Mother sat in the next room while Robertson was disciplining Child, and she could hear what was going on between Robertson and Child. Mother did not believe that Robertson's disciplining of Child was excessive. Mother testified that if she believed that Robertson was hurting Child, she would have

intervened. After the spanking, Mother instructed Child to take a shower and go to bed. Child did not complain of any pain that night or the following morning.

Robertson and Mother sent Child to school the next day. At school, Child's teacher apparently was preparing to write another note in Child's notebook. Child told his teacher that Child did not want another note because he did not want to be punished. Child was not sure if he would receive another spanking, or if Parents would prohibit him from going to football practice that day. Child informed his teacher that he had received a "whooping" and showed her his buttocks and hip area. Child's school subsequently called the Honolulu Police Department (HPD).

HPD Officer Len Fujinaka (Officer Fujinaka) arrived on the scene and met with Child. Child was "calm" and "playing with toys." Officer Fujinaka observed "slight bruising" on Child's hips and buttocks area and on his arm. Child told Officer Fujinaka that the bruising did not hurt and that he was not in any pain. Child was not hesitant to go home. That same day, Officer Fujinaka interviewed and obtained a written statement from Robertson. Officer Fujinaka determined that there was no immediate danger of abuse or harm to Child. Officer Fujinaka did not arrest Robertson that day and released Child to Mother. Child went to flag-football practice and later asked if he could ride home with Robertson.

Two days after the incident, Child Protective Services took Child for an evaluation by Dr. Kayal Natarajan (Dr. Natarajan), a Kapiolani Medical Center pediatrician with experience in examining children suspected of being abused. Dr. Natarajan observed bruises on Child's arms, back, and thighs, and "some of them were linear, like rectangular shaped, and some were round, and some were just generalized bruising . . . ." Dr. Natarajan took pictures of Child and estimated that there were more than fifteen bruises. Dr. Natarajan did not observe any open wounds on Child during the examination.

Dr. Natarajan opined that some of the bruises were consistent with being spanked by a belt, but she conceded that she could not say how all of the bruises occurred. Child had gone to flag-football practice a day earlier, although Dr. Natarajan was not aware of this at the time of the examination. Child testified that when he plays flag football, he makes contact with the other players and sometimes falls down. Child identified a bruise shown in Dr. Natarajan's photographs as resulting from football, and not the spanking. Child identified other bruises in the photographs as resulting from Robertson's use of the belt.

Eight days after the incident, Child was examined by his regular physician, Dr. Wendell Mew (Dr. Mew), a family practice doctor. Mother told Dr. Mew that Robertson had spanked Minor. Dr. Mew testified that he did a full-body physical exam of Child and that Child's examination was "normal." Child did not have any bruises, lacerations, tenderness, or swelling.

STANDARDS OF REVIEW

"[A]n appellate court will not overturn a conviction by a jury if viewing the evidence in the light most favorable to the prosecution, there is substantial evidence to support the conclusion of the trier of fact." State v. Matavale, 115 Hawai i 149, 158, 166 P.3d 322, 331 (2007) (internal quotation marks, brackets, and citation omitted). However, a defendant's conviction is subject to reversal if the jury's verdict "was not supported by legally sufficient evidence as a matter of law." Id. at 158, 166 P.3d at 331 (internal quotation marks, citations, and emphasis in original omitted). This occurs, in a prosecution for abuse of a family or household member, where there is insufficient evidence to disprove a defendant's properly raised justification defense of parental discipline. See id. at 168, 166 P.3d at 341; State v. Stocker, 90 Hawai i 85, 95-96, 976 P.2d 399, 409-10 (1999).

DISCUSSION

Robertson contends that the evidence adduced by the State was legally insufficient to disprove his defense of

parental discipline, and therefore, his conviction must be reversed. We agree.

A.

"A parent's right to direct his or her child's upbringing has found protection in both the federal and Hawai i constitutions." Matavale, 115 Hawai i at 158, 166 P.3d at 331. "Society recognizes the primary role of parents in preparing children to assume the obligations and responsibilities of adulthood, and it is well-established that parents have a privilege to subject children to reasonable corporal punishment." Id. at 163, 166 P.3d at 336 (quoting State v. Crouser, 81 Hawai i 5, 14, 911 P.2d 725, 734 (1996)). The parental discipline defense is intended to recognize a parent's privilege to use force in disciplining his or her child as long as the force used is limited to that which is reasonable or moderate. See id. at 161, 166 P.3d at 334.

> [S]uch discipline must be with due regard as to the amount of force utilized and must be directed to promote the welfare of the child. *The force used* must (1) reasonably be proportional to the misconduct being punished and (2) reasonably be believed necessary to protect the welfare of the recipient. The means used to effect the discipline must also be reasonable.

Id. at 164, 166 P.3d at 337 (citation omitted).

Because there is "no bright line," "the *permissible degree of force* will vary according to the child's physique and age, the misconduct of the child, the nature of the discipline, and all the surrounding circumstances." Id. at 165, 166 P.3d at 338. In enacting the parental discipline defense, the Legislature expressed its belief that in distinguishing between physical abuse and appropriate parental discipline, "the 'gray areas' must be resolved by not criminalizing such parental discipline, even if a majority of the community would find the extent of the punishment inappropriate." Id. at 161, 166 P.3d at 334 (quoting Sen. Stand. Comm. Rep. No. 2493, in 1992 Senate Journal, at 1121).

To invoke the justification defense of parental discipline under HRS § 703-309(1), Robertson was required to present evidence supporting the following elements:

> (1) he was a parent, guardian, or other person as described in HRS § 703-309(1); (2) he used force against a minor for whose care and supervision he was responsible; (3) his use of force was with due regard to the age and size of the recipient and reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of misconduct; and (4) the force used was not designed to cause, or known to create a risk of causing, substantial bodily injury,[4] disfigurement, extreme pain or mental distress, or neurological damage.

Crouser, 81 Hawai i at 10-11, 911 P.2d at 730-31 (footnote added). In response to such evidentiary showing, "the prosecution had the burden of disproving beyond a reasonable doubt the justification evidence that was adduced, or proving beyond a reasonable doubt facts negativing the justification defense." Id. at 11, 911 P.2d at 731.

The only element of the parental discipline defense contested by the State is whether Robertson's use of force was employed "with due regard for the age and size of [Child] and [was] reasonably related to the purpose of safeguarding or promoting the welfare of [Child], including the prevention or punishment of [Child]'s misconduct[.]" HRS § 703-309(1)(a).

B.

In Matavale, the defendant mother was convicted of abuse of a family or household member for disciplining her fourteen-year-old daughter by hitting the daughter with a plastic backpack; a plastic hanger; the hard, flat side of a car brush; and the plastic handle of a metal tool. Matavele, 115 Hawai i at 167, 166 P.3d at 340. The defendant, who was "taller, heavier, and stronger" than her daughter, disciplined the daughter for skipping tutoring classes to meet with friends at a mall and for

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[4] HRS § 707-700 (Supp. 2001) defines "substantial bodily injury" as bodily injury which causes:

(1) A major avulsion, laceration, or penetration of the skin;

(2) A burn of at least second degree severity;

(3) A bone fracture;

(4) A serious concussion; or

(5) A tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs.

the daughter's "continuously defiant behavior" in lying and refusing to answer the defendant's questions. Id. The disciplining occurred while the daughter was sitting diagonally from the defendant in a vehicle, and defendant used the various objects because she could not reach the daughter easily. Id. at 153, 166 P.3d at 326. The defendant admitted that she "lost control." Id. at 155, 167, 166 P.3d at 328, 340.

The charged incident in Matavale occurred on a Friday, and the defendant kept her daughter from school the following Monday, after seeing the injuries on the daughter's arm, and allowed the daughter to remain at home until Thursday. Id. at 154, 166 P.3d at 327. When the daughter returned to school six days after the incident, the bruises on her arm were still visible, and the police were called. Id. The Hawai i Supreme Court reversed the defendant's conviction, holding that the defendant's conduct was justified under the parental discipline defense. Id. at 168-69, 166 P.3d at 341-42.

The supreme court noted that "bruises are not necessarily indicative of excessive corporal discipline." Id. at 166, 166 P.3d at 339 (internal quotation marks and citation omitted). The supreme court expressly agreed with the following sentiments expressed by the New Mexico Court of Appeals:

> [A]n isolated instance of moderate or reasonable physical force *that results in nothing more than transient pain or temporary marks or bruises is protected under the parental discipline privilege*.
>
> *This protection for parents should exist even if the parent acts out of frustration or short temper. Parents do not always act with calmness of mind or considered judgment when upset with, or concerned about, their children's behavior. Nor do parents always act pursuant to a clearly defined circumstance of discipline or control*. A reaction often occurs from behavior a parent deems inappropriate that irritates or angers the parent, causing a reactive, demonstrative act. Heat of the moment must not result in immoderate physical force and must be managed; however, *an angry moment driving moderate or reasonable discipline is often part and parcel of the real world of parenting with which prosecutors and courts should not interfere*. What parent among us can say he or she has not been angered to some degree from a child's defiant, impudent, or insolent conduct, sufficient to call for spontaneous, stern, and meaningful discipline?

Id. (ellipsis points omitted) (quoting State v. Lefevre, 117 P.3d 980, 984-85 (N.M. Ct. App. 2005)).

In concluding that the evidence was insufficient to disprove the defendant's parental discipline defense, the supreme court noted that (1) the daughter's injuries consisted of "a few small bruises that were visible for about a week"; (2) there was no evidence that the bruises required medical attention; (3) "there [was] no evidence to indicate any detriment to [the d]aughter's overall well-being or physical, emotional or psychological state"; and (4) the evidence indicated the daughter was able to tend to her chores on the night of the incident and attend family gatherings in the following two days. Id. The supreme court held that the defendant's "conduct fell within the parameters of the justified parental discipline statute" and that the evidence was insufficient to support a guilty verdict as a matter of law. Id. at 168, 166 P.3d at 341.

C.

As in Matavale, we conclude that considering the totality of the facts and circumstances, the discipline employed by Robertson was "reasonably . . . proportional to the misconduct being punished" and "reasonably . . . believed necessary to protect the welfare of the recipient." Id. at 164, 166 P.3d at 337. Child had been misbehaving at school on numerous occasions. Child lied to Robertson in attempting to conceal the teacher's negative note, and Child failed to tell Robertson about an accumulation of other bad notes recently written by the teacher. Prior to the charged incident, Robertson and Mother had tried non-physical disciplinary measures to correct Child's misbehavior at school, such as taking away privileges, but these measures had not worked. Given the circumstances, it was not unreasonable for Robertson to conclude that corporal punishment was warranted.

Robertson asked Child to go to another room and then proceeded to spank Child with a belt for one to two minutes. Before beginning, Robertson explained to Child the purpose of the discipline. Robertson also intermittently paused during the spanking to talk to Child about the reasons Child was being punished. There was no substantial evidence that Robertson lost control in disciplining Child. Robertson meted out the punishment in a measured fashion that was designed to establish a

clear link between the punishment and Child's misbehavior and thereby to prevent future misbehavior by Child. The resulting bruises did not result in the need for medical care, there were no open wounds, and the bruises were no longer visible when Child was examined by his physician eight-days later. Child did not complain of any pain following the discipline, and the evidence established that he was able to resume his normal activities. Child returned to school and went to flag football practice the next day. Child did not display any hesitation or fear of going home, and there was no evidence indicating that Child was emotionally or psychologically harmed by the discipline.

Based on Matavale, we conclude that Robertson's conduct "fell within the parameters of the justified parental discipline statute and that, as a matter of law, the evidence in this case was insufficient to support a determination of guilt on the charge of abuse of a family or household member beyond a reasonable doubt." Id. at 168, 166 P.3d at 341; see also State v. Roman, 119 Hawai i 468, 481-83, 199 P.3d 57, 70-72 (2008) (reversing the defendant's conviction for abuse of a family or household member because the prosecution had failed to disprove the defendant's parental discipline defense). Our conclusion is also supported by State v. Deleon, 72 Haw. 241, 813 P.2d 1382 (1991), a case in which a father similarly used a belt to discipline his daughter.

In Deleon, the defendant father had a fourteen-year-old daughter who disobeyed the defendant's directive that the daughter's friends could not come over to the house. Id. at 242, 813 P.2d at 1383. On the day in question, the daughter had her friends over at the house, and one of the friends was crying. Id. The defendant asked the daughter why her friend was crying but did not receive a satisfactory answer. Id. The defendant told the daughter's friends to go home, but they refused. Id. The defendant disciplined his daughter by hitting her six to ten times with a folded, 36-inch-long belt on her stretch pants above the knees. Id. This use of force made the daughter cry for a half hour, resulted in pain that lasted for an hour and a half,

and immediately caused welts and then bruising that lasted for approximately one week. Id. at 242-24, 813 P.2d at 1383.

The defendant's abuse-of-family-or-household-member conviction was reversed based on the Hawai i Supreme Court's conclusion that the defendant's actions were justified under the parental discipline defense. Id. at 244, 813 P.2d at 1384. Deleon was decided under the pre-1992 version of the parental discipline defense. However, in 1992, when HRS § 703-309(1) was amended to reflect the current version of the defense,

> the legislature expressly indicated that "the changes [were] not intended to create a standard under which the result in Deleon would have been different. *The force* used by the father in Deleon, as described in the decision, *did not exceed the* ***permissible force*** *under the new language*."

Matavale, 115 Hawai i at 162, 166 P.3d at 335 (brackets in original) (quoting Sen. Stand. Comm. Rep. No. 2493, in 1992 Senate Journal, at 1121).

CONCLUSION

We reverse the July 9, 2007, Judgment of the Family Court of the First Circuit.

DATED: Honolulu, Hawai i, November 30, 2009.

On the briefs:

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Chief Judge

Associate Judge

Associate Judge