DISSENTING OPINION BY ACOBA, J.,
WITH WHOM DUFFY, J. JOINS

I respectfully dissent and would reverse the February 7, 2005 Judgment of Probation of the circuit court of the second circuit (the court), adjudicating Defendant-Appellant Leopoldo Schneidewind (Defendant) guilty of two counts of violation of an order for protection because, as Defendant argued, there was not evidence sufficient to enable a person of reasonable caution to conclude that Defendant had the requisite mental state to knowingly violate the order for protection.

I.

Defendant testified that he was told by the family court judge at the hearing on the order for protection on July 6, 2004, that in order to see his daughter he would need to obtain a divorce. He then sought the advice of counsel as to how to go about initiating divorce proceedings. The parties do not dispute the fact that Defendant's attorney -- an officer of the court -- advised Defendant beforehand that the service of legal documents would not be a violation of the protective order. The attorney testified under oath that he also advised Defendant that service could be effected by either a process server or by any other person of Defendant's choosing. The court apparently did not doubt the credibility of this testimony. As the court stated, "The issue in dispute is whether the defendant's reliance upon advice of counsel in the service of documents is [sic]

essentially not guilty of the charges contained in the complaint." (Emphasis added.)

As to this court's review of a defendant's conviction, "[t]he test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact." State v. Batson, 73 Haw. 236, 248, 831 P.2d 924, 931 (1992) (citations omitted). "Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to reach a conclusion." State v. Webster, 94 Hawai'i 241, 246, 11 P.3d 466, 471 (2000) (internal quotation marks and citation omitted). Thus, "[i]f there is substantial evidence which supports the fact finder's conclusion [of guilt], affirmance is required; conversely, the absence of such substantial evidence requires reversal of the conviction." State v. Gabrillo, 10 Haw. App. 448, 459, 877 P.2d 891, 896 (1994).

The majority classifies the evidence that Defendant did not knowingly violate the protective order as supporting a doomed mistake-of-law defense or, in the alternative, a failed mistake-of-fact defense. SDO at 5-6. An analysis under the mistake-of-law or mistake-of-fact statutes is not necessary here, and I would not reach those issues inasmuch as it must be determined as a preliminary matter whether Plaintiff-Appellee State of Hawai'i (the prosecution) presented substantial evidence to prove

Defendant guilty.[1] As discussed infra, the prosecution failed to prove that Defendant knew that his actions were practically certain to result in a violation of the order for protection and, hence, failed to adduce substantial evidence of a violation.

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[1] Because the majority discusses such defenses, I make the limited observations that follow. Hawai'i Revised Statutes (HRS) § 702-220 (1993), titled "Ignorance or mistake of law; belief that conduct not legally prohibited," requires that the defendant have acted or caused the result in reliance on an official statement of the law:

> In any prosecution, it shall be an affirmative defense that the defendant engaged in the conduct or caused the result alleged under the belief that the conduct or result was not legally prohibited when the defendant acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in:
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> (1) A statute or other enactment;
> (2) A judicial decision, opinion, or judgment;
> (3) An administrative order or administrative grant of permission; or
> (4) An official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration, or enforcement of the law defining the offense.

(Emphases added.) This section applies to a limited mistake-of-law defense raised as an affirmative defense. It thus "deals with a special type of ignorance or mistake of law -- mistaken belief by the defendant that the defendant's conduct is not legally prohibited by the penal law." Commentary on HRS § 702-220. A violation of "the penal law" because of "an official statement of the law" is not involved here, inasmuch as the language in a court order was involved. The issue, rather, is whether Defendant possessed the requisite state of mind as to each element of the offense for which he was charged. This makes the mistake-of-law statute the majority focuses on, HRS § 702-220, inapplicable.

Without extended discussion of the mistake-of-fact defense it may be observed that the instant case is similar to State v. Cavness, 80 Hawai'i 460, 911 P.2d 95 (App. 1996), in which a mistake-of-fact defense was recognized. In Cavness, the defendant, who claimed he thought he had a right to be on the property at issue, was convicted of Criminal Trespass in the Second Degree. Id. at 462, 911 P.2d at 97. The Intermediate Court of Appeals (the ICA) vacated the judgment based on the district court's failure to consider and decide whether the defendant had acted recklessly in regards to whether he was permitted to be on the property. Id. at 466, 911 P.2d at 101.

The ICA held that whether the defendant indeed acted without license or privilege was a question of law. Id. at 464 n.5, 911 P.2d at 99 n.5. However, whether he intentionally, knowingly, or recklessly acted without license or privilege, in contrast, was a question of fact. Id. According to the ICA, "[a] finding that Cavness actually believed he had a right to be on the premises is an implicit finding that Cavness did not intentionally or knowingly act without license, invitation, or privilege." Id. at 465, 911 P.2d at 100 (emphasis added). Hence, Cavness would have a viable mistake-of-fact defense if it were established that he negligently believed he had a right to be on the premises. Id.

II.

"An essential or material element of a crime is one whose specification with precise accuracy is necessary to establish the very illegality of behavior." State v. Kupihea, 98 Hawai'i 196, 204, 46 P.3d 498, 506 (2002) (internal quotation marks, brackets, and citation omitted). As defined in HRS § 702-205 (1993), "[t]he elements of an offense are such (1) conduct, (2) attendant circumstances, and (3) results of conduct, as:

(a) [a]re specified by the definition of the offense, and

(b) [n]egative a defense (other than a defense based on the statute of limitations, lack of venue, or lack of jurisdiction)."

The Commentary to HRS § 702-204 (1993) explains that the requisite state of mind for each element must be proven in order to justify the imposition of punishment:

> The distinct punitive nature of the penal law dictates that its sanction be reserved for those individuals who can be morally condemned. The penal law does not, in most instances, condemn a person's conduct alone. Rather, it condemns the individual whose state of mind with regard to the individual's conduct, attendant circumstances, and the result of the individual's conduct, exhibits an intent to harm, an indifference to harming, or a gross deviation from reasonable care for protected social values. Thus we have limited penal liability to those individuals who act intentionally, knowingly, recklessly, or negligently contrary to values protected by the Code.

(Emphasis added.) Under HRS § 702-204 titled "State of mind required," a person is not guilty of an offense unless he or she acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense:

> Except as provided in section 702-212, a person is not guilty of an offense unless the person acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense. When the state of mind required to establish an element of an offense is

> not specified by the law, that element is established if, with respect thereto, a person acts intentionally, knowingly, or recklessly.

(Emphasis added.)

"When an offense . . . requires the actual commission of an underlying crime, . . . the [prosecution] is required to prove all of the conduct, attendant circumstances, and results of conduct that comprise the underlying crime." State v. Webster, 94 Hawai'i 241, 247, 11 P.3d 466, 472 (2000) (internal quotation marks and citations omitted). In State v. Aganon, 97 Hawai'i 299, 303, 36 P.3d 1269, 1273 (2002), this court held that the failure to require that the requisite mental state be shown as to each element of a crime is plain error. The relevant statute at issue in that case, HRS § 707-701.5 (1993), states that "a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person." We held that "[t]he death of another person, as the intentional or knowing result of the conduct, constitutes the result element of the offense." Aganon, 97 Hawai'i at 303, 36 P.3d at 1273. Thus, in that case it was necessary to prove that the defendant possessed the requisite state of mind -- intentionally or knowingly -- with respect to causing the death that resulted.

III.

In the present case, HRS § 586-11 (Supp. 2005) states that a person "who knowingly or intentionally violates the order for protection is guilty of a misdemeanor." As stated, supra, in most instances one is not punished merely for engaging in

particular conduct. Commentary to HRS § 702-204. It is only when the person acts with knowledge that harm is likely to result that actions are condemned. In HRS § 586-11, the term "violates" encompasses more than an act. It embodies the characterization of the act as being culpable. The term, then, must necessarily encompass a result element.

Difficulties in distinguishing conduct, attendant circumstances, and result elements arise because most modern codes use terms that combine "conduct" and "result" elements through the use of verbs such as "damages" or "obstructs" or "kills." Paul H. Robinson & Jane A. Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 Stan. L. Rev. 681, 709 (1983). In the phrase "violates an order for protection," the verb "violates" plainly encompasses both conduct and result elements, making it necessary to establish the requisite state of mind to both engage in the conduct and to cause the result of violating the order.

Here, it must be shown that Defendant acted knowingly[2] with respect not only to the conduct of dispatching the service of legal documents, but also that he knew that violation of the order for protection would be the result of his actions. Therefore, consistent with our holding in Aganon, the violation of the order for protection constitutes the result element. In order to be found guilty of the offense, then, it is necessary

[2] Because knowingly is a lesser state of mind than intentionally, the discussion herein focuses on a knowing state of mind.

that Defendant not only have knowingly engaged in the conduct of having the legal documents served, but also that he did so knowing that violation of the order would be the result of his conduct.

IV.

As in Aganon, it was incumbent upon the prosecution to present substantial evidence sufficient to prove that Defendant had the requisite state of mind as to the result element, i.e., that he knew the order for protection would be violated. HRS § 702-206 (1993), "Definitions of states of mind," provides that "[a] person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result." HRS § 702-206(c) (emphases added).

As mentioned before, Defendant testified that, at the protective order hearing, a family court judge informed him that in order to see his child he must file for a divorce. On its face the order says nothing about the service of legal documents and whether the prohibition against contact by an "agent" would apply to the otherwise lawful process for serving legal documents. Defendant contacted his attorney as to the appropriate course to take before proceeding to have the divorce papers served. He caused the documents to be served only after ascertaining through his counsel that such a course was

permissible.[3] Plainly, the prosecution failed to adduce substantial evidence that Defendant knew that his actions would result in a violation of the order.

Neither Defendant's testimony nor his attorney's testimony, see supra, was refuted. Under these circumstances a person exercising caution could not reasonably conclude that the evidence showed Defendant was aware that it was practically certain that his conduct would result in a violation of the order. Hence, it cannot be concluded that substantial evidence existed to prove that Defendant acted "knowingly" with respect to the result element.

In explaining how Defendant, after being advised by his attorney Gerald Johnson, came to believe that serving legal documents in order to begin divorce proceedings would not be a violation of the order for protection, the majority states:

> Johnson, in turn, had relied on the opinions of two different prosecutors and on his own experience in a case involving a non-family abuse restraining order in providing the aforementioned advice to Appellant. Johnson, however, admitted that he jumped to the conclusion that the prosecutors' opinions represented "office policy" with respect to violations of protective orders.

SDO at 5-6 (emphasis added). What Johnson based his professional advice on is not relevant. What is relevant is that, before taking action, Defendant sought what he believed to be reliable

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[3] It may be observed that Defendant's attorney testified that, in a previous case in which another client had obtained a civil restraining order against a defendant, legal documents were similarly served. When he brought it to the attention of law enforcement officials, no action was taken. The attorney related that two different prosecutors subsequently advised the attorney that they did not believe that the service of the complaint was a violation of the restraining order. Thus, the attorney advised Defendant in this case that serving the documents would not be a violation of the order for protection.

counsel. He was told by his attorney that his actions would not be a violation of the order for protection, and thus could not have been aware that it was practically certain that his actions would result in a violation.

V.

HRS § 702-212 (1993) indicates that the state of mind requirements in HRS § 702-204 apply to all offenses except, pertinent here, that a crime other than that defined in the Code must plainly have been intended to be one of strict liability. HRS § 702-212(2) provides in relevant part that "[t]he state of mind requirements prescribed by sections 702-204 and 702-207 through 702-211 do not apply to . . . (2) [a] crime defined by statute other than this Code, insofar as a legislative purpose to impose absolute liability for such offense or with respect to any element thereof plainly appears." HRS § 586-11, on its face, does not evince "a legislative purpose to impose absolute liability for such offense." HRS § 702-212. Therefore, to criminally sanction Defendant for his conduct would impose absolute liability for a conviction under HRS § 586-11. That is specifically prohibited by HRS § 702-212.

In this case, Defendant acted reasonably and prudently, and not culpably, in consulting with his attorney, and then relying on the advice of his attorney, before the legal documents were served. In this regard, "[t]he Code takes the general position that absolute or strict liability in the penal law is indefensible in principle if conviction results in the

possibility of imprisonment and condemnation. Therefore, within the immediate context of the Penal Code, criminal liability must be based on culpability." Commentary on HRS § 702-212. This court has said that "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion, for the requirement of a culpable state of mind is deeply rooted and remains the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." State v. Torres, 66 Haw. 281, 283, 660 P.2d 522, 524 (1983) (internal quotation marks, citations, and footnote omitted). Hence, because "no legislative purpose to impose absolute liability for the offense or any of its elements clearly appears[,]" id. at 284, 660 P.2d at 524 (citations omitted), the prosecution must have established by substantial evidence that Defendant acted "knowingly or intentionally" in violating the protection order as HRS § 586-11 declares. As indicated supra, it plainly failed to do so.

VI.

The prosecution here failed to present substantial evidence that Defendant knew that his actions were practically certain to bring about the resulting violation of the order for protection. Accordingly, his conviction must be reversed.

James E. Duffy Jr.