NO. 26901

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

JASON DENNEHY, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 04-1-1807)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant-Appellant, Jason Dennehy ("Jason"), appeals from the first circuit court's[1] September 24, 2004 judgment convicting him of the offense of Abuse of Family and Household Members, in violation of Hawai'i Revised Statutes ("HRS") § 709-906,[2] and sentencing him to one hundred eighty days of incarceration, two years of probation, and fees totaling $200.00

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[1] The Honorable Patrick W. Border presided.

[2] HRS § 709-906 (Supp. 2004) provides, in relevant part, as follows:

> **§709-906 Abuse of family or household members; penalty.** (1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member or to refuse compliance with the lawful order of a police officer under subsection (4). The police, in investigating any complaint of abuse of a family or household member, upon request, may transport the abused person to a hospital or safe shelter.
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> For the purposes of this section, "family or household member" means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

for abusing[3] his wife, Shannon Elaine Dennehy ("Shannon"). On appeal, Jason presents the following points of error: (1) there is insufficient evidence to support his conviction of the offense of Abuse of Family and Household Members; (2) the circuit court erred by sentencing him without the benefit of a presentence investigation and report; and (3) the circuit court erred by precluding him from using a firearm in his military training, including target practice.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that: (1) the record contains sufficient evidence[4] to support Jason's

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[3] "[A]s ordinarily used[,] abused means to maltreat and connotes such treatment as will injure, hurt or damage a person." State v. Nomura, 79 Hawai'i 413, 416, 903 P.2d 718, 721 (App. 1995) (citations omitted) (some brackets added and some in original).

[4] When reviewing the sufficiency of the evidence, this court has previously set forth the following standard of review:

> We have long held that evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or a jury. The 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. "Substantial evidence" as to every material element of the offense charged is credible evidence which is of sufficiency quality and probative value to enable a person of reasonable caution to support a conclusion.

State v. Viglielmo, 105 Hawai'i 197, 202-03, 95 P.3d 952, 957-58 (2004) (block quote formatting removed) (internal citations omitted) (some internal quotation marks omitted) (brackets omitted).

conviction;[5] (2) the circuit court did not abuse its discretion by refusing to consider a presentence investigation and report prior to sentencing Jason;[6] and (3) Jason failed to preserve an

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[5] Viewed in the light most favorable to the prosecution, the evidence adduced at trial demonstrates that: (1) Shannon and Jason got into an argument during the early morning hours of July 5, 2004; (2) Jason got upset when Shannon told him, "I'm really tired. Let's just go to bed. It's really late, and let's just go to sleep[]"; and (3) Jason punched Shannon in the back of the head, pushed her down the stairs, and choked her and held her down until Jason's friend, William Milligan, intervened.

[6] Of particular relevance is HRS § 706-601 (1993 & Supp. 2004), which provides as follows:

> §706-601 **Pre-sentence diagnosis and report.** (1) Except as provided in subsections (3) and (4), the court shall order a pre-sentence correctional diagnosis of the defendant and accord due consideration to a written report of the diagnosis before imposing sentence where:
>
> (a) The defendant has been convicted of a felony; or
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> (b) The defendant is less than twenty-two years of age and has been convicted of a crime.
>
> (2) The court may order a pre-sentence diagnosis in any other case.
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> (3) With the consent of the court, the requirement of a pre-sentence diagnosis may be waived by agreement of both the defendant and the prosecuting attorney.
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> (4) The court on its own motion may waive a pre-sentence correctional diagnosis where:
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> (a) A prior pre-sentence diagnosis was completed within one year preceding the sentencing in the instant case;
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> (b) The defendant is being sentenced for murder or attempted murder in any degree; or
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> (c) The sentence was agreed to by the parties and approved by the court under rule 11 of the Hawaii rules of penal procedure.

(Emphasis added.) Insofar as the present matter does not involve a felony conviction or a defendant who is less than twenty-two years of age, the plain language of HRS § 706-601(2) places it within the circuit court's discretion to order a presentence investigation and report.

Although Jason asserts that a presentence investigation and report would have afforded the court some information regarding Jason's "law-abiding past, his character and attitude, . . . need, availability and viability of programming, counseling and the hardship to [he] and his family with respect to the effects on his military career and incapacitation while imprisoned[,]" the record indicates that the court was already aware that (1) Jason had no prior criminal history, (2) Jason was in the military, and (3) Jason was married with at least one child. The court made clear that whatever additional information a presentence investigation and report would have uncovered would not have outweighed or mitigated the punishment it felt was necessary light of the seriousness of the offense -- i.e., the fact that

adequate record on appeal and thereby waived[7] his argument that the circuit court erred by precluding the use of weapons in his military training based upon 18 U.S.C. § 922(g)(9).[8] Therefore,

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Shannon's life was placed in great peril. Accordingly, Jason has failed to demonstrate that the circuit court abused its discretion by refusing to consider a presentence investigation and report.

[7] Jason's point of error is problematic insofar as he relies on the circuit court's minutes to establish that the circuit court's November 5, 2004 "Order Pertaining to Bail" was founded upon 18 U.S.C. § 922(g)(9). According to Hawai'i Rules of Appellate Procedure Rule 10(a) (2005), the record on appeal consists of the following:

> (1) the original papers filed in the court or agency appealed from;
> (2) written jury instructions given, or requested and refused or modified over objection;
> (3) exhibits admitted into evidence or refused;
> (4) the transcripts prepared for the record on appeal;
> (5) in a criminal case where the sentence is being appealed, a sealed copy of the presentence investigation report; and
> (6) the indexes prepared by the clerk of the court appealed from.

Circuit court minutes are not considered a part of the record on appeal, and they may not be cited. See Doe v. Grosvenor Center Assocs., 104 Hawai'i 500, 505 n.3, 92 P.3d 1010, 1015 n.3 (App. 2004) (noting "that documents, such as clerk minutes and letters to and from the court, that are in, attached to, or apprehended to the lower court record but which have not been 'filed' in the lower court record as evidenced by the court clerk's file stamp, are not part of the record on appeal[]") (citing Webb v. Harvey, 103 Hawai'i 63, 66, 79 P.3d 681, 684 (App. 2003)). Hence, Jason has failed to crystallize his argument by preserving an adequate record on appeal. Absent the clerk minutes, the record merely indicates that the circuit court changed its mind and precluded Jason from possessing or controlling dangerous weapons, effectively preventing him from participation in military training drills which require the use of such weapons. Jason offers no arguments outside the scope of 18 U.S.C. § 922(g)(9) as to why such a bail condition is improper. Accordingly, the point of error is not properly presented and may be deemed waived.

[8] 18 U.S.C. § 922(g)(9) states as follows:

> (g) It shall be unlawful for any person . . .
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> . . . .
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> (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, April 18, 2007.

On the briefs:

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Jason Dennehy

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ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.