NO. 24803

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
KYONG SU YI, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-Cr. No. 01-1-1968)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe, and Lim, JJ.)

Defendant-Appellant Kyong Su Yi (Yi or Mr. Yi) appeals from the Judgment of Conviction and Sentence entered on December 3, 2001 by the Family Court of the First Circuit (the family court), Judge Steven S. Alm presiding, convicting Yi of, and sentencing him for, Violation of a Temporary Restraining Order (TRO), in violation of Hawaii Revised Statutes (HRS) § 586-4 (Supp. 2002).[1]

[1/] Hawaii Revised Statutes (HRS) § 586-4(d) (Supp. 2002) provides now, as it did when Yi was arrested, as follows:

> (d) When a temporary restraining order is granted and the respondent or person to be restrained knows of the order, a knowing or intentional violation of the restraining order is a misdemeanor. A person convicted under this section shall undergo domestic violence intervention at any available domestic violence program as ordered by the court. The court additionally shall sentence a person convicted under this section as follows:
>
> (1) For a first conviction for violation of the temporary restraining order, the person shall serve a mandatory minimum jail sentence of forty-eight hours and be fined not less than $150 nor more than $500; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine; and

(continued...)

Yi argues that:

(1) The evidence adduced at trial was insufficient to find him guilty of the offense of Violation of a TRO;

(2) The family court's jury instruction on the elements of Violation of a TRO was prejudicially insufficient and erroneous because the instruction failed to list "conduct" and "result" as separate elements of the offense, improperly included the state of mind as an element of the offense, and failed to specify that the state of mind applied to all elements of the offense;

(3) The family court unconstitutionally punished him for exercising his constitutional right to a jury trial and for an uncharged crime (perjury) when it sentenced him to serve a four-month jail term; and

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[1/](...continued)

> (2) For the second and any subsequent conviction for violation of the temporary restraining order, the person shall serve a mandatory minimum jail sentence of thirty days and be fined not less than $250 nor more than $1,000; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine.
>
> Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.
>
> The court may suspend any jail sentence, except for the mandatory sentences under paragraphs (1) and (2), upon condition that the defendant remain alcohol[-] and drug-free, conviction-free, or complete court-ordered assessments or intervention. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor.

(4) The family court abused its discretion when it sentenced him to a four-month jail term for a conviction that did not involve violence, physical injury, or property damage.

We affirm in part and vacate in part.

BACKGROUND

A. *The TRO Against Yi*

On June 4, 2001, the family court, Judge R. Mark Browning presiding, granted the request of Pom Sun Callahan (Pom) and issued an *ex parte* TRO against Pom's live-in boyfriend, Yi,[2] who was thirty-four years old, had been born in Korea, and had lived in Hawai‘i since he was fourteen years old. Pom had indicated in her request for the *ex parte* TRO that in May 2001, Yi had "pushed or grabbed or shoved her, choked her, [and] . . . also threatened to kill her." In issuing the order, the family court found that "there is probable cause to believe that a past act or acts of abuse have occurred, or that threats of abuse make it probable that acts of abuse by [Yi] may be imminent."[3]

B. *The Trial*

At the trial against Yi held on October 24, 2001, four witnesses testified.

[2/] Pom Sun Callahan (Pom) and Defendant-Appellant Kyong Su Yi (Yi) made up after the events recounted here and were still together at the time of trial and sentencing.

[3/] In June of 1999, Yi had been convicted of Assault in the Third Degree against Pom.

1.

Pom testified that on the morning of June 14, 2001, she and Yi were sleeping in the bedroom of her apartment when the telephone rang. Patrick Callahan (Patrick), her son from a previous marriage, answered the call, which was from a police officer asking for Yi. According to Pom, Patrick brought the phone to Yi, but because Yi did not understand what the police officer was saying, Yi passed the phone to Pom. Pom testified that the police officer then asked her if Yi was in the apartment and she responded affirmatively.

Pom testified that she realized that the police officer was checking to be sure Yi was in before coming to serve Yi with the TRO papers. She did not want to be in the apartment when the police officer arrived, so she got up, closed the bedroom door, and left her apartment. On her way out of her apartment building, Pom noticed Honolulu Police Officer William Lu (Officer Lu or the officer) outside the "security doors" of the building. She let Officer Lu in, told him that Yi was up in her apartment, and then went to visit a friend in the apartment building next door.

Pom stated that about an hour later, she called her apartment. Patrick answered the phone and informed her that Yi and the police officer had just left the apartment. Pom remained at her friend's apartment for another hour and at about 11:00 a.m., decided to go back to her apartment. However, when

she got to her apartment and saw Yi's shoes in front of the door, she backed away and returned to her friend's apartment. She then called "911" and informed the police that Yi was still at her apartment and "not supposed to be there."

On cross-examination, Pom stated that she and Yi converse with each other in Korean. Additionally, Yi watches only Korean television programs, reads only Korean newspapers, has only Korean friends,[4] and speaks only in Korean.

2.

Patrick testified that he answered the door when Officer Lu arrived at the apartment to serve the TRO on Yi. Patrick called Yi, who went outside the apartment door to talk to the officer, although according to Patrick, Yi "didn't really talk, he just mostly listened[.]" Patrick was at his computer when he heard the officer tell Yi, "You can't come back here, you know[.]" Thereafter, according to Patrick, Yi "just got a couple clothes, and then he left" with the officer. However, Yi returned to the apartment about five or ten minutes later, got some more work clothes, "had a couple beers[,]" and was looking through Pom's phone book, trying to find her. Yi also asked Patrick where Pom was, and Patrick answered truthfully that he didn't know. Later that morning, Pom called Patrick to inquire if Yi was still present. Patrick responded yes, then hung up the

[4/] Pom testified that Yi owned his own auto body repair shop.

phone. When Yi asked Patrick who had been on the phone, Patrick responded, "A friend of mine."

On cross-examination, Patrick said that he does not speak Korean and doesn't speak with Yi "at all." Additionally, Yi watches Korean television programs and occasionally reads a Korean newspaper. Patrick also agreed that when Yi returned to the apartment after initially leaving with Officer Lu, Yi got some work clothes and left the apartment before Pom returned.

3.

Officer Lu testified that he served Yi with the TRO on June 14, 2001 and then explained to Yi, in English, "why the [TRO] was issued, and the -- the orders or the instructions from the Judge as what [Yi] was allowed and not allowed to do." Officer Lu gave the explanation by reading to Yi "verbatim" the prohibitions listed in the TRO against Yi. Officer Lu recognized that Yi spoke in broken English and had a foreign accent. However, no request was made for the presence of an interpreter to communicate with Yi because Yi never asked for an interpreter nor indicated that he did not understand what Officer Lu was telling him. It also appeared that Yi understood what Officer Lu was saying.

Officer Lu also testified that Yi signed a proof of service document, acknowledging that he had been served personally with the TRO. Thereafter, Officer Lu asked Yi if he needed "to take any personal belongings with him 'cause he's not

authorized to come back[.]" Yi then went to the bedroom, got dressed, "took his personal items, wallet, keys, that kind of thing," and then left the apartment with Officer Lu.

According to Officer Lu, at about 11:05 or 11:10 the same morning, he received a call from the Honolulu Police Department dispatcher that Yi was back at Pom's apartment. Officer Lu returned to the apartment, could not find Yi, and learned from witnesses who were in the area that Yi sometimes drove Pom's vehicle. Shortly thereafter, Officer Lu saw a vehicle matching the description of Pom's vehicle, radioed another officer to stop the vehicle, and placed Yi under arrest for Violation of a TRO. During the arrest process, Officer Lu asked Yi numerous questions and gave Yi numerous directions in English. Yi answered the questions and complied with the directions and did not appear to lack understanding of what was being communicated to him.

4.

Yi testified through an interpreter[5] that he did not understand the TRO papers served on him and signed the papers only because he thought he was going to be arrested if he did not do so. Yi also could not recall ever being told by Officer Lu to gather his personal belongings before leaving the apartment. According to Yi, after he had been served with the TRO, he and

[5/] At trial, Yi had access to an interpreter. It appears from the transcript that he answered some questions himself and some through the interpreter.

Officer Lu took the elevator together and Yi got off on the lobby level and Officer Lu got off on the lower (parking lot) level. Yi sat for a few minutes, thinking about what had happened. He then decided to go back upstairs to Pom's apartment because he gave all the money he made to Pom and had no money.

Yi stayed in Pom's apartment for "30 to 40 minutes," grabbing some "work clothes" and drinking one beer. He then went back downstairs, got into the car that he owned but which was registered under Pom's name for "[i]nsurance purpose[s]," decided to go to work, and was arrested.

Yi did not dispute that he received the TRO but nevertheless had gone back to the apartment. However, he testified that when he was arrested, he did not understand what was going on and only began to realize what had occurred when he saw Pom standing nearby talking to the police. On cross-examination, Yi admitted that following his arrest, he answered in English all the questions posed to him by Officer Lu. Yi also acknowledged that he had been living in Hawai‘i for twenty years and had not asked Officer Lu for an interpreter.

C. *The Jury Instructions, Verdict, and Sentence*

After the close of evidence, the family court, without objection, gave the jury the following instructions regarding the offense of Violation of a TRO:

> A person commits the offense of Violation of [TRO] if he [or she] intentionally or knowingly engages in conduct which he [or she] knows is prohibited by a [TRO] issued by a Judge of the Family Court, and the [TRO] was personally

> served on the Defendant and in effect at the time of the prohibited conduct.
>
> There are four material elements of the offense of Violation of [TRO], each of which the prosecution must prove beyond a reasonable doubt.
>
> These four elements are:
>
> 1. That on or about June 14, 2001, in the City and County of Honolulu, State of Hawaii, a [TRO] issued by a Judge of the Family Court prohibiting [Yi] from engaging in certain conduct was in effect; and
>
> 2. That [Yi] had been personally served with a copy of the [TRO] on June 14, 2001; and
>
> 3. That [Yi] engaged in conduct which he knew was prohibited by the [TRO]; and
>
> 4. That [Yi] engaged in said conduct intentionally or knowingly.

The jury returned a verdict of guilty on October 25, 2001.

At the sentencing hearing on December 3, 2001, Plaintiff-Appellee State of Hawai‘i (the State) noted that Yi had a prior conviction of Assault in the Third Degree involving Pom, "a DUI discharge in '94, [and] abuse dismissed in 1990[.]" The State asked that Yi be sentenced to two years' probation and three months in jail due to Yi's past history of abuse and his dishonesty to the court regarding his ability to understand English. Defense counsel and Yi both asked the family court for leniency with regard to a jail term because of Yi's family and work obligations.

The following colloquy occurred between defense counsel, Yi, and the family court with respect to Yi's sentence:

> [DEFENSE COUNSEL]: Yes, Your Honor. Mr. Yi has now been convicted of this offense by a jury of his peers. He respects the verdict that the jury gave in this case.

I also, and this is through my discussions with him, he can also make his own statement. He is taking responsibility -- well, he's convicted, of course, but he is also coming forward to the [c]ourt now to say that he did understand enough of what the officer had conveyed to him, that he should not have gone back to that apartment, and he did have a court order in his hand.

So, although he did -- did not understand, didn't have the capability to understand every word or every provision in that order, he violated that order.

. . . .

[DEFENSE COUNSEL]: Okay. Also, Your Honor, at this time I'd like to go into some background about my client's current situation. This doesn't necessarily -- this doesn't go to -- it goes to what -- what's going on in his life, and that may also -- that may be related to what the appropriate sentence would be.

THE COURT: Okay.

[DEFENSE COUNSEL]: Mr. Yi is in the household right now with [Pom]. They are together, I think that was apparent at the trial, or at least the [c]ourt was aware of it.

Mr. Yi has three children from a -- from a marriage where he separated from his wife. He is with [Pom]. The children are 17, 13 and 8 years old.

THE COURT: These are from a marriage not involving [Pom], you're saying?

[DEFENSE COUNSEL]: That's correct.

THE COURT: Okay.

[DEFENSE COUNSEL]: Mr. Yi does support or help support these children. He does own a business. It's a business where he takes cars that are, I think, in -- need to be salvaged, or somebody supplies him these cars. He repairs them, and then that person, I guess, takes them back and markets them, so he does have a -- a business that's his own business.

And if he's given a substantial period of jail, he's likely to have to close that business. He has -- his sister, who's present in the court, had posted bail in the amount of $1,000 in this case.

The [c]ourt's aware that, I believe the maximum fine in this case would also be a fine imposed up to [$]2,000. Mr. Yi understands that there was an expense involved in asserting his rights to a jury trial, but that because he went forward, and in a sense, because he didn't take responsibility, he's asking that there be a fine imposed, not in lieu -- entirely in lieu of jail, but to lessen the severity of jail.

THE COURT: So his sister can pay for that?

[DEFENSE COUNSEL]: He certainly will be paying for it, when he -- so he can keep his business together, do a jail sentence, that wouldn't cause him to lose his business, and then pay a fine. And we're asking that the [c]ourt impose a sentence of two weeks[']jail.

The way his business operates, if he [sic] -- going to have to pay the rent for his business, the overhead of his business, pay it on a monthly basis. He's in jail for a long period of time, his business will close down, but if he can keep his business going, pay the substantial fine, he can continue to support his children, and also pay back his sister for the bail.

THE COURT: Okay. Your client wanted to address the [c]ourt?

INTERPRETER [FOR YI]: Yeah. I like to say, I admit my fault. That's all I like to say.

I -- I fear. I'm sorry that, you know, I had to go through jury trial that taking the [c]ourt's time, so I apologize for that. I like to ask a favor, you know. Hopefully give me a chance so I can support my family so as little [sic] possible, I would like to request.

THE COURT: Okay. Is that it?

INTERPRETER [FOR YI]: I -- I admit my fault. I understood principles, but --

THE COURT: Go ahead.

INTERPRETER [FOR YI]: I did not, frankly, I did not understand all the details, everything that entails. I made a mistake.

THE COURT: Okay. So a statement that he knew he did something wrong, or he didn't know and he made a mistake? I'm a little confused.

INTERPRETER [FOR YI]: At this time, I will take full my responsibility.

THE COURT: Okay. Okay, Mr. Yi, if you would [sic] come here before the trial and had said all this, I certainly would have listened to all of it. You would have been given another chance. You didn't, presumably, you weren't on probation any more, so I would imagine that this would have been a minimal amount of jail.

As the prosecutor points out, though, you came into court; you took an oath to tell the truth, and you lied under oath. I'm not going to say that's based on your language 'cause the State could make what they wanted out of that, but I am convinced that you knew you weren't supposed to be in the apartment, that you knew that that's what the order was, that the officer explained that, that you

> understood him to say that, and you testified under oath that you didn't understand that, and that you went back.
>
> You also have been convicted of assaulting [Pom] in the past. The fact that she's still with you, I think you're an extremely lucky guy, so I don't want to, you know, I'm certainly not going to give you the maximum, because I don't think that's appropriate.
>
> On the other hand, you do not have the right to come into court and lie to me, to the jurors, to everyone else, so I'm going to sentence you to two years of probation, four months in jail. You are ordered to pay the cost of your own probation, which is $75 a year for two years, plus $50 CICC victim's fund fee, that's $200. You have 30 days to pay that.
>
> The -- I will stay the imposition of this for 30 days. Regarding the jail term, if you're -- if you folks are going to file an appeal, that can be done, that will stay the jail time alone, all the rest of the conditions will go forward.
>
> . . . .
>
> I'm trying to take into account here, Mr. Yi, the fact that you do have another family to support. You have another business. At the same time, you've been convicted of a crime of a domestic crime of violence in the past, and you committed another one here, and then came into court to lie about it, so I'm trying to balance that, and I think four months is, you know, a very fair sentence for that.

DISCUSSION

A. *The Sufficiency of the Evidence to Convict Yi for Violation of a TRO*

Yi contends that the State failed to adduce evidence of sufficient quality and probative value to enable a person of reasonable caution to conclude that he intentionally or knowingly engaged in conduct which he knew was prohibited by order of a court. Specifically, Yi argues that there was no direct evidence that he understood the TRO and that it had been issued by a judge of the family court. Therefore, he could not have acted intentionally or knowingly to disobey the order when he went back to Pom's apartment after being escorted away by Officer Lu.

When reviewing the legal sufficiency of evidence to support a conviction, this court must consider the evidence "in the strongest light for the prosecution[.]" State v. Richie, 88 Hawai‘i 19, 33, 960 P.2d 1227, 1241 (1998).

> 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 sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

Id. at 33 (citations and internal quotation marks omitted).

The evidence in the record reveals that Yi had arrived in Hawai‘i when he was a teenager, aged fourteen, and had been living here for over twenty years, more than half his lifetime. Yi ran his own auto body repair business, and Officer Lu testified that he interacted with Yi extensively on the day of the violation and Yi always seemed to understand what was being told or asked of him. Viewed "in the strongest light for the prosecution[,]" the evidence adduced at trial was clearly substantial enough to determine that Yi understood the TRO that had been served on him.

B. *The Family Court's Jury Instructions*

The Hawai‘i Supreme Court has stated:

> When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading. If the instructions requested by the parties are inaccurate or incomplete but are necessary in order for the jury to have a clear and correct understanding of what it is that they are to decide, then the trial court has the duty either to correct any defects or to fashion its own instructions.

> Nevertheless, the trial court is not required to instruct the jury in the exact words of the applicable statute but to present the jury with an understandable instruction that aids the jury in applying that law to the facts of the case. Erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial. If that standard is met, however, the fact that a particular instruction or isolated paragraph may be objectionable, as inaccurate or misleading, will not constitute ground for reversal. Whether a jury instruction accurately sets forth the relevant law is a question that this court reviews *de novo*.

State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998) (citations and internal quotation marks omitted). The supreme court also stated in Sawyer:

> As a general rule, jury instructions to which no objection has been made at trial will be reviewed only for plain error. If the substantial rights of the defendant have been affected adversely, the error will be deemed plain error. Further, this [c]ourt will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights.

Id. (citations omitted).

Applying the foregoing standards, we initially review *de novo* whether the family court's jury instruction in this case accurately set forth the relevant law.

HRS § 586-4(d) (Supp. 2002), which sets out the offense of Violation of a TRO, states, in relevant part:

> (d) When a temporary restraining order is granted and the respondent or person to be restrained knows of the order, a knowing or intentional violation of the restraining order is a misdemeanor.

For Yi to be convicted of the foregoing offense, the State was required to prove that:

(1) "[A] temporary restraining order [wa]s granted";[6]

(2) Yi knew of the TRO; and

(3) Yi "knowing[ly] or intentional[ly]" violated the restraining order.

The family court in this case gave the following jury instructions, as modified by agreement of the State and Yi, without objection by Yi:

> The defendant, [Yi], is charged with the offense of Violation of [TRO].
>
> A person commits the offense of Violation of [TRO], if he [or she] intentionally or knowingly engages in conduct which he [or she] knows is prohibited by a [TRO] issued by a judge of the family court, and the [TRO] was personally served on the defendant and in effect at the time of the prohibited conduct.
>
> There are four material elements of the offense of Violation of [TRO], each of which the prosecution must prove beyond a reasonable doubt. These four elements are:
>
> 1. That on or about June 14th, 2001, in the City and County of Honolulu, State of Hawaii, a [TRO] issued by a judge of the family court prohibiting [Yi] from engaging in certain conduct was in effect; and
>
> 2. That [Yi] had been personally served with a copy of the [TRO] on June 14, 2001[7]; and

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[6/] Of course, the temporary restraining order (TRO) must also have been valid and in effect at the time of the alleged violation.

[7/] The jury instruction of the Family Court of the First Circuit (the family court) did not track HRS § 586-4 (2002), which requires that a defendant "knows of the [TRO.]" Instead, the family court instructed the jury that Yi "had been personally served with a copy of the [TRO] on June 14, 2001[.]" We note, however, that HRS § 586-6(a) (Supp. 2003) provides as follows:

> **Notice of order.** (a) Any order issued under this chapter shall either be personally served upon the respondent, or served by certified mail, unless the respondent was present at the hearing in which case the respondent shall be deemed to have notice of the order. A filed copy of each order issued under this chapter shall be served by regular mail upon the chief of police of each county.

(Emphasis added.) In State v. Grindling, 96 Hawai‘i 402, 31 P.3d 915 (2001), (continued...)

> 3. That [Yi] engaged in conduct which he knew was prohibited by the [TRO]; and
>
> 4. That [Yi] engaged in said conduct intentionally or knowingly.
>
> A person acts intentionally with respect to his [or her] conduct when it is his [or her] conscious object to engage in such conduct.
>
> A person acts intentionally with respect to attendant circumstances when he [or she] is aware of the existence of such circumstances or believes or hopes that they exist.
>
> A person acts intentionally with respect to a result of his [or her] conduct when it is his [or her] conscious object to cause such a result.
>
> A person acts knowingly with respect to his [or her] conduct, when he [or she] is aware that his [or her] conduct is of that nature.
>
> A person acts knowingly with respect to attendant circumstances when he [or she] is aware that such circumstances exist.
>
> A person acts knowingly with respect to a result of his conduct, when he is aware that it is practically certain that his [or her] conduct will cause such a result.

(Footnote added.)

Yi contends on appeal that the family court plainly erred in: (1) listing the requisite state of mind as a material element; (2) failing to list the "conduct" element (i.e., "[a]ny

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[7/](...continued)
the Hawai'i Supreme Court construed HRS §§ 586-4(d) and 586-6(a) in tandem as follows:

> Although a TRO issued ex parte under HRS § 586-4 becomes effective on the date of signing and filing, HRS § 586-5.6 (1993) (stating that "[t]he [TRO] shall be effective as of the date of signing and filing"), enforcement for violations of the order cannot be made until the respondent is aware of the order. *See* HRS § 586-4(c) ("When a [TRO] is granted pursuant to this chapter and the respondent or person to be restrained knows of the order, violation of the [TRO] is a misdemeanor."). This occurs when the order is served upon the respondent pursuant to HRS § 586-6 (Supp. 1999). *See* HRS § 134-7(f) (Supp. 1999) ("The ex parte order shall be effective upon service pursuant to section 586-6.").

Id. at 405 n.6, 31 P.3d 915, 918 n.6 (emphases added). Therefore, in instructing the jury on the offense of Violation of a TRO, the family court did not err in equating personal service of a TRO to knowledge of a TRO.

voluntary act prohibited by the TRO") separately from the "result" element (i.e., "[t]he violation of the TRO, as an intentional or knowing result of the conduct"); and (3) failing to require the jury to find that the state of mind applied to each element of the offense. Yi alleges that the family court should have instructed the jury as follows:

> (1) That on or about June 14th, 2001, in the City and County of Hawai‘i, [Yi] intentionally or knowingly engaged in conduct prohibited by the [TRO] [conduct element];
>
> (2) [Yi] acted intentionally or knowingly that his conduct would result in a violation of the [TRO] [result element]; and
>
> (3) [Yi] acted intentionally or knowingly that the [TRO] issued by a judge of the family court was in effect [attendant circumstances element].

(Some bracketed material in original.)

Since Yi failed to object to the jury instruction at trial, we apply the plain-error standard of review to evaluate whether the family court's jury instruction seriously affected the fairness, integrity, or public reputation of the judicial proceedings to serve the ends of justice and to prevent the denial of fundamental rights. Sawyer, 88 Hawai‘i at 330, 966 P.2d at 642.

Based on our review of the record of the entire proceeding below, we conclude that the challenged instructions given by the family court were not erroneous. The family court's instructions as to the second and third material elements of the Violation-of-TRO offense, in combination with the family court's other instructions, adequately informed the jury that the

prosecution was required to prove that Yi knew of the TRO and knew that his conduct would violate the TRO. The family court's instruction as to material element No. 4 correctly instructed the jury that Yi must have "intentionally or knowingly" engaged in the conduct that violated the TRO.

Although Yi argues on appeal that "the [family] court should have listed the conduct element and the result element separately and required that the state of mind applied to each element[,]" the jury instructions that Yi claims in his opening brief should have been given materially differ from the family court's jury instructions only in that Yi's instructions proposed that the State prove that Yi knew that the order was "issued by a judge of the family court[.]"

Nothing in HRS § 586-4(d) implies that a defendant must know which type of judge issued the TRO against him or her before the defendant can be convicted of violating that TRO. It is enough that the defendant knew that the TRO was a court order.[8]

C. *The Family Court's Sentence of Yi*

1.

HRS § 586-4(d) provides that "[w]hen a [TRO] is granted and the respondent or person to be restrained knows of the [TRO], a knowing or intentional violation of the [TRO] is a misdemeanor." The sentencing options for a person convicted of a

[8/] Yi's claim that there was not sufficient evidence to convict him, discussed above, essentially relied on the prosecution's alleged failure to prove that Yi knew that the TRO was "issued by a family court judge."

misdemeanor are set forth in HRS § 706-663 (1993), which provides, in relevant part:

> **Sentence of imprisonment for misdemeanor and petty misdemeanor.** After consideration of the factors set forth in sections 706-606 and 706-621, the court may sentence a person who has been convicted of a misdemeanor . . . to imprisonment for a definite term to be fixed by the court and not to exceed one year in the case of a misdemeanor[.]

HRS § 706-606 (1993) sets out the factors to be considered by a court in imposing a sentence:

> **Factors to be considered in imposing a sentence.** The court, in determining the particular sentence to be imposed, shall consider:
>
> (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) The need for the sentence imposed:
>
> (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
>
> (b) To afford adequate deterrence to criminal conduct;
>
> (c) To protect the public from further crimes of the defendant; and
>
> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) The kinds of sentences available; and
>
> (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

HRS § 706-621 (1993) explains in greater detail what factors the court should consider when determining whether to grant probation to, rather than imprison, a convicted defendant:

> **Factors to be considered in imposing a term of probation.** The court, in determining whether to impose a term of probation, shall consider:

> (1) The factors set forth in section 706-606 to the extent that they are applicable;
>
> (2) The following factors, to be accorded weight in favor of withholding a sentence of imprisonment:
>
> (a) The defendant's criminal conduct neither caused nor threatened serious harm;
>
> (b) The defendant acted under a strong provocation;
>
> (c) There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
>
> (d) The victim of the defendant's criminal conduct induced or facilitated its commission;
>
> (e) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;
>
> (f) The defendant's criminal conduct was the result of circumstances unlikely to recur;
>
> (g) The character and attitudes of the defendant indicate that the defendant is unlikely to commit another crime;
>
> (h) The defendant is particularly likely to respond affirmatively to a program of restitution or a probationary program or both;
>
> (i) The imprisonment of the defendant would entail excessive hardship to the defendant or the defendant's dependents; and
>
> (j) The expedited sentencing program set forth in section 706-606.3, if the defendant has qualified for that sentencing program.

2.

Yi contends that the family court improperly punished him for: (1) exercising his right to a jury trial; and (2) the uncharged crime of perjury. In making this argument, Yi relies primarily on the emphasized language in the quotation below (taken from transcripts of the sentencing hearing):

THE COURT: Okay. Your client wanted to address the [c]ourt?

INTERPRETER [FOR YI]: Yeah. I like to say, I admit my fault. That's all I like to say.

I -- I fear. I'm sorry that, you know, I had to go through jury trial that taking the [c]ourt's time, so I apologize for that. I like to ask a favor, you know. Hopefully give me a chance so I can support my family so as little [sic] possible, I would like to request.

THE COURT: Okay. Is that it?

INTERPRETER [FOR YI]: I -- I admit my fault. I understood principles, but --

THE COURT: Go ahead.

INTERPRETER [FOR YI]: I did not, frankly, I did not understand all the details, everything that entails. I made a mistake.

THE COURT: Okay. So a statement that he knew he did something wrong, or he didn't know and he made a mistake? I'm a little confused.

INTERPRETER [FOR YI]: At this time, I will take full responsibility.

THE COURT: Okay. Okay, Mr. Yi, if you would [sic] come here before the trial and had said all this, I certainly would have listened to all of it. You would have been given another chance. You didn't, presumably, you weren't on probation any more, so I would imagine that this would have been a minimal amount of jail.

As the prosecutor points out, though, you came into court; you took an oath to tell the truth, and you lied under oath. I'm not going to say that's based on your language 'cause the State could make what they wanted out of that, but I am convinced that you knew you weren't supposed to be in the apartment, that you knew that that's what the order was, that the officer explained that, that you understood him to say that, and you testified under oath that you didn't understand that, and that you went back.

You also have been convicted of assaulting [Pom] in the past. The fact that she's still with you, I think you're an extremely lucky guy, so I don't want to, you know, I'm certainly not going to give you the maximum, because I don't think that's appropriate.

On the other hand, you do not have the right to come into court and lie to me, to the jurors, to everyone else, so I'm going to sentence you to two years of probation, four months in jail.

(Emphases added.)

Yi's claim that the family court punished him for exercising his right to a jury trial appears to take the family court's comments out of context. The family court was merely telling Yi that if Yi had come forward and taken responsibility for his actions before trial and before lying under oath,[9] his plea for mercy would have received a much more receptive audience. Judges are understandably less impressed by defendants who own up to their actions only after being convicted. The record contains no hint that the family court actually intended to punish Yi for taking his case to trial.[10]

Yi's second claim, that the family court's punishment of him was based on an uncharged crime (perjury), cannot be disposed of as easily. While the word "perjury" was never used by the family court and there is no indication that the court considered Yi's lying to be a separate offense, it does appear

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[9/] The judge clearly felt that Yi had just admitted that Yi really had understood that the TRO was a court order forbidding him to go back to the apartment.

[10/] In State v. Mata, 71 Haw. 319, 326, 789 P.2d 1122, 1126 (1990), the Hawai'i Supreme Court observed that, while a judge may not threaten a defendant with more severe punishment to encourage the defendant to plead guilty, courts can take into account a defendant's admission of guilt at the time of sentencing:

> Very obviously the threat, express or implied, of more severe sentencing, in the event of a guilty verdict, if a jury trial is demanded, would be coercive, and would violate a defendant's constitutional rights.
>
> In an analogous situation, a judge at time of sentencing may very well take into consideration the fact that a defendant has pled guilty, and thus indicated remorse, and a start toward rehabilitation, but a judge cannot, in advance, induce a plea of guilty by hinting at more lenient sentencing without violating [Hawai'i Rules of Penal Procedure Rule] 11(d) and a defendant's constitutional rights.

that the family court imposed a harsher sentence on Yi because Yi misled or lied to the court.

In United States v. Grayson, 438 U.S. 41, 50-55, 98 S. Ct. 2610, 2616-18 (1978), the United States Supreme Court held that a defendant's truthfulness while on the stand is a relevant consideration in sentencing:

> A defendant's truthfulness or mendacity while testifying on his [or her] own behalf, almost without exception, has been deemed probative of his [or her] attitudes toward society and prospects for rehabilitation and hence relevant to sentencing. Soon after *Williams* was decided, the Tenth Circuit concluded that "the attitude of a convicted defendant with respect to his [or her] willingness to commit a serious crime [perjury] is a proper matter to consider in determining what sentence shall be imposed within the limitations fixed by statute." *Humes v. United States, 186 F.2d 875, 878 (1951).* The Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have since agreed. See n.3, *supra*. Judge Marvin Frankel's analysis for the Second Circuit is persuasive:
>
> > "The effort to appraise 'character' is, to be sure, a parlous one, and not necessarily an enterprise for which judges are notably equipped by prior training. Yet it is in our existing scheme of sentencing one clue to the rational exercise of discretion. If the notion of 'repentance' is out of fashion today, the fact remains that a manipulative defiance of the law is not a cheerful datum for the prognosis a sentencing judge undertakes. Impressions about the individual being sentenced -- the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, the degree to which he does or does not deem himself at war with his society -- are, for better or worse, central factors to be appraised under our theory of 'individualized' sentencing. The theory has its critics. While it lasts, however, a fact like the defendant's readiness to lie under oath before the judge who will sentence him would seem to be among the more precise and concrete of the available indicia." *United States v. Hendrix, 505 F.2d 1233, 1236 (1974).*
>
> Only one Circuit has directly rejected the probative value of the defendant's false testimony in his [or her] own defense. In *Scott v. United States, 135 U.S. App. D.C. 377, 382, 419 F.2d 264, 269 (1969),* the court argued that
>
> > "the peculiar pressures placed upon a defendant threatened with jail and the stigma of conviction make his [or her] willingness to deny the crime an unpromising test of his [or her] prospects for rehabilitation if guilty. It is indeed unlikely that

> many men who commit serious offenses would balk on principle from lying in their own defense. The guilty man [or woman] may quite sincerely repent his [or her] crime but yet, driven by the urge to remain free, may protest his [or her] innocence in a court of law."

See also *United States v. Moore, 484 F.2d 1284, 1288 (CA4 1973)* (Craven, J., concurring). The *Scott* rationale rests not only on the realism of the psychological pressures on a defendant in the dock -- which we can grant -- but also on a deterministic view of human conduct that is inconsistent with the underlying precepts of our criminal justice system. A "universal and persistent" foundation stone in our system of law, and particularly in our approach to punishment, sentencing, and incarceration, is the "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States, 342 U.S. 246, 250 (1952).* See also *Blocker v. United States, 110 U.S. App. D.C. 41, 53, 288 F.2d 853, 865 (1961)* (opinion concurring in result). Given that long-accepted view of the "ability and duty of the normal individual to choose," we must conclude that the defendant's readiness to lie under oath -- especially when, as here, the trial court finds the lie to be flagrant -- may be deemed probative of his [or her] prospects for rehabilitation.

Against this background we evaluate Grayson's constitutional argument that the District Court's sentence constitutes punishment for the crime of perjury for which he has not been indicted, tried, or convicted by due process. A second argument is that permitting consideration of perjury will "chill" defendants from exercising their right to testify on their own behalf.

In his due process argument, Grayson does not contend directly that the District Court had an impermissible purpose in considering his perjury and selecting the sentence. Rather, he argues that this Court, in order to preserve due process rights, not only must prohibit the impermissible sentencing practice of incarcerating for the purpose of saving the Government the burden of bringing a separate and subsequent perjury prosecution but also must prohibit the otherwise *permissible* practice of considering a defendant's untruthfulness for the purpose of illuminating his [or her] need for rehabilitation and society's need for protection. He presents two interrelated reasons. The effect of both permissible and impermissible sentencing practices may be the same: additional time in prison. Further, it is virtually impossible, he contends, to identify and establish the impermissible practice. We find these reasons insufficient justification for prohibiting what the Court and the Congress have declared appropriate judicial conduct.

First, the evolutionary history of sentencing . . . demonstrates that it is proper -- indeed, even necessary for the rational exercise of discretion -- to consider the defendant's whole person and personality, as manifested by his [or her] conduct at trial and his [or her] testimony under oath, for whatever light those may shed on the

sentencing decision. The "parlous" effort to appraise "character," *United States v. Hendrix, supra, at 1236,* degenerates into a game of chance to the extent that a sentencing judge is deprived of relevant information concerning "every aspect of a defendant's life." *Williams v. New York, 337 U.S., at 250[, 69 S. Ct. at 1084].* The Government's interest, as well as the offender's, in avoiding irrationality is of the highest order. That interest more than justifies the risk that Grayson asserts is present when a sentencing judge considers a defendant's untruthfulness under oath.

Second, in our view, *Williams* fully supports consideration of such conduct in sentencing. There the Court permitted the sentencing judge to consider the offender's history of prior antisocial conduct, including burglaries for which he had not been duly convicted. This it did despite the risk that the judge might use his knowledge of the offender's prior crimes for an improper purpose.

Third, the efficacy of Grayson's suggested "exclusionary rule" is open to serious doubt. No rule of law, even one garbed in constitutional terms, can prevent improper use of firsthand observations of perjury. The integrity of the judges, and their fidelity to their oaths of office, necessarily provide the only, and in our view adequate, assurance against that.

Grayson's argument that judicial consideration of his conduct at trial impermissibly "chills" a defendant's statutory right, *18 U.S.C. § 3481* (1976 ed.), and perhaps a constitutional right to testify on his own behalf is without basis. The right guaranteed by law to a defendant is narrowly the right to testify truthfully in accordance with the oath -- unless we are to say that the oath is mere ritual without meaning. This view of the right involved is confirmed by the unquestioned constitutionality of perjury statutes, which punish those who willfully give false testimony. See, *e.g., 18 U.S.C. § 1621* (1976 ed.); cf. *United States v. Wong*, 431 U.S. 174[, 97 S. Ct. 1823, 52 L. Ed. 2d 231] (1977). Further support for this is found in an important limitation on a defendant's right to the assistance of counsel: Counsel ethically cannot assist his [or her] client in presenting what the attorney has reason to believe is false testimony. See *Holloway v. Arkansas, 435 U.S. 475, 480 n.4[, 98 S. Ct. 1173, 1176 n.4, 55 L. Ed. 2d 426]* (1978); ABA Project on Standards for Criminal Justice, The Defense Function § 7.7(c), p. 133 (Compilation 1974). Assuming, *arguendo*, that the sentencing judge's consideration of defendants' untruthfulness in testifying has any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible. There is no protected right to commit perjury.

Grayson's further argument that the sentencing practice challenged here will inhibit exercise of the right to testify truthfully is entirely frivolous. That argument misapprehends the nature and scope of the practice we find permissible. Nothing we say today requires a sentencing judge to enhance, in some wooden or reflex fashion, the

> sentences of all defendants whose testimony is deemed false. Rather, we are reaffirming the authority of a sentencing judge to evaluate carefully a defendant's testimony on the stand, determine -- with a consciousness of the frailty of human judgment -- whether that testimony contained willful and material falsehoods, and, if so, assess in light of all the other knowledge gained about the defendant the meaning of that conduct with respect to his [or her] prospects for rehabilitation and restoration to a useful place in society. Awareness of such a process realistically cannot be deemed to affect the decision of an accused but unconvicted defendant to testimony truthfully in his [or her] own behalf.

(Some bracketed material in original, internal ellipses omitted.)

In State v. Nunes, 72 Haw. 521, 824 P.2d 837 (1992), the defendant appealed his sentence of thirty days in prison, claiming that the family court had unconstitutionally punished him based on a belief that the victim had lied for the defendant at trial. At the time, several sentencing guideline memoranda for household abuse cases had been circulated among the family court judges, one of which called for a sentence of thirty to sixty days in prison "where the victim lied for the defendant in Court." Id. at 523, 824 P.2d at 839. In vacating the sentence, the supreme court noted initially that although the testimony of the victim at trial conflicted with the statement she had made to police on the evening of the events leading to the defendant's arrest, there was no evidence that the defendant had asked the victim to lie in court or that he had intimidated or threatened her. Id. at 525-26, 824 P.2d at 840. The supreme court then stated:

> In essence, the judge imposed a sentence for uncharged crimes -- either intimidating a witness or tampering with a witness. In our minds this raises serious constitutional questions.

> While a court has broad discretion in imposing a sentence, and can consider the candor, conduct, remorse and background of the defendant as well as the circumstances of the crime and many other factors, a judge cannot punish a defendant for an uncharged crime in the belief that it too deserves punishment. Because the sentencing guideline fixed a sentence based on a finding that the "victim lied for the defendant" and the court based its sentencing on that factor alone, we hold that it unconstitutionally punished the defendant for an uncharged crime.
>
> Without reaching the question of when it is permissible for a trial judge in sentencing to consider a defendant's conduct at trial which may amount to criminal conduct, we note merely that there is nothing in the record before us that would support a conclusion that defendant's conduct toward other witnesses supports increasing his sentence. ***See, e.g., United States v. Grayson***, *438 U.S. 41[, 98 S. Ct. 2610, 57 L. Ed. 2d 582] (1978);* ***Strachan v. State***, *615 P.2d 611 (Alaska 1980);* ***People v. Allen***, *60 Ill. App. 3d 445, 376 N.E.2d 1042 (1978).*

Id. at 526, 824 P.2d at 840 (bolding in original).

In this case, the family court appears to have placed great weight on Yi's conduct at trial (i.e., Yi's lying to the court) in sentencing Yi to four months in jail. Under Nunes, the family court, in sentencing Yi, had broad discretion to consider the candor, conduct, remorse, and background of Yi, as well as the circumstances of Yi's offense. Therefore, it was appropriate for the family court, in sentencing Yi, to consider Yi's lack of candor.

However, by informing Yi that he would have been "given another chance" and his jail sentence would have been "minimal" if he had admitted violating the TRO "before the trial," the family court appears to have sentenced Yi based primarily on Yi's false testimony, rather than on his violation of the TRO. That is, the family court appears to have unconstitutionally punished Yi for an uncharged crime.

CONCLUSION

In light of the foregoing disussion, we affirm that part of the December 3, 2001 Judgment of the family court that convicted Yi of Violation of a TRO. We also vacate that part of the December 3, 2001 Judgment of the family court that sentenced Yi to four months in prison and remand for resentencing. Our disposition of this appeal renders it unnecessary to decide Yi's remaining argument on appeal--that the family court abused its discretion in sentencing Yi to four months' imprisonment.

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