NOT FOR PUBLICATION

NO. 24999

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
STEPHEN KWON, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-Cr. No. 01-1-3274)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Watanabe, and Lim, JJ.)

Defendant-Appellant Stephen Kwon (Kwon or Mr. Kwon) appeals from the Judgment of Conviction and Sentence entered on February 22, 2002 by the Family Court of the First Circuit (the family court), Judge Steven S. Alm presiding, as amended by a March 22, 2002 Order of Resentencing. We affirm.

On December 13, 2001, Kwon was charged via a complaint with "intentionally, knowingly or recklessly physically abus[ing his wife,] TOK SIM KWON, a family or household member, thereby committing the offense of Abuse of Family and Household Members[,]" in violation of Hawaii Revised Statutes § 709-906 (Supp. 2001). On February 22, 2002, a jury found Kwon guilty as charged, and the family court immediately proceeded to sentence Kwon. Informed that Kwon had two prior convictions, the family court sentenced Kwon to serve two years' probation and six

months' imprisonment, and to pay fees totaling $200. In imposing the sentence, the family court observed, in part:

> Okay, I'm looking at the two photos from October 10th of 1999 where I believe Mr. Kwon's testimony was that he put a -- like hit his wife in the head with a plastic bucket. It appears from here there are injuries to the forehead, to the lip, to the cheek, to the chin, and blood on her blouse or her shirt.
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> We have a history of violence. You said that, you know, he's gone through this before -- yeah, please stand -- but it doesn't seem to have worked and it doesn't seem to have gotten the point across. What -- it also really concerns me about the choking. The -- there's no presumption of innocence anymore. The jury has found that you abused your wife, that choking was involved. A slap can be upgraded to a punch. The only way choking can be upgraded is more choking, and that can lead to somebody getting killed.
>
> I found your testimony not believable in court. There -- that is obstructing the process of the truth. I found your wife's testimony about the self-defense part not to be credible as well. I found her 252 [statement] more credible as well as her statements to the officer, the 911 tape where she was crying and she repeated several times, twice at least, about being choked during that. I have no doubt that the choking occurred.

On March 18, 2002, Kwon moved to modify and/or reduce his sentence on grounds that: (1) a six-month prison term "would entail excessive hardship on [Kwon], his wife, . . . and their . . . son . . . because [Kwon] would lose his job"; (2) the imposed sentence exceeded the ten-day jail term that Plaintiff-Appellee State of Hawai‘i (the State) had initially offered to have Kwon serve if he pled guilty to the charge without a trial; (3) the imposed sentence exceeded the 120-day jail term that the State recommended Kwon serve after trial; and (4) Kwon's due process rights to a fair trial and sentence were violated because the family court based its harsh sentence on its

belief that Kwon, knowing he was guilty, obstructed justice by proceeding to trial and testifying falsely.

At a March 22, 2002 hearing on Kwon's motion, the family court, upon learning that Kwon had only one prior conviction, not two, reduced Kwon's imprisonment sentence to five months. However, the family court left the other parts of the sentence intact, explaining in part:

> The other thing that I had considered at the [prior sentencing hearing], and I -- as I told Mr. Kwon that I was very concerned about at the time is the mechanism of injury in this case. The -- if somebody has -- is a slapper, they can escalate that to punching people. When somebody is a choker or chokes somebody, and there were injuries consistent with that in this case, the only way that can be escalated is to continue to choke people. And that causes me real concern.
>
> So if that harassment was in error, that will not, uh -- that should not be considered, and I will take a month off. At the same time Mr. Kwon has been convicted of assault third before. He's had an opportunity to go through the court system, be put on probation, and for this not to have happened again. Now he's back in here. He's convicted of abuse of household member involving choking, and he's not truthful on the stand at the same time.
>
> The two years[']' probation is appropriate. Five months[']' jail is appropriate. . . .
>
> And I -- Mr. Kwon, this is going to have an affect [sic] on your work. That is certainly not my first choice in doing -- in doing that, but I think any less would not reflect the severity of what had happened in the past and what had happened in this case.
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> . . . .
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> . . . The danger to the victim in this case is ongoing. I think a sentence of anything less would continue to keep her in danger that way. I think Mr. Kwon will certainly have to think about it in the future.
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> . . . .
>
> Anytime -- and this is certainly not limited to your client . . . you know, it's an unfortunate byproduct sometimes of it that people's employment gets hurt by it, but that's what -- when he was convicted of assault third

> and put on probation at the time, that was a huge red flag to your client about changing his behavior. That didn't happen. And it didn't happen in a choking manner in this case, and it didn't happen when he came in and testified in court.
>
> So I will grant the motion only to the extent of reducing it from six months to five months.

Kwon now argues that the family court abused its discretion by punishing him for uncharged crimes, i.e., obstruction of justice and perjury. We disagree.

Kwon is correct that "a judge cannot punish a defendant for an uncharged crime in the belief that it too deserves punishment." State v. Nunes, 72 Haw. 521, 526, 824 P.2d 837, 840 (1992). It is well established, however, that a sentencing judge "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[.]" Nunes, 72 Haw. at 526, 824 P.2d at 840.

In this case, while the family court did note that Kwon "was untruthful in court" and "[lied] to the court," a full review of the transcripts of the sentencing hearing and the hearing on Kwon's motion to modify and/or reduce sentence demonstrates that Kwon's lack of candor was just one factor among many considered by the family court in sentencing Kwon. The family court also considered the "mechanism of injury" used by Kwon (i.e., choking, which the court pointed out can escalate to death), the history of violence in the family, Kwon's prior

record, the possibility of future and more serious violence, the continuing danger to Kwon's wife, the need for the sentence to reflect the severity of the offense, and Kwon's failure to rehabilitate himself after being put on probation for a prior assault offense.

Based upon our review of the record, and having duly considered the arguments of the parties and the case law relevant to the issues on appeal, we conclude that the family court did not abuse its discretion in sentencing Kwon. The judgment of the family court is affirmed.

DATED: Honolulu, Hawai‘i, March 4, 2004.

On the briefs:

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