

NOT FOR PUBLICATION

NO. 25369

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
CHARLES K. KEKAHU, Defendant-Appellant

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 02-1-1691)

MEMORANDUM OPINION

(By: Burns, C.J., Foley and Nakamura, JJ.)

Defendant-Appellant Charles K. Kekahu (Kekahu) appeals from the Judgment filed on September 11, 2002, in the Family Court of the First Circuit (family court).¹ A jury found Kekahu guilty as charged of physically abusing a family or household member, in violation of Hawaii Revised Statutes (HRS) § 709-906 (Supp. 2001).² The family court sentenced Kekahu to two years' probation subject to the condition that he be incarcerated for 120 days. His sentence was stayed pending appeal.

Kekahu contends that: 1) there was insufficient evidence to support his conviction; 2) the prosecutor's comments during closing argument impermissibly shifted the burden of proof

¹ The Honorable Darryl Y.C. Choy presided.

² Hawaii Revised Statutes § 709-906 (Supp. 2001) provides, in pertinent part, that "[i]t shall be unlawful for any person, singly or in concert, to physically abuse a family or household member"

to Kekahu; and 3) Kekahu's trial counsel provided ineffective assistance. We affirm.

DISCUSSION

The alleged victim in this case was Angela Richie (Richie), who was Kekahu's former girlfriend and the mother of his three children. After their relationship ended, Kekahu was awarded legal and physical custody of the children with Richie retaining visitation rights. In the afternoon on December 30, 2001, Richie went to Kekahu's house and dropped off the three children with Kekahu's mother, Diane Kekahu (Diane). Richie's daughter from another relationship, Mary Richie (Mary), waited in the car. Kekahu arrived home while Richie was still there. Kekahu asked Richie if they could talk, Richie agreed, and they walked to an area on the side of the house where a washing machine and dryer were located.

Richie testified at trial that when they stopped walking, Kekahu angrily told her, "You're fucked, yeah, Angie?" Richie told Kekahu that she was doing well and tried to walk away from him. Kekahu grabbed Richie from behind, covered her mouth with his hand, and pinned her head against the top of the washing machine. Richie tried to scream but could not because Kekahu's hand was cupped over her mouth. She later discovered cuts in her mouth. To attract attention, Richie began banging her knee against either the washing machine or dryer and eventually was

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able to let out a scream. She heard Kekahu's mother say, "Knock it off, Charles."

Richie testified that she was able to stand upright and told Kekahu that she did not want anything to do with him. Kekahu grabbed Richie by the neck and choked her until she became light-headed and dizzy and thought she was going to pass out. Kekahu let go and backed away when Richie's daughter, Mary, appeared. Richie told Kekahu that she was going to call the police. In response, Kekahu started scratching his own face with his right hand while remarking to Richie, "After what you just did to me?" Richie was unfazed by Kekahu's ploy. She told Kekahu that she was sure the police could measure his fingers, suggesting that the police would uncover his deception by matching the scratch marks on his face to his hand, which was bigger than her hand. Kekahu grabbed a cordless phone and said he was calling the police. Richie walked away and drove to her sister's house. While there, Richie called the police and reported the incident.

Mary, who was thirteen when she testified at trial, corroborated Richie's version of events. Mary testified that while waiting in the car, she heard Kekahu's mother yell, "Charles, cut it out." She also heard someone banging on the washer or dryer. Mary jumped out of the car and ran over to where her mother and Kekahu were. Mary testified that her mother

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appeared to be "in a state of shock" and that her mother's "hair was down and her lips were kind of blue and her neck was a little bit red." Earlier, when Richie arrived at the house, her hair was up in a bun, and her lips and neck were not discolored. Mary reached for her mother, and Kekahu tried to shove Mary's hand away. Mary heard her mother tell Kekahu, "I'm going to report you." Mary then saw Kekahu turn, lean on his face, and move his elbow in an up and down motion while saying, "Why, when look what you've done to me."

Honolulu Police Officer Randall Platt (Officer Platt) took statements from Richie and Mary shortly after Richie reported the incident. Officer Platt testified that he noticed scratches on Richie's neck and forearm and that Richie complained of pain to her mouth area. Photographs taken by Officer Platt showing scratches on Richie's neck were admitted in evidence. Officer Platt testified that the scratches on Richie's neck were consistent with her report of being choked. He further testified that the statements taken from Richie and Mary were consistent with each other.

Kekahu testified in his own defense. He denied grabbing Richie, pinning her head against the washing machine, or choking her and claimed that any contact he had with Richie was in self-defense. According to Kekahu, he told Richie that he was going to make her pay child support. Richie responded by

attacking Kekahu, scratching and kicking him. Kekahu defended himself by using his hands to push her away. Richie's attack lasted about 30 seconds and stopped when Mary arrived. Kekahu told Richie that he was going to call the police, but he did not actually do so.

Kekahu testified that he sustained scratches to his face as a result of Richie's attack and denied scratching his own face. Kekahu stated that his mother took a picture of the scratches on his face, but that he did not bring the picture to court. Kekahu's mother, Diane, also testified that she took a picture of scratches on Kekahu's face. Diane stated that she heard arguing, asked Mary to see what was happening, and yelled out, "What's going on?" Diane did not see what transpired between Kekahu and Richie.

DISCUSSION

I.

Kekahu's argument that there was insufficient evidence to support his conviction boils down to a claim that the jury should have accepted his version of the incident and rejected Richie's version. Kekahu's argument fails under firmly established legal rules. It is the province of the trier of fact, not the appellate court, to determine the credibility of witnesses and the weight of evidence. State v. Aki, 102 Hawai'i 457, 460, 464, 77 P.3d 948, 951, 955 (App.), cert. denied, 102

Hawai'i 526, 78 P.3d 339 (2003). Moreover, in reviewing the sufficiency of the evidence, we examine the evidence in the light most favorable to the prosecution. Id. at 460, 77 P.3d at 951. Richie's testimony as corroborated by the testimony of Mary, the testimony of Officer Platt, and the photographs depicting Mary's injuries provided ample and substantial evidence to support the jury's verdict. State v. Eastman, 81 Hawai'i 131, 141, 913 P.2d 57, 67 (1996) (holding that sufficient evidence to support a conviction can be established through the testimony of a single witness).

II.

During closing argument, the Deputy Prosecuting Attorney (DPA) commented on Kekahu's failure to introduce the photograph Kekahu and his mother testified had been taken of scratches on Kekahu's face. The DPA first suggested that the absence of the alleged photograph cast doubt on Kekahu's testimony that a picture was taken of the scratches Richie purportedly inflicted, which, in turn, cast doubt on Kekahu's claim that he was a victim of an attack by Richie. Alternatively, the DPA suggested that if the photograph was taken, the reason Kekahu failed to produce it was because Richie had warned him that the police could match Kekahu's fingers to the scratch marks.

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Kekahu argues that DPA's comments on Kekahu's failure to introduce the photograph constituted prosecutorial misconduct in that the comments deprived Kekahu of a fair trial by shifting the burden of proof to the defense. We disagree.

During closing argument, a prosecutor is entitled to draw reasonable inferences from the evidence and is given wide latitude to discuss the evidence. State v. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209 (1996). In particular, the prosecutor may comment on "the failure of the defense to introduce material evidence or to call logical witnesses." State v. Napulou, 85 Hawai'i 49, 59, 936 P.2d 1297, 1307 (App. 1997). The prosecution may also argue that the jury should draw an adverse inference from the defendant's failure to produce evidence that could reasonably be expected to support the defendant's theory. State v. Davis, 965 S.W.2d 927, 930 (Mo. App. 1998). Although the prosecutor cannot comment on a defendant's failure to testify, once the defendant takes the stand, the prosecutor is permitted to impugn the defendant's credibility by commenting on his failure to produce corroborating evidence. United States v. Boulerice, 325 F.3d 75, 87 (1st Cir. 2003).

We conclude that the DPA's arguments were a permissible comment on Kekahu's failure to produce corroborating evidence and did not shift the burden of proof to Kekahu. The DPA was

entitled to draw reasonable inferences from the evidence and to argue that the jury should draw an adverse inference from Kekahu's failure to introduce the photograph. The DPA's remarks did not suggest that Kekahu had the burden of proof. Napulou, 85 Hawai'i at 58, 936 P.2d at 1306. Moreover, the trial court's instructions made clear that "the prosecution [has] the duty of proving every material element of the offense charged against the defendant beyond a reasonable doubt" and that "[t]he defendant has no duty or obligation to call any witness or produce any evidence."

III.

Kekahu claims that his trial counsel provided ineffective assistance because 1) trial counsel's questioning of Richie led to Richie's testimony that she had a restraining order against Kekahu; and 2) trial counsel failed to obtain the alleged photograph of scratches to Kekahu's face. We review claims of ineffective assistance of counsel to determine whether, "viewed as a whole, the assistance provided was within the range of competence demanded of attorneys in criminal cases." Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (internal quotation marks, citation, and brackets omitted).

[T]he defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.

State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998). We conclude that Kekahu has not met his burden of establishing that his trial counsel provided ineffective assistance.

Kekahu had legal and physical custody of the three children he had with Richie. Kekahu's trial counsel sought to demonstrate Richie's bias and motive to lie by showing that she wanted to obtain custody of the children. Thus in cross-examining Richie, Kekahu's trial counsel attempted to elicit evidence about the custody and visitation arrangements between Kekahu and Richie:

[Kekahu's counsel]: And your visitations are arranged with Mr. Kekahu? In other words, you guys talk about when you can visit the children?

[Richie]: We're not allowed to talk. I have a restraining order.

[Kekahu's counsel]: Okay. So visitation just occurs on a certain day.

[Richie]: Through PACT?³

[Kekahu's counsel]: I'm sorry?

[Richie]: It was through PACT, but starting this Saturday it will be at Kaneohe Police Station. He'll drop them off at 9:00 in the morning.

[Kekahu's counsel]: Okay. So there was a certain schedule?

[Richie]: Yeah. It's in our restraining order.

The record shows that Richie's references to the restraining order were volunteered by Richie and were not responses invited by trial counsel's questions. The questions were posed in the context of an attempt by Kekahu's trial counsel

³ "PACT" is an acronym for Parents and Children Together, a non-profit family service agency.

to elicit evidence of Richie's bias and ulterior motives through showing that Kekahu had custody of the children and Richie had to arrange for visitation. Because the questions posed by trial counsel "had and obvious tactical basis for benefitting the defendant's case," they do not provide Kekahu with a valid ground for his ineffective assistance claim. Briones v. State, 74 Haw. 442, 462-63, 848 P.2d 966, 976 (1993). In any event, the questions did not reflect "counsel's lack of skill, judgment, or diligence." Richie, 88 Hawai'i at 39, 960 P.2d at 1247. Moreover, the references to the restraining order were brief and neither counsel mentioned the restraining order in closing argument. The references to the restraining order did not result in "either the withdrawal or substantial impairment of a potentially meritorious defense." Id.

We also conclude that Kekahu's trial counsel did not provide ineffective assistance in failing to obtain and introduce the alleged photograph depicting the scratches to Kekahu's face. There was no dispute that Kekahu's face had been scratched as both Richie and Kekahu testified to this fact. The dispute was over whether Richie had scratched Kekahu's face or whether the scratches were self-inflicted. Because the existence of the scratches was undisputed, Kekahu's counsel was not ineffective in failing to obtain and introduce the alleged photograph. We find it difficult to see how a photograph of scratches on Kekahu's

face could have served to persuade the jury that the scratches were caused by Richie as opposed to Kekahu. Thus, the failure of trial counsel to obtain and introduce the alleged photograph did not reflect deficient representation on his part, nor did it substantially impair a potentially meritorious defense.

To be sure, the introduction of the alleged photograph would have stopped the DPA from commenting on Kekahu's failure to produce it. But because the existence of the scratches were undisputed, the DPA's arguments regarding the failure of Kekahu to produce the photograph were not convincing. Kekahu's trial counsel did not render ineffective assistance by failing to anticipate and introduce evidence to block a weak prosecution argument.

Kekahu's trial counsel is also his counsel on appeal. We note the inherent conflict in counsel on appeal arguing his own ineffectiveness at trial. Accordingly, our denial of Kekahu's ineffective assistance of counsel claims is without prejudice to Kekahu raising those claims through a different attorney or pro se in a petition under Rule 40 of the Hawai'i Rules of Penal Procedure.

CONCLUSION

The September 11, 2002, Judgment of the Family Court of the First Circuit is affirmed.

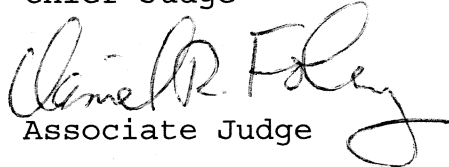
DATED: Honolulu, Hawai'i, September 14, 2005.

On the briefs:

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Chief Judge


Associate Judge


Associate Judge