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NO. 26807

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JENNY TAKEMOTO, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR NO. 04-1-0154)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Watanabe and Fujise, JJ.)

Defendant-Appellant Jenny Takemoto (Jenny) appeals from the August 19, 2004 judgment entered in the Family Court of the Second Circuit (family court)¹. Jenny was found guilty of Abuse of a Family or Household Member, Hawaii Revised Statutes (HRS) § 709-906², and sentenced to probation for a period of one year

¹ Judge Reinette W. Cooper presided.

² Hawaii Revised Statutes (HRS) § 709-906 (Supp. 2004) states, in relevant part:

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

For the purposes of this section, "family or household member" means spouses[.]

HRS § 703-304 (Supp. 2004) states, in relevant part:

Use of force in self-protection. (1) Subject to the provisions of this section and of section 703-308, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.

HRS § 703-300 (1993) states, in relevant part:

Definitions relating to justification. In this chapter, unless a different meaning is plainly required:

"Believes" means reasonably believes.

The Hawai'i Supreme Court has decided that

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on the condition that she serve 48 hours in jail, with credit for time served, and pay a \$50 criminal injuries compensation fee and a \$75 probation service fee. The family and household member was her husband, Calvin Takemoto (Calvin). The appeal in this case was filed on September 9, 2004 and assigned to this court on June 7, 2005.

Following closing arguments by the parties, the family court orally decided as follows:

I have listened to all of the testimony, looked at the photographs. 17-year marriage, [Jenny] wants me to believe she doesn't know what they were arguing about that got so physical. I don't quite buy that, especially given her statement to [Police Officer Audra] Sellers that they had argued before in their relationship, but never argued as physically as tonight. And he is taunting her by pointing finger at her and she bites him and scratches him. Nothing about being attacked.

She says she calls the police. [Police] Officer [Glenn] Goya is responding to a dropped call. In other words, that call that somehow is dropped. You know, how the police got there is -- I don't know who dropped the call, but it's clear she did not call the police on an abuse matter.

The phone recording, again, is definitive of [Calvin] wanting to get her away and it's consistent with his testimony which I find to be more believable, more credible.

So based on the evidence and the photographs of injury to face, back, shoulder, bite mark and because I find [Calvin's] version to be more credible, I am going to find that the State has proven its case beyond a reasonable doubt and has proven that self-defense is not a defense in this case beyond a reasonable doubt. So they have disproven that this was a case of self-defense.

By [Jenny's] own admission, if there was any finger pointing in her mind, it was taunting her and not she felt being attacked or felt endangered.

HRS § 703-301 (1976) provides that justification, including the use of force in self-defense, is a complete defense in any prosecution for an offense. Justification is not an affirmative defense within the meaning of HRS s 701-115 (1976) and, as such, once evidence of justification has been adduced at trial, the prosecution has the burden of *disproving*, beyond a reasonable doubt, the facts constituting justification.

State v. McNulty, 60 Haw. 259, 261-62, 588 P.2d 438, 442 (1978) (footnotes omitted).

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I also don't believe if you so worried about a guy with a gun and, you know, that he is going to do that you go ahead and you bite him and scratch him. That is not credible.

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For the record, I accept and believe that the prosecutor has to disprove self-defense beyond a reasonable doubt and I am making a finding that the evidence by the State has disproven any type of self-defense beyond a reasonable doubt.

In her opening brief, Jenny argues that she

testified that she used force (biting and scratching) to make her husband release her because she was afraid he was going to harm her. The Court's determination that there was "nothing about being attacked" and that [Jenny] had not "felt being attacked or felt endangered" is controverted by the evidence presented at trial. Once a defense is properly raised, the State has the burden of proving, beyond a reasonable doubt, all the elements that negative the defense. The State failed to do so. As such, the Court's findings are clearly erroneous, and the conclusion of law that [Jenny] was not entitled to use force to protect herself is reversible error.

Jenny further argues that

the Court made findings regarding whether [Jenny] had "felt attacked or felt endangered", and whether she had been attacked. Although the former finding is closer to the correct standard, neither question provides the correct issue the court needed to address, namely whether Jenny reasonably believed that use of force was immediately necessary for the purpose of protecting herself against use of unlawful force against her.

Jenny fails to understand that there is a material difference between evidence and facts and that a trial court's findings of fact are reviewed under the "clearly erroneous" standard of review. Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994).

A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made.

State v. Harada, 98 Hawai'i 18, 22, 41 P.3d 174, 178 (2002)).

Verdicts based on conflicting evidence will not be set aside where there is substantial evidence to support the trier of fact's findings. We have defined substantial evidence as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

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It is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trier of fact.

State v. Mattiello, 90 Hawai'i 255, 259, 978 P.2d 693, 697 (1999) (internal quotation marks, citations, and brackets omitted).

Here, the court decided that the relevant parts of Calvin's testimony were credible and the relevant parts of Jenny's testimony were not credible. Calvin's testimony describes the relevant facts and the court's "finding that the evidence by the State has disproven any type of self-defense beyond a reasonable doubt" is not clearly erroneous.

Therefore, in accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the August 19, 2004 judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, February 10, 2006.

On the briefs:

Thomas Kolbe
(David A. Sereno, ALC)
for Defendant-Appellant.

Chief Judge

Artemio C. Baxa,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.

Associate Judge

Associate Judge