

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27090

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
MICHAEL B. MUDRICK, Defendant-Appellant

NONIMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR. NO. 03-1-0761(2))

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Michael B. Mudrick (Mudrick) appeals from the Judgment of Probation filed on December 3, 2004 in the Family Court of the Second Circuit (family court).^{1/} The family court found Mudrick guilty of Abuse of Family or Household Members, in violation of Hawaii Revised Statutes (HRS) § 709-906 (Supp. 2005); sentenced him to probation for a period of one year and to five days of imprisonment; and ordered him to pay a \$50 Criminal Injuries Compensation Fund fee, \$75 probation services fee, and \$1,000 fine.

On appeal, Mudrick argues the family court committed plain error by:

(1) announcing at trial two clearly erroneous Findings of Fact and three wrong Conclusions of Law, in violation of the

^{1/} The Honorable Barclay E. MacDonald presided.

Due Process Guarantees of the United States Constitution and the Hawai'i Constitution;

(2) failing to obtain Mudrick's voluntary, knowing, and intelligent waiver of his right to a jury trial;

(3) imposing a sentence based on his refusal to admit guilt with respect to the offense charged, which violated his privilege against self-incrimination;

(4) imposing a sentence based on factors not in the record; and

(5) imposing a discretionary condition of probation prohibiting his use of alcohol and requiring him to submit at his own expense to drug/alcohol assessment and treatment.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Mudrick's points of error as follows:

(a) The family court committed plain error by imposing a sentence based on Mudrick's refusal to admit guilt with respect to the offense charged. Mudrick maintained his innocence after conviction, and the family court attempted to get Mudrick to admit guilt. It appears that Mudrick's sentence would not have been as severe had Mudrick affirmatively admitted guilt. State v. Kamana'o, 103 Hawai'i 315, 321-23, 82 P.3d 401, 407-09 (2003); see HRS §§ 706-624 (1993) and 706-606 (1993).

(b) Finding of Fact 1 was clearly erroneous because Mudrick did not testify that he knocked down Rancho or that Rancho was knocked down, but the error did not affect Mudrick's substantial rights because the family court had substantial evidence from which to conclude that Mudrick had knocked down Rancho. Finding of Fact 2 was clearly erroneous because the family court misstated Mikey's testimony; however, the error did not affect Mudrick's substantial rights because the finding of fact was not material to the elements of the offense. Conclusion of Law 1 was wrong because the family court misstated the State's burden of proof, but this error did not affect Mudrick's substantial rights because the family court determined the State had proven the elements of the offense. Conclusion of Law 2 was not wrong because it was within the family court's discretion whether or not to believe Mudrick's version of events and to infer from the circumstantial evidence of Mudrick's failure to assist Rancho that Mudrick intentionally, knowingly, or recklessly pushed Rancho down, causing her to fall and injure herself. State v. Bui, 104 Hawai'i 462, 467, 92 P.3d 471, 476 (2004); In re Jane Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001). Conclusion of Law 3 was not wrong because Mikey's testimony corroborated Rancho's testimony.

(c) The family court did not fail to obtain Mudrick's voluntary, knowing, and intelligent waiver of his right to a jury

trial. Although the family court's colloquy with Mudrick on November 14, 2003 may have been inadequate, the family court's April 12, 2004 colloquy with Mudrick regarding his waiver of jury trial was sufficient and, apparently, timely. State v. Myers, 108 Hawai'i 300, 303-04, 119 P.3d 608, 611-12 (App. 2005), cert. denied, 108 Hawai'i 379, 120 P.3d 735 (2005); HRS § 806-61 (1993).

(d) The family court imposed its sentence based on substantial evidence in the record on appeal that Mudrick was intoxicated. State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995). Further, the family court did not actually state that Jason and Mikey were present during the alleged abuse.

(e) The family court did not commit plain error by imposing a discretionary condition of probation prohibiting Mudrick's use of alcohol. The record on appeal includes evidence that Mudrick was intoxicated at the time of the incident, and, in accordance with HRS § 706-624, this probation condition was reasonably related to the factors set forth in HRS § 706-606.

Therefore,

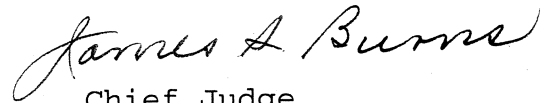
IT IS HEREBY ORDERED that the Judgment of Probation filed on December 3, 2004 in the Family Court of the Second Circuit is affirmed, with the exception of the probation condition that Mudrick be sentenced to five days in prison, which

is vacated. This case is remanded to the family court for further proceedings consistent with this opinion.


DATED: Honolulu, Hawai'i, August 29, 2006.

On the briefs:

Georgia K. McMillen,
for Defendant-Appellant.


Chief Judge

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


Associate Judge


Associate Judge