NO. CAAP-13-0000064

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
CHARLES E. GOEBEL, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 12-1-2142)

SUMMARY DISPOSITION ORDER
(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

Defendant-Appellant Charles E. Goebel (Goebel) appeals from the December 3, 2012 Judgment of Conviction and Sentence/Notice of Entry entered by the Family Court of the First Circuit (Family Court).[1] Goebel was convicted of Violation of an Order for Protection, in violation of Hawaii Revised Statutes (HRS) § 586-11 (Supp. 2015).

On appeal, Goebel contends his right to testify was violated by an inadequate colloquy required by Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995) and State v. Lewis, 94 Hawai'i 292, 12 P.3d 1233 (2000), warranting a reversal of his conviction.

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 Goebel's point of error as follows:

Goebel contends that the Family Court failed to adequately advise him of his rights prior to trial as well as

[1] The Honorable Darryl Y.C. Choy presided.

immediately prior to the close of his defense. Goebel argues that the verbal exchange between himself and the Family Court failed to meet the colloquy requirement of Tachibana. Finally, Goebel argues that the Family Court's error was not harmless beyond a reasonable doubt. We disagree.

Prior to trial, a trial court is required "to (1) inform the defendant of his or her personal right to testify or not to testify and (2) alert the defendant that, if he or she has not testified by the end of the trial, the court will briefly question him or her to ensure that the decision not to testify is the defendant's own decision." Tachibana, 79 Hawai'i at 237 n.9, 900 P.2d 1304 n.9; Lewis, 94 Hawai'i 297, 12 P.3d 1238 (making this advisement mandatory). Prior to the commencement of trial, the Family Court informed Goebel that

> you have the right to testify. You can take the stand. You have the right not to testify. However, though, if you do take the stand, now, okay, you'd be subject to cross-examination, okay, and what you say can be used either for you or against you. So if you do take the stand under the Tachibana ruling, you're taking your chances. It might help; it might hurt.
>
> MR. GOEBEL: I understand.
>
> THE COURT: And that the prosecutor will cross-examine you if you take the stand.
>
> Now, whether or not you want to testify is up to you, okay, and you can decide at the end of the State's case if you want to testify. Okay, I just want you to know that the Tachibana ruling requires me to inform you of your right to testify and your right not to testify. It is your choice, and you need to make the decision for yourself. Okay?
>
> MR. GOEBEL: Yes, Your Honor.
>
> THE COURT: All right, do you have any questions what we're going to do today?
>
> MR. GOEBEL: No, Your Honor.

Shortly before this advisement Goebel told the Family Court that he did not intend to call witnesses of his own, thus making the end of the State's case the appropriate time for the end-of-trial colloquy.

Goebel argues that this pre-trial advisement was "severely lacking" and that the Family Court "should have done more to ensure that Goebel understood his rights, because he was a pro se defendant." However, Goebel does not identify what was

lacking or what more the Family Court should have done. As the quoted passage reveals, the Family Court's advisement accurately informed Goebel consistent with Tachibana and Lewis.

As to the end of trial colloquy, Tachibana requires that

> the trial court must be careful not to influence the defendant's decision whether or not to testify and should limit the colloquy to advising the defendant that he [or she] has a right to testify, that if he [or she] wants to testify that no one can prevent him [or her] from doing so, [and] that if he [or she] testifies the prosecution will be allowed to cross-examine him [or her]. In connection with the privilege against self-incrimination, the defendant should also be advised that he [or she] has a right not to testify and that if he [or she] does not testify then the jury can be instructed about that right.

Tachibana, 79 Hawai'i at 236 n.7, 900 P.2d at 1303 n.7 (citation omitted and block format altered). As this was a bench trial, an exchange regarding a jury instruction was not applicable. The Family Court's colloquy with Goebel consisted of the following:

> THE COURT: . . . At this juncture, though, I need to remind you of the Tachibana ruling, the one that says you can testify or you can decide not to testify.
>
> MR. GOEBEL: I don't need to testify . . . Your Honor.
>
> THE COURT: Okay, I want to -- I want you to understand the whole rule first before you tell me yes or no. I know pretty much in your mind what you want to do.
>
> Now, if you do testify, you're subject to cross-examination by the Prosecuting Attorney's Office. If you choose not to testify, the court cannot hold that against you in any way. It is your right to remain silent.
>
> Did you have enough time to consider both of your choices, that is, to testify and not to testify? Have you considered it?
>
> MR. GOEBEL: Yes, I've considered not to testify, Your Honor.
>
> THE COURT: Okay. And have you considered the pluses and minuses with both of those choices?
>
> MR. GOEBEL: Yes, sir.
>
> THE COURT: Okay, at this point, you -- you're electing to do what?
>
> MR. GOEBEL: Not testify.
>
> THE COURT: You're not going to testify at all?
>
> MR. GOEBEL: Yes, sir.

THE COURT: Very well. And it is your right not to testify. You are remaining silent at this point? So --

MR. GOEBEL: Yes, sir.

THE COURT: -- you will not be -- will you be calling any witnesses?

MR. GOEBEL: No, sir.

THE COURT: Very well. Okay, you're resting the case at this point?

MR. GOEBEL: Yes, sir.

THE COURT: Very well. Thank you.

Goebel argues that the Family Court "failed to conduct a complete colloquy, as Goebel was not informed about his right to testify or the fact that if he chose to testify, nobody could prevent him from doing so, as required by Tachibana." As the foregoing passage indicates, the Family Court did engage in a colloquy with Goebel. However, it does not reflect that the Family Court discussed with Goebel that if he did choose to testify, no one could prevent him from doing so. As this aspect of the Tachibana colloquy is required, the remaining inquiry is whether the omission harmed Goebel insofar as his waiver of his right to testify was not knowing and voluntary. State v. Akahi, 92 Hawai'i 148, 150, 988 P.2d 667, 669 (App. 1999). We conclude that the omission was harmless beyond a reasonable doubt.

"Under the harmless-beyond-a-reasonable-doubt standard, the question is whether there is a reasonable possibility that error may have contributed to conviction." Akahi, 92 Hawai'i at 150, 988 P.2d at 669 (citation and internal quotation marks omitted). "When deciding whether an error is harmless beyond a reasonable doubt, the error must be viewed in the light of the entire proceedings and given the effect which the whole record shows it to be entitled." Akahi, 92 Hawai'i at 151, 988 P.2d at 670 (citation and internal quotation marks omitted).

First of all, it is clear from the exchange that Goebel decided not to testify for himself. As the Family Court began its Tachibana colloquy, Goebel interrupted the court to say, "I don't need to testify." Our view is supported, not only by the Family Court's pre-trial advisement that "whether or not you want to testify is up to you" and "[i]t is your choice, and you need

to make the decision for yourself" but by the nature of Goebel's asserted defenses, that the protective order he was accused of violating was invalid, and that the prosecution had no authority to prosecute him because his mother, the purported victim in this case, did not authorize the prosecution. The former was a question of law and the latter was matter of fact that Goebel could not testify to from personal knowledge.

Second, while Goebel argues on appeal that the Family Court should have taken into account "salient facts" that called into question whether Goebel understood and voluntarily waived his right to testify, State v. Han, 130 Hawai'i 83, 91-92, 306 P.3d 128, 136-37 (2013) we find none here that indicate Goebel did not knowingly and voluntarily waive this right.

Goebel argues that his lack of legal representation should be considered a salient fact. However, the record amply supports the conclusion that Goebel knew his rights and exercised them as he saw fit. In a previous hearing before the Family Court, Goebel told the Family Court that he had been arrested forty-seven times, in which he represented himself twenty-five times and was successful in gaining dismissals or "no further action" in all twenty-five, whereas when he was represented by the public defender "[he] lost." The record is replete with examples of Goebel speaking to the Family Court, often interrupting the court, when he had something to say or a question to ask. For example, Goebel orally moved to dismiss the case when the prosecution asked for a continuance and asked for reduction of bail or release on his own recognizance, showing a sophisticated understanding of the options available to him as well as a willingness to speak up and assert his rights when he chose to do so. Thus, Goebel's lack of counsel does not support the notion that the Family Court should have taken "extra steps" to assure Goebel's understanding of his rights.

Moreover, as a *pro se* litigant, Goebel appears to have made his own decisions regarding the conduct of his defense. Unlike Tachibana, there is no indication in the record that any person influenced, let alone prevented, Goebel from testifying.

On appeal, Goebel argues that it is impossible to conclude beyond a reasonable doubt "that if the family court heard Goebel's version of the incident, 'it could not have created a reasonable doubt in the mind of the factfinder and, hence, that the error could not have contributed to the conviction.'"

However, such a speculative claim is not consistent with the arguments and factual representations Goebel actually made at trial. Goebel's arguments pertained to the validity of the underlying order for protection and whether the prosecution could proceed with this case without permission or authorization by the subject of the order, his mother.

Furthermore, Goebel did not refrain from presenting his version of the facts at trial. For example, Goebel interjected, during the State's witness's testimony, that he and his mother were headed to a grocery store and not the bank and that his mother walked with a cane as an objection to testimony that his mother could walk on her own. Goebel's insistence on making these relatively minor factual assertions at trial is inconsistent with the notion that he might have made other, more salient representations had he testified.

On this record, the failure to explicitly advise Goebel that no one could prevent him from testifying was harmless beyond a reasonable doubt.

Therefore, the Judgment of Conviction and Sentence/Notice of Entry, entered on December 3, 2012 in the Family Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, April 21, 2016.

On the briefs:

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Deputy Public Defender,
for Defendant-Appellant.

Brandon H. Ito,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Presiding Judge

Associate Judge

Associate Judge