

Electronically Filed
Intermediate Court of Appeals
CAAP-15-0000198
13-APR-2016
09:45 AM

NO. CAAP-15-0000198

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
LORNA M. MACASO, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 15-1-1059)

MEMORANDUM OPINION

(By: Nakamura, Chief Judge, and Foley and Leonard, JJ.)

Plaintiff-Appellee State of Hawaii (State) charged Defendant-Appellant Lorna M. Macaso (Macaso) with harassment, in violation of Hawaii Revised Statutes (HRS) § 711-1106(1)(a) (2014).^{1/} The Complainant, Dominador Macaso, Jr., was Macaso's ex-husband, and they had a child (Child) together. During a bench trial before the Family Court of the First Circuit (Family Court),^{2/} the State presented evidence that on the day of the charged incident, Complainant went to Macaso's house to pick up Child. Macaso was angry at Complainant because he was fifteen minutes late which would cause Macaso to be late for a job

^{1/} HRS § 711-1106(1)(a) provides that "[a] person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person . . . [s]trikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]"

^{2/} The Honorable Gale L.F. Ching presided.

interview. While Complainant was carrying Child, Macaso called him names, punched him twice in the face with a closed hand, and also struck him in the stomach.^{3/} The Family Court found Macaso guilty as charged. It sentenced her to six months probation and required her to attend anger management classes until clinically discharged. The Family Court entered its Amended Judgment on March 13, 2015.

On appeal, Macaso argues that her conviction must be overturned because the Family Court's Tachibana colloquy^{4/} was inadequate and thus rendered her waiver of her right to testify invalid. She also asserts that because English is not her primary language, there was a "possible language barrier" which is a "salient fact" in determining whether her waiver was valid. We conclude that Macaso's Tachibana claim is without merit and affirm her conviction.

BACKGROUND

The proceedings at issue in this case, including Macaso's entire trial, took place on the same day.

I.

Prior to commencing trial, the Family Court asked defense counsel whether Macaso needed an interpreter and was informed that she did not need one:

THE COURT: And, [defense counsel], your client, does she need an interpreter?

[DEFENSE COUNSEL]: Uh, I don't believe so, Your Honor. I have spoken with her extensively. I've interviewed her. I can effectively communicate with her.

THE COURT: Okay. You want to just ask her some things and put that on the record that she doesn't need an --

[DEFENSE COUNSEL]: Do you need an interpreter?

^{3/} The trial transcript shows Complainant as testifying that Macaso "punch me on my face and pinch me on my stomach[,] but Complainant, another witness, and the prosecutor subsequently refer to Complainant being hit or struck in the stomach by Macaso. In closing argument, defense counsel stated that Complainant testified he was punched in the stomach.

^{4/} Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995).

MS. MACASO: No. I understand English. But, uh, it's okay for me if, uh, it's English, but, uh, sometimes there's a word that I can't understand. If you elaborate it, I can understand.

THE COURT: Given that, [defense counsel], what's your position?

[DEFENSE COUNSEL]: Have you not understood any words that have been spoken so far today?

MS. MACASO: Uh, I understand.

[DEFENSE COUNSEL]: Okay. Um, I don't believe she needs an interpreter.

II.

Also before trial, the Family Court provided Macaso with a pretrial advisement pursuant to State v. Lewis, 94 Hawai'i 292, 12 P.3d 1233 (2000), as supplemented by State v. Monteil, 134 Hawai'i 361, 341 P.3d 567 (2014). Macaso stated that she understood the Family Court's advisement. The following exchange took place:

THE COURT: Okay. I'm going to read you something. Please listen carefully.

Before the court allows the defense to rest, it is critical that you understand your right to testify or not to testify in this trial. The decision is completely up to you and no one can force you to decide one way or the other. This decision is solely yours. If you decide to testify, the State of Hawaii will be allowed to cross-examine you. If you decide not to testify, your decision cannot be used against you or considered in any way whatsoever. Do you understand that?

[MACASO]: Yes, Your Honor.

THE COURT: Have you heard everything of what I've gone over with you?

[MACASO]: Yes, Your Honor.

THE COURT: In addition if you exercise your right not to testify, the court cannot use it against you in any way. Do you understand that?

[MACASO]: Yes, Your Honor.

THE COURT: Okay. So you've heard everything that I went over with you?

[MACASO]: (No audible response.)

THE COURT: Is that a yes?

[MACASO]: Yes, Your Honor.

THE COURT: And you understood everything?

[MACASO]: Yes, Your Honor.

THE COURT: Do you have any questions of the court at this time?

[MACASO]: No, Your Honor.

THE COURT: Okay. I'm not going to ask you for your answer on this matter at this time. I'm going to revisit this issue again or give you some time to talk it over with your attorney. Okay.

[MACASO]: Yes, Your Honor.

THE COURT: And at the appropriate time we'll come back to this again. Okay.

[MACASO]: Yes, Your Honor.

Counsel? THE COURT: All right. Thank you. Anything else,

[PROSECUTOR]: Nothing.

[DEFENSE COUNSEL]: Nothing further, Your Honor.

III.

After the State completed its case in chief and immediately prior to the defense resting, the Family Court engaged in the following Tachibana colloquy:

THE COURT: Okay. Um, before we proceed I'm going to return to the Tachibana.

[DEFENSE COUNSEL]: Uh, may I have a moment to speak with my client outside?

THE COURT: Sure.

. . . .

THE COURT: We're back on the record. The record should reflect the presence of the defendant, her counsel, and the prosecutor.

Um, you can have a seat. I'm just going to review the Tachibana matter again. Okay.

[DEFENSE COUNSEL]: Thank you, Your Honor.

THE COURT: Just please listen carefully. Before the court allows the defense to rest, it is critical that you understand your right to testify or not to testify in this trial. The decision is completely up to you and no one can force you to decide one way or the other. This decision is solely yours.

If you decide to testify, the State of Hawaii will be allowed to cross-examine you. If you decide not to testify, your decision cannot be used against you or considered in any way whatsoever. In addition if you exercise your right not to testify, this court as the finder of fact cannot use this against you in deciding this case. Okay?

Have you heard everything that the court has gone over with you?

[MACASO]: Yes, Your Honor.

THE COURT: I'm sorry?

[MACASO]: Yes, Your Honor.

THE COURT: Okay. And did you understand what the court has gone over with you?

[MACASO]: (No audible response.)

THE COURT: Did you understand what the court stated?

[MACASO]: Yes, Your Honor.

THE COURT: Okay. And do you have any questions of the court at this time?

[MACASO]: No, Your Honor.

THE COURT: Okay. Um, have you made a decision on this matter whether to testify or not to testify?

[MACASO]: Um, not to testify, Your Honor.

THE COURT: Okay. And you've discussed this with your attorney?

[MACASO]: Yes, Your Honor.

THE COURT: Okay. Um, has anyone made any promises, threats, or pressured you in any way concerning your decision?

[MACASO]: No, Your Honor.

THE COURT: Is this your own decision and yours alone?

[MACASO]: Yes, Your Honor.

THE COURT: Is your mind clear?

[MACASO]: Yes, Your Honor.

THE COURT: And what is your date of birth?

[MACASO]: Uh, April 18, 1971.

THE COURT: Okay. Do you have any difficulty with the English language?

[MACASO]: Um, yes, Your Honor.

THE COURT: Okay.

[MACASO]: Sometimes.

THE COURT: Sometimes. But with respect to what, uh, you and your attorney has discussed and what the court and you have discussed, have you been able to understand what we've been talking about?

[MACASO]: Yes, Your Honor.

THE COURT: Okay. And you -- did you need an interpreter?

[MACASO]: Uh, no, Your Honor.

THE COURT: Okay. Are you suffering from any type of mental or emotional issues?

[MACASO]: No, Your Honor.

THE COURT: Have you taken any drugs, medication, or alcohol within the last 48 hours?

[MACASO]: No, Your Honor.

THE COURT: And is your mind clear?

[MACASO]: Yes, Your Honor.

THE COURT: Do you have any questions of the court or of your attorney at this time?

[MACASO]: (No audible response.)

THE COURT: Do you have any questions of the court, of me, or of your attorney at this time that you would like to ask?

[MACASO]: No, Your Honor.

THE COURT: Okay. Um, is there any -- counsels have any further colloquy in this area --

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: -- that you would want the court to ask counsel?

[DEFENSE COUNSEL]: No, Your Honor.

[PROSECUTOR]: No, Your Honor.

THE COURT: Okay. Okay. Based -- based on what has been discussed with the defendant, the court finds that the defendant has made a knowing, voluntary, and informed decision not to testify and has done so with a full understanding of the consequences of the decision.

[DEFENSE COUNSEL]: Thank you, Your Honor.

(Emphases added.)

DISCUSSION

Macaso concedes that the Family Court's pretrial advisement complied with the requirements of Lewis and Monteil.^{5/} Macaso also concedes that the Family Court "did advise [Macaso] of all the rights that Tachibana requires[.]"^{6/} Macaso, however, argues that the Family Court's Tachibana colloquy was inadequate because the Family Court "did not sufficiently ascertain whether or not [Macaso] understood those rights." In particular, Macaso contends that the Family Court failed to engage her in a "meaningful exchange" regarding whether she understood her rights, and therefore it lacked an "objective basis" for finding that she knowingly and voluntarily waived her right to testify. We disagree with Macaso's arguments.

I.

We look to the totality of the facts and circumstances to determine whether Macaso's waiver of her right to testify was voluntarily and intelligently undertaken. See State v. Han, 130

^{5/} In Lewis, the Hawai'i Supreme Court required that before trial, courts must "(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." Lewis, 94 Hawai'i at 297, 12 P.3d at 1238. In Monteil, the supreme court added the requirement that "the trial courts when informing the defendant of the right not to testify during the pretrial advisement must also advise the defendant that the exercise of this right may not be used by the fact finder to decide the case." Monteil, 134 Hawai'i at 373, 341 P.3d at 579.

^{6/} In Tachibana, the supreme court stated that the trial court should advise 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 (brackets omitted) (quoting State v. Neuman, 371 S.E.2d 77, 82 (W. Va. 1988)).

Macaso refers to each element of the Tachibana advisement as a "right" she was required to understand to validly waive her right to testify. For simplicity, we also use the term "right" when referring to each element of the Tachibana advisement.

Hawai'i 83, 89, 306 P.3d 128, 134 (2013). Here, the Family Court provided Macaso with a pretrial advisement pursuant to Lewis and Monteil, and Macaso told the Family Court she understood what the court had said and did not have any questions at that time. After the State had completed its case in chief and immediately before the defense rested, the Family Court advised Macaso of the rights required by Tachibana. The Family Court then asked Macaso if she understood what the court had stated, and she answered, "Yes, Your Honor." The Family Court asked Macaso if she had any questions, and she said, "No[.]" After Macaso informed the Family Court that she decided not to testify, the Family Court confirmed through additional questioning of Macaso that she had discussed her decision with her attorney; that she was not pressured in any way concerning her decision; that the decision not to testify was her decision; that her mind was clear; and that she did not need an interpreter and had been able to understand what she and her attorney had discussed and what she and the Family Court had been talking about. The Family Court then again asked Macaso whether she had any questions for the court and also whether she had any questions for her attorney. Macaso responded, "No, Your Honor." The Family Court also asked defense counsel whether any further colloquy was desired, and defense counsel said no.

Based on the record in this case, we conclude that the Family Court's Tachibana colloquy with Macaso was sufficient. The Family Court's questioning of and exchanges with Macaso were sufficient to enable it to ascertain that Macaso understood her rights. In particular, Macaso explicitly acknowledged understanding her rights and told the Family Court that she did not have any questions. We conclude that the Family Court's colloquy provides assurance that Macaso understood her rights, and it provided an objective basis to support the Family Court's finding that Macaso "made a knowing, voluntary, and informed decision not to testify and has done so with a full understanding of the consequences of the decision."

II.

Citing the Tachibana colloquy provided in State v. Christian, 88 Hawai'i 407, 414-15, 967 P.2d 239, 246-47 (1998), Macaso argues that the Tachibana colloquy in her case was deficient because the Family Court did not stop after advising her of each right of the Tachibana advisement to ask whether she understood that right. We disagree.

Although the Hawai'i Supreme Court concluded in Christian that "the trial judge assiduously followed the procedures mandated in Tachibana[,] "Christian, 88 Hawai'i at 420, 967 P.2d at 252, and has cited the Tachibana colloquy in Christian as a model, see Han, 130 Hawai'i at 91 n.6, 306 P.3d at 136 n.6, the supreme court has not held that the method used to conduct the Tachibana colloquy in Christian is the only way to obtain a valid waiver. Indeed in Han, the supreme court stated that the first time the trial court should have requested a response from the defendant was after the trial court had advised the defendant that he had a right to testify, that the decision to testify was his alone, that no one could force him to testify, that he had the right to remain silent, and that if he exercised that right, the jury would be instructed not to hold that against him. Han, 130 Hawai'i at 90-91, 306 P.3d at 135-36.^{2/} Accordingly, stopping after each right of the Tachibana advisement to determine whether the defendant understands that right is not a *per se* requirement for an adequate Tachibana colloquy.^{3/} That said, because the method used in Christian to

^{2/} In Han, the supreme court also noted that the trial court had failed to advise the defendant that if he testified, the prosecution would be allowed to cross-examination him, as well as other ways in which the trial court's advisement of rights varied from that described in Tachibana. Han, 130 Hawai'i at 93 n.8, 306 P.3d at 138 n.8.

^{3/} In State v. Pomroy, 132 Hawai'i 85, 319 P.3d 1093 (2014), the supreme court cited the trial court's reciting "a litany of rights" and then asking the defendant whether he "understood that" in support of its conclusion that the trial court had failed to engage the defendant in a "true colloquy." Pomroy, 132 Hawai'i at 93, 319 P.3d at 1101. However, the supreme court further noted that "it is unclear which right 'that' referenced" and cited other indications in the record of the defendant's lack of understanding of his rights in holding that his waiver of his right to testify was invalid. Id. at 93-94, 319 P.3d at 1101-02.

conduct the Tachibana colloquy has been cited favorably by the supreme court, it provides a safe harbor and clear method for establishing a valid Tachibana colloquy.

III.

Macaso relies upon Han in arguing that the Tachibana colloquy in this case was deficient. We conclude that Macaso's reliance on Han is misplaced. Unlike in this case, the trial court in Han did not ask Han whether he understood his rights, did not obtain Han's acknowledgment that he understood his rights, did not ask Han if he had any questions about his rights, and did not advise Han of all the rights required by Tachibana. See Han, 130 Hawai'i at 88, 90-91, 306 P.3d at 133, 135-36. Han is therefore distinguishable and does not control the decision in this case.

In this case, the Family Court advised Macaso of all the rights required by Tachibana, asked Macaso whether she understood those rights, obtained her acknowledgment that she understood her rights, and determined that she did not have any questions about her rights. There is nothing in the record to suggest that Macaso lacked an understanding of her rights. We conclude that the Tachibana colloquy in this case was adequate and that Macaso's on-the-record waiver of her right to testify was valid.

IV.

Our conclusion is not affected by the "salient fact" that English does not appear to be Macaso's primary language. The Family Court established through its inquiries on the record that Macaso's command of the English language was sufficient for a valid waiver of rights. Before trial, Macaso's counsel advised the Family Court that he did not believe Macaso needed an interpreter as he had interviewed her, had spoken with her extensively, and was able to communicate with her effectively. Macaso also confirmed that while she might need elaboration for certain words, she understood English and did not need an interpreter. During the Family Court's Tachibana colloquy,

Macaso reaffirmed that she did not need an interpreter and further acknowledged that she understood what she and the court had been discussing, which included the court's advisement of her rights. Accordingly, the record shows that Macaso's command of English was sufficient for her to understand the Family Court's advisement of rights and to validly waive her right to testify.

CONCLUSION

For the foregoing reasons, we affirm the Family Court's Amended Judgment.

DATED: Honolulu, Hawai'i, April 13, 2016.

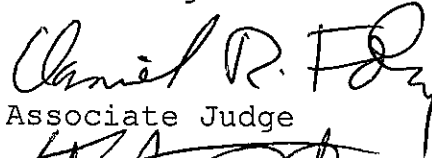
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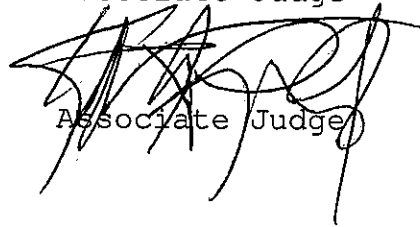
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Chief Judge



Associate Judge



Associate Judge