

NO. 24297

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

LEOPOLDO SCHNEIDEWIND, Defendant-Appellant.

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APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT  
(FC-CR. NO. 00-01-0930)

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

Defendant-appellant Leopoldo Schneidewind appeals from the judgment of conviction and sentence of the Family Court of the Second Circuit, the Honorable Ruby Hamili presiding, adjudging him guilty of abuse of a family or household member, in violation of Hawai'i Revised Statutes (HRS) § 709-906 (Supp. 2000).<sup>1</sup> Schneidewind claims that the trial court erred by failing to: (1) engage him in a colloquy concerning his

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<sup>1</sup> HRS § 709-906 states in pertinent part:

(1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member or to refuse compliance with the lawful order of a police officer under subsection (4). The police, in investigating any complaint of abuse of a family or household member, upon request, may transport the abused person to a hospital or safe shelter.

For the purposes of this section, "family or household member" means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

constitutional right to testify on his own behalf; and (2) allow him to exercise his right of allocution. For the reason discussed below, we vacate the judgment of conviction and sentence of the family court and remand this case for further proceedings.

#### I. BACKGROUND

On November 21, 2000, Schneidewind was charged by complaint with two counts of violating HRS § 709-906. Schneidewind waived his right to a jury trial, and a bench trial was held on March 15, 2001.

At the close of the prosecution's case, the trial court indicated that it would reconvene the following week in order for the defense to present its case. The defense responded that it "would prefer to have this matter settled now," and stated that it would rest without presenting a case. Subsequently, the court engaged Schneidewind in the following colloquy:

THE COURT: Having no witnesses to present, Mr. Schneidewind, your counsel indicates that you are not presenting a defense and with respect to this matter you're entitled to many rights under the constitution, and many of those include the right to remain silent. You understand that?

[Schneidewind]: Uh-huh, I do.

THE COURT: So that you have that right to sit here and have the State put the test -- put to the test. You understand that?

[Schneidewind]: I do.

THE COURT: And you understand that they have the burden of proving this case beyond a reasonable doubt?

(No audible answer.)

THE COURT: Now, if you should decide at any time during this trial that you wish to present evidence, that no one in this courtroom can prevent you from doing that. You understand that, Mr. Schneidewind?

(No audible response.)

THE COURT: So with respect to not presenting a defense in this matter regarding further witnesses or exhibits of photos?

[Schneidewind]: Uh-huh.

THE COURT: Is that something you wish to do, not present a case?

[Schneidewind]: No.

THE COURT: Because you understand that your counsel is not the one on trial.

(No audible response.)

THE COURT: Okay. With respect to this matter, Mr. Schneidewind, this Court, having had a colloquy with you, understands that you do not wish to proceed with a case of witnesses or otherwise?

[Schneidewind]: Huh-huh.

After hearing arguments, the trial court found Schneidewind guilty of the second count of violating HRS § 709-906.<sup>2</sup> Schneidewind was sentenced to, inter alia, one year of probation. On March 30, 2001, the trial court filed an order granting the defense's motion to stay the sentence pending appeal. Schneidewind timely filed his notice of appeal.

## II. STANDARDS OF REVIEW

A defendant may waive his or her constitutional right to testify. Tachibana v. State, 79 Hawai'i 226, 232, 900 P.2d 1293, 1299 (1995). "A waiver is the knowing, intelligent, and voluntary relinquishment of a known right. Thus, to determine whether a waiver was voluntarily and intelligently undertaken, this court will look to the totality of facts and circumstances of each particular case." State v. Friedman, 93 Hawai'i 63, 68-69, 996 P.2d 268, 273-74 (2000) (citations, internal quotation marks, and brackets omitted).

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<sup>2</sup> On May 2, 2001, a judgment of acquittal was entered as to the first count of the complaint.

### III. DISCUSSION

In Tachibana, this court held that "trial courts must advise criminal defendants of their right to testify and must obtain an on-the-record waiver of that right in every case in which the defendant does not testify." 79 Hawai'i at 236, 900 P.2d at 1303. To ensure that evidence of a valid waiver appears in the record, courts are required to engage defendants in a colloquy advising them that: (1) they have a right to testify and that no one can prevent them from doing so; (2) if they testify, the prosecution will be allowed to cross-examine them; (3) they have a right not to testify; and (4) if they do not testify, the jury can be instructed about that right. Id. at 236 n.7, 900 P.2d at 1303 n.7.

In the present case, the colloquy by the trial court did not specifically advise Schneidewind of his right to testify and did not advise him of the consequences of both exercising and waiving that right. Additionally, no waiver of Schneidewind's right to testify appears in the record. Thus, the trial court erred by not obtaining an on-the-record waiver of Schneidewind's right to testify as required by Tachibana. Moreover, the prosecution does not argue and the record does not indicate that the violation of Schneidewind's right to testify was harmless beyond a reasonable doubt.

IV. CONCLUSION

Based upon the foregoing, we hold that the family court erred by not obtaining the on-the-record waiver of Schneidewind's right to testify as required by Tachibana. Accordingly, we vacate Schneidewind's judgment of conviction and sentence and remand this case for a new trial.<sup>3</sup>

DATED: Honolulu, Hawai'i, July 17, 2002.

On the briefs:

Georgia K. McMillen,  
for defendant-appellant

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Deputy Prosecuting Attorney,  
for plaintiff-appellee

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<sup>3</sup> Because we hold that this case must be remanded for a new trial, we do not address Schneidewind's allegation of error regarding his right of allocution.