

NO. 22967

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
BRENNEN ROBERTS, Defendant-Appellant.

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT COURT
(FC-CRIMINAL NO. 99-2171)

MEMORANDUM OPINION

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

Defendant-Appellant Brennen Roberts (Roberts) appeals, on the basis of insufficiency of the evidence, the October 19, 1999 judgment of the family court of the first circuit, which convicted him, upon a bench trial, of the offense of abuse of family or household members, in violation of Hawai'i Revised Statutes (HRS) 709-906.¹ Concluding that there was substantial evidence adduced at trial to support the conviction, we affirm.

I. Background.

At the trial on October 19, 1999, the State's first witness was the victim, Sage Southcott (Southcott).

¹ Hawai'i Revised Statutes § 709-906 (Supp. 2000) provides, in pertinent part, that "[i]t shall be unlawful for any person, singly or in concert, to physically abuse a family or household member[.]"

Southcott testified that she is the mother of Nainoa, then eighteen months old. Roberts, her boyfriend, is the father. At the time of the trial, Southcott and Roberts were living together. On June 19, 1999, however, they were living apart. Southcott remembered that she went over to Roberts' Ewa Beach residence at about 8 p.m. that night. She had left Nainoa there earlier.

At about 10 p.m., as Southcott was getting ready to leave, she asked Roberts whether Nainoa could stay with him that night. Roberts refused and told Southcott to take Nainoa with her. A tense disagreement over the issue ensued, which Southcott ended by walking away to her car without Nainoa. But Roberts followed with Nainoa and placed the baby into Southcott's car. Southcott thereupon took Nainoa and put him right back outside the car on the road near Roberts. By this time, both parents were angry with each other.

Roberts then pushed and bent the driver's side, front door of Southcott's car the wrong way, which buckled the front side panel. According to Southcott, "I jumped out and I was mad." The couple started yelling at each other, which caused Nainoa to cry and to fall over. Roberts picked up Nainoa and resisted Southcott's requests for the baby, fearing that Southcott would take Nainoa and "drive off in a rage with our door broken." Southcott testified that "he just held onto him and I just kept trying to get him and he was just kind of

stopping me from grabbing him and driving off like that, you know." Because she was angry, Southcott went to a neighboring residence and called 911. Southcott testified that she sustained only redness on her right ear as a result of the scuffle. She denied receiving any scratches or bruises. There was, she said, "no blood."

The State proffered the audiotape of Southcott's 911 call, and it was received into evidence and played for the court. On the audiotape, Southcott can be heard sobbing and telling the 911 dispatcher in a tremulous voice that "this asshole is hitting me and broke my car door." Explaining her assault allegation, Southcott told the dispatcher that "he punched me in my face."

After the audiotape was played for the court, Southcott adamantly maintained, in the face of insistent questioning by the State, that Roberts did not hit her in the face or at all that night. Whereupon the State proffered and the court received into evidence the Honolulu Police Department Statement Form 252 that Southcott hand-wrote and signed at 10:30 p.m. that night. In her 252 statement, Southcott wrote that "he hit me several times in my face and neck once closed fist the others open handed. . . . I feel pain to my nose area and to my neck." She closed with, "I will press charges."

Confronted by her statements on the 911 audiotape and her 252 statement, Southcott admitted:

Q [PROSECUTOR] Okay. You're back together with [Roberts], aren't you?

A Yes.

Q And you're not working right now?

A No. I start later this week.

Q Okay. Does [Roberts] -- does [Roberts] work now?

A Yes, he does.

Q Okay. So where do you get the money to be able to support the family?

A [Roberts].

Q And isn't it true that you would just assume [sic] this case went away?

A Yeah.

Q Okay. Because you've made up with him; right?

A Yeah.

Q All right. And you would prefer that the charges weren't -- that the charges that we have here of abuse -- you'd prefer that all that was just dropped, don't you?

A Yes.

Q And isn't that really the reason why you're making the statements that you're making today?

A Yes.

Q Okay. You love [Roberts] now?

. . . .

A Yes, I do.

Q And you don't want to get him in any trouble; right?

A No, I don't.

On cross-examination, defense counsel endeavored to rehabilitate Southcott:

Q [DEFENSE COUNSEL] But the reason why you want the charges dropped, though, is because they weren't true; is that correct?

A Yes.

Q He never hit you?

A He didn't hit me.

Q And when you wrote the police report and when you called 911 and when he informed you that he hit you, that was a lie then; is that correct?

A Yes.

Defense counsel also elicited from Southcott a line of testimony suggesting that the train of incidents of the evening had made her increasingly incensed, to the point that she made up her accounts of physical abuse just to get Roberts into trouble. In the course of this line of questioning, Southcott characterized the physical contact as more of a push or a "blocking" movement.

One of the police officers who responded to the scene, Coreen Rivera, testified that Southcott was upset and "kind of teary-eyed" at the scene. Southcott told her that Roberts had "slapped her several times in the face, that -- the neck area, and then he hit her on her nose." Officer Rivera trained her flashlight on Southcott and saw "a little bit redness on her neck and her nose area of her face." Southcott also told Officer Rivera that she felt pain from the blows.

Officer Rivera also had occasion to speak with Roberts at the scene. Roberts told her that Southcott had thrown Nainoa to the ground. He also "said . . . something about they got into an argument and at no time did he hit her. He just pushed her." Officer Rivera examined Nainoa for injuries and observed none.

In his case, Roberts testified that Southcott was leaving his residence with Nainoa when he offhandedly said that he was going into his house to take a shower. Roberts divined that this made Southcott angry because she assumed he was going out somewhere afterwards. Southcott then insisted upon leaving Nainoa with Roberts. Roberts insisted that she take Nainoa with her as she had originally intended. According to Roberts, "things just escalated from there."

Roberts grabbed Nainoa and put him in Southcott's car. In response, Southcott grabbed Nainoa and put him on the road outside the car. Roberts claimed that as Southcott was closing her car door, he became afraid that the door was going to hit Nainoa. He pushed the door back, which caused the door hinge to bend. As Roberts picked up Nainoa, an incensed and swearing Southcott got out of the car and began attacking him. Southcott demanded that Roberts give Nainoa to her, but he refused because he was afraid for Nainoa's safety. Southcott threatened to call the police and get him arrested if he did not give Nainoa up. As Southcott continued to advance on him, Roberts retreated backwards and put up his left hand to block her. Southcott

eventually gave up the offensive and went into a house, saying, "okay, I'm calling the cops." Roberts maintained that he did not hit Southcott. Roberts admitted that his left hand made contact "with her hands or whatever," but claimed that was the extent of it.

In finding Roberts guilty as charged, the court found as follows:

The Court has heard the evidence presented by the State and the defense in this particular case -- the State, by and through its witnesses, and the defendant on his own behalf.

In any case, the Court must rely upon what it construed as the credible testimony in the case. And credibility is not only whether or not a person's telling the truth, of course, but how much weight and effect the Court is going to be giving to that particular testimony.

There is no doubt in this case that a situation could have been avoided but it wasn't. And the question here is whether or not the defendant did violate the law with his actions towards the complaining witness.

In this case, based upon the credible evidence, the Court does find that the State has proven its case beyond a reasonable doubt. The Court does find the defendant guilty as charged, predicated not only upon what the Court believes the credible testimony was so far as between the defendant and the complaining witness, but also based upon the consistency of the observations of the officer with what has been alleged here. Accordingly, that is the Court's decision.

During sentencing, Roberts made allocution, saying, "I didn't intentionally hurt her or try to hurt her. All I did was -- I just thought about the safety of my child." The court responded: "Thank you. As I said, this could have been avoided. And I

understand your concerns of the safety of your child. But after -- what took place after that is the -- was the Court's concern. I don't think it rises to the issue of a self-defense or just trying to contain a situation. I believe it went beyond that. That's the Court's decision."

The court sentenced Roberts to one year of probation, subject to terms and conditions including the mandatory two days in jail. HRS § 709-906(5) (a). Sentence was stayed pending appeal.

II. Discussion.

Roberts raises a single issue on appeal. He contends there was insufficient evidence adduced at trial to convict him of abuse of family or household members.

In considering whether evidence adduced at trial is sufficient to support a conviction, we are guided by the following principles:

On appeal, the test for a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact. **State v. Ildefonso**, 72 Haw. 573, 576, 827 P.2d 648, 651 (1992); **State v. Tamura**, 63 Haw. 636, 637, 633 P.2d 1115, 1117 (1981). "It matters not if a conviction under the evidence as so considered might be deemed to be against the weight of the evidence so long as there is substantial evidence tending to support the requisite findings for the conviction.'" **Ildefonso**, 72 Haw. at 576-77, 827 P.2d at 651 (quoting **Tamura**, 63 Haw. at

637, 633 P.2d at 1117). “‘Substantial evidence’ . . . is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion.” See *id.* 72 Haw. at 577, 827 P.2d at 651 (quoting ***State v. Naeole***, 62 Haw. 563, 565, 617 P.2d 820, 823 (1980)).

State v. Matias, 74 Haw. 197, 207, 840 P.2d 374, 379 (1992).

“Furthermore, ‘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[.]’” *Tachibana v. State*, 79 Hawai‘i 226, 239, 900 P.2d 1293, 1306 (1995) (citation omitted).

HRS § 709-906 (Supp. 2000) provides, in pertinent part, that “[i]t shall be unlawful for any person, singly or in concert, to physically abuse a family or household member. . . . For purposes of this section, ‘family or household member’ means . . . persons who have a child in common, . . . and persons jointly residing or formerly residing in the same dwelling unit.” For purposes of the statute, to “physically abuse” someone means to “maltreat in such a manner as to cause injury, hurt, or damage to that person’s body.” *State v. Nomura*, 79 Hawai‘i 413, 416, 903 P.2d 718, 721 (App. 1995).

In order to convict a defendant of abuse of family or household members, the prosecution must prove, beyond a reasonable doubt, that the defendant (1) physically abused a family or household member, and (2) did so intentionally,

knowingly or recklessly. State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996).

In contending that there was insufficient evidence adduced at trial to convict, Roberts argues, specifically, as follows:

The evidence adduced at trial was insufficient to show that [Roberts] acted with the requisite state of mind to justify a conviction for Abuse of Household Member. The evidence showed that he and [Southcott] had gotten into an argument over whether the baby would stay over with [Roberts]. However, it was already understood that [Southcott] would take the baby home. An argument followed and [Roberts] walked to [Southcott's] car and put the baby into the car. [Southcott], however, removed the baby from the car and placed the baby in the street and proceeded to close the door. Believing that the baby would be hurt, [Roberts] pushed the door back away from the baby and in one movement, scooped the baby back into his arms. [Southcott] then came out of the car and yelled obscenities at [Roberts] and tried to take the baby back. [Roberts] refused because he feared for Nainoa's safety. He believed that [Southcott] had almost harmed the baby once and was capable of doing so again. When [Southcott] grabbed for the baby, he pushed her back but had no memory of where his hand may have made contact or how hard the contact may have been.

In light of these circumstances, the evidence does not show that [Roberts] intentionally or knowingly, or even recklessly, injured [Southcott] when he pushed her away. And if there were injuries, the evidence at most shows that [Roberts'] actions were negligent.

What this argument boils down to is an assertion that the court was wrong in its assessment of the credibility of the witnesses and the weight of the evidence. As we have noted above, however, an appellate court will not tread upon a trial

court's assessment of the credibility of the witnesses and the weight of the evidence. Tachibana, 79 Hawai'i at 239, 900 P.2d at 1306. Rather, in an inquiry into the sufficiency of the evidence, we take the evidence in the light most favorable to the State. Matias, 74 Haw. at 207, 840 P.2d at 379.

The court was therefore entitled, in the exercise of its exclusive trial prerogatives, to credit Southcott's statements in her 911 call and her 252 statement, and to discount the exculpatory story contained in her recantation at trial and in Roberts' testimony. The court's rendition of its ruling, quoted above, indicates that it did just as we have described. The evidentiary residue remaining, viewed in the light most favorable to the State, establishes that Roberts struck Southcott in and about the face, hurting her, which was the culmination of an intense argument, which in turn amply demonstrates that Roberts did so in anger and on purpose; in other words, intentionally.

Hence, we conclude there was substantial evidence to convict Roberts as charged.

III. Conclusion.

We therefore affirm the October 19, 1999 judgment of the family court of the first circuit.

DATED: Honolulu, Hawaii, February 9, 2001.

On the briefs:

Linda C. R. Jameson,
Deputy Public Defender,
for defendant-appellant.

Acting Chief Judge

Donn Fudo,
Deputy Prosecuting Attorney,
for plaintiff-appellee.

Associate Judge

Associate Judge