NO. 22896

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
ERIC HOO, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(FC-CR. NO. 99-1690)

MEMORANDUM OPINION
(By: Burns, C. J., Watanabe and Lim, JJ.)

Defendant-Appellant Eric Hoo (Defendant) appeals the September 3, 1999 judgment of the family court of the first circuit, which convicted him of one count of violation of an order for protection, in violation of Hawaiʻi Revised Statutes (HRS) § 580-10(d) (1993), and one count of terroristic threatening in the second degree, in violation of HRS § 707-717(1) (1993), and which sentenced him on each count to one year of concurrent probation upon terms and conditions, including sixty days of incarceration. Defendant also appeals the court's September 24, 1999 order denying his motion for a new trial and his motion for reconsideration of his sentence. We affirm.

I. Relevant Statutes.

At the time of Defendant's arrest, HRS § 580-10(d) provided, in pertinent part:

Restraining orders; appointment of master. . . .

. . . .

(d) Whenever it is made to appear to the court after the filing of any complaint [for annulment, divorce or separation], that there are reasonable grounds to believe that a party thereto may inflict physical abuse upon, threaten by words or conduct, or harass the other party, the court may issue a restraining order to prevent such physical abuse, threats, or harassment, and shall enjoy in respect thereof the powers pertaining to a court of equity. Where necessary, the order may require either or both of the parties involved to leave the marital residence during the period of the order, and may also restrain the party to whom it is directed from contacting, threatening, or physically abusing the children or other relative of the spouse who may be residing with that spouse at the time of the granting of the restraining order. The order may also restrain a party's agents, servants, employees, attorneys, or other persons in active concert or participation with the respective party.

(1) A knowing or intentional violation of a restraining order issued pursuant to this section is a misdemeanor.

HRS § 707-717 provides:

Terroristic threatening in the second degree. (1) A person commits the offense of terroristic threatening in the second degree if the person commits terroristic threatening other than as provided in section 707-716 [terroristic threatening in the first degree].

(2) Terroristic threatening in the second degree is a misdemeanor.

HRS § 707-715 (1993) provides, in relevant part:

> **Terroristic threatening, defined.** A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person . . . in reckless disregard of the risk of terrorizing, another person[.]

II. Background.

Evidence at the August 26, 1999 jury trial revealed the following.

Dona Diane Tomita (Dona) testified on direct examination that she married Defendant in 1988. They had one child, a nine-year-old girl named Tara, who attends the Maryknoll Grade School. In 1995, they divorced. In connection with the divorce, the family court issued a restraining order (RO) against Defendant. In January of 1999, Dona renewed the RO for three more years, until sometime in 2002.

A police officer had previously testified that he served the 1999 RO upon Defendant on February 10, 1999. The officer explained the specifics of the RO to Defendant and Defendant indicated that he understood them. Defendant signed a proof of service of the RO acknowledging his receipt of a copy of the RO and his understanding of the RO.

Pertinent terms of the RO are as follows:

> 1 . . . Defendant is prohibited from personally contacting [Dona] and any minor children residing in the household at home, school or babysitters which includes telephoning, visiting and/or remaining within three (3) blocks of the place of residence,

school and/or employment of [Dona], and particularly the school of the minor child [Tara] located at (Maryknoll Schools) 1722 Dole Street, Honolulu, Hawaii, 96822.

. . . .

2 . . . [Dona] shall report any violations of this Order within five (5) minutes to the . . . Honolulu Police Department, phone 911[.]

3 . . . Defendant is prohibited from personally contacting the minor child [Tara] at home, school or babysitter's which includes telephoning, visiting and/or remaining within three (3) blocks of the place of residence and/or school of said minor child.

4 . . . The terms of this Order shall be explained by the serving officer to the Defendant. The serving officer shall file a Return of Service and/or Affidavit confirming that the terms of this order were explained to Defendant and that Defendant understood the terms and conditions of this Order and the possible criminal sanctions for violating it.

Dona further testified that on April 18, 1999, the day of Tara's First Communion, she and her husband (Dona had remarried after her divorce from Defendant), along with other family members and friends, attended the 9:30 a.m. liturgy at the Sacred Heart Church. The director of religious education for the Maryknoll Schools Sacred Heart Parish had previously testified that Sacred Heart Church is located within the Maryknoll Grade School campus on the same city block.

Dona remembered that she sat with her husband and her in-laws in the second pew from the front of the church. Dona's seat was the second from the center aisle of the church. Her husband's seat was the first.

During the sacrament, Dona noticed Defendant standing in the back of the church, watching. She was shocked because she knew that the RO prohibited him from being within three blocks of the school property. Eventually, Defendant came up the center aisle to receive communion. After he received communion, Defendant said hello to Tara, who was sitting to the side facing the audience. Defendant then walked down the side aisle and returned to the back of the church. There were no words or eye contact exchanged between Dona and Defendant at this point.

After the ceremony was over, Dona was concerned about the situation, so she told Tara to come to her. Tara complied and came into their pew. As Dona and the family were congratulating her, Defendant approached Tara.

Defendant had a small gift package and a camera in his hands. Standing at the entrance to the pew, about one to two feet away from Dona, Defendant spoke to Tara. He told her that the gift was for her First Communion and that he wanted to take pictures with her and the priest. As Defendant started to lead Tara out of the pew, Dona protested that he was not supposed to be there. She pulled Tara behind her. At this point, Dona and Defendant were face-to-face. Dona's husband was standing outside their pew by the first pew.

Dona again told Defendant that he was not supposed to be there. She warned him that she was going to call the police. Defendant told her to go ahead and call the police. Then he told

her, "Fuck you." Shocked, Dona picked up her cellular phone and started to dial. Defendant entered the pew, leaned in towards Dona, put his face in close to hers, and with his left hand in the shape of a handgun ("pointer finger extended, . . . thumb up in the air, and the rest of [the] fingers in a fist[]"), put his index finger to her right temple and told her, "Boom, you haven't heard the last of this." Dona pulled back, shaking. Defendant left the pew and walked away.

On cross-examination, Dona acknowledged that when she obtained the extension of the RO in January 1999, she knew Defendant had lived on Alexander Street, within three blocks of the campus/church complex, for approximately two years. However, Dona testified under redirect examination that, at the time of the trial, Tara had been attending the Maryknoll Grade School for six years, and that the RO had been in continuous effect since its inception in 1995.

Father Marc Alexander, the pastor of Sacred Heart Parish, testified that Defendant approached him outside the church after the April 18, 1999 mass and expressed his desire to congratulate Tara on her First Communion. Cognizant of the RO, Father Alexander told Defendant that he had to leave. Defendant responded, something to the effect, "well, you know, there's a separation of church and state, you know, I'm here for a service[,]" but Father Alexander insisted that he leave. Thereupon, Defendant appeared agitated and repeated his comment

about the church-state dichotomy. A short while later, Defendant again approached Father Alexander, this time inside the church. Father Alexander reminded Defendant that he had to leave on account of the RO. Father Alexander did not notice what Defendant did after that, but later he came upon Dona in the church and saw that she was "crying and upset."

Defendant testified on direct examination that he lives in an apartment on Alexander Street, across the street from the campus/church complex. At the time of the trial, he had lived there for about four years. He owns and runs a business on South King Street, three blocks away from his residence.

At another point during direct examination, Defendant admitted that his residence is within the three-block radius prohibited to him by the RO. He admitted that his living there is a violation of the RO, but explained: "It is a violation of the restraining order. And my former wife knows about it, and we agreed upon it, and there's a provision in here on the -- page 3, the first paragraph, where it says if plaintiff knows of a violation, she has five minutes to call the police department. Over the years, she wasn't [sic] called."

Defendant further testified that, as a "regular parishioner[,]" he always attends the 9:30 a.m. Sunday mass at Sacred Heart Church. He admitted attending the April 18, 1999 mass. It was a special mass to him because Tara was having her

First Communion, and he felt a moral obligation as a parent and a parishioner to be there.

Defendant acknowledged that he understood the RO prohibited him from being within three blocks of Tara's school. In defense of his presence at the April 18, 1999 mass, he explained:

> A. Because it had no jurisdiction over the church, and that is -- I'm a -- I live within the geographic lines of Sacred Hearts Parrish [sic], therefore I have every right to be at church.
>
> Q [Defense counsel]. Okay. And what do you base this belief upon?
>
> A. This is based upon the catechisms that we learned in elementary school, the Catholic Almanac. In the rectory, there's a huge map in there that outlines the geographic lines of the church. If you live within the geographic lines and you're a registered parishioner and you donate money to the school, which we donate tremendous monies to the parrish [sic] and the school, you are a parishioner. You're entitled to that privilege.
>
> Q. So you felt that on that day you were entitled to be at church?
>
> A. Absolutely.

Defendant recalled that he arrived a little late at the mass. Because the mass was crowded, he stood just inside the church entrance at the back of the church and stayed there all mass, except when he went up to the front of the church to receive communion. After mass, he went outside and talked to Father Alexander. He told Father Alexander that he wanted to give Tara the First Communion gift. Father Alexander expressed

misgivings relating to the RO, but Defendant assured him: "I said yes, but it pertains to the school, which is Monday through Friday. This is Sunday mass, I'm there always Sunday. My former wife is always here Sunday too, so it's no big deal." Defendant then gave the gift to Tara. He denied the allegations about threatening Dona.

At another point during direct examination, Defendant again explained his reasons for being at the church that day:

> A. Well, you know, . . . I'm a practicing Catholic, a very loving, concerned father who hasn't seen my daughter for five years. It's my moral obligation as a Catholic to be there. And nowhere in the stipulation of the -- this restraining order does it mention school -- I mean -- I'm -- may I retract that -- church. It specifically says school, which is primarily a Monday through Friday event, and it's -- it's -- everyone knows school is Monday through Friday.
>
> Q [Defense counsel]. That was your understanding on that day?
>
> A. Absolutely, right.
>
> Q. What about when you went up the aisle after mass and tried to give your daughter the gift, what's your understanding about that despite what the order says here about personally contacting the minor child?
>
> A. Personally contacting the minor child at the -- you know, at school. This wasn't the school, it's a holy sanctuary, and it's -- again, it's my -- as a father -- you know, it would have been worse if I did not give her something or if I wasn't there. You know, this would just -- just demoralize that little girl for the rest of her life.
>
> Q. Well, wouldn't it demoralize you?
>
> A. Oh, absolutely.

Q. Why?

A. Because it's -- it's -- it's a moral obligation, it's a holy sacrament. I take my -- my faith very seriously.

Q. How -- how seriously do you take your faith, Mr. Hoo?

A. To know that marriage is a holy sacrament and it is a moral sin to go through divorce. You're married once in your life, that's it.

Q. What about towards the care of your child, Mr. Hoo?

A. The care of my child, gads, you know - you know, I'd give up everything -- anything just to be there with her. I-- I pay for her entire tuition for school.

On cross-examination, Defendant admitted that the terms of the 1999 RO are identical to the terms of the original 1995 RO. He further admitted that he had read and understood both with the aid of explanation from the serving police officers. He confirmed that the terms of the RO "prohibited [him] from coming within three blocks of home, school or babysitter's's [sic][.]" He admitted again that his living in the Alexander Street apartment is a violation of the RO. He added that his business is located within the three-block, stay-away radius and that it too is a violation of the RO.

Under questioning by the prosecutor, Defendant testified that he knew Tara was having her First Communion at the April 18, 1999 mass. He acknowledged that Sacred Heart Church is on the same lot of land as Maryknoll Grade School, and is thus

within three blocks of Tara's school. He confirmed that he had a gift and a camera with him. He described taking communion and returning to the back of the church. He acknowledged walking back up to Tara and giving her the gift, with Dona standing there.

Defendant admitted that during his marriage to Dona, he owned all sorts of firearms, and that she was aware of that fact. He explained that he was a conservation educator for the State Department of Land and Natural Resources, and in connection with that taught firearm safety. He also offered that he was a competitive shooter. On the weekends, he acted as the range director for the Schofield Routing Gun Club.

The jury found Defendant guilty on both counts of the amended complaint. On September 3, 1999, Defendant was sentenced and the court entered the judgment appealed from.

On September 7, 1999, Defendant filed a motion for a new trial. In his motion, Defendant argued that he was entitled to a new trial because, among other reasons, certain evidence had been excluded from the trial. That evidence concerned Dona's previous acquiescence in his concurrent attendance at the Sacred Heart Church, previous agreements between them -- the conditions of the RO notwithstanding -- regarding his church attendance and his residence near the school, and the previous lack of complaint from Dona regarding these apparent violations of the RO. Defendant reasoned that these circumstances showed

> that there was a discrepancy and some confusion as to how the divorce parties were treating the restraining order. Defendant should have been permitted to present this evidence that would have depicted his state of mind on the day in question and would have shown whether he intentionally and knowingly violated a court order. Evidence that would make a reasonable person think that going to Sunday church was not a TRO violation should have been permitted to have been presented. The testimony was improperly excluded from presentation during the motions in limine stage and during the trial.

The motion for a new trial also alleged that the judge should have recused himself because his sister "knows the complaining witness." This is the first time this allegation arose in the proceedings. No details of the alleged relationship were ever provided.

The court denied the motion for a new trial at the September 24, 1999 hearing. With respect to Defendant's evidentiary complaints, the court noted that it had already ruled on those issues during motions in limine and upon objections at trial. With respect to recusal, the court stated:

> I don't even understand what you're talking about. My sister never said anything to me about this de -- she doesn't even know that I sat on this case. There's no evidence that there is any relationship between my sister and the defendant.

Defendant also filed a motion for reconsideration of his sentence on September 7, 1999, seeking a reduction in the length of his incarceration. The motion for reconsideration was heard at the same hearing as the motion to dismiss was heard, and was also denied.

In a motion in limine heard just before jury selection, Defendant had proffered the evidence of Dona's previous acquiescence in his concurrent attendance at the church:

> [DEFENSE COUNSEL]: Well, what prosecution [sic] is referring to, I think, is there are other times when my client has been in church with the alleged -- well, with [Dona], and the fact that -- you know, and we're gonna -- we will bring that up, but I don't think that's a bad act, but I think that we can address that when the time comes.
>
> THE COURT: What context would that be brought up in?
>
> [DEFENSE COUNSEL]: Okay. Well, the -- in this particular case we're looking at whether or not my client thought that he was precluded from going to church if his wife or daughter is present, okay? My client will testify to the fact that there were other times, numerous other times, when he was present in church with them, and prosecution will probably order [sic] that he's not supposed to go to church with -- you know, whether they're there, period.
>
> And our point to that would be to show simply that there were other times when he was there, my client was there, she was there. She never ever complained about that. And then she chooses this one particular time to voice a complaint, because it's a special occasion that she suddenly chooses now to complain about it. And that there are other times when he was there, numerous other times, 'cause my guy goes to church almost every Sunday, and it wasn't a big thing, but suddenly it turns into a big thing, and, you know, this isn't -- this particular restraining order was in place beginning in January, and there had been a prior restraining order before, but that -- that's our point is that there are other times when they both were in church and that it was no big thing, okay, and she had never objected to him being in church with her before.
>
> THE COURT: So that goes to what, his state of mind that he didn't know it was a violation?

> [DEFENSE COUNSEL]: Well, it's his state of mind knowing that, number one, the restraining order doesn't say that I can't go to church with her there, because of the way that it's -- you know, the plain language of it. And the second is is [sic] that while I'm there, she's there, she's not complaining, she's not calling the police within five minutes, as the restraining order says, and we go -- each goes on their merry way afterward, and that Sunday we do the same thing, no big thing.
>
> [PROSECUTOR]: Your Honor, we would object to any mention of prior trips to church with the complaining witness, it's irrelevant. We should be focusing only on the date of [sic] question. We don't even know when he went to church, what days he went to church, and importantly we don't even know if the complaining witness realized he was there. As far as I'm aware of, she never -- she never -- she's not aware of any other time when he was in church with them.

The court excluded the proffered evidence:

> THE COURT: The problem I have with getting into prior alleged attendances by the Defendant at the church site is that it's not the complaining witness who determines whether or not an order has been violated. There's so many different circumstances that can arise where even though she may not call the authorities to arrest the [D]efendant for violation, that still doesn't make it not a violation, it's the Court that makes that determination. And I think we're getting into an area that's gonna cause too much confusion to the jury as to who is the one responsible to consider it to be a violation. I'm gonna deny the request.
>
> . . . .
>
> As far as the Defendant's request to introduce evidence that the Defendant was at the church site on prior occasions, I'll deny that request on the grounds of relevance.

On the morning of jury selection, Defendant filed a motion to dismiss and a motion for judgment of acquittal. During

the pretrial hearings, however, Defendant chose to argue only certain issues contained in those motions:

> [DEFENSE COUNSEL]: Again, my client argues that -- again, Judge, my client orders that -- or argues that the particular incident complained of is a permitted act under the restraining order that there were, again, several different times the Defendant and complaining witness would attend the same -- the same mass, although they were at - in different areas of the church, sit in different areas of the church.
>
> The wording of the restraining order said that, again, Defendant can't contact his ex-wife and the child at the residence, at her work, and at the child's school, and it doesn't mention at all -- there's no -- the word "church" is not in any of the pages of the restraining order.
>
> So, again, we would ask that this particular case be dismissed, that the restraining order on its face is vague, that it does not include or preclude my client from attending church, attending to mass, and my client had done that on many and numerous occasions.

The court, however, was not persuaded:

> THE COURT: Do you stipulate that the order says that he has to stay away at least three blocks away from the daughter's school? You don't dispute that?
>
> [DEFENSE COUNSEL]: Well, we don't dispute the fact that that's what the order say, Judge.
>
> THE COURT: And where is the school located in relation to the church where the incident occurred? Within three blocks?
>
> [DEFENSE COUNSEL]: The school, yes, is within three blocks. However, Judge, the difference is is [sic] that there is no school on Sunday. Those are different events. School is not just a location, it's also an event, and school is Monday through Friday. There's no school on Sundays.

> THE COURT: It's a factual matter whether the Defendant was within three blocks as prohibited by the order. Leave it for the jury to decide. I'll deny the motion to dismiss.

III. Issues Presented.

On appeal, Defendant raises two issues with respect to the September 3, 1999 judgment and the September 24, 1999 order denying his motion for a new trial:

> 1. Testimony regarding the several times that Mr. Hoo and his ex-wife attended church together was improperly excluded from being presented to the jury[.]
>
> 2. The Presiding Judge failed to recuse himself when it was pointed out that the Judge's sister is good friends with Appellant's ex wife.

(Citation to the record omitted.)

IV. Discussion.

At the outset, we observe that Defendant's points and arguments on appeal do not in any way address or pertain to his conviction of terroristic threatening in the second degree under the second count of the amended complaint. Neither do they mention the court's September 24, 1999 order denying his motion for reconsideration of his sentence. This being the case, we affirm Defendant's conviction of and sentence for terroristic threatening in the second degree, and, in light of our disposition of this appeal, infra, we also affirm the court's September 24, 1999 order denying Defendant's motion for

reconsideration of sentence. Hawai‘i Rules of Appellate Procedure (HRAP) Rule 28(b)(7) (1999) ("[T]he appellant shall file an opening brief, containing . . . [t]he argument, exhibiting clearly the points of fact and of law being presented, citing the authorities relied upon."); CSEA v. Doe, 88 Hawai‘i 159, 174 n.20, 963 P.2d 1135, 1150 n.20 (App. 1998) ("Appellant, however, fails to present discernible argument with respect to these allegations and this court, therefore, need not address those matters." (Citations omitted.)); Bank of Hawai‘i v. Shaw, 83 Hawai‘i 50, 52, 924 P.2d 544, 546 (1996) ("[Appellant's] appeal asserts numerous grounds but fails to provide discernible argument or discussion on many of the points. We will disregard a point of error if the appellant fails to present discernible argument on the alleged error." (Citation omitted.)).

For his first point on appeal, Defendant argues that the court erroneously excluded from the trial evidence relevant to the charge of violation of an order for protection under the first count of the amended complaint.

First, Defendant argues that the court should have admitted evidence of numerous previous instances in which he attended services at the Sacred Heart Church, at the same time as his ex-wife and without complaint from her, all while under the restrictions of the RO.

Second, Defendant claims that he and his ex-wife had an "agreement" allowing his attendance at the church, the restrictions of the RO notwithstanding.

Last, Defendant contends that evidence "regarding the separate nature of the church where the incident took place and the school was [wrongfully] excluded."

According to Defendant, the foregoing evidence

> goes straight to the determination of whether [Defendant's] State of Mind at the time of the incident was possessive of criminal intent. That matter is the heart of this case. It is improper to exclude such important evidence on the simple basis that it is irrelevant.
>
> Throughout the record, [Defendant] asserts that he believed that it was permissible for him to attend church even if his ex-wife and minor child were attending. He argues that his state of mind was such that if he thought that attendance at church was not permitted under the restraining order that he would not have been there.

At bottom, Defendant's first point on appeal is an assertion that the relevant *mens rea* for the offense of violation of an order for protection is, that Defendant intentionally or knowingly violated what he <u>believed</u> were the terms of the RO.

We disagree. Aside from the fact that such an interpretation of the requisite state of mind would eviscerate the statute, the interpretation is simply incorrect. The requisite state of mind is, quite simply, that Defendant intentionally or knowingly violated the RO; in this case, the express RO restrictions against "personally contacting" Dona or

Tara, and against "remaining within three (3) blocks of . . . the school of the minor child located at (Maryknoll Schools) 1722 Dole Street, Honolulu, Hawaii, 96822." Defendant admitted at trial that he intended to do these things. What Defendant believed was permissible under the RO was, as the court correctly decided, simply irrelevant.

Seen from another perspective, Defendant's argument is essentially a mistake-of-law defense; in other words, that he did not intend or know that his conduct was illegal. But the Hawai‘i Penal Code does not recognize a mistake-of-law defense:

> The Legislature in dealing with [HRS] § 702-218 deleted a defense based on mistake of law. The Legislature said that it was "thereby avoiding a major dilemma with respect to enforcement of the provisions of this Code. The defenses of ignorance of the law afforded by [HRS] §§ 702-218 and 220 would have been available, to a degree, under any given set of circumstances and as such would have constituted a major encumbrance to enforcement of the substance and spirit of the Code." See Conference Committee Report No. 2 (1972).
>
> Although the Legislature did not provide for a defense based on mistake of law, the State Supreme Court has recognized that, in some instances, there must exist, as a necessary corollary to the definition of certain offenses, a defense based on this type of mistake. See State v. Marley, 54 Haw. 450, 476-477, 509 P.2d 1095, 1111-1112 (1973). The court cited [HRS] § 702-220 of the Hawaii Penal Code as providing a defense to a state trespass prosecution in the case of honest and reasonable belief ("no matter how incorrect such a belief might be") that another law (American treaty law) afforded a defense to the trespass.

Supplemental Commentary on [HRS] § 702-218. The judicial gloss on the general rule noticed by this Supplemental Commentary, State v. Marley, 54 Haw. 450, 476-77, 509 P.2d 1095, 1111-12 (1973), involved a defunct trespass statute containing the material element "without right." Id. at 454 n.1, 509 P.2d at 1099 n.1. Hence the right under American treaty law championed by the defendants in Marley was a defense because it was, as the Supplemental Commentary notes, "a necessary corollary to the definition" of the offense. In this case, the definition of HRS § 580-10(d) admits of no such corollary defense. Again, the evidence Defendant proffered was irrelevant.

Nor can Defendant take comfort in the Marley reference to HRS § 702-220 (1993). Marley, 54 Haw. at 476, 509 P.2d at 1111. HRS § 702-220 provides for an affirmative defense where a defendant acts

> under the belief that the conduct or result was not legally prohibited when the defendant acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in:
>
> (1) A statute or other enactment;
>
> (2) A judicial decision, opinion, or judgment;
>
> (3) An administrative order or administrative grant of permission; or
>
> (4) An official interpretation of the public officer or body

> charged by law with responsibility for the interpretation, administration, or enforcement of the law defining the offense.

Clearly, Defendant's assertion that Dona's previous words and actions led him to believe his conduct was authorized does not qualify as an affirmative defense under this statute. Cf. State v. DeCastro, 81 Hawai'i 147, 151-53, 913 P.2d 558, 562-64 (App. 1996) (911 telephone operator's authorization to disobey a police officer's order is not an affirmative defense under HRS § 702-220).

We conclude that the evidence proffered by Defendant was irrelevant and correctly excluded by the court. In this connection, we observe that, despite the court's rulings in limine and upon objections at trial, Defendant still managed to get the excluded evidence before the jury. When his attorney asked him why he was residing within three blocks of Tara's school, Defendant replied:

> It is a violation of the restraining order. And my former wife knows about it, and we agreed upon it, and there's a provision in here on the -- page 3, the first paragraph, where it says if plaintiff knows of a violation, she has five minutes to call the police department. Over the years, she wasn't [sic] called.

In recounting his conversation with Father Alexander, Defendant gave this explanation for his nonchalance regarding the restrictions of the RO:

> I said yes, but it [the RO] pertains to the school, which is Monday through Friday. This is Sunday mass, I'm there always Sunday. My former wife is always here Sunday too, so it's no big deal.

And in explaining his reasons for being at the church that day, Defendant said:

> A. Well, you know, . . . I'm a practicing Catholic, a very loving, concerned father who hasn't seen my daughter for five years. It's my moral obligation as a Catholic to be there. And nowhere in the stipulation of the -- this restraining order does it mention school -- I mean -- I'm -- may I retract that -- church. It specifically says school, which is primarily a Monday through Friday event, and it's -- it's -- everyone knows school is Monday through Friday.
>
> Q [Defense counsel]. That was your understanding on that day?
>
> A. Absolutely, right.

In addition, Defendant told the jury in his opening statement that

> [w]e will show that there's a difference between the parrish [sic], the church, and the school. We will show that there's no school on Sundays. We will show that my client went to mass almost every Sunday at 9:30. We will show that the complaining witness went to the same mass at 9:30 every Sundays [sic].

During his summation, Defendant argued that

> [h]e didn't go to church to terrorize anybody, he went to church because he felt that he had a fundamental belief to -- to -- to be there and a right to be there. He looks at the restraining order. There is no word church in it. It's not a matter of a vacuum or imagining stuff. You look at it and you read it. There is no church.

And later,

> He didn't intentionally violate the TRO, he didn't knowingly violate the TRO. He had done things that apparently he had done in the past. It's not the only paragraph that he's read about a TRO, and he's -- he did what he normally does, and this time she happened to raise the issue.

It is apparent that Defendant was able to get the proffered evidence and argument thereon before the jury, despite the strictures laid down by the court. Hence, if error there was, it was harmless beyond a reasonable doubt. State v. Arceo, 84 Hawai'i 1, 12, 928 P.2d 843, 854 (1996).

For his second and final point on appeal, Defendant argues that the trial judge should have recused himself. As we previously noted, Defendant raised this issue for the first time in his motion for a new trial. At that time, the allegation was that the judge's sister "knows the complaining witness." This allegation was made only by Defendant's attorney, and only in a memorandum in support of the motion and in argument at the hearing on the motion. Now, on appeal, the allegation is that "the Judge's sister was a good friend of [Defendant's] ex-wife." This allegation is also made only by Defendant's attorney, and only in the opening brief, without citation to any evidence in the record. The evolution of the allegation serves to underline the fact that Defendant did not below and does not now adduce an iota of cognizable evidence or clarifying detail regarding the allegation.

Thus, on the record and briefs before us, we cannot and need not review this point on appeal. HRAP Rule 28(b)(3) (1999) ("[T]he appellant shall file an opening brief, containing . . . the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of trial proceedings."); International Brotherhood of Electrical Workers v. Hawaiian Telephone Co., 68 Haw. 316, 322 n.7, 713 P.2d 943, 950 n.7 (1986) ("Counsel has no right to cast upon the court the burden of searching through a voluminous record to find the ground of an objection. It is counsel's duty to cite accurately the portions of the record supporting counsel's position." (Internal citation omitted.)); cf. State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000) ("Because the factual basis of [appellant's] alleged point of error is not part of the record on appeal, this court has no basis upon which to rule on the merits of his claim." (Citation omitted.)).

V. Conclusion.

For the foregoing reasons, we affirm the family court's September 3, 1999 judgment of conviction and sentence. We also affirm the family court's September 24, 1999 order denying

Defendant's motion for a new trial and his motion for reconsideration of his sentence.

DATED: Honolulu, Hawaii, April 17, 2001.

On the briefs:

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for defendant-appellant.

Chief Judge

Loren J. Thomas,
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for plaintiff-appellee.

Associate Judge

Associate Judge