NO. 23442

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI I

STATE OF HAWAI I, Plaintiff-Appellee, v.
ROBERT CRATES, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-CR. NO. 00-01-0141(3))

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

Defendant-Appellant Robert Crates (Crates) appeals the April 5, 2000, "Judgment of Probation" of the Family Court of the Second Circuit[1] (family court), which found Crates guilty of one count of Abuse of Family/Household Member [sic], pursuant to Hawai i Revised Statutes (HRS) § 709-906(4) (Supp. 2000).[2] The

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[1] The Honorable Douglas J. Sameshima presiding.

[2] HRS § 709-906 provides, in relevant part, as follows:

§709-906 Abuse of family or household members; penalty. (1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member . . . .

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.

. . . .

(4) Any police officer, with or without a warrant, may take the following course of action where the officer has reasonable grounds to believe that there was physical abuse or harm inflicted by one person upon a family or household member, regardless of whether the physical abuse or harm occurred in the officer's presence:

(a) The police officer may make reasonable inquiry of the

family court sentenced Crates to forty-eight hours of incarceration (with seventeen hours' credit given for time served) and one year of probation; assessed a $50.00 Criminal Injuries Compensation fee against Crates; and ordered Crates to

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> family or household member upon whom the officer believes physical abuse or harm has been inflicted and other witnesses as there may be;
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> (b) Where the police officer has reasonable grounds to believe that there is probable danger of further physical abuse or harm being inflicted by one person upon a family or household member, the police officer lawfully may order the person to leave the premises for a period of separation of twenty-four hours, during which time the person shall not initiate any contact, either by telephone or in person, with the family or household member; provided that the person is allowed to enter the premises with police escort to collect any necessary personal effects;
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> (c) Where the police officer makes the finding referred to in paragraph (b) and the incident occurs after 12:00 p.m. on any Friday, or on any Saturday, Sunday, or legal holiday, the order to leave the premises and to initiate no further contact shall commence immediately and be in full force, but the twenty-four hour period shall be enlarged and extended until 4:30 p.m. on the first day following the weekend or legal holiday;
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> (d) All persons who are ordered to leave as stated above shall be given a written warning citation stating the date, time, and location of the warning and stating the penalties for violating the warning. A copy of the warning citation shall be retained by the police officer and attached to a written report which shall be submitted in all cases. A third copy of the warning citation shall be given to the abused person;
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> (e) If the person so ordered refuses to comply with the order to leave the premises or returns to the premises before the expiration of the period of separation, or if the person so ordered initiates any contact with the abused person, the person shall be placed under arrest for the purpose of preventing further physical abuse or harm to the family or household member; and
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> (f) The police officer may seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of an offense under this section.

participate in a substance abuse assessment and to undergo counseling with the Family Peace Center until clinically discharged. On appeal, Crates contends that the family court committed plain error because the evidence adduced at trial failed to establish beyond a reasonable doubt all of the material elements necessary to support a conviction under HRS § 709-906(4). We disagree with Crate's contention and affirm the April 5, 2000, "Judgment of Probation."

I. BACKGROUND

On February 28, 2000, Crates was charged by complaint with the following:

> Count One: Abuse of Family and Household Member, in violation of HRS § 709-906 (Supp. 2000); and
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> Count Two: Abuse of Family and Household Member, in violation of HRS § 709-906(4).

At a bench trial held on April 5, 2000, the State moved to dismiss Count 1 for failure to secure the attendance at trial of an essential witness. The trial court granted the motion to dismiss without prejudice. The parties stipulated prior to trial that on February 26, 2000, at about 8:30 p.m., Crates made two telephone calls from the Wailuku police station while he was being processed.

The following evidence was adduced at trial. Maui County Police Officer David Leffler (Officer Leffler) testified that on February 26, 2000, at approximately 1930 (7:30 p.m.), he

responded to an assignment directing him to 16 Nanialii Street, where a possible physical abuse matter was taking place. At the residence, Officer Leffler first came in contact with Crates, whom Officer Leffler identified at trial as the defendant. Fronting a neighbor's residence, Officer Leffler next came in contact with Crates' daughter, Chelsea Hobbs (Hobbs). Asked about Chelsea's demeanor when he arrived, Officer Leffler testified that "[s]he was fine." Officer Leffler told Hobbs that he was there on an abuse-type case, and they spoke about the incident for "[a] few minutes, maybe five minutes." Hobbs reported that she and her father had an argument about her boyfriend. Hobbs related that after the verbal argument, Crates picked up a telephone and hit her once on her right hip area. Hobbs complained of pain in that area to Officer Leffler.

Officer Leffler testified that after speaking with Hobbs, he again spoke with Crates, after first informing Crates of his Miranda rights. Crates appeared intoxicated, with red, watery eyes, and Officer Leffler smelled liquor on Crates' breath. When Officer Leffler asked Crates if he had been drinking, Crates said he "had a few." After taking Crates' statement, Officer Leffler issued him a Maui Police Department (MPD) warning citation (citation). Officer Leffler filled out and signed the citation at Crates' residence at approximately 8:00 p.m. Crates initialed the citation after Officer Leffler

read and explained it to him. Officer Leffler explained to Crates in English that Crates was not allowed to contact Hobbs either in person or by telephone. Crates indicated that he understood this requirement. Officer Leffler explained to Crates that since the incident occurred on a Saturday (February 26, 2000), the warning period extended to Monday (February 28, 2000) at 4:30 p.m. Officer Leffler gave copies of the citation to both Crates and Hobbs.

Officer Leffler testified that after giving Crates a copy of the citation, Officer Leffler obtained a statement from Crates and placed him under arrest. Officer Leffler took Crates to the Wailuku police station and began processing him in the processing room. During processing, the arresting officer types up the arrest report and the arrestee is fingerprinted, photographed, and given an opportunity to use the telephone. The telephone in the processing room is located directly next to the typewriter where the officer types the arrest report. Officer Leffler testified that at approximately 8:30 p.m. on February 26, 2000, Crates was processed "in the same room right next to me."

Officer Leffler testified that it took approximately twenty minutes to process Crates. Officer Leffler remained in the room the entire time, except for an approximately thirty-second period when he left the room to obtain a form from the receiving desk sergeant. Crates asked for permission to make a

telephone call. Officer Leffler gave Crates permission to use the telephone to make one telephone call for bail and told him not to call Hobbs. Officer Leffler was about three feet away from Crates when Crates made his telephone call. Officer Leffler saw Crates use the telephone only once; he heard Crates talk with someone "very briefly," although Crates did not mention anyone's name in particular so Officer Leffler did not know with whom Crates talked.

Maui Police Department Officer Rocky Silva (Officer Silva) testified that on February 27, 2000, at approximately 7:00 p.m., he received an assignment directing him to the Wailuku station to speak with Crates regarding two telephone calls allegedly made to the complainant Hobbs. Prior to speaking with Crates, Officer Silva notified Crates of his Miranda rights by reading to him MPD 103 form - the warning of rights (103 form). After Officer Silva read the 103 form to Crates, Crates signed it and wrote the date and time of his signature on the 103 form. Officer Silva initialed the bottom of the 103 form and wrote the date and time. Officer Silva did not put any pressure on Crates to make a statement. Officer Silva did not make any promises that if Crates made a statement, Officer Silva would do something for him in return. Crates did not appear to be under the influence of any drugs nor did Crates ask for an attorney. Officer Silva testified that Crates voluntarily told him that

Crates had called his residence twice. Officer Silva further testified:

> A: [Officer Silva] He did not intentionally mean to speak to his daughter Chelsea. But after she got onto the phone he asked her to bring down his identification [card] to him to the Wailuku police station. She then hung up the phone. He stated that he called the home again. And at that time on the second call nobody answered the phone, so he left a message on the recorder.
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> Q: [Deputy prosecuting attorney] Now, did he tell you where he was when he made those phone calls?
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> A: [Officer Silva] Yes, he stated that he was being booked and processed at the Wailuku police station.

Under cross-examination, Officer Silva testified that Crates did not want to talk to Hobbs. Officer Silva stated that an identification card is not required by police to complete processing. Officer Silva testified that regarding the second telephone call, Crates "may have said that, that he was trying to get ahold [sic] of his friend, but nobody answered the telephone and he left a message." Crates told Officer Silva that when he called home the second time, Crates thought Hobbs had gone to a friend's house.

Crates testified on his own behalf. Crates testified that on February 26, 2000, he made two telephone calls from the processing room of the Wailuku Police Station. The first call was to his residence. When asked who answered the telephone at his residence, Crates responded, "[u]nfortunately, my daughter." Crates said this was unfortunate because he "had no intention -- when we're upset we don't talk -- no intention whatsoever to talk

to my daughter." Crates called home, hoping one of his three roommates would answer the telephone. Crates wanted one of his roommates to go to his neighbor's house or get their telephone number from his address book so he could call the neighbor to bail him out; he also wanted his boss' telephone number. Crates remembered that when his daughter answered the telephone he said, "could you -- I didn't say my daughter's name, I said, could you get -- get one of the roommates or -- and -- and she hung up. She said, you're not supposed to call, and hung up on me. And that's how I -- that -- two words, could you." Crates testified that since he did not have his employer's home telephone number, his second telephone call was to his employer's office to leave a message that he would not report to work the following morning. Crates did not call his residence a second time and did not leave a message there.

Under cross-examination, Crates testified that when he called his residence he did so because "[m]y roommates, my address -- everything was there." Crates called his home because he believed that his daughter was staying at his neighbor's house (where she was when he left). Hobbs had her own bedroom in Crates' house and had been staying with Crates for about a week because Crates "was trying to help her get away from her boyfriend in California." When Hobbs answered the telephone she did not identify herself, but Crates identified her voice and

Hobbs immediately identified his voice. When asked if he admitted talking to Hobbs, Crates responded, "[a]bsolutely." Crates knew it was Hobbs when she said hello. Crates acknowledged that he made the telephone call after receiving the citation.

The family court found:

> The Defendant is charged with one count of con- -- initiating contact by telephone with one Chelsea Hobbs. The evidence is undisputed that he received the citation, that he made two telephone calls from the Maui Police Department, and that he initialed the citation that he received from Officer Leffler and that it covers the period of time during which he made the telephone con- -- telephone calls from the police station.
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> The only fact that remains for the Court to resolve is whether, pursuant to the complaint, Mr. Crates did initiate contact by telephone with Chelsea Hobbs before expiration of the cooling off period. The statute reads, in part: if the person so ordered initiates any contact with the abused person. The Court's going to find that Mr. Crates did initiate the telephone call by clearly making the -- by his own admission, making the telephone call from the police station on the night in question.
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> The evidence shows that within a half hour or 45 minutes earlier he had been at the residence where his daughter had been living for a week, he had received the citation, yet he chose to call that very same residence. If nothing else, Mr. Crates was taking a very big chance that one in three people might answer the telephone. It turned out to be his daughter, who he was forbidden from contacting.
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> And what the Court further finds is that not only did she pick up the telephone, that is, Ms. Hobbs pick up the telephone and say hello, but even after knowing that he was speaking to his daughter Mr. Crates continued to attempt to communicate with her in an attempt to gain his address book. I think that's what the testimony showed at trial. This clearly is contact by telephone with Chelsea Hobbs, is in direct violation of the order that Mr. Crates had received just within the hour, or a very short time earlier.
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> Therefore, based on the evidence presented in court today, testimony of the witnesses, I find the Defendant guilty as charged.

II. STANDARD OF REVIEW

A. Plain Error.

Hawai i Rules of Penal Procedure Rule 52(b) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Therefore, an appellate court "may recognize plain error when the error committed affects substantial rights of the defendant." State v. Davia, 87 Hawai i 249, 253, 953 P.2d 1347, 1351 (1998) (internal quotation marks omitted).

The appellate court "will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Vanstory, 91 Hawai i 33, 42, 979 P.2d 1059, 1068 (1999) (internal quotation marks omitted).

B. Sufficiency of the Evidence.

Regarding appellate review for insufficient evidence, the Hawai i Supreme Court has repeatedly stated:

> [E]vidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support the conviction; the same standard applies whether the case was before a judge or jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

State v. Quitog, 85 Hawai i 128, 145, 938 P.2d 559, 576 (1997) (quoting State v. Eastman, 81 Hawai i 131, 135, 913

> P.2d 57, 61 (1996)) (emphasis omitted). "'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Eastman, 81 Hawai i at 135, 913 P.2d at 61.

State v. Richie, 88 Hawai i 19, 33, 960 P.2d 1227, 1241 (1998).

III. DISCUSSION

Crates contends that the family court committed plain error by convicting him of violating HRS § 709-906(4) in the absence of evidence beyond a reasonable doubt to establish all the material elements of the offense. Since Crates failed to challenge the sufficiency of the evidence at trial, the plain error analysis applies to this court's review. The Hawai i Supreme Court in State v. Kelekolio, 74 Haw. 479, 849 P.2d 58 (1993), stated:

> This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system - that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes. Nevertheless, where plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial court.

Id. at 515, 849 P.2d at 74-75 (citation omitted).

Crates relies on State v. Kapela, 82 Hawai i 381, 922 P.2d 994 (App. 1996), where this court stated:

> To sustain a conviction for this offense, the State was required to prove beyond a reasonable doubt the following four elements:
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> (1) that a police officer had reasonable grounds to believe that there was recent physical abuse or harm inflicted by Defendant upon Complainant, a family or household member;

> (2) that the officer had reasonable grounds to believe that there was a probable danger of further physical abuse or harm being inflicted by Defendant upon Complainant;
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> (3) that the officer issued a written warning citation to Defendant, ordering him to leave the home for a cooling-off period of twenty-four hours or a specified enlarged period if the incident occurred after 4:30 p.m. on any Friday, or on any Saturday, Sunday or legal holiday; and
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> (4) that Defendant returned to the home before the expiration of the cooling-off period.

Id. at 387, 922 P.2d at 1000. The State correctly points out that since Kapela was decided, the legislature amended § 709-906 by removing the word "recent" (in subsection (1) above) from the law governing when physical abuse or harm must occur before a police officer can issue a warning citation. 1998 Haw. Sess. L. Act 172, § 8 at 645-46. The House Judiciary Committee, in proposing the amendment to remove the requirement that abuse be "recent" in order for police to order a period of separation,[3] stated:

> This bill also removes "recent" from the law governing the police issuance of twenty-four hour warnings. Under current law, if a police officer has reasonable grounds to believe that there was recent physical abuse or harm, the officer may order the abuser to leave the premises for a cooling off period of twenty-four hours. Your Committee finds that police officers responding to a domestic violence complaint have to make quick decisions on whether or not to remove an abuser from a home. This decision is often delayed because an officer has to interpret how "recently" the physical abuse occurred. Deleting this ambiguous term

[3] By 1998 Haw. Sess. L. Act 172, § 8 at 645-46, the phrase "cooling-off period" became "period of separation." The House Judiciary Committee, in proposing the amendment, stated: "H.B. 2666 substitutes the term 'period of safety' for 'cooling off period.' The intent of this amendment is to emphasize that by removing a domestic abuser from a premises after an incident, the concern is for the victim rather than the aggressor. However, the term 'period of safety' may mislead a victim into believing that the victim is actually safe from further abuse. In order to avoid this problem, your Committee recommends changing the phrase to 'period of separation.'" Hse. Stand. Comm. Rep. No. 578-98, in 1998 House Journal, at 1264.

> would result in more twenty-four hour warnings, thereby protecting more victims of domestic abuse.

Hse. Stand. Comm. Rep. No. 578-98, in 1998 House Journal, at 1264.

Under the reasonable grounds standard articulated in Kapela, the State was required to prove that Officer Leffler had reasonable grounds to issue the warning citation to Crates. Subsection (4) of HRS § 709-906 requires that before a police officer issues a citation ordering an alleged abuser to observe a period of separation, the police officer must have reasonable grounds to believe that there was "physical abuse or harm inflicted by one person upon a family or household member." Subsection (4)(b) of HRS § 709-906 provides for the twenty-four hour period of separation "[w]here the police officer has reasonable grounds to believe that there is probable danger of further physical abuse or harm being inflicted by one person upon a family or household member." Additionally, under Kapela, "a warning citation cannot be issued purely on a complainant's claim that he or she was beaten or abused. There must be other objective facts and circumstances which would warrant a reasonable police officer to believe the complainant's claim." 82 Hawai i at 393, 922 P.2d at 1006.

Evidence was elicited at trial that Officer Leffler responded to an abuse-type call at Crates' residence. Hobbs reported to Officer Leffler that she and her father had an

argument about her boyfriend. Officer Leffler testified that Hobbs related that the verbal argument turned physical when Crates picked up a telephone and hit her once on her right hip. Hobbs reported pain in that area to Officer Leffler. Officer Leffler testified that Crates appeared intoxicated, with red, watery eyes. The officer also stated that he smelled liquor on Crates' breath. When Officer Leffler asked Crates if he had been drinking, Crates reported that he "had a few." After Crates made a statement to Officer Leffler, Officer Leffler issued him the citation. At trial, Crates testified that he believed Hobbs was staying at "the neighbor's house where she was when I left."

We conclude there was substantial evidence elicited at trial providing objective facts or circumstances to support Hobbs' claim of abuse. Officer Leffler had reasonable grounds to believe that Crates inflicted abuse or harm on Hobbs. Additionally, there was substantial evidence in the record that Officer Leffler had "reasonable grounds to believe that there [was] probable danger of further physical abuse or harm being inflicted" by Crates against Hobbs. We conclude that the family court did not commit plain error in convicting Crates of a violation of HRS § 709-906(4), as the State met its burden of proving all of the material elements of the offense and there is substantial evidence in the record to support a conviction.

IV. CONCLUSION

Accordingly, we affirm the April 5, 2000, "Judgment of Probation" of the family court.

In the statement of the case section of the opening brief, counsel for Crates cites and quotes from a police report not in evidence in violation of Hawai i Rules of Appellate Procedure (HRAP) Rule 28(b)(3). Counsel is warned that future violations of HRAP Rule 28 may result in sanctions against her pursuant to HRAP Rule 30.

DATED: Honolulu, Hawai i, June 26, 2001.

On the briefs:

Georgia K. McMillen
for defendant-appellant.

Acting Chief Judge

Richard K. Minatoya,
Deputy Prosecuting Attorney,
County of Maui,
for plaintiff-appellee.

Associate Judge

Associate Judge