NO. 23097

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
KENICHI KURASHIGE, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR NO. 99-1559)

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

On March 30, 1999, Defendant-Appellant Kenichi Kurashige (Kurashige) was charged by complaint with two counts of violating a temporary restraining order (TRO), in violation of Hawaiʻi Revised Statutes (HRS) § 586-4 (Supp. 1998). A jury-waived trial before family court Judge Linda Luke was held on May 11, 1999. As the trial began, the State moved to amend the charges to lesser charges of "criminal contempt of court, 710-1077, subsection 1, subsection G." Kurashige agreed to the amendments. Kurashige was acquitted of Count I and convicted of a petty misdemeanor under HRS § 710-1077(3)(b) (1993) as to Count II. He was sentenced to six months probation and ordered to pay a CICC fee of $25.00, to undergo a mental health assessment, and to complete domestic violence intervention classes at his own expense.[1]

[1] Sentence was pursuant to the original Judgment filed on May 11, 1999, which was superceded by the Findings of Fact, Conclusions of Law and Judgment filed on December 17, 1999.

On appeal, Kurashige contends that Count II of the complaint, as amended, was fatally defective because it did not sufficiently describe the offense charged; the family court erred in finding Kurashige knowingly disobeyed the TRO because of a language barrier; and the family court erred in finding Kurashige violated the TRO by coming within 100 yards of complainant's residence.

We disagree with Kurashige's contentions and affirm the December 17, 1999, Findings of Fact, Conclusions of Law and Judgment of the family court.

I. BACKGROUND

Susan Kurashige (Susan), 73, is the mother of Janice Terayama (Terayama). Terayama was appointed legal guardian of Susan, who has Alzheimer's disease. Kurashige is Susan's older brother. On March 22, 1999, Terayama filed an ex parte petition on behalf of herself and Susan for a TRO against Kurashige.[2] The

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[2] As part of the TRO, Kurashige was ordered not to do the following:

1. Do not threaten or physically abuse the Plaintiff [Janice Terayama, individually and on behalf of Susan M. Kurashige] or anyone living with the Plaintiff.

2. Do not contact, write, telephone or otherwise electronically contact (by recorded message, pager, etc.) the Plaintiff, including where the Plaintiff lives or works.

3. Do not visit or remain within 100 yards of any place where the Plaintiff lives or works.

4. Do not have contact with: Janice Terayama[.]

5. Do not have any contact with: Susan M. Kurashige[.]

TRO attached to the ex parte motion was granted, and a hearing was set for April 1, 1999, to determine if the TRO should continue. Kurashige, Terayama, and Terayama's attorney were present at the hearing.

At trial, Terayama testified that Kurashige had been served with the ex parte motion and TRO on March 24, 1999. State's Exhibit 3, the "Proof of Service" on the TRO signed by Kurashige, was admitted into evidence.

Terayama testified that on March 26, 1999, after she finished work, she spoke to her mother (Susan) on the telephone. Susan told Terayama that Kurashige had telephoned and he was coming to her apartment. Terayama went to Susan's apartment at 620 McCully Street, took Susan away, and then returned Susan to her apartment around 7:00 p.m. Terayama then went to her home. As soon as Terayama walked in the door, Susan telephoned to tell her Kurashige had telephoned again and said he was coming right over. Terayama immediately called "911," then went back over to Susan's apartment.

Terayama testified that she arrived at Susan's apartment at about the same time as two police officers. Terayama showed the officers a copy of the TRO. Because the officers wanted to talk to Susan, Terayama called her from the lobby of the apartment building and Susan came down to the lobby. While Terayama, Susan, and the police officers were in the lobby,

Terayama saw Kurashige drive "[s]lowly" past them "[t]hree to five" feet away on the driveway immediately fronting the lobby. The driveway does not serve any other building; it is specifically for Susan's apartment building. Terayama identified Kurashige to the police.

Calvin Arakawa (Arakawa) testified he knew Susan, Terayama, and Kurashige. When asked how he knew that Susan had a TRO against Kurashige, Arakawa replied, "Well, [Kurashige] called me the day that he got the restraining order saying that he cannot come and see his sister. He wanted to talk to me and showed [sic] me the papers so I could read it and explain it to [him]." Kurashige was supposed to meet Arakawa in the parking lot at Kapiolani Shopping Plaza on March 26. The parking lot was right across the property line from Susan's apartment. Arakawa was waiting at Susan's apartment for Kurashige to call so they could meet in the parking lot. Arakawa testified that "[Kurashige] called and instead of Susan telling me that [Kurashige] was there, Susan went downstairs . . . to meet [Kurashige]."

Kurashige testified that he "went up to middle school" in Japan and he speaks in Japanese. Kurashige said he recalled being served with the TRO:

> Somebody brought it to me and said are you Kenichi Kurashige, I said yes. They were saying something I didn't understand so I told 'em go get an interpreter who speaks Japanese.

. . . .

> . . . They said this date is a court date and so this is most important, you don't -- you didn't -- you don't -- the other -- the other facts are unimportant. So they told me to sign here.

Kurashige was told the court date was April 1, 1999. Kurashige testified that he "looked at the paper but I didn't know what it -- what it meant so since it was -- there was some time until April 1st, I decided to ask Mr. Arakawa to explain it to me." Kurashige did not speak directly with Arakawa; he thought he called Susan to arrange the meeting with Arakawa. Kurashige testified: "That's what I think I did. . . . But I'm so old I don't remember. . . . We were supposed to meet -- I think we were supposed to meet in the parking lot." Kurashige testified he "entered the parking lot and there were police officers there so I thought something was odd so I just went -- I just passed through it and -- and out of it." Kurashige did not see Susan or Arakawa that day.

On cross-examination the deputy prosecutor asked Kurashige: "I'd just like to be clear. Do you read any English at all?" Kurashige answered: "I think I understand a little, but difficult legal terms I don't understand."

During the trial Terayama testified that at the TRO hearing Kurashige spoke in fluent English, was articulate, used sentences for about five minutes, and did so without the aid of an interpreter.

The family court found Kurashige guilty of Count II, Criminal Contempt of Court, in violation of HRS § 710-1077(3)(b).

II. STANDARDS OF REVIEW

A. Sufficiency of the Evidence

We review the sufficiency of evidence on appeal as follows:

> [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 a 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).

B. Sufficiency of the Complaint and Oral Amendment

The question of whether a charging instrument sets forth all essential elements is a question of law which we review de novo under the right/wrong standard. State v. Merino, 81 Hawai'i 198, 212, 915 P.2d 672, 686 (1996).

C. Findings of Fact

We review findings of fact according to the clearly erroneous standard.

> A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2)

> despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made.

State v. Wilson, 92 Hawai‘i 45, 48, 987 P.2d 268, 271 (1999) (quoting State v. Okumura, 78 Hawai‘i 383, 392, 894 P.2d 80, 89 (1995)).

D. Conclusions of Law

We review conclusions of law de novo, under the right/wrong standard. Under the right/wrong standard, this court "examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answer to it." State v. Kapiko, 88 Hawai‘i 396, 401, 967 P.2d 228, 233 (1998) (internal quotation marks omitted; brackets in original and added).

III. DISCUSSION

A. The Complaint and Oral Amendment Were Not Fatally Defective.

Kurashige alleges that Count II of the complaint, as amended, was fatally defective because it did not sufficiently describe the offense charged.

A complaint is fatally defective and in violation of due process if it fails to allege all essential elements or fails to sufficiently apprise the defendant of what he or she must be prepared to meet. Merino, 81 Hawai‘i at 212, 915 P.2d at 686. If challenged for the first time on appeal, the conviction should be reversed if the "defendant can show prejudice or that the

indictment [complaint] cannot within reason be construed to charge a crime." State v. Borochov, 86 Hawai'i 183, 193, 948 P.2d 604, 614 (App. 1997) (internal quotation marks omitted).

Count II of the complaint read as follows:

> COUNT II: On or about MARCH 26, 1999, in the City and County of Honolulu, State of Hawaii [Hawai'i], KENICHI KURASHIGE did intentionally or knowingly violate the Temporary Restraining Order issued in FC-DA No. 99-0387 on MARCH 22, 1999 by the Honorable RODNEY K.F. CHING, Judge of the Family Court of the First Circuit, State of Hawaii [Hawai'i], pursuant to Chapter 586 of the Hawaii [Hawai'i] Revised Statutes, thereby committing the offense of Violation of Temporary Restraining Order in violation of Section 586-4 of the Hawaii [Hawai'i] Revised Statutes.

Count II was amended as follows (changes are indicated by double underlining):

> COUNT II: On or about MARCH 26, 1999, in the City and County of Honolulu, State of Hawaii [Hawai'i], KENICHI KURASHIGE did knowingly disobey or resist the process, injunction or other mandate of a court by violating the Temporary Restraining Order issued in FC-DA No. 99-0387 on MARCH 22, 1999 by the Honorable RODNEY K.F. CHING, Judge of the Family Court of the First Circuit, State of Hawaii [Hawai'i], pursuant to Chapter 586 of the Hawaii [Hawai'i] Revised Statutes, thereby committing the offense of Criminal Contempt of Court in violation of Section 710-1077(1)(g) of the Hawaii [Hawai'i] Revised Statutes.[3]

Kurashige contends Count II was defective because it was couched in the language of the statute and the language contained the generic term "mandate." Disobeying or resisting the "mandate" of the court is clearly identified in the charge as being the knowing violation of the Temporary Restraining Order

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[3] HRS § 710-1077(1)(g) (1993) states, in relevant part:

> **§710-1077 Criminal contempt of court.** (1) A person commits the offense of criminal contempt of court if:
> . . . .
> (g) The person knowingly disobeys or resists the process, injunction, or other mandate of a court[.]

issued against Kurashige in case number FC-DA 99-0387, by Judge Rodney Ching, on March 22, 1999, in the Family Court of the First Circuit, in the State of Hawai‘i.

Furthermore, Kurashige's clear acceptance of the reduced charge in Count II evinces no prejudice to him. Before trial, the State moved to reduce Counts I and II against Kurashige to "criminal contempt of court." The family court held a colloquy with Kurashige and his counsel regarding the reduction of the charges and asked if the deputy prosecutor had explained the reduction to Kurashige. Kurashige stated to the court that he understood the State was seeking "[t]o reduce the degree of the charges." When the family court asked if Kurashige was objecting to the downgrading of the charge, Kurashige responded, "No, I don't object." Kurashige then told the court that he would like his attorney to "explain it to me, then I'll be fine." After allowing Kurashige time to speak with his counsel, the following exchange took place between the family court and defense counsel:

> THE COURT: [S]hould the record reflect that you've had a chance to talk to Mr. Kurashige through the interpreter?
>
> [Defense counsel]: Yes, Your Honor. And I fully believe he does understand what is going on. He would agree to the amendment and we ask for a trial.
>
> THE COURT: Okay. And is he waiving any substantive or procedural defects caused by the amendment in open court?
>
> [Defense counsel]: Yes, Your Honor.

The court went on to ask the interpreter to confirm with Kurashige directly whether he indeed agreed to "allow the

amendment to a lesser charge" and whether "he is also asking the Court for a trial?" Kurashige responded yes to both inquiries. Defense counsel also indicated he believed Kurashige could "assist with the defense and assist counsel." The State requested that defense counsel state for the record "the extent to which he [had] been able to communicate with [Kurashige]." Defense counsel replied:

> Your Honor, basically I have been able to discuss with him his right to a trial and he has been able to assist me with the defense. We had discussed this case in-depth this morning. He came in about I believe it was about 9:00 and we've had discussions ever since 9:00 with the interpreter present. And we actually did discuss quite a bit before we convened and I do believe he can assist with the defense and assist counsel.

The deputy prosecutor then read the charge to Kurashige, after which Kurashige signed the complaint "acknowledging his review of it." Based on the discussion among the family court judge, Kurashige, his interpreter, and defense counsel, as well as the trial record, we find no prejudice to Kurashige occurred in what he had to be prepared to meet at trial.

B. The Court Did Not Err in Finding Kurashige Knowingly Disobeyed the TRO by Coming Within 100 Yards of Where Susan Lives.

Kurashige contends the evidence was insufficient to prove that he knew or understood the terms of the TRO, or that he came within 100 yards of any place where Susan lives or works.

1. The prohibitions set forth in the TRO.

Although Kurashige asserts he does not understand difficult legal terminology, the wording of the prohibitions in the TRO contained simple commands: do not threaten, contact, visit, inter alia, Plaintiff. Kurashige testified that he knew the TRO mentioned something about his sister Susan. Arakawa testified that Kurashige "called me the day he got the restraining order saying that he cannot come and see his sister." Terayama testified that she observed Kurashige talking "comfortably" to people in English within the last few years. Terayama also testified that at the hearing on the TRO Kurashige addressed the court for about five minutes in English, speaking fluently regarding the restraining order, and that Kurashige was "impressive in a sense that he was able to articulate himself really well."

After considering all the evidence, the family court found Kurashige had made an admission that he knew he could not see Susan, which admission indicated he, "knew more than [he was] letting on." The family court found that Kurashige "had notice and knowledge of the specific terms of the Temporary Restraining Order" and that "there is sufficient evidence beyond a reasonable doubt to convict [Kurashige] of Count II."

We conclude the record contains sufficient evidence that would enable a person of reasonable caution to conclude, as

the family court did, that Kurashige understood the prohibitions set forth in the TRO, as well as the charges against him. Richie, 88 Hawai‘i at 33, 960 P.2d at 1241.

2. Coming within 100 yards of Susan's apartment building.

Kurashige claims there was insufficient evidence that he came within 100 yards of where Susan lives or works. The following facts were adduced at trial: Susan resided in an apartment building located at 620 McCully Street. Kurashige's own counsel asked him: "[W]hat happened when you actually went to Susan Kurashige's residence?" Kurashige testified that he "entered the parking lot" of Susan's apartment building. Terayama testified that she saw Kurashige drive through the apartment building's driveway "very close" to the entrance of the building, within "three to five" feet.

And finally, Kurashige's opening brief makes the admission that "[u]ltimately, it was [Kurashige's] attempts to solicit the help of Calvin Arakawa to help explain the terms of the TRO that brought him within 100 yards of his sister's residence." The family court's finding of fact that Kurashige came within 100 yards of Susan's residence by driving into the apartment building's parking lot and passing directly in front of the apartment building's lobby was not clearly erroneous. The family court properly found that Kurashige knowingly violated the TRO and, therefore, HRS § 710-1077(3)(b).

IV. CONCLUSION

The December 17, 1999, Findings of Fact, Conclusions of Law and Judgment of the Family Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai‘i, July 5, 2001.

On the briefs:

Tracy S. Fukui,
Deputy Public Defender,

for defendant-appellant.

Chief Judge

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge