NO. 23708

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI I

STATE OF HAWAII, Plaintiff-Appellee, v.
SOLOMON BROCKINGTON, III, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT COURT
(FC-CRIMINAL NO. 00-1-1831)

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

On July 25, 2000, a jury found Defendant-Appellant Solomon Brockington, III (Defendant) guilty of intentionally or knowingly violating an order for protection granted to Valerie R. Hutchinson (Hutchinson) under Hawai i Revised Statutes (HRS) § 586-5.5 (2000),[1] in violation of HRS § 586-11 (2000)[2]. He was sentenced to one year of probation, upon terms and conditions including, *inter alia,* fourteen days in jail. Defendant contends that the term of jail was based on a prior conviction for violation of the same order for protection, as provided by HRS

[1/] Hawai i Revised Statutes (HRS) § 586-5.5(a) (2000) provides, in pertinent part, that [i]f after hearing all relevant evidence, the court finds that the respondent has failed to show cause why the order should not be continued and that a protective order is necessary to prevent domestic abuse or a recurrence of abuse, the court may order that a protective order be issued for such further period as the court deems appropriate, not to exceed three years from the date the protective order is granted.

[2/] HRS § 586-11(a) (2000) provides that [w]henever an order for protection is granted pursuant to this chapter, a respondent or person to be restrained who knowingly or intentionally violates the order for protection is guilty of a misdemeanor.

§ 586-11(a)(2)(A) (2000).[3] Defendant appeals the August 1, 2000 judgment of conviction and sentence entered by the family court of the first circuit, the Honorable Michael D. Wilson, judge presiding.

On appeal, Defendant challenges (1) the sufficiency of the evidence at trial and (2) the court s application of HRS § 586-11(a)(2)(A) to his sentencing.

I. Background.

In 1996, Hutchinson ended a twenty-two year relationship with Defendant. On April 14, 1999, she obtained the order for protection prohibiting Defendant from, *inter alia,* telephoning, writing, communicating or being within one hundred feet of her. The order was modified a few days later, permitting Defendant to contact Hutchinson in order to arrange visitation with their eleven-year-old daughter, Angelica.[4]

Hutchinson has two other children from a previous relationship, Wayne, 27, and Bertha, 25. In addition, Hutchinson

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[3] HRS § 586-11(a)(2)(A) (2000) is a repeat offender sentencing statute that provides for a mandatory minimum jail sentence of not less than forty-eight hours for a second conviction for violation of the order for protection . . . [t]hat is in the nature of non-domestic abuse, and occurs after a first conviction for violation of the same order that was in the nature of non-domestic abuse[.]

[4] The Honorable Darryl Y.C. Choy of the family court of the first circuit granted Defendant's motion to amend the order for protection and allowed Defendant to have limited contact with [Hutchinson], by phone, to establish visitation . . . , and in person for court proceedings. Defendant shall be allowed telephone contact with [Angelica] as arranged between the parties, and at reasonable hours.

adopted her daughter Bertha s three children, Jolisa, 8, Lavander, 6, and Lavelle, 4. Defendant grew close to Hutchinson s adopted children over the years.

Lavander s sixth birthday fell on the weekend of May 20, 2000. Hoping to visit him, Defendant called Hutchinson on her cellular phone three times. Since Hutchinson was not available for the first call at 9 a.m., Defendant called again at 11 a.m. It was then that Hutchinson informed Defendant that it was not a good time to visit Lavander. According to Hutchinson, however, [h]e wouldn t take no for an answer so I hung up. At Hutchinson s request, Andrea Kaniaupio (Kaniaupio) answered the third call, and told Defendant that Hutchinson did not want to speak to him and that she didn t want him to come down (indiscernible). [5]

Defendant then walked to Pokai Bay Beach Park, carrying Lavander s birthday card. Aware that Hutchinson had previously celebrated Angelica s birthday there, Defendant testified that it occurred to him that Hutchinson might be there, but that he did not see her. After sitting on the Pokai Bay breakwater for a period of time, Defendant saw Angelica and Lavander playing unsupervised in the water.

[5/] Although Defendant apparently violated the order for protection by contacting Hutchinson about affairs unrelated to visitation with their daughter Angelica, Hutchinson did not alert the police at that time.

Although Defendant argued at trial that he could not also see, from his position on the breakwater, the picnic area where Hutchinson sat, a photograph depicting an open view was admitted over his objection. In addition, Hutchinson testified that she saw Defendant facing in her direction, without any obstructions between herself and his vantage point on the breakwater. Hutchinson testified, I m sure he saw us.

After walking out to the water to speak with Angelica, Hutchinson noticed Defendant heading in her direction, whereupon she walked back to the picnic area to retrieve her cellular phone. After wishing Lavander happy birthday, Defendant followed him to the picnic area, purportedly to ensure the card was put in a safe place. Upon Defendant s arrival at the picnic area, Hutchinson told him that he was not supposed to be there and to leave immediately. As Angelica pushed Defendant away from the table, Defendant complained that he wasn t doing anything wrong, he just wanted to give Lavander his card[.] Hutchinson then called the police, ignoring Defendant s remonstrance. After a few minutes, Defendant left and went to a nearby heiau. On his way home, he was stopped by the police and arrested for violating the order for protection.

At trial, it was established that Defendant had contacted Hutchinson on at least twenty prior occasions. However, the only violation Hutchinson reported to the police was a series of insulting phone messages Defendant left for her in

June 1999. In July 1999, Defendant pleaded guilty to and was convicted for that violation of the order for protection, and received a sentence of five days in jail.

On July 25, 2000, Defendant was found guilty by the jury of the May 20, 2000 violation of the order for protection. At trial, both Hutchinson and Defendant testified that he had been convicted in July 1999 of violating the same order for protection. Concurring with the State in this respect, defense counsel agreed sentencing was controlled under HRS § 586-11(a)(2)(A), thus subjecting Defendant to punishment as a repeat offender. Defendant was sentenced to one year of probation upon terms and conditions, including 14 days in jail and counseling. Judgment was entered on August 1, 2000. On August 30, 2000, Defendant filed this timely appeal.

II. Issues Presented.

Defendant contends on appeal that (1) there was insufficient evidence to support the jury s verdict, and (2) the circuit court violated his right to due process by sentencing him under HRS § 586-11(a)(2)(A) without determining that he had a prior conviction for violation of the same order for protection.

III. Standards of Review.

A. Insufficiency of the Evidence.

The test on appeal 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) (citations omitted). See also State v. Tamura, 63 Haw. 636, 637, 633 P.2d 1115, 1117 (1981).

Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion. Ildefonso, 72 Haw. at 577, 827 P.2d at 651 (citation, internal quotations marks and ellipsis omitted).

The jury, as the trier of fact, is the sole judge of the credibility of witnesses or the weight of the evidence. Tamura, 63 Haw. at 637-38, 633 P.2d at 1117 (citations omitted).

[V]erdicts based on conflicting evidence will not be set aside where there is substantial evidence to support the jury s findings. Tsugawa v. Reinartz, 56 Haw. 67, 71, 527 P.2d 1278, 1282 (1974) (citation and internal quotation marks omitted). 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 (citation and internal quotation marks omitted).

B. Plain Error in Sentencing.

Where a challenge to a sentence is not raised before the sentencing court, the sentencing court s decision is reviewed for plain error. State v. Jenkins, 93 Hawai i 87, 114, 997 P.2d 13, 40 (2000). Plain error is recognized when the error affects substantial rights of the defendant. State v. Cullen, 86 Hawai i 1, 8, 946 P.2d 955, 962 (1997). See also Hawai i Rules of Penal Procedure (HRPP) Rule 52(b) (2000) (Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.).

IV. Discussion.

A. Insufficiency of the Evidence.

HRS § 586-11(a) provides, in relevant part, that a person to be restrained who knowingly or intentionally violates the order for protection is guilty of a misdemeanor. The provisions of the order for protection that concern us here provided:

> Defendant is prohibited from coming or passing within 100 yards of any place of employment or where [Hutchinson] lives and within 100 feet of each other at neutral locations. In the event the parties happen upon each other at a neutral location, the subsequent arriving party shall leave immediately or stay at least 100 feet from the other. When the parties happen upon each other at the same time at a neutral location, the Defendant shall leave immediately or stay at least 100 feet from [Hutchinson]. **Do not violate this order even if the Plaintiff invites you to be at the place of employment or where the other lives.**

(Emphasis in the original.)

On appeal, Defendant concedes that he and Hutchinson were within 100 feet of each other at a neutral location (Pokai Bay). Defendant argues, however, that there was insufficient evidence to conclude that he intentionally or knowingly violated the order for protection:

> The evidence shows that [Defendant] arrived at Pokai Bay without the knowledge that Hutchinson would be there. [Defendant] was in the area for some time before he noticed his grandchild [(Lavander)]. [Defendant] gave the child a card and some money. [Defendant] and the child walked up the beach to a picnic area. [Defendant] followed the child to ensure the child had a safe place to put the card and money. [Defendant] did not approach the picnic area with the intent to violate the Protective Order. [Defendant] intended to ensure the child had a safe place to put the card and money.
>
> The evidence fails to establish that [Defendant] saw Hutchinson in the area when he followed the child. It was Hutchinson who saw [Defendant] coming to the picnic area and she confronted him, telling him to leave. When confronted at a neutral location by Hutchinson, [Defendant] verbally responded to her and immediately left 10-15 seconds later. [Defendant s] response was that this is a public place and I am doing nothing wrong. [Defendant s] statements are a clear indication of his state of mind and are corroborated by a State witness [(Kaniaupio)].

Opening Brief at 7.

Viewing the evidence in the light most favorable to the State, and recognizing the jury s right to determine credibility, weigh the evidence, and draw justifiable inferences from the evidence presented, State v. Lima, 64 Haw. 470, 475, 643 P.2d 536, 539 (1982), we conclude there was substantial evidence adduced at trial to support the decision of the trier of fact.

Although Hutchinson never expressly informed Defendant that she would be celebrating Lavander s birthday at Pokai Bay, the jury could justifiably infer that Defendant knew Hutchinson was there when he first saw Lavander and Angelica playing in the ocean.

That morning, Defendant had called Hutchinson s cellular phone three times, attempting to arrange a visit with Lavander. Defendant first called around 9 a.m., speaking only with Kaniaupio, who promised to have Hutchinson call back when she returned. During the second call, around 11 a.m., Hutchinson told Defendant it was not a good time to visit. Defendant would not take no for an answer, so he immediately called back and spoke with Kaniaupio, who told him that he should not come down. Because Defendant knew that Hutchinson had previously celebrated Angelica s birthday at Pokai Bay, the jury could justifiably infer that Defendant knew there was a good chance she would likewise celebrate Lavander s birthday there. This inference is borne out by the fact that when Defendant went to Pokai Bay, he carried Lavander s birthday card with him. Defendant himself admitted on cross-examination that it occurred to him Hutchinson might be there:

> Q [PROSECUTOR:] [D]id it occur to you that [Hutchinson] was with Lavander and Angelica at the beach for Lavander s birthday?
>
> A [DEFENDANT:] It occurred to me, I did not see her so, I know [Hutchinson].

It is undisputed that when Defendant walked out on the breakwater, he had a view down the beach, where he spotted Lavander and Angelica playing in the ocean. The jury could justifiably infer that Defendant, from this vantage point, could also see Hutchinson further up the beach at the picnic area. Hutchinson testified that Defendant was sitting on the breakwater, looking in her direction. She was certain that he saw them. Defendant denies that he saw Hutchinson at that point in time. However, even if he did not see Hutchinson from the breakwater, it was a justifiable inference that he would have known that Hutchinson, Lavander s sole caretaker, would be there celebrating Lavander s birthday.

After giving Lavander his card, Defendant followed him, purportedly to ensure that the card was put in a safe place. Although he could have merely watched Lavander take the card to a safe place, while remaining the requisite one hundred feet away from the family, Defendant chose instead to walk straight up to Hutchinson. The jury could justifiably infer, under the circumstances revealed by the evidence in the light most favorable to the State, that Defendant intentionally or knowingly approached Hutchinson s immediate presence. Once there, Defendant refused to leave until Angelica pushed him away and Hutchinson phoned the police.

As an overarching matter of general motive, the jury was also privy to Defendant s testimony about over twenty

instances of prior contacts he had with Hutchinson while she was under the protection of the order for protection, many of them initiated by Defendant. These, in the light most favorable to the State, could yield a justifiable inference that Defendant was intentionally insinuating himself back into her life.

B. Sentencing.

Defendant also claims the circuit court violated his right to due process, under the Fifth Amendment to the United States Constitution and article I, section 5 of the Hawai i Constitution, by sentencing him as a repeat offender under HRS § 586-11(a)(2)(A) without determining that he had a prior conviction for violation of the same order:

> The record also indicates that [Defendant] had previously plead guilty to a charge of violating a protective order. However, there was no finding that [Defendant] had a previous conviction. The court merely asserts that there was a previous violation. Furthermore, the sentencing court does not determine whether there was a *prior conviction* of the *same protective order* before sentencing [Defendant] under HRS § 586-11(a)(2)(A).

Opening Brief at 10 (emphases in the original).

Setting to one side the circuit court s terminology during the sentencing hearing, and its omission of complete findings under HRS § 586-11(a)(2)(A), both of which we consider unexceptionable, the fact remains that during trial, evidence was adduced of Defendant s prior conviction for violation of the same order, through the testimony of Hutchinson and of Defendant himself. In addition, Defendant s counsel conceded at sentencing

that Defendant could be sentenced on the basis of HRS § 586-11(a)(2)(A).

Hutchinson testified that in June 1999, she called the police after receiving harassing phone messages from Defendant. She further testified as follows:

> Q [PROSECUTOR:] And, in fact, the defendant was convicted for that, wasn t he?
>
> A[:] Yes.
>
> Q[:] And on those, on that occasion last year, the restraining order was in force, wasn t it?
>
> A[:] Yes.
>
> Q[:] And he was convicted for a violation of this restraining order, right?
>
> A[:] Yes.
>
> . . . .
>
> Q[:] So . . . when you called the police on May 20th, [2000,] it was also because of a violation of this same restraining order, is that right?
>
> A[:] Yes.

Defendant himself admitted as much under direct examination by his attorney:

> Q [DEFENSE COUNSEL:] You left some messages for her, correct?
>
> A[:] Yes, I did, I left some messages on June 21st, [1999].
>
> Q[:] And you actually got charged for that, right?
>
> A[:] Correct, yes.
>
> Q[:] And you pled guilty to that?
>
> A[:] Yes, I did plead guilty to that.

Upon cross-examination, Defendant affirmed his prior conviction:

> Q [PROSECUTOR:] So, going back to the conviction from the June 21st[, 1999] violation, you said yes, you pled guilty to that, isn t that right?
>
> A[:] Yes, ma am, I did.
>
> Q[:] And that violation was the fact that you called and left her several voice messages on the phone?
>
> A[:] Correct.

Finally, at the sentencing hearing, defense counsel conceded that

> sentencing is controlled under 586-11. This would be 586-11(2)(a) [(sic)], a second conviction for violating an order for protection. There s a mandatory two-day jail sentence. He does have credit for that time, so it s not a case of the Court needs to send him to jail. He does have the minimum two days under his belt already. He was arrested on that Saturday and released on the following Monday from Courtroom 8 Delta.

When the court questioned defense counsel if Defendant had a previous violation of an order protection [(sic)] July 12 which resulted in five days in jail[,] defense counsel confirmed,

That s correct. He also stated that [Defendant has] never been in trouble except for these incidents, and this order is the sole source of his legal problems. In the past year, he s violated it twice, and but for this order, but for this breakup, he wouldn t have any legal problems. In summation on sentencing, defense counsel stated, So, we understand that the two days is mandatory, and we want the Court to understand that he has served two days already, and that he can successfully complete probation.

We conclude that the circuit court did not err or violate Defendant s right to due process in sentencing him. We observe, in passing, that though the court did base Defendant s sentence at least in part upon his prior conviction for violation of the same order for protection, it is also clear that the court considered other factors and thereupon had ample justification, HRS §§ 706-606 & 706-621 (1993), for sentencing Defendant to the full year in prison authorized upon conviction of a misdemeanor. HRS § 706-663 (1993).

V. Conclusion.

For the foregoing reasons, we affirm the August 1, 2000 judgment.

DATED: Honolulu, Hawaii, August 6, 2001.

On the briefs:

Matthew L. Hall,
Deputy Public Defender,
for defendant-appellant.

Caroline M. Mee,
Deputy Prosecuting Attorney,
for plaintiff-appellee.

Acting Chief Judge

Associate Judge

Associate Judge