

---

NO. 25170

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

---

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

FREDDIE F. DOLOR, Defendant-Appellant.

---

APPEAL FROM THE FIRST CIRCUIT COURT  
(FC-CR. NO. 02-1-2260)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant-appellant Freddie F. Dolor appeals from the May 29, 2002 judgment of conviction and sentence of the Family Court of the First Circuit, the Honorable Steven Alm, presiding, on a charge of abuse of a family or household member, pursuant to Hawai'i Revised Statutes (HRS) § 709-906 (Supp. 2001). On appeal, Dolor alleges that the family court erred in:

(1) allowing complaining witness Erlaine Villaver to testify regarding her prior statement to police officers; (2) admitting into evidence photographs taken by Honolulu Police Department Officer Shane Wright, which Dolor contends do not accurately represent Villaver's injuries; (3) erroneously instructing the jury on the elements of abuse of a family member by (a) failing to separate the "conduct" element and the "result" element and (b) failing to specify that the state of mind element applied to all elements of the offense; and (4) violating his constitutional right to a unanimous verdict by (a) not requiring the prosecution

to elect the specific act that constituted the "conduct" element of abuse of a family member and (b) not giving the jury a unanimity instruction regarding the "conduct" element.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the issues raised and the arguments presented, we resolve each of Dolor's contentions on appeal as follows.

First, Villaver's testimony at trial regarding her prior oral statements to Officer Wright, although hearsay, were properly admitted by the trial court under the excited utterance exception. Hawai'i Rules of Evidence Rule 803(b)(2) (1993); State v. Moore, 82 Hawai'i 202, 218-22, 921 P.2d 122, 138-42 (1996).

Second, both the prosecution and defense agree that the photographs of Villaver's injuries were not of the best quality. Both the prosecution and the defense also maintained that the photographs tended to minimize the nature of the injuries. Thus, absent a showing of an abuse of discretion, the trial court's decision to admit the photographs into evidence will not be disturbed on appeal. State v. Edwards, 81 Hawai'i 293, 296, 917 P.2d 703, 706 (1996). None having been shown, we hold that the family court did not abuse its discretion in admitting the photographs into evidence.

Third, although we recognize that the family court's jury instruction combined the conduct and result elements of the

offense charge in this case, we hold that the instruction was substantively, if not technically, correct and not prejudicial. See State v. Aganon, 97 Hawai'i 299, 36 P.3d 1269 (2001), and State v. Sugihara, 101 Hawai'i 361, 68 P.3d 635 (App. 2003) (citing Aganon for the proposition that "[t]he combination of conduct and result in a single element does not, in and of itself, portend prejudice").

Finally, inasmuch as Dolor's alleged acts of physical abuse all occurred during a single physical altercation with Villaver, we agree with the prosecution that the altercation constitutes a continuing course of conduct rather than separate and distinct culpable acts. See State v. Rapoza, 95 Hawai'i 321, 22 P.3d 968 (2001). We, therefore, hold that the family court did not err in failing to require the prosecution to elect a specific act to support conviction nor in refusing to give a unanimity instruction. Accordingly,

IT IS HEREBY ORDERED that the May 29, 2002 judgment of conviction and sentence from which this appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, September 16, 2003.

On the briefs:

James S. Tabe, Deputy  
Public Defender, for  
defendant-appellant

James M. Anderson,  
Deputy Prosecuting Attorney,  
for plaintiff-appellee