

NO. 26723

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

PHILLIP BUGADO, JR., Petitioner-Appellant

vs.

STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE SECOND CIRCUIT COURT
(SPP NO. 04-1-0001)

SUMMARY DISPOSITION ORDER

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

EXHIBIT
STATE OF HAWAII
APPELLATE COURTS

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FILED

Petitioner-Appellant Philip Bugado, Jr. (Bugado)

appeals from the Order Denying Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody (the order) entered by the circuit court of the second circuit (the court)¹ on June 28, 2004 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (2004).² We affirm.

¹ The Honorable Shackley F. Raffetto presided over this matter.

² In pertinent part, Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (2004), entitled "Post-conviction proceeding," provides a petitioner relief from judgments of conviction and from custody based on judgments of conviction, where "(i) . . . the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawai'i," or "(v) any ground which is a basis for a collateral attack on the judgment." (Emphases added.)

In addition, HRPP Rule 40 does not apply when "the issues sought to be raised have been previously ruled upon or were waived," in that "petitioner knowingly and understandingly failed to raise [the issues] . . . before the trial, at the trial, on appeal, . . . or [in] any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, [absent] the existence of extraordinary circumstances to justify . . . failure to raise the issue." HRPP Rule 40(a)(3) (emphasis added). Moreover, "[t]here is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure."

On April 11, 2001, Bugado was convicted after trial by jury of Terroristic Threatening in the First Degree under Hawai'i Revised Statutes (HRS) § 707-716(1)(d) (1993)³ (Count I), three counts of Abuse of Family or Household Member under HRS § 709-906 (Supp. 2005)⁴ (Counts II, IV, and V), and Unlawful Imprisonment in the Second Degree under HRS § HRS § 707-722(1) (1993)⁵ (Count VI) of the indictment, and acquitted of Count III, one of the abuse charges. Previously, Bugado pled no contest to Count VII of the indictment, for Possession of a Firearm by Persons under Restraining Orders in violation of HRS § 134-7 (Supp. 2005),⁶ which the court accepted after engaging Bugado in a colloquy.

After moving for substitution of trial counsel, appellate counsel was appointed for Bugado. Bugado's conviction was affirmed by this court by Summary Disposition Order filed January 21, 2003. Subsequently, on January 8, 2004, Bugado filed

³ Hawai'i Revised Statutes (HRS) § 707-716(1)(d) (1993), entitled "Terroristic Threatening in the first degree," provides in pertinent part that "[a] person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening . . . [w]ith the use of a dangerous instrument."

⁴ HRS § 709-906(1) (Supp. 2005), entitled "Abuse of family or household members; penalty," provides in pertinent part that "[i]t shall be unlawful for any person, singly or in concert, to physically abuse a family or household member"

⁵ HRS § 707-722(1) (1993), entitled "Unlawful imprisonment in the second degree," states that "[a] person commits the offense of unlawful imprisonment in the second degree if the person knowingly restrains another person."

⁶ In general, HRS § 134-7(f) (Supp. 2005), entitled "Ownership or possession prohibited, when; penalty," prohibits any person who has been restrained pursuant to an order of a court from possessing a firearm or ammunition. HRS § 134-7(h) (Supp. 2005) provides that any person violating HRS § 134-7(f) shall be guilty of a misdemeanor.

a Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody (Rule 40 petition) which the court denied without a hearing. The court held that Bugado either waived the claims in his petition or presented no colorable claim.

On appeal, Bugado reiterates his arguments in his Rule 40 petition, that (1) the court erred in denying him a hearing on his petition;⁷ (2) his convictions were "obtained by the unconstitutional failure of [Respondent-Appellee State of Hawai'i (the State)] to disclose to the petitioner evidence favorable to [him]"; (3) his plea of no contest as to Count VII, for Possession of a Firearm by Persons under Restraining Orders, "was not knowingly, voluntarily, or intelligently made since [trial] counsel told petitioner that there was a plea agreement, when in fact, there was not, and that a [deferred acceptance of a no contest (DANC)] plea was statutorily barred, notwithstanding [trial] counsel's representation [to the contrary]"; (4) his

⁷ Under the first ground of his Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody, Petitioner-Appellant Philip Bugado, Jr. (Bugado) claimed as sub-issues that his trial counsel neglected to "investigate and to present exculpatory evidence," by his failure to (1) subpoena abuse reports showing that Complainant physically abused him in 1995, (2) subpoena relevant witnesses to prior abuse by Complainant, (3) subpoena forgery and theft reports against Complainant, (4) hire a handwriting expert to support the forgery and theft charges despite seeking continuances from the court and assuring Bugado that he would do so, (5) interview witnesses presented by Respondent-Appellee State of Hawai'i (the State), (6) obtain and elicit prior bad acts evidence of Complainant to support his claim of self-defense, (7) submit into evidence a sworn statement by Complainant made to support a request for a temporary restraining order (TRO) to prove inconsistencies in her statements that she was threatened with a gun, (8) move to dismiss the charge Bugado pled guilty to even though insufficient evidence was adduced at the grand jury to support a finding of probable cause, (9) cross-examine certain witnesses presented by the State, and (10) present exculpatory witnesses or evidence on behalf of the defense.

convictions were obtained by "violation of the protection against double jeopardy^[8] and [HRS § 701-109 (1993)],"⁹ that "the court was without jurisdiction because abuse of household members can only be heard by the family court," and that "his trial and

⁸ Article I, section 10 of the Hawai'i Constitution provides in pertinent part:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law, except in cases arising in the armed forces when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy; nor shall any person be compelled in any criminal case to be a witness against oneself.

(Emphasis added.)

⁹ HRS § 701-109 (1993), entitled "Method of prosecution when conduct establishes an element of more than one offense," reads in pertinent part:

(1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:

(a) One offense is included in the other, as defined in subsection (4) of this section; or

(e) The offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of conduct constitute separate offenses.

(4) A defendant may be convicted of an offense included in an offense charged in the indictment or the information. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

(c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

(Emphases added.)

appellate counsel did not raise the issue[s].” Bugado requests that this court vacate his convictions or in the alternative, for a remand for trial.

In response, the State contends that (1) the court was right in determining that the issues were waived and are without merit, and (2) even if not waived, the court was correct in its ruling. In reply, Bugado states that (1) he “was denied a hearing and an opportunity to question his counsel[] under oath as to why certain witnesses were not called,” (2) “no showing of actual prejudice is required for the [court] to order a Rule 40 . . . hearing[,]” and (3) he “should be allowed to call all of his witnesses to testify at a hearing” inasmuch as “[t]heir testimony will support their sworn statements made in the petition [which] would have made a difference in the trial outcome.”

On appeal, “the issue whether the trial court erred in denying a Rule 40 petition without a hearing based on a showing of no colorable claim is reviewed de novo; thus, the right [or] wrong standard of review is applicable.” Dan v. State, 76 Hawai‘i 423, 427, 879 P.2d 528, 532 (1994) (quoting State v. Allen, 7 Haw. App. 89, 92-93, 744 P.2d 789, 792-93 (1987), overruled on other grounds by Dan, 76 Hawai‘i at 427, 879 P.2d at 532.

With regard to Bugado’s first ground, it is noted that Bugado does not allege that appellate counsel was ineffective,

and therefore, trial counsel's actions or inactions are at issue. It is concluded that sub-issues (1), (2), (3), (4), (6), (8) and (9) of the first ground of Bugado's petition were waived. Sub-issue (1), pertaining to failure of trial counsel to subpoena reports of the alleged 1995 abuse by Complainant, when asked at trial whether Complainant's prior or subsequent bad acts would be referred to by Bugado, trial counsel indicated he did not intend to use any. Inasmuch as trial counsel's intention not to use any of Complainant's prior or subsequent bad acts were made on the record, Bugado had a "realistic opportunity," Matsuo v. State, 70 Haw. 573, 577, 778 P.2d 332, 334 (1989) (citing Commonwealth v. Hertzog, 425 A.2d 329 (Pa. 1981)), to raise this issue on appeal but did not do so.

Moreover, the reports state that Bugado and Complainant were "involved in a verbal argument" and that "[n]o injuries [were] reported or complained of." Assuming that this omission precluded Bugado from raising a claim of self-defense, no basis exists as a matter of law for such a claim since the abuse reports concern an incident from 1995, and would not be admissible given that Bugado's convictions relate to incidents occurring in February and March of 2000. See HRS § 703-304 (Supp. 2005) (providing that "the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on

the present occasion" (emphasis added)). Furthermore, Bugado's court testimony made no mention of any aggression on Complainant's part. In sum, even if not waived, trial counsel's alleged omissions did not "result[] in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Fukusaku, 85 Hawai'i 462, 479-80, 946 P.2d 32, 49-50 (1997).

Similarly, with regard to sub-issue (2), trial counsel's supposed failure to subpoena relevant witnesses as to the alleged 1995 abuse, again, trial counsel's intention not to use prior or subsequent bad acts are in the record. Accordingly, such claim was waived for the same reason noted in item (1). Even if not waived, because the alleged abuse by Complainant took place approximately five years before, the statements of these witnesses would not be relevant to a potential self-defense claim by Bugado for the abuse incidents in 2000 with which he was charged.

In regard to the 1995 incident, the statement by Sgt. Eric Muroki (Muroki) provided by Rule 40 counsel stated that he noticed that, in 1995, Bugado had scratches on his neck and chest but he could not determine whether they were "offensive or defensive" injuries, and that Bugado declined to file a complaint. A statement by Officer Eric Lee Correa stated that he recalled observing Bugado in 1995 with swelling and bruising on his legs. Hence, Muroki's and Correa's testimonies conflicted as

to the nature of the injuries. In any event, as noted above, such statements would not be relevant to the defense of self defense for the 2000 charges. According to Rule 40 counsel's investigation, Lt. Daniel Matsuura and Sgt. Lloyd Yamashita did not possess knowledge of Bugado being involved in a dispute with Complainant.

Bugado also did not produce any affidavit or sworn statements as to what the remaining witnesses, Sgt. Delima and Lt. Gregg Peresa, would testify to, see State v. Richie, 88 Hawai'i 19, 39-40, 960 P.2d 1227, 1247-48 (1998) (stating that "[i]neffective assistance of counsel claims based on the failure to obtain witnesses must be supported by affidavits or sworn statements describing the testimony of the proffered witnesses"), and, therefore, Bugado failed to meet his burden of showing these omissions "resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Fukusaku, 85 Hawai'i at 479-80, 946 P.2d at 49-50.

With respect to sub-issue (3), involving trial counsel's alleged failure to subpoena reports that Complainant was involved in theft and forgery, trial counsel did obtain such reports, which according to the State, were made a part of discovery. The record indicates that the checks alleged to have been forged were deposited into Bugado and Complainant's joint account. Complainant freely admitted to depositing these checks into their joint credit union account, and Bugado does not dispute Complainant's admission.

Even if evidence of Complainant's alleged forgery would be admissible to impeach her credibility, inasmuch as such evidence was available and therefore apparent in the record, Bugado had a "realistic opportunity," Matsuo, 70 Haw. at 577, 778 P.2d at 334, to raise this issue on direct appeal but failed to do so.

In the same light, because the checks in question are in the record, sub-issue (4), trial counsel's failure to hire a handwriting expert, was waived. The purpose of obtaining an expert was to ascertain whether Complainant had indeed forged Bugado's signature. As noted previously, when asked by the court whether Complainant's prior or subsequent bad acts would be referred to by Bugado, trial counsel indicated he did not intend to use any. Thus, Bugado had a "realistic opportunity," id., to raise an ineffective assistance claim against trial counsel for failure to obtain a handwriting expert.

Sub-issue (6) apparently relates to trial counsel's failure to elicit "prior bad acts" evidence of Complainant following the alleged 1995 abuse incident in order to substantiate self defense. Such evidence seemingly refers to acts by Complainant wherein she became emotional about Bugado's alleged infidelities, and purportedly threatened to kill herself. Again, trial counsel's intention not to use these prior or subsequent "bad acts" are in the record, and, thus, Bugado had the opportunity to raise this sub-issue on direct appeal.

Moreover, the omission by trial counsel of Complainant's "prior bad acts," as Bugado claims them to be, appears to be a matter of trial strategy. In excluding such evidence, trial counsel apparently avoided introduction of Bugado's own alleged bad acts, including his alleged infidelities. Such determination by trial counsel should not be second-guessed. See Richie, 88 Hawai'i at 39-40, 960 P.2d at 1247-48 (stating that the "calling of witnesses is a strategic decision that is generally left to defense counsel" and that the "decision whether to call witnesses in a criminal case is normally a matter within the judgment of counsel [which] will rarely be second-guessed by judicial hindsight").

With respect to sub-issue (8), trial counsel's failure to move to dismiss the charge of Possession of Firearm by Persons Under Restraining Orders, such issue could also have been raised on direct appeal and was therefore waived. The record shows that trial counsel observed that "[t]hey have got witnesses to say [Bugado] handed [the firearms] over. That's why we are pleading no contest to it." Bugado had the opportunity to challenge the grand jury determination that probable cause existed to support the charge on direct appeal but failed to do so.

Sub-issue (9), pertaining to trial counsel's alleged failure to cross-examine certain witnesses, was similarly waived. Bugado provides a long list of such witnesses. The witnesses' testimony are apparent in the transcripts, and are made a part of

the record. Although Bugado does not specify what relevant information was omitted by trial counsel's failure to cross-examine these witnesses, Bugado had the opportunity to review the record in order to raise the ineffectiveness of counsel during direct appeal and, therefore, had a "realistic opportunity . . . to raise an ineffective assistance of counsel claim." Matsuo, 70 Haw. at 577, 778 P.2d at 334; see Stanley v. State, 76 Hawai'i 446, 450, 879 P.2d 551, 555 (1994) (recognizing that "HRPP Rule 40(a)(3) restricts the issues that may be raised in a post-conviction proceeding and provides that '[s]aid proceeding shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived" and explaining that "[a]n issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted" (quoting HRPP Rule 40(a)(3)) (emphases added); Bryant v. State, 6 Haw. App. 331, 334, 720 P.2d 1015, 1018 (1986) (noting that in a HRPP Rule 40 proceeding, waiver "can only be lodged against the petitioner when it may be inferred from an examination of the entire record"), overruled on other grounds by Briones v. State, 74 Haw. 442, 460-61 n.11, 848 P.2d 966, 975-76 n.11 (1993).

As to the remainder of Bugado's claims under the first ground of the petition, the court was correct in ruling that

these claims were without merit. Bugado, as the court recognized, "lists multiple specific errors or omissions reflecting [trial] counsel's lack of skill, judgment, or diligence." However, Bugado fails to meet his burden of showing that "such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Fukusaku, 85 Hawai'i at 479-80, 946 P.2d at 49-50.

With respect to sub-issue (5), trial counsel's failure to interview witnesses presented by the State, Bugado names three witnesses in particular. The first witness, Ruth Balderas (Balderas), a victim witness counselor and acquaintance of Complainant's, testified at trial that Complainant approached her, she contacted the Maui Police Department domestic violence unit, and requested assistance for Complainant to get her personal belongings and to report the abuse incident. Balderas then testified that she observed that Complainant had a bruise on her neck and appeared "upset, worried, and scared." Trial counsel then expressed his intention not to cross-examine. No affidavit or sworn statement was obtained from Balderas, and Bugado does not present any argument as to how he was affected by trial counsel's failure to interview this witness prior to trial.

The second witness, Barbara Pagay, also testified at trial, and provided a sworn statement, and would have further testified that (1) Bugado and Complainant are her friends, (2) she would have denied that Bugado brandished a gun on a

certain date, (3) she was never told by Complainant that Complainant was threatened with a firearm, and (4) Bugado complained to her about Complainant having an affair. Although said information could have been used to impeach Complainant, Bugado does not say how this resulted in a "withdrawal or substantial impairment of a potentially meritorious defense," id., much less identify the defense affected.

The third witness, Lt. Duane Asami, would have only testified as to what he observed in 1995 which, as stated earlier, would not have been relevant to show self defense. Thus as to the three witnesses, Bugado failed to meet his burden of showing how this omission would have "resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Id.

As to sub-issue (7), trial counsel's failure to subpoena Complainant's ex-parte petition for a temporary restraining order, that petition was made following the March 6, 2000 abuse incident. Complainant did not allege that Bugado used a firearm in that incident. Further, Complainant apparently was responding to a question in the petition form regarding the abuse incident, and stated that she was unsure if Bugado had possession of any firearm. Bugado does not state how this omission would have resulted in the "withdrawal or substantial impairment of a potentially meritorious defense." Id.

As to sub-issue (10), trial counsel's failure to present exculpatory witnesses or evidence, only Lt. Asami, Stephen Kaneshiro (Kaneshiro), and Philip Bugado, Sr. (Philip) provided statements. As discussed, Lt. Asami's testimony relates to the 1995 abuse incident. Kaneshiro's testimony would have included his opinion that Bugado's "behavior was detrimental to his marriage" and that Bugado "was treating his wife . . . in a very poor manner." Accordingly, because Kaneshiro's testimony would have been detrimental to Bugado's defense, it is apparent that trial counsel's omission was a matter of trial strategy.

Similarly, Philip's testimony would only adduce evidence of the 1995 abuse, that Complainant was emotionally upset about Bugado's infidelities, and that she was not afraid of firearms. It was reasonable for trial counsel not to present Philip inasmuch as potentially damaging information in the form of prior bad acts by Bugado could have resulted. Furthermore, the fact that Complainant was unafraid of firearms would not, ipso facto, mean that she would not be threatened when a gun is pointed at her. Therefore, trial counsel's decision not to present Kaneshiro's and Philip's testimony should not be second-guessed. Richie, 88 Hawai'i at 39-40, 960 P.2d at 1247-48.

As to the second ground of Bugado's petition, it is unclear at what stage Bugado knew of the presence or absence of the audiotape at issue. The State argues that HRPP Rule 16(b) provides that statements recorded by the State "shall not be

subject to disclosure," and, thus, the State would have had no duty to provide Bugado with the audiotape. Even if HRPP Rule 16(b)(1)(vii) (2004) controls, as Bugado asserts, the record indicates that such audiotape is not in the "possession or control," HRPP Rule 16(b)(1)(i), of the State. Bugado has not suggested or indicated that the State acted maliciously, egregiously, or in bad faith.

Moreover, Lt. Asami, the witness who made the statement on the audiotape, testified in court. When questions were asked by the State as to what Complainant had told Lt. Asami, a hearsay objection was raised by trial counsel which was sustained by the court. Thus, trial counsel's objection on the grounds of hearsay to preclude Lt. Asami from testifying as to what Complainant may have told him may have provided a benefit to Bugado, and appears to be "an informed tactical decision," Briones, 74 Haw. at 463, 848 P.2d at 977, which will not be second-guessed on review, id.

As to the third ground in Bugado's petition, that his conviction resulted from a no-contest plea not made "knowingly, voluntarily, and intelligently" as he asserts, Bugado apparently argues that he entered a no-contest plea only after trial counsel allegedly informed him that a plea agreement was entered into and that he would move for a DANC plea. The record shows that Bugado entered his plea after the trial court conducted an appropriate colloquy, the sufficiency of which Bugado does not challenge.

Accordingly, the court did not err in finding that Bugado's claim in this respect had no merit.

Bugado contends, further, that trial counsel misinformed him of the availability of a DANC plea as to Count VII, and was therefore ineffective. Count VII pertains to Bugado's possession of a firearm while a protective order was in effect. The record indicates that trial counsel requested the granting of a DANC plea with respect to Count VII but that his no-contest plea was immediately accepted.

HRS § 853-4(9) (Supp. 2005) appears to make a DANC plea unavailable when "a firearm was used in the commission of the offense charged." (Emphasis added.) That was not the case here as to the Count VII charge. Hence, it cannot be said that trial counsel was ineffective by stating that he would move for a DANC plea.

As stated before, as to his fourth ground, Bugado claims that his convictions were obtained in violation of the protections against double jeopardy and HRS § 701-109, and that the court was without jurisdiction to be tried for abuse of household members under HRS § 709-906. Bugado clearly could have raised these issues on direct appeal, but failed to do so. However, Bugado also claims that both trial and appellate counsel were ineffective for failing to raise these issues. Therefore, a determination is required on whether trial counsel's and appellate counsel's omissions were "within the range of

competence demanded of attorneys in criminal cases." Briones, 74 Haw. at 462, 848 P.2d at 976 (quoting State v. Kahalawe, 54 Haw. 28, 30, 501 P.2d 977, 979 (1972)).

In support of his double jeopardy argument, Bugado relies on this court's opinion in State v. Lessary, 75 Haw. 446, 865 P.2d 150 (1994), in claiming that he cannot be convicted of Counts V and VI, the abuse charge and unlawful imprisonment charge, respectively, because those offenses occurred on the same date.

However, Lessary involved a subsequent conviction for terroristic threatening and unlawful imprisonment after the defendant in that case had already been convicted of abuse under HRS § 709-906, a situation not present in this case. As indicated in Lessary, the offenses of abuse and unlawful imprisonment are separate and distinct. It stated:

Abuse requires proof of physical abuse; Unlawful Imprisonment and Terroristic Threatening do not. Unlawful Imprisonment requires proof of restraint, Abuse and Terroristic Threatening do not. Terroristic Threatening requires proof of a threat to cause bodily injury; Abuse and Unlawful Imprisonment do not. Thus, Abuse, Unlawful Imprisonment, and Terroristic Threatening are all "different" offenses under the double jeopardy clause of the United States Constitution.

Id. at 452 n.8, 865 P.2d at 153 n.8 (emphases added).

The Lessary court barred prosecution for both the unlawful imprisonment charge and the abuse charge because the State alleged that the defendant engaged in throwing the victim against the wall and dragging the victim out of the office into his vehicle as the conduct element for the abuse charge, id. at

460, 865 P.2d at 167, which was the same conduct element used to support the charge of unlawful imprisonment. Because the alleged conduct had already been proven as part of the abuse charge, the unlawful imprisonment charge was not allowed to stand. Id. at 460, 865 P.2d at 157.

Contrary to Bugado's contentions, no "multiple punishments for the same offense," id. at 454, 865 P.2d 154, exists. Based on the record, the convictions were apparently based on the evidence following. On March 6, 2000, Complainant testified that after she placed her hands on Bugado's shoulders, she shook Bugado in order that he would stop threatening her. Bugado pushed Complainant to the ground, punched her several times on the head while she was on the ground, and then started choking her. Complainant testified she managed to free herself and ran to her neighbor's unit.

Bugado then followed her and after the neighbor interceded, Complainant returned to their residence. Bugado again assaulted Complainant, struck her on the head, and choked her. Complainant then ran to the neighbor's unit, Bugado again followed her, and forcibly pulled Complainant against her will by grabbing her by her hand, and carried her without her permission, presumably to return to their residence. Complainant's neighbor's testimony essentially corroborated Complainant's recollection. Hence, sufficient evidence to support convictions for the offenses of unlawful imprisonment and abuse existed for

the jury to find that Bugado committed two offenses based on distinguishable conduct. See State v. Bui, 104 Hawaii 462, 467, 92 P.3d 471, 476 (2004) (stating that “[i]n reviewing whether substantial evidence exists to support a conviction, . . . due deference must be given to the right of the trier of fact to determine credibility, weigh the evidence, and draw reasonable inferences from the evidence adduced” (quoting State v. Lubong, 77 Hawai‘i 429, 432, 886 P.2d 766, 769 (App. 1994))). Moreover, as earlier stated, the elements of abuse of family and household members and unlawful imprisonment differ.

As to Bugado’s claim with respect to HRS § 701-109, Bugado posits that because the State stated during trial that Bugado “engaged in a continuous course of conduct[,]” he claims that he was engaged in a continuing course of conduct. In addition, Bugado claims that “the unlawful imprisonment charge is also an included offense of the abuse of household member charge.”

HRS § 701-109 states that “[w]hen the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element.” (Emphasis added.) Hence, unless the offense falls within the five exceptions under HRS § 701-109, a defendant may be prosecuted for separate offenses where the conduct element for respective offenses are one and the same. Under subsection (e), prosecution is barred where “the offense is

defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted."

Here, however, the offense of abuse of a family or household member under HRS § 709-906 is not defined as a continuing course of conduct offense. The facts of the instant case show that Bugado's actions were not continuous. Hence, HRS § 701-109(e) is inapplicable.

Second, unlawful imprisonment was not an included offense of abuse.¹⁰ Since an attempt is not involved here, and the offenses do not differ, only in respect that a less serious injury or risk of injury is sought to be protected or a different state of mind indicating lesser culpability is involved, subsections (b) and (c) are not germane.

With respect to HRS § 701-109(4)(a), as discussed earlier, abuse of family or household member requires proof of physical abuse, which unlawful imprisonment does not require, and unlawful imprisonment requires proof of restraint, which is not a

¹⁰ Pursuant to HRS § 701-109(4), an included offense must meet one of the following definitions:

- (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
- (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
- (c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

(Emphasis added.)

requirement to establish abuse. Hence, it cannot be said that each of the counts against Bugado was "established by proof of the same or less than all the facts required to establish the commission of the offense charged." HRS § 701-109(4)(a). Because Bugado's claims are without merit, it cannot be said that trial counsel's and appellate counsel's failure to raise these issues fell outside "the range of competence demanded of attorneys in criminal cases." Briones, 74 Haw. at 462, 848 P.2d at 976.

It is noted that Bugado fails to present any argument that the court lacked jurisdiction to hear the charge of Abuse of Family or Household Members under HRS § 709-906, and, therefore, Bugado's claim as to jurisdiction is disregarded. See Bui, 104 Hawai'i at 464, 92 P.3d at 473 (stating that where a defendant "presents no discernable argument in support of [his] contention[,] . . . it is our prerogative to disregard this claim" (quoting State v. Moore, 82 Hawai'i 202, 206, 921 P.2d 122, 126 (1996))).

Accordingly, Bugado waived or failed to raise a colorable claim in his petition for post-conviction relief. Therefore,

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the court's June 28, 2004 Order Denying Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody is affirmed.

DATED: Honolulu, Hawai'i, May 23, 2006.

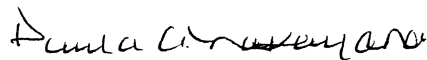
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