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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Petitioner/Plaintiff-Appellee,

vs.

CEDRIC K. KIKUTA, Respondent/Defendant-Appellant.

NO. 29445

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(FC-CR. NO. 07-1-0056)

JUNE 8, 2011

DISSENTING OPINION BY NAKAYAMA, J.
WITH WHOM RECKTENWALD, C.J., JOINS

I respectfully dissent. In my view, there was no evidence supporting a parental discipline defense instruction under Hawaiʻi Revised Statutes (HRS) § 703-309(1)(a) (1993). Additionally, the circuit court was not required to issue a special interrogatory on mutual affray sua sponte. Therefore, I would vacate the Intermediate Court of Appeals' (ICA) memorandum opinion and affirm Cedric K. Kikuta's ("Kikuta") conviction.

A. Kikuta Was Not Entitled To a Parental Discipline Instruction Under HRS § 703-309(1)(a) and the Failure To Instruct the Jury On That Defense Was Harmless.

Under HRS § 703-309(1)(a), the "force employed" to discipline a child must be "reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct[.]"[1] Kikuta failed to adduce any evidence that he punched the Complainant in the face in order to discipline him. Kikuta testified that he punched the Complainant reflexively and did not think about what he did before he acted. He also testified that he punched the Complainant after the Complainant swung a crutch at him in order to force the Complainant to drop the crutch. Although Kikuta testified that after he punched the Complainant he said "what makes you think you could stand up to dad" and "[d]on't do that,"

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[1] Additionally, I disagree with the majority's conclusion that the prosecution waived this argument, because "[a]n appellate court may affirm a judgment of the lower court on any ground in the record that supports affirmance." State v. Fukagawa, 100 Hawai'i 498, 506-07, 60 P.3d 899, 907-08 (2002) (internal quotation marks omitted) (quoting State v. Dow, 96 Hawai'i 320, 326, 30 P.3d 926, 932 (2001)); State v. Duncan, 101 Hawai'i 269, 275, 67 P.3d 768, 774 (2003) (upholding the trial court's decision to exclude testimony on other grounds and noting that "we have consistently held that where the decision is correct it must be affirmed by the appellate court even though the lower tribunal gave the wrong reason for its action") (quoting State v. Taniguchi, 72 Haw. 235, 240, 815 P.2d 24, 26 (1991)).

The majority asserts that the circuit court did not address this argument and the argument was waived. Majority opinion at 27. However, the proposition that an appellate court can affirm a judgment on any ground in the record has not been predicated on raising an issue before the trial court. See Fukagawa, 100 Hawai'i at 506-07, 60 P.3d at 907-08; Kiehm v. Adams, 109 Hawai'i 296, 301 n.13, 126 P.3d 339, 344 n.13 (2005).

The majority also asserts that HRS § 703-309(1)(a) requires a determination of fact. Majority opinion at 27-28. However, even assuming Kikuta's version of events is true, his use of force does not qualify as parental discipline under HRS § 703-309(1)(a). See infra at 2-5.

his testimony established that he hit the Complainant reflexively to force him to drop the crutch. Even under Kikuta's version of the incident, he was not entitled to a parental discipline instruction because he did not strike the Complainant for disciplinary reasons.

The majority asserts that the Complainant misbehaved and that parental discipline can occur reflexively or out of anger. Majority opinion at 33-34. This argument is not persuasive, because this court has held that "[h]eat of the moment must not result in immoderate physical force and must be managed; however, an angry moment driving moderate or reasonable discipline is often part and parcel of the real world of parenting with which prosecutors and courts should not interfere." State v. Matavale, 115 Hawai'i 149, 166, 166 P.3d 322, 339 (2007) (block quote formatting omitted) (emphasis added and omitted) (quoting State v. Lefevre, 117 P.3d 980, 984-85 (N.M. Ct. App. 2005)). This court has also held that "the force used" must "reasonably be proportional to the misconduct being punished[,]" id. at 164, 166 P.3d at 337 (emphasis omitted) (citing State v. Crouser, 81 Hawai'i 5, 10-12, 911 P.2d 725, 730-32 (1996)), and that the "viciousness of the attack" can sever "any relationship between the use of force and the welfare of [a minor] which might be considered 'reasonable.'" State v. Roman, 119 Hawai'i 468, 481, 482, 199 P.3d 57, 70, 71 (2008) (some

internal quotation marks omitted) (quoting State v. Tanielu, 82 Hawai‘i 373, 381, 922 P.2d 986, 994 (App. 1996)). Kikuta testified that the Complainant had misbehaved by failing to put dog food away, slamming a glass door shut, ignoring Kikuta, and swinging a crutch at Kikuta. However, even taking Kikuta's version of the event as true, his use of force was not proportional to the Complainant's misconduct. Kikuta pushed the Complainant into a glass door and punched him in the face hard enough to break his nose and chip his teeth. This severed the relationship between the force employed and the welfare of the minor. In Matavale, this court held that the force used by parents in Crouser, 81 Hawai‘i at 8, 911 P.2d at 728 (minor testified that defendant hit minor in the face and struck her with a plastic bat until it broke), Tanielu, 82 Hawai‘i at 376-77, 922 P.2d at 989-90 (defendant kicked his daughter in the shin, slapped her six to seven times, punched her in the face multiple times, stomped on her face, and pulled her ears), and State v. Miller, 105 Hawai‘i 394, 396, 98 P.3d 265, 267 (App. 2004) (minor testified that the defendant hit him five times with his fist and kicked him), "illustrate[s] the kind of conduct that clearly falls outside the parameters of parental discipline." 115 Hawai‘i at 164 n.11, 166 P.3d at 337 n.11.[2] Likewise, this

[2] The concurring opinion asserts that Crouser, Miller, and Tanielu "support the proposition that Defendant should not have been stripped of his continue...

court has not approved the use of a minimum of two punches to a minor's face resulting in a broken nose and chipped teeth for parental discipline, and Kikuta's use of force therefore was not moderate or "reasonably related" to the Complainant's welfare.[3]

Finally, the failure to give the parental discipline instruction was harmless because there was no reasonable possibility that Kikuta's actions qualified as parental

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[2]...continue
right to have the jury consider his defense." Concurring opinion at 2. The concurring opinion observes that the "parental discipline defense was asserted and considered by the trier of fact in all three cases, notwithstanding the force exercised by the defendants." Id. at 3. However, in those cases, the appellate courts only determined whether substantial evidence supported the trial court's rejection of the parental discipline defense. See Miller, 105 Hawai'i at 402, 98 P.3d at 273; Crouser, 81 Hawai'i at 12, 911 P.2d at 732; Tanielu, 82 Hawai'i at 381, 922 P.2d at 994. Because those cases did not address whether a parental discipline defense instruction was required, they do not implicitly stand for that proposition. See Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd., 19 Cal. 4th 1182, 1195, 969 P.2d 613, 620, 81 Cal. Rptr.2d 521, 528 (1999) ("It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.").

[3] At various points, the majority asserts that the dissent "assumes the role of the trier of fact in this case . . . ." Majority opinion at 41 n.11, 35. This argument is not persuasive because this court has held that "a defendant is entitled to an instruction on every defense or theory of defense having any support in the evidence, provided such evidence would support the consideration of that issue by the jury, no matter how weak, inconclusive, or unsatisfactory the evidence may be." State v. Locquiao, 100 Hawai'i 195, 205, 58 P.3d 1242, 1252 (2002) (internal quotation marks omitted) (emphasis added) (quoting State v. Hironaka, 99 Hawai'i 198, 204, 53 P.3d 806, 812 (2002)). If the evidence adduced by the defendant does not support the consideration of the issue by the jury, the trial court is not required to instruct the jury as to that defense.

At some point, the force used is so unreasonable as to take the issue of the parental discipline defense away from the jury. For instance, if a parent shoots a minor and asserts the parental discipline defense, in my view, a trial court should not instruct the jury on the parental discipline defense because the evidence adduced does not create a jury question as to whether the use of that force was reasonably related to the discipline of a minor. See HRS § 703-309(1)(a). In this case, the two punches to the face of the Complainant resulting in a broken nose and chipped teeth exceeded that point, and therefore the circuit court properly refused Kikuta's request for a parental discipline defense instruction.

discipline under HRS § 703-309(1)(a). See Roman, 119 Hawai'i at 477, 199 P.3d at 66 (quoting State v. Gano, 92 Hawai'i 161, 176, 988 P.2d 1153, 1168 (1999)). This conclusion is bolstered by this court's analysis in Roman, where this court held that the family court's failure to apply the parental discipline defense was not harmless. Id. at 482, 199 P.3d at 71. In so holding, this court paid close attention to the injuries suffered by the minor. For instance, this court noted that there "was no evidence of bruising or swelling; nor did Minor require medical attention." Id. at 481, 199 P.3d at 70. This court also noted that "there was no evidence to indicate any detriment to Minor's overall well-being or physical, emotional or psychological state." Id. (citing HRS § 703-309(1)(b)). In this court's discussion of other Hawai'i cases involving the parental discipline defense, it distinguished prior Hawai'i cases because "the injuries suffered by the minors were far more severe than Minor's injuries." Id. at 482, 199 P.3d at 71 (emphasis added). This court held that:

> Here, no evidence was adduced that the degree of force employed by Roman caused bruising, swelling, or required medical attention. Consequently, Roman's discipline was not so excessive that it "severed any relationship between the use of force and the welfare of [Minor] which might be considered 'reasonable.'" Tanielu, 82 Hawai'i at 381, 922 P.2d at 994. The discipline used by Roman was reasonably proportionate to Minor's misconduct, i.e., his defiant attitude and demeanor, and the discipline was necessary to punish Minor's misconduct. Therefore, we believe that, in light of the circumstances in this case, including the family court's expressed findings, the prosecution failed to disprove Roman's parental discipline defense beyond a reasonable doubt.

Id. (emphasis added).

Unlike Roman, the force employed by Kikuta was excessive and caused a broken nose and chipped teeth. Therefore, the parental discipline instruction was not warranted in this case.

B. The Trial Court Did Not Plainly Err By Failing To Instruct the Jury Sua Sponte On the Defense Of Mutual Affray.

I respectfully dissent from the majority's conclusion that the trial court reversibly erred by failing to instruct the jury sua sponte on the mitigating defense of mutual affray. In my view, the trial court did not have a duty to instruct the jury sua sponte on a defense that was not supported by the evidence, not raised by Kikuta, and clearly peripheral to Kikuta's defense at trial.

The majority concludes that mutual affray is a "mitigating defense that reduces the offense of Assault in the Third Degree to a petty misdemeanor" and that "[a]ccordingly, . . . the court must submit a mutual affray instruction to the jury where there is any evidence in the record that the injury was inflicted during the course of a fight or scuffle entered into by mutual consent, as indicated in [Hawai'i Jury Instructions Criminal ("HAWJIC")] 9.21." Majority opinion at 44, 45-46 (emphasis added). The majority holds that there was "some

evidence" supporting the mutual affray instruction because Kikuta testified that the Complainant swung the crutch at him and the Complainant may have impliedly consented to fight Kikuta. Id. at 47-48.

First, even assuming the "some evidence" standard applied to the mutual affray instruction in this case (as discussed below, it does not), Kikuta did not adduce any evidence supporting the defense of mutual affray. I agree with the majority that Hawai'i case law does not define the term "mutual consent" in this context and that mutual affray "requires both parties to have approved of, or agreed to, a fight or scuffle, whether expressly or by conduct." Majority opinion at 46, 47. In my view, under the foregoing standard, Kikuta did not adduce any evidence supporting this defense.

The majority asserts that Kikuta's testimony that he struck the Complainant after the Complainant attempted to hit him with a crutch supports the mutual affray defense. Majority opinion at 47-48. However, Kikuta's testimony provides no indication that the fight was entered into by mutual consent. Although Kikuta testified that the Complainant attempted to hit him with the crutch, the mere fact that a fight occurred does not evidence an agreement to fight. See State v. Schroder, 359 N.W.2d 799, 804-05 (Neb. 1984) (holding that the trial court did

not err by failing to consider whether the fight occurred during a mutual scuffle because the "mere fact that two persons engage in a fight does not mean that both consented to fight"). Kikuta failed to adduce any evidence of an agreement to fight between the Complainant and himself, and therefore was not entitled to assert the mutual affray defense.

The majority asserts that this opinion requires an express statement of an intent to fight. Majority opinion at 48, n.13. However, holding that evidence of a fight alone does not warrant a mutual affray instruction does not foreclose the possibility of proving that a complaining witness impliedly consented to fight. For instance, gesturing to leave a bar, "throwing down the gauntlet," and clearing the bench at a baseball game, are all actions taken prior to a fight indicative of implied consent. Kikuta failed to adduce evidence that the fight was entered into by mutual consent, and therefore was not entitled to a mutual affray instruction.

Furthermore, Kikuta's description of the fight undermines his use of the mutual affray defense. Kikuta testified that he struck the Complainant reflexively in order to force the Complainant to drop the crutch. Nothing in Kikuta's testimony indicated an intent to engage the Complainant in a fight. The Complainant and his cousin testified that Kikuta was

the aggressor, and that the Complainant did not agree to fight.[4] Neither version of the events is compatible with the mutual affray defense, which requires that both participants mutually consent to fight.

Second, I disagree with the majority because this court has never held that a trial court must instruct the jury sua sponte as to all available defenses, even those on the periphery. For instance, in State v. Stenger, this court held that a trial court erred by failing to instruct the jury sua sponte on the mistake of fact defense when the defendant had requested a claim of right instruction. 122 Hawai'i 271, 276, 282, 226 P.3d 441, 446, 452 (2010); Stenger, 122 Hawai'i at 296, 226 P.3d at 466 (Kim, J., concurring) ("the defense had the theory right, but the specific instruction wrong"). The concurring opinion limited the majority's opinion by asserting that the "specter raised by Justice Nakayama's dissent of trial courts hereafter being responsible as a matter of law for combing through the entire body of evidence in search of every possible defense theory that may fit is, in my view, not warranted by the specific holding of the majority in this case, based as it is on the specific facts

[4] The majority asserts that this argument "disregards" Kikuta's testimony and weighs the evidence. Majority opinion at 47, n.13. This argument is not persuasive because neither version of the events supports a mutual affray instruction. Thus, weighing the evidence is not necessary to conclude that the mutual affray defense was not supported by the evidence.

of this case, especially where, as here, the theory at issue formed the very heart of the defense case, rather than some nebulous, barely glimpsed theory on the margins." Id. at 297, 226 P.3d at 467 (Kim, J., concurring); see Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'") (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).[5] Stenger is distinguishable, because at Kikuta's trial mutual affray was a "nebulous" and "barely glimpsed theory on the margins." Kikuta testified that he blocked the Complainant's attempt to hit him with the crutch, and defense counsel argued that he punched the Complainant in self defense. Because the defendant did not request a mutual affray instruction and the testimony at trial did not clearly suggest that mutual affray applied, the trial

[5] The majority asserts that the majority opinion in Stenger is binding on this court. Majority opinion at 49 n.14. Even assuming arguendo that is correct, the majority's argument is unpersuasive because Stenger is distinguishable. As discussed above, we have no case law in this jurisdiction requiring trial courts to instruct the jury sua sponte as to all available defenses.

Furthermore, although the majority notes some criticism of the Marks doctrine, federal courts have continued applying it. See Jackson v. Danberg, 594 F.3d 210, 219-20 (3d Cir. 2010) (identifying the United States Supreme Court's holding by employing the Marks framework); United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007).

court was not alerted that the failure to instruct the jury sua sponte on mutual affray was reversible error. Therefore, in my view, Stenger is distinguishable and the trial court was not obligated to instruct the jury sua sponte on the barely glimpsed theory of mutual affray.

Furthermore, the result of the majority's opinion is that in any case involving a fight with two active participants, the trial court must instruct the jury sua sponte on the defense of mutual affray. This holding is much too broad and far-reaching. The better rule would be to confine the instruction to situations that warrant it, and where the evidence supports it. Now, trial courts will be obligated to instruct the jury sua sponte on mutual affray even though that defense may have little or no application to the facts of the case.[6] In my view, this

[6] The majority asserts that it is not requiring trial courts to instruct the jury on all available defenses, but only those supported by the evidence. Majority opinion at 48-49. However, the majority has set the threshold for a sua sponte defense instruction so low that its opinion effectively requires the trial court to instruct the jury sua sponte as to all available defenses. See Stenger, 122 Hawai'i at 306, 226 P.3d at 476 (Nakayama, J., dissenting). The facts of this case provide a good illustration of this argument. The majority holds that the trial court reversibly erred by failing to instruct the jury sua sponte on the defense of mutual affray because Kikuta testified that the Complainant attempted to strike him. However, many assault cases will involve two people fighting, and under the majority's analysis, trial courts will be required to instruct the jury sua sponte on the defense of mutual affray in those cases even though the defendant is not relying on that defense. The majority's decision effectively requires the trial court to ferret through the record unassisted by counsel and sua sponte instruct the jury as to all available and remotely tenable defenses. As discussed above, this is not a desirable result.

result is neither desirable nor compelled by this court's precedent. Therefore, I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama