IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellant,

vs.

HERMAN DECOITE,
Petitioner/Defendant-Appellee.

SCWC-30186

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 30186; FC-CR NO. 09-1-0127(4))

FEBRUARY 28, 2014

RECKTENWALD, C.J., NAKAYAMA, AND McKENNA, JJ.,
WITH ACOBA, J., CONCURRING SEPARATELY,
AND POLLACK, J., DISSENTING SEPARATELY

OPINION OF THE COURT BY NAKAYAMA, J.

On application for writ of certiorari, Petitioner-Defendant Herman Decoite (Decoite) asks us to determine whether Abuse of Family or Household Member, HRS § 709-906(1), can be charged as a "continuing course of conduct" offense. On narrower

grounds, we hold that an alleged two-year period of domestic abuse could not be charged on a continuing course of conduct theory. Accordingly, we reverse the Intermediate Court of Appeals's (ICA) judgment on appeal and affirm the Circuit Court of the Second Circuit's (family court) order dismissing the State's complaint without prejudice.

I. BACKGROUND

This case arises out of alleged acts of domestic abuse that Decoite committed against his former girlfriend over the course of their five-year relationship. On April 3, 2009, the State filed a misdemeanor complaint against Decoite, charging him with one count of abuse of a family or household member (domestic abuse) pursuant to Hawaiʻi Revised Statutes (HRS) § 709-906 (Supp. 2006).[1] The complaint stated in relevant part: "during or about the period between February 1, 2005, through June 1, 2007, inclusive, as a continuing course of conduct, . . . Herman Decoite did intentionally, knowingly or recklessly engage in and cause physical abuse of a family or household member[.]"

Decoite requested discovery, and the State produced police reports of two incidents that occurred on November 29, 2006, and March 13, 2007, respectively. Decoite then filed a

[1] HRS § 709-906(1) provided then as it does now: "It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member[.]"

motion to dismiss the State's complaint in the family court.[2] Decoite argued that the domestic abuse statute does not permit charging domestic abuse as a continuous crime, and also that the only incidents of alleged domestic abuse produced in discovery fell outside of the applicable two-year statute of limitations. The State responded that the domestic abuse statute punishes "physical abuse," and that because physical abuse can extend beyond isolated moments, it may be charged on a theory of continuing conduct. The State further argued that its complaint against Decoite was not time barred because it had alleged a continuing course of conduct that ended within the two-year statute of limitations.

The family court concluded that domestic abuse cannot be charged on a continuous conduct theory, and issued an order dismissing the State's complaint without prejudice. On appeal, the ICA reversed, holding that in some cases domestic abuse may be charged as a continuous offense. We granted Decoite's application for writ of certiorari to resolve this issue as a matter of first impression.

II. STANDARDS OF REVIEW

A. Conclusions of Law

Conclusions of law are reviewed de novo under the

[2] The Honorable Richard T. Bissen, Jr. presided.

right/wrong standard. Chun v. Bd. of Trs. of Emps.' Ret. Sys. of Haw., 106 Hawaiʻi 416, 431, 106 P.3d 339, 354 (2005).

B. Statutory Interpretation

When interpreting a statute, this court follows several well established canons of interpretation.

> "[O]ur foremost obligation is to ascertain and give effect to the intention of the legislature, which is obtained primarily from the language contained in the statute[s]" themselves. Mathewson v. Aloha Airlines, Inc., 82 Hawaiʻi 57, 71, 919 P.2d 969, 983 (1996) (citation and quotation signals omitted). Second, "[l]aws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another." HRS § 1-16 (1993); Richardson v. City and County of Honolulu, 76 Hawaiʻi 46, 55, 868 P.2d 1193, 1202 (1994) (citation omitted). And, third, "[t]he legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction[,] and illogicality." State v. Malufau, 80 Hawaiʻi 126, 137, 906 P.2d 612, 623 (1995) (citation and internal quotation marks omitted).

State v. Arceo, 84 Hawaiʻi 1, 19, 928 P.2d 843, 861 (1996) (some citations omitted).

III. DISCUSSION

A. Domestic abuse cannot be charged as a continuing conduct offense based on discrete abusive transactions that occurred over a two-year period

The conduct element of the domestic abuse statute states in relevant part: "It shall be unlawful for any person . . . to physically abuse a family or household member[.]" HRS § 709-906(1) (emphasis added). The narrow issue of this case is whether that conduct, "to physically abuse," permits the State to

charge two temporally discrete instances of domestic abuse on a continuous course of conduct theory. The State argues that abusive domestic relationships are defined by a cycle of violence that is motivated by the abuser's singular desire for power and control. Thus, the State would have us hold that temporally discrete acts of abuse can all be linked to one continuous criminal impulse that forms the basis of one crime. However, HRS § 709-906(1) criminalizes "physical abuse," which is conduct that is necessarily discrete and episodic. In fact, the discrete nature of the actus reus of domestic abuse is a crucial element of the statutory scheme's graduated penalty structure, which is specifically tailored to punish repeated acts of abuse separately and with increasing severity. Accordingly, we hold that HRS § 709-906(1) does not permit charging temporally discrete episodes of domestic abuse that occurred over a two-year period as a continuous course of conduct offense.[3]

The test to determine whether a crime may be charged on a continuous conduct theory is whether the language, structure, and purpose of the statute reveals a legislative intent to criminalize continuing conduct. See HRS § 701-108(4) (supp. 2006) ("An offense is committed either when every element occurs,

[3] However, a single violent transaction comprised of, for example, several punches, may constitute one continuous episode of domestic abuse. The episode terminates when the perpetrator's physically abusive impulse ends.

or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct. . . is terminated."); see also Arceo, 84 Hawaiʻi at 19, 928 P.2d at 861 (stating that an offense may be deemed continuous if it is statutorily defined as an uninterrupted and continuing course of conduct, or manifests a plain legislative purpose to be treated as such, or both). Additionally, a crime may only be charged on the theory of continuing conduct if the statute actually prohibits conduct that may be deemed continuous. See State v. Rabago, 103 Hawaiʻi 236, 253, 81 P.3d 1151, 1168 (2003) (rejecting the legislature's attempt to define the continuing sexual abuse of a minor as a continuous offense because the actus reus of the statute was actually targeting a series of necessarily discrete criminal acts).

This court has defined a continuous offense as "a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy[.]" Arceo, 84 Hawaiʻi at 18, 928 P.2d at 860 (quoting State v. Temple, 65 Haw. 261, 267 n.6, 650 P.2d 1358, 1362 n.6 (1982)). "The test to determine whether [a] defendant intended to commit more than one offense in the course of a criminal episode is whether the evidence discloses one general intent or discloses separate and distinct intents."

State v. Castro, 69 Haw. 633, 653, 756 P.2d 1033, 1047 (1988) (citations omitted). "If there is but one intention, one general impulse, and one plan, there is but one offense." Id.

We first applied this rule in State v. Martin, 62 Haw. 364, 369, 616 P.2d 193, 197 (1980), where we held that first degree theft could constitute a continuous offense. There, the defendant periodically filed fraudulent public assistance forms for a six-year period in order to obtain welfare disbursements from the State. Id. at 366, 616 P.2d at 195-96. We held that the defendant had committed a continuing offense because each fraudulent transaction was the continuation of a single and uninterrupted criminal impulse. Id. at 369, 616 P.2d at 197 ("We do not view each filing by defendant of a statement of facts supporting continued eligibility as necessarily constituting a new offense, since all statements were identical[.]"); see also Temple, 65 Haw. at 267, 650 P.2d at 1362 (holding that theft of a firearm was a continuous offense because the conduct element of the theft statute specifically criminalized the ongoing act of "retaining" stolen property); State v. Kealoha, 95 Hawaiʻi 365, 376, 22 P.3d 1012, 1023 (App. 2000) (holding that manufacturing a dangerous drug may be a single continuous offense because the general character of "manufacturing" connotes an ongoing process of various steps that are motivated by one uninterrupted

impulse).

We have also found continuing conduct in criminal transactions that were temporally quite short. For example, in State v. Rapoza, we held that attempted murder in the second degree could constitute a continuing offense. 95 Hawaiʻi 321, 329, 22 P.3d 968, 976 (2001). There, Rapoza discharged a firearm five to seven times in the span of a few seconds while pointing it in the general direction of three complaining witnesses. Id. at 323, 22 P.3d at 970. We stated: "As to any given complainant, [Rapoza's] conduct in discharging the firearm several times did not amount to 'separate and distinct culpable acts,' but rather betokened 'a continuous, unlawful . . . series of acts set on foot by a single impulse and operated by an unintermittent force[.]'" Id. at 329, 22 P.3d at 976 (quoting Arceo, 84 Hawaiʻi at 18, 928 P.2d at 860).

Turning to the statute at issue in this case, the conduct element of HRS § 709-906(1) makes it a crime to "physically abuse" a family or household member. We have defined the term "physically abuse" for purposes of HRS § 709-906(1) as follows: "To 'physically abuse' someone is to maltreat in such a manner as to cause injury, hurt or damage to that person's body." State v. Fields, 115 Hawaiʻi 503, 530, 168 P.3d 955, 982 (2007) (citations and internal quotations omitted). Physical abuse, so

defined, contemplates discrete episodes that are transitory in nature, whether those events occur in isolation or in a series. Cf. Temple, 65 Haw. at 267, 650 P.2d at 1362 (distinguishing the non-continuous criminal acts "receive" and "dispose" from the continuous act "retain," because the former are transitory in nature and of a brief duration). In that respect, "physical abuse" is unlike "retaining" a stolen firearm, or "manufacturing" methamphetamine, which involve ongoing processes.

Furthermore, the touchstone characteristic of a continuing offense is that it is motivated by a single uninterrupted criminal impulse. See Martin, 62 Haw. at 369, 616 P.2d at 197. That domestic abuse may occur repetitively, as the State claims, helps to illustrate that cyclic abuse is a non-continuous crime. First, the State attached to its opposition to Decoite's motion to dismiss sample testimony from a domestic violence expert. That testimony illustrates that in cases of repetitive domestic abuse, many superseding impulses and intermittent forces are at work:

> The cycle of violence . . . starts off when people first start dating and everything is good, and there's no tension. And the relationship starts to progress, and something will begin to create tension.
>
> So one of the phases in the cycle of violence is called the tension building phase. So during this phase . . . something . . . starts to create tension and they begin to argue a little bit about it.
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> And the tension continues to build. And in an abusive relationship, a final outburst will happen. And that's what

> we call the violent outburst phase. And after -- immediately after the violence, typically the abuser is feeling very remorseful, and sorry, and apologizes, and tries to make repairs, make amends for the behavior. And that's the apologetic, loving reconciliation phase, so that after the violence happens, the abuser is very sorry and conciliatory.
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> . . . .
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> And so they bond and become closer. And then we have the honeymoon phase, where everything is good and there is no tension, and life's pretty good. And what happens is we go from the honeymoon phase -- and then there is always something that creates tension[.]

As the sample testimony shows, during the "loving reconciliation" phase following a violent incident, a serial abuser typically feels remorse and will try to repair the relationship. In other words, the serial abuser's malignant impulses are frequently interrupted by the contrary impulse to set things right. This characterization of serial abuse does not fit with the definition of a continuing offense, which requires a single, uninterrupted criminal impulse.[4] See Martin, 62 Haw. at 369, 616 P.2d at 197.

Second, statutory and case law make clear that the single impulse underlying a continuing offense must be a criminal impulse. See, e.g., Martin, 62 Haw. at 369, 616 P.2d at 197 (recognizing that repeated fraudulent filings were motivated by

[4] Decoite argues that the ICA erred when it considered the State's proferred evidence. HRAP 10(a) states: "The record on appeal shall consist of the trial court . . . record, as set out in Rule 4 of the Hawaiʻi Court Records Rules[.]" Hawaiʻi Court Records Rules (HCRR) Rule 4 states: "The record of each case . . . shall include: (a) all documents related to the case, including correspondence, submitted for filing in any form[.]" Here, all of the documents that Decoite claims should not be part of the record on appeal were attached to the State's opposition to Decoite's motion to dismiss. Thus, these documents were properly considered on appeal.

the single criminal impulse to steal from the State); Temple, 65 Haw. at 267, 650 P.2d at 1362 (recognizing that retaining a stolen firearm was motivated by the single criminal impulse to steal the firearm); Kealoha, 95 Hawaiʻi at 376-78, 22 P.3d at 1023-25 (recognizing that the various steps of methamphetamine production were all motivated by the single criminal impulse to manufacture a dangerous drug). HRS § 701-104 (1993) specifically states: "The provisions of [the HRS] cannot be extended by analogy so as to create crimes not provided for herein[.]" If we allowed a continuous crime to be founded on a non-criminal impulse, then we would be extending the provisions of the penal code by analogy in direct violation of HRS § 701-104.

Here, the State has posited that a serial abuser is motivated by a single continuous impulse, the desire for power and control in a relationship. However, the actus reus of HRS § 709-906(1) is physical abuse. HRS § 709-906(1) does not contemplate psychological abuse. Attempting to exert power and control in a relationship, on its own, is not illegal. Thus, although the desire for power and control merits no praise, it is not a criminal impulse that can support charging domestic abuse on a continuing conduct theory.

Finally, the overarching structure of the domestic abuse statute provides compelling evidence that the legislature

intended repeated acts of abuse to be treated as separate crimes. Specifically, the graduated penalty provisions of HRS § 709-906 provide:

> (5) Abuse of a family or household member [is a] . . . misdemeanor[] and the person shall be sentenced as follows:
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> (a) For the first offense the person shall serve a minimum jail sentence of forty-eight hours; and
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> (b) For a second offense that occurs within one year of the first conviction, the person shall be termed a "repeat offender" and serve a minimum jail sentence of thirty days.[5]
>
> . . . .
>
> (7) For a third or any subsequent offense that occurs within two years of a second or subsequent conviction, the offense shall be a class C felony.

This penalty structure is specifically tailored to address the repetitive and cyclic nature of domestic abuse. It evinces a legislative determination that multiple acts of abuse constitute separate offenses that should be punished separately and with increasing severity. The House Judiciary Committee made this plain when it stated:

> The nature of domestic abuse is such that ongoing violence is not uncommon and, in fact, has the great likelihood of becoming more serious and increasing in frequency. Your Committee understands that uniform sanctions applied in a graduated way in response to these serious offenses will deliver a strong message to the offenders[.]

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[5] In State v. Dudoit, we held that "the repeat offender provision of HRS § 709-906(5) applies to the commission of successive violations of HRS § 709-906 and not merely to successive convictions of such violations" and that it "may be applied to offenses occurring on the same day." 90 Hawaiʻi 262, 266, 274, 978 P.2d 700, 704, 712 (1999) (capitalization and quotations omitted).

H. Stand. Comm. Rep. No. 20-92, in 1992 House Journal, at 906. Charging multiple discrete acts of domestic abuse as a single continuous crime, as the State did here, conflicts with the domestic abuse statute's graduated penalty structure.

In sum, the family court properly dismissed the State's complaint because it defectively charged Decoite with domestic abuse under a continuing course of conduct theory. As a matter of law, an alleged two-year period of domestic abuse can never be charged as a continuous conduct offense.[6]

IV. CONCLUSION

For the foregoing reasons, we reverse the ICA's judgment on appeal and affirm the family court's order dismissing the State's complaint without prejudice.

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/s/ Sabrina S. McKenna

[6] Our holding does not prevent a criminal defendant from invoking HRS § 701-109(1)(e) (1993) in an attempt to merge multiple counts of domestic abuse that factually arise from a single, discrete criminal transaction. See discussion supra at n.3.