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SCWC-12-0000588

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Respondent/Plaintiff-Appellee,

vs.

SCOTT YANG, Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-12-0000588; CR. NO. 10-1-0899)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Nakayama, McKenna, and Pollack, JJ.,
and Circuit Judge Kuriyama, in place of Wilson, J., recused)

Petitioner/Defendant-Appellant Scott Yang seeks review of the July 1, 2016 Judgment on Appeal of the Intermediate Court of Appeals (ICA), entered pursuant to the ICA's May 12, 2016 Summary Disposition Order. The judgment affirmed the Circuit Court of the First Circuit's (circuit court) May 12, 2012

Judgment,¹ which convicted Yang of Counts VI and VIII in violation of Hawai'i Revised Statutes (HRS) § 709-906(1)² and (5).³

On certiorari, Yang contends that the ICA erred in holding that (1) regarding Count VI, the self-defense and defense of others jury instructions were not plainly erroneous; and (2) regarding Count VIII, the circuit court did not err in refusing the time-specific elements instruction and denying his motion to

¹ The Honorable Michael D. Wilson presided.

² HRS § 709-906(1) (Supp. 2012) provides:

(1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member or to refuse compliance with the lawful order of a police officer under subsection (4). The police, in investigating any complaint of abuse of a family or household member, upon request, may transport the abused person to a hospital or safe shelter.

³ HRS § 709-906(5) (Supp. 2012) provides:

(5) Abuse of a family or household member and refusal to comply with the lawful order of a police officer under subsection (4) are misdemeanors and the person shall be sentenced as follows:

(a) For the first offense the person shall serve a minimum jail sentence of forty-eight hours; and

(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.

Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.

dismiss and motion for judgment of acquittal.

This court accepted Yang's application for writ of certiorari, and we now affirm the ICA's judgment on appeal as to Count VI, vacate the ICA's judgment on appeal and the circuit court's judgment as to Count VIII, and remand the case to circuit court as to Count VIII for further proceedings.

With respect to the self-defense jury instructions given as to Count VI, we conclude that the circuit court properly gave the relevant jury instructions. Thus, the ICA did not err in affirming the circuit court's judgment as to Count VI.

With respect to Count VIII, we conclude that the circuit court erred in denying Yang's motion to dismiss. We find persuasive Yang's argument that the trial testimony of the complaining witness created a material time variance from the State's response to the notice of alibi, thereby undermining the defense that Yang prepared. We further note that the State conceded in its closing argument that it did not prove Count VIII beyond a reasonable doubt. However, we conclude that there was sufficient evidence to support a conviction, and that the circuit court did not err in denying the motion for judgment of acquittal.

Accordingly, we affirm the ICA's July 1, 2016 Judgment on Appeal as to Count VI, and vacate the ICA's July 1, 2016 Judgment on Appeal and the circuit court's May 12, 2012 Judgment

as to Count VIII, and remand the case to circuit court for further proceedings consistent with this Order.

DATED: Honolulu, Hawai'i, March 20, 2017.

Phyllis J. Hironaka
for petitioner

/s/ Mark E. Recktenwald

Brian R. Vincent
for respondent

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Christine E. Kuriyama

