

DISSENTING OPINION BY NAKAMURA, C.J.

In my view, the family court did not err in denying the request of Defendant-Appellant Cedric K. Kikuta (Kikuta) for an instruction on the parental discipline defense and did not commit plain error in failing to give an instruction on mutual affray. Accordingly, I respectfully dissent.

I.

The parental discipline defense, which is set forth in Hawaii Revised Statutes (HRS) § 703-309(1) (1993), provides as follows:

§ 703-309. Use of force by persons with special responsibility for care, discipline, or safety of others.
The use of force upon or toward the person of another is justifiable under the following circumstances:

- (1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor, or a person acting at the request of the parent, guardian, or other responsible person, and:
 - (a) The force is employed with due regard for the age and size of the minor and is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; and
 - (b) The force used is not designed to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.

The evidence in this case did not support a parental discipline defense. There was insufficient evidence to support a claim that the force employed by Kikuta against his fourteen-year-old stepson (Minor) was "reasonably related to the purpose of safeguarding or promoting the welfare of [Minor]" or was not "known to create a risk of causing substantial bodily injury, extreme pain or mental distress, or neurological damage." HRS §§ 703-309(1) (a) and (1) (b).

There was undisputed medical evidence that Minor suffered a broken nose (bone fracture), chipped teeth, a bruised cheek and forearm, and an injured wrist. Kikuta testified that he used two hands and pushed Minor, causing Minor to fall back

and hit his head on the door jam. Kikuta stated that he then punched Minor twice in the face. Although Kikuta only testified to two punches,^{1/} Minor and Minor's cousin, who witnessed the incident, testified that Kikuta punched Minor four or five times in the face and then continued to punch Minor in the back of the head, while Minor was down on his knees with his hands covering his head.

The trial evidence did not support a claim that Kikuta's use of force was "reasonably related to the purpose of safeguarding or promoting the welfare of the minor," a requirement for the parental discipline defense under HRS § 703-309(1)(a). Kikuta's acts of punching Minor multiple times in the face and breaking his nose cannot be justified as being for the purpose of safeguarding or promoting Minor's welfare. Although there was evidence that Kikuta's use of force came after Minor had engaged in disobedient conduct, Kikuta did not testify that his use of force was done with the intent to safeguard or promote the welfare of Minor, or even to punish Minor for his misconduct or prevent future misconduct. Instead, Kikuta simply testified that he was "upset." Thus, the evidence did not support a claim that the requirements of HRS § 703-309(1)(a) had been satisfied.^{2/}

Kikuta acknowledges that Minor sustained a broken nose which constitutes substantial bodily injury. See HRS § 707-700 (Supp. 2009) (defining "substantial bodily injury" to include "bodily injury which causes: . . . [a] bone fracture[.]").

^{1/} Kikuta acknowledged that in his statement to a detective, Kikuta stated that he hit Minor "two or three times," "three times," and "[n]o more than three times."

^{2/} The trial court did not address the requirements of HRS § 703-309(1)(a) in denying Kikuta's request for an instruction on the parental discipline defense. The trial court based its decision on the lack of evidence to support a claim that the requirements of HRS § 703-309(1)(b) had been satisfied. However, "an appellate court may affirm the judgment of [a trial court] on any ground in the record that supports affirmance[.]" even if the trial court did not rely on it. State v. Fukagawa, 100 Hawai'i 498, 506, 60 P.3d 899, 907 (2002) (internal quotation marks and brackets in original omitted).

However, Kikuta argues that it is "the nature of the conduct, and not the result of the conduct, [that] is determinative in assessing whether the force used is permissible as parental discipline" under HRS § 703-309(1)(b). That distinction is of no help to Kikuta because the nature of his conduct--a minimum of two punches to the face of Minor--was clearly the type of conduct known to create a risk of causing substantial bodily injury, extreme pain, mental distress, or neurological damage. In my view, Kikuta's use of force exceeded the permissible limits set forth in HRS § 703-309(1)(b) and Kikuta failed to adduce sufficient evidence to support a contrary claim. Therefore, I conclude that the family court did not err in denying Kikuta's request for an instruction on the parental discipline defense.

II.

Kikuta was charged with second degree assault in violation of HRS § 707-711(1)(a) (Supp. 2007). The jury acquitted Kikuta of that charge and found him guilty of the lesser included offense of third degree assault.^{3/} The family court did not commit plain error in failing to give a mutual affray instruction with respect to the lesser included offense of third degree assault. A mutual affray is "a fight or scuffle

^{3/} Although there is no way to be certain, it appears that the jury may have acquitted Kikuta of the charged second degree assault and found him guilty of third degree assault because it found that he did not knowingly, but only recklessly, caused substantial bodily injury to Minor. Kikuta was charged with second degree assault in violation of HRS § 707-711(1)(a), which requires proof that he "intentionally or knowingly cause[d] substantial bodily injury to another[.]" With respect to that charge, the jury was instructed that the prosecution was required to prove that Kikuta acted "intentionally or knowingly." While HRS § 707-711(1)(b) (Supp. 2007) provides that second degree assault can also be committed by "recklessly caus[ing] serious or substantial bodily injury to another[.]" Kikuta was not charged with violating HRS § 707-711(1)(b).

There was no dispute that Minor had sustained substantial bodily injury in the form of a broken nose that had been caused by Kikuta. Kikuta testified, however, that in response to Minor's swinging a crutch at Kikuta, he reacted by punching Minor twice in the face without thinking or aiming. The jury could have concluded that Kikuta did not act knowingly with respect to the result of his conduct, a requirement for the second degree assault as charged, but only satisfied the reckless state of mind sufficient to prove third degree assault under the lesser included offense instruction for third degree assault given by the family court.

entered into by mutual consent[.]" HRS § 707-712(2) (1993). Kituta testified that he punched Minor in self-defense without thinking and in reaction to Minor's swinging a crutch at him. Minor and Minor's cousin testified that Minor did not attempt to swing the crutch at Kikuta and did not take any aggressive action toward Kikuta. There was no evidence that Kituta and Minor had entered into a fight or scuffle by mutual consent. Thus, the family court did not err in failing to give a mutual affray instruction.

III.

For the foregoing reasons, I respectfully dissent.

Craig H. Nakamura