CONCURRING AND DISSENTING OPINION BY NAKAMURA, C.J.

The family court concluded that the prosecution had disproved the parental discipline defense[1] of Defendant-Appellant Richard D. Dowling, Jr. (Dowling) based on its finding that Dowling's actions had caused "mental distress" to his minor son (Minor). I agree with the majority that the family court misapplied the law in concluding that this finding negated the defense under the excessive-force limitation set forth in Hawaii Revised Statutes (HRS) § 709-309(1)(b). I also agree with the majority that there was insufficient evidence to disprove the defense under HRS § 709-309(1)(b).

I do not agree that there was insufficient evidence to disprove the defense under HRS § 703-309(1)(a). However, it is not apparent from the record that the family court relied on HRS § 703-309(1)(a) in concluding that the prosecution had disproved the parental discipline defense. Because I cannot tell whether the family court would have found Dowling guilty absent its misreading of HRS § 709-309(1)(b), I would vacate Dowling's conviction and remand the case for a new trial.

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

> **§ 703-309 Use of force by persons with special responsibility for the 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.

Accordingly, I concur with the majority to the extent that it concludes that Dowling's conviction cannot stand, but I respectfully dissent from the majority's decision to reverse Dowling's conviction without the opportunity for a new trial.

I.

In rendering and explaining its verdict, the family court stated, in pertinent part, as follows:

> THE COURT: Mr. [Defense counsel], you are reading 703-309(1)(b) to me, and you are inferring that the Court would have to find that he caused substantial bodily injury. I don't read that Section that way. I think I read it as being causing the substantial injury, disfigurement, extreme pain, or mental distress, or neurological damage.
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> The Court could very well find mental distress, is that (inaudible). Are you just saying I have to find substantial bodily injury?
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> [DEFENSE COUNSEL]: No, no, absolutely not. Absolutely not.
>
> But I would say that you need to read it in (inaudible) material, that is that level of -- is that level of abuse that we are talking about.
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> . . . ..
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> THE COURT: Well, I have listened very carefully to all of the evidence today, and I have listened to [Minor's] testimony, which, quite frankly, I thought was extremely credible.
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> I believe the Court finds [Minor's] description of what happened entirely believable. I believe from hearing the evidence that [Minor] knew he was going to get a licking, he knew his dad was extremely angry. He got pushed down onto the bed, and the last thing he saw was a fist, and then he covered his eyes and he got hit twice on his left side.
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> His testimony was his mother was in the room trying to break it up, he was crying, saying stop, don't hit me. It hurt.
>
> . . . .
>
> Now, is it justified under 703-309? A parent has a right to discipline their kid. Absolutely. You know, you have a right to do that. But I think this case just went a little bit too far. I think you lost your temper and you punched your son. I don't believe your testimony to be credible at all. I don't believe [Minor] was laying on the bed with his feet sticking straight up, and you can have a whack at his right butt cheek. I just don't see any evidence of that. I don't -- you know, when you demonstrated it on the stand, you pretty much demonstrated what [Minor] did. You know, he is scared. He put his hands over his head. He didn't want to get hit in the head.

> . . . .
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> THE COURT: . . . .
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> Your lawyer has a good point. You know, you are allowed to discipline your child. It might not be the way the thinking is now, that you should physically hit your kid, but you are allowed to do that.
>
> Did you go overboard or not?
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> You know, there is bruises on him. They are not huge bruises, but there are bruises.
>
> You know, if I read 309 -- 703-309(1)(b), which states the force used is not designed to cause, or known to cause, or risk of causing substantial bodily injury.
>
> Yes, you didn't break his bones. You didn't do anything like that. It wasn't -- it didn't rise to that occasion. But, I do -- I do believe that it rose to mental distress, and not just that he was going to get lickings at the time.
>
> I think the evidence that the Court heard and [Minor's] testimony of what happened the Sunday following it, it was still on his mind. You know, Tuesday, Wednesday, Thursday, Friday, Saturday, Sunday, and he went to the person he testified he trusted the most who would help him. And he was that concerned about it, five days after the fact to tell somebody about it. And I think that is what rises, just this case goes over the edge just a little, you know, that it did cause mental distress.
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> So I'm going to find you guilty of the offense of abuse on family and household member.

(Emphases added.)

II.

The record indicates that the family court concluded that the prosecution had disproved the parental discipline defense under the excessive-force limitation set forth in HRS § 709-309(1)(b) by virtue of the family court's finding that Dowling's use of force had caused "mental distress" to Minor. However, the excessive-force limitation requires that the force used was "designed to cause or known to create a risk of causing . . . extreme . . . mental distress[.]" HRS § 709-309(1)(b) (emphasis added). The family court's finding that Dowling's use of force caused mental distress to Minor was inadequate to invoke the excessive-force limitation and to disprove the parental discipline defense based on HRS § 709-309(1)(b).

The family court's statements in rendering its verdict reveal that it relied upon an erroneous view of the law in rejecting Dowling's parental discipline defense and in finding Dowling guilty of abuse of a family or household member. I further agree with the majority that there was insufficient evidence to support a finding that Dowling's use of force against Minor was designed to cause or known to create a risk of causing extreme mental distress. I concur with the majority to the extent that it concludes that Dowling's conviction cannot stand.

III.

However, I disagree with the majority's conclusion that there was insufficient evidence to negate the parental discipline defense under HRS § 703-309(1)(a). Under HRS § 703-309(1)(a), a parent's use of force against his or her child is justifiable if "[t]he 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[.]" In construing HRS § 703-309(1)(a), the Hawaiʻi Supreme Court has held that "to be 'reasonably related' to the purpose of punishing misconduct, *use of force must be both reasonably proportional to the misconduct being punished and reasonably believed necessary to protect the welfare of the recipient*." State v. Matavale 115 Hawaiʻi 149, 163, 166 P.3d 322, 336 (2007) (quoting State v. Crouser, 81 Hawaiʻi 5, 12, 911 P.2d 725, 732 (1996). "[T]he question of reasonableness or excessiveness of physical punishment given a child by a parent is determined on a case-by-case basis and is dependent upon the particular circumstances of the case." Id. at 165, 166 P.3d at 338.

Whether Dowling's use of force against Minor was both reasonably proportional to the misconduct being punished and reasonably believed necessary to protect Minor's welfare was a factual question for the trier of fact to resolve. Based on the evidence presented, a reasonable trier of fact could certainly have resolved this factual question in Dowling's favor. However,

the test for sufficiency of evidence is not whether the trier of fact could have found for the defendant, but whether when viewed in the strongest light for the prosecution, there was substantial evidence to support the defendant's guilt. See State v. Richie, 88 Hawaiʻi 19, 33, 960 P.2d 1227, 1241 (1998).

When viewed in the strongest light for the prosecution, the evidence showed that Dowling, with a closed fist, punched Minor twice out of anger, after becoming mad over Dowling's inability to open a closet door that Minor had gotten stuck on a rug. I believe that sufficient evidence was presented for a reasonable trier of fact to find that Dowling's use of force was not "both reasonably proportional to the misconduct being punished and reasonably believed necessary to protect the welfare of the recipient." See Crouser, 81 Hawaiʻi at 12, 911 P.2d at 732. Thus, I do not agree with the majority's decision to reverse Dowling's conviction.

IV.

The family court's statements indicate that it based its verdict on the erroneous conclusion that its finding that Dowling had caused mental distress to Minor meant that the prosecution had disproved the parental discipline defense under HRS § 703-309(1)(b). It is not apparent from the record that the family court relied on HRS § 703-309(1)(a) in concluding that the prosecution had disproved the parental discipline defense. Accordingly, the sufficiency of the evidence to disprove the defense under HRS § 703-309(1)(a) does not provide a valid basis to affirm Dowling's conviction.

I believe Dowling's conviction should be vacated and the case remanded for a new trial.[2]

[2] Because the prosecution in this case only presented sufficient evidence to disprove the parental discipline defense based on HRS § 709-309(1)(a) and not based on HRS § 709-309(1)(b), the prosecution on retrial would be limited to disproving the parental discipline defense based on HRS § 709-309(1)(a).