S.C. No. 24928

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

AND

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee	)	FC-CR NO. 01-1-0767
	)	APPEAL FROM THE JUDGMENT FILED JANUARY 17, 2002
vs.	)	FAMILY COURT, SECOND CIRCUIT
	)	HONORABLE ERIC G. ROMANCHAK HONORABLE RUBY HAMILI HONORABLE DOUGLAS SAMESHIMA HONORABLE GERONIMO VALDRIZ, JR. District/Family Court Judges, Second Circuit
MARGARET GAUNTT-BRYANT, Defendant-Appellant	)	

OPENING BRIEF

APPENDIX

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S.C. No. 24928

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee vs. MARGARET GAUNTT-BRYANT, Defendant-Appellant	)	FC-CR NO. 01-1-0767 APPEAL FROM THE JUDGMENT FILED JANUARY 17, 2002 FAMILY COURT, SECOND CIRCUIT HONORABLE ERIC G. ROMANCHAK HONORABLE RUBY HAMILI HONORABLE DOUGLAS SAMESHIMA HONORABLE GERONIMO VALDRIZ, JR. District/Family Court Judges, Second Circuit

OPENING BRIEF

I. STATEMENT OF THE CASE

A. Nature of the Case

The Defendant-Appellant, Margaret Gauntt-Bryant (hereafter, Appellant), files this appeal from the judgment, conviction and sentence entered against her on one count of the offense Abuse of Family and Household Members, in violation of Hawai'i Revised Statutes (hereafter, HRS) § 709-906 (1993 & Supp. 2000), after a bench trial in the Family Court for the Second Circuit (hereafter, the trial court or the court) on January 17, 2002. (See, Judgment, attached as Appendix.)

In this timely appeal, Appellant argues that the following trial court errors were not harmless beyond a reasonable doubt, and, therefore, require reversal:

1. the trial court failed to engage Appellant in the required colloquy concerning her constitutional right to testify in her own defense both before the trial and at the close of the trial, which failure was not harmless beyond a reasonable doubt;

2. under the totality of the circumstances, the record does not support a finding that at the arraignment and plea hearing Appellant voluntarily, knowingly and intelligently waived her right to a jury trial;

3. the prosecutor failed to prove beyond a reasonable doubt the elements of the offense, Abuse of Family and Household Member, thus the trial court erred in denying Appellant's motion for a judgment of acquittal;

4. Appellant's trial counsel rendered ineffective assistance of counsel for failure have Appellant testify in her own defense.

B. Pretrial Proceedings

The plaintiff-appellee the State of Hawai'i (the State) filed a complaint against Appellant on August 30, 2001, alleging one count of violation of HRS § 709-906, Abuse of Family and Household Members:

> That on or about the 29th day of August, 2001, in the County of Maui, State of Hawaii, MARGARET GAUNTT-BRYANT did intentionally, knowingly or recklessly engage in and cause physical abuse of a family or household member, to wit, Kelly Gauntt, thereby committing the offense of Abuse of Family and Household Member in violation of Section 709-906 of the Hawaii Revised Statutes.

(Record on Appeal [hereafter, RA], at 1-2.)

Section 709-906 of the HRS states in relevant part: "(1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member . . . " HRS § 709-906. The offense is a misdemeanor, which, for the first time offender, carries a mandatory minimum jail sentence of 48 hours, and requires that the offender undergo any available domestic violence intervention programs ordered by the court. HRS §709-906(5)(a) & (6).

On August 30, 2001, Appellant appeared at the arraignment and plea hearing with a deputy public defender of the Maui Public Defenders Office. (Transcript of Proceeding on August 30, 2001 [hereafter, TR 8/30/01], 2.) Through the public

defender, Appellant acknowledged receiving both the Complaint and the Affidavit of Judicial Determination of Probable Cause, and waived the reading of the charge. (TR 8/30/01, 2.) Appellant entered a plea of not guilty (Id., 2), which the court accepted. (Id., 3.) As to Appellant's right to a jury trial, the public defender did not represent that he had informed Appellant of her right to a jury trial, or that, having been so informed, Appellant chose to waive her right to a jury trial. (Id., 2.) The court engaged Appellant in a colloquy concerning her right to a jury trial; Appellant's three responses thereto are represented in the hearing transcript as, "No audible response". (Id., 3.) The trial court found, "that with full understanding of her right to jury trial Margaret Gauntt-Bryant does knowingly and intelligently waive her right to jury trial." Id.

As to whether the court would issue a stay-away order, the State told the court, "I can represent that in the police reports it indicates that he [Appellant's husband, Kelly Gauntt] did not want prosecution when the police were there. That's his decision, but (inaudible) whether or not he wanted a stay away order." (Id., at 4-5.) The court released Appellant on her own recognizance, but in the Order Pertaining to Bail filed on August 30, 2001, issued a stay away order against Appellant for the weekend. (Id., 5.)

C. Trial Proceedings

The trial took place on January 17, 2001, and resulted in the court finding Appellant guilty of the offense charged, Abuse of Family and Household Member. At trial, Appellant was no longer represented by the public defenders office, but instead by appointed counsel, Walter Vierra, Esq.

Appellant's husband, Kelly Gauntt (Kelly), the victim of the alleged abuse, testified for the State. He and Appellant were married in March, 2001. (Transcript of Proceedings on January 17, 2002 [hereafter, TR 1/17/02], 4-5.) At the time of the subject incident on August 29, 2001, one of Appellant's children from an earlier union, a son of undetermined age, lived with Kelly and Appellant at their home in Pukalani Maui. (Id., 3-5.)

As to the incident on August 29, 2001 which precipitated the charge, Kelly testified:

"[Kelly].	My wife [Appellant] got home around 9:30 that evening. Her car was overheating and she parked it out on the dirt so that the antifreeze wouldn't leak on to the driveway, and she was kind of parked at an angle. And I came out to let her know that I had dinner ready, and she said that she wanted to go to the store. And I told her that I didn't want her to go to the store.
[The State].	Okay. Why didn't you want her to go to the store?
[Kelly].	I had dinner cooked and I'd been waiting for an hour and a half for her to get home.
[The State].	Where had she been?
[Kelly].	Um, I'm not sure, your Honor – or ma'am.
[The State].	(Inaudible) the judge. Okay, did you observe anything –
[Kelly].	Can I finish answering the question?
[The State].	Well, I – okay, go ahead.
[Kelly].	I believe the question was did you get injured. And what happened was her car door was open. She was kind of parked at an angle up against a bunch of bushes in front of the house, and the bushes had big huge thorns on them. And I grabbed the keys, her keys from her, because I didn't want her going to the store and I believe that the bushes scratched my forehead. I – and I'm not sure how my shirt got torn, whether it was caught on the corner edge of the door or whether those bushes ripped my shirt, but that's how I was injured." (Id., 5-7.)

Kelly testified that neither he nor Appellant had been drinking on August 29, 2001. (Id., 7.) Kelly believed their landlord called the police that night. (Id., 5, 7.) When the police arrived, Kelly was not sure whether he told the police officer that he received his injuries from either the bush or the car. (Id., 9.) He did nothing "physically" to Appellant. (Id., 9.)

During the trial the State showed Kelly two photographs, marked as State's Exhibit 1 and State's Exhibit 2. Kelly testified that State's Exhibit 1 accurately depicted him on August 29, 2001 with a scratch on his forehead, which scratch Kelly testified came from a thorny bush. (Id., 10.) State's Exhibit 2 accurately depicted Kelly's shirt on August 29, which shirt Kelly testified was torn by the thorny bush. (Id., 10-11.) The court accepted both photographs into evidence. (Id., 11.)

Kelly denied during his trial testimony that he told the Maui County police officer who arrived at the scene that: Appellant had come home after drinking with her friends (Id., 8); he believed Appellant was intoxicated due to the odor of liquor on her breath (Id., 8); he took the car keys from Appellant because she was drunk (Id., 8-9); that Appellant grabbed his shirt and ripped it, then scratched the right side of his face several times. (Id., 9.)

On cross-examination, Kelly testified that he received the injuries, "from reaching over her car door, grabbing her keys." (Id., 12.) "[T]he bushes were like way overgrown and she was parked so close to the bushes that she – when she opened her door there was no room for me to walk around the door to get her keys, and so I reached up and over the car door and the bushes were like grown out at an angle." (Id., 12.) He insisted that Appellant did not hurt him. (Id., 12.) He did not call the police (Id., at 12), and refused to provide the police with a statement when they arrived. (Id., at 13.)

On redirect, Kelly testified, "[t]he police officer asked me if I wanted my wife arrested, and I said, no, there was no cause for arrest. * * * I didn't even see it as a case." (Id., 14.) On re-cross, he testified that the reason he didn't want the case prosecuted was because, "my wife didn't do anything to me." (Id., 14.)

The State also called to testify during the trial Maui County Police Officer David Leffler (hereafter, Officer Leffler or Leffler) (Id., 15), whose testimony concerning Kelly's statements to him on August 29, 2001 was introduced for the purpose of impeachment only, and not as substantive evidence. (Id., 17, 21, 22, 23.) As to Kelly's injuries, Leffler testified that he stated the following:

> "He related that he was home. His wife, Margaret, came home late. She pulled up close to the driveway area and parked the car crooked. He went over there. He could smell liquor on her breath, started getting in an argument about

why she was home late, and he tried to take the keys away from her. A scuffle ensued.

* * *

He didn't want her to leave. He didn't want her to drive drunk because he could smell alcohol on her breath. And he related that she tore his shirt and she scratched him on the forehead and face area." (Id., 18.)

As to his observations, Officer Leffler testified that:

- he responded to a call in the evening of August 29, 2001 (Id., 15);
- at Appellant and Kelly's home, he observed Kelly in the garage with a scratch to the right side of his face and wearing a ripped shirt (Id., 16);
- Kelly was sober and upset (Id., 16);
- inside the house, he observed Appellant who he found to be intoxicated due to the smell of liquor on her breath and, "very uncooperative" (Id., 17);
- there was a vehicle parked on the street in front of the house (Id., 18);
- the driver's door of the vehicle was facing the street, with nothing near it (Id., at 19);
- the car did not appear to be overheating (Id., 19);
- he saw nothing around the car that could have caused the scratch on Kelly's face. (Id., at 19.)

On cross-examination, Officer Leffler testified that he did not pop the hood of the vehicle to determine if it was overheated, or otherwise inspect the car. (Id., 20.) He did not specifically check the area around the car to see if something could have scratched Kelly's face and ripped his shirt. (Id., 20.) On redirect, he testified that Kelly did not tell him that the car had overheated, or that the scratch and the ripped shirt came from a tree or from the car. (Id., 21.)

After Officer Leffler completed his testimony the State rested its case, at which time defense counsel moved for a judgment of acquittal, on the ground that the State failed to present substantive evidence proving that Appellant caused Kelly's injuries. (Id., 21.) The State opposed the motion, arguing that: Kelly's testimony was not credible (Id., 22); the exhibits and Leffler's testimony of his observations sustained the

State's burden of proving the elements of the offense. Defense counsel reminded the court that Leffler's testimony not substantive, but, "simply for rebuttal." (Id., 22.) The court denied the motion, finding that, "there is sufficient evidence to support a conviction when viewing it in the light most favorable to the State. Motion is denied." (Id., 23.)

Defense counsel requested and received a brief recess. (Id., 23.) When the trial reconvened, defense counsel stated, "Your Honor, the defense will not be calling any witnesses at this time." (Id., 23.) Shortly thereafter, the court engaged Appellant in the following colloquy:

"THE COURT: Ms. Gauntt-Bryant, your counsel has indicated that you do not wish to present a case on your behalf. Is that your wish?

THE DEFENDANT: (Inaudible). My husband said was accurate.

THE COURT: . . . you have a right to remain silent, and you don't need to present a case. You understand that right? And that's guaranteed to you, and just cause you decide, okay, I'm not going to present to a case today, I'm not going to say a word, that because you have decided to not take any of those steps, that no court can hold that against you. You understand that?

THE DEFENDANT: (No audible response.)

* * *

THE COURT: And your counsel has indicated today that you choose to exercise that right to not testify and to remain silent?

THE DEFENDANT: (No audible response.)

THE COURT: So today that is your decision, your sole decision?

THE DEFENDANT: (No audible response.)

THE COURT: Thank you, Ms. Gauntt-Bryant." (Id., 24-25.)

D. Judgment and Sentence

After hearing closing arguments, the court found Appellant guilty of the offense

charged:

> "[W]ith respect to the testimony that was given, what we have, as indicated outright, is the credibility issue, and we've got statements given on the date of the incident, August 29th, and the day of recanting those statements given today, January 17th, year 2001.
>
> We also have the independent observations and photographs taken by an officer who's not a party to the incident in question.
>
> With respect to this matter this Court does find that on August 29th, year 2001, Margaret Gauntt-Bryant did recklessly engage in and cause physical abuse of a family and household member, that being Kelly Gauntt." (Id., 29-30.)

The court sentenced Appellant to one year probation, 48 hours jail time, mittimus to issue forthwith. (Id., 31.) The court ordered participation in substance abuse assessment. (Id., 32.) On January 18, 2002, the court amended its judgment and ordered that the Criminal Injuries Compensation Fee of $50.00 and a Probation Fee of $75.00 be waived due to Appellant's, "extraordinary financial situation." (RA, 26.)

E. Post Trial Proceedings

Defense counsel moved to stay execution of sentence pending appeal (TR 1/17/02, 32), which motion the court granted on February 5, 2002. (RA, 29.) On February 4, 2002, defense counsel filed a Stipulation and Order for Withdrawal and Substitution of Counsel, seeking to appoint the undersigned counsel to represent Appellant during the appeal of this matter. (RA, 27-28.) The court approved the stipulation. (RA, 28.) On February 13, 2002, Appellant filed a Notice of Appeal from the judgment of conviction and the amendment. (RA, 30-34.) On April 15, 2002, the Clerk of the Supreme Court placed this case on the Court's calendar. This Opening Brief is due on or before May 25, 2002.

II STATEMENT OF POINTS OF ERROR

A. The Trial Court Erred in Failing to Engage Appellant in the Required Colloquy Concerning Her Constitutional Right to Testify, Which Error Was Not Harmless Beyond a Reasonable Doubt.

Under the Hawai'i and United States Constitutions, as well as Hawai'i statute, an

accused enjoys a right to testify in his/her own defense. Hawai'i Const. art. 1, §§ 5, 10, 14[1]; U.S.Const. amends. V, VI, XIV[2]; HRS § 801-2.[3] To protect this right, trial courts must advise criminal defendants of their right to testify, and trial courts must obtain from defendants on-the-record waivers of that right in every case in which defendants do not testify. Tachibana v. State, 79 Hawai'i 226, 236, 900 P.2d 1293, 1303 (1995). "The decision to testify is ultimately committed to a defendant's own discretion[.] ... Thus, a defendant's personal constitutional right to testify truthfully in his [or her] own behalf may not be waived by counsel as a matter of trial strategy, but 'may be relinquished only by the defendant." Id., at 232, 900 P.2d at 1299 (internal citations and quotation marks omitted.)

The Tachibana rule was clarified in State v. Lewis: "we now mandate that, in trials beginning after the date of this opinion, such advice shall be imparted by the trial courts to defendants, that is, the trial courts "prior to the start of trial, [shall] (1) inform the defendant of his or her personal right to testify or not to testify and (2) alert the defendant that, if he or she has not testified by the end of the trial, the court will briefly

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[1] As to the Hawai'i State Constitution, Article I, section 5 provides, in relevant part, that, "No person shall be deprived of life, liberty or property without due process of law[.]" Article I, section 10 provides, in relevant part, "... nor shall any person be compelled in any criminal case to be a witness against oneself." Article I, section 14 provides the defendant the right "to have compulsory process for obtaining witnesses in the accused's favor [.]"

[2] As to the United States Constitution, the fifth amendment provides, in relevant part, that, "No person ... shall be compelled in any Criminal Case to be a witness against himself..." The sixth amendment provides the defendant with the right "to have compulsory process for obtaining Witnesses in his favor..." The fourteenth amendment provides, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law[,]"

[3] HRS § 801-2 provides:

> In the trial of any person on the charge of any offense, he shall have a right to meet the witnesses, who are produced against him, face to face; to produce witnesses and proofs in his own favor; and by himself or his counsel, to examine the witnesses produced by himself, and cross-examine those produced against him; and to be heard in his defense.

question him or her to ensure that the decision not to testify is the defendant's own decision." State v. Lewis, 94 Hawai'i 292, 297, 12 P.3d 1233, 1238 (2000).

In this matter the court provided Appellant with no advisement concerning her right to testify in her own defense - either prior to the trial, or at the close of the trial. The court's colloquy with Appellant concerning her right to testify (TR 1/17/02, 25) is woefully inadequate under Tachibana and Lewis, as fully argued below.

Appellant did not preserve this issue in the trial record. Notwithstanding, review is proper inasmuch as the error of failing to advise Appellant of her right to testify, and obtain a personal on-the-record waiver of that right, constitutes plain error. State v. Hoang, 94 Hawai'i 271, 277, 12 P.3d 371, 377 (App. 2000). "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Rule 52(b), Hawai'i Rules of Penal Procedure (HRPP).

Assuming plain error, the issue is whether the error was harmless beyond a reasonable doubt. "The entire burden of showing harmlessness beyond a reasonable doubt is on the State. The defendant has no burden whatsoever in this regard." State v. Akahi, 92 Hawai'i 148, 152, 988 P.2d 667, 671 (App. 1999). "Once a violation of the constitutional right to testify is established, the conviction must be vacated unless the State can prove that the violation was harmless beyond a reasonable doubt." Tachibana, 79 Hawai'i at 240, 900 P.2d at 1307; Hoang, at 279, 12 P.3d at 379. For all the reasons set forth below under Argument A, the State cannot carry its burden of proving that the trial court's violation of Appellant's right to testify was harmless beyond a reasonable doubt. Her conviction must be reversed.

B. The Trial Court Failed to Obtain from Appellant at Her Arraignment and Plea Hearing a Valid Waiver of Her Fundamental Right to a Jury Trial.

Because a conviction for Abuse of a Family and Household Member under HRS § 709-906 is a misdemeanor which carries a possible one year term of imprisonment, Appellant had the right to a jury trial. State v. Ibuos, 75 Haw. 118, 120, 857 P.2d 576, 577 (1993); HRPP, Rule 5(b)(1) (1996); HRS §806-60 (1993). A defendant may voluntarily waive his/her right to trial by jury either orally or in writing. Ibuos, 75 Haw. at

121, 857 P.2d at 578 (*citing* HRPP Rule 5(b)(3)). For a valid waiver of the right to a jury trial, the trial court has a duty to inform the accused of that constitutional right. Ibuos, 75 Haw. at 120, 857 P.2d at 577 (*citing* State v. Swain, 61 Haw. 173, 176, 599 P.2d 282, 284 (1979)). The failure to obtain a valid waiver of this fundamental right constitutes reversible error. State v. Friedman, 93 Hawai'i 63, 68, 996 P.2d 268, 273 (2000).

Appellant did not preserve this issue in the trial record. Notwithstanding, review is proper inasmuch as the error of failing to advise Appellant of her right to a jury trial, and obtain a valid waiver, constitutes plain error. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." HRPP 52(b). "The appellate court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." Lewis, 94 Hawai'i at 313, 12 P.3d at 1254 (*quoting* State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999)).

C. The Court Erred in Denying the Motion for a Judgment of Acquittal since Reasonable Minds Might Fairly Conclude That the State Failed to Prove Beyond a Reasonable Doubt That Appellant Knowingly, Intentionally or Recklessly Physically Abused Her Husband Kelly in Violation of HRS § 709-906(1).

The two material elements of the offense of abuse of a family or household member under HRS §709-906(1) are, "(1) the defendant physically abused either a family or household member; and (2) the defendant did so intentionally, knowingly, or recklessly." State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996). The State failed to prove these elements beyond a reasonable doubt. This issue was preserved in the trial record. At the close of the State's case, defense moved for a judgment of acquittal on the ground that the substantive evidence presented - two photographs showing injury, and Officer Leffler's observations on the evening of August 29 - were insufficient to prove beyond a reasonable doubt the materials elements of the offense, Abuse of Family and Household Members. (TR 1/17/02, 21.) After hearing argument

from the State (Id., 21-23), the court denied the motion.

D. When Viewed as a Whole, Trial Counsel's Assistance Fell Outside the Range of Competence Demanded of Attorneys in Criminal Cases, with Counsel's Error in Failing to Have Appellant Testify in her Own Behalf Leading to the Conviction.

Appellant's trial counsel committed the error of failing to have Appellant testify in her own behalf, which error, viewed as a whole, fell outside the range of competence demanded of attorneys in criminal cases. Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994). The claim of ineffective assistance of counsel was not raised during the trial. There can be no waiver of the issue of defense counsel's performance, however, because no realistic opportunity existed to raise the issue until now, on direct appeal. *See* Briones v. State, 74 Hawai'i 442, 460, 848 P.2d 966, 975 (1993)(*citing* Matsuo v. State, 70 Hawai'i 573, 577, 778 P.2d 332, 334 (1989)). Moreover, the Hawai'i Supreme Court has held that claims of ineffective assistance of counsel may be raised for the first time on appeal. State v. Silva, 75 Hawai'i 419, 439, 864 P.2d 583, 592 (1993).

III STANDARDS OF REVIEW

A. Where the trial court fails to provide the defendant with the required advice concerning his/her personal right to testify in his/her own defense, "the conviction must be vacated unless the State can prove that the violation was harmless beyond a reasonable doubt." Tachibana, 79 Hawai'i at 240, 900 P.2d at 1307.

> "Under the harmless-beyond-a-reasonable-doubt standard, the question is whether there is a reasonable possibility that error may have contributed to conviction. If there is . . . a reasonable possibility . . . , then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.
>
> When deciding whether an error is harmless beyond a reasonable doubt, the error must be viewed in the light of the entire proceedings and given the effect which the whole record shows it to be entitled.
>
> On appeal, the question whether an error was harmless beyond a reasonable doubt is a question of law reviewable de novo under the right/wrong standard of review."

Akahi, 92 Hawai'i at 150-51, 988 P.2d at 669-70 (internal citations and quotation marks omitted).

B. “The validity of a criminal defendant's waiver of his or her right to a jury trial presents a question of state and federal constitutional law. . . . We answer questions of constitutional law by exercising our own independent constitutional judgment based on the facts of the case. Thus, we review questions of constitutional law under the right/wrong standard.” Friedman, 93 Hawai’i at 67, 996 P.2d at 272 (internal quotation marks omitted). "[W]e review the validity of a defendant's waiver of his/her right to a jury trial under the totality of the circumstances surrounding the case, taking into account the defendant's background, experience, and conduct." Id. at 70, 996 P.2d at 275.

C. As to the court’s error in denying the acquittal motion, the standard of review is, "whether, upon the evidence viewed in light most favorable to the prosecution and in full recognition of the province of the [fact finder], a reasonable mind might fairly conclude guilt beyond a reasonable doubt." State v. Alston, 75 Hawai’i 517, 528, 865 P.2d 157, 164 (1994).

D. As to the claim of ineffective assistance of counsel, the applicable standard is whether, “'viewed as a whole, the assistance provided was within the range of competence demanded of attorneys in criminal cases.' " Dan, 76 Hawai'i at 427, 879 P.2d at 532 (1994)(quotation marks and citations omitted.) “The defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.” Silva, 75 Haw. at 440, 864 P.2d at 593.

IV ARGUMENT

A. The Trial Court Failed to Engage Appellant in the Required Colloquy Concerning Her Constitutional Right to Testify, Which Error Was Not Harmless Beyond a Reasonable Doubt.

Since the Hawai'i Supreme Court's 1995 decision in Tachibana, trial courts have been required to advise criminal defendants of their right to testify under article 1, sections 5, 10 and 14, of the Hawai'i Constitution, and the amendments 5, 6 and 14 of the United States Constitution; in every case where the defendant chooses not to testify, the trial court must obtain the defendant's personal, on-the-record waiver of this right. Tachibana, 79 Hawai'i at 231-32, 236, 900 P.2d 1298-99, 1303. The chief purpose in providing the defendant with such advice is to ensure that he is, "aware of his right to testify and that he knowingly and voluntarily waived that right." Id. at 237, 900 P.2d at 1304. The HRS also protects the right to testify: "In the trial of any person on the charge of any offense, he [or she] shall have a right . . . to be heard in his [or her] defense." HRS § 801-2 (1985).

To ensure that the lower courts protect defendants' right to testify, this Court set forth a four-part colloquy concerning the notice to be provided all defendants. The trial court should have advised Appellant: "that he [or she] has a right to testify, that if he [or she] wants to testify that no one can prevent him [or her] from doing so, [and] that if he [or she] testifies the prosecution will be allowed to cross-examine him [or her]. In connection with the privilege against self-incrimination, the defendant should also be advised that he [or she] has a right not to testify and that if he [or she] does not testify then the jury can be instructed about that right." Tachibana, 79 Hawai'i at 244 n. 7, 900 P.2d at 1311 n. 7.

"[T]he ideal time to conduct the colloquy is immediately prior to the close of the defendant's case. Therefore, whenever possible, the trial court should conduct the colloquy at that time." Id., at 237, 900 P.2d at 1304. In conducting the colloquy the trial court must be careful not to influence the defendant's decision whether or not to testify. Id., at 244 n. 7, 900 P.2d at 1311 n. 7. "Tachibana does not require that the court engage in the colloquy if the defendant chooses to testify in his or her own behalf. . . . [I]f a defendant notifies the court of his or her intent to testify, the court should not

comment upon the advisability of such a decision. Indeed, [i]f a defendant insists on testifying, no matter how unwise such a decision, the attorney must comply with the request." Lewis, 94 Hawai'i at 296, 12 P.3d at 1237 (citations and quotation marks omitted).

The Court's opinion in State v. Lewis made explicit its order in Tachibana. "[W]e now mandate that . . . the trial courts "prior to the start of trial, [shall] (1) inform the defendant of his or her personal right to testify or not to testify and (2) alert the defendant that, if he or she has not testified by the end of the trial, the court will briefly question him or her to ensure that the decision not to testify is the defendant's own decision." Lewis, 94 Hawai'i at 297, 12 P.3d at 1238 (the directive "[shall]" is found in Lewis.)

1. The Trial Court Erred in Failing to Engage Appellant in the Required Colloquy Designed to Protect her Right to Testify.

Under Lewis, the trial court was required to implement the prior-to-trial colloquy concerning Appellant's constitutional right to testify in her own defense. Prior to the start of the trial, however, the court did not engage Appellant in the colloquy required under Tachibana and Lewis: 1) the court did not advise Appellant of her personal right to testify or not to testify; 2) the court did not advise Appellant that if she did not testify by the end of the trial, the court would briefly question her to ensure that the decision not to testify was her own decision. Lewis, at 297, 12 P.3d at 1238. Rather, at the beginning of the trial the State immediately launched into presenting its case by calling its first witness, Kelly. (TR 1/17/02, 3.)

Assuming for the sake of argument that this Court finds no error in the trial court's failure to engage Appellant in the prior-to-trial colloquy, Appellant argues that the trial court failed to engage Appellant in the required close-of-trial colloquy. Tachibana, 79 Hawai'i at 226 n. 7, 900 P.2d at 1311 n 7. After the defense rested it's case without presenting any witnesses (TR 1/17/02, 23), the court advised Appellant as follows:

"THE COURT: Ms. Gauntt-Bryant, your counsel has indicated that you do not wish to present a case on your behalf. Is that your wish?

THE DEFENDANT: (Inaudible). My husband said was accurate.

THE COURT: Okay. Because as you know, the Constitution guarantees that right, that **you have a right to remain silent**, and you don't need to present a case. You understand that right? And that's guaranteed to you, and just cause you decide, okay, I'm not going to present to a case today, I'm not going to say a word, that because you have decided to not take any of those steps, that no court can hold that against you. You understand that? [emphasis added].

THE DEFENDANT: (No audible response.)

THE COURT: Okay. And you understand who has the burden of proof in this case?

THE DEFENDANT: (No audible response.)

THE COURT: Yes?

THE DEFENDANT: (No audible response.)

THE COURT: Okay. And that would be the State; right?

THE DEFENDANT: (No audible response.)

THE COURT: Okay. Because you're presumed innocent; right?

THE DEFENDANT: (No audible response.)

THE COURT: And your counsel has indicated today that **you choose to exercise that right to not testify and to remain silent**?

THE DEFENDANT: (No audible response.)

THE COURT: So today that is your decision, your sole decision?

THE DEFENDANT: (No audible response.)

THE COURT: Thank you, Ms. Gauntt-Bryant." (Id., 24-25)(emphasis added).

The trial court's notice to Appellant of, "the right to remain silent" and the "right to not testify and to remain silent" fails to provide Appellant with the four-part advisory this

Court mandated be implemented in every case in which the defendant chooses not to testify. Here, the court's inadequate advisement tended to suggest to Appellant that the correct course of action was to say nothing.

Trial courts must directly advise a defendant (as opposed to going through her lawyer, Id., at 232, 900 P.2d at 1299), "that he [or she] has a right to testify, that if he [or she] wants to testify that no one can prevent him [or her] from doing so, [and] that if he [or she] testifies the prosecution will be allowed to cross-examine him [or her]. In connection with the privilege against self-incrimination, the defendant should also be advised that he [or she] has a right not to testify and that if he [or she] does not testify then the jury can be instructed about that right." Tachibana, 79 Hawai'i at 244 n. 7, 900 P.2d at 1311 n. 7. Here, not only did the trial court fail properly advise Appellant to her fundamental right to testify in her own defense, but it as well failed to fulfill its concomitant obligation to obtain from the defendant a personal, on-the-record waiver of the right to testify. Id., at 236, 900 P.2d at 1303.

The trial court had a final opportunity to advise Appellant of her right to testify after the State and defense delivered closing arguments. *See*, *e.g.*, Hoang, 94 Hawai'i at 276, 12 P.3d at 376. This opportunity was lost, however, with the trial court launching into its decision after the State completed rebuttal remarks. (TR 1/17/02, 29.)

2. The Trial Court's Error Was Not Harmless Beyond a Reasonable Doubt.

Having established the trial court's error in failing to notify Appellant of her right to testify in her own behalf, the issue is whether such error was harmless beyond a reasonable doubt. Tachibana, 79 Hawai'i at 240, 900 P.2d at 1307; Hoang, 94 Hawai'i at 279, 12 P.3d at 379. "[T]he question is whether there is a reasonable possibility that error may have contributed to conviction. If there is . . . a reasonable possibility . . . , then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside." Akahi, 92 Hawai'i at 150-51, 988 P.2d at 669-70 (citations and quotation marks omitted). "The entire burden of showing harmlessness beyond a reasonable doubt is on the State. The defendant

has no burden whatsoever in this regard." Id., at 152, 988 P.2d at 671.

"In general, it is inherently difficult, if not impossible, to divine what effect a violation of the defendant's constitutional right to testify had on the outcome of any particular case." Hoang, 94 Hawai'i at 279, 12 P.3d at 379, *citing, e.g.*, Silva, 78 Hawai'i at 126, 890 P.2d at 713. Here, the trial transcript suggests that had Appellant testified, she would have corroborated her husband Kelly's testimony.

"THE COURT: Ms. Gauntt-Bryant, your counsel has indicated that you do not wish to present a case on your behalf. Is that your wish?

THE DEFENDANT: (Inaudible). My husband said was accurate." (TR 1/17/02, 24.)

This Court has found that where the decisive issue in a case is credibility, but at trial an eyewitness extensively contradicts the State's witnesses and supports the defense, a reasonable possibility remains that a violation of the defendant's right to testify contributed to conviction. Akahi, 92 Hawai'i at 159-60, 988 P.2d at 678-79. As the Court held in Akahi, a case involving a Tachibana violation,

> [i]n this case, the decisive issue was credibility. As noted by counsel for [co-defendant] Grace [Akahi] in closing argument, the jury had to decide between "the police version of what occurred up at the land . . . versus Grace Akahi's version of what occurred at the land[.]" We conclude that it cannot be said beyond a reasonable doubt that, if [defendant James Kimo] Akahi's and/or [co-defendant] Kaahanui's voices had been added to Grace's version of what occurred at the land, the jury's decision would not have been different.

Id. at 160, 988 P.2d at 679.

In this case, the trial record indicates that there were two eyewitnesses to the August 29 incident: Appellant and Kelly. Kelly refused to fill out the VVFS on August 29. (TR, 1/17/02, 7.) Of the two eyewitnesses, only Kelly testified at the trial.

The State's other witness was Officer Leffler, who was not present during the incident. Leffler's testimony as to what Kelly told him could only be used for the purpose of impeaching Kelly's testimony about the incident. (Id., 17, 21, 22, 23.) Thus, the only evidence the State presented concerning the August 29 incident was Leffler's testimony concerning his observations when he arrived at Appellant's home, and the

two photographs showing the scratch on Kelly's face and the his torn shirt. Clearly, Appellant's testimony concerning the August 29 and how Kelly was injured could have tipped the scales and established reasonable doubt. Thus, it cannot be said beyond a reasonable doubt that had the trial court heard Appellant's testimony the judgment would not have been different. It follows that the court's Tachibana error cannot be deemed harmless beyond a reasonable doubt. Hence Appellant's conviction and sentence must be reversed. *See*, Tachibana, 79 Hawai'i at 240, 900 P.2d at 1307.

B. The Trial Court Failed to Obtain from Appellant at Her Arraignment and Plea Hearing a Valid Waiver of Her Fundamental Right to a Jury Trial.

Under HRPP 5(b)(1) in appropriate cases the court shall, "inform the defendant of the right to jury trial in circuit court[.]" HRPP, Rule 5(b)(1). "'Appropriate cases' arise whenever the accused has a constitutional right to a jury trial." Ibuos, 75 Haw. at 120, 857 P.2d at 577 (citations omitted); *see also* article I, section 14, of the Hawai`i Constitution (1978)[4]; sixth amendment to the United States Constitution.[5] In the criminal context, "any defendant charged with a serious crime shall have the right to trial by a jury of twelve members. 'Serious crime' means any crime for which the defendant may be imprisoned for six months or more." HRS §806-60; *see* Ibuos, 75 Haw. at 120, 857 P.2d at 577. Because a conviction for Abuse of a Family and Household Member under HRS §709-906 is a misdemeanor which carries a possible one year term of imprisonment, Appellant had the right to a jury trial. Id.

A defendant may voluntarily waive his/her right to trial by jury either orally or in

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[4] "Section 14. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed . . . Juries, where the crime charged is serious, shall consist of twelve persons. . . . "

[5] Amendment VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . . "

writing. Id. at 121, 857 P.2d at 578 (*citing* HRPP Rule 5(b)(3)). For a valid waiver of the right to a jury trial, the trial court has a duty to inform the accused of that constitutional right. Ibuos, 75 Haw. at 120, 857 P.2d at 577.

The colloquy in open court informing a defendant of his/her right to a jury trial at arraignment serves several purposes: "(1) it more effectively insures voluntary, knowing and intelligent waivers . . . ; (2) it promotes judicial economy by avoiding challenges to the validity of waivers on appeal . . . ; and (3) it emphasizes to the defendant the seriousness of the decision[.]" United States v. Cochran, 770 F.2d 850, 851-52 (9th Cir. 1985) (citations omitted); *see also* State v. Young, 73 Haw. 217, 221-22, 830 P.2d 512, 514 (1992) (*citing* Cochran for the proposition that the preferred method of obtaining a valid written or oral waiver from the defendant occurs at arraignment). The failure to obtain a valid waiver of this fundamental right constitutes reversible error. Ibuos, 75 Haw. at 120, 857 P.2d at 577.

> "A knowing and voluntary waiver of the right to trial by jury must come directly from a defendant, either in writing or orally. HRPP Rule 5(b)(3) . . . The necessity for colloquy between the court and a defendant is especially apparent in light of the importance we place on the personal nature of a defendant's right to a jury trial. [Citations omitted.] **With a silent or minimal record, the burden is upon the prosecution to prove a knowing and voluntary waiver.** Wong v. Among, 52 Haw. 420, 425, 477 P.2d 630, 634 (1970) (*citing* Boykin v. Alabama, 395 U.S. 238, 243, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969)). However, where it appears from the record that a defendant has waived a constitutional right, the defendant carries the burden of proof to show otherwise by a preponderance of the evidence. [Citations omitted.]" Ibuos, 75 Haw. at 120, 857 P.2d at 577. (Emphasis added.)

The record in this regard is minimal. At the arraignment and plea hearing on August 30, 2001, defense counsel failed to represent in open court that he had advised Appellant of her right to a jury trial. (TR 8/30/01, 2.) As well, defense counsel failed to represent that he had obtained Appellant's waiver of her right to a jury trial. (Id.)

Then the trial court undertook to inform Appellant of her right to a jury trial, however, as seen below the relevant colloquy between Appellant and the trial court is minimal in general, and ambiguous at best. (Id., 2-3.) It cannot be said that the court fully informed Appellant of her right to the jury trial. Therefore, the burden is upon the

State to prove that the waiver was knowing and voluntary. Ibuos, 75 Haw. at 120, 857 P.2d at 577.

A waiver is the knowing, intelligent, and voluntary relinquishment of a known right. *See* State v. Reponte, 57 Haw. 354, 361, 556 P.2d 577, 583 (1976) (citation omitted). "To determine whether a waiver was voluntarily and intelligently undertaken, this court will look to the totality of facts and circumstances of each particular case." State v. Vares, 71 Haw. 617, 621, 801 P.2d 555, 557-58 (1990) (*citing* State v. Dicks, 57 Haw. 46, 49, 549 P.2d 727, 730 (1976)) (noting that waiver of the right to counsel is reviewed under the totality of the circumstances); *see also* State v. Merino, 81 Hawai`i 198, 221, 915 P.2d 672, 695 (1996). Where it appears from the record that a defendant has voluntarily waived a constitutional right to a jury trial, the defendant carries the burden of demonstrating by a preponderance of the evidence that his/her waiver was involuntary. *See* Ibuos, 75 Haw. at 121, 857 P.2d at 578. Elsewhere, this Court has reviewed the validity of a defendant's waiver of his/her right to a jury trial under the totality of the circumstances surrounding the case, taking into account the defendant's background, experience, and conduct. *See* Reponte, 57 Haw. at 361, 556 P.2d at 583.

Appellant submits that under the totality of the circumstances the State will not be able to demonstrate that she voluntarily and knowingly waived her right to a jury trial. The record does not provide sufficient basis to make such an inference. At the August 30, 2001 arraignment and plea hearing the following colloquy took place, with Appellant represented by the "Mr. Aquino" of the Public Defenders Office, and the State by "Ms. Forelli":

"MR. AQUINO: "Your Honor, Deputy Public Defender (inaudible) on behalf of Ms. Gauntt-Bryant, who's present in custody.

MS. FORELLI: (Inaudible).

MR. AQUINO: Your Honor, I'll acknowledge receipt of the written complaint. We'll waive oral reading of the charges. Also knowledge [sic] receipt of the affidavit in this courtroom of judicial determination of probable cause.

At this time Ms. Gauntt-Bryant will enter a plea of not

guilty.

[1] THE COURT: Okay, good afternoon, Ms. Bryant-Gauntt – or is it Gauntt-Bryant?

Okay, did you understand what Mr. Aquino just represented to the Court? Do you understand your right to jury trial? Okay, that's whereby you, your attorney, the prosecutor and the Court all participate in selecting 12 people to sit in the jury box and be judge over you.

At the trial it's the prosecutor's burden to come forward with witnesses, documents, evidence sufficient to convince all 12 jurors of your guilt beyond a reasonable doubt.

THE DEFENDANT: (No audible response).

[2] THE COURT: Okay, but you understand your right to jury trial, and it's your intent this afternoon to waive your right to jury trial and have this matter set before a judge such as myself?

THE DEFENDANT: (No audible response).

[3] THE COURT: Okay. And you do that with full understanding of your right to jury trial? In order words, all 12 jurors must be convinced of your guilt before you can be convicted, as opposed to just the judge.

THE DEFENDANT: (No audible response)

THE COURT: Okay. I'm going to find that with full understanding of her right to jury trial Margaret Gauntt-Bryant does knowingly and intelligently waive her right to jury trial, accept her plea of not guilty, set this matter for pretrial and trial." (TR 8/30/01, 2-3).

To begin with, the public defender did not represent in open court that Appellant was aware of her right to a jury trial. Moreover, the he did not represent whether or not Appellant wished to waive her right to a jury trial. Then in statement [1] the court undertook to inform Appellant of her right to a jury trial, the adequacy of which Appellant does not dispute here. The issue is whether Appellant's waiver was voluntary and knowing.

The record is literally silent as to whether or not Appellant actually understood

the court's right-to-jury-trial advisement. More importantly, the record is silent as to whether or not Appellant waived this right.

After the court's right-to-jury-trial advisement, Appellant's response is described in the record as, "No audible response". (Id. 3.) Immediately thereafter, in statement [2], the trial court said: "Okay, but you understand your right to jury trial, and it's your intent this afternoon to waive your right to jury trial and have this matter set before a judge such as myself?" (Id.) This statement indicates that Appellant did not acknowledge to the court her right to a jury trial, and thus the court repeated the advisement. It is reasonable to conclude at this point that Appellant did not voluntarily and knowingly waive her right to a jury trial, let alone acknowledge her right to the same.

Moreover, statement [2] by the court represents a compound question: 1) the court seeks acknowledgment from Appellant of the right to a jury trial; 2) without waiting for an answer, the court demands to know whether Appellant wishes to relinquish this right and proceed with a bench trial. The second part of this compound question is the only time in the colloquy in which the court mentions the word "waive". (Id.)

In response to the compound question, the transcript indicates that there was no audible response from Appellant. Thereafter, in statement [3] the court said: "Okay. And you do that with full understanding of your right to jury trial?" This statement suggests that Appellant provided some form of affirmative response. It cannot be determined from the present record, however, whether Appellant acknowledged her right to a jury trial, or whether she chose to waive her right to a jury trial, or both. Appellant's voluntary and knowing waiver of her right to a jury trial simply cannot be discerned from this transcript.

The ambiguity of this colloquy contrasts dramatically with the colloquy scrutinized by this Court in Friedman, where this Court found that under the totality of the circumstances, defendant Friedman did not meet his burden of demonstrating that his waiver was involuntary:

> "Rather, the colloquy between Friedman and the trial court suggests that Friedman was aware of his constitutional right to a trial by jury. Friedman did not simply acknowledge his right to a jury trial with a simple "yes"; rather, Friedman

> articulated to the trial court that "[a] jury trial is where the outcome of . . . whether it's guilty or not is to be determined by 12 adults instead of a judge." Additionally, the trial court specifically informed Friedman that a judge would be trying his case if he waived his jury trial right. The record also reflects that, at the arraignment, Friedman was represented by competent counsel, who informed the court that he had previously "explain[ed] to [Friedman] the differences between a jury trial and judge trial"; moreover, Friedman acknowledged his attorney's representation. Finally, Friedman affirmatively indicated to the trial court that his waiver of the right to a jury trial was voluntary and a result of his own reflection."

Friedman, 93 Haw. 63, 996 P.2d 268.

Here, the record reveals an absence of facts which clearly and affirmatively demonstrate that Appellant voluntarily and knowingly waived her right to a jury trial. Accordingly, her conviction must be reversed.

C. The Court Erred in Denying the Motion for a Judgment of Acquittal since Reasonable Minds Might Fairly Conclude That the State Failed to Prove Beyond a Reasonable Doubt That Appellant Knowingly, Intentionally or Recklessly Physically Abused Her Husband Kelly in Violation of HRS § 709-906(1).

The two material elements of the offense of Abuse of a Family and Household Member are, "(1) the defendant physically abused either a family or household member; and (2) the defendant did so intentionally, knowingly, or recklessly." Eastman, 81 Hawai'i at 135, 913 P.2d at 61. This Court has defined the phrase "physically abuse" as used in HRS § 709-906(1) as, "to maltreat in such a manner as to cause injury, hurt, or damage to that person's body." State v. Nomura, 79 Hawai'i 413, 416, 903 P.2d 718, 721 (App.), *cert. denied*, 80 Hawai'i 187, 907 P.2d 773 (1995). Appellant contends that there was insufficient evidence with respect to both these elements to support her conviction.

There is no dispute that the injury depicted in State's Exhibit 1, the photograph of Kelly with the scratch on his face, if actually inflicted by Appellant would constitute physical abuse under HRS § 709-906(1). The issue is the effect to be given to Kelly's alleged August 29, 2001 statements to Officer Leffler in which Kelly alleged stated that Appellant had caused his injury - as Leffler so testified during the trial.

Under the Hawai'i Rules of Evidence (HRE) Leffler's testimony concerning what Kelly told him on August 29 constitutes hearsay because Kelly's statements are, "statement[s], other than [those] made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." HRE Rule 801(3) (1993); *see* Eastman, 81 Hawai'i at 136-37, 913 P.2d at 62-63. Hearsay is not admissible at trial unless it qualifies as an exception to the rule against hearsay. Shea v. City & County, 67 Haw. 499, 505, 692 P.2d 1158, 1164 (1985); Kekua v. Kaiser Found., 61 Haw. 208, 217, 601 P.2d 364, 370 (1979). An exception to the hearsay rule is found in HRE Rule 802.1(1), which, "provides for substantive use of most prior inconsistent witness statements[.]" Commentary to HRE Rule 613 (1993).

> Rule 802.1 Hearsay exception; prior statements by witnesses. The following statements previously made by witnesses who testify at the trial or hearing are not excluded by the hearsay rule:
>
> (1) Inconsistent statement. The declarant is subject to cross-examination concerning the subject matter of the declarant's statement, the statement is inconsistent with the declarant's testimony, the statement is offered in compliance with rule 613 (b), and the statement was:
>
> (B) Reduced to writing and signed or otherwise adopted or approved by the declarant; . . .

HRE Rule 802.1(1)(B) (1993). "The intent is to include in paragraph (1) all written or recorded statements that can be fairly attributed to the witness declarant." Commentary to HRE Rule 802.1 (1993).

Here, there is an insurmountable obstacle to use of Kelly's allegedly inconsistent August 29, 2001 statements to Officer Leffler as substantive evidence: Kelly's statements were never reduced to writing and signed or otherwise adopted or approved by Kelly. Therefore, Leffler's trial testimony concerning Kelly's allegedly inconsistent August 29 statements as to how he got his injuries could not, and cannot, be used as substantive evidence of the offense; they can only be used to impeach Kelly's trial testimony, for which purpose the State specifically proffered it.

This purpose is set out in the trial transcript at the beginning of Officer's Leffler's testimony, and later concerning the motion for a judgment of acquittal. At the beginning of Leffler's testimony the following exchange occurred, with Mr. Vierra representing

defense counsel, and Mr. Forelli representing the State:

MR. VIERRA:	Your Honor, at this point are we just going to – just so that the record is clear, we're not going to object to the testimony if the prosecution intends to use it as rebuttal, but we –
MS. FORELLI:	**Impeachment**.
MR. VIERRA:	– would object to that and have the Court rule that this would not be admissible as substantive evidence.
MS. FORELLI:	Your Honor, this would be (inaudible). (TR, 1/17/02, 17)(Emphasis added.)

Later, concerning the motion for a judgment of acquittal:

MS. FORELLI:	Based on that, the photographs, the officer's observations, the circumstantial evidence that there's nothing else to cause this other than how the complaining witness said, which does support the charge of abuse of a family household member.
MR. VIERRA:	(Inaudible). **None of the statements that the prosecutor referred to are substantive evidence.** Again, all the officer's statements are simply for rebuttal. . . .
MS. FORELLI:	"Your Honor, the photos are substantive evidence. The circumstantial evidence of how these injuries would have occurred based on the impeachment, impeachment evidence, as well as the officer's observations. That is substantive evidence . . . " (TR 1/17/02, 22-23)(Emphasis added.)

Leffler's trial testimony concerning Kelly's August 29 statements as to how he got his injuries were not substantive evidence of the offense. But the remaining "substantive evidence", as the prosecutor put it, does not support the court's denial of the motion for judgment of acquittal. The only evidence to prove beyond a reasonable doubt the offense charged was the photographs and Leffler's observations. As to the photographs, one depicted Kelly with a scratch on his face, (Id., 10), and the second depicting Kelly's torn shirt. (Id., 11.) As to Leffler's observations on August 29, his testimony told the court that: 1) he found Kelly in the garage with a scratch on his face

and wearing a ripped shirt; 2) Kelly appeared to be upset, but sober (Id., 16); 3) he found Appellant inside the residence, who he described as "uncooperative", and who appeared intoxicated due to the smell of liquor on her breath (Id., 17); 4) he observed a vehicle in the street in front of Appellant's home parked at a "crooked angle" (Id., 18); 5) he observed that the driver's door was facing the street with nothing near the driver's door (Id., 19); 6) he observed that the vehicle did not appear to be overheated (Id., 19.)

The State had the burden of proving beyond a reasonable doubt that Appellant physically abused Kelly, and that she did so intentionally, knowingly, or recklessly. Eastman, 81 Hawai'i at 135, 913 P.2d at 61. The above list of observations, coupled with the photographs, only show that Kelly had an injury in the form of a facial scratch on August 29, 2001, and a torn shirt. Otherwise, the State presented no evidence demonstrating that Appellant caused the scratch, let alone evidence demonstrating the requisite culpable mental state. Leffler's observation that Appellant was "uncooperative" was never examined during the trial as to what behavior Appellant was exhibiting that led Leffler to make this conclusion. There is no record establishing intoxication beyond Leffler's observation. But even if intoxication had been actually established, the state of intoxication hardly proves abuse under HRS §709-906.

Thus, the court erred in denying the motion for a judgment of acquittal, and later in imposing the judgment of conviction against Appellant. Even considering the evidence in the strongest light for the prosecution, it is simply insufficient proof of the offense charged.

Assuming this Court reverses the judgment of conviction on these grounds, Appellant submits that the State is precluded by principles of double jeopardy from re-trying Appellant. Briones, 74 Haw. 442, 848 P.2d at 979 n.21. The double jeopardy clause of the fifth amendment to the United States Constitution guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]" Similarly, article I, section 10 of the Hawai'i Constitution provides that "nor shall any person be subject to the same offense be twice put in jeopardy[.]" Finally, HRS § 701-110 (1993) provides in relevant part:

When a prosecution is barred by former prosecution for the same offense. When

> a prosecution is for an offense under the same statutory provision and is based on the same facts as a former prosecution, it is barred by the former prosecution under any of the following circumstances:
>
> > (3) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, . . .

This court has acknowledged that the underlying purpose of the double jeopardy clause is that:

> the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

State v. Quitog, 85 Hawai'i 128, 140, 938 P.2d 559, 571 (1997) (*quoting* Green v. United States, 355 U.S. 184, 187-88 (1957)).

This court has also recognized that there are three separate and distinct aspects to the protections offered by the double jeopardy clause. "Double jeopardy protects individuals against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." Id. at 141, 938 P.2d at 572 (citations omitted). Therefore, "where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." State v. Timoteo, 87 Hawai'i 108, 112, 952 P.2d 865, 869 (1997) (*citing* United States v. Wilson, 420 U.S. 332, 344 (1975)).

In the present case, the protection at issue is Appellant's right to be free from a second prosecution for the same offense on the same facts because the former prosecution resulted in a judgment of conviction. Inasmuch as the trial court rendered a judgment of conviction against Appellant for the offense Abuse of Family and Household Member concerning the injuries Kelly sustained on August 29, 2001, the State is bound by the preclusive effect of the former conviction as to any future proceedings on the same offense with the same facts.

D. When Viewed as a Whole, Trial Counsel's Assistance Fell Outside the Range of Competence Demanded of Attorneys in Criminal Cases, with Counsel's Error in Failing to Have Appellant Testify in her Own Behalf Leading to the Conviction.

The Hawai'i Supreme Court has recognized that in the context of the decision to call the defendant as a witness, a claim of ineffective assistance of counsel can be maintained that is conceptually distinct from a claim that a defendant's right to testify was violated. Jones v. State, 79 Hawai'i 330, 334, 902 P.2d 965, 969 (1995). Although the decision whether or not to testify is ultimately committed personally to the defendant, this Court has recognized that the defendant's decision will ordinarily be made, "in consultation with counsel." Silva, 78 Hawai'i at 125, 890 P.2d at 712. Defense counsel will be called upon to explain the pros and cons of testifying to assist the defendant in reaching his or her decision. Id., at 124, 890 P.2d at 711 ("One of defense counsel's responsibilities is to advise the defendant on the question of whether or not he or she should testify.") Consequently, a claim can be made that a defendant's attorney provided ineffective assistance in advising the defendant whether or not to testify. Jones, 79 Hawai'i at 334, 902 P.2d at 969.

Generally, "in assessing claims of ineffective assistance of counsel, the applicable standard is whether, viewed as a whole, the assistance provided was within the range of competence demanded of attorneys in criminal cases." Dan, 76 Haw. at 427, 879 P.2d at 532 (citation and quotation marks omitted). In order to establish that the assistance provided was not within that range, "a petitioner must show: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Domingo v. State, 76 Haw. 237, 241, 873 P.2d 775, 779 (1994) (citation and quotation marks omitted).

Because the decision whether or not to testify is a highly tactical one that is "ultimately committed to a defendant's own discretion," Silva, 78 Hawai'i at 124, 890 P.2d at 711, an attorney's recommendation as to whether or not a defendant should testify will rarely qualify as an error reflecting a, "lack of judgment." *Cf.* State v. Reed, 77 Haw. 72, 84, 881 P.2d 1218, 1230 (1994) ("the decision whether to call a witness in

a criminal trial is normally within the judgment of counsel and, therefore, will rarely be second-guessed by judicial hindsight").

On the other hand, providing erroneous legal advice to a defendant by trial counsel - e.g., misinforming the defendant as to the types of evidence that can be used to attack his or her credibility on cross-examination - *see* People v. Mosqueda, 5 Cal. App. 3d 540, 546, 85 Cal. Rptr. 346, 349 (1970) (considering defendant's claim that "he did not testify at his trial because the public defender erroneously advised him that if he testified the People could impeach him by disclosing his past criminal record to the jury") - could constitute a, "lack of skill." Likewise, an attorney's failure to perform sufficient investigation and trial preparation to be able to adequately advise a defendant whether or not to testify - e.g., by failing to ascertain the full scope of the testimony that the defendant has to offer - could constitute a, "lack of diligence." Jones, 79 Hawai'i 330, 902 P.2d 965.

In the event that defense counsel's lack of skill, judgment, or diligence is established, the petitioner must further demonstrate the withdrawal or substantial impairment of a potentially meritorious defense resulting therefrom. Domingo, 76 Hawai'i at 241, 873 P.2d at 779. In the context of faulty advice that allegedly influenced the decision not to testify, a two-prong test must be satisfied. The petitioner must show (1) that, absent defense counsel's failings, the petitioner would have decided to testify, and (2) that there is a reasonable possibility, *see* Dan, 76 Hawai'i at 427, 879 P.2d at 532 ("whether a defense is 'potentially meritorious' requires an evaluation of the possible, rather that the probable, effect of the defense on the decision maker"), that his or her testimony could have established or supported an available defense.

In the instant case, after the court denied the acquittal motion. The following colloquy occurred:

THE COURT: "....Motion is denied.

MR. VIERRA. Your Honor, if I could have a brief recess to consult with my client?

THE COURT: Yes. (At which time a recess was taken.)

MR. VIERRA:	Your Honor, the defense will not be calling any witnesses at this time.
THE COURT:	Thank you, Mr. Vierra. Arguments?
MS. FORELLI:	Your Honor, (inaudible) Court needs to Tachibana.
THE COURT:	With respect to the defense case –
MR. VIERRA:	Your Honor, if you could speak up please, I'm sorry, she can't hear.
THE COURT:	Ms. Gauntt-Bryant, your counsel has indicated that you do not wish to present a case on your behalf. Is that your wish?
THE DEFENDANT:	(Inaudible). My husband said was accurate." (TR 1/17/02, 23-24)

The court's denial of the acquittal motion provided defense counsel with notice that the court found sufficient evidence to support a conviction. Defense counsel should have inferred that the court considered Kelly's trial testimony as to the events on August 29 not credible, and impeached by Officer Leffler's testimony. Defense counsel also should have inferred that the court was poised to convict Appellant based upon the scant evidence presented: the photographs, and Officer Leffler's observations, listed above under Argument C.

Thus, it was critical that defense counsel proffer the only remaining direct evidence concerning the August 29 incident, i.e., the testimony of Appellant. The record clearly indicates that if she had testified in her own behalf, Appellant would have supported Kelly's version of the events on August 29: i.e., that she was not the cause of his injury. We may reasonably infer this because Appellant told the court: "(Inaudible). My husband said was accurate." (Id., 24.) The record indicts that her testimony would have supported her defense that she did not cause Kelly's injury. This was a specific error reflecting counsel's lack of skill, judgment and diligence, and this error resulted in either the withdrawal or substantial impairment of a potentially meritorious defense. Domingo, 76 Haw. at 241, 873 P.2d at 779.

V RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, TREATIES, REGULATIONS, OR RULES.

All relevant constitutional provisions, statutes and rules are set forth in either the body of the Opening Brief, or related footnotes.

VI CONCLUSION

For all the foregoing reasons, Appellant respectfully requests that this Court reverse the January 17, 2002 judgment of conviction and sentence, and dismiss the complaint; or, in the alternative, reverse the judgment of conviction and sentence, and remand for a new trial before a different judge.

DATED: Wailuku, Hawai'i, May 17, 2002.

Respectfully submitted,

By ________________________________

Georgia K. McMillen
Attorney for Defendant-Appellant,
Margaret Gauntt-Bryant

VII STATEMENT OF RELATED CASES

Appellant is aware of no other related cases pending in the Hawai`i courts or agencies.

S.C. No. 24928

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

AND

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

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<tr><td>STATE OF HAWAI'I,
Plaintiff-Appellee

vs.

MARGARET GAUNTT-BRYANT,
Defendant-Appellant</td><td>)
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APPEAL FROM THE JUDGMENT
FILED JANUARY 17, 2002

FAMILY COURT, SECOND CIRCUIT

HONORABLE ERIC G. ROMANCHAK
HONORABLE RUBY HAMILI
HONORABLE DOUGLAS SAMESHIMA
HONORABLE GERONIMO VALDRIZ, JR.
District/Family Court Judges, Second Circuit</td></tr>
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served two copies of the foregoing Opening Brief and Appendix upon the Plaintiff-Appellee the State of Hawai'i by mailing the copies to the Attorney for the Plaintiff-Appellee, the Department of the Prosecuting Attorney, Maui County, 150 South High Street, Wailuku, Maui, Hawai'i 96793, on May 17, 2002.

GEORGIA K. MCMILLEN
Attorney for Defendant-Appellant