NO. 25283

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,

vs.

JAMES C. JONES, Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD CR. NO. 02266025)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson and Nakayama, JJ., and
Circuit Judge Marks, assigned by reason of vacancy;
Acoba, J., dissenting)

Defendant-appellant James C. Jones appeals from the July 22, 2002 judgment of conviction and sentence of the District Court of the First Circuit, the Honorable Michael A. Marr presiding, adjudging him guilty of and sentencing him for disorderly conduct, in violation of Hawaiʻi Revised Statutes (HRS) § 711-1101(3) (1993).[1] On appeal, Jones contends: (1) the

[1] HRS § 711-1101 provides in pertinent part:

> **Disorderly conduct.**
> (1) A person commits the offense of disorderly conduct if, with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof, the person:
> (a) Engages in fighting or threatening, or in violent or tumultuous behavior; or
> . . .
> (c) Makes any offensively coarse utterance, gesture, or display, or addresses abusive language to any person present, which is likely to provoke a violent response[.]
> . . . .
> (3) Disorderly conduct is a petty misdemeanor if it

(continued...)

district court erred in convicting him of a petty misdemeanor when he was only charged with a violation; (2) there was insufficient evidence to support conviction of disorderly conduct as a petty misdemeanor; (3) the prosecution failed to prove beyond a reasonable doubt that he did not act in self-defense; and (4) there was insufficient evidence to support conviction of disorderly conduct as a violation. The prosecution concedes that the district court erred in convicting Jones of and sentencing him for a petty misdemeanor, but argues that sufficient evidence was adduced to convict Jones of disorderly conduct as a violation. For the following reasons, we vacate Jones' conviction of and sentence for violation of HRS § 711-1101(3) and remand this case for entry of a judgment of conviction and sentence for violation of HRS § 711-1101(1).

I. BACKGROUND

Jones was orally charged as follows:

> On or about July [11], 2002, in the City and County of Honolulu, State of Hawaiʻi, with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating the risk thereof, you did engage in fighting or threatening, or in violent or tumultuous behavior, and make any offensive coarse utterance, gesture or display, or address abusive language to any person present, which is likely to provoke a violent response, thereby committing the offense of Disorderly Conduct in violation of Section 711-1101(a) and (c) of the Hawaiʻi Revised Statutes.

The following was adduced at Jones's bench trial.

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[1](...continued)

> is the defendant's intention to cause substantial harm or serious inconvenience, or if the defendant persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a violation.

On July 11, 2002, at approximately 11:00 a.m., Jones entered the office of the Makaha Valley Towers, which was open to the public. Office secretaries Edna Ikeda and Patricia Wood were in the main office area when Jones entered. Jones asked Ikeda if he could speak with the building superintendent. Ikeda told Jones that the superintendent had left the property and asked if there was anyone else who could help him. Jones responded by throwing a Makaha Valley Towers newsletter on the counter and reading off the names of the board members listed on it. Ikeda informed Jones that none of the board members were in the office. Jones asked for the board members' apartment numbers so he could speak with them personally, but Ikeda refused, explaining that the information was confidential and that it was against office policy to release it.

Jones began to raise his voice, which attracted the attention of general manager Johanna Miranda. Miranda heard Jones from her office, which was between ten to twenty-five feet from the front desk.[2] Miranda alerted security via a "panic button" before entering the main office area.[3] Jones began

[2] Miranda's office was a separate room adjacent to the main office area. The door to Miranda's office was open when she heard Jones.

[3] Regarding the panic button, Miranda testified:

> [I]t's an emergency procedure that if someone's come in, irate, or causing a problem or yelling, to protect the staff, the emergency button is summoned; that goes directly down to our security gate. At which the time [sic] security finds what the problem is and gives a code over the radio and certain employees responds [sic] to the staff who carries radios, not all the employees.

yelling and asked Miranda for copies of various documents, including by-laws, house rules, and "the documents that our fucking board of directors made up." Miranda informed Jones that he could complete a request form and obtain the documents he wanted for a fee. Miranda recounted,

> A. [By Miranda:] [Jones] asked me how much it was going to cost. I said approximately $125. I turned to the secretaries and asked, I think it was Mrs. Ikeda to give me the form. I handed him the form and when he looked at the form and saw that the fee of the by-laws were $25, he got very irate and started calling me names and said why did I fucking lie to him because I told him it was $125.
>
> Q. [By the prosecutor:] What name specifically was he calling you?
>
> A. That I was a fucking bitch[[4]] and I better watch my step. My family better watch out and that he was going to get me fired.
>
> Q. What was your response in regards to the $125 versus the $25?
>
> A. I told him that he was asking for other documents and if it was $25 then that's what he would pay.

Miranda later testified that Jones "said he was going to fucking get me fired and I better watch out because he knew what my car or something that my car about my car and my family and he was going to fire myself and the security and get Wackenhut[5] in there." Miranda stated that she felt threatened by Jones.

While Miranda spoke with Jones, building maintenance and security staff entered the office. Ronald Josue, one of the maintenance staff, witnessed the interaction between Jones and Miranda and testified that Ikeda and Woods "looked scared,

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[4] Miranda later indicated that she was not sure if Jones used this term.

[5] Jones was apparently referring to The Wackenhut Corporation, a company which provides security services. At the time of the incident, Makaha Valley Towers employed Burns Security.

fearful of what's going on." A total of seven to eight employees entered, one at a time. Ikeda testified that Jones appeared disturbed that the other employees had entered the office. Miranda stated:

> [Jones] was very red in the face. He was very angry. He kept coming forward. I stepped back from the counter but he came to the edge of the counter which I think at that point I felt most threatened because he pounded his hands and his fist on the desk and the employees moved closer. And he said that all these fucking Filipino hui that I had there that we better watch out. He started pointing particularly to one security guard.

Jones accused one of the security staff of being a drug dealer and then, according to Miranda, "said that we better all watch out because he was going to take us down. He said that when he was in Cambodia, he killed Filipinos with his hands and ate them on a stick."[6] Josue stated that Jones pointed around the room and then stared directly at Josue while making his comment about Filipinos.[7]

Jones's account of the incident differed slightly from those of the prosecution's witnesses. Jones testified that, when the security and maintenance staff entered the office, "I caught on quick thinking in my mind, I'm thinking somebody dropped a dime on me. Apparently, I didn't know that they had this panic

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[6] The testimony of the prosecution witnesses varies as to the precise words used by Jones. According to Ikeda, Jones said, "I eat Filipinos for lunch. I eat them on a stick so don't fuck with me." Josue testified that Jones "turned around and said he's going to kill all Filipinos and put their head[s] on a stick and he will do it."

[7] Ikeda testified that there were three Filipino maintenance workers in the office at the time, Josue, Dominador Edra, and Joel Galariada. Josue similarly testified that, including himself, there were three or four Filipino employees in the office.

system. I lived there seven years. They kept it hidden pretty well." Jones stated that, although none of the employees moved towards him, they threatened him "[w]ith eye contact," surrounded him, and blocked his exit.

Jones had the following exchange with his counsel:

> Q. [By the public defender:] At some point, did you ever make a comment about Filipinos?
> A. [By Jones:] Yes, I did.
> Q. Describe for me what you said.
> A. Okay. I was surrounded by Filipinos. I dealt with Filipinos. Can I give a background as to why, it's pertinent.
> Q. Briefly.
> A. Okay, I worked in [a] Southeast Asian Refugee location. I got people out of Laos and Cambodia. We moved them into Thailand into camps and then into the PI [sic]. Then we got them over here in the United States. Now when I was in the PI, I dealt with Filipinos. I know how Filipinos think. I know how they act. I know how they move. And I could tell that it was a very aggressive fashion. I seen them. They don't go one on one. They fight in groups. They will jump you in groups and they will beat you down and they will cut you with the machetes.
> Q. Okay, let me stop you here. In your experience in your military service that your experience within the [sic] Filipino people fight, they fight in groups?
> A. Correct.
> Q. And because of that, you were under the belief that they were about to jump you?
> A. Imminent danger.
> Q. Alright. And at some point what is it, if anything, did you say relating to Filipinos?
> A. I said, I said, I know all about you people. I spent time down in the Philippines and I went through my history with them. And I said, look if you attack me, I will have you on a stick meaning that we used to barbecue monkeys on sticks and I will barbecue their ass on a stick if they attacked me.[[8]]

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[8] Jones explained:

> Q. [By the prosecutor:] You never said you're gonna have their heads and put 'em on a stick?
> A. [By Jones:] No. I said I will have them on a stick. I will have you on a stick meaning I will barbecue like I used to barbecue monkeys over there.
> Q. Did you clarify that for them?
> A. No, I didn't have a chance to. I was surrounded by 10 guys.

Jones later testified, "I said, I went around the room, looked at everybody in

(continued...)

Q. Okay. Now when you said this, did you say it forcefully?
A. Forcefully yes, absolutely forcefully. I was trying to counter or use some type of tactic to throw them off because I felt physically they were going to jump me. So I figure if I can mentally slow them down at least I would be able to achieve an avenue of escape.
Q. So you felt that you needed to use, it's fair to say, you needed to use a show of force?
A. Correct.
Q. To diffuse the situation.
A. Yes. I felt that that was an adequate defense measure. I did not physically threaten -- I could have start [sic] tossing them over but I didn't.
Q. And so when you said that -- it's fair to say it wasn't so much to threaten them, but to get them to back off?
A. Correct, absolutely.

Jones indicated that his comments were addressed "generally to the whole group."

The prosecution elicited testimony regarding the witnesses' reactions to Jones's comments about Filipinos. Miranda felt "afraid" and "very threatened." Miranda explained, "[Jones's] behavior was irrational. I wasn't sure what he was going to do. He kept threatening and telling us that he kill [sic] people with his hands and he didn't need weapons. So I wasn't sure at that point what it was going to lead to." Although Ikeda was not Filipino and no threats were directed to her, she stated, "I took [Jones] seriously and I was afraid." Josue testified, "I feel fear. I feel angry, racial. I mean I just felt very, very angry and in fear that he may and can probably do it."

[8](...continued)
the eye and I said, if you attack me, I will have you on a stick. That's my direct quote."

Miranda asked Woods three times to call the police, but was not sure if she actually called or if security did. Miranda testified that "Jones was yelling that [sic] go ahead and call the police and make sure that you call intelligence or something at the same time because the Waianae Police were all Bruddahs and they were all fucking corrupt anyway." Honolulu Police Department (HPD) officers responded to the Makaha Valley Towers after Jones had left the office, but the record is not clear how long it took officers to arrive.

During closing arguments, the prosecution argued, inter alia, that conviction of disorderly conduct was warranted because Jones "was creating this disturbance before the security officers or maintenance walked into the rooms [sic]. That's why they were called. He continued the disturbance and made offensively [coarse] utterances after their arrival." The defense responded that Jones could not be convicted of disorderly conduct as a petty misdemeanor because: (1) he was only charged with disorderly conduct as a violation, and (2) there was insufficient evidence that Jones intended to cause substantial harm or serious inconvenience or persisted in disorderly conduct after reasonable warning to desist." The defense also argued that conviction of disorderly conduct as a violation was unsupported by the record and, further, that Jones's conduct was justified because he felt that he was in imminent danger.

The trial court ruled as follows:

> The Court believes that you intentionally acted in a way where you intended to threaten other people. Now you can't do that under the law. You may have been upset with Ms. Miranda but you can't threaten her family and you can't threaten her. You can't threaten the co-workers who were called in to protect her.
>
> The Court finds that her pushing the panic button, so to speak, was justified and was reasonable under the circumstances. The Court believes your conduct was not excusable. Your threats to Ms. Miranda and her family were unlawful. Your threats to Ronald Josue was unlawful. Your threats to everybody in general was unlawful. And your demeanor as well as your vocabulary, tone of voice was most certainly unlawful on that day. So the court's going to find you guilty as charged of a petty misdemeanor disorderly conduct.

The trial court also told Jones, "[T]he Court believes that you did not tell the entire truth while you were testifying."

Jones was sentenced to: imprisonment for eleven days with credit for time served[9]; probation for six months; attend anger management classes; pay a $75 probation fee; pay $25 to the Criminal Injuries Compensation Fund; and stay away from the Makaha Valley Towers personnel who were in the office at the time of the offense.

II. STANDARDS OF REVIEW

A. Confession of Error

When the prosecution concedes error, "it is incumbent on the appellate court first to ascertain that the confession of error is supported by the record and well-founded in law and second to determine that such error is properly preserved and prejudicial. In other words, a confession of error by the prosecution is not binding upon an appellate court, nor may a conviction be reversed on the strength of the prosecutor's

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[9] Jones was confined for eleven days before trial.

official action alone." State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000) (citations, internal quotation marks, ellipsis points, and brackets omitted).

B. Sufficiency of the Evidence

> We have long held that evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or a jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

State v. Martinez, 101 Hawai'i 332, 338, 68 P.3d 606, 612 (2003) (citations and internal quotation marks omitted).

C. Statutory Interpretation

"The interpretation of a statute is a question of law reviewable de novo." State v. Kaua, 102 Hawai'i 1, 7-8, 72 P.3d 473, 479-80 (2003) (citations, internal quotation marks, ellipsis points, and brackets omitted).

III. DISCUSSION

A. Conviction of Disorderly Conduct as a Petty Misdemeanor

As previously indicated, Jones contends that the circuit court erred in convicting him of a petty misdemeanor when he was only charged with a violation. On appeal, the prosecution concedes that the circuit court erred in convicting Jones of and sentencing him for disorderly conduct as a petty misdemeanor because an essential element of the offense was not included in the oral charge. This court has stated,

> The accusation must sufficiently allege all of the essential elements of the offense charged. This requirement obtains whether an accusation is in the nature of an oral charge, information, indictment, or complaint, and the omission of an essential element of the crime charged is a defect in substance rather than of form. A charge defective in this regard amounts to a failure to state an offense, and a conviction based upon it cannot be sustained, for that would constitute a denial of due process.

State v. Jendrusch, 58 Haw. 279, 281, 567 P.2d 1242, 1244 (1977) (citations omitted).

Conviction of disorderly conduct as a petty misdemeanor requires proof that "it is the defendant's intention to cause substantial harm or serious inconvenience, or if the defendant persists in disorderly conduct after reasonable warning or request to desist." HRS § 711-1101(3). However, this element was not included in the prosecution's oral charge. Therefore, the trial court erred in convicting Jones of disorderly conduct as a petty misdemeanor because an essential element of the petty misdemeanor offense was not alleged in the oral charge. Accordingly, we vacate Jones's conviction and sentence of HRS § 711-1101(3).[10]

B. Sufficiency of the Evidence Supporting Conviction of HRS § 711-1101(1)(c)

Jones contends that the prosecution adduced insufficient evidence to support conviction of disorderly conduct as a violation because Miranda, Ikeda, Woods, and the other Makaha Valley Towers employees were not members of the public for

[10] Inasmuch as we vacate Jones's conviction of and sentence for disorderly conduct as a petty misdemeanor, we do not address his contention that the prosecution failed to adduce sufficient evidence that Jones intended to cause substantial harm or serious inconvenience, or if that he persisted in disorderly conduct after reasonable warning or request to desist.

purposes of HRS § 711-1101. Jones also contends that the prosecution failed to disprove his claim of self-defense.

1. Member or Members of the Public

Jones submits that, although the evidence may support a charge of harassment, it does not support conviction of disorderly conduct because all of the employees present in the office were participants of the confrontation and, therefore, not members of the public. Initially, harassment is defined by HRS § 711-1106 (Supp. 1996), which provides in pertinent part:

> **Harassment.** (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:
> . . .
> (b) Insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response or that would cause the other person to reasonably believe that the actor intends to cause bodily injury to the recipient or another or damage to the property of the recipient or another;
> . . .
> (f) Makes a communication using offensively coarse language that would cause the recipient to reasonably believe that the actor intends to cause bodily injury to the recipient or another or damage to the property of the recipient or another.
> . . . .

The commentary to HRS § 711-1106 states that "[h]arassment, a petty misdemeanor, is a form of disorderly conduct aimed at a single person, rather than at the public. The intent to harass, annoy, or alarm another person must be proved." By his own admission, Jones's statement about placing Filipinos on a stick was not aimed at a single person, but addressed "generally to the whole group." Thus, Jones's suggestion that harassment was a more appropriate charge is not supported by the record.

Unlike harassment, disorderly conduct requires proof that the defendant engaged in culpable conduct "with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof." HRS § 711-1101(1). The word "public," as defined in HRS § 711-1100 (1993), means "affecting or likely to affect a substantial number of persons." Although HRS § 711-1100 does not quantify "substantial number of persons," the statute does not require that the "substantial number of persons" be disassociated from each other or from the person committing the offense under HRS § 711-1101(1). Additionally, testimony of a witness who is not a "member . . . of the public," such as a police officer,[11] may be sufficient to support conviction of disorderly conduct, State v. Ferreira, 68 Haw. 238, 243, 709 P.2d 607, 610-11 (1985), and a defendant may be convicted based on threats directed at a single person who is not a member of the public for purposes of HRS § 711-1101(1), State v. Pauole, 5 Haw. App. 120, 121, 678 P.2d 1107, 1108 (1984).

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[11] The commentary to HRS § 711-1101(1)(a) provides:

> A person may not be arrested for disorderly conduct as a result of activity which annoys only the police, for example.[] Police officers are trained and employed to bear the burden of hazardous situations, and it is not infrequent that private citizens have arguments with them. Short of conduct which causes "physical inconvenience or alarm to a member or members of the public" arguments with the police are merely hazards of the trade, which do not warrant criminal penalties.

(Footnote omitted.)

In the present case, there were approximately eleven people in the Makaha Valley Towers office at the time of the incident. The fact that the people were employees of Makaha Valley Towers does not preclude them from being members of the public, as defined by HRS § 711-1100. The defense did not establish that the employees, which included office and maintenance staff, were "trained and employed to bear the burden of hazardous situations," or that it was "not infrequent that private citizens have arguments with them." Under the facts of this case, the eleven persons in the office constituted a "substantial number of persons" in the office who were affected or likely to be affected by Jones's threatening conduct directed at the whole group. HRS § 711-1100. Thus, under the plain language of HRS § 711-1101(1)(a) and (c), the Makaha Valley Towers employees were "members of the public" to whom Jones intended to cause physical inconvenience or alarm by his comments or recklessly created the risk thereof. <u>See</u> <u>State v. Rodgers</u>, 99 Hawaiʻi 70, 72, 53 P.3d 10, 11 (2002) ("Our foremost obligation when interpreting a statute is to ascertain and give effect to the intention of the legislature, which is obtained primarily from the language contained in the statute itself." (Citation omitted.)). Accordingly, we hold that the prosecution adduced sufficient conviction of disorderly conduct as a violation.

2. Self-Defense

Jones contends that the prosecution failed to disprove his claim of self-defense. HRS § 703-304 (1993) provides in pertinent part:

> **Use of force in self-protection.** (1) Subject to the provisions of this section and of section 703-308, the use of force upon or toward another person is justifiable <u>when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion</u>.
>
> . . . .
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> (3) Except as otherwise provided in subsections (4) and (5) of this section, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used without retreating, surrendering possession, doing any other act which he has no legal duty to do, or abstaining from any lawful action.
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> . . . .

(Emphasis added.) As used in HRS § 703-304, "'[f]orce' means any bodily impact, restraint, or confinement, <u>or the threat thereof</u>[,]" and "'[b]elieves' means reasonably believes." HRS § 703-300 (1993) (emphasis added). "Self-defense is not an affirmative defense, and the prosecution has the burden of disproving it once evidence of justification has been adduced." <u>State v. Culkin</u>, 97 Hawai'i 206, 215, 35 P.3d 233, 242 (2001) (citations omitted). "Essentially, the prosecution does this when the trier of fact believes its case and disbelieves the defense." <u>State v. Pavao</u>, 81 Hawai'i 142, 146, 913 P.2d 553, 557 (App. 1996) (citations omitted).

In the present case, pursuant to HRS § 703-304, the prosecution was required to disprove the justification of self-defense once evidence was adduced that Jones reasonably believed threats of force were immediately necessary to protect himself

from the use of unlawful force by Makaha Valley Tower employees. Although Jones’s testimony was consistent with claim of self-defense, the trial court expressly found Jones not credible and ruled that Jones’s conduct “was not excusable.” “[I]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence.” Tachibana v. State, 79 Hawaiʻi 226, 239, 900 P.2d 1293, 1306 (1995) (citation, internal quotation marks, and brackets omitted).

IV. CONCLUSION

Based on the foregoing, we vacate the district court’s July 22, 2002 judgment of conviction and sentence for violation of HRS § 711-1101(3) and remand this case for entry of a judgment of conviction and sentence for violation of HRS § 711-1101(1).

DATED: Honolulu, Hawaiʻi, June 21, 2004.

On the briefs:

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