NO. 22367

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee
v.
BRUCE RIOS, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-1518)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Bruce Rios (Rios) appeals the circuit court's March 3, 1999 Judgment, upon a jury's verdict, finding him guilty of Count I, Terroristic Threatening in the First Degree, Hawaiʻi Revised Statutes (HRS) § 707-716 (1993); Count III, Terroristic Threatening in the Second Degree, HRS § 707-717 (1993); Count IV, Criminal Property Damage in the First Degree, HRS § 708-820 (1993); Count V, Place to Keep Loaded Firearm, HRS § 134-6(b) (Supp. 1994); and Count VI, Felon in Possession of a Firearm, HRS § 134-7(b) (Supp. 1995); and sentencing him as a repeat offender to the following concurrent terms of imprisonment: three twenty-year terms, one ten-year term, and one one-year term. We affirm.

A July 15, 1998 Complaint charged Rios with the following offenses:

> Count I Terroristic Threatening in the First Degree, HRS § 707-716(1)(d), of John Rosa (Rosa) allegedly committed on June 26, 1998;

Count II Terroristic Threatening in the First Degree, HRS § 707-716(1)(d), of Lori Avilla (Avilla) allegedly committed on June 26, 1998;

Count III Terroristic Threatening in the First Degree, HRS § 707-716(1)(a), of Avilla and Rosa allegedly committed on January 1, 1998;

Count IV Criminal Property Damage in the First Degree, HRS § 708-820(1)(a), allegedly committed on June 26, 1998;

Count V Place to Keep Loaded Firearm, a class B felony, HRS §§ 134-6(c) and (e), allegedly committed on June 26, 1998;

Count VI Possession of Firearm by a Person Convicted of Certain Crimes, HRS §§ 134-7(b) and (h), allegedly committed on June 26, 1998; and

Count VII Possession of Ammunition by a Person Convicted of Certain Crimes, HRS §§ 134-7(b) and (h), allegedly committed on June 26, 1998.

The jury found Rios guilty of Count I, not guilty of Count II, guilty of an included offense as to Count III, and guilty of Counts IV, V, and VI. The court dismissed Count VII.

In this case, the court gave each juror a copy of the written instructions before the court read those instructions to the jury. The closing arguments by the attorneys occurred after the court read its instructions to the jury.

BACKGROUND

According to the evidence of Plaintiff-Appellee State of Hawai‘i (the State), Rios was Avilla's ex-boyfriend. Avilla terminated the relationship because of Rios's jealousy and threats. Rosa was Avilla's longtime friend with whom she had recently become reacquainted. Rios did not want Avilla having any contact with Rosa. The incidents that led to the charges in

this case occurred when Rios found Rosa with or in the vicinity of Avilla.

In his testimony, Rios admitted that he wanted Rosa to stay away from Avilla but denied the alleged crimes and having or shooting a gun.

STANDARDS OF REVIEW

The issues on appeal pertain to jury instructions. "In reviewing jury instructions, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Maelega, 80 Hawai‘i 172, 176, 907 P.2d 758, 762 (1995) (quoting State v. Hoey, 77 Hawai‘i 17, 38, 881 P.2d 504, 525 (1994)).

In addressing whether error is harmless beyond a reasonable doubt, "the court is required to examine the record and determine 'whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction.'" State v. Suka, 79 Hawai‘i 293, 300, 901 P.2d 1272, 1279 (App. 1995) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967) (footnote omitted)).

RELEVANT STATUTES

The relevant statutes (HRS 1993) state, in relevant part, as follows:

> **§ 707-715 Terroristic threatening, defined.** A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony:

(1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person[.]

. . . .

§ 707-716 Terroristic threatening in the first degree. (1) A person commits the offense of terroristic threatening in the first degree if he commits terroristic threatening:

(a) By threatening another person on more than one occasion for the same or a similar purpose[.]

. . . .

§ 707-717 Terroristic threatening in the second degree. (1) A person commits the offense of terroristic threatening in the second degree if the person commits terroristic threatening other than as provided in section 707-716.

DISCUSSION

First Point on Appeal

The circuit court instructed the jury, in relevant part, as follows:

In Count III of the complaint the defendant Bruce Rios is charged with the offense of the Terroristic Threatening in the First Degree.

There are four material elements to this offense, each of which must be proven by the prosecution beyond a reasonable doubt.

. . . .

These four elements are, one, that on or about the 1st day of January, 1998, to and including the 25th day of June, 1998, on the island of Oahu, in the City and County of Honolulu, State of Hawaii [Hawai‘i], the defendant threatened, by word or conduct, to cause bodily injury to Lori Avilla **and/or** John Rosa; that the defendant threatened Lori Avilla **and/or** John Rosa on more than one occasion; that the defendant's threats were for the same or similar purpose; and that the defendant did so in reckless disregard of the risk of terrorizing Lori Avilla **and/or** John Rosa.

You are further instructed that as to Count III of the complaint you must unanimously agree that during the time period charged the defendant threatened Lori Avilla **and/or** John Rosa on at least two specific occasions for the same or a similar purpose which were proven by the State beyond a reasonable doubt in order to support a finding of guilty.

You must unanimously agree which individual or individuals were so threatened and you must also unanimously agree on which two or more occasions the threats were made. **The attorneys will explain this a little more later.**

(Emphases added.)

Count III charged in relevant part that "BRUCE RIOS did threaten Lori Avilla and John Rosa on more than one occasion for the same or similar purpose, in reckless disregard of the risk of terrorizing Lori Avilla and John Rosa[.]" In contrast, the instruction quoted above required the jury to find that Rios "threatened Lori Avilla and/or John Rosa on more than one occasion . . . for the same or similar purpose . . . in reckless disregard of the risk of terrorizing Lori Avilla and/or John Rosa[.]"

During the settlement of jury instructions, the following relevant discussion occurred:

> [DEFENSE COUNSEL]: You added the "or"?
>
> [PROSECUTOR]: Well, it changes the element to "and/or," which is what I believe under Batson and Jendrusch.[1]
>
> [DEFENSE COUNSEL]: We would be objecting it's not tracking what the initial indictment was, so we object to that.
>
> [THE COURT]: Yeah, what Jendrusch and Batson say, it's better if the prosecution does "and/or". . . . I guess there's a couple of things to do here if you want to go forward. One is simply move again to amend the complaint to read "and/or," or absent that just go ahead and say that the legal effect is "and/or." What are you going to argue to the jury?
>
> . . . .

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[1] The prosecutor was speaking of State v. Jendrusch, 58 Haw. 279, 567 P.2d 1242 (1977), and State v. Batson, 73 Hawai'i 236, 831 P.2d 924 (1992). In Batson, the Hawai'i Supreme Court stated, in relevant part, as follows:

> we hold that it is sufficient, as in the present case, that one offense allegedly committed in two different ways be charged **conjunctively** in a single count. If two alternative counts joined in the conjunctive are permissible, . . . , and if joinder of alternative allegations in a single count by "and/or" is "appropriate," . . . , then a single count joining alternative means of committing an offense in the conjunctive is indistinguishably acceptable, the disjunctive "or" being subsumed within the conjunctive "and."

State v. Batson, 73 Haw. at 250-51, 831 P.2d at 932 (emphasis in original).

[PROSECUTOR]: Okay. I'm going to argue that they have to, first of all, be unanimous about whether Lori was threatened and/or John. In other words, to find him guilty beyond a reasonable doubt, they have to agree that one of them was threatened, they can find that both were, and then they have to look at the specific occasions where threats were alleged to be unanimous that there were two or more.

. . . .

THE COURT: I see. But they have to find all twelve the same two threats?

[PROSECUTOR]: Right, and I'll make that clear to them.

. . . .

[DEFENSE COUNSEL]: Your Honor, as to the two different instances where the jury has to agree, what if they agree as to one only with John and one with Lori alone?

[PROSECUTOR]: Cannot find guilt.

[DEFENSE COUNSEL]: Then you cannot find guilt, but I don't know if that says it.

THE COURT: Well, I'm going to deny the motion for judgment of acquittal on Count III. I read the cases and . . . it looks like and/or, it would have been better in hindsight to have and/or but I think that Jendrusch and Batson allow the Court to go forward.

I want to make sure that the jury clearly understands that they have to unanimously agree as to the exact two same threats as to each individual defendant.[2]

[PROSECUTOR]: Absolutely. And I plan to make a chart for closing and I'll say, you know, look at one of them first and then the other and -- and make it clear to them that when they look at Lori, for example, they can convict based on either Lori or John, they might find that they were both threatened more than one time.

THE COURT: Where I think your concern is met, [Defense Counsel], is on the last sentence of 2: You must unanimously agree which individual or individuals were so threatened and you must also unanimously agree on which two or more occasions the threats were made. And you folks need show that to the, underline it, and I'll emphasize it in the reading.

(Footnote added.)

The words, "[t]he attorneys will explain this a little more later," set out above in bold print above were not in the written instructions given by the court to the jury. The court

[2] It would have been simpler had the court's instruction to the jury said exactly that.

added these words when it read the instructions to the jury. The above-quoted discussion suggests the reason. Rios did not object when these words were read. In fact, when the court completed reading the instructions, both counsel answered "no" to the court's question: "Thus far, counsel, any objection to the reading of the instructions as corrected?" On appeal, Rios contends that these words rendered the instructions as a whole prejudicially insufficient, erroneous, inconsistent, and misleading. In his Amended Opening Brief, Rios contends that

> [t]he court, in this instruction, to the substantial prejudice of Mr. Rios, told the jury several things. One the instruction is incomplete. Two, the jury is not bound to stay within the four corners of the court's instruction. Three, the attorney's [sic] have the final say as to what the law is that the jury is to apply. Fourth, given that the attorneys are adversaries, the law to be applied can be that which is decided by the jurors based on, one or the other of the attorneys' arguments, or on something that the jury devises falling between counsel's arguments. And, five, most harmful in the giving of this instruction, is the fact that the jury has no gauge on where the applicable law ends and argument begins.

We disagree. The words complained of expressly pertain specifically and solely to Count III. Count III charged a violation of HRS § 707-716(1)(a). Although we disapprove of the words complained of, we conclude for the following five reasons that the instruction was not reversible error.

First, the jury was also instructed that "[s]tatements or remarks made by counsel are not evidence. You should consider their arguments to you, but you are not bound by their recollections or interpretations of the evidence."

Second, the jury was also instructed that

> [y]ou must consider all of the instructions as a whole and consider each instruction in the light of all the others. Do not single out any word, phrase, sentence, or instruction and ignore

> the others. Do not give greater emphasis to any word, phrase, sentence, or instruction simply because it is repeated in these instructions.

Third, the jury was also instructed, "Please listen carefully to the attorneys. What you're going to hear is their view of the evidence. It's their summary, it's not evidence. The evidence is what you've heard through the witnesses. But please listen carefully."

Fourth, Rios does not contend that the attorneys in their oral argument said anything they should not have said.

Fifth, the jury found Rios guilty of the included offense of Terroristic Threatening in the Second Degree and thereby rendered the instruction regarding the charged offense of Terroristic Threatening in the First Degree irrelevant. HRS § 707-717(1) (1993) specifies that "[a] person commits the offense of terroristic threatening in the second degree if the person commits terroristic threatening other than as provided in section 707-716." In other words, "on more than one occasion" was not a material element.

Second Point on Appeal

Rios contends that State's Instructions nos. 13 and 14 rendered the instructions pertaining to Counts I, II, and III prejudicially erroneous, confusing, and misleading. The challenged instructions state as follows:

> In reckless disregard of the risk of terrorizing another person" means that the defendant recklessly disregarded the risk that his or her words or actions could cause another person serious alarm for his or her personal safety. The law does not require that the person actually experience such alarm for personal safety, **but that the person could have experienced such an alarm**. You may consider the words and conduct of the defendant

> and attendant circumstances existing at the time of the alleged offense.
>
> **Actual terrorization** is not a material element of Terroristic Threatening, although it **is evidence of the occurrence of this material element**.

(Emphases added.)

Focusing particular attention on the parts of the instruction set out above in bold print, Rios contends:

> First, . . . [t]he above instruction was not given in conjunction with the definition o[f] "recklessly" as it pertains to the elements of the offense. Rather, it was given several instructions later. . . . The effect of this is to confuse the jury as to the proper standard/definition to be applied.
>
> Second, the court's instruction defines the offense of Terroristic Threatening in terms of causation and result. Terroristic Threatening as defined under HRS §§ 707-715, 707-716 & 707-717, is not defined in terms of causation and/or result. . . . The commission of the offense hereunder is wholly dependent upon the defendant's state of mind and whether the act caused the desired or reckless result, has absolutely no bearing upon whether the offense was committed.
>
> The prejudice in the giving of this instruction is that, with respect to this point, if there is a showing in the evidence that an alleged victim actually experienced serious alarm for his/her safety, there is an axiomatic leap that the defendant was **in fact** in disregard of the risk of terrorizing another person. As there was such testimony in this case as set our in the statement of the facts, this leap resulted in a denial of Mr. [Rios'] right to fair trial . . . .
>
> . . . As stated above, the offense of Terroristic Threatening is not defined in terms of causation and/or result. Where the charge to the jury states: "although it is evidence of the occurrence of this material element," it results in another axiomatic leap that once there is a showing of actual terrorization, there is the occurrence of this material element.

(Emphasis in original.) We disagree with Rios. In these instructions, the court was defining for the jury the words "the risk of terrorizing."

The words "but that the person could have experienced such an alarm" reminded the jury that "risk" means "possibility" rather than "actuality."

The authority for the court's instruction that "actual terrorization is not a material element of Terroristic Threatening" is the following quote: "Finally, '[a]ctual terrorization is not a material element' of the offense of terroristic threatening. State v. Nakachi, 7 Haw. App. 28, 32, 742 P.2d 388, 391 (1987)." State v. Chung, 75 Haw. 398, 413, 862 P.2d 1063, 1071 (1993).

The authority for the instruction that "[a]ctual terrorization . . . is evidence of the occurrence of this material element" is the following quote: "Actual terrorization is not a material element although it is evidence of the occurrence of the material elements." Nakachi, 7 Haw. App. at 32, 742 P.2d at 391.

We conclude that when read and considered as a whole, the instructions given were not prejudicially insufficient, erroneous, inconsistent, or misleading.

CONCLUSION

Accordingly, we affirm the circuit court's March 3, 1999 Judgment.

DATED: Honolulu, Hawai‘i, September 20, 2000.

On the briefs:

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Chief Judge

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Associate Judge

Associate Judge