

NO. 22475

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
STEVEN SAKAI, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(HPD NO. 150107DL)

MEMORANDUM OPINION

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

Defendant-Appellant Steven Sakai (Sakai) appeals the district court's March 18, 1999 judgment, following a bench trial, convicting him of violating Hawai'i Revised Statutes (HRS) §§ 705-500 (1)(a) and (1)(b) (1993) and 711-1109(1)(b) (Supp. 1999), Attempted Cruelty to Animals, and sentencing him to probation for one year, a \$250 fine, and 100 hours of community service. The sentence was stayed pending appeal. We reverse.

THE ORAL CHARGE

The oral charge (Complaint) was stated by Plaintiff-Appellee State of Hawai'i (the State) as follows:

On or about September 28th, 1998 at about 6:30 a.m. in the City and County of Honolulu, you did intentionally, knowingly or recklessly engage in the conduct which was a substantial step and under circumstances as set forth in Section 705-500, subsection 1A and 1B of the Hawaii Revised Statutes **intending to result in poisoning or killing an animal or animals** which were not insects, vermin or other pest in violation of Section 711-1109, sub-section 1B of the Hawaii Revised Statutes[.]

(Emphasis added.)

THE RELEVANT STATUTE

HRS § 711-1109(1)(b) (Supp. 1999) states, in relevant part, as follows: "A person commits the offense of cruelty to animals if the person intentionally, knowingly, or recklessly . . . poisons . . . without need any animal other than insects, vermin, or other pests[.]"

HRS § 705-500(1)(b) (1993) states, in relevant part, as follows: "A person is guilty of any attempt to commit a crime if the person . . . [i]ntentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime."

BACKGROUND

On September 28, 1998, the State's witness (the Witness) observed Sakai spraying, from an aerosol can, a substance onto canned cat food that the Witness had left out earlier for the cats in the area. Where the substance came in contact with the red-colored cat food, the food turned jet black. The Witness testified, in relevant part, as follows:

Q Okay. And did you see in the past the feral cats eating this cat food?

A Well, they eat. They scratch away what they can eat.

. . . .

A Wherever there's red meat, they eat but.

. . . .

Q . . . You said that when the cats come to eat the food, they pick at the food . . . like they scratch bits of it, smell it?

A Yeah, maybe they lick one corner, what-not, then they walk away.

The Witness called the Humane Society to report the incident.

Denise Loconte (Loconte), an animal control officer with the Humane Society, testified that she was dispatched to the scene to investigate a complaint of cruelty to cats. Loconte spoke with Sakai, and he admitted to her "that he had sprayed this chemical on the cat food because he's sick of the feral cats in the area[.]" Sakai showed Loconte the aerosol can of 620 Anti-Siege and Lubricating compound he used to spray the cat food. On the aerosol can, Loconte noticed the phrase "harmful if swallowed." Pictures she took of the sprayed cat food were introduced into evidence by the State. Samples of the cat food were taken at the scene but were not submitted for any testing. After Loconte's testimony, the State rested its case.

Sakai then moved for a judgment of acquittal, contending that the State had failed to show a prima facie case of Attempted Cruelty to Animals. Sakai argued that (1) the State failed to establish that the cats in question were not "vermin, or other pests" and (2) no animal died as a result of the incident. The trial court denied the motion and stated that "viewing the evidence in the light most favorable to the State, I'm giving the State the benefit of all reasonable inferences

from the evidence, the Court finds that the State has made a prima facie case[.]"

Sakai then took the stand in his own defense and thereby waived any error in the denial of his motion for judgment of acquittal. State v. Halemanu, 3 Haw. App. 300, 303, 650 P.2d 587, 591 (1982). Sakai testified that he had seen cat food around the area on numerous occasions. On the day of the incident in question, he was "ticked off" and "frustrated" by the recurring feral cat feeding and the problems associated with it. Seeing more cat food left on the ground, he grabbed a can of 620 Anti-Siege and Lubrication compound and sprayed the mounds of cat food. Prior to this spraying, Sakai had always removed the cat food with a dust pan and deposited it in a dumpster. Sakai testified that his action was not "premeditated" and "was a spur of the moment thing." Although Sakai stated that his actions were to only make the cat food unpalatable, he acknowledged that the spray he used was a lubricant not to be ingested. Also, he was aware that according to the information provided by the vendor regarding the spray, prolonged human use of the lubricant over a long period of time may cause a sickness.

In his closing argument, Sakai renewed all arguments made in support of his prior motion for judgment of acquittal.<sup>1</sup>

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<sup>1</sup> We will, for purposes of this opinion, accept this renewal of the motion for a judgment of acquittal as being a Hawai'i Rules of Penal Procedure Rule 29(a) motion for judgment of acquittal made at the close of all the evidence.

At the conclusion of closing arguments, the trial court found:

[T]here is no dispute in the evidence. It's clear that you did spray that aerosol spray, that lubricant, on the food for whatever purposes you had intended. You say you didn't intend to kill them.

However, I agree with the State that this spray was harmful if swallowed and you knew that it would change the -- it was something that would make the food unfit for the use intended. So the Court considers that to be poison and **you had intended to spray the food so that the cats wouldn't eat it** and that was poison and that is an attempt to poison cats.

So based on the evidence present, the Court finds that you are guilty of cruelty to animals under section 711-1109. And feral cats are still considered animals within the cruelty to animals statute.

So the Court finds you guilty as charged[.]

(Emphasis added.)

The court sentenced Sakai to one year of probation, a fine of \$250, and 100 hours of community service.

#### POINTS ON APPEAL

A. The oral charge was fatally defective because it stated states of mind not authorized by HRS § 705-500, criminal attempt.

B. In the absence of sufficient evidence to prove that Sakai intended to poison without any need any animal other than vermin or pests, the trial court erred in denying Sakai's motion for judgment of acquittal.

C. The trial court erred in concluding, under the cruelty to animals statute, that feral cats are considered animals, rather than pests or vermin.

D. Both facially and as applied to Sakai, the terms "pests" and "vermin" are unconstitutionally vague and overbroad and for that reason the trial court committed plain error in convicting Sakai.

## STANDARDS OF REVIEW

### A. Sufficiency of Complaint

It is well settled that an "accusation must sufficiently allege all of the essential elements of the offense charged," a requirement that "obtains whether an accusation is in the nature of an oral charge, information, indictment, or complaint[.]" Put differently, the sufficiency of the charging instrument is measured, *inter alia*, by "whether it contains the elements of the offense intended to be charged, and sufficiently appraises the defendant of what he [or she] must be prepared to meet[.]" "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." "Whether an indictment [or complaint] sets forth all the essential elements of [a charged] offense . . . is a question of law," which we review under the *de novo*, or "right/wrong," standard.

State v. Merino, 81 Hawai'i 198, 212, 915 P.2d 672, 686 (1996)  
(citations omitted).

### B. Denial of Motion for Acquittal/Sufficiency of Evidence

When reviewing a . . . motion for judgment of acquittal, we employ the same standard that a trial court applies to such a motion, namely, whether, upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, the evidence is sufficient to support a prima facie case so that a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Sufficient evidence to support a prima facie case requires substantial evidence as to every material element of the offense charged. Substantial evidence as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. Under such a review, we give full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact.

State v. Timoteo, 87 Hawai'i 108, 112-13, 952 P.2d 865, 869-70  
(1997) (internal citation omitted).

Regarding appellate review for insufficient evidence, the Hawai'i Supreme Court has repeatedly stated:

[E]vidence 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 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. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998).

#### C. Interpretation of a Statute

"[T]he interpretation of a statute . . . is a question of law reviewable de novo." State v. Kotis, 91 Hawai'i 319, 327, 984 P.2d 78, 86 (1999) (quoting State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996) (quoting State v. Camara, 81 Hawai'i 324, 329, 916 P.2d 1225, 1230 (1996) (citations omitted))).

#### D. Constitutionality of a Statute

We review questions of constitutional law "by exercising our own independent constitutional judgment based on the facts of the case." State v. Rogan, 91 Hawai'i 405, 411, 984 P.2d 1231, 1237 (1999) (citations omitted). Accordingly, we review questions of constitutional law *de novo* under the "right/wrong" standard. State v. Mallan, 86 Hawai'i 440, 443, 950 P.2d 178, 181 (1998) (citation omitted).

## DISCUSSION

- A. Although the oral charge set forth extraneous states of mind for an attempt, it was not fatally defective.

Sakai contends that the oral charge against him was fatally defective because of the inclusion of the terms "knowingly" and "recklessly" in the charge. HRS § 705-500 (1993), criminal attempt,<sup>2</sup> requires that a defendant intentionally, not knowingly or recklessly, engage in specific conduct.

The Hawai'i Supreme Court has

adopted the rule [hereinafter, the "*Motta/Wells* post-conviction liberal construction rule"] followed in most federal courts of liberally construing indictments [and complaints] challenged for the first time on appeal. [*State vs.*] *Motta*, 66 Haw. [89,] at [90-]91, 657 P.2d [1019,] at 1020. Elaborating on this standard, this court [will] "not reverse a conviction based upon a defective indictment [or complaint] unless the defendant can show prejudice or that the indictment [or complaint] cannot within reason be construed to charge a crime." *Id.*

*Merino*, 81 Hawai'i at 212, 915 P.2d at 686 (1996) (citation omitted).

In the instant case, Sakai is challenging the charge for the first time on appeal such that *Merino* is applicable. Whereas Sakai has not alleged and a review of the facts of the

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Hawai'i Revised Statutes § 705-500(1) states as follows:

A person is guilty of an attempt to commit a crime if the person:

- (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or
- (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.



case do not show prejudice nor "that the indictment cannot within reason be construed to charge the crime," the charge was not fatally defective. Moreover, the trial court found Sakai to have "intended to spray the food." Therefore, the trial court based its conclusions on the correct standard such that the additional inclusions were harmless error.

- B. Did the trial court err in denying Sakai's motion for judgment of acquittal at the close of all the evidence?

Sakai next argues that "there was insufficient evidence to establish that [Sakai] intentionally attempted to poison the feral cats."

HRS § 702-206(1) (1993) describes "intentionally," in relevant part, as follows:

- (a) A person acts intentionally with respect to his [or her] conduct when it is his [or her] conscious object to engage in such conduct.
- (b) A person acts intentionally with respect to attendant circumstances when he [or she] is aware of the existence of such circumstances or believes or hopes that they exist.
- (c) A person acts intentionally with respect to a result of his [or her] conduct when it is his [or her] conscious object to cause such a result.

We will assume, for purposes of this opinion, that the evidence was sufficient to support a finding that Sakai intended to poison the cats.

C. Did the trial court correctly conclude that all cats are not pests or other vermin under HRS § 711-1109(1) (b)?

Sakai argues that the "trial court erred in concluding that feral cats are considered animals, rather than pests or vermin, under the cruelty to animals statute." In interpreting statutes, we are guided by several basic principles:

First, the fundamental starting point . . . is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Moreover, the courts may resort to extrinsic aids in determining the legislative intent. One avenue is the use of legislative history as an interpretive tool.

Peterson v. Hawaii Elec. Light Co., 85 Hawai'i 322, 327-28, 944 P.2d 1265, 1270-71 (1997) (brackets, citations, and quotation marks omitted).

The question is whether a feral cat is an "animal" rather than included within the category "vermin, or other pests[.]"

HRS § 711-1100 (Supp. 1999) defines "[p]et animal" as "a dog, **cat**, rabbit, guinea pig, domestic rat or mouse, or caged birds (passeriformes, piciformes, and psittaciformes only)." (Emphasis added.) In unambiguous terms, the statute includes pet cats as pet animals and does not make a distinction between feral

and non-feral cats. On the other hand, rats and mice are limited to domestic ones and birds are limited to caged ones.

Assuming the cats in this case are feral and not pets, the question is whether a cat that is feral and not a pet is included within the category "vermin, or other pests." We will assume, for purposes of this opinion, that the answer is no.

D. HRS § 711-1109 is not unconstitutionally vague or overbroad.

Sakai argues that HRS § 711-1109(1)(b) "fails to specify the conduct which it seeks to prohibit as it lacks a definition of the terms 'pests' and 'vermin.'" Without these definitions, Sakai argues that the statute "is unconstitutionally vague and overbroad both on its face and as applied to the facts of the instant case."

1. HRS §711-1109 is not unconstitutionally vague.

In determining whether the statute is void for vagueness, we are guided by the following principle:

Due process of law requires that a penal statute state with reasonable clarity the act it proscribes and provide fixed standards for adjudging guilt, or the statute is void for vagueness. Statutes must give the person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that he or she may choose between lawful and unlawful conduct.

. . . .

[A] criminal statute is void for vagueness unless: it (1) gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he or she may act accordingly; and (2) provides explicit standards for those who apply the statute, in order to avoid arbitrary and discriminatory enforcement and the delegation of basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis.

State v. Gaylord, 78 Hawai'i 127, 138, 890 P.2d 1167, 1178 (1995)  
(citations, internal quotation marks, and brackets omitted).

The words "vermin" and "pests" are defined in the dictionary. Therefore, they do not cause HRS § 711-1109 to be unconstitutionally vague or ambiguous.

2. HRS §711-1109 is not unconstitutionally overbroad.

"The doctrine of overbreadth, although closely related to a vagueness claim, is distinct in that while a statute may be clear and precise in its terms, it may sweep so broadly that constitutionally protected conduct as well as unprotected conduct is included in its proscriptions." Gaylord, 78 Hawai'i at 142, 890 P.2d at 1182 (quoting State v. Kaneakua, 61 Haw. 136, 143, 597 P.2d 590, 594 (1979)).

Sakai contends that

[t]o the extent that HRS § 711-1109(1)(b) prohibits the extermination of undesirable, stray animals, it is facially overbroad. In addition, the statute is overbroad as applied to [Sakai]. In light of the fact that the trial court found that the Cruelty to Animals statute protected feral cats, the statute is overbroad as applied to [Sakai].

Sakai does not expressly identify the constitutionally protected conduct that is being proscribed. To the extent that he is implicitly identifying the extermination of cats that are feral and not pets, we disagree that such action is constitutionally protected conduct.

E. Based on a fact found by the circuit court, it must be concluded that Sakai is not guilty.

The elements of an attempt to poison are as follows: the defendant intentionally engaged in conduct which, under the circumstances as the defendant believed them to be, constituted a substantial step in a course of conduct intended to poison the cats.

In Sakai's case, there is no evidence that the cats ate the poisoned food. There is uncontradicted evidence that the cats refused to eat the poisoned food and ate only the part of the food that was not poisoned. As noted above, the court believed Sakai and expressly found that Sakai "intended to spray the food so that the cats wouldn't eat it[.]" The facts that (a) Sakai intended that the cats would not eat the poisoned food and (b) the cats refused to eat the poisoned food, compel the conclusion that Sakai did not engage in conduct which, under the circumstances as Sakai believed them to be, constituted a substantial step in a course of conduct intended to poison the cats. In light of Sakai's intent and reasonable expectation that the cats would not eat the food after the spraying, his act of spraying food with a substance that would have been harmful if and when ingested did not constitute an attempt to poison the cats.

CONCLUSION

Accordingly, we reverse the circuit court's March 18, 1999 judgment convicting Sakai of violating HRS §§ 705-500(1)(a) and (1)(b) and 711-1109(1)(b) (Supp. 1999), Attempted Cruelty to Animals.

DATED: Honolulu, Hawai'i, November 27, 2000.

On the briefs:

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