

NO. 23822

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
DOUGLAS MOOK, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-0377)

MEMORANDUM OPINION

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

Defendant-Appellant Douglas Mook (Defendant) appeals the August 16, 2000 judgment of the circuit court of the first circuit, the Honorable Dexter D. Del Rosario presiding, that convicted him, as charged, of assault in the second degree, in violation of Hawaii Revised Statutes (HRS) § 707-711(1)(c) (1993),¹ and sentenced him to a five-year, indeterminate term of imprisonment, to run consecutively to the prison term he was serving at the time he committed the offense in this case.

On appeal, Defendant contends there was insufficient evidence to sustain his conviction; specifically, that the State

¹ Hawaii Revised Statutes (HRS) § 707-711(1)(c) (1993) provides that "[a] person commits the offense of assault in the second degree if: . . . The person intentionally or knowingly causes bodily injury to a correctional worker, as defined in section 710-1031(2), who is engaged in the performance of duty or who is within a correctional facility[.]" (Enumeration omitted.)

HRS § 710-1031(2) (1993) defines "correctional worker" as "any employee of the State or any county who works in a correctional or detention facility, a court, a paroling authority or who by law has jurisdiction over any legally committed offender or any person placed on probation or parole."

failed to prove that he did not act in self-defense. We conclude the contrary and affirm.

I. BACKGROUND.

On September 19, 1997, adult correctional officer (ACO) Kraig Massey (ACO Massey) was at work at the Halawa correctional facility when he was involved in an incident with Defendant, an inmate at the facility.

ACO Massey and ACO Sergeant Malcolm Ahlo (Sgt. Ahlo) were assigned to strip search Defendant and transport him to the medical unit. A strip search is standard safety procedure conducted, before transport, to detect contraband. ACO Massey explained that, during a strip search, the inmate must remove all clothing so the clothing can be examined. Parts of the inmate's body, such as the mouth, ears, feet, hair and hands, must also be observed. The final check is the squat-and-cough, which ensures the inmate is not carrying contraband in his bodily cavity.

There should be no physical contact between the ACO and the inmate during the strip search. The inmate conducts the procedure himself by, for example, turning his head and pulling his ears, and lifting his tongue, so the ACO can observe. The only thing the ACO should touch is the clothing, which must be searched manually for contraband.

ACO Massey and Sgt. Ahlo arrived at Defendant's cell at approximately 2:00 p.m. The cell door was electronically opened.

ACO Massey entered and gave Defendant instructions for the routine strip search. ACO Massey testified that he spoke to Defendant in a normal, low speaking voice. The procedure had been completed up to the final check, the squat-and-cough, when Defendant refused to remove his underwear to complete the search. ACO Massey repeated the instructions and Defendant partially complied. He pulled his underwear down to his knees, half-squatted and coughed, without turning around one-hundred-and-eighty degrees to be adequately observed. After ACO Massey instructed again, Defendant removed his underwear and performed the squat-and-cough procedure correctly. However, while ACO Massey was examining the underwear for contraband, Defendant came up from the crouching position, spun around and punched him.

ACO Massey said he did not see the punch coming until it was too late, and was not able to react in time. According to ACO Massey, at the time of the punch, he was about ready to return the underwear so Defendant could get dressed and they could move on with the transport. The force of Defendant's punch drove ACO Massey back into the wall. ACO Massey said the punch hurt, but he was not knocked unconscious.

ACO Massey and Sgt. Ahlo took Defendant to the ground. Then Sgt. Ahlo ordered ACO Massey to leave the cell. ACO Massey was not present when Defendant was subdued. ACO Massey was

escorted out of the area because backup was on the way, and he was bleeding profusely and needed medical attention.

On cross-examination, ACO Massey said that he treats inmates with dignity and respect; he does not tease, antagonize or swear at inmates, nor does he physically or verbally abuse them. On the day of the incident, he was very calm and patient with Defendant, but for no reason whatsoever, Defendant turned around and punched him in the face.

Sgt. Ahlo's testimony corroborated ACO Massey's account of the incident. Sgt. Ahlo, employed by the Department of Public Safety at the Halawa medium security facility for sixteen years, was part of the team that was tasked with transferring Defendant to the medical unit. Sgt. Ahlo testified that after he and ACO Massey arrived at Defendant's cell and the door was opened electronically by ACO Tony Dacoscos (ACO Dacoscos), they entered the cell and positioned themselves within reach to take the clothes from Defendant. Sgt. Ahlo said that ACO Massey entered the cell first and stood about one-to-two feet from Defendant. Sgt. Ahlo stood about a foot right behind ACO Massey.

ACO Massey instructed Defendant to strip, but Defendant did not fully comply. ACO Massey asked a second time, at which point Defendant complied. But after performing the squat-and-cough portion of the search, Defendant turned around and punched ACO Massey in the mouth. Sgt. Ahlo said that Defendant swung "out of the blue[,] " and that it shocked them.

Sgt. Ahlo then jumped over ACO Massey, at which time Defendant took a swing at Sgt. Ahlo. Sgt. Ahlo proceeded to restrain Defendant by pushing him to the back of the cell and then throwing him down on the bed. Sgt. Ahlo said that while he was trying to restrain Defendant, Defendant probably hit his head. Defendant was bleeding from his forehead. Sgt. Ahlo injured his shoulder during the restraint and had to seek medical attention.

ACO Dacoscos could hear the commotion from the control panel, so he came running to check out the situation. ACO Dacoscos then called ACO Robert Jones (ACO Jones) and ACO Thomas Evans (ACO Evans) for backup.

Sgt. Ahlo said that at this point, ACO Massey managed to get off his knees and tried to help restrain Defendant by adding weight behind Sgt. Ahlo's back, even though ACO Massey had taken "one hard hit[,]" and was "half knocked out" and "woozy." ACO Massey was bleeding profusely from his nose, and his blood was all over the floor and soaked into the back of Sgt. Ahlo's uniform.

After Defendant was taken to the ground, Sgt. Ahlo put Defendant in an arm bar so that he could not swing again. Sgt. Ahlo said the arm bar was necessary because Defendant was resisting restraint. Defendant was yelling, "Come on, you fuckers. You like some more. Come on, come on." Then backup

arrived. They placed Defendant in shackles and he was removed from the cell.

Sgt. Ahlo testified that ACO Massey did not do anything to provoke Defendant. Sgt. Ahlo maintained that ACO Massey instructed Defendant in a normal tone. Sgt. Ahlo said that ACO Massey conducted the strip search in a professional manner.

ACO Jones and ACO Evans, who responded to the call for backup, testified that when they arrived at the scene they saw Sgt. Ahlo holding Defendant down on the bed, and ACO Massey leaning on Sgt. Ahlo's back. ACO Jones said that ACO Massey appeared dizzy and that, "He wasn't all there." ACO Evans said it took both him and ACO Jones to handcuff Defendant, because he was fully resisting.

The parties stipulated to the testimony of Dr. Nip, a plastic surgeon, who was called to the emergency room after the incident to treat ACO Massey. Dr. Nip diagnosed ACO Massey with a broken nose. A physical procedure and sutures were required to correct the break.

After the State rested, Defendant moved for a judgment of acquittal, claiming the State had failed to make a *prima facie* case. The court denied the motion.

On direct examination, Defendant gave a different account of the incident:

Q [DEFENSE COUNSEL] Okay. And what happened?

A [DEFENDANT] ACO Massey ordered me to strip, and I went with the procedure.

Q Okay. And what happened next?

A He told me to strip, and I stripped. I -- I pulled my -- my boxer shorts all the way down to my ankles. And he told me to strip again. And he was, like, telling me to strip, you know. So when he did that, he came towards me, and that's when I hit him.

Q Okay.

A He told me, no, no. Because when I -- the proper procedure is to take your clothes off all the way. But I pulled it down to my ankles. He says, no, no, no. I told you to strip again. And he moved towards me. When he did that, I -- I hit him one time to get him away from me and I stepped back. And as soon as I did, I said, oh, shit. What did I just do? I hit an ACO.

I turned around and I -- I went down, I laid on my bed slab, and I put my hands behind my back, knowing that's what [Sgt. Ahlo] would want. Because I seen [Sgt. Ahlo] coming at me after I hit the ACO.

Q After you hit [ACO Massey]?

A After I hit [ACO Massey].

Q That went by pretty fast. I want to slow you down a bit and back up. Okay.

After you had put your shorts down to your ankles, yeah, what exactly did [ACO Massey] -- [ACO Massey] tell you?

A He just told me, no, no. I told you to strip. But he had an attitude with his -- with his order. He was -- he wasn't saying it in a respectful way. When he told me to strip, I said, no, no, no. I told you to strip.

Q Okay. What was the tone of his voice?

A It was -- it wasn't too respectful.

Q How loud was it?

A It was pretty loud.

Q How close was he to you?

A He was about -- about three feet away from me.

Q Okay. And how was his body language?

A He moved toward me. He came at me, like, to -- I don't know. When he said, no, no, I told you to strip, he was coming at me. See, because I got -- I've been assaulted by staff previously.

[(State's objection and motion to strike sustained and granted; last answer stricken and the jury instructed.)]

Q [Defendant], if I could ask you to just focus on this particular incident.

A It's hard for me to give an answer to you as to why I hit the ACO, because it -- it stems back from a long history of being assaulted --

[(State objects.)]

-- by other prison guards. You see what I am saying? It's hard for me to give you an honest answer as to what my reaction was and how I felt at that time. I thought that he was going to hit me.

[(State objects.)]

I honestly felt that he was going to put his hands on me, so I hit him. I wouldn't have -- I wouldn't have come at the officer like I did, naked. I would wait until I was fully dressed if I wanted to hit an ACO.

[(State objects and moves to strike; overruled and denied.)]

Q You say that he was coming towards you. Can you describe that for the jury?

A Well, when I -- when I had my -- my underwear down to my ankles, and he told me -- when he was like this, he stood up, he said, no, no, no. I told you to strip. And when he did that, I was like this, and I had my -- like, it was down to my ankles, and I came up, and I hit him with my left. And I didn't turn around. And that story about them telling me -- saying that I did turned around and I --

. . . .

When they said that I turned around and did a full squat and all that, that didn't happen. That never occurred. See, they're trying to cover up my

being beaten up after that, so they're coming up with all these scenarios, you see.

[(State objects and moves to strike; denied.)]

. . . .

I thought he was going to put his hands on me. I honestly felt that he was going put his -- because I had been assaulted before.

[(State objects; sustained and the jury instructed.)]

. . . .

Q Okay. And was he coming towards you?

A At the same time he was doing that, no, no, no, I told you to strip. So when he did that, at the same time he was saying that, immediately after he said that, I hit him.

Defendant said that after he hit ACO Massey, ACO Massey bounced back and fell against the wall. Defendant described his actions after he hit ACO Massey:

No, I backed off. And I said, oh, shit. My reaction was, like, oh, shit. See, it was a reaction. That's what it was to what he was doing to me. I reacted towards what he was -- but, see, that's all it was, was a reaction.

So I hit him one time, but when I did that, I realized that I hit an ACO, I said, oh, shit, to myself. I said, oh, shit. You know, I realized what I did. . . .

Defendant claimed that after he hit ACO Massey, he was not aggressive and did not resist the ACOs, contrary to the testimony of the State's witnesses. According to Defendant, he was handcuffed, removed from the cell and beaten up. Defendant claimed that Sgt. Ahlo, Sergeant Baldwin Andrade (Sgt. Andrade) and ACO Massey all participated in beating him, and that is how he sustained his injuries.

However, on direct examination during the State's rebuttal, Sgt. Andrade testified that when he arrived shortly after the incident, he saw Defendant already bleeding from the head. Sgt. Andrade said that he did not assault Defendant, and he did not witness any officer assault Defendant in any fashion.

On June 22, 2000, the jury found Defendant guilty as charged. On August 16, 2000, the court entered its judgment of conviction and sentence. After an extension of time granted by the court, Defendant filed his notice of appeal on October 13, 2000.

II. ISSUE PRESENTED.

Defendant presents a single issue on appeal. He contends there was insufficient evidence adduced at trial to support the jury's verdict because the State failed to prove beyond a reasonable doubt that he did not act in self-defense.

III. STANDARDS OF REVIEW.

"The test on appeal [for a claim of insufficient evidence] is not whether guilt is established beyond a reasonable doubt[.]" State v. Okumura, 78 Hawai'i 383, 403, 894 P.2d 80, 100 (1995) (citations and internal block quote format omitted). The test is "whether, viewing the evidence in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact. It matters not if a

conviction under the evidence as so considered might be deemed to be against the weight of the evidence so long as there is substantial evidence tending to support the requisite findings for the conviction. 'Substantial evidence' is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion." State v. Ildefonso, 72 Haw. 573, 576, 827 P.2d 648, 651 (1992) (citations, ellipsis and some internal quotation marks omitted).

"Furthermore, it 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 Hawai'i 226, 239, 900 P.2d 1293, 1306 (1995) (citation, brackets and internal quotation marks omitted).

IV. DISCUSSION.

On appeal, Defendant argues that his conviction must be reversed because his use of force was justifiable, based upon his reasonable belief that his use of force was then immediately necessary to protect himself.

The justification defense of self-protection is set forth in HRS § 703-304 (1993), which provides, in pertinent part, that "the use of force upon or toward another person is justifiable 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."

Where any evidence of self-defense has been adduced, the burden is on the prosecution to prove beyond a reasonable doubt that the force used by the defendant was not justifiable. State v. Straub, 9 Haw. App. 435, 444, 843 P.2d 1389, 1393 (1993). In such a jury trial, the defendant is entitled to instructions on the defense. State v. Unea, 60 Haw. 504, 511, 591 P.2d 615, 620 (1979).

With regard to the State's burden of proof and the law of self-defense, the court instructed the jury as follows:

Justifiable use of force, commonly known as self-defense, is a defense to the charge of Assault in the Second Degree. The burden is on the prosecution to prove beyond a reasonable doubt that the force used by the defendant was not justifiable. If the prosecution does not meet its burden, then you must find defendant not guilty.

The use of force by a defendant upon or toward another person is justified when the defendant reasonably believes that such force is immediately necessary to protect himself on the present occasion against the use of unlawful force by the other person.

The reasonableness of the defendant's belief that the use of such protective force was immediately necessary shall be determined from the viewpoint of a reasonable person in the defendant's position under the circumstances of which the defendant was aware or as the defendant believed them to be.²

"Force" means any bodily impact, restraint, or confinement, or the threat thereof.³

"Unlawful force" means force which is used without the consent of the person against whom it is

^{2/} HRS § 703-300 (1993).

^{3/} Id.

directed, and the use of which would constitute an unjustifiable use of force.⁴

(Footnotes supplied.)

Viewing the evidence in the light most favorable to the State, and recognizing "the jury's right to determine credibility, weigh the evidence, and draw justifiable inferences from the evidence presented," State v. Lima, 64 Haw. 470, 475, 643 P.2d 536, 539 (1982), we can conclude there was substantial evidence to support the jury's verdict.

The evidence, in the light most favorable to the State, indicates that Defendant was the sole aggressor. Defendant struck ACO Massey without being provoked, and because his defense was self-defense, he cannot deny that he intentionally or knowingly caused bodily injury to ACO Massey. HRS § 707-711(1)(c). Moreover, this case is one of credibility, and we should not disturb the jury's findings on credibility and weight of evidence. Tachibana, 79 Hawai'i at 239, 900 P.2d at 1306. The jury was instructed on the law of self-defense and on the State's burden to disprove that defense. The jury is presumed to have followed these instructions. State v. Amarin, 58 Haw. 623, 629, 574 P.2d 895, 899 (1978). In the absence of any contrary indication in the record, it is obvious that the jury found Defendant's version of the events simply not credible.

^{4/} Id.

V. CONCLUSION.

For the foregoing reasons, we affirm the August 16, 2000 judgment.

DATED: Honolulu, Hawaii, January 18, 2002.

On the briefs:

Jon N. Ikenaga,
Deputy Public Defender,
for defendant-appellant.

Chief Judge

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge