NO. 23993

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
MARCUS S. MALEWSKI, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CR. NO. 99-372721)

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

Defendant-Appellant Marcus S. Malewski (Malewski or Defendant) appeals from the December 8, 2000 judgment of the District Court of the First Circuit, entered by District Court Judge Christopher McKenzie, convicting Malewski of Disorderly Conduct, Hawaii Revised Statutes (HRS) § 711-1101(1)(a) (1993).

Malewski appeals on the grounds that (1) the oral charge was erroneously stated and (2) the evidence was insufficient to prove the offense. We agree with ground (2) above and reverse the December 8, 2000 judgment.

I. PROCEDURAL BACKGROUND

On November 18, 1999, Plaintiff-Appellee State of Hawaiʻi (the State) filed its complaint charging Malewski with, in Count I, Obstructing Government Operations, HRS § 710-1010(1)(b) (1993), and, in Count II, Harassment, HRS § 711-1106 (1993). On November 22, 2000, acting Circuit Court Judge Karl K. Sakamoto approved and ordered the State's "Motion

for Nolle Prosequi Without Prejudice of Count II as to Defendant Malewski."

On November 21, 2000, the State filed a motion to amend Count I of the complaint to charge Malewski with Disorderly Conduct, HRS § 711-1101(1)(a) (1993). On December 1, 2000, Judge Sakamoto entered an order granting the State's motion to amend, remanding Count I to the district court for further proceedings, and stating, in relevant part, as follows:

> IT IS FURTHER ORDERED that the complaint be amended in Count I from the offense of Obstructing Government Operations to Disorderly Conduct (711-1101(1)(a)(3) [sic], to read as follows:
>
> > COUNT I: On or about the 24th day of October, 1999, in the City and County of Honolulu, State of Hawaii, MARCUS S. MALEWSKI, with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof, MARCUS S. MALEWSKI engaged in fighting or threatening, or in violent or tumultuous behavior, thereby committing the offense of Disorderly Conduct in violation of Section 711-1101(1)(a) and (3) of the Hawaii Revised Statutes.

At trial in the district court on December 8, 2000, the State orally charged Malewski as follows:

> [O]n or about October 24th (twenty fourth), 1999, in the City and County of Honolulu, State of Hawaii, the defendant is charged with Disorderly Conduct under Section 711-1101(1)(a) and (b), or (c), Your Honor. Essentially he's charged with disorderly conduct with -- with the intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof, engaging in fighting, or threatening, or tumultuous behavior, or making unreasonable noise or any offensive coarse utterance, gestures, or display, or addresses -- addresses abusive language to any person present which is likely to provoke a violent response. And, again, all that occurred within the City and County of Honolulu, State of Hawaii.

II. EVIDENCE AND COURT'S DECISION

Evidence was presented that Malewski and a female (the co-tenant) leased an apartment at the Sunset Lakeview apartments.

At approximately 10:45 p.m., on October 24, 1999, two Honolulu Police Officers requested that the resident manager of the building accompany them to Malewski's apartment.[1] Janice Dinken (Dinken) was the resident manager. Dinken's son, John Marshall (Marshall), was asked to accompany his mother as a witness. Both Dinken and Marshall testified as witnesses for the State.

Upon arrival at Malewski's apartment, Marshall saw "a whole bunch of belongings . . . sitting outside in the walkway" and that the co-tenant "was trying to get in and couldn't get access into the apartment." Dinken saw the co-tenant and "some boxes" in the hallway. That hallway "goes to two doorways, two separate apartments. One on either side." At that point, the two police officers, Marshall, Dinken, the co-tenant, and James Malloy (Malloy), "one of the other security personnel at the building," were in the hallway. The co-tenant spoke to a police officer and gave the police officer her key to the apartment. The police officer put the key into the lock and unlocked the door but Malewski relocked the door from the inside each time the police officer unlocked it. Malewski said through the door to the police officers and the co-tenant, "You're not coming in." In Dinken's words, Malewski "wasn't yelling to the point where like the neighbors all around could hear. It was more yelling

[1] No evidence was presented of the details leading to the request by the police officers.

through a doorway to make sure each other can hear each other through a doorway."

Unable to enter through the door, one of the police officers stayed at the door while the other police officer went around the corner to Malewski's bedroom window and removed the jalousies from Malewski's bedroom window. By that time, a third police officer arrived and the first two uniformed police officers, one male and one female, entered the apartment through the bedroom window. The people in the hallway observed the ensuing scuffle through that window.

Dinken testified that Malewski wrestled and fought with the officers, pushed them into doorways, and pushed them from one end of the apartment to the other. Dinken heard Malewski say that he would sue the police officers and that "he was gonna' kick their ass." Dinken believed the police officers tried to calm Malewski down by "telling him to please sit because they didn't want to have to get violent with him or -- or physically have contact with him. They asked him to stop fighting them." Dinken also saw the police officers spray Malewski once with pepper spray, "although it was obvious he had been sprayed" more than once.

Marshall left the area for fifteen or twenty minutes after the police officers arrived. He returned after the police officers were inside the apartment and, through the window,

observed the physical battle between the police officers and Malewski.

When questioned on direct examination by the Deputy Prosecuting Attorney (Prosecutor), Dinken responded as follows:

> Q . . . Okay. How did that make you feel seeing all this commotion?
>
> A As -- as the resident manager, I was concerned for everybody, including [Malewski], because I was afraid someone was gonna' be hurt on the floor. And, at one point, because we weren't sure what was happening, I felt threatened. And, that's where my maintenance manager kind of moved me out of the way and put me to the side.
>
> Q Is it safe to say the situation caused you alarm?
>
> A Yes.

On cross-examination, Dinken testified:

> Q . . . [A]s far as what [Malewski] was doing, he was basically objecting to -- to their detaining him? He thought it was unjustified, correct? He was telling [the police officers] 'you guys shouldn't be here. I'm gonna' sue you'? Things of that nature, right?
>
> A From entering the apartment, yes.
>
> Q He -- he didn't think they were justified, and he was complaining rather loudly to that fact, correct?
>
> A Right. Yes.
>
> . . . .
>
> Q And, from what you saw, the gist of what [Malewski] was doing was complaining to the police they [sic] didn't think they were supposed to be there, correct?
>
> A Yes.

After the close of the State's case, counsel for Malewski (Defense Counsel) moved for a judgment of acquittal. In part, Defense Counsel argued that

> this charge is -- is charged incorrectly. . . . This has to do with a person who's trying to cause a physical inconvenience to the public. He's inside his own house, and he's objecting to

> being arrested. He's objecting to the police coming into his house without a warrant. That isn't disorderly conduct. It's not under the statute and it's not under the case law.
>
> And, there's no evidence.

The court denied the motion. Malewski did not testify or present any evidence.

In his closing argument, the Prosecutor asserted,

> clearly, there is violent and tumultuous behavior . . . according to Ms. Dinken's uncontroverted testimony. And, again, she's a member of the public. Said it caused her alarm. So, clearly we have a case of disorderly conduct.
>
> . . . .
>
> Clearly, Mr. Malewski, at the very least, was recklessly creating a situation where alarm would occur. And, the facts clearly support the argument that those kinds of action by the defendant is gonna' cause somebody alarm. Those words and that violent action, I would be alarmed if I saw that.
>
> So, clearly, Your Honor, under the evidence, the uncontroverted evidence, we have disorderly conduct.

Defense Counsel argued that

> clearly, there's a reasonable doubt that [Malewski] was trying or was even thinking recklessly that the public was somehow getting alarmed when the police were in his apartment and he's trying to tell 'em, 'what the hell you guys here. Get outta' my place'. I mean, how would any of us react if you're in your house and the cops come in the window?
>
> . . . .
>
> . . . I think that you have to look at -- for his state of mind what the situation was. This was a guy who was in his apartment. And, yes, so he was trying to keep 'em from coming in. You know, arguably, he could have done that. And then, he's -- the police came in. It wasn't the public he was directing. Everything was directed to the police officers. There was nothing to do with the public here.

When advising Malewski of the court's decision in the case, Judge McKenzie narrowed his consideration to two issues:

> In order for the State to prove its case, it must prove beyond a reasonable doubt that -- in this case it's, as far as I'm concerned, it's narrowed down to a question of whether you by your actions caused alarm or recklessly created a risk of alarm, and

> whether the two -- Ms. Dinken and the -- Mr. Marshall were members of the public. And, I'm finding that they were members of the public. . . .
>
> I'm also finding that there was -- it has been proven beyond a reasonable doubt that Miss Dinkens (sic) was -- felt threatened or alarmed. She testified to that. She said that even the -- the maintenance man had to come and get somebody to -- or move -- move her out of the way. So, I find that that evidence is credible and has been proven.
>
> Therefore, I'm finding that you are guilty. . . .
>
> . . . .
>
> . . . I'm finding that you are guilty . . . of a violation because the State has not proven beyond a reasonable doubt that you intended substantial harm or serious inconvenience, or that you persisted in any disorderly conduct after reasonable warning.

Judge McKenzie imposed a fine of fifty dollars and stayed the fine for thirty days to allow Malewski time to decide whether or not to appeal.

III. RELEVANT STATUTES

HRS, Chapter 702 (1993) states, in relevant part, as follows:

> **§702-204 State of mind required.** Except as provided in section 702-212, a person is not guilty of an offense unless the person acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense. When the state of mind required to establish an element of an offense is not specified by the law, that element is established if, with respect thereto, a person acts intentionally, knowingly, or recklessly.
>
> . . . .
>
> **§702-206 Definitions of states of mind.**
> (1) "Intentionally."
>
> (a) A person acts intentionally with respect to his conduct when it is his conscious object to engage in such conduct.
>
> (b) A person acts intentionally with respect to attendant circumstances when he 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 conduct when it is his conscious object to cause such a result.

. . . .

(3) "Recklessly."

(a) A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature.

(b) A person acts recklessly with respect to attendant circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances exist.

(c) A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.

(d) A risk is substantial and unjustifiable within the meaning of this section if, considering the nature and purpose of the person's conduct and the circumstances known to him, the disregard of the risk involves a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation.

HRS, Chapter 711 (1993) states, in relevant part, as follows:

§711-1100 Definitions of terms in this chapter. In this chapter, unless a different meaning plainly is required:

. . . .

"Public" means affecting or likely to affect a substantial number of persons.

. . . .

§711-1101 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

(b) Makes unreasonable noise; 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; or

. . . .

(2) Noise is unreasonable, within the meaning of subsection (1)(b), if considering the nature and purpose of the person's conduct and the circumstances known to the person, including the nature of the location and the time of the day or night, the person's conduct involves a gross deviation from the standard of conduct that a law-abiding citizen would follow in the same situation; or the failure to heed the admonition of a police officer that the noise is unreasonable and should be stopped or reduced.

The renter, resident, or owner-occupant of the premises who knowingly or negligently consents to unreasonable noise on the premises shall be guilty of a noise violation.

(3) Disorderly conduct is a petty misdemeanor if 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. Otherwise disorderly conduct is a violation.

IV. RELEVANT STANDARD OF REVIEW

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. Indeed, even if it could be said in a bench trial that the conviction is against the weight of the evidence, as long as there is substantial evidence to support the requisite findings for conviction, the trial court will be affirmed.

"Substantial evidence" as to every material element of the offense charged is credible[2] evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion. And as trier of fact, the trial judge is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence.

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[2] In light of the precedent that "[i]t is for the trial judge as fact-finder to assess the credibility of witnesses and to resolve all questions of fact[,]" State v. Eastman, 81 Hawai‘i 131, 139, 913 P.2d 57, 65 (1996), we question the presence of the word "credible" in this standard of review.

State v. Batson, 73 Haw. 236, 248-49, 831 P.2d 924, 931 (1992), *reconsideration denied*, 73 Haw. 625, 834 P.2d 1315 (1992) (citations omitted) (footnote added).

V. QUESTIONS ON APPEAL

Malewski presents the following questions on appeal:

> 1. Whether the court plainly erred in convicting Malewski of the offense of disorderly conduct where the state laid its charge in the disjunctive rather than the conjunctive as required by the Hawai'i Supreme Court in State v. Jendrusch[, 58 Haw. 279, 567 P.2d 1242 (1977)].
>
> 2. Whether the lower court erred in finding Malewski guilty of the offense of disorderly conduct where the evidence was insufficient to prove the offense of disorderly conduct.

VI. RELEVANT PRECEDENT

"[M]ere inconvenience, annoyance or alarm [is] insufficient to impose penal liability. There must have been intent by the defendant to cause *physical* inconvenience to, or alarm by, a member or members of the public." Jendrusch, 58 Haw. at 282, 567 P.2d at 1244. (Emphasis in the original.)

In State v. Leung, 79 Hawai'i 538, 904 P.2d 552 (1995), Leung was detained in a theater lobby and yelled at the manager and at police officers. Patrons stopped to watch. The Leung court held that members of the public "who, of their own volition, stop or slow down to satisfy their curiosity about an encounter between Defendant and the police in a theater lobby cannot be said to be physically inconvenienced or alarmed." Id. at 544, 904 P.2d at 558. Furthermore, in "[c]onsidering Defendant's alleged acts and conduct, and the inferences to be

drawn from the surrounding circumstances," the Leung court concluded "that a person of reasonable caution would not believe the evidence was adequate to establish that when Defendant addressed the theater manager and the police concerning what he believed to be an unjustified detention, his intent was to cause physical inconvenience or alarm by members of the public or that he recklessly created a risk thereof." Id. at 545, 904 P.2d at 559.

The Leung court discussed that

> the police, of course, cannot be considered "members of the public" for the purpose of establishing Defendant's culpability under the disorderly conduct statute. Arguments with the police, without more, do not fall within the ambit of the disorderly conduct statute:
>
> > This is an important point. *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.*
>
> Commentary to HRS § 711-1101 (1993) (emphases added) (footnote omitted).

Leung, 79 Hawai‘i at 543, 904 P.2d at 557.

VII. DISCUSSION

HRS § 711-1100 (1993) defines "Public" as "affecting or likely to affect a substantial number of persons."

HRS § 702-206(3)(c) (1993) specifies that "[a] person acts recklessly with respect to a result of his conduct when he

consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result."

The following are the relevant material elements of disorderly conduct: Malewski (1) recklessly, i.e., consciously disregarded a substantial and unjustifiable risk that his conduct would create a risk of causing alarm, (2) created a risk of causing alarm, (3) by a member or members of the public, i.e., a substantial number of persons other than police officers and people "who, of their own volition, stop or slow down to satisfy their curiosity about an encounter between Defendant and the police," and (4) by intentionally, knowingly, or recklessly, (5) engaging in fighting, or threatening, or in violent or tumultuous behavior.

It is clear that there was evidence of (2), (4), and (5). The question is whether there was evidence of (1) and (3).

Judge McKenzie stated, "Well, it -- it seems to me that the two questions that I have to decide was -- was Mr. Marshall and Ms. Dinken were they members of the public. And, number two, were the defendant's actions did they -- did they -- those actions cause alarm or recklessly create a risk of alarm."

In its answering brief, the State argues, "[b]y repeatedly defying the orders of police officers and physically engaging in a fight with them, Defendant recklessly created a risk that members of the public would be alarmed." The State

further argues, "Contrary to Defendant's assertion, the State below *did* present substantial evidence proving Defendant's reckless disregard in causing alarm" when "[Malewski] denied the officers' request for entry into the apartment[.]" (Emphasis in original.) This latter allegation of fact is not supported by the record. Although there is evidence that Malewski repeatedly relocked the door after the police unlocked it, there is no evidence that the police identified themselves as police officers or orally requested entry into the apartment.

The State argues that "Defendant's actions recklessly caused, at the very least, a risk of alarm since any other tenant or visitor in the hallway could have walked by, seen the items in the hallway, witnessed the violence inside the Defendant's apartment and been alarmed." The fact is, however, that the hallway to Malewski's apartment was a hallway to only two apartments, his and one other. There is no evidence that any "other tenant or visitor in the hallway" would have been a member of the "public." Moreover, as noted in Leung at 544, 904 P.2d at 558, "members of the public who, of their own volition, stop or slow down to satisfy their curiosity about an encounter between Defendant and the police in a theater lobby cannot be said to be physically inconvenienced or alarmed."

There is evidence of the presence of Dinken, Marshall, Malloy, and the co-tenant. It is questionable whether Malewski

"consciously disregarded a substantial and unjustifiable risk" that these four people were in the vicinity. It is certain that this group of four people does not constitute the "substantial number of persons" referred to in HRS § 711-1100. Consequently, there is no evidence that Malewski "consciously disregarded a substantial and unjustifiable risk that his conduct would create a risk of causing alarm" to "a member or members of the public[.]"

VIII. CONCLUSION

Accordingly, we reverse the December 8, 2000 judgment.

DATED: Honolulu, Hawai‘i, November 27, 2002.

On the briefs:

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