NO. 24081

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
SCOTT FERGUSON, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 00-1-0076(2))

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

On February 28, 2000, Plaintiff-Appellee State of Hawaiʻi (State) charged Defendant-Appellant Scott Ferguson (Defendant) by Complaint as follows: (1) Count I, Assault in the Second Degree, Hawaii Revised Statutes (HRS) §§ 707-711(1)(a) and/or (d) (1993);[1] (2) Count II, Abuse of Family or Household

[1] Hawaii Revised Statutes (HRS) § 707-711 (1993) states, in relevant part, as follows:

> (1) A person commits the offense of assault in the second degree if:
>
> (a) The person intentionally or knowingly causes substantial bodily injury to another;
>
> . . . ; [or]
>
> (d) The person intentionally or knowingly causes bodily injury to another person with a dangerous instrument; or
>
> . . . .
>
> (2) Assault in the second degree is a class C felony.

Member, HRS § 709-906 (2001);[2] (3) Count III, Terroristic Threatening in the First Degree, HRS § 707-716(1)(c) (1993);[3][4] and (4) Count IV, Terroristic Threatening in the First Degree, HRS § 707-716(1)(c) (1993).

Following a jury trial, Defendant appeals from the January 10, 2001 Judgment entered by Judge Rhonda I. L. Loo, convicting him of Counts I, II, and IV, and acquitting him of

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[2] HRS § 709-906(1) (Supp. 2001) states, in relevant part, as follows:

> It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member . . .
>
> For the purposes of this section, "family or household member" means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

[3] HRS § 707-715(1) (1993) states, in relevant part, as follows:

> 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: . . . [w]ith the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person[.]

[4] HRS § 707-716 (1993) states, in relevant part, as follows:

> (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:
>
> . . . .
>
> (c) Against a public servant, including but not limited to an educational worker, who for the purposes of this section shall mean an administrator, specialist, counselor, teacher, or other employee of the department of education, or a volunteer as defined by section 90-1, in a school program, activity, or function that is established, sanctioned, or approved by the department of education, or a person hired by the department of education on a contractual basis and engaged in carrying out an educational function; . . .
>
> . . . .
>
> (2) Terroristic threatening in the first degree is a class C felony.

Count III. Defendant was sentenced to maximum terms of incarceration of five years in each of Counts I and IV, and one year in Count II, to be served concurrently with credit for time served.

In Counts I and IV, Defendant initially was sentenced to a mandatory minimum term of one year and eight months, as a repeat offender. On August 15, 2001, the trial court entered its Order Correcting Illegal Sentence rescinding the mandatory minimum sentence imposed in Counts I and IV. This order mooted Defendant's point 5 on appeal.

We affirm the convictions of Count I and Count II and reverse the conviction of Count IV.

BACKGROUND

Viewed most favorably to the State, the jury heard evidence of the following facts. On February 11, 2000, at approximately 7:00 p.m., Defendant's brother, Brian Ferguson (Brian), returned to the home where he lived with Defendant and their mother, Georgeann Ferguson (Georgeann), and discovered a forty-ounce bottle of "malt liquor" (bottle of beer) in the refrigerator. Due to Georgeann's rules of no drinking alcohol in the house, Brian confronted Defendant. In response to Brian's questions, Defendant took the bottle of beer to the patio and placed it there.

Georgeann testified that she heard loud voices coming from downstairs and, in response, went downstairs and saw Defendant being confrontational with Brian. Georgeann further testified that Defendant was yelling and appeared to be inebriated. As Georgeann was talking to Defendant, Brian went into another room. Georgeann did not see any alcohol, but assumed that Defendant had put the alcohol on the patio as he had done on previous occasions. As Georgeann walked towards the patio, Defendant pushed her from behind into the screen door, causing her to fall face first on her hands and knees on the screen door on the patio. As a result of the fall, Georgeann received bruises to her hand and ribs.

Georgeann then called Brian for help. Brian immediately went onto the patio. Georgeann took the beer in her hand, tossed it to Brian, and Brian threw it over the backyard fence.

Brian testified that in response to his throwing of the bottle of beer over the backyard fence, Defendant took a cup of wine that Defendant had placed on a patio table that evening and threw it in Brian's face. Defendant then proceeded to punch Brian in the face three times before Brian fell onto the ground. While Brian was on the ground, Defendant kicked Brian in his ribs. As Brian stood up and walked towards Defendant, Defendant punched Brian three more times until Brian fell on the ground

again. Brian testified that while he was lying on the ground in a fetal position, Defendant lifted a seventy-five-pound rattan chair above Defendant's head and threw it down at Brian. The chair glanced off of Brian's left side. Defendant was 6 feet and 1-1/2 inches tall, weighing 250 pounds. Brian was 5 feet and 11 inches tall, weighing 210 pounds.

Georgeann tried to call the police, but Defendant yanked the phone out of the wall and threw the phone over the backyard fence. Brian and Georgeann then left the backyard and went across the street to a general store to call the police.

As a result of being punched by Defendant, Brian received eight stitches below the eye, ten stitches in the lip area, and had a tooth knocked out of place.

Maui Police Department Officers Michael Taketa (Officer Taketa) and Terrence Gomez (Officer Gomez) arrived at the house and were informed that Defendant had stated that he had a gun. Officer Gomez was a recent graduate from recruit school, was in training, and was on his first ride-along. Defendant ran out of the house and yelled, "I don't have a gun, don't shoot, don't shoot." Defendant was ordered on the ground and his hands were handcuffed behind his back by Officer Taketa who testified that he did not have to use any physical force when handcuffing Defendant. Defendant was then frisked by Officer Gomez. While Defendant was being handcuffed, Defendant threatened that he was

going to sue Officer Taketa and "going to get" Officer Taketa's job and family. At Officer Taketa's request, before Defendant was placed in the police vehicle, Officer Gomez again frisked Defendant because of the report that Defendant may have possessed a gun. Defendant was placed in the back seat of the police vehicle and the back seat was separated from the front seat partially by a roll cage and partially by plexiglass. When asked during trial whether the plexiglass was bullet-proof glass, Officer Taketa responded, "Probably not." On the drive to the police station, Officer Taketa sat in the driver's seat, Officer Gomez sat in the front passenger seat, and Defendant was in the back seat of the police vehicle. While in the police vehicle, Defendant was screaming and thrashing around.

Officer Gomez testified that Defendant "stated he had a gun within his pants and that he was pointing it right at us, and for us to turn around to look at him." Officer Taketa testified that Defendant stated that "we didn't search him well, and that he had a weapon and he was going to shoot us." Officer Taketa further testified that it was possible for a person handcuffed to shoot a gun within a police car.[5] Officer Taketa stated at

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[5] Officer Taketa testified, in relevant part, as follows:

> [Deputy Prosecutor]: Is it possible to still get a weapon and point it in a car even though you are handcuffed?
>
> [Officer Taketa]: Yes.
>
> [Deputy Prosecutor]: How is that possible?

(continued...)

trial that, because he was driving, he was unable to turn around to check on Defendant. Officer Taketa testified that Officer Gomez looked back at Defendant, but was unable to determine if Defendant had a firearm because the vehicle was dark. Officer Gomez testified, "I didn't want to look back. I just looked forward." Officer Gomez stated that Defendant could have concealed a small weapon on his body.[6] Officer Gomez further

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[5](...continued)

> [Officer Taketa]: If he kept it in the small of his back, he could have easily pulled it, because his hand was in the back. He could have turned his body and shot through the roll cage.
>
> [Deputy Prosecutor]: What if he had it like secured in his crotch area?
>
> [Officer Taketa]: I believe that in the vehicle that has occurred, but I don't know all the facts of that.
>
> [Deputy Prosecutor]: As police officers, do you sometimes hear about those kind of cases where people get shot in police cars?
>
> [Officer Taketa]: Yes.
>
> [Deputy Prosecutor]: Even though a suspect is handcuffed?
>
> [Officer Taketa]: Yes.

[6] Officer Gomez testified, in relevant part, as follows:

> [Deputy Prosecutor]: In your experience and training as a police officer, are you familiar with various firearms?
>
> [Officer Gomez]: Yes.
>
> [Deputy Prosecutor]: What's the smallest firearm you are aware of?
>
> [Officer Gomez]: I don't know the name. I have seen it. About this big.
>
> [Deputy Prosecutor]: You are holding up about three inches?
>
> [Officer Gomez]: About three inches.
>
> [Deputy Prosecutor]: That would be shooting a real bullet?

(continued...)

testified that he began to second-guess his search of Defendant and was scared that Defendant may have had a gun. After Defendant made the threats, Officer Taketa responded to Defendant that the roll cage separating the front seat and back seat was bullet-proof and, if Defendant were to shoot, he would only be harming himself. At no time did Officer Taketa pull the police vehicle over to check on Defendant, nor did Officer Gomez request such action. At trial, Officer Taketa testified, in relevant part, as follows:

> Q. Is there also any kind of glass barrier?
>
> A. There's plexiglass in the upper half.
>
> Q. Is that bullet-proof glass?
>
> A. Probably not.
>
> Q. Do you know how heavy bullet-proof glass is?
>
> A. Yes.
>
> Q. Is it like that at all?
>
> A. No.

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[6](...continued)

> [Officer Gomez]: Yes.
>
> [Deputy Prosecutor]: Could you conceal that on your person somewhere?
>
> [Officer Gomez]: Definitely.
>
> [Deputy Prosecutor]: Could [Defendant] have concealed that type of weapon on his body without you finding it?
>
> [Officer Gomez]: It is possible.

POINTS ON APPEAL

1. The jury verdicts finding Defendant not guilty of Count III, Terroristic Threatening in the First Degree (of Officer Taketa), but guilty of Count IV, Terroristic Threatening the First Degree (of Officer Gomez), were inconsistent and unsupported by the evidence.

2. and 3. There was insufficient evidence to support the decision that Defendant was guilty of Count IV, Terroristic Threatening in the First Degree (of Officer Gomez), because there was insufficient evidence (a) of a threat and (b) of "the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person[.]"

4. There was insufficient evidence to prove that Defendant was guilty of Count I, Assault in the Second Degree (of Brian), because the evidence was insufficient to support findings that (a) he acted intentionally or knowingly with respect to the result of his conduct or (b) Brian suffered bodily injury as a result of a dangerous instrument.

RELEVANT STANDARD OF REVIEW

Regarding appellate review for insufficient evidence, the Hawai‘i Supreme Court has repeatedly stated 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 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) (citation and internal citation omitted).

RELEVANT PRECEDENT

The relevant precedent is that

> threats punishable consistently with the First Amendment are only those which according to their language and context conveyed a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected "vehement, caustic and unpleasantly sharp attacks. . . ."
>
> Proof of a "true threat" focuses on threats which are so unambiguous and have such immediacy that they convincingly *express* an *intention* of being carried out.
>
> So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, so as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied.

State v. Chung, 75 Haw. 398, 416-17, 862 P.2d 1063, 1072-73 (1993) (quoting United States v. Kelner, 534 F.2d 1029 (2d. Cir. 1976), *cert. denied*, 429 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976)) (original ellipses and brackets omitted, emphasis in original).

> Chung mandates that, in a terroristic threatening prosecution, the prosecution prove beyond a reasonable doubt that a remark threatening bodily injury is a "true threat," such that it conveyed to the person to whom it was directed a gravity of purpose and imminent prospect of execution. In other words, the prosecution must prove beyond a reasonable doubt that the alleged threat was objectively capable of inducing a reasonable fear of bodily injury in the person at whom the threat was directed and who was aware of the circumstances under which the remarks were uttered. Under the particular circumstances of Chung, as we have indicated, the "true threat" was "so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution."
>
> . . . .
>
> . . . [T]he "imminency" required by Kelner, and hence by Chung, can be established by means other than proof that a threatening remark will be executed immediately, at once, and without delay. . . . Of course, one means of proving the foregoing

> would be to establish, as in Chung and Kelner, that the threat was uttered under circumstances that rendered it "so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." See Chung, 75 Haw. at 416-17, 862 P.2d at 1073; Kelner, 534 F.2d at 1026-27. But another would be to establish that the defendant possessed "the apparent ability to carry out the threat," such that "the threat . . . would reasonably tend to induce fear [of bodily injury] in the victim." In re M.S., 10 Cal.4th [698,] 712-15, 42 Cal Rptr.2d 355, 896 P.2d [1365,] 1372-74.
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> . . . .
>
> . . . "[W]here abusive speech is directed at . . . a police officer, it must generally be coupled with . . . outrageous physical conduct, . . . which exacerbates the risk that the officer's training and professional standard of restrained behavior will be overcome such that the officer will be provoked into a violent response[.]" [In the Interest of Doe,] 76 Hawai'i [85,] at 96, 869 P.2d[1304,] at 1315 [(1994))] (emphasis, internal quotation signals, and citations omitted).
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> . . . .
>
> . . . [T]he particular attributes of the defendant and the subject of the threatening utterance are surely relevant in assessing whether the induced fear of bodily injury, if any, is objectively reasonable.

State v. Valdivia, 95 Hawai'i 465, 476-77, 479, 24 P.3d 661, 672-73, 675 (2001) (original brackets omitted).

From the above, we glean the following principles of law.

Punishable threats are only those which, according to their language and context, conveyed a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected vehement, caustic, and unpleasantly sharp attacks. The prosecution must prove beyond a reasonable doubt that (a) the threat was objectively capable of inducing fear of bodily injury in the person at whom the threat was directed and who was aware of the circumstances under which the remarks were uttered and (b) the remark threatening bodily injury was a true

threat such that it conveyed to the person to whom it was directed a gravity of purpose and imminent prospect of execution.

The "imminency" can be established by means other than proof that a threatening remark will be executed immediately, at once, and without delay. One means of proving the "imminency" is to establish that the threat was uttered under circumstances that rendered it so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution. Another means of proving the "imminency" is to establish that the defendant possessed the apparent ability to carry out the threat, such that the threat would reasonably tend to induce fear of bodily injury in the victim.

The particular attributes of the defendant and the subject of the threatening utterance are relevant in assessing whether the induced fear of bodily injury, if any, is objectively reasonable.

Where abusive speech is directed at a police officer, it must generally be coupled with outrageous physical conduct, which exacerbates the risk that the officer's training and professional standard of restrained behavior will be overcome such that the officer will be provoked into a violent response.

DISCUSSION

Points 2 and 3

Challenging his conviction of Count IV, Defendant argues that there was no gravity of purpose and imminent likelihood of execution because prior to being placed in the police vehicle, the police subjected Defendant to two separate pat-down searches for weapons and Defendant's statement after being arrested, frisked, and handcuffed did not convey an element of immediacy. Further, Defendant contends that there was no apparent ability to carry out the threat such that the threat would reasonably tend to induce fear of bodily injury of Officer Gomez because (a) once Defendant was ordered out of the house, except for his verbal tirades, Defendant was very cooperative with police; (b) Defendant could not have possessed a gun in the police vehicle because Officer Gomez twice frisked Defendant, thus any threats uttered were empty threats; and (c) Officer Gomez did not take Defendant's threat seriously because after Defendant made the threat, Officer Gomez did not ask Officer Taketa to stop the police vehicle, nor confront or search Defendant again.

The State argues that Defendant's statement was a "true threat" because the threat was (1) unconditional and unequivocal; (2) specific as to the person threatened; and (3) immediate because Defendant had the ability to carry out the threat because

(a) Defendant was a large male, being 6 feet and 1-1/2 inches tall, weighing 250 pounds, and very strong, (b) Defendant initially stated that he had a gun, (c) Defendant inflicted serious injury upon his brother who was 5 feet 11 inches tall and weighed 210 pounds, (d) Defendant was screaming and swearing at the officers, as well as thrashing around in the vehicle, and (e) Defendant exhibited violent, erratic, and irrational behavior over a bottle of beer.

We agree with Defendant. The threat was that Defendant had a weapon and was going to shoot the officers seated in the front of the police car. However, Defendant twice had been frisked by Officer Gomez, was seated with his hands handcuffed behind his back, and was in the back seat of the police car and separated from the officers in the front seat(s) by the back of the seat(s), a roll cage, and a plexiglass barrier. Applying the relevant principles of law stated above, it is clear that the evidence is insufficient to prove a punishable threat to Officer Gomez, an imminent prospect of execution, the apparent ability to carry out the threat, or that the threat was objectively capable of inducing fear of bodily injury in the person at whom the threat was directed. The fact that Officer Gomez was a police officer increases this deficiency.

Point 1

Challenging his conviction of Count IV, Defendant argues that the jury did not "fairly and rationally conclude guilt beyond a reasonable doubt" because its verdicts regarding Count III and Count IV were inconsistent and unsupported by the evidence. In Count III, the jury found Defendant not guilty of Terroristic Threatening in the First Degree of Officer Taketa. In Count IV, the jury found Defendant guilty of Terroristic Threatening in the First Degree of Officer Gomez. Our decision to reverse Count IV, Terroristic Threatening in the First Degree, HRS § 707-716(1)(c), moots this issue.

Point 4

The jury was instructed, in relevant part, as follows:

> There are three material elements of the offense of assault in the second degree, each of which the prosecution must prove beyond a reasonable doubt.
>
> These three elements are, one, that on or about the 11th day of February, 2000, in the County of Maui, State of Hawaii, [Defendant], two, caused substantial bodily injury to [Brian], and/or (b) caused bodily injury to [Brian] with a dangerous instrument, to-wit, a rattan chair, and three, that [Defendant] did so intentionally or knowingly.

Defendant argues that there was insufficient evidence to prove that Defendant was guilty of Assault in the Second Degree under HRS §§ 707-711(1)(a) or 707-711(1)(d).

HRS § 707-711(1)(d)

Defendant argues that there was insufficient evidence for Defendant to be found guilty under HRS § 707-711(1)(d) because that subsection requires that the accused intentionally

or knowingly caused bodily injury to another person with a dangerous instrument. Defendant argues (1) there was insufficient evidence to show that Brian suffered bodily injury as a result of a dangerous instrument, (2) the State failed to prove that Defendant used a dangerous instrument, and (3) there was insufficient evidence to prove that Defendant acted with the requisite state of mind.

The State responds that there was substantial evidence that (1) Brian sustained bodily injury, (2) Defendant used a dangerous instrument, and (3) Defendant acted intentionally or knowingly with respect to his conduct. The State argues that the jury could determine "that a big wicker [sic] chair weighing [seventy-five] pounds thrown from over six feet with the force that Defendant could use, even in glancing off Brian's side was circumstantial evidence that this caused pain, being bodily injury." The State argues that the chair was a dangerous instrument and contends that Defendant admitted that the seventy-five-pound chair could cause serious injury if dropped from a height above Defendant's head. The State argues that based upon Defendant's erratic actions that night and Defendant's concession that the rattan chair can be used as a dangerous instrument, the jury had sufficient evidence to conclude that Defendant was aware that throwing the rattan chair could cause pain.

We agree with Defendant that there was insufficient evidence that Brian suffered bodily injury as a result of a dangerous instrument, the rattan chair. HRS § 707-700 (1993) states, in relevant part, as follows, "'[b]odily injury' means physical pain, illness, or any impairment of physical condition." In this case, according to the evidence presented, the injuries that Brian sustained were a result of Defendant's punches, and there was no evidence that Brian suffered any bodily injury as a result of the rattan chair. Brian testified, in relevant part, as follows:

> There was a chair. After the second time that I was on the ground, I did look up, and I was in a fetal position. I looked up, and he did have a chair above his head, and the reason I looked, I heard my mom say, "Don't do it, [Defendant], don't do it," and I looked up and then looked down and the chair did glance upon me on the left side as I was down. It wasn't a big blow or anything to hurt me at that point, but the chair was thrown.

HRS § 707-711(1)(a)

Defendant argues that there was insufficient evidence to find Defendant guilty of Assault in the Second Degree under HRS § 707-711(1)(a) because that subsection requires that the accused intentionally or knowingly caused substantial bodily injury to another. Defendant argues that he was merely acting recklessly with respect to his conduct and "there was no evidence to show that it was [Defendant's] conscious object to cause major lacerations or that he was practically certain that his conduct would cause such an injury." In light of the evidence of the facts leading to, and the facts of, Defendant's unprovoked

punching and kicking of Brian, we conclude that the evidence was sufficient to support the verdict.

CONCLUSION

Accordingly, with respect to the January 10, 2001 Judgment in this case, we affirm the convictions of Count I, Assault in the Second Degree, HRS § 707-711(1)(a), and Count II, Abuse of Family or Household Member, HRS § 709-906. We reverse the conviction of Count IV, Terroristic Threatening in the First Degree, HRS § 707-716(1)(c).

DATED: Honolulu, Hawai‘i, December 26, 2002.

On the briefs:

James S. Tabe,
Deputy Public Defender,
for Defendant-Appellant.

Chief Judge

Arleen Y. Watanabe,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.

Associate Judge

Associate Judge