NOT FOR PUBLICATION

NO. 24122

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
DANIEL JOHNSON, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT,
NORTH AND SOUTH KONA DIVISION
(CASE NO. 3P7 of 02/12/01, RPT. NO. G-48733)

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

On February 12, 2001, following a jury-waived trial, Daniel J. Johnson (Defendant) was convicted in the district court of the third circuit of terroristic threatening in the second-degree,[1] and sentenced to probation upon terms and conditions, including jail time in the amount already served. Defendant appealed the judgment entered that day. We conclude the court erred by, in effect, amending the oral charge while rendering its verdict, to the prejudice of Defendant's substantial rights. Further, insufficient evidence was adduced at trial to support a

[1] Hawaii Revised Statutes (HRS) § 707-715(1) (1993) provides: "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: ... With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person[.]"

conviction under the original charge. We therefore reverse the February 12, 2001 judgment.

I. Background.

Defendant was arrested on November 18, 2000. The arrest report attached to the arresting officer's Application and Affidavit in Support of Probable Cause Determination contained the following synopsis:

> On the above noted date and time, [Defendant] was arrested for the Offense of TERRORISTIC THREATENING, pursuant to Section 707-717 of the Hawaii Revised Statutes [(HRS)], as amended. [Defendant] was identified by the victim, (Benjamin JOHNSON-brother) as being responsible for threatening to stick a knife into the belly of [Defendant's] estranged wife, Carrie JOHNSON[.] [Defendant] also was heard stating to their minor child, (Melissa JOHNSON) in the form of a question, "would you like to see your mother murdered". The victim, Benjamin JOHNSON stated that [Defendant] has made statements such as these numerous times, that the statement made today, (11-18-00) was worded in such a way that the victim felt terrorized that [Defendant] would follow through in deed what he was verbally stating. [Defendant] subsequently charged for the above Offense.

(Capitalization in the original; emphases supplied.)

On November 20, 2000, Defendant was orally arraigned:

> [DEPUTY PROSECUTING ATTORNEY (DPA)]: Okay, on, uh, the charge is on, uh, terroristic threatening, charges are, on or about the eighteenth day of November of the year two-thousand, in Kona, County and State of Hawaii, Daniel J. Johnson, with intent to terrorize or reckless disregard of the risk of terrorizing, uh, another person, uh, did threaten by word or conduct to cause bodily injury to, uh, Kerry Johnson [(sic)], uh, thereby committing the offense of Terroristic Threatening in the Second Degree, in violation of section seven zero seven dash seven one five, subsection one and seven zero seven dash, uh, seven one seven, subsection one, uh, Hawaii Revised Statutes, as amended.

Defendant pled not guilty and waived his right to a jury trial. The court then noticed the arresting officer's affidavit and report, supra, and before it was clarified that the charge is a

misdemeanor, found that "there is probable cause to believe that the defendant committed the offense of terroristic threatening[.]"

Defendant's bench trial commenced on November 27, 2000.[2] The State's first witness, Defendant's brother Benjamin Johnson (Benjamin), lived with Defendant in Captain Cook from August 2000 to November 2000. On November 18, 2000, Benjamin was at home with Defendant and Defendant's daughter, five- or six-year-old Melissa Johnson (Melissa). Defendant's wife, Carrie Johnson (Carrie), had moved out of the house with Melissa the week before. The day before, Defendant had picked Melissa up to spend some time with her. At around nine o'clock that morning, Benjamin was on his way out of the house when he stopped to help Defendant start his car. A conversation ensued between the brothers. Benjamin testified that they began talking about Carrie. He remembered that Defendant "was very upset. He's been upset since the entire week that she moved out. So he was upset. And he mentioned some things about wanting to hurt her." When asked what he meant by "upset," Benjamin explained that Defendant was angry. Benjamin then went on to specify what Defendant had

[2] The Honorable Joseph P. Florendo, judge presiding.

said about wanting to hurt Carrie: "He said he would like to put a knife in her, that kind of thing."

When they went back into the house, Defendant tried repeatedly to call Carrie. Apparently, Defendant was trying to reconcile with her. Carrie was supposed to meet them at the house that day to get Melissa, and to help clean the house because Defendant was in the process of moving out, but Carrie did not respond to Defendant's phone calls -- deliberately, Benjamin maintained. Benjamin recalled that he overheard Defendant ask Melissa "if she would like to see her mom die." Benjamin explained: "And he may not have even have said it to her. He might have been walking around. Because in his frame of mind, he was talking to himself a lot that day."

Benjamin described for the DPA the condition of the house while Defendant was moving out, then a colloquy took place among counsel and the court:

> Q What kind of knives were in that house?
> A To be honest, there was stuff all over the house. I mean, the place was a wreck. Stuff was everywhere. There were kitchen utensils all around the house. The kitchen was disheveled. The living room was disheveled. And there were knives on the ground in various locations.
> Q Now, do you know anything about something that might be a shrine with Carrie's picture in your brother's house?
> [DEFENSE COUNSEL]: Objection. Relevance, your Honor. My client is charged with terroristic threatening, and the person testifying now is the brother of the victim [(sic)]. And all these questions now are going down the path that doesn't go to whether this person was -- how he was feeling and what made or didn't make him feel like a victim in this case.
> THE COURT: Any response?
> [DPA]: Your Honor, what we're looking at is the state of mind of

the defendant. It's the action of the defendant that matters in this. And what we're trying to bring out is -- the allegations of the charge are that he did something with either an intent or a reckless disregard of the intent of terrorizing. So it's therefore necessary to show what his state of mind and his attitude was at the time.

THE COURT: Was there a filed complaint?

[DPA]: No. There was an oral arraignment, your Honor.

THE COURT: All right. I'll overrule the objection.

Q [(By the DPA)]: Was there anything that Daniel Johnson had in his house that was like a shrine involving his wife's picture?

A He was expecting his wife to come that day.

Q Right.

A He was expressing how he cared for her. And she was just doing stuff to just drive him crazy. Basically he was upset about her not responding, because he wanted to make it work out. So what he did was he did have a picture of them together with stuff that was special to them so when she did arrive that maybe it would help warm her up a little bit, yes.

Q Was there a knife on that shrine?

[DEFENSE COUNSEL]: Your Honor, I object. The objection is based on relevance due to the fact that this person who was allegedly threatened is not the listed victim. And she is not here. And she is not testifying. And the defense's position is that it's the state of mind of Ben[jamin] Johnson whether he felt terrorized. Because Carrie Johnson is not the listed victim. And she's not here. And she is not the victim in this case.

[DPA]: Your Honor, the state of mind of Benjamin Johnson is not as relevant. The state of mind we're trying to show is Daniel Johnson's state of mind. Was he acting in a manner that would terrorize someone else or recklessly disregarding the risk of terrorizing somebody? We're trying to show his state of mind, how he was behaving.

THE COURT: All right. I'll overrule the objection.

Q [(By the DPA)]: Okay. Was there a knife on that shrine?

A There was a knife on the TV cabinet.

(Emphases supplied.) The DPA then asked Benjamin about Defendant's arrest:

Q Now, when did -- do you recall was your brother arrested that morning?

A Yes.

Q Do you know how the police got there?

A The police were called by Carrie's father.

Q Okay.

A Ron Cawthon [(Ron)].

Q And he's in this room, isn't he?

A Yes.

Q Did you tell him -- how did he get down to the house?

A I explained to my dad that my brother was very angry. And so we went over there to go pick up Ron to go get Melissa.

Q Why did you call Ron to go get Melissa?

[DEFENSE COUNSEL]: Your Honor, objection. Relevance. The circumstances of Mr. Johnson's arrest are not relevant to whether he committed the offense of Terroristic Threatening in the First Degree -- or the Second Degree. And a lot of this is obviously hearsay, and it is circumstantial and does not go to this offense at all.

. . . .

[DPA]: It does because it shows whether or not there was a feeling that the defendant was terrorizing people or whether he was recklessly creating a risk of terrorizing people that people would be terrorized.

If I ask [Benjamin] Johnson -- I'm asking [Benjamin] Johnson why [Ron] came down. That would tend to show -- indicate something about how Mr. Daniel Johnson was behaving and how the other people, such as Mr. Benjamin Johnson, perceived his behavior.

[DEFENSE COUNSEL]: Well, your Honor, the only –

THE COURT: It's being offered to show how Mr. Benjamin Johnson reacted?

[DPA]: It's being offered to show how Benjamin Johnson reacted to Daniel Johnson and, therefore, if Daniel Johnson's behavior could be classified as -- such as of terrorizing or intent to terrorize or in reckless disregard of terrorizing.

THE COURT: Let me just clarify: There is not a written complaint. So the person who is the -- is being terrorized is who?

[DPA]: Would be Benjamin Johnson and also Melissa Johnson, the five-year-old.

THE COURT: That's how the complaint was read?

[DPA]: I don't believe Melissa Johnson was read in the complaint. It was only Benjamin Johnson.

[DEFENSE COUNSEL]: Melissa Johnson is not listed as a victim in this report, your Honor.

THE COURT: Pardon me?

[DEFENSE COUNSEL]: Melissa Johnson is not listed anywhere in this report as a victim.

THE COURT: What's pertinent is what did the complaint say?

[DPA]: The complaint that was read, I believe, said Benjamin Johnson.

THE COURT: So is that what we're talking about right now?

[DPA]: Yes.

THE COURT: I'll overrule the objection.

Q [(By the DPA)]: Mr. Johnson, did you call [Ron]?

A No. My dad did.

Q Why did you want [Ron] -- he called him because you had asked him to?

A I talked to my dad. [Defendant] was swearing a lot. And so that was my main concern. I just didn't want [Melissa] to -- just to witness him swearing and being upset like that, so we came down to go get Melissa.

Q So you were worried about what would happen to Melissa?

A No. Not what would happen to her. Nothing would happen to her. I was worried about what she was just witnessing. That's all.

Q Okay.

A It was stressful.

(Emphases supplied.) Defense counsel's cross-examination of Benjamin commenced as follows:

> Q Now that you've testified as to things that you heard your brother say, how were you feeling? Or let me rephrase that. Were you feeling terrorized?
> A Not -- my personal --
> Q You.
> A No. Not at all.
> Q He was very angry; is that right?
> A Yes.
> Q And you've seen him be angry on that occasion and other occasions; is that true?
> A Yes.
> Q Did you believe everything you heard him say that day?
> A No. Not at all.
> Q What did you hear him say that you didn't believe?
> A The parts where he was stating he wanted to, you know, kill Carrie and all that. . . .
> . . . .
> Q So you testified that you wanted to get Melissa out of there, right?
> A Yes.
> Q And you said the reason was what?
> A That there was a lot of emotional goings on with my brother at the time, and I didn't want her to witness it. That's all.
> Q And what was -- how were you feeling if you can tell us in a couple of words?
> A Well, I was frustrated because I tried to talk to him, calm him down. But . . .
> Q Frustrated? Were you feeling afraid, frightened?
> A No.
> Q Were you feeling terrorized?
> A No.

(Last ellipsis in the original.) On redirect examination, the DPA queried Benjamin about prior instances of domestic violence between Defendant and Carrie, and about Melissa's behavior when her maternal grandfather, Ron, went to the house to get her. At this point, defense counsel called for a bench conference:

> [DEFENSE COUNSEL]: Judge Florendo, it appears that Melissa Johnson is not here. Carrie Johnson is not here. The victim is listed as Ben[jamin] Johnson. It's the defense's position that -- whether [Benjamin] was feeling terrorized or whether he wasn't feeling

> terrorized, how he was feeling by what his brother, my client, was doing is really central to whether my client is guilty or not.
>
> And my belief is just that a lot of this information about his relationship with his wife really muddies the situation today. I mean, this is a very specific charge. And there's only one person listed as a victim. And that person is Ben[jamin] Johnson.
>
> THE COURT: The State's not required to show though that the victim was actually terrorized.
>
> [DEFENSE COUNSEL]: Well, it obviously is very highly prejudicial to Daniel Johnson to bring in a lot of material information or speculation or hearsay about his relationship with his wife on other occasions.
>
> THE COURT: It's not speculation if he says he saw them hurting each other.
>
> [DEFENSE COUNSEL]: I don't think it's relevant to the charge before us today. It's prejudicial.
>
> THE COURT: Well, I made a ruling already. I'll stick with my ruling.
>
> (Bench conference concluded.)
>
> . . . .
>
> Q [(By the DPA)]: When Carrie's father came down to get Melissa, would you please describe Melissa's demeanor?
>
> A She seemed fine. She didn't seem distraught at all.
>
> Q Not at all?
>
> A No, she didn't.

(Emphasis supplied.) After Benjamin's testimony was completed, the DPA requested and was granted a continuance of the trial in order to interview Melissa and have her brought to trial as a witness.

Melissa did not testify at the January 17, 2001 continued trial. Instead, the DPA re-called Benjamin as a witness. Then arresting officer Rian Sato (Officer Sato) testified for the State. Officer Sato interviewed Benjamin on November 18, 2000 and wrote the police report of the incident, supra. When asked by the DPA what Benjamin told him "with regard to whether or not he was terrorized on this particular

occasion[,]" Officer Sato replied,

> He stated that his brother, Daniel Johnson, had made numerous threats in the past specifically about sticking a knife into his estranged wife Carrie's belly. Ben[jamin] Johnson stated that the words that Daniel [Johnson] used that day was that he wanted to gut his wife Carrie.
>
> But what really alarmed [Benjamin Johnson] was that [Daniel Johnson] posed a question to their little daughter Melissa: If she would like to see her mother murdered. [Benjamin Johnson] said that would make him extremely alarmed and terrorized him that Mr. [Daniel] Johnson would follow through with that threat.

The DPA was beginning his direct examination of Ron, who had picked Melissa up from Defendant's house, when defense counsel objected to Ron's testimony as generally irrelevant. In response, the DPA stated:

> [DPA]: Your Honor, I'd just like the record to reflect that the only victim is not Ben[jamin] Johnson. This is the risk of terrorizing another person. That would be either Ben[jamin] or Melissa.

(Emphasis supplied.) Ron testified that he was at home when Benjamin and Benjamin's father showed up. "They both appeared to be in a panic. They said that I needed to come rescue Melissa right away and come over to where Melissa was with [Daniel Johnson] at their house in Captain Cook." Ron also remembered that Benjamin "explained on the way [to the house] that he overheard [Daniel Johnson] trying to enlist Melissa's help to kill her mommy and bring the knife to daddy and those kinds of things. And that also [Daniel Johnson] was planning on taking [Melissa] out of the state." Ron described the scene at the

house and Melissa's demeanor:

> At first I came in and [Daniel Johnson] was extremely combative and appeared to be up all night or intoxicated. Just crazy is the only way I could describe it. I had a cell phone and called the police. And then [Daniel Johnson's] dad took Melissa to the end of [the] street while the police came. And then I was with Melissa at the end of the street. . . .
> . . . .
> [Melissa] appeared to be traumatized like her eyes were ghost-like, like she was kind of in shock or something.
> . . . .
> . . . . In the house I was -- there were knives what [(sic)] appeared to be strategically placed: one by the door on a shelf, there was one in the bedroom, and in some other location, but one right by the door.
> . . . .
> [Melissa] looked like she was shell-shocked. That's the only way to describe it. Her demeanor and just -- hard to -- just didn't look like she had any life in her eyes. It looked like she was in shock for -- I'd never seen her up to that point like that.

Ron remembered a conversation he had with Benjamin, after Defendant was arrested again during the continuance of the trial:

> Ben[jamin] apologized. He felt like he -- he went to great lengths to explain how he thought his brother was doing good, and he wanted to help him. And that's why he didn't really fully say everything about what was said to Melissa at the [November 27, 2000 trial proceedings]. He was very apologetic.

Benjamin had testified earlier in the day, however, that the conversation had nothing to do with his previous testimony. On cross-examination, Ron also recalled that Melissa told his wife, "you know, my daddy wanted me to kill my mommy."

After Ron's testimony, both sides rested. Immediately after closing arguments were completed, the court asked the DPA

to read the charge again. The DPA recited:

> On or about the 18th day of November, 2000, in Kona, County and State of Hawaii, Daniel J. Johnson, with the intent to terrorize or in reckless disregard of the risk of terrorizing another person did threaten by word or conduct to cause bodily injury to Carrie Johnson, thereby committing the offense of Terroristic Threatening in the Second Degree, in violation of Section 707-715(1) and 707-717 (1), Hawaii Revised Statutes as amended.

The court then asked, "So who is the person who was to be terrorized?" The DPA replied, "Both and either/or, Ben[jamin] or Melissa." The court queried whether the person threatened and the person put at risk of being terrorized need be one and the same under the statute, pointing out that "the threat was directed at Carrie." The DPA responded, "Correct. But it's with the risk of terrorizing another person. And you don't have to threaten to cause bodily harm to the same person that you risk terrorizing." The DPA added:

> I haven't seen any case law that requires that the person who the threat is made to be the object of the threat. Because you can do terroristic threatening by threatening by word or conduct either to cause bodily injury to another person, to cause serious damage to property, or to commit a felony.
>
> And for that matter, I could reread the charge to commit a felony. And I will reread it that way, because clearly stabbing a woman with a dangerous weapon would be a felony. So let me read it that way.
>
> On or about the 18th day of November, 2000, in Kona, County and State of Hawaii, Daniel Johnson, with the intent to terrorize or in reckless disregard of the risk of terrorizing another person, did threaten by word or conduct, A, to cause bodily injury to Carrie Johnson, and/or, C, to commit a felony, thereby committing the offense of Terroristic Threatening in the Second Degree in violation of Section 707-715 (1) and 707-717 (1), Hawaii Revised Statutes as amended.

The court thereupon continued the proceedings to February 12, 2001, so that the parties could file memoranda

concerning the issue it had just raised. At the February 12, 2001 proceedings, and after reviewing the memoranda submitted, the court first convicted Defendant of terroristic threatening in the second degree, then proceeded to explain its reasoning in doing so:

> [THE COURT]: . . . . The Court has reviewed the memorandum [(sic)] of counsel and will find that the State has proven beyond a reasonable doubt that the Defendant did commit the offense of terroristic threatening in the second degree. And let me tell you the reasoning for this decision. . . . . [T]he Court concludes that the statement, I would like to put a knife in her, is a true threat, given the context of the statement, which is [(sic)] situation where [Defendant] was under some degree of stress and upset because of the process of moving and his relationship with his wife, the mother of the child Melissa. The house was a mess because of moving efforts. There were knives around, around the house. And the, [Defendant's] actions prompted his brother to seek help from his father and from the father-in-law, [Ron Cawthon]. So, I, I think that there is evidence of a true threat with regard to the statement, I'd like to put a knife in her. The statement, would you like to see you [(sic)] mom die, I think is a little more of a gray area. I would find that that would not be a terroristic threat. But the statement, I would like to put a knife in her, is. So, you have the right to appeal if you like, Mister Johnson. You can consult with your attorney about that decision.
>
> [DEFENDANT]: Um-hm.
>
> [THE COURT]: Any comment from the State on sentencing?
>
> [DPA]: No, Your Honor.

(Emphasis supplied.) At that point, however, defense counsel piped up:

> [DEFENSE COUNSEL]: We were . . . No, I was hoping we could make our closing argu, some argument at this point. But is that not . . .
>
> [THE COURT]: Oh, I'm sorry. I kind of . . . Okay, well, go ahead. I'm sorry. I, I erroneously did not let you argue before I made my ruling, so . . .
>
> [DEFENSE COUNSEL]: Well, based . . .
>
> [THE COURT]: I had reviewed your written memorandum and I, I thought . . .
>
> [DEFENSE COUNSEL]: Yes, I understand. Based on my research and what I wrote in the memorandum, is that there are two prongs. And the Court just addressed the first prong, which is, is the statement or was the statement made a true threat? And the Court just concluded that it was a true threat. . . . . However, if, even if the Court finds that

that is a true threat, which our position is that it is not a true threat under the law, the second prong is, in uttering that statement, did [Defendant] intend or at least disregard a substantial risk that his statements would be communicated to Carrie Johnson? And the answer to that is clearly no. [Defendant's] brother Ben[jamin] testified that yes, his, [Defendant] was angry, he was upset to the point where he did call for help to try to get Carrie [(sic)] out of the house, not because he was afraid of anybody being hurt, but his testimony was just he didn't want Carrie [(sic)] to be around [Defendant], her father . . . I'm sorry, Melissa, to be around her dad when he was so angry. . . . . Carrie was not there. Ben[jamin] Johnson, by his testimony, had no reason to tell Carrie. He never said he was going to. That, that was not even a, a, anything that ever came up. And certainly, . . . Melissa, who was never brought into Court, either in person or by way of any kind of videotape or audiotape, whether, what, that, that [Defendant's] statement in anger, made in anger, was going, was going to be communicated to the mother, is the second prong of this offense. And that's really the thrust of this motion, that it's two-pronged, and that even if the Court finds that [Defendant's] statements were a true threat under the law, the second prong, as outlined in Chung,[3] has not been met here. Because, a, a third-party threat . . . It's not that any third party might be terrorized. It's that, has there been a risk created that the object of the threat would be told, that Carrie would be told, what [Defendant] said and that thereby Carrie would be threatened? And that is, the answer to that is no. And therefore, we're asking for an acquittal in this case based on the fact that that second prong has not been met.

[THE COURT]: Mister [DPA]:

[DPA]: Yes, Your Honor, we think that, as our memorandum argues, that the statute does not say that the person who, about whom the threat is made, in this case which would be Carrie, does not have to be the person who is, who is terrorized or in reckless disregard of terrorizing. It simply says in the charge, on the statute says, with intent to terrorize or in reckless disregard of the risk of terrorizing another person. Mister, the Defendant's behavior in this case did terrorize or was in reckless disregard of the risk of terrorizing other people, including Melissa or his brother [Benjamin]. His brother was the one that reported the whole situation and, and that must have, that put him in fear. So therefore, with the wording of the statute and the wording that the charge was in here, it was not necessary that Carrie be the person, that Carrie have been, heard this, or that it would've been communicated to her. It is that the, that the threat was made and that the reaction of his brother Ben[jamin] Johnson was to then contact the police and, and so, it leads to a conclusion that he either terrorized him or was in reckless disregard of terrorizing. So we think that the charge can stand.

. . . .

[DEFENSE COUNSEL]: . . . I know, but, but the problem with, with construing, with, with the vagueness of the statute, and then trying to,

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[3] State v. Chung, 75 Haw. 398, 862 P.2d 1063 (1993).

and then finding my client guilty under the statute is we had testimony from the person who was listed, and the only person I know who was ever listed, considered the victim, Ben[jamin] Johnson. And I, I mean, by, by the Court's, the Court's, under the Court's interpretation it appears that this is a victimless crime, and it isn't really.

. . . .

[THE COURT]: Okay. So, I, I don't think that the State is required to prove that the Defendant intended to, or act in reckless disregard of the risk that his statement be communicated to Carrie Johnson. That's not what's, that's not a, an element of the offense of terroristic threatening.

[DEFENSE COUNSEL]: Well, how would you . . .

[THE COURT]: It is, there is, the element is that he acted with intent to terrorize or in reckless disregard of the risk of terrorizing another person, and . . .

[DEFENSE COUNSEL]: Well, who was the, what, who was the, who, who, [Defendant], who was [Defendant] intending to terrorize? Was he intending to terrorize his brother? We would say no. His brother testified. This trial was continued for many, many, many weeks so that Melissa Johnson could be brought to Court. Well, that never occurred. We never saw Melissa Johnson. We never heard from her, and we never heard of any audio or video tapes. And so there was nobody . . . And there was no one in the room with [Defendant] when he apparently made these statements, according to the testimony that we heard. Ben[jamin] Johnson was listed as the victim, and, in fact, the police report was written in such as [(sic)] way that Ben[jamin] Johnson, they, they claimed, although he refused, he testified to the contrary, the officers claimed he told them he was, quote, unquote, terrorized. But he testified under oath that that was not true. He was not terrorized, he was not threatened. And then my, under my, by, and after my reading of the, of this [Chung] case, my understanding of the law then changed, because under this case it appeared to me very clear that Melissa, I'm sorry, that Carrie was the one who was at risk, who would've had to have been at risk of being terrorized. And, and the question then is did [Defendant] place Carrie at risk of being terrorized or did he intend for Carrie to be terrorized? And the answer is, appears to be no, under the facts of this particular case.

[THE COURT]: Okay. So, I think that the threats were communicated to Benjamin Johnson and/or to Melissa. Benjamin Johnson heard the threats. He reported them to Officer Saito. He testified that Melissa was present while Defendant was present. He testified that Mister Johnson, the Defendant, stated that he said, he would like to put a knife in her, once outside and again inside the house. And he was sufficient, sufficiently concerned enough to contact Carrie's father and the police department.

[DEFENSE COUNSEL]: Well, just for the record, I don't believe, I believe Ben[jamin] Johnson testified that he, he was not in the room with [Defendant] when he made these statements. Ben[jamin] Johnson also testified that [(sic)] did not know where Carrie was either. I'm sorry, he stated that he didn't, testified that he didn't know where Melissa, [Defendant's] daughter, was either, at the time that these statements were made. And, you know . . .

> [THE COURT]: Yeah, the, the, the intent to terrorize in this case I will find would be the intent to terrorize Carrie Johnson or the reckless disregard of the risk of terrorizing reckless [(sic)], Carrie Johnson.
>
> [DEFENSE COUNSEL]: Carrie?
>
> [THE COURT]: Carrie Johnson. That is how the complaint was . . .
>
> [DEFENSE COUNSEL]: Well, you're finding, the Court is now finding that he intentionally or, or recklessly disregarded the risk that Carrie Johnson would be terrorized?
>
> [THE COURT]: By the statement, I'd like to put a knife in you.
>
> [DEFENSE COUNSEL]: Well, how is that proven though?
>
> [THE COURT]: Well, it's for the trier of fact to determine whether or not a reasonable person would be terrorized or there would be a reckless disregard of the risk of terrorizing a reasonable person by that statement.
>
> [DEFENSE COUNSEL]: But Carrie was not . . .
>
> [THE COURT]: There doesn't have to be proof of actual terrorization, as you know.
>
> . . . .
>
> [DEFENSE COUNSEL]: Well, no, I would just ask the court, then, on the record, what were the circum [(sic)], what are the circumstances found from the trial testimony whereby the risk was created that Carrie would be terrorized?
>
> [THE COURT]: Well, from the statement itself. From the other statement, would you like to see your mom die. From the presence of knives within the home. From the statement about the Defendant's emotional condition at the time of the offense. From the fact that Mister Ben[jamin] Johnson himself felt sufficiently alarmed to contact the police and the minor's father [(sic)] in order to retrieve the minor from the custody of Mister Benjamin [(sic)] Johnson. From Officer, Officer Sato's statement to, of his interview with Benjamin Johnson, who stated to Officer Sato that he, Defendant made numerous threats, to sticking a knife in his wife's belly, that he wanted to gut her, that he asked his child, do you want to see your mother murdered. That the testimony of Mister Ron [Cawthon], that he overheard that Benjamin Johnson said he overheard Defendant enlist, enlist his [(sic)] help in killing his wife and that he wanted to take his child from the State. Testified that Daniel Johnson was combative, crazy. That after the incident, Melissa's eyed were ghostly and in shock. That Mister [Ron Cawthon] testified that he saw knives on the shelves by the door and on other occasions.

(Emphases and footnote supplied; some ellipses in the original.) An extended colloquy between Defendant and the court followed, after which the court again found Defendant guilty, and sentenced him to probation, but granted his oral motion to stay the

sentence pending appeal. Defendant filed a timely notice of appeal on February 15, 2001.

II. Discussion.

On appeal, Defendant first contends that

> [i]n the instant case, the oral charge was fatally defective in that it failed to sufficiently allege the elements of terroristic threatening in the second degree. Specifically, the oral charge failed to allege the person whom [Defendant] intended to terrorize. The oral charge failed to name a complainant; the oral charge only stated "another person."
>
> Because of the defective charge, [Defendant] suffered substantial prejudice. The failure to identify the "another person" resulted in much confusion about the identity of the complainant during the trial. The State throughout the trial misled the defense by repeatedly identifying the wrong person as to whom [Defendant] intended to terrorize or was in reckless disregard of terrorizing. The State NEVER named Carrie Johnson as the "another person." Instead, on numerous occasions, the State identified either Benjamin Johnson and/or Melissa Johnson as the person(s) whom [Defendant] intended to terrorize.

Opening Brief at 7 (capitalization in the original; citations to the record omitted).

Although we may not necessarily agree with Defendant's categorization of the trial error, as one involving a defective oral charge, State v. Jendrusch, 58 Haw. 279, 283, 567 P.2d 1242, 1245 (1977) ("Where the statute sets forth with reasonable clarity all essential elements of the crime intended to be punished, and fully defines the offense in unmistakable terms readily comprehensible to persons of common understanding, a charge drawn in the language of the statute is sufficient." (Citations omitted.)); State v. Israel, 78 Hawai'i 66, 70, 890 P.2d 303, 307 (1995) ("In analyzing whether a defendant's article

I, section 14 [(of the Hawai‘i Constitution)] right to be informed has been violated, however, we are not confined to an examination of the charge. On the contrary, in determining whether the accused's right to be informed of the nature and cause of the accusation against him or her has been violated, we must look to all of the information supplied to him or her by the State to the point where the court passes upon the contention that the right has been violated." (Citations, internal block quote format and original brackets omitted.)), we agree that there was error. For it is clear, on the whole record, that from Defendant's arrest up until the time the court rendered its final verdict, the State proceeded on the allegation that Benjamin or Melissa was the person Defendant intended to terrorize, or recklessly put at risk of being terrorized. And it is equally obvious from the record that the defense also proceeded all along on this basis. Defense counsel's evident astonishment when the court convicted Defendant on the theory that Carrie was the person in question, is emblematic in this respect.

The State, in effect, rendered a bill of particulars that specified Benjamin or Melissa as the person in question, and the State should have been held to that theory of the case. Cf. State v. Valenzona, 92 Hawai‘i 449, 452, 992 P.2d 718, 721 (App.

1999) ("once a bill of particulars is filed, the State is limited to proving the particulars specified in the bill" (footnote omitted)). Instead, the court in effect amended the oral charge while rendering its verdict, by finding Defendant guilty on the theory that Carrie was the person Defendant intended to terrorize, or recklessly put at risk of being terrorized. This was error, because it prejudiced Defendant's substantial rights. Hawai‘i Rules of Penal Procedure (HRPP) Rule 7(f) (2001) ("The court may permit a charge other than an indictment to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."); State v. Matautia, 81 Hawai‘i 76, 81, 912 P.2d 573, 578 (App. 1996) ("The [HRPP Rule 7(f)] test is conjunctive, and amendment of a charge is improper unless both requirements are satisfied. State v. Whitley, 65 Haw. 486, 654 P.2d 354 (1982).")).

In Matautia, supra, the State initially charged the defendant with driving while his license was suspended. Just minutes before trial, however, the trial court granted the State's request to amend the complaint to charge the offense of driving without a license. On appeal, we concluded that the defendant "clearly did not have time to prepare an adequate

defense to the new charge and was substantially prejudiced by the last-minute amendment." Matautia, 81 Hawai'i at 84, 912 P.2d at 581.

Here, the turnabout was even more egregious, because the change was made as the court rendered its verdict -- after the presentation of evidence and closing arguments. In Matautia, the trial court erred in not affording the defendant sufficient time to prepare an adequate defense. Here, the court's turnabout put preparation time and an adequate defense simply out of the question. And the specification of the person Defendant allegedly intended to terrorize, or recklessly put at risk of being terrorized, was critical. Defendant did not seriously dispute at trial that he made the statement at issue. His defense was, one, that the statement was not a true threat cognizable under the statute, and two, that he did not intend, or recklessly disregard the risk, that another person be terrorized. Just the portions of the record quoted above detail several material evidentiary disputes that were argued and resolved against Defendant on the basis that Benjamin or Melissa was that person. Whether those disputes would have been resolved in favor of Defendant, were it understood that the person in question was Carrie, is a matter of immaterial speculation. The timing of the

court's turnabout foreclosed even the possibility of an adequate defense. That clearly prejudiced Defendant in his substantial rights, HRPP Rule 7(f), and was therefore error. By the same token, we conclude the error was not harmless beyond a reasonable doubt. State v. Vinuya, 96 Hawai'i 472, 481, 32 P.3d 116, 125 (App. 2001) ("with the possible exception of a limited class of trial errors not relevant here, the standard of review applicable to all trial errors is the 'harmless beyond a reasonable doubt standard'"; in other words, "whether there is a reasonable possibility that error might have contributed to conviction" (internal block quote format and citation omitted)).

We further decide that insufficient evidence was adduced at trial to support a conviction under the allegation the State elected in this case -- namely, that Defendant intended to terrorize Benjamin or recklessly placed Benjamin at risk of being terrorized[4] – and we must therefore reverse the judgment.[5] As we stated in State v. Yamamoto, 98 Hawai'i 208, 219, 46 P.3d

[4] The court found that the purported threat -- in the court's paraphrasing, "would you like to see you [(sic)] mom die" -- that Defendant-Appellant Daniel J. Johnson allegedly conveyed to his daughter, Melissa Johnson, "would not be a terroristic threat."

[5] Cf. State v. Valenzona, 92 Hawai'i 449, 454, 992 P.2d 718, 723 (App. 1999) (affirming the trial court's dismissal of the criminal complaint with prejudice where the State filed a bill of particulars specifying allegations that were insufficient to constitute an offense).

1092, 1103 (App. 2002):

> In considering whether to reverse or remand for a new trial on the kidnapping charge on account of the court's erroneous jury instruction, we must inquire whether there was sufficient evidence to support the charge. State v. Malufau, 80 Hawai'i 126, 132, 906 P.2d 612, 618 (1995). The test on appeal for sufficiency of the evidence 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." State v. Ildefonso, 72 Haw. 573, 576, 827 P.2d 648, 651 (1992) (citations omitted). See also State v. Tamura, 63 Haw. 636, 637, 633 P.2d 1115, 1117 (1981). "Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion." Ildefonso, 72 Haw. at 577, 827 P.2d at 651 (citation, internal quotations marks and ellipsis omitted).

We have also stated that "the precise issue is whether the record contains sufficient evidence of [the defendant's] intent to cause or of his reckless disregard of the risk of causing [the victim] serious alarm for his personal safety." In re Doe, 3 Haw. App. 325, 332, 650 P.2d 603, 608 (1982). Although there may have been evidence of Defendant's "intent to cause or of his reckless disregard of the risk of causing [Carrie] serious alarm for [her] personal safety[,]" id., there was no evidence of the same with respect to Benjamin.

III. Conclusion.

We therefore reverse the February 12, 2001 judgment of the court. In the light of this disposition, we do not reach Defendant's remaining points of error on appeal.

DATED: Honolulu, Hawaii, March 7, 2003.

On the briefs:

James S. Tabe,
Deputy Public Defender,
State of Hawaii,
for defendant-appellant.

Frederick Giannini,
Deputy Prosecuting Attorney,
County of Hawaii, for
plaintiff-appellee.

Chief Judge

Associate Judge

Associate Judge