

NO. 24399

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
RICHARD R. CASSELL, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(CR. NO. 00019246)

MEMORANDUM OPINION

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

Defendant-Appellant Richard Cassell (Defendant) appeals from the June 7, 2001 judgment convicting him of Harassment, Hawaii Revised Statutes (HRS) § 711-1106(1) (a) (Supp. 2001)<sup>1</sup>. District Judge Fa'auuga To'oto'o presided in the bench trial. Defendant was sentenced to probation for six months subject to the following conditions: (1) that he undergo anger management assessment and treatment if deemed appropriate by the probation officer, (2) that he pay a fine of \$200, (3) that he pay a criminal compensation fee of \$50, and (4) that he remain arrest- and conviction-free.

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<sup>1</sup> Hawaii Revised Statutes (HRS) § 711-1106 (Supp. 2001) states, in relevant part, as follows:

(1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:

(a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact;

. . . .

(2) Harassment is a petty misdemeanor.

Defendant contends that (1) the evidence was insufficient to support a finding that Defendant acted "with intent to harass, annoy, or alarm" Complainant; (2) Plaintiff-Appellee State of Hawai'i (the State) failed to present evidence supporting findings, beyond a reasonable doubt, of facts negating the HRS § 703-302(1) (1993)<sup>2</sup> choice-of-evils justification defense; and (3) in light of the State's failure to present evidence supporting findings, beyond a reasonable doubt, of facts negating the HRS § 703-304(1) (1993)<sup>3</sup> use of force in self-protection justification defense, the conviction is plain error.

We affirm.

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<sup>2</sup> HRS § 703-302(1) (1993) states, in relevant part, as follows:

Conduct which the actor believes to be necessary to avoid an imminent harm or evil to the actor or to another is justifiable provided that:

- (a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
- (b) Neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
- (c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

<sup>3</sup> HRS § 703-304(1) (1993) states, in relevant part, as follows:

Subject to the provisions of this section and of section 703-308, 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.

## BACKGROUND

On June 7, 2001, Defendant was orally charged as follows:

[O]n or about January 15th, the year 2000, in the City and County of Honolulu, State of Hawaii with the intent to harass, annoy[,] or alarm another person in partic [sic] to wit [Complainant], you did strike, shove, kick or touch [Complainant] in an offensive manner or subject her to offensive physical contact thereby committing the offense of harassment in violation of [HRS § 711-1106(1)(a)][.]

The following evidence is in the record.

On January 15, 2000, at approximately four o'clock in the morning, Complainant was driving Defendant's white Lexus automobile on Wilikina Drive while Defendant was in the passenger seat. At that time, Complainant was sixteen years old, but out of high school, and had been dating Defendant who was nineteen years old.

During direct examination, Complainant testified that she had been arguing with Defendant about her getting jealous while in town earlier in the evening. Complainant testified that Defendant touched her on the tricep area of her arm which eventually left bruises. Furthermore, Complainant stated that Defendant touched her by the earrings on her ear. These touchings occurred while Complainant and Defendant were arguing and while Defendant was upset. Complainant further testified, in relevant part, as follows:

Q. So this wasn't like he was touching you or as a caress?

A. No.

Q. Okay. Did you feel pain?

A. No.

Q. You didn't hurt when he-- Do you remember telling an officer that he struck you several times in the head?

A. No.

Q. Did he ever strike you in the head?

[DEFENSE COUNSEL]: Objection your Honor. Leading.

[PROSECUTOR]: Your Honor, State asks for some leeway as we do have a local witness.

THE COURT: Alright, overruled.

Q. [Complainant], did he ever touch you on the head?

A. Yes.

Q. How many times did he do that?

A. I don't know.

Q. Was it more than once?

A. Like that night?

Q. Yes, that night.

A. I really don't remember. I don't remember anything about him hitting me that night but I know that-- I don't remember it now but I know that I had a bruise on my arm.

Q. And you remember that it being from him?

A. Yes.

Q. And all of this was when you were arguing?

A. Yes.

Q. And he was upset?

A. Yes.

Q. Did he touch you because he wanted to hurt you?

A. I don't know.

Q. Did he do it because he didn't want to hurt you? Why do you think he was--

[DEFENSE COUNSEL]: Objection, your Honor, calls for speculation.

THE COURT: Overruled.

A. I think he touched me because I was trying to get out of the car.

Q. Why were you trying to get out of the car?

A. Because I was irritated because he was yelling at me.

Q. And how-- Did you give him permission to touch you in this way?

A. No.

Q. Did you want him to do this?

A. No.

Q. Okay. Do you remember stopping the vehicle that night on Wilikina Drive, near Wilikina Drive?

A. Yes.

Q. Do you remember exiting the car?

A. Yes.

Q. Yelling "He's trying to kill me!"?

A. No.

Q. Do you remember running out of the car?

A. Yes.

Q. Were you scared at that time?

A. I was crying. I don't remember my feeling though.

During cross-examination, Complainant testified, in relevant part, as follows:

Q. [Complainant], when you say you were trying to get out of the car, was the car moving when you were trying to get out of the car?

A. Yes.

Q. And was this on Wilikina Drive?

A. I was trying to get out on the freeway.

Q. While the car was moving?

A. Yeah, it was moving.

Q. And what's the speed limit on the freeway?

A. Probably from 5 to 50 miles an hour, around there.

Q. You mean you had slowed the car down to 5 miles an hour on the freeway?

A. By the Mililani exit.

Q. At the Mililani exit. But you were driving, right?

A. Yes.

Q. So the car was-- Was the car still rolling when you were trying to get out?

A. Yes.

Q. And at that point, isn't it true that [Defendant] grabbed your right arm and pulled you back into the car?

A. I don't remember where he grabbed me but I know that he was, yeah.

Q. Trying to pull you back into the car?

A. Yes.

. . . .

Q. Did you succeed in getting the car come to a complete stop on the freeway?

A. I don't remember.

Q. So now this incident that happened on the freeway is several miles from the Wilikina Drive area where you were stopped, right?

A. Yeah.

Q. So at some point you started the car moving back to the normal rate of speed that you should be driving on the freeway?

A. Yes.

. . . .

Q. Now, did you try to get out of the car anytime between Mililani and Wilikina Drive a second time?

A. No.

Q. And while you were trying to get out of the car the first time, there was a struggle between you and [Defendant], right?

A. Yes.

Q. And you said that you were irritated?

A. Yeah.

Q. Because he was yelling at you?

A. Yes.

Q. But he was yelling at you because he wanted you to drive, right?

A. He was just interrogating me, asking me questions about what I did that night and stuff like that.

Prior to Complainant's testimony, the State's first witness was Military Police Sergeant Scott Anderson (MP Anderson), a canine handler with the Schofield Barracks military police. MP Anderson testified that on January 15, 2000, at four o'clock in the morning, he was in his military police vehicle returning from Higgins Road to Schofield Barracks on Wilikina Boulevard just prior to Kunia Road and he observed a white Lexus automobile stopped on the right lane, not on the shoulder of the road, with its left hand turn signal on. MP Anderson could not see within the Lexus automobile because the vehicle's windows were tinted. Concerned that it might be a drunk driver, MP Anderson notified his military police desk for Honolulu Police Department (HPD) support and stopped his vehicle twenty-five yards behind the Lexus automobile.

MP Anderson testified that one to two minutes after stopping behind the Lexus automobile, the Lexus automobile started to pull forward at a very slow rate of speed "swerv[ing] to the left and cross[ing] the center line and back to the right into the curb area." MP Anderson turned on the blue lights on his military police vehicle for safety. "As soon as [he] turned on [his] blue lights, the Lexus accelerated very fast, probably up to 60 miles an hour." Thinking that he did not have any jurisdiction to pursue the Lexus automobile with his blue lights

on, MP Anderson turned off his blue lights and pursued the Lexus automobile for about 400 meters. The Lexus automobile then pulled over to the right side of the road and MP Anderson stopped behind the Lexus automobile and turned on his blue lights for safety. At that point, MP Anderson saw Complainant jump from the driver's side of the Lexus automobile and run back to his military police vehicle yelling, "Help me! Help me! . . . He's trying to kill me." MP Anderson noticed that Complainant was crying, agitated, screaming, and hysterical. He also noticed that Complainant's clothes were in disarray as if she had been in a struggle. He also noticed that she had some blood on her right ear. MP Anderson testified that Defendant exited the Lexus automobile cursing<sup>4</sup>, screaming, combative, and advancing towards MP Anderson. In the words of MP Anderson, "I was ordering him to stop. I told him to stop right there. He didn't want to do it. He kept advancing saying, 'This is fucking bullshit.'" Removing his dog from the military police vehicle, MP Anderson ordered Defendant on the ground. While Defendant was lying face down on the ground, MP Anderson patted Defendant down for weapons, handcuffed him, and waited for HPD officers to arrive.

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<sup>4</sup> Military Police Sergeant Scott Anderson testified, in relevant part, as follows:

Some of the things I remember, he was saying "This is fucked up. This is fucking bullshit." Basically, for the most part he just kept repeating that "This is fucked up. This is bullshit[,] while he was advancing on me and my vehicle.



HPD Officer Frank Bonnell (Officer Bonnell) arrived on the scene and was informed of the situation by MP Anderson.

Officer Bonnell testified, in relevant part, as follows:

A. . . . [Complainant] verbally told me that she had been struck in the head several times. She said she was grabbed tightly on the right arm. She had a bruise over there. She said an earring had been taken off of her ear and she opened up her lip to show a small cut inside.

Q. Did you observe any other physical indications of violence?

A. Other than the arm, the bruise on the arm.

Q. She had bruises on her arm?

A. And the cut on the lip. I believe it was the right arm.

Q. Right arm, okay. Were these bruises fresh?

A. They appeared to be, yes.

Q. Okay. And the cut on her lip. Did you notice anything about her right ear?

A. She had wiped off a little bit of blood on her ear but I couldn't see any cut or anything. I couldn't physically see any cut. She showed me on the back side. It looked like a small cut or whatever. She told me that her earring had been removed from her ear.

Q. And did she indicate who did this to her?

A. [Defendant].

Officer Bonnell further stated, "Complainant would give us a verbal statement but she refused to give any type of written statement whatsoever."

After the trial court denied Defendant's motion for judgment of acquittal, Defendant testified as to the events on January 15, 2000, in relevant part, as follows:

Q. So when you were in the car and you were on the H2 freeway, what happened between you and [Complainant]?

A. We were arguing . . . .

. . . . .

Q. What were you arguing about?

. . . . .

A. She was jealous about something earlier.

Q. Okay, . . . what happened during the argument while the car was on the freeway?

A. She stopped in the middle of the freeway and she tried to jump out of the car while other cars were going in the middle of the freeway, while other cars are going, you know, speed limit 55 and I was trying to bring her in.

. . . . .

Q. How did she try to jump out of the car? Describe her actions.

A. She opened the door. She opened the driver's door and she tried to jump out while other cars were passing so I like grabbed her and tried to pull her . . . . .

Q. Okay, you're making a motion with two hands. So you're seated where in the front?

A. In the passenger seat.

Q. And so in the front?

A. Mm, hmm.

Q. And so you turned your body and you made your two arms go outward?

A. Yeah.

Q. And that to indicate what, cause we're recording. You have to describe your action.

A. Well, I was pulling her--

Q. With two arms.

A. -- in the car while she was struggling to get away from me, right.

Q. How did she struggle to get away from you?

A. Well, she was throwing her arms around and just trying to get out but--

Q. What was the car doing during all of this?

A. It was rolling a little but-- I don't remember the whole situation exactly what happened but--

Q. Okay, so, did she get out of the car?

A. No, she didn't.

Q. Okay, and then what happened then?

A. She continued. She drove up. She continued to drive at like 3 miles per hour and then she--

Q. On the freeway?

A. Yeah.

Q. With the car door open?

A. No, it was shut. I know it was open for a little while but she closed it.

Complainant then drove two miles.

Q. So what happened after she started the car rolling at 50 miles an hour? What happened then?

A. The MP pulled behind us and pulled us over.

. . . .

Q. . . . .

And what happened after the car was stopped?

A. She jumped out of the car, ran towards the MP, and I stepped out of the car and I didn't curse and I didn't throw my hands in the air. And he was trying to set the dog on me right as soon as I stepped out of the car. I didn't run over there. I didn't walk over there.

. . . .

Q. Did you touch her earring?

A. Well, during the struggle I may have, you know, I was trying to pull her in. I may have. That's probably why she got the cut on the ear.

. . . .

Q. And did you grab her at any other parts of her body besides the arm and by her ear?

A. No.

Q. She testified that you touched her head. Did you touch her head?

A. No, I didn't touch her head.

Q. So when you were trying to get back in the car you just used her arms and--

A. I just tried to pull her in the car and she was struggling to fight me away, right, so I was pulling her in and that's all that happened. I didn't strike her. I didn't have no intent to hurt her or anything like that.

Q. Okay. Did you intend to annoy her in any way?

A. No, not, I mean we were arguing but I didn't intend to hurt her or harass her.

Q. So during the argument you never struck her?

A. No.

During closing arguments, the State argued as follows:

Your Honor, I believe the State has met its burden beyond a reasonable doubt that there was touching. There was a touch to the head. [Complainant] [alleged] a touch to the head, bruised - a grab to the right arm, pain to her face, her earrings were removed. The earrings resulted in blood coming down her ears.

All of the factors even with [Complainant] trying to minimize what occurred still results in showing that there was some offensive touching and that the obvious proof of the intent to harass, annoy[,] or alarm another person is a fact that [Complainant] was in fact alarmed, harassed and annoyed.

She exited the vehicle screaming, yelling, saying . . . "He's going to kill me!" Basically we have the testimony of the third party witnesses that testified to her injuries, obviously fresh injuries. [MP Anderson] testified that she was scared.

Taking the totality of the circumstances, the State has proven its case beyond a reasonable doubt.

During closing arguments, Defense Counsel argued as follows:

Your Honor, the defense is saying that [Defendant] had no choice. Under [HRS §] 703-302 he had a-- This is a choice of evils defense. Either she's going to jump out of the car in the middle of the freeway or he's going to pull her back in. She's driving the vehicle. They're on the freeway. They're about to get off and she just wants to get out of the car.

The car is still rolling. She testified that that's what she was doing and he pulled her back in any way he could. He could not get out of the car himself in the middle of the freeway. He had no choice but to pull her back in and he used every means possible at that point to pull her back into the car. And any kind of injuries she sustained was because of the struggle to get her back in for her own safety; also for his safety. They could have had a rear-end

collision. Somebody who had not seen them might have hit them on the freeway.

So she testified that that's what she was doing and she also has not made it clear that any of the touching was offensive to her. She does admit that she did have bruises but those bruises were caused because he grabbed her to pull her back in.

And therefore, your Honor, we ask the court to find him not guilty of harassment.

Following closing arguments, the trial court orally decided, in relevant part, as follows:

[B]ased on the testimony in front of this court, that of this case [Complainant], [MP Anderson] and [Officer Bonnell] and of course [Defendant's] testimony on the witness stand and basically this case, there's no question the [Complainant] was reluctant in this case to say what really happened.

And based on her statement to [Officer Bonnell], she told the police she was struck on the head several times. She also showed a cut in her upper lip to [Officer Bonnell] and also [MP Anderson's] observation, she was screaming, crying, running, asking for help saying that [Defendant was] going to kill her.

Based on those statements, the court finds that the State has proven its case against you beyond a reasonable doubt and find you guilty of the offense of harassment.

## RELEVANT STANDARDS OF REVIEW

### 1. Substantial Evidence

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).

### 2. Plain Error

"We may recognize plain error when the error committed affects substantial rights of the defendant." State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997) (citations and internal quotation signals omitted). See also Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) (1993) ("Plain error or defects affecting substantial

rights may be noticed although they were not brought to the attention of the court.").

State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999) (citations omitted).

"[T]his court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998) (citing State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 676 (1988)).

This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system--that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes.

State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993) (quoting State v. Fox, 70 Haw. 46, 55-56, 760 P.2d 670, 675-76 (1988)). "If the substantial rights of the defendant have been affected adversely, the error will be deemed plain error." State v. Sawyer, 88 Hawai'i at 330, 966 P.2d at 642 (citing [State v.] Pinero, 75 Haw. [282,] 291-92, 859 P.2d [1369,] 1374 [(1993)]).

"[T]he decision to take notice of plain error must turn on the facts of the particular case to correct errors that 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 676 (1988) (quoting United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)). Furthermore,

plain error may be recognized "when the error committed affects substantial rights of the Defendant." State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999) (quoting State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997)).

[E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction.

State v. Heard, 64 Haw. 193, 194, 638 P.2d 307, 308 (1981)  
(citations omitted).

#### DISCUSSION

##### 1.

Defendant argues that the State failed to present sufficient evidence that Defendant intended to harass, annoy, or alarm complainant and, therefore, the trial court erred in convicting Defendant of Harassment. Defendant contends that

There was no evidence to indicate that the touching occurred at any other time than when [Complainant] tried to jump out of the car. . . . [Defendant's] only intent was to prevent [Complainant] from jumping out of the car. Unfortunately, [Defendant's] attempt to prevent [Complainant] from falling out of the car resulted in injuries to her ear, lip and arm.

Defendant further argues that Complainant's statements to MP Anderson and Defendant's reaction after he exited the Lexus automobile was after the fact and not evidence of Defendant's intent to harass Complainant. We disagree.

HRS § 711-1106(1)(a) provides, in relevant part, that "[a] person commits the offense of harassment if, with intent to

harass, annoy, or alarm any other person, that person: . . .  
[s]trikes, shoves, kicks, or otherwise touches another person in  
an offensive manner or subjects the other person to offensive  
physical contact[.]" "It is an elementary principle of law that  
intent may be proved by circumstantial evidence; that the element  
of intent can rarely be shown by direct evidence; and it may be  
shown by a reasonable inference arising from the circumstances  
surrounding the act." State v. Hopkins, 60 Haw. 540, 544, 592  
P.2d 810, 812 (1979) (quoting State v. Yabusaki, 58 Haw. 404,  
409, 570 P.2d 844, 847 (1977)). In addition, "the mind of an  
alleged offender may be read from his acts, conduct and  
inferences fairly drawn from all the circumstances." State v.  
Birdsall, 88 Hawai'i 1, 8, 960 P.2d 729, 737 (1998) (quoting State  
v. Batson, 73 Haw. 236, 254, 831 P.2d 924, 934 (1992)). "It [is]  
for the trial judge as fact finder in [the] case to assess the  
credibility of the witnesses, including the defendant's and to  
resolve all questions of fact. The fact finder may accept or  
reject any witness' testimony in whole or in part." State v.  
Cannon, 56 Haw. 161, 166, 532 P.2d 391, 395-96 (1975) (citations  
omitted).

We agree with the State that the evidence, including  
the circumstantial evidence, permitted the trial court to find  
that Defendant intended to harass, annoy, or alarm Complainant by  
touching her on the arm, mouth, and ear.



First, there is evidence of the touchings.

Second, there is evidence that Defendant became angry with Complainant and was yelling at her before the touchings occurred. Complainant testified that Defendant was yelling at her and "interrogating [her], asking [her] questions about what [she] did that night and stuff like that." Defendant testified that he and Complainant were arguing before the touchings occurred. Defendant admits in his opening brief that "prior to the physical contact between [Complainant] and [Defendant], they were engaged in an argument. . . . [Defendant] and [Complainant] were arguing about the fact that [Complainant] was jealous over something that happened earlier in the evening."

Third, MP Anderson testified that he saw Complainant jump out of the driver's side of the Lexus automobile and run back to his military police vehicle yelling, "Help me! Help me! . . . He's trying to kill me." MP Anderson noticed that Complainant was crying, agitated, screaming, and hysterical at that point.

Fourth, Complainant testified that Defendant touched her on the tricep area of her arm, by the earring on her right ear, and on the head. Officer Bonnell testified, in relevant part, that

[Complainant] verbally told me that she had been struck in the head several times. She said she was grabbed tightly on the right arm. She had a bruise over there. She said an earring had been taken off of her ear and she opened up her lip to show a small cut inside.

Fifth, the trial court found MP Anderson and Officer Bonnell's testimony more credible than that of Defendant and Complainant. As noted above, the trial court stated, in relevant part, as follows:

[B]ased on the testimony in front of this court, that of this case [Complainant], [MP Anderson] and [Officer Bonnell] and of course [Defendant's] testimony on the witness stand and basically this case, there's no question the [Complainant] was reluctant in this case to say what really happened.

And based on her statement to [Officer Bonnell], she told the police she was struck on the head several times. She also showed a cut in her upper lip to [Officer Bonnell] and also [MP Anderson's] observation, she was screaming, crying, running, asking for help saying that [Defendant was] going to kill her.

Based on those statements, the court finds that the State has proven its case against you beyond a reasonable doubt and find you guilty of the offense of harassment.

In light of the relevant law and the evidence presented, we hold that there was sufficient circumstantial evidence for the trial court to find that when Defendant touched Complainant, he did so in an offensive manner and while intending to harass, annoy, or alarm Complainant.

2.

Defendant argues that (a) sufficient evidence of the HRS § 703-302 choice-of-evils defense was presented so as to require the State to prove, beyond a reasonable doubt, facts which negative the defense and (b) the trial court erred where it failed to conclude that the State did not do so. Defendant argues that the touching occurred while Complainant was trying to jump out of the Lexus automobile and Defendant reasonably believed that Complainant was in imminent danger. Defendant

argues that "[i]n the absence of sufficient evidence rebutting or negating beyond a reasonable doubt [Defendant's] justification defense, the trial court plainly erred in convicting [Defendant] of Harassment."

HRS § 703-302(1)(a) describes the choice-of-evils defense, in relevant part, as follows:

Conduct which the actor believes to be necessary to avoid an imminent harm or evil to the actor or to another is justifiable provided that: . . . [t]he harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged[.]

All of the elements of the choice-of-evils defense are contained within the express language of HRS § 703-302. State v. Maumalanga, 90 Hawai'i 58, 63, 976 P.2d 372, 377 (1998). "Where the defense is justification, once evidence of a fact, or a set of facts, which negatives penal liability has been introduced, the burden is on the prosecution to prove facts negating the justification defense beyond a reasonable doubt." State v. Sanchez, 2 Haw. App. 577, 578, 636 P.2d 1365, 1366 (1981) (citing State v. Realina, 1 Haw. App. 174, 616 P.2d 229 (1980)).

In the present case, there was substantial evidence, direct and circumstantial, of facts negating Defendant's choice-of-evils justification defense beyond a reasonable doubt. As stated previously, the trial court was presented with sufficient circumstantial evidence that Defendant intended to harass, annoy, or alarm Complainant. The trial court was presented with the following evidence: (1) before the touchings

occurred, Defendant was angry with Complainant and they had been arguing; (2) MP Anderson's testimony describing Complainant's statements and fearful state of mind following the incident; (3) Complainant's testimony of Defendant touching her on the tricep area of her arm, by her earrings on her right ear, and on the head; and (4) Officer Bonnell's description of Complainant's injuries.

"It [is] for the trial judge as fact finder in [the] case to assess the credibility of the witnesses, including the defendant's and to resolve all questions of fact. The fact finder may accept or reject any witness' testimony in whole or in part." State v. Cannon, 56 Haw. 161, 166, 532 P.2d 391, 395-96 (1975) (citations omitted). In this case, the trial court based its decision on its finding that the testimony of MP Anderson, Officer Bonnell, and Complainant was more credible than the testimony of Defendant. We agree with the State that

[t]he issue of whether Defendant only grabbed [Complainant] because she was attempting to jump out of a moving car or whether [Complainant] even attempted to get out the vehicle was a matter of credibility and weighing the testimony of all the witnesses as a whole. The trial court made its determination on those issues as it was within the factfinder's purview to do so.

3.

Defendant argues that (a) sufficient evidence of self-defense under HRS § 703-304(1) was presented so as to require the State to negative the use of force in the self-protection justification defense beyond a reasonable doubt, and (b) the

trial court plainly erred in failing to conclude that the State did not satisfy its burden of proof. Defendant argues that, "[a]lthough this issue was not raised by the defense at the trial court level, [Defendant's] rights were substantially impaired by the failure of the trial court to find justification." We disagree.

First, HRS § 703-304 (1993) states that "the use of force upon or toward another person is justifiable when the actor [reasonably]<sup>5</sup> 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." The evidence is insufficient to support all of the required findings and conclusion.

Second, Defendant did not testify that he was acting to protect himself. Moreover, assuming the Lexus automobile was moving when the touchings occurred, there was no evidence that Defendant's efforts in trying to physically force Complainant to unwillingly remain in the driver's seat were motivated by Defendant's interest in self-protection.

Third,

[e]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction.

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<sup>5</sup> HRS § 703-300 (1993) states that "'Believes' means reasonably believes."

State v. Heard, 64 Haw. 193, 194, 638 P.2d 307, 308 (1981)

(citations omitted). Assuming the evidence supported Defendant's assertion of a use of force in the self-protection justification defense, Defendant's failure to assert it is harmless beyond a reasonable doubt. This is so because the trial court's findings of facts supporting the conclusion that the State negated Defendant's choice-of-evils defense beyond a reasonable doubt also support the conclusion that the State similarly negated Defendant's use of force in the self-protection defense beyond a reasonable doubt. The trial court decided that Defendant's choice-of-evils justification defense was not credible. His use of force in the self-protection justification defense was similarly not credible.

#### CONCLUSION

Accordingly, we affirm the June 7, 2001 judgment convicting Defendant of Harassment, HRS § 711-1106(1)(a) (Supp. 2001).

DATED: Honolulu, Hawai'i, October 7, 2002.

On the briefs:

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