NO. 24493

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
ISAAC Y. JOO, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CR. NO. 00403693)

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

Defendant-Appellant Isaac Y. Joo (Isaac or Mr. Joo) appeals from the district court's July 26, 2001 Judgment convicting him of Harassment, Hawaii Revised Statutes (HRS) § 711-1106(1)(a) (Supp. 2002). We affirm.

BACKGROUND LISTED CHRONOLOGICALLY

October 23, 2000 Isaac and Peggy A. Joo (Peggy) are the divorced parents of a young daughter (Daughter). By court order, when one parent's time with Daughter was ceasing and the other parent's time with Daughter was commencing, the parents would meet at a public place to transfer physical custody of Daughter to the other parent. Isaac alleges that the following relevant events occurred on this date:

> [Isaac's] "state of mind" was that before he went to work he was "dropping [Daughter] off" (exchanging his daughter) in a Court Ordered "public" place "in front of Wal-Mart." [Isaac] got out of his car and proceeded to go through the process of readying his child and stroller for the exchange to Peggy. Instead of waiting for [Isaac] to finish the process which would only have taken a few minutes, [Peggy] approached [Isaac] ([Isaac] did not approach her) and attempted to rush him by touching the door, touching/pushing [Isaac] into the stroller as he was bent over readying the stroller. There is very little room between the open door of the vehicle (a small Blazer) and the vehicle itself. [Isaac] was in that space with the stroller. Peggy moved into

> that space and came in contact with [Isaac]. She then pulled [Daughter] out of the vehicle. It was not Peggy's right to pull [Daughter] out of the vehicle, it was [Isaac's] right because it was his vehicle and he was driving it and he was in the process of getting [Daughter] out of it. [Isaac] was not delaying or even leisurely conducting the exchange (he was expeditiously attempting to conduct the exchange because he was on his way to work). It was certainly not [Isaac's] intent to aggravate Peggy to action. Yet, it was Peggy who acted with intent to annoy, not Appellant Isaac. Peggy (the person alleging harassment) and her counsel through the State failed to offer sufficient evidence that [Isaac] struck, shoved, kicked, or otherwise touched [Peggy] in an offensive manner, or intended to annoy, harass, or alarm her. Quite the contrary.

(Emphasis in original.)

October 25, 2000 — Isaac alleges that on this date in the divorce case between Isaac and Peggy, District Family Judge Darryl Choy conducted an evidentiary hearing of events including the relevant events occurring on October 23, 2000, and denied Peggy's request for a restraining order and Isaac's request for a change of custody.

May 24, 2001 — Isaac was served with a penal summons charging him with having committed Harassment, HRS § 711-1106(1)(a), on October 23, 2000.

July 26, 2001 — Trial was conducted by District Court Judge Fa‘auuga To‘oto‘o. According to the partial transcript presented by Isaac, the following was stated during the trial:

> THE COURT: Okay . . . Mr. Joo, you said you wanted me to look at some statements. Alright, and do you have a copy of this statement for the prosecutor to look at? Make sure whatever you give me, make sure you have a copy for the prosecutor.
>
> MR. JOO: Yes, same thing.
>
> THE COURT: Okay, let's see what you got. Alright, Mr. Joo, looking at these documents, looks like it's all documents involving the family court proceeding that's ongoing?
>
> MR. JOO: Correct, but it shows a pattern, your Honor.

THE COURT: Okay. Alright. Ms. Prosecutor, any rebuttal witnesses from the State.

As noted in footnote 1 infra, these documents were six orders entered by the family court in the divorce case.

According to the partial transcript presented by Isaac, after all of the evidence was presented, the following was stated:

MR. JOO: . . . .

The State tries to make [Peggy] out to be a credible witness although she's lied in the past and left the state, kidnapped [sic] the child, actually, and took her to Illinois. I didn't have to wait for the court to get her, but I went to the channels.

I haven't done anything wrong through the divorce case or as of today, nothing. They'd like you to believe that everything like that happened but it didn't, it didn't, and that's all I have.

. . . .

THE COURT: . . . .

. . . .

And Mr. Joo and Ms. Prosecutor, based on the Court's overall observation and listening and try[ing] to figure out what really happened, this Court finds that based on the credible evidence, the offer by the complainant in this case, the Court finds that Mr. Joo indeed pushed [Peggy] twice on October 23rd, . . . that [Mr. Joo] did indeed push her without her permission[.]"

Judge To‘oto‘o found Isaac guilty and sentenced Isaac to six months' probation with conditions, payment of a $25.00 fine, and a $25.00 compensation fee.

August 1, 2001 — Someone filed in the district court file a copy of an affidavit by the District Court Clerk who was assigned to the trial on July 26, 2001, stating, "Due to tape recording equipment malfunction, the audio cassette tape is inaudible."

November 13, 2001 — Isaac filed his opening brief. Attached thereto are: (1) the original of the District Court Clerk's August 1, 2001 affidavit; (2) the original of the "TRANSCRIPT OF PARTIAL PROCEEDINGS" in Judge

To'oto'o's court on July 26, 2001; and (3) a copy of the July 26, 2001 Notice of Entry of Judgment and/or Order.

November 13, 2001 Isaac filed his motion and memorandum seeking

> that the Record on Appeal be augmented to include 1) the 16th of July 2001 "Declaration of Isaac Y. Joo," including Exhibits therewith and together attached hereto,[1] and 2) 10/25/00 Transcript of Proceedings [in the family court] which was referenced but not introduced into evidence in the Trial Court 7/26/01 Transcript of Proceedings, p.4, lines 4-5.

(Footnote added.)

November 15, 2001 The Hawai'i Supreme Court entered an order denying Isaac's November 13, 2001 motion, in relevant part, as follows:

> IT IS HEREBY ORDERED the motion to supplement the record on appeal is denied as to the transcripts as the transcripts were not a part of the record in the district court in this case. . . .
>
> IT IS FURTHER ORDERED the motion to supplement the record on appeal with the evidence that was submitted to the district court for admission but was not admitted is denied as there is no indication that [Isaac] seeks to allege as a point of error on appeal that the trial court erred by not admitting the proffered evidence.[2]

(Footnote added.)

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[1] The "Exhibits therewith and together attached hereto" were six orders entered by the family court in the divorce case on the following dates: August 31, 2000; September 29, 2000; October 25, 2000; December 21, 2000; January 17, 2001; February 15, 2001; and a copy of Isaac Joo's harassment complaint against Peggy Ann Joo, filed January 13, 2001.

[2] The Hawai'i Supreme Court's statement that "there is no indication that [Isaac] seeks to allege as a point of error on appeal that the trial court erred by not admitting the proffered evidence" appears to be based on the fact that Isaac's opening brief did not state any "points on appeal" and did not include the issue in its statement of the "ISSUES PRESENTED." In the body of his opening brief, however, Isaac complains that Isaac's "Declaration of Isaac Y. Joo with Exhibits (specifically six Court Orders attached) was not duly considered by the Trial Court."

ISSUES ARGUED BY ISAAC IN HIS OPENING BRIEF

1. Isaac contends that his "Declaration of Isaac Y. Joo with Exhibits (specifically six Court Orders attached) was not duly considered by the Trial Court."

2. Isaac contends that "the evidence was insufficient to support the necessary findings, beyond a reasonable doubt" and the "credible witness" was not adequately proved to be credible. Isaac asks, "[W]hy didn't [Judge To‘oto‘o] uphold on the face of consistency the ruling that Judge Choy issued some nine months prior[?]" "[Isaac] believed that the ruling by Judge Choy in [the divorce case] on October 25, 2001, ended the issue of harassment. [Isaac] was more than shocked when he received the Complaint filed by the State of Hawaii some six months after the alleged incident." (Emphasis in original.) Isaac asks, "Why was [the charge] not filed more timely, if in fact the party alleging harassment had been harassed[?]"

DISCUSSION

The "record on appeal" is defined by Hawai‘i Rules of Appellate Procedure (HRAP) Rule 10(a) (2002). In this case, the record on appeal does not contain a transcript of the trial or of the court orders presented to the court by Isaac at trial. The record does contain a copy of an affidavit by the District Court Clerk who was assigned to the trial on July 26, 2001, stating,

"Due to tape recording equipment malfunction, the audio cassette tape is inaudible." The original of this affidavit is an appendix to Isaac's opening brief.

It appears that the District Court Clerk's affidavit is only partially true. Also attached to the opening brief as an appendix is the "ORIGINAL" of a "TRANSCRIPT OF PARTIAL PROCEEDINGS" of the July 26, 2001 trial. This transcript appears to report everything that was said at the trial except Peggy's testimony on direct examination.

A.

Isaac contends that his "Declaration of Isaac Y. Joo" and the six family court orders attached to it were not duly considered by the trial court. The "record" presented by Isaac indicates otherwise. The partial transcript offered by Isaac reports that Isaac presented the orders to the court for viewing and consideration and, although the court did not receive them in evidence, the court considered them. Nothing in the record on appeal or in the "record" presented by Isaac suggests that the offered items "were not duly considered by the trial court." Isaac does not argue that the court erred when it did not receive the orders into evidence. Had he done so, he would have had to prove that he offered the orders into evidence and that they were relevant and material to one or more issues in the case.

B.

Isaac contends that "the evidence was insufficient to support the necessary findings, beyond a reasonable doubt" and the prosecution's sole witness was not adequately proved to be credible. Isaac states that he "believed that the ruling by Judge Choy in [the divorce case] on October 25, 2001, ended the issue of harassment. [Isaac] was more than shocked when he received the Complaint filed by the State of Hawaii some six months after the alleged incident." (Emphasis in original.) Isaac asks, "[W]hy didn't [Judge To'oto'o] uphold on the face of consistency the ruling that Judge Choy issued some nine months prior[?]" Isaac also asks, "Why was [the charge] not filed more timely, if in fact the party alleging harassment had been harassed[?]"

In other words, Isaac alleges that when, in the divorce case on October 25, 2000, Judge Choy conducted an evidentiary hearing of events occurring prior to and on October 23, 2000, and denied Peggy's request for a restraining order and Isaac's request for a change of custody, Judge Choy decided that Isaac did not harass Peggy on October 23, 2000. We disagree. The issues Judge Choy faced in deciding whether to enter a temporary restraining order pursuant to HRS § 586-4 (2001) were not the same as the issues Judge To'oto'o faced in deciding whether Isaac

was guilty of Harassment on October 23, 2000. There is no evidence that the two decisions are contradictory.

Isaac contends that there was insufficient evidence to sustain a conviction. However, he has failed his duty specified in HRAP Rule 10 (2002) regarding a transcript of the proceedings. Moreover, even had he complied with his duty specified in HRAP Rule 10, the transcript presented by him indicates that he would not have sustained his burden on appeal. The issue at trial was credibility. The transcript attached to the opening brief shows that Peggy testified for the prosecution, Isaac testified for the defense, and no other witnesses testified. Isaac does not suggest that Peggy did not testify as to all of the material elements of the offense charged. He contends that the court "erred in finding Peggy to be the credible witness." He fails to understand that an appeal is not a new trial and that the trial judge's decision to believe Peggy and not to believe Isaac is not reviewable on appeal. The relevant standard of review has been described as follows:

> On appeal, the test for a claim of insufficient 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); State v. Tamura, 63 Haw. 636, 637, 633 P.2d 1115, 1117 (1981). "'It matters not if a conviction under the evidence as so considered might be deemed to be against the weight of the evidence so long as there is substantial evidence tending to support the requisite findings for the conviction.'" Ildefonso, 72 Haw. at 576-77, 827 P.2d at 651 (quoting Tamura, 63 Haw. at 637, 633 P.2d at 1117). "'Substantial evidence' . . . is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion." See id., 72 Haw. at 577, 827 P.2d at 651 (quoting State v. Naeole, 62 Haw. 563, 565, 617 P.2d 820, 823 (1980)).

> State v. Matias, 74 Haw. 197, 207, 840 P.2d 374, 379 (1992). "Furthermore, 'it is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence[.]'" Tachibana[v. State, 79 Hawaii [226,] at 239, 900 P.2d [1293,] at 1306 (citation omitted).

State v. Graybeard, 93 Hawai‘i 513, 522-23, 6 P.3d 385, 394-95 (App. 2000).

The relevant standard of review also has been described as follows:

> We have long held that evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or a jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact. Indeed, even if it could be said in a bench trial that the conviction is against the weight of the evidence, as long as there is substantial evidence to support the requisite findings for conviction, the trial court will be affirmed.
>
> "Substantial evidence" as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion. And as trier of fact, the trial judge is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence.

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

When applying the "clearly erroneous" test, it must be remembered that

> [i]t is for the trial judge as fact-finder to assess the credibility of witnesses and to resolve all questions of fact; the judge may accept or reject any witness's testimony in whole or in part. As the trier of fact, the judge may draw all reasonable and legitimate inferences and deductions from the evidence, and the findings of the trial court will not be disturbed unless clearly erroneous. An appellate court will not pass upon the trial judge's decisions with respect to the credibility of witnesses and the weight of the evidence, because this is the province of the trial judge.

State v. Eastman, 81 Hawai‘i 131, 139, 913 P.2d 37, 65 (1996) (citations omitted).

CONCLUSION

Accordingly, we affirm the district court's July 26, 2001 Judgment convicting Defendant-Appellant Isaac Y. Joo of Harassment, HRS § 711-1106(1)(a) (Supp. 2002).

DATED: Honolulu, Hawai‘i, December 4, 2002.

On the briefs:

Isaac Y. Joo,
Defendant-Appellant, *pro se*.

Chief Judge

Daniel H. Shimizu,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge