

CONCURRING AND DISSENTING OPINION BY WATANABE, J.

In my opinion, the circuit court plainly erred when it failed to provide a "true threat" instruction to the jury, as required by State v. Valdivia, 95 Hawai'i 465, 478, 24 P.3d 661, 674 (2001).

In its answering brief, Plaintiff-Appellee State of Hawai'i (the State) concedes that the words uttered by Defendant-Appellant Mark Alan Martins (Martins) to Wilbert Pascua (Wilbert), Ross Baybado (Ross), and Hazel Cappal (Hazel) "do not constitute a 'threat' prohibited by the terroristic threatening statutes as they do not involve 'specific threats of physical injury to others.'" Answering Brief at 21-22. The State also acknowledges that

[t]he offense of Terroristic Threatening ("TT"), by its statutory language, requires at the very least words which "threaten" some form of bodily injury. Clearly, such was not the case with the words [Martins] yelled, and no testimony existed from Wilbert, Hazel, or Ross that they felt "threatened or terrorized" after [Martins] yelled at them. Therefore [Martins] could not have been convicted for TT2 by the jury based upon his words he spoke.

Id. at 22 (citation omitted). According to the State, it

is not arguing that the threat must always be specific and could never be implied. For instance, the same words spoken by [Martins] in the case at bar, "get off my f-ing land, you're killing the cows," simultaneously accompanied by some shaking of the fist, or some other conduct which, in and of itself would not constitute a threat, could nevertheless "imply" consequences resulting in bodily injury. Under those circumstances, a "true threat" definition would be required.

Id. (citation omitted; emphasis added).

A review of the record reveals that the circumstances that the State admits would trigger the requirement for a true threat definition are present in this case. The State's terroristic threatening case against Martins was premised on both Martins' words and subsequent conduct in firing gunshots. Indeed, the deputy prosecutor argued in closing arguments:

Now, they all testified to you that they were frightened. In fact, Ross indicated he thought he was going to get shot. And probably Hazel was the one that was most upset by the behavior. But all three were frightened and all three testified to that fact. They were, in fact, terrorized. And it wasn't just by the guns, although the gun, of course, basically was the operative force here that caused them to be very much afraid. But it was also the first thing that set them off, was the conduct.

The words and conduct. Individual sitting on top of a hill, yelling at them, swearing at them, "Get off my f'ing land, you are killing the cattle." Other inappropriate things like that. . . .

That upset them initially. But they were being pragmatic. They were going to go back down to the truck and wait. But when the gun started to go off, that's when they all became frightened.

Now, actions speak louder than words.

Tr. 12/19/01 at 31-32 (emphases added).

In light of the evidence adduced below, I believe it was incumbent on the circuit court to instruct the jury that Martins' threats, by words or conduct, had to be "unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." State v. Chung, 75 Haw. 398, 416-17, 862 P.2d 1063, 1073 (1993) (quoting United States v. Kelner, 534 F.2d 1020, 1026-27 (2d Cir. 1976), cert. denied, 429 U.S. 1022, 97 S.

Ct. 639, 50 L. Ed. 2d 623 (1976)). I would therefore vacate Martins' conviction for Terroristic Threatening in the Second Degree and remand for a new trial on that offense. In all other respects, I concur with the majority opinion.

Acting Chief Judge