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NO. 25027

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
DUKE PA'A'AINA, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
PUNA DIVISION
(REPORT NO. G-61594)

MEMORANDUM OPINION

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

Defendant-Appellant Duke Pa'a'aina (Pa'a'aina) appeals from the March 4, 2002 Judgment and Sentence of the District Court of the Third Circuit, Puna Division (district court), finding him guilty of Reckless Driving of Vehicle, Hawaii Revised Statutes (HRS) § 291-2 (Supp. 2002)¹, and sentencing him to pay a fine of \$200, plus \$7 to the Driver's Education Fund, and to attend and complete a defensive driving class conducted by the Driver's Education Division.

¹/ Hawaii Revised Statutes (HRS) § 291-2 (Supp. 2002) states, in relevant part, as follows: "Whoever operates any vehicle . . . recklessly in disregard of the safety of persons or property is guilty of reckless driving of vehicle[.]"

HRS § 702-206(3) (1993) defines the term "recklessly" as follows:

- (a) A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature.
- (b) A person acts recklessly with respect to attendant circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances exist.
- (c) A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.

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On appeal, Pa'a'aina asserts that the district court clearly erred when it convicted him of Reckless Driving of Vehicle, HRS § 291-2, because Plaintiff-Appellee State of Hawai'i (the State) presented insufficient evidence to prove beyond a reasonable doubt that Pa'a'aina operated his vehicle recklessly in disregard of the safety of persons or property. Specifically, Pa'a'aina contends that the district court erred when it found that (1) Pa'a'aina drove fast or faster than he should have been driving when he passed the Puna Humane Society (Humane Society) and (2) Pa'a'aina did not see Mark D. Bolema (Bolema) as he approached the Humane Society.

We reverse. We decide that the district court's (1) oral findings are insufficient to support its decision that Pa'a'aina is guilty beyond a reasonable doubt and (2) the finding which is the basis for the court's determination of guilt is not supported by the evidence.

BACKGROUND

On August 31, 2001, the State, by Complaint, charged Pa'a'aina with Reckless Driving of Vehicle, HRS § 291-2. On March 4, 2002, Pa'a'aina's case proceeded to a bench trial before Judge Sandra E. P. Schutte.

At trial, the State called Bolema to testify. Bolema stated that on March 17, 2001, Bolema went to the Humane Society with his three-year-old son. When Bolema left the Humane Society

around noon, Bolema drove his 1990 Jeep Wrangler onto a two-lane highway and headed home in the direction of Pahoā.

Soon thereafter, Bolema noticed Pa'a'aina's brown pickup truck traveling on his right side on the highway's paved shoulder lane. Bolema testified that Pa'a'aina "was waving his arms at [him] and stuff" and tried to push Bolema into the lane for oncoming traffic. According to Bolema, Pa'a'aina came "at least within a foot [of me]. I mean, [Pa'a'aina] was pushing me over."

Bolema stated that following Pa'a'aina's attempt to push Bolema into the lane for oncoming traffic, Pa'a'aina maneuvered his truck behind Bolema and proceeded to come "real close" to Bolema's bumper several times. After Pa'a'aina made his final move towards Bolema's bumper, Pa'a'aina "came up on [Bolema's left]² side, and . . . kept pushing [Bolema] over towards the [highway's] shoulder to the point where [Pa'a'aina] pushed [Bolema] off the shoulder into the grass" on the side of the road.

While Pa'a'aina directed his movements at Bolema's Jeep, Bolema "kept . . . pointing at [his] child." According to Bolema, Pa'a'aina continued to wave his hands and yell. Bolema testified that he told Pa'a'aina, "I got a child in the back." Pa'a'aina responded, "quote, 'I don't care.'"

When Pa'a'aina "got far enough in front of [Bolema] where

^{2/} On direct examination, Mark D. Bolema (Bolema) testified that Defendant-Appellant Duke Pa'a'aina (Pa'a'aina) "came up on [his] right side, and . . . kept pushing [Bolema] over towards the shoulder [of the highway][.]" Under subsequent questioning by the deputy prosecuting attorney, Bolema positioned Pa'a'aina's pickup truck on the left side of his Jeep Wrangler.

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[Bolema] was able to get back . . . onto the road . . . , [Pa'a'aina] kept braking in front of [Bolema's Jeep]." Bolema stated that he "called 911 [on his cellular phone] to give 'em the license [plate] number and [a] description of [Pa'a'aina's] car."

While Bolema was on the phone, Pa'a'aina maneuvered his truck onto the right-hand shoulder lane and proceeded "to push [Bolema] . . . into oncoming traffic[.]" When Bolema showed Pa'a'aina the phone, Pa'a'aina "sped off." According to Bolema, the entire incident "went on for . . . just over a mile[.]"

On cross-examination, Bolema testified that the speed limit near the Humane Society was forty-five miles per hour.

At trial, Pa'a'aina testified in his own defense. Pa'a'aina stated that on March 17, 2001, he "was coming towards . . . the dog pound" "at [his] regular speed" when Bolema "just came [out] right in front of [him]" and headed in the same direction he was traveling. Pa'a'aina said, "I was thinking . . . at that little bit [of] time that I had, . . . I almost hit [Bolema] on . . . the right side of [Bolema's] car."

To avoid a collision with Bolema, Pa'a'aina "wen step [on his] brakes" to "slow down real fast[.]" Pa'a'aina stated that to avoid Bolema's Jeep, he "[weaved] around onto the [right-hand] shoulder lane, and then . . . came back onto the road" in front of Bolema.

Bolema then "came up from behind" Pa'a'aina, leading Pa'a'aina to think, "'Oh, [Bolema] going make crazy kine to [him].'"

Pa'a'aina pulled his pickup truck over to the right-hand shoulder lane to talk to Bolema. According to Pa'a'aina, "we [(Pa'a'aina and Bolema)] never even made verbal contact."

Pa'a'aina "then . . . pulled up behind [Bolema] and then [Bolema] pulled over again[.]" "[By] the time [Pa'a'aina] came [by] [Bolema's] side, [Bolema] was . . . showing [Pa'a'aina] the phone." Pa'a'aina testified, "I was, like, 'Yeah, call [the police]. I calling the police, too.'" According to Pa'a'aina, when he returned home, he telephoned the police about what transpired on the highway.

On direct examination, Pa'a'aina testified that the entire incident took place within "45 seconds to one minute at the most."

Following closing arguments from both parties, Judge Schutte orally found³ and concluded, in relevant part, as follows:

I . . . find that on March 17th, . . . 2001, . . . in the District of Puna near the Humane Society[,] there was an incident regarding [Pa'a'aina] and [Bolema], . . . and as [the deputy prosecuting attorney] and [the deputy public defender] . . . said, this case relies a lot . . . on the credibility of the witnesses.

^{3/} Hawai'i Rules of Penal Procedure (HRPP) Rule 44(b) (2003), permits the district court (1) to decide the case on the record or (2) to enter findings of fact, conclusions of law and order. This rule is silent regarding findings of fact orally stated on the record in support of (1).

HRPP Rule 23(c) states the following:

In a case tried without a jury the court shall make a general finding and shall in addition, on request made at the time of the general finding, find such facts specially as are requested by the parties. Such special findings may be orally in open court or in writing at any time prior to sentence.

We conclude that findings orally stated by the court on the record in support of the court's decision are the official findings to be considered in the appeal if (a) they are not subsequently replaced by written findings and (b) a transcript of them is a part of the record on appeal.

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And, frankly, after hearing the testimony of both [witnesses], I have . . . a hard time believing both of them . . . in this case. There are inconsistencies with both [witnesses'] testimony which give me . . . some concern.

. . . I do find that based on the evidence, . . . [Bolema] was pulling out of the Humane Society and turning left in the Pahoa direction.

. . . Route 11 . . . at that area is a two-lane highway. . . . It's a two-way highway, and there are shoulders on either side of the road.

[Pa'a'aina] was traveling also in the Pahoa direction, and I do find that based on the testimony it is . . . likely that [Bolema] was not paying attention as carefully as he should when he pulled on the highway and also that [Pa'a'aina] was probably going much faster than he should have when he approached . . . that area.

So the two of them did not see one another, and [Bolema] pulled onto the highway without [Pa'a'aina] seeing him, and [Pa'a'aina] was forced to pull onto the shoulder.

I find no other reason to understand why [Bolema] would have seen [Pa'a'aina] with his hands in the air in an angry manner if he did not know . . . [Pa'a'aina] personally.

And unless this was a situation of road rage where somebody is very angry about somebody else's driving, there's no other reason to believe . . . that's not what happened so I do find that [Pa'a'aina] was forced onto the shoulder.

. . . [A]nd based on the evidence presented, I find that [Pa'a'aina] then pulled in front of [Bolema], but I don't know how [Pa'a'aina] could have safely gone from the shoulder which was pushed to the side to go in front of [Bolema] if he was driving carefully and safely.

. . . [I]f he was pushed off to the shoulder, it would be more probable than not that he would have . . . [been] safer if . . . he had slowed down and pulled behind [Bolema] than in front of him.

Um, but I also find that . . . [Bolema's] testimony that he was pushed . . . beyond the shoulder portion of the roadway onto the grass -- and that is the shoulder portion used for traffic -- not credible because the only shoulder portion of the highway that is used for traffic is on the opposite side of the road⁴, and I don't . . . find from the testimony that there was any activity on the shoulder of the road in the . . . Kea'au direction or Hilo direction. It was all in the Pahoa direction, and [Bolema] testified [that] he was traveling in that direction.

[Pa'a'aina] says he was traveling in [the Pahoa] direction, and

^{4/} There being no evidence in the record that supports this finding, it appears that this finding is based on the court's personal knowledge.

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although there is a shoulder that's paved on that direction, it is not a shoulder lane that is used . . . by traffic.⁵

However, . . . I do find that based on the testimony, this is probably a case where both [Pa'a'aina and Bolema] should have been charged [with the offense of Reckless Driving of Vehicle, HRS § 291-2], . . . but only [Pa'a'aina] was [charged], and this . . . definitely sounds like a case of road rage . . . probably on [Pa'a'aina's and Bolema's] parts [(sic)].

But, [Pa'a'aina], since you were the one charged, I do find that your driving -- because you must have been going very fast to have ended up on the shoulder and that you . . . ended up in front of [Bolema].

I find that . . . [your] driving was . . . in reckless disregard of the safety of others, and I find you guilty . . . [of Reckless Driving of Vehicle, HRS § 291-2].

(Footnotes added.)

Judge Schutte fined Pa'a'aina \$200 and ordered him to pay \$7 to the Driver's Education Fund and to attend and complete a defensive driving class conducted by the district court's Driver's Education Division. Pa'a'aina timely filed his Notice of Appeal on April 1, 2002.

POINTS OF ERROR

On appeal, Pa'a'aina asserts that the district court erroneously convicted him of Reckless Driving of Vehicle, HRS § 291-2, because the State presented insufficient evidence to prove beyond a reasonable doubt that Pa'a'aina operated his vehicle recklessly in disregard of the safety of persons or property. Specifically, Pa'a'aina contends that the district court clearly erred when it found that (1) Pa'a'aina drove fast or faster than he should have been driving at the time of the incident and

^{5/} See footnote 4 above.

(2) Pa'a'aina did not see Bolema as Pa'a'aina approached the Humane Society.

STANDARDS OF REVIEW

Findings of Fact

A trial court's findings of fact are reviewed under the "clearly erroneous" standard of review. Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994). This is true of implicit and explicit findings. "A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995) (citations and internal quotation marks omitted).

Conclusions of Law

"An appellate court may freely review conclusions of law and the applicable standard of review is the right/wrong test. A conclusion of law that is supported by the trial court's findings of fact and that reflects an application of the correct rule of law will not be overturned." Dan, 76 Hawai'i at 428, 879 P.2d at 533 (citations and internal quotation marks omitted).

Sufficiency of the Evidence

The Hawai'i Supreme Court has repeatedly stated:

[E]vidence 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.

"'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."

State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998)

(citations and block quotation format omitted).

RELEVANT PRECEDENTS

Burden of Proof

An accused in a criminal case can be convicted only upon proof beyond a reasonable doubt of every element of the crime charged. State v. Lima, 64 Haw. 470, 474, 643 P.2d 536, 539 (1982).

Proof by Circumstantial Evidence

The Hawai'i Supreme Court has held that

proof by circumstantial evidence and reasonable inferences arising from circumstances surrounding the [defendant's conduct] is sufficient. . . . Thus, the mind of an alleged offender may be read from his acts, conduct and inferences fairly drawn from all the circumstances. State v. Sadino, 64 Haw. 427, 430, 642 P.2d 534, 536-37 (1982) (citations omitted); see also State v. Simpson, 64 Haw. 363, 373 n.7, 641 P.2d 320, 326 n.7 (1982).

State v. Mitsuda, 86 Hawai'i 37, 44, 947 P.2d 349, 356 (1997)

(quoting State v. Batson, 73 Haw. 236, 254, 831 P.2d 924, 934, *reconsideration denied*, 73 Haw. 625, 834 P.2d 1315 (1992))

(internal quotation marks and block quotation format omitted).

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DISCUSSION

The district court's oral findings suggest that the court was applying the more-probable-than-not burden of proof. In relevant part, the court found as follows:

[B]ased on the testimony it **is . . . likely that** [Bolema] was not paying attention as carefully as he should when he pulled on the highway and also that [Pa'a'aina] **was probably going** much faster than he should have when he approached . . . that area.

. . . .

. . . [B]ased on the evidence presented, I find that [Pa'a'aina] . . . pulled in front of [Bolema], but I don't know how [Pa'a'aina] could have safely gone from the shoulder which was pushed to the side to go in front of [Bolema] if he was driving carefully and safely.

. . . [I]f [Pa'a'aina] was pushed off to the shoulder, it **would be more probable than not** that he would have . . . [been] safer if . . . he had slowed down and pulled behind [Bolema] than in front of him.

Um, but I also find that . . . [Bolema's] testimony that he was pushed . . . beyond the shoulder portion of the roadway onto the grass -- and that is the shoulder portion used for traffic -- not credible because the only shoulder portion of the highway that is used for traffic is on the opposite side of the road, and I don't . . . find from the testimony that there was any activity on the shoulder of the road in the . . . Kea'au direction or Hilo direction. It was all in the Pahoa direction, and [Bolema] testified [that] he was traveling in that direction.

[Pa'a'aina] says he was traveling in [the Pahoa] direction, and although there is a shoulder that's paved on that direction, it is not a shoulder lane that is used . . . by traffic.

However, . . . I do find that based on the testimony, **this is probably** a case where both [Pa'a'aina and Bolema] should have been charged [with the offense of Reckless Driving of Vehicle, HRS § 291-2], . . . but only [Pa'a'aina] was [charged], and this . . . definitely **sounds like** a case of road rage . . . **probably on** [Pa'a'aina's and Bolema's] parts [(sic)].

But, [Pa'a'aina], since you were the one charged, I do find that your driving -- because you **must have been going** very fast to have ended up on the shoulder and that you . . . ended up in front of [Bolema].

I find that . . . [your] driving was . . . in reckless disregard of the safety of others, and I find you guilty . . . [of Reckless Driving of Vehicle, HRS § 291-2].

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(Emphases added.) The court's findings are insufficient to support its decision that Pa'a'aina is guilty beyond a reasonable doubt.

See Lima, 64 Haw. at 474, 643 P.2d at 539.

Additionally, the following finding, which is the basis for the court's determination of guilt, is not supported by the evidence:

I don't know how [Pa'a'aina] could have safely gone from the shoulder which was pushed to the side to go in front of [Bolema] if he was driving carefully and safely.

. . . [I]f he was pushed off to the shoulder, it would be more probable than not that he would have . . . [been] safer if . . . he had slowed down and pulled behind [Bolema] than in front of him.

. . . .

But, [Pa'a'aina], since you were the one charged, I do find that your driving -- because you must have been going very fast to have ended up on the shoulder and that you . . . ended up in front of [Bolema].

I find that . . . [your] driving was . . . in reckless disregard of the safety of others, and I find you guilty . . . [of Reckless Driving of Vehicle, HRS § 291-2].

CONCLUSION

Accordingly, we reverse the March 4, 2002 Judgment and Sentence finding Defendant-Appellant Duke Pa'a'aina guilty of Reckless Driving of Vehicle, HRS § 291-2.

DATED: Honolulu, Hawai'i, June 24, 2003.

On the briefs:

James S. Tabe, Deputy Public Defender, for Defendant-Appellant.	Chief Judge
Jason M. Skier and Stephen A. Power, Deputy Prosecuting Attorneys, County of Hawai'i, for Plaintiff-Appellee.	Associate Judge Associate Judge