

NOT FOR PUBLICATION

NO. 25535

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
MICHAEL NICHOLSON, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL CIRCUIT
(HPD Cr. No. 01410972)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Acting C.J., Foley, and Nakamura, JJ.)

Defendant-Appellant Michael Nicholson (Nicholson) challenges his conviction and sentence for the offense of Harassment, a violation of Hawaii Revised Statutes (HRS) § 711-1106(1)(a) (Supp. 2003), orally pronounced by the District Court of the First Circuit (the district court) on November 14, 2002 and memorialized in a Notice of Entry of Judgment and/or Order filed on June 29, 2004. The appeal was assigned to this court on September 15, 2003. We affirm.

On July 22, 2002, following an incident that occurred at the Prince Kūhiō Federal Building on October 21, 2001, Nicholson was charged in the district court with committing Assault in the Third Degree, in violation of HRS § 707-712(1)(a) (1993), a misdemeanor. On September 5, 2002, Nicholson demanded a jury trial and the case was committed to the Circuit Court of the First Circuit (the circuit court). On September 10, 2002, Plaintiff-Appellee State of Hawai'i (the State) filed a written

complaint in the circuit court, charging Nicholson with "intentionally, knowingly, or recklessly caus[ing] bodily injury to Kevin Costello, thereby committing the offense of Assault in the Third Degree[.]" Two days later, however, the State filed a motion to amend the complaint to reduce the charge to Harassment, a petty misdemeanor, and remand the case to the district court for a bench trial.

At the September 19, 2002 hearing on the State's motion, the circuit court¹ expressly inquired whether Nicholson had any objection to the amendment. After Nicholson's attorney responded, "No, Your Honor," the circuit court amended the charge against Nicholson to Harassment and remanded the case to the district court for trial. Following a bench trial held on November 14, 2002, the district court, Judge Fa'auuga To'oto'o presiding, found Nicholson guilty as charged and sentenced Nicholson to serve six months' probation; pay a \$200 fine and a \$25 Criminal Injuries Compensation Fee; and undergo anger management and alcohol assessment, as well as treatment, if necessary, at Nicholson's own expense, until clinically discharged.

On appeal, Nicholson raises two arguments: (1) the circuit court reversibly erred when it allowed the State to amend the original complaint, in violation of Hawai'i Rules of Penal

¹ Judge Barbara Richardson presided at the hearing on Plaintiff-Appellee State of Hawai'i's motion to amend the complaint and remand the case to the district court for bench trial.

Procedure (HRPP) Rule 7(f)²; and (2) there was insufficient evidence to support a conviction for the offense of Harassment. Based on our review of the record, and having duly considered the statutes and case law relevant to the arguments raised by Nicholson, we resolve Nicholson's points of error as follows:

(1) Nicholson is correct that HRPP Rule 7(f) permits a complaint to be amended only "if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." (Emphasis added.) Nicholson is also correct that under controlling case law, Harassment and Assault in the Third Degree are "different" offenses, State v. Kupau, 63 Haw. 1, 620 P.2d 250 (1980), and therefore, the circuit court should not have granted the State's motion to amend the complaint.

However, Nicholson waived this error by failing to object to the amendment. State v. Sanchez, 9 Haw. App. 315, 319, 837 P.2d 1313, 1315 (1992). Nicholson was not prejudiced by the amendment, since it resulted in a less serious criminal charge against him and he was given ample time to prepare for trial. The State could have accomplished the same result as the amendment by dismissing the Assault in the Third Degree charge and filing a complaint for Harassment in the district court. By

² Hawai'i Rules of Penal Procedure (HRPP) Rule 7(f) provides as follows:

(f) *Amendment.* 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.

not objecting to the amendment, Nicholson avoided being rearrested and reprocessed by the police on the new charge. Any error committed by the circuit court was therefore harmless.

(2) There was substantial evidence in the record to support Nicholson's conviction for Harassment.

Accordingly, we affirm Nicholson's November 14, 2002 conviction and sentence, as memorialized in the Notice of Entry of Judgment and/or Order entered by the district court on June 29, 2004.

DATED: Honolulu, Hawai'i, August 31, 2004.

On the briefs:

James S. Tabe, deputy public
defender, State of Hawai'i,
for defendant-appellant.

Peter B. Carlisle, prosecuting
attorney, City and County of
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