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DISSENTING OPINION BY BURNS, C.J.

I respectfully dissent.

The May 12, 2004 Judgment affirmed by two of my colleagues found Sherez guilty as charged of violating HRS § 291-2 (Supp. 2004) by operating a vehicle recklessly in disregard for the safety of persons or property, and sentenced him to pay a fine of \$300, a \$7 fee to the Driver's Education Fund, a \$25 Criminal Injuries Compensation Fund fee, and to complete a driver's improvement course conducted by the Driver's Education Division.

DIFFERENCE BETWEEN TRAFFIC INFRACTIONS AND CRIMES

HRS § 291D-2 (1993) states, in relevant part, as follows: "'Traffic infraction' means all violations of statutes, ordinances, or rules relating to traffic movement and control, including parking, standing, equipment, and pedestrian offenses, for which the prescribed penalties do not include imprisonment." In contrast, such violations for which the prescribed penalties include imprisonment are crimes.

STANDARD OF APPELLATE REVIEW

Sherez challenges the sufficiency of the evidence. The standard of review on appeal for sufficiency of the evidence is the following substantial evidence standard:

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

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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. Pone, 78 Hawai'i 262, 265, 892 P.2d 455, 458 (1995) [.]

State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996)

(internal quotation marks and brackets omitted).

BURDEN OF PROOF

The State of Hawai'i (the State) had the burden to prove that, considering the nature and purpose of his conduct and the circumstances known to him, Sherez consciously disregarded a substantial and unjustifiable risk that one or more persons would be injured and/or that property would be damaged and the disregard of this risk involved a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation.

BACKGROUND

Considering the evidence in the strongest light for the prosecution, the relevant facts are as follows: On December 11, 2003, at approximately 7:49 p.m., Sherez was operating a motorcycle, but Police Sergeant Kurt Ng (Sergeant Ng) was "not too aware of what type of motorcycle." The passenger riding with Sherez testified that it was "a 150 CC Honda." Sergeant Ng was operating a 2003 Toyota 4 Runner automobile, marked by a police officer's blue light on its roof, in the right lane of Kalākaua

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Avenue, entering Waikīkī. At that point Kalākaua Avenue has only three lanes, all going toward Waikīkī. At that time, traffic going into Waikīkī is rather congested. As Sergeant Ng was crossing the bridge which crosses over the Ala Wai canal, the traffic light turned yellow, so he slowed down and was coming to a halt. While he was slowing down and coming to a halt, the motorcycle operated by Sherez, who had a female passenger seated behind him, suddenly moved from the center lane onto the right lane, and stopped in front of Sergeant Ng for the red light. This move forced Sergeant Ng to "brake suddenly[.]" There is no evidence of a screeching of tires or how close Sergeant Ng's vehicle was to the motorcycle when Sergeant Ng's vehicle stopped. Sergeant Ng could not recall if Sherez signaled an intent to change lanes. Beyond the light, Kalākaua Avenue's left lane proceeds to the left side of a marked safety zone leading to an area covered with grass and trees between Kalākaua's center lane and Kalākaua's left lane. Sergeant Ng testified in relevant part as follows:

[SERGEANT NG]: And at the red light, I decided to stop him after the light turned green, on the opposite side. At this time, after the light had turned from red to green, he had cut across two lanes, crossing the safety zone area, and into the [left] most entry lane into Waikiki, causing the vehicle next to me to brake suddenly, and causing the other vehicle in the [left] most lane to brake suddenly to avoid a collision with him.

Q And how do you know that they braked suddenly?

A The reason why I know they braked suddenly is I was a little behind, they went forward. Their vehicles had lunged forward. You know, they -- the nose of their vehicles had dipped a little, and I could see their brakes [sic] lights on."

. . . .

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[DEPUTY PROSECUTING ATTORNEY]: And . . . how do you choose what you will write a citation for?

A Well, I take into the fact what the person does first, okay. In this scenario, Mr. Sherez had forced me to brake suddenly, okay. So first on his failure to yield the right of way. Okay.

The second one he did was failure to signal his lane change, and he crossed over the center median. And also failure to yield to the right of way of the other two vehicles. Okay. So that's approximately another two to three citations.

So--and then also taking in the fact that it was rather dangerous what he had done, seeing that he did have a passenger on the vehicle--on his motorcycle.

To me, that encompassed reckless driving. So instead of citing him for five to six other citations, I just cited him for the reckless driving.

There is no evidence of a screeching of tires or how close the other vehicles were to the motorcycle when they stopped. There is no evidence of the length of the intersection or the distance between the beginning of the intersection and the safety zone that divides the center lane from the left lane or the length of the safety zone. At that time, traffic going into Waikīkī was "rather congested." Sergeant Ng stopped the motorcycle at the intersection of Kalākaua Avenue and Ala Moana Boulevard. There is no evidence of what Sherez and his female passenger on the motorcycle were wearing. In Sergeant Ng's words, "I believe that [Sherez's female passenger] was not wearing a helmet, but I'm not a hundred percent sure on that."

DISCUSSION

In this case, the combination of the following caused Sergeant Ng to cite Sherez for reckless driving of a vehicle:

(1) failure to yield the right of way to Sergeant Ng; (2) failure to signal a lane change when moving from the right lane (a)

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across the center lane, (b) to the left lane; (3) failure to yield the right of way to the operator of the vehicle in the center lane; (4) failure to yield the right of way to the operator of the vehicle in the left lane; and (5) driving of his motorcycle across the safety zone.

No. (5) is not evidence of reckless driving because there is no evidence that it involved any risk that one or more persons would be injured and/or that property would be damaged. On the contrary, no. (5) is evidence that no. (4) was not reckless driving because it gave the operator of the vehicle in the left lane the opportunity to prepare for Sherez's safe entry into the left lane.

The question is whether nos. (1) through (4) add up to substantial evidence of reckless driving. Nos. (1) through (4) are violations of one or both of the following statutes:

HRS § 291C-62 (1993) which states, in relevant part, as follows:

Vehicle turning. The driver of a vehicle intending to turn within an intersection . . . shall yield the right of way to any vehicle, bicycle, or person . . . proceeding in the same direction when such vehicle, bicycle, or person is within the intersection or so close thereto as to constitute an immediate hazard.

HRS § 291C-84 (1993) which states, in relevant part, as follows:

Turning movements and required signals. (a) No person shall . . . turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided.

(b) A signal of intention to turn right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning;

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By definition, all failures to yield the right-of-way are deviations from the standard of conduct that a law-abiding person would observe in the same situation because they involve an unjustifiable risk that one or more persons will be injured and/or that property will be damaged. A nonsubstantial bodily injury and/or a minor property damage is sufficient.

The penalties for a violation of any requirement stated in HRS Chapter 291C are stated in HRS § 291C-161 (Supp. 2004) as follows:

Penalties. (a) It is a violation for any person to violate any of the provisions of this chapter except as otherwise specified in subsection (c) of this section and unless the violation is by other law of this State declared to be a felony, misdemeanor, or petty misdemeanor.

(b) Except as provided in subsection (c) every person who violates any provision of this chapter for which another penalty is not provided shall be fined:

- (1) Not more than \$200 for a first conviction thereof;
- (2) Not more than \$300 for conviction of a second offense committed within one year after the date of the first offense; and
- (3) Not more than \$500 for conviction of a third or subsequent offense committed within one year after the date of the first offense;

provided that upon a conviction for a violation of section 291C-12, 291C-12.5, 291C-12.6, or 291C-95, the person shall be sentenced in accordance with that section.

(c) Every person who violates section 291C-13 or 291C-18 shall:

- (1) Be fined not more than \$200 or imprisoned not more than ten days for a first conviction thereof;
- (2) Be fined not more than \$300 or imprisoned not more than twenty days or both for conviction of a second offense committed within one year after the date of the first offense; and
- (3) Be fined not more than \$500 or imprisoned not more than six months or both for conviction of a third or subsequent offense committed within one year after the date of the first offense.

(d) The court may assess a sum not to exceed \$50 for the cost of issuing a penal summons upon any person who fails to appear at the place within the time specified in the citation issued to the person for any traffic violation.

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(e) The court may require a person who violates any of the provisions of this chapter to attend a course of instruction in driver retraining as deemed appropriate by the court, in addition to any other penalties imposed.

It follows that Sherez's violations of HRS § 291C-62 and/or HRS § 291C-84 were "traffic infractions," not crimes.

In contrast, a violation of HRS § 291-2 (Supp. 2004) is a crime. That statute states as follows:

Reckless driving of vehicle or riding of animals; penalty.
Whoever operates any vehicle or rides any animal recklessly in disregard of the safety of persons or property is guilty of reckless driving of vehicle or reckless riding of an animal, as appropriate, and shall be fined not more than \$1,000 or imprisoned not more than thirty days, or both.

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

Definitions of states of mind. . . .

(3) "Recklessly."

(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.

. . . .

(d) A risk is substantial and unjustifiable within the meaning of this section if, considering the nature and purpose of the person's conduct and the circumstances known to him, the disregard of the risk involves a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation.

Is there substantial evidence that there was a substantial risk that one or more persons would be injured and/or that property would be damaged? HRS § 291-12 (Supp. 2004) states as follows:

Inattention to driving. Whoever operates any vehicle without due care or in a manner as to cause a collision with, or injury or damage to, as the case may be, any person, vehicle or other property shall be fined not more than \$500 or imprisoned not more than thirty days, or both.

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In my view, the law permitted Sherez to assume that the operators of the other vehicles would not violate HRS § 291-12, and the risk of what would happen is exactly what happened in this case -- no personal injury and no damage to property.

Even assuming there is substantial evidence that there was a substantial risk that one or more persons would be injured and/or that property would be damaged, is there evidence that the disregard of that substantial risk involved a "gross deviation" from the standard of conduct that a law-abiding person would observe in the same situation? In State v. Moser, 107 Hawai'i 159, 111 P.3d 54 (App. 2005), this court discussed the meaning of the phrase "gross deviation[.]"

(a) The Unreasonable-Noise-Attendant-Circumstances Element

Unreasonable noise requires a *gross deviation* from the ordinary standards of behavior. HRS § 711-1101(2). "Gross deviation" is not defined in the disorderly conduct statute, nor does Hawai'i case law explain the meaning of the term. See State v. Najibi, 78 Hawai'i 282, 284, 892 P.2d 475, 477 (App.1995) (mentioning gross deviation standard but not discussing it). Black's Law Dictionary defines "gross" as "[o]ut of all measure; beyond allowance; flagrant; shameful; as a gross dereliction of duty, a gross injustice, gross carelessness or negligence. Such conduct as is not to be excused." Black's Law Dictionary 702 (6th ed.1990) (citation omitted). See also State Bd. of Dental Exam'rs v. Savelle, 90 Colo. 177, 8 P.2d 693, 696 (1932) (adopting above definition of "gross").

Id. at 172, 111 P.3d at 67.

In my view, to be a "gross deviation," the risk of the occurrence of personal injury and/or property damage must be more than substantial and/or that what is being risked is no less than "substantial bodily injury"¹ and/or substantial property damage.

¹ HRS § 291C-1 states, in relevant part, as follows:

"Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent

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This conclusion is supported by the evidence that the legislature intended a significant difference between (1) failures to yield the right of way and failures to signal a lane change, and (2) reckless driving of a vehicle. These conclusions are based on the substantial difference in the legislature's categorization of, and penalties for, violations of HRS § 291C-62 (1993) or HRS § 291C-84 (1993) (a fine of not more than \$200 for a first conviction; a fine of not more than \$300 for conviction of a second offense committed within one year after the date of the first offense; and a fine of not more than \$500 for conviction of a third or subsequent offense committed within one year after the date of the first offense) and the legislature's categorization of, and penalties for, a violation of HRS § 291-2 (a fine of not more than \$1,000 or imprisonment for not more than thirty days).

The evidence supports the findings necessary to support a conclusion that Sherez committed six "traffic infractions." The sole result of these six "traffic infractions" was that they caused the drivers of each of the lead vehicles in the three lanes to brake suddenly. The State argues that the evidence supports the findings necessary to support a conclusion that

disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

. . . .

"Substantial bodily injury" means bodily injury which causes: (1) a major avulsion, laceration, or penetration of the skin; (2) a chemical, electrical, friction, or scalding burn of second degree severity; (3) a bone fracture; (4) a serious concussion; or (5) a tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs.

Sherez committed one traffic crime. My question is, when did what Sherez did change from various traffic infractions to one traffic crime? When he failed to yield the right of way to Sergeant Ng? When he failed to signal a lane change when moving from the right lane (a) across the center lane, (b) to the left lane? When he failed to yield the right-of-way to the operator of the vehicle in the center lane? When he drove his "motorcycle" across the safety zone? When he failed to yield the right of way to the operator of the vehicle in the left lane?

CONCLUSION

I conclude that the evidence does not support the findings necessary to support a conclusion that Sherez committed a traffic crime.²

James S Burns

² HRS § 291C-50(a) (1993) states as follows:

Following too closely. (a) The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

If the actions and inactions of defendant-appellant Robert Sherez in this case add up to substantial evidence of reckless driving, are not all following too closely violations of HRS § 291C-50(a) (1993) always substantial evidence of a reckless driving violation of HRS § 291-2 (Supp. 2004)? As noted in HRS § 291C-161 (Supp. 2004), following too closely is a traffic infraction, not a crime.