

NO. 27537

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
TODD NISHIHARA, Defendant-Appellant

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STATE OF HAWAII

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CRIMINAL NO. 05-1-0709)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Todd Nishihara (Nishihara) appeals from the September 6, 2005 Judgment of Conviction and Sentence, based upon a jury verdict, finding him guilty of the lesser included offense of Terroristic Threatening in the Second Degree, Hawaii Revised Statutes (HRS) § 707-717(1) (1993), and sentencing him to incarceration for one year.¹

Nishihara's sole point on appeal is that "[t]he court erred by including a reckless state of mind in the lesser included charge of Terroristic Threatening 2, which defendant was ultimately convicted of." Nishihara's sole question presented is whether the court erred "when it instructed the jury that defendant only needed reckless, rather than intentional intent to threaten complaining witnesses in the lesser included offense of Terroristic Threatening 2 in count 2 of the complaint." Nishihara argues that "[b]ased on the instructions given by the court the jury may have convicted him only because he was

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The September 6, 2005 Judgment was entered by Judge Fa'auuga L. To'oto'o.

recklessly threatening Mr. or Mrs. Chong, instead of actually intending to[.]"

The word "threat" means "an expression of intention to inflict evil, injury, or damage[.]" MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, (11th Ed. 2004) at 1302. In Hawai'i, a threat is not a crime unless it is a "terroristic threat[.]" HRS § 707-715 (1993) states as follows:

Terroristic threatening, defined. A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony:

- (1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person; or
- (2) With intent to cause, or in reckless disregard of the risk of causing evacuation of a building, place of assembly, or facility of public transportation.

The court instructed the jury consistent with the applicable statute.² Nishihara was convicted of threatening, by

² The court instructed the jury in part:

A person commits the offense of Terroristic Threatening in the Second Degree if, in reckless disregard of the risk of terrorizing another person, he threatens, by word or conduct to cause bodily injury to another person.

There are two material elements of the offense . . . , each of which the prosecution must prove beyond a reasonable doubt.

These two elements are:

1. That, . . . , the defendant threatened by word or conduct to cause bodily injury to another person; and
2. That the defendant did so in reckless disregard of the risk of terrorizing that person.

The threat on its face and in the circumstances in which it is made must be so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and an imminent prospect of execution, or the defendant must possess the apparent ability to carry out the threat such that the threat would reasonably tend to induce fear of bodily injury in the person against whom the threat was uttered.

. . . .

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.

A risk is substantial and unjustifiable 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.

word, to cause bodily injury to another person, in reckless disregard of the risk of terrorizing another person.

In Virginia v. Black, 538 U.S. 343 (2003), both defendants were convicted of attempted cross burning with intent to intimidate and one of them was also convicted of conspiracy to commit a felony. In the following quote, the court discussed a "true threat":

Furthermore, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*). And the First Amendment also permits a State to ban a "true threat." *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (*per curiam*) (internal quotation marks omitted); accord, *R.A.V. v. City of St. Paul*, [505 U.S. 377] *supra*, at 388, 112 S.Ct. 2538 ("[T]hreats of violence are outside the First Amendment"); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 774, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994); *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U.S. 357, 373, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997).

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts v. United States*, [394 U.S. 705] *supra*, at 708, 89 S.Ct. 1399 ("political hyperbole" is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S., at 388, 112 S.Ct. 2538. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." *Ibid.* Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

538 U.S. at 359-60.

Citing Black, Nishihara contends that "recent United States Supreme Court and Federal Ninth Circuit Court of Appeals cases have found that speech may be deemed unprotected by the First Amendment of the United States Constitution as a 'true

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threat' only upon proof that the speaker subjectively intended the speech as a threat."

As noted above, HRS § 707-715(1) describes two types of terroristic threats. The first is done with the intent to terrorize. The second is done in reckless disregard of the risk of terrorizing. Nishihara contends that only the first type is a true threat not protected by the First Amendment of the United States Constitution. In his view, the second type is not a true threat because it is not done with the intent to terrorize. We disagree. The Black quote above states that "a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" 538 U.S. at 360.

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and applying the law relevant to the issues raised and arguments presented, IT IS HEREBY ORDERED that the September 6, 2005 Judgment is affirmed.

DATED: Honolulu, Hawai'i, September 15, 2006.

On the briefs:

Jonathan E. Burge
for Defendant-Appellant.

Stephen K. Tsushima,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge