

NO. 27775

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
DREVIS TSUI, Defendant-Appellant

E.M. RIMANDO
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STATE OF HAWAII

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APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,
HONOLULU DIVISION
(HPD Criminal No. 05207153)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Foley and Nakamura, JJ.)

Defendant-Appellant Drevis Tsui (Tsui) appeals the Judgment filed on January 23, 2006 in the District Court of the First Circuit, Honolulu Division (district court).^{1/} On appeal, Tsui argues that (1) at his arraignment, the State of Hawaii (the State) failed to identify the person Tsui allegedly harassed and, therefore, his arraignment was constitutionally defective; and (2) the State did not prove beyond a reasonable doubt that Tsui was guilty of Harassment.

On May 27, 2005, in the Circuit Court of the First Circuit (circuit court), the State charged Tsui via a written Complaint with two counts of Terroristic Threatening in the Second Degree, in violation of Hawaii Revised Statutes (HRS) §§ 707-715(1) (1993) and 707-717(1) (1993). Count I identified Leonard Castrence (Castrence) and Count II identified Marie Iwasaki (Iwasaki) as the complainants. On August 10, 2005, the circuit court granted the State's motion (1) to amend the Complaint, changing the offense alleged in the two counts to Harassment in violation of HRS § 711-1106(1)(b) (Supp. 2006); and

^{1/} The Honorable Clarence A. Pacarro presided.

(2) to remand the case to the district court for further proceedings.

At the start of trial on October 4, 2005 in the district court, the State orally arraigned Tsui with the following charge:

On or about March -- May 22, 2005, in the City and County of Honolulu, State of Hawaii, with intent to harass, annoy, or alarm another person, you did insult, taunt, or challenge another person in a manner likely to provoke an immediate response or which would cause the other person to reasonably believe that you intended to cause bodily injury to the recipient or to another or damage the property of the recipient or another thereby committing the offense of Harassment in violation of Section 711-1106(1)(b) of the Hawaii Revised Statutes.

Tsui entered a plea of not guilty.

At the close of the State's evidence, Tsui moved for a judgment of acquittal, arguing insufficiency of the evidence, and submitted a written memorandum in support of his motion. The district court continued the trial to review the cases Tsui had cited and the record. Tsui subsequently filed two supplemental memoranda, on November 8 and 28, 2005, in support of his motion, this time arguing that he had not been properly arraigned because the State, in its oral charge, failed to (1) recite both charges and (2) specifically name the person(s) being harassed .

On December 2, 2005, the district court heard argument on the motion for acquittal. The district court denied the motion and found the following in regards to the State's oral arraignment:

In this case, there was a written complaint that was filed.

I believe that because they were not put on adequate notice, that's why they're saying could have been either of the people that they decided not to allow that type of charge in this case. Adequate notice was given as to who the people were involved and what the charges were. In fact, it's the exact same charge except for different complaining witnesses.

So, in this particular case because it is fairly unique, I'm going to exercise discretion. I'm going to find that there's a sufficient charge for a count of harassment,

but in the order of the written complaint since count I involves Mr. [Castrence], and the second count involves Ms. Iwasaki and they charged only one count, in my discretion, I'm gonna dismiss count II, but leave count I.

Trial resumed on January 20, 2006, and after further testimony and closing arguments, the district court found Tsui guilty of Count I. The district court filed its Judgment on January 23, 2006. Tsui filed a Notice of Appeal on February 16, 2006.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we conclude Tsui's appeal is without merit.

In 2005, Hawai'i Rules of Penal Procedure (HRPP) Rule 5(b)(1) mandated that in district court, if the offense charged against the defendant was other than a felony, a "complaint shall be filed or the oral charge stated." The purpose was to "sufficiently apprise the defendant of what he or she must be prepared to meet. As such, an oral charge or complaint must sufficiently allege all of the essential elements of the offense, regardless of whether an accusation is in the nature of an oral charge, information, indictment, or complaint." State v Sprattling, 99 Hawai'i 312, 318, 55 P.3d 276, 282 (2002) (internal quotation marks, citations, and brackets omitted). "[A]n indictment or oral charge that fails in a material respect would encroach upon a defendant's constitutional rights." Id.; accord State v. Jendrusch, 58 Haw. 279, 281, 567 P.2d 1242, 1244 (1977) (A charge that omits an essential element of the crime charged "amounts to a failure to state an offense and a conviction based upon it cannot be sustained, for that would constitute a denial of due process."). Due to the significant consequences associated with omitting an essential and material element in an oral charge, the Hawai'i Supreme Court has opined

that an objection to this deficiency may be raised at any time during the pendency of the proceeding. Sprattling, 99 Hawai'i at 318, 55 P.3d at 282; accord HRPP Rule 12(b)(2).

In the instant case, Count I as amended by the circuit court's August 10, 2005 Order Granting State's Motion to Amend Complaint and Remand to District Court of the First Circuit for Trial on the Merits and the oral arraignment sufficiently apprised Tsui of what he must be prepared to meet and sufficiently alleged all the essential elements of the offense. Therefore, Tsui's arraignment was not constitutionally defective.

As to Tsui's contention that the State did not prove beyond a reasonable doubt that Tsui was guilty of Harassment, the standard of review on appeal is substantial evidence.

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 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).

We conclude there was substantial evidence that Tsui was guilty of Harassment.

Therefore,

The Judgment filed on January 23, 2006 in the District Court of the First Circuit, Honolulu Division, is affirmed.

DATED: Honolulu, Hawai'i, August 9, 2007.

On the briefs:

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Cornie KA Watanabe
Presiding Judge

Daniel R. Foley
Associate Judge

Cynthia M. Mahan
Associate Judge