

NO. 28038

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
BARNEY BETER, Defendant-Appellant

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APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
KANEHOE DIVISION
(HPD CRIMINAL NO. 04403814)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Barney Beter (Beter) appeals from the Judgment filed on June 16, 2006 in the District Court of the First Circuit (district court).¹

Beter was charged with Harassment in violation of Hawaii Revised Statutes (HRS) § 711-1106(1)(a)(1993).² The charge relates to an incident on the night of October 3, 2004, when Dawn Crabbe (Dawn) and Edmund Rickard (Rickard) got into an argument in the driveway of Dawn's home. During the argument, Rickard, who weighed 325 pounds, was yelling obscenities and waving his arms as he approached Dawn, who was nine months pregnant. Despite repeated requests to leave the property, Rickard continued to approach Dawn. Beter, who was Dawn's friend, then struck Rickard once in the face.

¹ The Honorable Lawrence Cohen presided.

² HRS § 711-1106 **Harassment.** (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:

(a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact;

(2) Harassment is a petty misdemeanor.

After a bench trial, the district court found Beter guilty and sentenced him to pay a \$500 fine and \$30 to the criminal injury compensation fund.

On appeal, Beter argues that "the court reversibly erred in convicting [him] of . . . harassment, where the state failed to prove beyond a reasonable doubt that [he] intended to harass, annoy, or alarm Mr. Rickard," and that his conviction must be reversed "where the state failed to disprove [his] . . . defense of others justification beyond a reasonable doubt."³ Additionally, Beter argues that the district court "erroneously concluded that [Dawn] was required to retreat."

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and upon careful review of the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments advanced and the issues raised, we

³ HRS § 703-305 (1993) Use of force for the protection of other persons. (1) Subject to the provisions of this section and of section 703-310, the use of force upon or toward the person of another is justifiable to protect a third person when:

- (a) Under the circumstances as the actor believes them to be, the person whom the actor seeks to protect would be justified in using such protective force; and
 - (b) The actor believes that the actor's intervention is necessary for the protection of the other person.
- (2) Notwithstanding subsection (1):
- (a) When the actor would be obliged under section 703-304 to retreat, to surrender the possession of a thing, or to comply with a demand before using force in self-protection, the actor is not obliged to do so before using force for the protection of another person, unless the actor knows that the actor can thereby secure the complete safety of such other person; and
 - (b) When the person whom the actor seeks to protect would be obliged under section 703-304 to retreat, to surrender the possession of a thing or to comply with a demand if the person knew that the person could obtain complete safety by so doing, the actor is obliged to try to cause the person to do so before using force in the person's protection if the actor knows that the actor can obtain the other's complete safety in that way; and
 - (c) Neither the actor nor the person whom the actor seeks to protect is obliged to retreat when in the other's dwelling or place of work to any greater extent than in the actor's or the person's own.

hold that the district court's guilty verdict was based on an erroneous application of the protection of others justification. In reaching its decision, the district court relied upon a mistaken belief that there was no evidence that Dawn was afraid during the incident, and erred as a matter of law in concluding that Dawn had a duty to retreat.⁴

First, the district court relied on a mistaken view of the evidence in concluding that Beter's actions were not objectively reasonable. State v. Augustin, 101 Hawai'i 127, 132, 63 P.2d 1097, 1102 (2002) (HRS § 703-305 and related provisions require that the defendant's belief that the use of force is necessary must be objectively reasonable). In analyzing the objective reasonableness of Beter's actions, the district court focused on whether Dawn herself believed that she was in danger when Rickard approached her. The district court found that Dawn "testified that she did not have any fear." That finding was clearly erroneous, since Dawn in fact testified that she was afraid during the argument. Because that erroneous finding was fundamental to the district court's rejection of the protection of others justification, we vacate and remand for a new trial. Cf. State v. Ruiz, 49 Hawai'i 504, 506, 421 P.2d 305, 308 (1966).

The district court also erroneously applied the law in assessing whether Beter's actions were justified. Although the transcript of the trial is incomplete because portions of the

⁴ We reject Beter's contention that the state failed to prove that Beter acted with the intent of harassing, annoying, or alarming Rickard. Viewing the evidence in the light most favorable to the State, there was sufficient evidence to establish that Beter intended to harass, annoy, and alarm Rickard, in order to prevent Rickard from assaulting Dawn. See State v. Pesentheiner, 95 Hawai'i 290, 299, 22 P.3d 86, 95 (App. 2001).

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proceeding were not audible, based on our review of the district court's oral ruling, it appears that the court incorrectly believed that Dawn was under a legal obligation to retreat if possible before Beter could use force to defend her. However, there was no duty to retreat since Dawn was on her own property at the time of the incident, and Beter did not use deadly force in defending her. See HRS §§ 703-305(2)(b), 703-304(5). Since the district court misapplied the law in assessing the protection of others justification, the appropriate remedy is a new trial. See Pesentheiner, 95 Hawai'i at 301, 22 P.3d at 97.

In conclusion, there was sufficient evidence to support Beter's conviction. However, because of the district court's errors in applying the justification defense in reaching its decision, we must vacate and remand for a new trial. Id. Therefore,

IT IS HEREBY ORDERED that the judgment entered by the District Court of the First Circuit on June 16, 2006 is hereby vacated and the case is remanded for a new trial.

DATED: Honolulu, Hawai'i, June 15, 2007.

On the briefs:

Teresa D. Morrison,
Deputy Public Defender,
for Defendant-Appellant.

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


Chief Judge


Associate Judge


Associate Judge