

NO. 28096

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
DEIN BURNS, Defendant-Appellant

E.M. RIMANDO
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FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(HPD CRIMINAL NO. 06172859)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Dein Thomas Albert Burns (Burns) appeals from the judgment entered on July 17, 2006 in the District Court of the First Circuit (district court).¹

Burns was charged with Assault in the Third Degree, in violation of Hawaii Revised Statutes (HRS) § 707-712(1)(a). The charge stemmed from an altercation in a nightclub involving Burns and Grant Ganda (Ganda). After a bench trial, the district court found Burns guilty and sentenced him to one year of probation, a \$200 fine, a \$55 criminal injuries compensation fee, and a \$75 probation fee.

On appeal, Burns contends that his conviction should be reversed because: (1) "the State failed to adduce substantial evidence to prove facts negating Burns' self-defense claim beyond a reasonable doubt," and (2) "the record is clear that the trial court did not remember or consider all matters in the record before rejecting Burns' justification of self-defense and finding

¹ The Honorable Lono J. Lee presided.

Burns guilty of the offense of Assault in the Third Degree, thereby denying Burns of a fair trial."

Upon careful review of the record and the briefs submitted by the parties, we resolve Burns's arguments as follows:

(1) Considering the evidence in the strongest light for the prosecution, State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998), there was substantial evidence supporting the conviction and negating Burns's self-defense justification. HRS § 703-304(1) (1993) and § 703-300 (Supp. 1992); State v. Lubong, 77 Hawai'i 429, 431, 886 P.2d 766, 768 (App. 1994). This included Ganda's testimony that Burns struck him while Ganda's arms were by his side. It also included testimony by Ganda's friend, Katherine Edwards-Fraser (Fraser), that although Ganda raised his right arm before being struck by Burns, Ganda did not make a fist, Ganda never punched Burns, and Burns struck and kicked Ganda several additional times after Ganda was on the ground.

(2) The district court's oral misstatement of some of the testimony does not require reversal. In explaining its reasons for finding Burns guilty, the district court stated:

Okay, first of all, let the Court address some of defense's concerns here. A, you raise the claim of self-defense, okay, and under Section 703-304, okay, use of force against another person is justified when defendant has a subjective belief that use of force is immediately necessary to protect himself against the use of unlawful force by the other person. And 2, defendant's subjective belief must be objectively reasonable. On that state, it also must be credible.

So, regarding the first instance, the first test, even if the Court was to believe the defendant's statement that clenched fist and mouthing words was unlawful force, the Court fails to find that meets the first test.

Second, by the defendant's own testimony, when he hit the complaining witness the first time, there's no evidence

that the complaining witness was coming back and yet he struck two and three more times. So, the claim of self-defense is not credible to this Court.

However, Burns had testified that after he struck Ganda the first time, Ganda fell back and "then came forward like he was gonna come like, full-steam ahead, but [Burns] wouldn't allow that to happen cause [Burns] felt threatened" Burns then hit Ganda two more times in the face "to make sure that [Ganda] wouldn't be able to give [Burns] any bodily harm." According to Burns, it was not until after the third punch that Ganda fell to the ground.

Burns's counsel did not object to the accuracy of the district court's comments. The district court did not enter written findings of fact and conclusions of law, and there is nothing in the record to indicate that it was asked to do so by Burns pursuant to Hawai'i Rules of Penal Procedure Rule 23(c).

We considered a similar situation in State v. Alsip, 2 Haw. App. 259, 630 P.2d 126 (1981), where the trial court misstated some of the testimony in a colloquy with counsel during the course of the trial. This court affirmed the conviction and noted:

If we hold that every expression of a misconception of the evidence made during the course of trial is a basis for reversal without a showing that it resulted in the ultimate finding of guilt on the issue tried, then obviously, trial judges will be careful to say nothing and parties will have lost the opportunity to clear up misconceptions, if they exist. We will not adopt a rule which would have such a chilling effect upon trial courts.

Here, there is ample evidence to support the court's ultimate conclusion without resort to the statements complained of. The statements made by the court below which are complained of, do not, considering the facts and circumstances of this case, overcome the presumption in favor of the correctness of the court's ultimate conclusions.

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Id. at 263, 630 P.2d at 129; see State v. Miner, 2 Haw. App. 581, 584, 637 P.2d 782, 784 (1981).

Applying those principles here, we conclude that "there is ample evidence to support the court's ultimate conclusion without resort[ing] to the statements complained of." Alsip, 2 Haw. App. at 263, 630 P.2d at 129. Most notably, Fraser testified that Ganda fell to the ground after the first punch and that Burns then struck and kicked Ganda several times while Ganda remained on the ground. That testimony amply supports the district court's ultimate conclusion that Burns's claim of self defense was not credible.

Therefore,

IT IS HEREBY ORDERED that the judgment entered on July 17, 2006 in the District Court of the First Circuit is affirmed.

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

On the briefs:

Alen M.K. Kaneshiro,
Deputy Public Defender,
for Defendant-Appellant.

Anne K. Clarkin,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Man E. Redden
Chief Judge

Daniel R. Foley
Associate Judge

Cyril H. Nakama
Associate Judge