

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27365

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
DEWITT L. LONG, Defendant-Appellant

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APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD CRIMINAL NO. 05163370)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Dewitt L. Long (Long) appeals from the Judgment filed on May 13, 2005, in the District Court of the First Circuit (district court)¹ that convicted him of harassment by stalking, in violation of Hawaii Revised Statutes (HRS) Section 711-1106.5 (Supp. 2007).² Long was charged with harassment by stalking (four charges), operating a motor vehicle without a license, and operating a motor vehicle without a valid

¹ The Honorable Lono J. Lee presided.

² Hawaii Revised Statutes (HRS) Section 711-1106.5 (Supp. 2007) provides in relevant part:

(1) A person commits the offense of harassment by stalking if, with intent to harass, annoy, or alarm another person, or in reckless disregard of the risk thereof, that person engages in a course of conduct involving pursuit, surveillance, or nonconsensual contact upon the other person on more than one occasion without legitimate purpose.

.....
(3) For purposes of this section, "nonconsensual contact" means any contact that occurs without that individual's consent or in disregard of that person's express desire that the contact be avoided or discontinued. Nonconsensual contact includes direct personal visual or oral contact and contact via telephone, facsimile, or electronic mail transmission.

safety check. After a bench trial, he was found guilty of one of the four charges of harassment by stalking and guilty of operating a motor vehicle without a license. He was acquitted of the remaining charges.

The district court sentenced Long to concurrent terms of imprisonment of thirty days on each of his convictions for harassment by stalking and operating a vehicle without a license, with credit for time served. Long did not appeal from the Judgment entered with respect to his conviction for driving without a license. We will thus confine our discussion to matters relevant to the harassment-by-stalking conviction.

I.

At trial, the complaining witness (CW) for the four harassment-by-stalking charges described a total of four encounters she had with Long. Each of the CW's four encounters with Long was charged as a separate harassment-by-stalking offense. At the close of the prosecution's case-in-chief, the district court granted Long's motion for judgment of acquittal on the harassment-by-stalking charges that corresponded with the CW's first two encounters with Long. In acquitting Long of these two charges, the district court agreed with the defense and found that the first encounter was "a chance meeting in Waikiki" and that the second encounter was "also a chance encounter." It thus concluded that the prosecution had "failed to prove a prima facie case for those two charges."

Long testified in his own defense and denied that he had harassed or stalked the CW during the third and fourth encounters. At the close of the evidence, the district court found Long guilty of harassment by stalking on the charge based on the third encounter and acquitted him of the charge based on the fourth encounter. The district court stated that "there was no real non-consensual contact except for the incident of April 22nd [(the third encounter)]. . . ." But the court found the CW's version of the third encounter to be credible and on that basis found Long guilty of the charge based on the third

encounter. The court found Long's explanation of his conduct during the fourth encounter to be "feasible" and thus concluded that the prosecution had failed to prove the charge based on the fourth encounter beyond a reasonable doubt.

II.

On appeal, Long asserts that the district court erred in: 1) finding him guilty of harassment by stalking based on the facts of the third encounter, instead of finding him guilty only of the lesser included offense of harassment, in violation of HRS Section 711-1106(1)(f) (Supp. 2007); and 2) failing to find that HRS Section 711-1106.5 is unconstitutionally vague. As discussed in greater detail below, we conclude that in light of the district court's determination that Long had only engaged in one harassing encounter, it reversibly erred in concluding that he was guilty of harassment by stalking, which requires proof of more than one harassing contact. We further conclude that harassment, in violation of HRS Section 711-1106(1)(f), is not a lesser included offense of the charged offense of harassment by stalking, in violation of HRS Section 711-1106.5. We therefore reverse Long's conviction for harassment by stalking.

A.

In order to commit the offense of harassment by stalking, a defendant must, "with intent to harass, annoy, or alarm another person, or in reckless disregard of the risk thereof, . . . engage[] in a course of conduct involving pursuit, surveillance, or nonconsensual contact upon the other person on more than one occasion without legitimate purpose." HRS § 711-1106.5 (emphases added). Thus, proof that the defendant engaged in at least two incidents of harassing conduct with the requisite intent is necessary to prove the offense.

In acquitting Long of the charges related to the first two encounters, the district court found that these encounters were "chance" encounters. The district court further found that the third encounter was the only "real non-consensual contact" between Long and the CW. Thus, the district court clearly

determined that Long's first two encounters with the CW did not constitute "pursuit, surveillance, or nonconsensual contact upon [the CW]" that Long had engaged in "with intent to harass, annoy, or alarm [the CW], or in reckless disregard of the risk thereof." The district court acquitted Long of the charge related to the fourth encounter.

Based on the district court's findings and the evidence presented, the prosecution only proved that Long had engaged in one harassing contact with the requisite intent, and thus the prosecution failed to establish the elements for harassment by stalking, which requires proof of at least two harassing incidents. Accordingly, the district court should have acquitted Long of the charge related to the third encounter and reversibly erred in failing to do so.

B.

Long submits that the district court should have found him guilty of the lesser included offense of harassment, in violation of HRS Section 711-1106(1)(f). We disagree because we conclude that HRS Section 711-1106(1)(f) is not a lesser included offense of harassment by stalking. HRS Section 711-1106(1)(f) provides:

(1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:

...

(f) Makes a communication using offensively course language that would cause the recipient to reasonably believe that the actor intends to cause bodily injury to the recipient or another or damage to the property of the recipient or another.

We agree with Plaintiff-Appellee State of Hawai'i that harassment, in violation of HRS Section 711-1106(1)(f), is not a lesser included offense of harassment by stalking, in violation of HRS Section 711-1106.5. HRS Section 711-1106(1)(f) requires proof of a more culpable mental state and involves different elements of proof than harassment by stalking. HRS Section 711-1106(1)(f) is therefore not a lesser included offense of

harassment by stalking. See HRS § 701-109(4) (1993) (setting forth the tests for an included offense).

C.

Because we are reversing Long's conviction for harassment by stalking, we need not reach his claim that the statute defining the offense is unconstitutionally vague.

III.

The May 13, 2005, Judgment of the district court in Case No. 1P105-06305/WSTA11 (Citation/Report No. 05163370), which convicted Long of harassment by stalking, is reversed.

DATED: Honolulu, Hawai'i, January 23, 2008.

On the briefs:

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City and County of Honolulu
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Daniel R. Foley

Presiding Judge


Craig F. Nakamura

Associate Judge


Auna RSK Fijina

Associate Judge