

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 28512

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
PENIAMINA MAILO, Defendant-Appellant

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 06-1-1770)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, Chief Judge, Nakamura, and Leonard, JJ.)

Defendant-Appellant Peniamina Mailo (Mailo) appeals from the Judgment filed on April 4, 2007, in the Circuit Court of the First Circuit (circuit court).^{1/} Following a jury trial, Mailo was found guilty of Terroristic Threatening in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 707-716(1)(d) (Supp. 2006).^{2/} The circuit court sentenced Mailo to a term of imprisonment of five years.

^{1/} The Honorable Dexter D. Del Rosario presided.

^{2/} At the time of the charged offense, HRS § 707-716 (Supp. 2006) provided in relevant part as follows:

§707-716 Terroristic threatening in the first degree. (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:

.

(d) With the use of a dangerous instrument.

HRS § 707-715 (1993) defines terroristic threatening in relevant part as follows:

§707-715 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 :

(1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person[.]

On appeal, Mailo argues that: 1) there was insufficient evidence to negate his claim of self-defense; and 2) the circuit court improperly penalized Mailo for exercising his right to trial in sentencing him. For the reasons discussed below, we affirm.

I.

Mailo and Osvaldo Ramos (Ramos), the complainant, were neighbors. Mailo lived with his girlfriend, Elisapeta Keli (Keli), and Ramos lived across the street with his children and girlfriend Efa Sheck (Efa), who was Keli's daughter. Ramos disassembled a deck in front of his house and used a Bobcat machine to discard the lumber. After Ramos finished using the Bobcat, Mailo approached Ramos from across the street and yelled, "What the F are you doing?" Ramos attempted to walk away, but Mailo berated Ramos for using the Bobcat. Mailo grabbed a shovel and said that he would "crack [Ramos's] head." When Ramos turned to face Mailo, he saw Mailo holding a shovel that was lifted in a position to hit Ramos. Mailo swung the shovel, which hit a nearby car and broke into two pieces. Ramos quickly walked away from Mailo and called the police.

One of the responding officers, Celine Aiu, testified that Mailo told her that Ramos had a large knife while they were arguing and that Mailo was fearful and was protecting himself with a shovel. Ramos testified that he did not have a knife in his hand or pocket during the argument. Efa testified that Ramos had a knife in his back pocket during the incident with Mailo. Efa, Keli, and Sharlene Sheck (Efa's sister) all testified that they did not see Ramos brandish a knife during the incident.

II.

We conclude that there was sufficient evidence to disprove Mailo's claim of self-defense and to support Mailo's

conviction. HRS § 703-304 (1993 & Supp. 2001) establishes the self-protection defense and provides in relevant part as follows:

§703-304 Use of force in self-protection. (1)
Subject to the provisions of this section and of section 703-308, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.

Once a defendant produces some credible evidence to support a self-protection defense, the prosecution must negate the defense beyond a reasonable doubt. State v. Lubong, 77 Hawai'i 429, 431, 886 P.2d 766, 768 (App. 1994).

The prosecution introduced substantial evidence to negate Mailo's self-defense claim. When viewed in the light most favorable to the prosecution, State v. Bui, 104 Hawai'i 462, 467, 92 P.3d 471, 476 (2004), there was substantial evidence to show that Mailo was the aggressor and that Mailo yelled at Ramos, threatened Ramos verbally and with a shovel, and swung the shovel near Ramos. Ramos denied taking any aggressive action toward Mailo, and Ramos also denied that he was in possession of a knife during the incident. Other witnesses testified that Ramos did not brandish a knife during the encounter. This evidence was sufficient to negate Mailo's self-defense claim, especially in view of the jury's province to determine credibility. See In re Doe, 107 Hawai'i 12, 19, 108 P.3d 966, 973 (2005) (stating that the prosecution disproves a claim of self defense beyond a reasonable doubt "when the trier of fact believes [the prosecution's] case and disbelieves the defense"). This same evidence also constitutes substantial evidence to support Mailo's conviction.

III.

We reject Mailo's claim that the circuit court improperly based Mailo's sentence on that fact that he chose to go to trial, rather than plead guilty. Mailo's claim is based on comments made by the circuit court during Mailo's sentencing.

The following exchange occurred between Mailo and the circuit court:

The Court: Mr. Mailo, please stand. You have the right to make any statement that you would like.

Is there anything that you want to say?

The Defendant: Yeah. I just want to say sorry. And I've been inside prison about seven or eight months, so I -- I miss my family. And I'm trying to ask you I'm sorry and please forgive me. If you can give me time served and five year probation so I can go back work and take care of my kids and my family. And I apologize for what happened.

The Court: Anything else that you want to say?

The Defendant: No, Your Honor. Thank you.

The Court: The Court is prepared to rule. In -- by statute, in determining an appropriate sentence, the Court must consider the history and character of the defendant -- that means his prior record -- and the nature and circumstances of the offense. What makes this case difficult is that Mailo has a history of criminal conduct and all which involves violence. And he in his last case was sentenced to an open term for assault in the second degree. He was paroled or his parole expired in 2005, and the present case occurred in 2006.

Also of significance is that Mr. Mailo had asserted his innocence and went to trial. And this was a matter for the jury, and the jury found the complaining witnesses to be credible by nature of their verdict.

Perhaps, it might have been a different situation if Mr. Mailo had taken responsibility for this case early on and the Court could consider that to be a mitigating circumstance. However, because of his prior record and the nature of this offense -- and I think it's fortunate that no one was physically harmed. There was a shovel involved, and it was broken, although there was, I believe, damage to a vehicle. It does indicate the defendant needs to be under supervision. I don't know what causes him to get so angry to a point where he will resort to violence, but that places the community at risk.

So, it will be the judgment and sentence of this Court that the defendant be committed to custody of the director of the Department of Public Safety for a period of five years' incarceration. It's not the Court's position that he serve all five years, but I think the paroling authority's in the best position to know when he deserves to be released under their supervision. And I think it will be in his interest and the community's interest under these circumstances. So mittimus will issue forthwith.

(Emphasis added.)

We conclude that when read in context, the circuit court's comments did not indicate that the court was punishing

