

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 29389

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAIISTATE OF HAWAII, Plaintiff-Appellee, v.
GUILLERMO B. FERNANDEZ, Defendant-AppellantJENNIFER K. KAPPA
CLERK, APPELLATE COURTS
STATE OF HAWAII

2009 OCT 15 AM 8:10

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 07-1-1274)MEMORANDUM OPINION

(By: Watanabe, Presiding J., Fujise, and Leonard, JJ.)

As a result of events that took place on the morning of June 29, 2007, Defendant-Appellant Guillermo B. Fernandez (Fernandez), a taxi driver, was indicted for the attempted murder of his customer, Rodney Ryan Foth (Foth). A jury found Fernandez guilty, and Fernandez now appeals from the judgment entered by the Circuit Court of the First Circuit (circuit court)¹ on September 3, 2008, convicting and sentencing him for Attempted Murder in the Second Degree in violation of Hawaii Revised Statutes §§ 705-500 (1993), 707-701.5 (1993), and 706-656 (1993 & Supp. 2008).

We affirm.

A.

Witnesses to the June 29, 2007 incident testified that on the morning in question, Foth exited a taxi in the CompUSA parking lot in Honolulu that was bordered on one side by Keawe Street, shouted some angry words² at Fernandez, and began walking towards Keawe Street. Fernandez then reversed his taxi, stepped on the gas, made a U-turn, and drove the taxi towards the parking-lot exit to Keawe Street. Just as Foth reached the exit gate to the parking lot near the Keawe Street curb, he was sideswiped by the taxi. To avoid being smashed into the gate,

¹ The Honorable Dexter D. Del Rosario presided.

² Foth testified that he was offended by comments that Fernandez had made during the taxi ride and with Fernandez's "attitude." Additionally, Foth was upset because he had handed Fernandez a ten dollar bill for the \$6.85 fare but Fernandez did not want to give Foth any change or a receipt.

Foth grabbed onto the taxi and lifted his legs on top of the taxi. The taxi then took off, collided with a parked car, and caused Foth to fly off the taxi's hood onto the hood of the parked car and roll onto the ground (sideswiping incident).

One witness testified that after the sideswiping incident had occurred, he went over to help Foth get up and out of the road but then "heard a car reverse, reverse pretty quickly" and noticed that the taxi was coming right at them. The witness recalled that he pulled Foth to the side and ran away, and as the taxi passed them, Fernandez yelled at and taunted Foth: "Come on, let's get this -- let's do this. Let's get this over with. Come on."

Thereafter, according to witnesses, Fernandez made several U-turns at both ends of Keawe Street and drove the taxi past Foth multiple times. Fernandez then turned right from Keawe Street onto Ala Moana Boulevard, turned right again onto South Street, drove into the South Street entrance of the CompUSA parking lot, and drove through the parking lot towards Foth. Foth and other bystanders got out of the taxi's path, and Fernandez turned left out of the parking lot onto Keawe Street and made another U-turn. At that point, Foth, claiming that his passport and paperwork were in the taxi and needed to be retrieved, walked to the middle of Keawe Street and began waving his hands in the air at Fernandez to "[s]top" the taxi. Fernandez then "stepped on the gas" and drove his taxi straight at Foth. Just as the taxi was about to reach Foth, Foth jumped up in the air, was struck by the taxi, flipped over a couple of times, landed on and cracked the windshield, and fell off the taxi to the ground (middle-of-the-road incident). Fernandez then drove off, and the witness helped pull Foth off the road and position Foth behind a parked car.

Thereafter, according to witnesses, Fernandez drove around the block again at high speed, but left the scene after hearing the sound of sirens.

B.

During the settling jury instructions, the circuit court declined to give the jury a unanimity instruction pursuant

to State v. Arceo, 84 Hawai'i 1, 928 P.2d 843 (1996) (Arceo instruction). Prior to the giving of jury instructions, the following dialogue took place between the deputy prosecutor and the circuit court, outside the presence of the jury:

[DEPUTY PROSECUTOR]: One of the things I did want to address regarding instructions was the Court's decision not to put an Arceo instruction, just so we have the Court's reasoning on the record. It's my understanding that the Court views the evidence as a continuing course of conduct, so the Arceo instruction is not necessary.

THE COURT: We discussed it yesterday; and from the Court's view of the evidence, I do not see a basis for the Arceo instruction. And from my discussion with both parties, my understanding, the conduct that was a substantial step in the course of conduct intending to cause the death of the complaining witness was the particular incident in which the complaining witness was standing in the middle of the road and the defendant came forward, and he either jumped or -- I don't know; there's a dispute as to how he ended up on the hood -- and he rolled and he hit the windshield and, my understanding from the discussion in chambers, that that's the conduct that the State is going to argue was the attempt to cause the death of the complaining witness.

Is that correct?

[DEPUTY PROSECUTOR]: We're going to argue the state of mind, however, from the beginning. But as far as a substantial step, yes.

THE COURT: Yes. As far as the particular conduct that he engaged in that was a substantial step, it was that incident on the road.

[DEPUTY PROSECUTOR]: Correct.

On May 16, 2008, the jury returned its verdict, finding Fernandez guilty as charged. This appeal followed.

Fernandez asserts that (1) the circuit court committed plain error when it failed to give the jury an Arceo instruction because there were two distinct and separate acts alleged, either of which could have provided the basis for the conduct element of the attempted-murder charge; and (2) there was no substantial evidence that Fernandez intentionally engaged in conduct that, under the circumstances as he believed them to be, constituted a substantial step in the course of conduct intended or known by Fernandez to cause the death of Foth.

Based on our review of the record on appeal and the briefs submitted by the parties, and having given due

consideration to the arguments presented and the applicable statutes and case law, we disagree with Fernandez.

C.

In State v. Arceo, 84 Hawai'i at 32-33, 928 P.2d at 874-75, the Hawai'i Supreme Court held that

when separate and distinct culpable acts are subsumed within a single count charging a sexual assault--any one of which could support a conviction thereunder--and the defendant is ultimately convicted by a jury of the charged offense, the defendant's constitutional right to a unanimous verdict is violated unless one or both of the following occurs: (1) at or before the close of its case-in-chief, the prosecution is required to elect the specific act upon which it is relying to establish the "conduct" element of the charged offense; or (2) the trial court gives the jury a specific unanimity instruction, i.e., an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt.

The supreme court has also held, however, that no Arceo instruction is required where a charge is based on "a single incident of culpable conduct[.]" See State v. Valentine, 93 Hawai'i 199, 208-09, 998 P.2d 479, 488-89 (2000) (holding that no unanimity instruction is required where the evidence showed only a single episode between the defendant and a police officer "during which the two allegedly engaged in a continuous struggle for possession and control of [a] firearm").

Additionally, "no specific unanimity instruction is necessary where the defendant is charged with a continuing offense, based on facts and circumstances that constitute a continuing course of conduct." State v. Rabago, 103 Hawai'i 236, 250, 81 P.3d 1151, 1165 (2003) (internal quotation marks omitted). For example,

Arceo is not implicated if the prosecution adduces evidence of a series of acts by the defendant that constitute a "continuous course of conduct," and the prosecution "argues that the requisite conduct element is satisfied by the defendant's continuous course of conduct, albeit that the defendant's continuous course of conduct may be divisible into conceptually distinct motor activity."

State v. Hironaka, 99 Hawai'i, 198, 208, 53 P.3d, 806, 816 (2002) (quoting State v. Rapoza, 95 Hawai'i 321, 330, 22 P.3d 968, 977

(2001)) (emphasis added; brackets and footnote omitted).
According to the supreme court, a "continuous offense" is

a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy, or an offense which continues day by day, or a breach of the criminal law, not terminated by a single act or fact, but subsisting for a definite period and intended to cover or apply to successive similar obligations or occurrences.

Put differently,

the test to determine whether a defendant intended to commit more than one offense in the course of a criminal episode is whether the evidence discloses one general intent or discloses separate and distinct intents. If there is but one intention, one general impulse, and one plan, there is but one offense.

Arceo, 84 Hawai'i at 18, 928 P.2d at 860 (emphasis added; brackets and citations omitted). An Arceo unanimity instruction "is not required if the conduct element of an offense is proved by the prosecution to have been a series of acts constituting a continuous course of conduct and the offense is statutorily defined in such a manner as to not preclude it from being a 'continuous offense.'" Rapoza, 95 Hawai'i at 329-30, 22 P.3d at 976-77 (2001). See also State v. Apao, 95 Hawai'i 440, 447, 24 P.3d 32, 39 (2001) (holding that "a specific unanimity instruction is not required if (1) the offense is not defined in such a manner as to preclude it from being proved as a continuous offense and (2) the prosecution alleges, adduces evidence of, and argues that the defendant's actions constituted a continuous course of conduct").

Here, Plaintiff-Appellee State of Hawai'i presented the conduct in the sideswiping and middle-of-the-road incidents as part of a "continuous course of conduct" or "a single incident of culpable conduct," rather than as distinct and separate acts. The testimony of the witnesses all indicated that Fernandez circled the CompUSA-Keawe Street area continuously during a period of time and his taxi came into contact with Foth twice during that period. The sideswiping and middle-of-the-road incidents in which Fernandez's taxi came into physical contact with Foth were part of a continuous course of conduct "divisible

into conceptually distinct motor activity[,]" rather than "separate and distinct" acts. The physical contacts between Foth and Fernandez's car were part of "a continuous, unlawful series of acts set on foot by a single impulse and operated by an unintermittent force and, thus, constituted but one breach of the criminal law[,]" since Fernandez "made a few passes" at Foth between the physical contacts. Rapoza, 95 Hawai'i at 329, 22 P.3d at 976 (quoting Arceo, 84 Hawai'i at 18, 928 P.2d at 860) (internal quotation marks and ellipsis omitted). Thus, because the conduct in the sideswiping and middle-of-the-road incidents were part of a continuous course of conduct, no Arceo unanimity instruction was required.

D.

Turning to Fernandez's second contention, there is substantial evidence in the record that Fernandez intentionally engaged in conduct which constituted a substantial step in a course of conduct intended, or known, to cause Foth's death. Numerous witnesses testified that they saw Fernandez deliberately aim his vehicle toward Foth. Based on such testimony, "a person of reasonable caution" could reasonably have concluded that Fernandez intentionally or knowingly collided his car with Foth. State v. Souza, 119 Hawai'i 60, 72, 193 P.3d 1260, 1272 (App. 2008). As such, the evidence was sufficient to support Fernandez's conviction.

CONCLUSION

The Judgment of Conviction and Sentence entered by the circuit court on September 3, 2008 is affirmed.

DATED: Honolulu, Hawai'i, October 15, 2009.

On the briefs:

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for Defendant-Appellant.

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