

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. 29730

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII Plaintiff-Appellee,  
v.  
BENJAMIN GRANT O'DONNELL,<sup>1/</sup> Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
KANEHOE DIVISION  
(CASE NO. 1P407-00068; HPD NO. 07014236)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., Watanabe and Leonard, JJ.)

Defendant-Appellant Benjamin Grant O'Donnell (O'Donnell) appeals from the Judgment entered by the District Court of the First Circuit (District Court) on March 13, 2009.<sup>2/</sup> After a bench trial, the District Court found O'Donnell guilty of harassment, in violation of Hawaii Revised Statutes (HRS) § 711-1106(1)(b) (Supp. 2008).<sup>3/</sup> The District Court sentenced O'Donnell to thirty days of imprisonment.

On appeal, O'Donnell argues that the District Court erred in: 1) denying O'Donnell's motion to continue trial, which was made on the day of trial; and 2) admitting evidence O'Donnell

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<sup>1/</sup> We note that in the caption of the Record on Appeal and the briefs, the Defendant-Appellant's last name is spelled "Odonnell" whereas the record indicates that Defendant-Appellant signs his last name as "O'Donnell" and the trial transcript also uses "O'Donnell." In this Summary Disposition Order, we will use "O'Donnell" in referring to Defendant-Appellant's last name.

<sup>2/</sup> The Honorable David Lo presided.

<sup>3/</sup> HRS § 711-1106(1)(b) provides:

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

...

(b) Insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response or that would cause the other person 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[.]

K. HAMAKADO  
CLERK, APPELLATE COURT  
STATE OF HAWAII

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claims was irrelevant and prejudicial, namely, testimony that O'Donnell had "killed before." We affirm the District Court's Judgment.

I.

Immediately prior to the commencement of trial, counsel for O'Donnell made the following request for a continuance:

Mr. O'Donnell was mistaken that he thought this trial was set for the 23rd. Therefore he told his dad that he doesn't need to be present today. His dad is a material witness to all of these cases, and he would ask the court to consider that and requests a short postponement so his dad could be here.

Plaintiff-Appellee State of Hawai'i (State) opposed the request, arguing:

And the State would object. The State is ready to proceed today. There have been several continuances on the part of the defense. The last continuance was designated last continuance for the defense.

The District Court ruled that "[i]nasmuch as it has been designated as defense's last continuance, the defendant's motion to continue is denied."

Jessica Crabtree (Jessica) testified that at around 11:20 p.m. on January 10, 2007, she was awakened by O'Donnell's yelling. Jessica tried to go back to sleep, but O'Donnell began yelling threats at her and she became frightened. O'Donnell threatened to get Jessica and have her children taken away. She feared for her life and the lives of her children.

Thomas Crabtree (Thomas), a U.S. Army surgeon, testified that he was awakened by O'Donnell's yelling and screaming. Three sets of neighbors came out onto the street in response to the noise. O'Donnell was making threats directed at Thomas, his wife, Jessica, and his children. Thomas was afraid for his life and the lives of his family members because O'Donnell had "made it known that he's certainly capable of violence." O'Donnell threatened to "take a rope and . . . hang [Thomas] 'til [Thomas was] fuckin' dead." Thomas testified, "That is a frequent phrase he employs, and it was used that night, yes." O'Donnell did not object to this testimony. Thomas testified that he felt that his life was in imminent danger.

On cross-examination, the following exchange took place between defense counsel and Thomas:

Q. Okay. Did you feel threatened at that point, that he was going to actually kill you?

A. Mr. O'Donnell has killed before, and I certainly felt that he might do that again.

Defense counsel objected and moved to strike Thomas's response. The District court overruled the objection and did not strike Thomas's response.

O'Donnell testified in his own defense. O'Donnell testified that around 9:30 on the night in question he was watching a football game and then went to his back yard and was listening to music. He heard Thomas yelling "I'm going to kill him." O'Donnell's eighty-eight-year-old father was in the yard. O'Donnell testified that he had previous problems with Thomas.

O'Donnell stated that Thomas accused O'Donnell's father of having sexual relations with Thomas's wife. O'Donnell told Thomas that Thomas was out of his mind. O'Donnell denied threatening Thomas or Thomas's wife in any way. O'Donnell admitted to drinking "maybe about seven or eight [beers] over a three- or four-hour period" that night.

## II.

The District Court did not abuse its discretion when it denied O'Donnell's motion for continuance on the day of trial. See State v. Lee, 9 Haw. App. 600, 603, 856 P.2d 1279, 1281 (1993) (applying abuse of discretion standard to trial court's ruling on motion to continue trial). The mere assertion of an unavailable witness does not give rise to an automatic right to a continuance. The movant is generally required to show that (1) the movant acted with due diligence to obtain the attendance of the witness; (2) the witness would provide substantial favorable evidence for the movant; (3) the witness is available and willing to testify; and (4) the denial of the continuance would result in material prejudice to the movant. Id. at 604, 856 P.2d at 1282 (citing United States v. Walker, 621 F.2d 163, 168 (5th Cir.

1980)); see also United States v. Harris, 436 F.2d 775, 776 (9th Cir. 1970).

At the time the motion to continue was denied, O'Donnell had not made the required showings. The reason O'Donnell gave for the absence of his witness, who was O'Donnell's father, was that O'Donnell had given his father the wrong date for trial. O'Donnell did not provide an explanation of why he had given his father the wrong date, and O'Donnell did not show that he had acted with due diligence to secure his father's presence. O'Donnell did not make any proffer or representation regarding the anticipated testimony of his father or the prejudice that O'Donnell would suffer if the continuance was denied. There was no evidence that the witness had been subpoenaed. In addition, the State represented that the District Court had already granted O'Donnell several continuances and had indicted that no more continuances would be granted. In light of the information that the District Court had regarding O'Donnell's motion for continuance, the District Court did not abuse its discretion in denying the motion.

### III.

In reviewing a claim regarding the admissibility of evidence, the District Court's determination of whether certain evidence was relevant is reviewed under the right/wrong standard, while the balance to be struck between the probative value and the prejudicial effect of such evidence is reviewed for an abuse of discretion. State v. Fetelee, 117 Hawai'i 53, 62-63, 175 P.3d 709, 718-719 (2008).

Preliminarily, we note that in his brief, O'Donnell makes reference to several instances in which he contends that evidence of prior bad acts was presented to the District Court. However, O'Donnell only complies with the Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (2008), which imposes specific requirements for raising points of error on appeal, with respect to Thomas's testimony that O'Donnell "has killed before." HRAP Rule 28(4) states: "Points not presented in accordance with this section will be disregarded, except that the appellate

court, at its option, may notice a plain error not presented." We decline to notice plain error for any points of error not properly raised.

As noted, O'Donnell's only properly presented evidentiary claim is that the District Court erred in admitting Thomas's testimony that Thomas believed that O'Donnell "has killed before." We reject O'Donnell's argument that his conviction must be overturned due to the admission of this evidence.

First, we note that defense counsel elicited this testimony through his question on cross-examination. Defense counsel asked Thomas if he felt threatened that O'Donnell "was going to actually kill you?" Thomas's answer--that O'Donnell had killed before and Thomas felt he might do the same again--was directly responsive to the question posed by defense counsel.

Second, O'Donnell was charged with violating HRS § 711-1106(1)(b), which provides, in relevant part, that the offense of harassment can be established by proof that a defendant, with the requisite intent, "[i]nsults, taunts or challenges another person in a manner . . . that would cause the other person to reasonably believe that the actor intends to cause bodily injury to the recipient . . . ." (Emphasis added.) Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Hawaii Rules of Evidence Rule 401 (1993). Thomas's testimony regarding his belief that O'Donnell had "killed before" was relevant to whether Thomas reasonably believed that O'Donnell intended to cause bodily injury to Thomas.

Third, O'Donnell's argument is premised on the erroneous assumption that the District Court may have relied upon the challenged evidence for an improper purpose. Contrary to O'Donnell's assumption, the law presumes that in a bench trial, the judge is not influenced by incompetent evidence. State v. Antone, 62 Haw. 346, 353, 615 P.2d 101, 107 (1980) ("It is well established that a judge is presumed not to be influenced by incompetent evidence."); State v. Lioen, 106 Hawai'i 123, 133,

102 P.3d 367, 377 (App. 2004). O'Donnell has not rebutted that presumption.

IV.

The Judgment entered by the District Court on March 13, 2009, is affirmed.

DATED: Honolulu, Hawai'i, December 29, 2009.

On the briefs:

Thomas M. Otake  
for Defendant-Appellant.

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

*Craig H. Nakamura*

Chief Judge

*Corinne K. Watanabe*

Associate Judge

*[Signature]*  
Associate Judge