

NO. 25554

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,

vs.

RICHARD THOMAS, Defendant-Appellant.

E.M. RIMANDO  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(HPD CR. NO. 02307339)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant-appellant Richard Thomas [hereinafter "Thomas"], appeals from the district court's<sup>1</sup> November 26, 2002 judgment convicting him of the offense of harassment, in violation of Hawai'i Revised Statutes [hereinafter "HRS"] § 711-1106(1)(a) (Supp. 2002).<sup>2</sup> On appeal, Thomas presents the following two points of error: (1) the district court's findings of fact were clearly erroneous, and its conclusion of law, adjudging him guilty of the charged offense, was wrong; and (2) the prosecution failed to adduce sufficient evidence to overcome the presumption of innocence to which he was constitutionally entitled.

<sup>1</sup> It is unclear who presided. The lower court record indicates that the Honorable Michael Marr presided at the November 26, 2002 trial. However, the transcript of the November 26, 2002 proceedings indicates that the Honorable Lawrence R. Cohen presided.

<sup>2</sup> HRS § 711-1106(1)(a) provides as follows:

**§711-1106 Harassment.** (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:

- (a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that:

(1) A review of the challenged findings of fact reveal that they are determinations of credibility. Accordingly, it is sufficient that we have repeatedly endorsed the maxim that the reconciliation of conflicting witness testimony is beyond the scope of appellate review.<sup>3</sup> Even assuming, arguendo, that this court may overturn a trial court's credibility determination based upon a demonstration, by clear and convincing evidence, that the credibility determination was incorrect,<sup>4</sup> Thomas has

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<sup>3</sup> See Fisher v. Fisher, 111 Hawai'i 41, 46, 137 P.3d 355, 360 (2006) ("But '[i]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trier of fact.'" (Brackets in original.) (Citations omitted.); State v. Martinez, 101 Hawai'i 332, 340, 68 P.3d 606, 614 (2003) ("It is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of evidence; this is the province of the trier of fact.") (Citations omitted.); State v. Mitchell, 94 Hawai'i 388, 393, 15 P.3d 314, 319 (App. 2000) ("The appellate court will neither reconcile conflicting evidence nor interfere with the decision of the trier of fact based on the witnesses' credibility or the weight of the evidence.") (Citations omitted.); Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 117, 839 P.2d 10, 28 (1992) ("Moreover, '[a]n appellate court will not pass upon issues dependent upon credibility of witnesses and the weight of the evidence; this is the province of the trial judge.'" (Brackets in original.) (Citations omitted.).

<sup>4</sup> Thomas suggests that the categorical preclusion of credibility issues is a violation of this court's obligation to afford him due process on appeal. However, that mere assertion, without invoking the proper due process analysis, is inadequate to trigger this court's judicial machinery.

The sole case cited in support of his due process challenge is the United States Supreme Court's decision in Miller-El v. Cockrell, 537 U.S. 322 (2003). In Miller-El, the Court reviewed a criminal defendant's claim that the prosecution's exercise of its peremptory challenges was racially motivated. Id. at 328. The Court stated that "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination[.]" id. at 339 (citation omitted), and that "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." Id. (emphasis added). The Court continued:

Deference is necessary because a reviewing court, which  
(continued...)

failed to make the requisite showing.

(2) Viewed in the light most favorable to the prosecution,<sup>5</sup> the evidence is that (a) Thomas tailgated the complaining witness from Kunia Road to the Kapolei police station, (b) Thomas grabbed the complaining witness and pinned

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<sup>4</sup>(...continued)

analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations. "[I]f an appellate court accepts a trial court's finding that a prosecutor's race-neutral explanation for his peremptory challenges should be believed, we fail to see how the appellate court nevertheless could find discrimination. The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems to be nothing left to review."

Id. at 339-340 (citing Hernandez v. New York, 500 U.S. 352, 367 (1991) (plurality opinion)) (brackets in original).

Nevertheless, the Court reasoned that "deference does not imply abandonment or abdication of judicial review," id. at 340, and that "[a] federal court can disagree with a state court's credibility determination and . . . conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." Id.

Thomas construes Miller-El as requiring this court to reevaluate the district court's credibility determinations and overturn them if shown to be incorrect by clear and convincing evidence. However, Thomas has failed to cite any legal authority or make any discernible argument explaining how the foregoing federal precedent binds this court. Thomas also fails to explain how, in light of Miller-El, his due process rights have been violated. See Hawai'i Rules of Appellate Procedure [hereinafter "HRAP"] Rule 28(b)(4) (2002) ("Points not presented . . . will be disregarded."); HRAP Rule 28(b)(7) (2002) ("Points not argued may be deemed waived.").

<sup>5</sup> In State v. Viglielmo, 105 Hawai'i 197, 202-03, 95 P.3d 952, 958 (2004) (quotation marks omitted) (citations omitted) (brackets in original), we stated that

evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or a jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact. Substantial evidence as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion.

her against her car, (c) Thomas cursed at the complaining witness and struck her in the right eye, and (d) although another witness was in the parking lot during the incident, she was unaware of the incident having been preoccupied with either unloading her telephone books and/or supervising her children. Accordingly, the record contains sufficient evidence supporting Thomas' conviction of the offense of harassment, in violation of HRS § 711-1106(1)(a). Therefore,

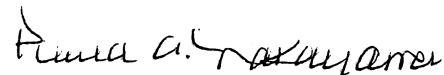
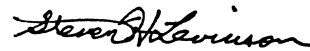
IT IS HEREBY ORDERED that the district court's November 26, 2002 judgment is affirmed.

DATED: Honolulu, Hawai'i, September 27, 2006.

On the briefs:

James S. Gifford, Deputy  
Public Defender, for  
defendant-appellant  
Richard Thomas

James M. Anderson, Deputy  
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State of Hawai'i



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