NOT FOR PUBLICATION

NO. 26783

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Respondent/Plaintiff-Appellee

vs.

HUBERT KANEKOA, Petitioner/Defendant-Appellant

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CR. NO. 04-1-1122)

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

Petitioner/Defendant-Appellant Hubert Kanekoa (Petitioner) filed an application for writ of certiorari[1] on January 27, 2006, requesting that this court review the December 28, 2005 Summary Disposition Order (SDO) of the Intermediate Court of Appeals (the ICA),[2] affirming the

[1] Pursuant to Hawai'i Revised Statutes (HRS) § 602-59 (1993 & Supp. 2005), a party may appeal the decision of the Intermediate Court of Appeals (ICA) only by an application to this court for a writ of certiorari. See HRS § 602-59(a). In determining whether to accept or reject the application for writ of certiorari, this court reviews the ICA decision for:

> (1) grave errors of law or of fact, or (2) obvious inconsistencies in the decision of the intermediate appellate court with that of the supreme court, federal decisions, or its own decision, and the magnitude of such errors or inconsistencies dictating the need for further appeal.

HRS § 602-59(b). The grant or denial of a petition for certiorari is discretionary with this court. See HRS § 602-59(a).

[2] The Summary Disposition Order was issued by Chief Judge James S. Burns and Associate Judges John S.W. Lim and Daniel R. Foley.

August 17, 2004 judgment of the first circuit court (the court)[3] convicting Petitioner of terroristic threatening in the second degree, Hawai'i Revised Statutes (HRS) §§ 707-715(1) and -717(1) (1993).[4]

Pertinent facts from the answering brief of Respondent/Plaintiff-Appellee State of Hawai'i (Respondent) are as follows:

> [Teddy Chow (Chow)] and [Petitioner] were close childhood friends . . . . On April 27, 2004, Chow was driving a forty-foot tractor trailer to Kailua Longs to pick up a "boom section for a crane" for work. . . . [H]e saw [Petitioner] driving in the opposite direction and waved to him. . . . [Petitioner] rolled down his window and said to him, "Oh, you think I scared of you? You think I scared of you?"
>
> . . . Chow . . . observed [Petitioner] execute "a U-turn in the middle of the intersection and begin to follow him towards Longs." [Petitioner] drove erratically and "overtook cars to catch up to Chow." . . . [A]t the entrance of the Kailua Longs parking lot, [Petitioner] drove over a "planter box" and pulled his vehicle along the left side of

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[3] The Honorable Rhonda A. Nishimura presided.

[4] HRS § 707-715(1) states in pertinent part that "[a] person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person . . . [w]ith the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person[.]"

HRS § 707-717 states as follows:

> (1) A person commits the offense of terroristic threatening in the second degree if the person commits terroristic threatening other than as provided in section 707-716.
>
> (2) Terroristic threatening in the second degree is a misdemeanor.

HRS § 707-716 entitled "Terroristic threatening in the first degree," states that terroristic threatening in the first degree is committed, inter alia, as follows:

> (a) By threatening another person on more than one occasion for the same or a similar purpose; or
>
> (b) By threats made in a common scheme against different persons; or
>
> . . . .
>
> (d) With the use of a dangerous instrument.

Chow's trailer about two feet away. . . . [Petitioner] yelled at Chow "at the top of his lungs, saying that he's going to kill Chow, and if not today, not tomorrow, within the next ten years Chow will be dead." [Petitioner] appeared "very upset, very scary." Chow felt threatened and afraid. . . . [Petitioner] said, "You know what, call the fucking cops, call the fucking cops if you like." Chow responded, "Why don't you stick around, they're probably on their way." Then [Petitioner] "burned rubber around the corner and left."

. . . [Chow prepared] a written statement [for the police.] . . . Chow testified that he wrote in his statement that [Petitioner] got out of his truck and started yelling at [Chow]. Chow clarified that that part of his statement was not correct because [Petitioner] did not get out of his truck . . . . [Respondent] rested. [Petitioner] moved for a judgment of acquittal . . . .

[Petitioner] . . . testif[ied] in his own defense and acknowledged that he came upon Chow at the Kailua Longs parking lot. [Petitioner] stated:

> . . . I was in the middle of the intersection when I pulled in thinking that the rig was going to go forward. He stopped and plant himself there and took two side of the lane.
>
> . . . I trying for get out of the intersection, so I don't make traffic or somebody hit my truck.
>
> So I avoided that. I wanted to know who was driving the rig. . . .

[Petitioner] claimed he did not realize that Chow was the driver of the trailer until he pulled up to the side of it and saw Chow sitting in the trailer. [Petitioner] admitted that he rolled down his window with the intention of telling Chow, "What the fuck you doing? No brains or something?" However, [Petitioner] claimed he did not say anything and denied making any threats.

(Brackets omitted.)

Petitioner presents the following questions.

A. Did the Circuit Court err when it denied [Petitioner's] motion to dismiss at the close of [Respondent's] case?

B. Was [Respondent's] only witness impeached and therefore unworthy of belief?

C. Did the Circuit Court err when it refused to give the two jury instructions which were requested by [Petitioner]?

D. Was the jury's verdict was [sic] inconsistent with any fair and impartial view of the evidence presented?

E. Did [Respondent] fail to prove its case against [Petitioner] beyond a reasonable doubt?

F. Did the Circuit Court err when it accepted the jury's verdict and entered the final judgment and sentence of the court?

(Capitalization omitted.)

I.

There is merit in Petitioner's Question C.

With respect to Question C, Petitioner maintained that instruction 17 given by the court, as opposed to his proposed instructions 6 and 7 refused by the court, failed to convey the "true threat" requirement. On appeal, "[w]hen jury instructions or the omission thereof are at issue . . . , the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." State v. French, 104 Hawai'i 89, 93, 85 P.3d 196, 200 (App. 2004).

Petitioner's proposed instruction no. 6 stated:

> In a terroristic threatening prosecution, the prosecution must prove beyond a reasonable doubt that a remark is a "true threat", as opposed to constitutionally protected speech, such that the remark conveyed to the person to whom it was directed a gravity of purpose and imminent prospect of execution. In other words, [the] prosecution must prove beyond a reasonable doubt that the alleged threat was objectively capable of inducing a reasonable fear of bodily injury in the person at whom the threat was directed and who was aware of the circumstances under which the remarks were uttered. State v. Valdivia, 95 Hawai'i 465, 476, 24 P.3d 661, 672 (2001).

Petitioner's proposed instruction no. 7 stated:

> In a terroristic threatening prosecution, to constitute a "true threat", the alleged statement must have been objectively susceptible to inducing fear of bodily injury in a reasonable person at whom the threat was directed and who was familiar with the circumstances under which the threat was uttered in order to differentiate a "true threat" from constitutionally protected free speech. State v. Valdivia, 95 Hawai'i 465, 478, 24 P.3d 661, 673 (2001).

The court's instruction no. 17 stated:

> In the Complaint, [Petitioner] is charged with the offense of Terroristic Threatening in the Second Degree.

> A person commits the offense of Terroristic Threatening in the Second Degree if, with the intent to terrorize or in reckless disregard of the risk of terrorizing another person, he threatens, by word or conduct, to cause bodily injury to that person.
>
> There are two material elements to this charge, each of which the prosecution must prove beyond a reasonable doubt.
>
> These two elements are:
>
> 1. That on or about April 27, 2004, in the City and County of Honolulu, State of Hawaii, that [Petitioner] threatened, by word or conduct, to cause bodily injury to [Chow]; and
> 2. That [Petitioner] did so with the intent to terrorize or in reckless disregard of the risk of terrorizing [Chow].
>
> The threat on its face and in the circumstances in which it is made must be so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and an imminent prospect of execution.

As to this issue, the ICA stated, "The [court] did not err when it refused [Petitioner's] proposed jury instruction . . . . Valdivia, 95 Hawai'i at 475-76, 24 P.3d at 671-72." SDO at 2.

A.

In his appeal, Petitioner maintained, inter alia, that (1) "the court's . . . instruction no. 17 does not contain or explain the words 'true threat,'" (footnote and capitalization omitted), and (2) "the words testified to by Chow, namely, "I'm going to fucking kill you, okay. If not today, if not tomorrow, within the next ten years you're going to be fucking dead[,]" were "words of future intention, not of a 'true threat' which carried with it an 'imminent prospect of execution.'" (Emphasis in original.)

In response to this argument, Respondent maintained simply that "[t]he jury was . . . properly instructed regarding the requirement that the words attributed to [Petitioner]

amounted to a 'true threat,' pursuant to Valdivia" and "Valdivia does not require the additional 'guidance' . . . as proposed by [Petitioner.]" Respondent did not argue that any error with respect to the court's instruction was harmless error.

The court gave no further instructions as to a "true threat" other than as set forth in instruction no. 17. However, it was required to do so.

B.

In Valdivia, the circuit court gave essentially the same instruction.

> The circuit court, partially in accord with [State v.] Chung, [75 Haw. 398, 862 P.2d 1063 (1993),] instructed the jury that, "to constitute a threat punishable by law, the threat on its face and in the circumstances in which it is made must be so unequivocal, unconditional, immediate[,] and specific as to the person threatened as to convey a gravity of purpose.

95 Hawai'i at 478, 24 P.3d at 674 (brackets omitted). This court said that such an instruction was insufficient and further advice as to the nature of a "true threat" was mandated.

> [T]he foregoing instructions[5] did not sufficiently inform the jury that, to constitute a "true threat," Valdivia's threatening utterance was objectively susceptible to inducing fear of bodily injury in a reasonable person at whom the threat was directed and who was familiar with the circumstances under which the threat was uttered. Absent some appropriate language regarding "imminency," . . . we cannot say that the jury was sufficiently instructed with respect to differentiating a "true threat" from constitutionally protected free speech. Inasmuch as erroneous instructions are presumptively harmful, and it does not affirmatively appear from the record as a whole that the error was not prejudicial--in that there is a reasonable possibility that the error may have contributed to Valdivia's conviction of first degree terroristic

[5] In its instruction as to the reckless state of mind, the circuit court indicated it was not necessary that the complainant "'actually experience such an alarm for personal safety, but that the person could have experienced such an alarm.'" Valdivia, 95 Hawai'i at 478, 24 P.3d at 674.

> threatening--, we must remand this matter for a new trial with respect to that offense.

Id. (emphasis added) (citations and footnote omitted).

It should be noted that this court previously granted certiorari and reversed the ICA's decision in circumstances like those presented in this case.

> In his application, Martins's sole contention is as follows: "The ICA gravely erred in holding that the circuit court did not plainly err in failing to instruct the jury on the definition of a 'true threat' because the evidence of terroristic threatening was Martins' conduct of 'discharging his shotgun' and not his 'remarks.'"
>
> On November 22, 2004, we granted certiorari in order to clarify that, pursuant to [Valdivia] and [Chung], the necessity of a jury instruction defining a "true threat" applies to all terroristic threatening prosecutions regardless of whether the charge is based exclusively upon the defendant's verbal statements, the defendant's physical conduct, or some combination of the two. . . . Insofar as the circuit court plainly erred in failing to instruct the jury as to the definition of a "true threat," the ICA gravely erred in affirming the March 1, 2002 judgment of the circuit court. See HRS § 602-59(b) (1993). Accordingly, we (1) reverse the ICA's opinion as to section III.B., (2) vacate the circuit court's March 1, 2002 judgment of conviction as to the offense of terroristic threatening in the second degree, and (3) remand this case to the circuit court for retrial on that count.

State v. Martins, 106 Hawai'i 136, 137-38, 102 P.3d 1034, 1035-36 (2004) (emphases added). Here the evidence of threats were as to "remarks," and the "necessity of a jury instruction defining a 'true threat' applie[d.]" Id. Accordingly, the ICA's December 28, 2005 SDO must be reversed, and the court's August 17, 2004 judgment is vacated and the case remanded to the court in accordance with this opinion.

II.

Because we remand the case for retrial, we observe the following as to the other questions raised.

As to his Question A, Petitioner rests on two grounds: (1) "[t]here was nothing imminent about the words which Chow attributed to [Petitioner]; Chow said he only wanted to make a record for the future," and (2) "[t]he sole witness [for Respondent], Chow, had been impeached . . . on a vitally important matter[.]" However, as Respondent noted, the imminency requirement may be proved by demonstrating that the defendant had the apparent ability to carry out the threat. In Valdivia, this court said:

> [T]he "imminency" require[ment] can be established by means other than proof that a threatening remark will be executed immediately, at once, and without delay. Rather, as a general matter, the prosecution must prove that the threat was objectively susceptible to inducing fear of bodily injury in a reasonable person at whom the threat was directed and who was familiar with the circumstances under which the threat was uttered. Of course, one means of proving the foregoing would be to establish . . . that the threat was uttered under circumstances that rendered it "so unequivocal, unconditional, immediate[,] and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." But another would be to establish that the defendant possessed "the apparent ability to carry out the threat," such that "the threat . . . would reasonably tend to induce fear [of bodily injury] in the victim."

95 Hawai'i at 477, 24 P.3d at 673 (citations omitted) (emphases added).

As to the second ground regarding impeachment, Petitioner's brief indicates he is referring to the following cross-examination of Chow:

> Q. All right. Now, in your statement, may I have you read, after the words Longs Kailua there, you see where that is in the sixth line? You then wrote something else starting, it looks like the word when. Would you read that.
> A. Yes. I put, when [Petitioner] got out of his truck and started telling me he was going to kill me. He did not get out of his truck. That is a false statement right there.

> Q. Okay. So that part of your statement is not correct?
> A. Yeah.
> Q. Okay. Isn't it a fact that [Petitioner] never got out of his truck during the entire incident on the 27th of April?
> A. True, he did not get out of his truck.

(Emphases added.) This is partially a restatement of Question B which is addressed below. The balance of Petitioner's argument rests on the ground that the mere use of words and the lack of threatening action invokes constitutional safeguards. Petitioner again refers to his contention that "[t]here was nothing imminent about the words [sic] which Chow attributed to [Petitioner]" which has already been addressed above. However, as between words and actions, as Respondent notes, "HRS [§] 707-715(1) defines 'terroristic threatening'" . . . as "threaten[ing], by word or conduct," and that "[Respondent] need only prove one" of the two "occurred . . . to establish . . . the offense[.]"

III.

With respect to Question B, the fact that Chow was impeached on an "important matter" based on the cross-examination reproduced above, does not vitiate the jury's verdict. Although, as Petitioner argued, "Chow admitted on the witness stand that he had falsified his report to the police, by adding a statement which he admitted was false," it was within the province of the jury, as the court instructed, to "determine whether and to what extent a witness should be believed and to give weight to his or testimony accordingly[,]" and to "reject the testimony of that witness except for those parts which [the jury] nevertheless

believe to be true." It is established that "jurors are presumed to follow the court's instructions." State v Haanio, 94 Hawai'i 405, 415, 16 P.3d 246, 256 (2001). By their verdict the jury apparently determined that the fact that Petitioner did not leave his truck did not obviate the evidence that Petitioner otherwise stated he was going to kill Chow.

IV.

With respect to Questions D and E,[6] as Respondent argues, there was substantial evidence to support the jury's verdict. See Bremer v. Weeks, 104 Hawai'i 43, 51, 85 P.3d 150, 158 (2004) (defining substantial evidence as "credible evidence which is of sufficient quality and probative value as to enable a person of reasonable caution to support a conclusion"). Respondent contends that

> [t]he evidence established that [Petitioner] threatened to cause bodily injury to Chow with the intent to terrorize or in reckless disregard of the risk of terrorizing. After following Chow's trailer in an erratic manner, [Petitioner] rolled down his window and threatened Chow "at the top of his lungs, saying that he's going to kill [Chow]." 8/11/04 TR at 15-16. [Petitioner] appeared "very upset, very scary," while Chow felt threatened and afraid. 8/11/04 TR at 16-17, 51.

Also, Respondent argues that "[Petitioner] . . . was stopped only two feet away from Chow's trailer. Therefore, [Petitioner] possessed the apparent ability to carry out his threat and that the threat would reasonably tend to induce fear of bodily injury in Chow." Accordingly, there was evidence from which the jury could determine terroristic threatening had been committed.

[6] Questions D and E were combined into one point on appeal.

V.

With respect to Question F, Petitioner complains about the probationary sentence, including the three months' incarceration imposed, but only contends with respect to this matter, that Petitioner's "words which, even if they were said, were words of future intention which carried constitutional protection, and which did not create any ' . . . imminent prospect of execution.'" (Emphasis in original.) (Footnote omitted.) That argument has been resolved supra.

DATED: Honolulu, Hawai'i, February 16, 2006.

James M. Sattler, on
the application for
petitioner/defendant-
appellant.