

NO. 22833

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
JIVAN RAM, Defendant-Appellant

APPEAL FROM DISTRICT COURT OF THE FIFTH CIRCUIT  
LIHUE DIVISION  
(CASE NO. LC99-5)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Jivan Ram (Ram) appeals the September 10, 1999, judgment of the district court that found Ram guilty of two counts of Harassment, in violation of Hawai'i Revised Statutes (HRS) § 711-1106 (Supp. 2000), and one count of Disorderly Conduct, in violation of HRS § 711-1101(1)(c) (1993). Ram contends on appeal that his convictions were not supported by substantial evidence, his statement to Kauai Police Officer Daniel Finney (Officer Finney) was improperly admitted, and his counsel provided ineffective assistance. We disagree with Ram regarding his Harassment and ineffective assistance of counsel claims, but find that his conviction for Disorderly Conduct merged with his Harassment convictions. Therefore, we affirm

Ram's Harassment convictions and reverse his Disorderly Conduct conviction.

## **I. BACKGROUND**

On December 10, 1998, Ram entered the Kauai County's administrative offices in the Moikeha building to make a complaint regarding the Kauai Police Department (KPD). Ram was greeted by Myra Arzadon (Arzadon). Arzadon is the Kauai mayor's executive protocol officer, whose job is to greet people as they come into the mayor's office and direct them to the appropriate person. Arzadon was aware that Ram had filed complaints with the mayor's office on previous occasions. Arzadon showed Ram to Cathy Agoot's (Agoot) office and then returned to her work area, about 20 feet from Agoot's office. Agoot is the Kauai mayor's complaints officer and information specialist. Agoot had spoken with Ram on the telephone a number of times in the past. During these telephone calls Ram had gotten agitated and irate, eventually making obscene remarks at the end of the calls.

Ram began his discussion with Agoot in a calm voice, but as he started telling Agoot about his complaints, his voice got louder and louder until he was yelling at the top of his lungs. Ram yelled at Agoot for five to ten minutes. At one point, Ram yelled at Agoot, "Fuck you and fuck the mayor." Agoot

testified that she was really scared of Ram and remained scared for four days after the incident. Arzadon could hear Ram shouting at Agoot and became nervous.

Beth Tokioka (Tokioka) is the Kauai mayor's public information officer. She had spoken with Ram on the telephone before and thought Ram was "unpredictable." Tokioka was in her office about five feet from Agoot at the time of the incident and could hear Ram shouting at Agoot. Tokioka became concerned that Ram was dangerous. Tokioka tried unsuccessfully to reach the KPD Chief of Police by telephone. Tokioka then came out of her office and asked Ram to leave. Leaning into Tokioka, Ram yelled at her from a distance of only three or four feet: "Oh, I remember you. I know who you are." "You shut up and fuck you too." "Shut up." "This is not the end and I won't forget you." "Fuck you." "Fuck the mayor." Tokioka was afraid Ram was going to hit her. Upon hearing Ram yelling at Tokioka, Arzadon called the police.

Ram continued to yell at Agoot and Tokioka for a few more minutes and then left their office through a glass door. Agoot and Tokioka could see Ram through the glass door, but Ram claims he could not see the women because of a reflection on the glass. As Ram stood behind the glass door, facing Agoot and

Tokioka, he thrust both of his middle fingers at the women several times, gyrated his hips for a few seconds, walked away, and then seconds later reappeared to thrust his hips at the women again. Ram walked away again, reappeared a few seconds later to repeat his finger and hip thrusts, and then left. Agoot locked the glass door.

Officer Finney found Ram talking with some KPD officers in the parking lot of the Moikeha Building. The KPD officers stayed with Ram while Officer Finney interviewed the three women. Officer Finney returned to the parking lot and arrested Ram. Officer Finney advised Ram of his constitutional rights, escorted him to the police station, and advised him of his rights a second time. Ram told Officer Finney that he did not wish to make a statement. Officer Finney booked Ram and asked him questions on the KPD booking form. When Officer Finney asked Ram question number 34 on the booking form, "Are you a convicted sex offender?" Ram responded, "no, just today for harassing a cunt."

Ram was charged with two counts of Harassment (Count I for harassing Agoot and Count II for harassing Tokioka), in violation of HRS § 711-1106. Ram was also charged with Disorderly Conduct (Count III) in violation of HRS § 711-1101(1)(c). At his bench trial, Ram testified he had a

disability endorsed by the Americans with Disabilities Act (ADA). Pursuant to Ram's request, the court permitted an interpreter to be present at the trial to translate for Ram because of Ram's representation that his emotional disability caused him to use vulgar language. Although Ram's counsel moved for a mental examination pursuant to HRS § 704-404 (1993 & Supp 2000), his counsel withdrew it three months later.

Ram was convicted of all three counts as charged and sentenced to thirty days imprisonment for each count, to run consecutively. The sentence was stayed pending the disposition of this appeal.

## II. STANDARDS OF REVIEW

### A. Sufficiency of the Evidence

We review the sufficiency of evidence as follows:

[E]vidence 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 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.

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*State v. Quitog*, 85 Hawai'i 128, 145, 938 P.2d 559, 576 (1997) (quoting *State v. Eastman*, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996)) (emphasis omitted). "'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." *Eastman*, 81 Hawai'i at 135, 913 P.2d at 61.

State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998).

### **B. Voluntariness of Statements**

We review the issue of the voluntariness of a statement de novo. State v. Hoey, 77 Hawai'i 17, 32, 881 P.2d 504, 519 (1994). The court in Hoey noted:

[W]aiver is a question that requires application of constitutional principles to the facts as found. Accomplishment of this task "requires us to examine the entire record and make an independent determination of the ultimate issue of voluntariness based upon that review and the totality of circumstances surrounding [the defendant's] statement."

Id. (internal quotation marks, citation, and emphasis omitted; brackets in original).

### **C. Ineffective Assistance**

When an ineffective assistance of counsel claim is raised, the question is: "When viewed as a whole, was the assistance provided to the defendant 'within the range of competence demanded of attorneys in criminal cases?'" Additionally,

the defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.

State v. Janto, 92 Haw. 19, 31, 986 P.2d 306, 318 (1999) (quoting State v. Edwards, 81 Hawai'i 293, 300, 916 P.2d 703, 710 (1996)).

### **D. Plain Error**

The appellate court "will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999) (internal quotation marks omitted).

This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the

adversary system--that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes.

Id. (quoting State v. Kelekolio, 74 Haw. 479, 514-15, 849 P.2d 58, 74-75 (1993)). "If the substantial rights of the defendant have been affected adversely, the error will be deemed plain error." Vanstory, 91 Hawai'i at 42, 979 P.2d at 1068.

### III. DISCUSSION

#### A. Ram's Convictions for Harassment Are Supported by Substantial Evidence.

Hawai'i Revised Statutes § 711-1106, Harassment,<sup>1</sup> states

in relevant part:

**§711-1106 Harassment.** (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[.]

The test of whether a defendant's words or conduct constitute harassment is an objective one. State v. Taliferro, 77 Haw. 196, 202, 881 P.2d 1264, 1270 (App. 1994).

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<sup>1</sup> Although the complaint did not specify under which subsection(s) of § 711-1106 Ram was being charged, the complaint was sufficient because it used the language of § 711-1106(1)(b) and stated all the essential elements of the crime charged. State v. Jendrusch, 58 Haw. 279, 281, 567 P.2d 1242, 1244 (1977).

Count I of the complaint stated:

The STATE OF HAWAII [HAWAI`I] charges that on or about the 10th day of December, 1998, in the County of Kauai, State of Hawaii [Hawai'i], JIVAN RAM, with intent to harass, annoy, or alarm another person, Cathy Agoot, did insult, taunt, or challenge said Cathy Agoot in a manner likely to provoke an immediate violent response, or which caused her to reasonably believe that Jivan Ram intended to cause bodily injury to her or another, or damage to her property or that of another, thereby committing the offense of Harassment in violation of Section 711-1106 of the Hawaii [Hawai'i] Revised Statutes.

Count II of the complaint used the same wording except to designate Beth Tokioka as the target of Ram's harassment.



Ram yelled at Agoot "at the top of his lungs" about his complaints with the KPD for five to ten minutes from a distance of less than five feet. Ram got more and more irate and yelled profanities at Agoot, such as "[f]uck you and fuck the mayor." Tokioka could hear what was transpiring, was concerned for Agoot, and came in to ask Ram to leave. Ram then leaned in towards Tokioka and yelled at her from a distance of only a few feet: "Oh, I remember you. I know who you are." "You shut up and fuck you too." "Shut up." "This is not the end and I won't forget you." "Fuck you." "Fuck the mayor." Tokioka was afraid Ram was going to hit her. Upon exiting, Ram shoved his middle fingers in the air at Agoot and Tokioka and thrust his hips obscenely at them. He repeated this act a total of three times. Agoot stated that she was afraid of Ram and remained in a state of fear for four days after the incident.

Viewing the evidence in the light most favorable to the State, there is substantial evidence that Ram intended to harass, annoy, or alarm both Agoot and Tokioka by insulting, taunting, or challenging them in a manner likely to cause a reasonable person to believe that Ram intended to cause bodily injury to them or another or damage to their property or the property of another.

**B. Ram's Conviction for Disorderly Conduct Merged with His Convictions for Harassment under HRS § 701-109(1) (e) .**

Although Harassment is not an included offense of Disorderly Conduct, State v. Woicek, 63 Haw. 548, 552-53, 632 P.2d 654, 657 (1981), under the facts of this case the charges for the two merged under HRS § 701-109(1) (e) (1993).

Hawai'i Revised Statutes § 701-109(1) (e) states, in relevant part, that:

[Although] the same conduct of a defendant may establish an element of more than one offense . . . [t]he defendant may not . . . be convicted of more than one offense if . . . [t]he offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted[.]" [Emphasis added.]

The Hawai'i Supreme Court held in State v. Hoey, 77 Hawai'i 17, 881 P.2d 504 (1994) that:

It is possible for [two charges] against a defendant to merge, pursuant to HRS § 701-109(1) (e), under circumstances in which (1) there is but one intention, one general impulse, and one plan, (2) the two offenses are part and parcel of a continuing and uninterrupted course of conduct, and (3) the law does not provide that specific periods of conduct constitute separate offenses.

Id. at 38, 881 P.2d at 525 (footnote omitted).

Hawai'i Revised Statutes § 711-1101(1) (c), Disorderly Conduct, states in relevant part:

**§711-1101 Disorderly conduct.** (1) A person commits the offense of disorderly conduct if, with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof, the person:

. . . . .

- (c) Makes any offensively coarse utterance, gesture, or display, or addresses abusive language to any person present, which is likely to provoke a violent response[.]

The State did not elect to specify the particular act(s) upon which it would rely to establish the conduct for its Disorderly Conduct charge.<sup>2</sup> It is impossible to decipher which conduct of Ram's would be separate factually, spatially, or temporally from that which was used to convict him of the two counts of Harassment. Ram's yelling of coarse language at the top of his lungs for five to ten minutes at the mayor's employees and Ram's stepping into the hallway, facing the two women, thrusting both his middle fingers in the air, and gyrating his hips obscenely at them were the same facts used to convict Ram of Harassment. Without an election by the State as to which acts constituted which offense, it appears that Ram acted with "but one intention, one general impulse, and one plan," and that "the

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<sup>2</sup> Count III of the complaint stated:

The STATE OF HAWAII [HAWAI'I] further charges that on or about the 10th day of December, 1998, in the County of Kauai, State of Hawaii [Hawai'i], JIVAN RAM with intent to cause substantial harm or serious inconvenience to a member or members of the public, or recklessly creating a risk thereof, did make any offensively coarse utterance, gesture or display, or address abusive language to any person present, which is likely to provoke a violent response, thereby committing the offense of Disorderly Conduct in violation of Section 711-1101(1)(c) of the Hawaii [Hawai'i] Revised Statutes.

two offenses [were] part and parcel of a continuing and uninterrupted course of conduct." Hoey, 77 Hawai'i at 38, 881 P.2d at 525. Further, the "law does not provide that specific periods of conduct [for Harassment or Disorderly Conduct] constitute separate offenses." Id.

Under the facts of this case, Ram's conviction for Disorderly Conduct was a continuous offense that merged with his Harassment convictions. We therefore reverse Ram's Disorderly Conduct conviction (Count III).<sup>3</sup>

**C. Ram's Statement to Officer Finney Was Properly Admitted.**

Before a person is subjected to custodial interrogation, he or she must be advised of his or her constitutional rights. State v. Kane, 87 Haw. 71, 78, 951 P.2d 934, 941 (1998). Ram was twice advised of his rights. After Ram was read his rights for the second time, he was booked. During the booking process, Officer Finney asked Ram question number 34 on the KPD standard booking form: "Are you a convicted sex offender?" to which Ram responded "no, just today for harassing a cunt."

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<sup>3</sup> Ram's Disorderly Conduct conviction is reversed rather than his two Harassment convictions because the Disorderly Conduct conviction carries the lesser sentence (thirty days as opposed to sixty days). See State v. Jumila, 87 Hawai'i 1, 4, 950 P.2d 1201, 1204 (1998).

The test for determining whether an officer's questions constitute interrogation is "whether the officer should have known that his words and actions were reasonably likely to elicit an incriminating response from the defendant." State v. Pebria, 85 Haw. 171, 174, 938 P.2d 1190, 1193 (App. 1997) (quoting State v. Paahana, 66 Haw. 499, 503, 666 P.2d 592, 595-96 (1983) (citation omitted)). Statements that are spontaneous in nature are not interrogation. Pebria, 85 Hawai'i at 174, 938 P.2d at 1193. The booking question required a yes or no answer and was not designed to elicit an incriminating admission or response. Ram's spontaneous statement was made after he was advised of his constitutional rights and, under the totality of circumstances, was properly admitted.

Even if the statement were improperly admitted, such error was harmless. State v. Chun, 93 Hawai'i 389, 393-94, 4 P.3d 523, 527-28 (App. 2000).

**D. Ram Has Not Demonstrated that His Counsel Was Ineffective.**

Ram argues on appeal that his trial counsel was ineffective for withdrawing his motion for mental exam pursuant to HRS § 704-404 and for failing to pursue a defense of mental irresponsibility based on mental disease, disorder, or defect.

Ram has the burden to establish ineffective assistance, and such a claim will only be upheld if he can show "there were specific errors or omissions . . . reflecting counsel's lack of skill, judgment or diligence[,] and these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Smith 68 Haw. 304, 309, 712 P.2d 496, 500 (1986) (internal quotation marks omitted). However, specific actions or omissions alleged to be error but which have an obvious tactical basis for benefitting a defendant's case are not subject to further scrutiny. State v. Timas, 82 Haw. 499, 516, 923 P.2d 916, 933 (App. 1996).

Ram and his trial counsel considered the advantages and disadvantages of pursuing Ram's motion for mental exam. Ram's trial counsel noted that they had discussed the matter in "great detail." The motion for mental exam was pending for three months before Ram and his trial counsel decided to withdraw it. Ram faced a maximum sentence of ninety days imprisonment. If Ram had proceeded with a motion for mental examination, he faced the risk of being institutionalized and stigmatized, and his trial may have had to be delayed.<sup>4</sup> "[A] decision by counsel not to subject

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<sup>4</sup> In State v. Soares, 81 Hawai'i 332, 354, 916 P.2d 1233, 1255 (App. 1996), overruled on other grounds, this court noted the dilemmas facing an attorney who represents a mentally impaired defendant:

his client to the rigors of an examination pursuant to § 704-404 cannot be considered unreasonable on its face. The examination may entail confinement in the state hospital for a period of thirty days or longer." State v. Tyrrell, 60 Haw. 17, 31, 586 P.2d 1028, 1036 (1978). There is nothing in the record to indicate trial counsel's decision not to pursue the motion for a mental exam was anything other than tactically sound.

Furthermore, there is nothing in the record to indicate what a court-appointed psychiatrist or psychologist may have found or concluded regarding Ram's physical or mental condition, Ram's capacity to understand the proceedings against him and to assist in his own defense, and Ram's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the

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Raising competency, however, may have serious costs for the defendant. Competency evaluations are usually done on an inpatient basis and may lead to lengthy hospitalization. This hospitalization usually takes place in a maximum-security institution with minimal treatment. Such hospitalization is often unnecessary and unduly stigmatizing. Additionally, prolonged hospitalization may jeopardize the defendant's right to a fair trial. For many defendants, particularly those charged with minor offenses, raising competency subjects the defendant to a far greater deprivation of his liberty than if he [or she] were convicted of the crime with which he [or she] is charged.

. . . .

R. Uphoff, The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court, 1988 Wis.L.Rev. 65, 68-72 (footnotes omitted).

requirement of law at the time of the alleged conduct. HRS § 704-404(4)(b), (c), (d). Without such an examination by a qualified psychiatrist or psychologist, it is not possible to determine whether the withdrawal of Ram's HRS § 704-404 motion resulted "in either the withdrawal or substantial impairment of a potentially meritorious defense."

Although Ram asserts that his trial counsel should have called physicians, psychiatrists, or psychologists familiar with his disability to present evidence of his disability, Ram cannot point to anything in the record indicating to what these experts would have testified. Ram has not met his burden of establishing ineffectiveness of counsel by his trial counsel.

#### **IV. CONCLUSION**

Accordingly, we affirm Ram's two Harassment convictions (Counts I and II) and reverse Ram's Disorderly Conduct conviction (Count III) without prejudice to Ram to pursue his ineffective assistance of counsel claim pursuant to Hawai'i Rules of Penal Procedure Rule 40.

DATED: Honolulu, Hawai'i, March 12, 2001.



On the briefs:

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for defendant-appellant.

Chief Judge

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Associate Judge

Associate Judge