NO. 23037

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
ALICE BROWN, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT,
KAʻU DIVISION
(Report Number: F-72159/KU)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Alice Brown (Brown) appeals the November 24, 1999 judgment of the district court of the third circuit, which convicted her of the offense of disorderly conduct and sentenced her to six months of probation under terms and conditions including, *inter alia*, ten hours of community service.

Brown was charged via complaint as follows:

> On or about the 15th day of September, 1998, in Kau, County and State of Hawaii, [Brown], with intent to cause physical inconvenience or alarm by a member or members of the public or recklessly creating a risk thereof, did engage in fighting and threatening, and in violent or tumultuous behavior, thereby committing the offense of Disorderly Conduct, in violation of Section 711-1101(1)(a), Hawaii Revised Statutes, as amended.

Hawaiʻi Revised Statutes (HRS) § 711-1101(1)(a) (1993) provides that

> [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 . . . [e]ngages in fighting or threatening, or in violent or tumultuous behavior[.]

HRS § 711-1101(3) (1993) provides that

> [d]isorderly conduct is a petty misdemeanor if it is the defendant's intention to cause substantial harm or serious inconvenience, or if the defendant persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a violation.

Brown contends on appeal that the charge in the complaint, that she "did engage in fighting and threatening, and in violent or tumultuous behavior," was defective and failed to state an offense because it was couched in the conjunctive and not in the statute's disjunctive; to wit, "[e]ngages in fighting or threatening, or in violent or tumultuous behavior." (All emphases added.). Brown further argues that even if the complaint did state an offense, there was insufficient evidence adduced at trial to sustain the conviction, because the State was required and failed to prove that she committed each and every act charged -- fighting and threatening and violent or tumultuous behavior.

Brown also contends there was insufficient evidence to prove that she intended to "cause physical inconvenience or alarm by a member or members of the public," or that she "recklessly creat[ed] a risk thereof[.]" HRS § 711-1101(1). Brown

complains, moreover, that no evidence was produced at trial to prove that she actually caused such inconvenience or alarm.

We disagree with Brown's contentions and affirm the court's judgment.

I. Background.

The State's first witness was Jane T. Taylor (Taylor), a Department of Human Services income maintenance worker at the "Naʻalehu State building" in the district of Kaʻu. Brown was one of her clients.

Taylor testified that during the morning of September 15, 1998, Brown came to the screen door of her office, "already highly agitated." Taylor's office is the first office opening onto the porch of the building. Brown gave her a water bill receipt to photocopy. Brown needed to submit proof of her utility costs to Taylor in order to get more food stamps. With that accomplished, Brown attempted, however, to continue the encounter. Taylor told her that she needed an appointment for a conference. Taylor asked Brown to leave, but Brown refused.

Taylor remembered that, throughout the incident, Brown was yelling at her in an out-of-control voice, "[t]o the point that it caused some commotion that there were some people that were at the post office [across the street]; they came over to see what was the matter." Brown was red-faced, "waving her hands and stuff." Three times Taylor told Brown to leave; after each

time, Brown called her "a fucking bitch." Taylor warned Brown that if she did not desist, the police would be called. Brown retorted, "Go ahead. Call the fucking police. I'm not afraid." Taylor testified that Brown remained "highly agitated" and was "raising her voice[,] and so I informed her that we are no longer communicating, that I would not speak to anyone who's using that kind of language."

Taylor said of the incident, "it was so threatening. I was afraid." She remembered that Brown advanced on her and tried to get into her office. Taylor wanted to avoid a physical confrontation. She estimated that Brown "weighed maybe a hundred pounds heavier. She's a lot bigger and taller than I am. I was afraid for my own safety, yes."

In an attempt to avoid further abuse, Taylor walked out of the screen door, along the porch, back through the agency's main office and out of the back door, and "stood there until things kind of calmed down." However, before Taylor could flee through the main office, Brown blocked her way. Brown had a dog with her, which Taylor described as a "cute little puppy, black one[,]" but with "sharp claws." The dog began to jump on Taylor. The dog also jumped on a little girl who was nearby, causing her to cry. Taylor asked Brown to restrain her dog. Brown responded by saying "something about go and eat 'em." Taylor told the little girl to move, whereupon Brown said, "Good. I'm going to train . . . my puppy to kill."

Taylor recalled that after she managed to escape through the back door, "[t]here ensued a commotion, a confrontation, I heard people yelling. I thought to myself, boy, the police better come real soon."

When asked how many people were in the vicinity when the incident occurred, Taylor counted the little girl and her grandmother, three staff including herself, and two men who were attracted by the commotion, one from the post office and one from the police station.

The State's next witness was Stephanie Tabbada (Tabbada). Tabbada was a clerk typist in the main office the day of the incident. Her work station at the reception window was approximately ten to fifteen feet away from Taylor's office. From this vantage point, Tabbada could see that Taylor "was outside of her office by my door . . . and her back was towards the door, and Ms. Brown was by Ms. Taylor's door." What drew Tabbada's attention was the dog's barking. Brown had her dog with her on a leash. Brown and Taylor were exchanging words about the water bill. Brown complained that she had brought in the water bill once before. Taylor responded that she needed the water bill to do "an adjustment if there was anything on her case." Taylor went into the main office to make a copy of the bill, then she told Brown "I have it now, and I can proceed." Taylor refused to meet further with Brown because she did not have an appointment that day. Tabbada recalled that Brown,

nevertheless, kept on talking: "She said 'You know what that is for. That's for you to do your job. You do know how to do your job.'"

Brown then raised her voice and started swearing. She "wanted her benefits to be corrected then and there[,]" Tabbada testified, "[b]ut we can't do that; that's not the way policy is. . . . She wanted Ms. Taylor to correct it right then and there." However, "Ms. Brown wasn't listening to what we had to say because she also mentioned something about her fair-hearing papers that she had submitted to the department, based on the reason why she came by to the office, on her benefits. I think she wanted more benefits or something. I'm not sure. That's why Mrs. Taylor needed more information from her."

At some point, "[Brown's] dog was released. She had her -- the leash with her dog, but she kind of, like, let it loose. It was a long leash[.]" The dog was barking and climbing on Taylor and the little girl. The little girl was scared. Taylor told Brown to restrain her dog, but Brown just stayed where she was and laughed. Brown observed that it was the first time she had seen her dog react that way. When asked to describe Brown's tone of voice as she made this observation, Tabbada testified, "It's a soft -- it was a loud voice but like an intimidating manner with a sly laugh that follows it, you know."

By this time, Brown's antics had raised the ire of other people on the porch, who suggested that she leave. Brown

swore at them, too. Noting the race of some of them, Brown laughed and said, "You F-ing Hawaiians lost everything. You don't own anything." At this point, Tabbada asked Brown to leave. Brown came back with an "F-ing B." Although Tabbada repeated her request two more times and backed it up with a threat to call the police, Brown still would not leave. Brown told Tabbada, "Yeah, you go ahead and call the cops." Tabbada did. Brown kept carrying on while Tabbada was on the phone with the police, so much so that Tabbada told the officer on the phone, "You can hear her[.]" The police were thereupon dispatched to the scene.

When Brown saw that Tabbada was on the phone with the police, she left. She got into her car and drove, but parked just across the way and sat looking at the State building. When the police arrived, Brown drove off towards Kona. A short while later, Brown called Tabbada on the telephone and threatened to sue her for slander for siccing the police on her. It just so happened that the police were in the office taking statements from the witnesses when Brown made her telephone call. Tabbada told one of the officers, "She's on the phone[.]" Tabbada handed the phone to the officer while Brown continued on, thinking it was Tabbada she was talking to. The court was not made privy to what the officer then told Brown on the phone, because Tabbada was cut off by defense counsel, who had apparently inadvertently elicited the testimony about the phone call on cross-examination.

The State's last witness was Hawai'i County Police Officer Mitcheal Higashide (Officer Higashide). Officer Higashide testified that he went to Brown's residence on South Point Road immediately after the incident. After being informed of her Miranda rights and consenting to answer questions sans counsel, Brown told Officer Higashide that she did go to the "Na'alehu Civic Center" that morning, where she had an argument with one of the workers. She said that the argument was over the dog, that the worker had complained that the dog was getting too close to a child. She remembered that the dog was "biting at a child or something like that," and that she had pulled the dog away.

Brown told Officer Higashide that she "may have used the F word, but it wasn't against the law[,]" and in any event it was not said in a threatening manner. She also stated that her relationship with Taylor was not good because of previous problems that had occurred. Brown had requested another worker, but to her chagrin that had not yet been accomplished. Brown had gone to the office to turn some papers in "for food stamps or for some aid[,]" but Taylor would not accept them because Brown did not have an appointment.

When asked by the prosecutor what Brown's "condition" was at the time of the interview, Officer Higashide replied, "I didn't see anything wrong with her." He added that she was not angry or upset during their interview.

In her case, Brown testified first. She said that she had moved to her South Point Road residence -- "just my puppy and me living at this home" -- from Compton, California about twenty-one months before the trial.

On the morning of the incident, Brown went to the government building with her puppy on a leash. She first checked her post office box, then proceeded to the Department of Human Services office to copy her duplicate water bill check for submittal, as requested by the office. She maintained that there was no reason for her to see Taylor, because standard operating procedure at that office was to go to the reception window and have Tabbada make the copy. Moreover, she testified, she was then in the midst of a fair-hearing dispute with the Honolulu offices of the department about her food stamp benefits. This being the case, the local office could do nothing vis-a-vis her benefits pending the outcome of the fair hearing. She therefore "had no reason to be upset, no reason to come to make an appointment, no reason to speak to anybody else."

As for the incident itself, Brown testified that as she approached the reception window, she saw a little girl standing there. Brown saw that her puppy was wagging her tail in a friendly manner. She held the leash away from the little girl and asked her puppy, "Do you want to say hi to the little girl, Leilani [the dog]?" As the little girl stood there pondering whether to pet the puppy, Taylor came rushing out past her screen

door and pushed the little girl toward the door to the main office, saying, "Hurry. Get in here before the dog eats you." This offended and disgusted Brown, because "my puppy was never aggressive to any man, woman, child, cat, dog, anything." Brown looked at Taylor with disgust and told her, "The fucking dog is not going to eat the fucking child." Brown claimed that she is not in the habit of using the epithet. She employed it this time, however, because Taylor's implied accusation was "just ludicrous."

Shocked at the profanity, Taylor told Brown, "[y]ou can't talk that way to me. You better get out of here before I call the police." Taylor walked back "somewhere in the back." Brown then went to the reception window and gave Tabbada her checkbook containing the duplicate check to be copied. As Tabbada walked back from the copier, Brown pointed to a man in another office and told her, "Let me speak to the supervisor." Brown later learned that the man's name was Ron Bell. Tabbada told her that the man was not a supervisor, but nevertheless called him forward to talk to Brown. Brown's testimony did not divulge the substance of their conversation.

While Brown was waiting for her checkbook to be returned, Taylor, Tabbada and a co-worker of theirs came up to her, each at a different time, and told her to take the puppy away from the area. Brown protested that her puppy was on a leash and harmless. Brown asked for her checkbook so she could

leave. An elderly Hawaiian couple nearby broke in and told Brown, "If you don't like it here, go back to where you came from." Brown retorted, "I'm a United States citizen. And as a United States citizen, I have a right to be in any state of the union." When Tabbada returned her checkbook, Brown left. She denied making any derogatory remarks about Hawaiians. She also denied calling anyone "an F-ing B." Brown denied that her puppy was barking. She maintained that her puppy did not jump on Taylor or the little girl. Brown claimed that she did not let go of the leash because she was afraid the puppy might run into the street. Brown volunteered the information that the puppy had since been killed: "She jumped out of my window at the post office 11:30 at night, Mother's Day, May 9th, ran into the street, was run over by a police truck."

Brown called Ron Bell to testify next. Bell, "a former football player," said that he is an income maintenance worker. He had worked at the Na'alehu office for three-and-a-half years with Taylor and Tabbada. He maintained, on the other hand, that "I know Alice Brown because of this case; otherwise, I did not know her."

Bell mentioned that "Alice Brown always parks her car over to the side behind her post office box, and she walks over and she takes care of her business either here or at the post office." When asked how he knows Brown's routine, Bell answered, "Because I recognize her car, and I recognize her." The morning

of the incident, Bell saw Brown arrive in her station wagon and get out with her "smaller-than-medium dog" on a leash. The next time Bell saw Brown, not more than five minutes later, she was at the reception window and "she seemed to have stress on her face." Bell testified that during that five minutes, he heard no loud conversation, no yelling, no profanities and no barking. His desk is about nine feet from the reception window. He said that he always keeps his office door open. He claimed that "I can hear everything in the office."

When Brown's attorney asked Bell if he would respond in aid of his female co-workers "where safety is a concern," implying that because he did not there had been no cause for concern, Bell candidly replied, "Well, to answer your question, because of past experiences, I'm not inclined to be sympathetic." On cross-examination, Bell admitted that "[s]he [Taylor] and I do not have a good relationship." His relationship with Tabbada is "[a] little bit better, but not much."

After hearing closing arguments, the court ruled as follows:

> The Court will find that with regard to the events concerning [Taylor], that the State has proven beyond a reasonable doubt that [Brown], with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating the risk thereof, did engage in tumultuous behavior, by using profanities, by refusing to cease her communication, by her gestures towards [Taylor].

> And there's evidence that there was physical inconvenience or alarm by a member or members of the public because [Taylor] testified that people from the post office were attracted to the commotion, and [Taylor] felt compelled to leave her office and to retreat to the rear of -- rear portion of the building in order to avoid any further confrontation with [Brown].
>
> Furthermore, she persisted in disorderly conduct after a warning or request to desist. [Taylor] testified that she asked [Brown] to leave three times, and [Brown] didn't leave.

II. Discussion.

A. The Adequacy of the Charge.

Brown first contends that the complaint was defective and failed to state an offense because it accused her of engaging in "fighting and threatening, and in violent or tumultuous behavior," whereas the *actus reus* of HRS § 711-1101(1)(a) is, "[e]ngages in fighting or threatening, or in violent or tumultuous behavior[.]" (All emphases added.).

Brown depends solely upon State v. Jendrusch, 58 Haw. 279, 567 P.2d 1242 (1977), to sustain this argument. Her reliance is misplaced. In Jendrusch, the Hawai'i Supreme Court, in judging a complaint charging a violation of HRS §§ 711-1101(1)(b) and (1)(c), held that a charge is defective and fails to state an offense if it omits an essential element of the offense charged. Id. at 281, 567 P.2d at 1244. There, however, the defect was the misstatement of one essential element and the

omission of another. Id. at 281-82, 567 P.2d at 1244-45. Brown makes no such argument here.

Indeed, the supreme court in Jendrusch noted the very issue in this case, and concluded against Brown's position:

> To further compound the problem, the draftsman in this case elected to charge the defendant in statutory language in one count. The type of conduct proscribed by subsection (1)(b) is not factually synonymous with that proscribed by subsection (1)(c). In charging the defendant in the disjunctive rather than in the conjunctive, it left the defendant uncertain as to which of the acts charged was being relied upon as the basis for the accusation against him. Where a statute specifies several ways in which its violation may occur, the charge may be laid in the conjunctive but not in the disjunctive.

Id. at 283 n.4, 567 P.2d at 1245 n.4 (citing Territory v. Lii, 39 Haw. 574 (1952)). See also State v. Pulse, 83 Hawai'i 229, 240 n.9, 925 P.2d 797, 808 n.9 (1996); State v. Batson, 73 Haw. 236, 249-51, 831 P.2d 924, 931-32 (1992); State v. Lemalu, 72 Haw. 130, 133-34, 809 P.2d 442, 444-45 (1991); cf. State v. Cabral, 8 Haw. App. 506, 510-11, 810 P.2d 672, 675-76 (1991). In fact, had the State charged Brown as she now urges it should have, the foregoing would indicate reversal.

B. Sufficiency of the Evidence.[1]

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[1]/ The record is devoid of any indication that Brown at any time brought a motion for judgment of acquittal. In State v. Rodrigues, 6 Haw. App. 580, 581, 733 P.2d 1222, 1223 (1987), we held that the defendant was not entitled to argue insufficiency of the evidence on appeal "because he did not move for a judgment of acquittal after all parties had finally rested." We further held, however, that he could argue the point as plain error. Though

(continued...)

Because Brown's first contention fails in light of the foregoing, her second, that there was insufficient evidence at trial because it lacked evidence of each and every one of the acts charged in the complaint, must also fail in light of the foregoing. Though the charge, per Jendrusch, et seq., must be laid in the conjunctive, the proof may be made in the alternative:

> However, combining the reasoning of **Lemalu** and **Cabral**, we hold that it is sufficient, as in the present case, that one offense allegedly committed in two different ways be charged **conjunctively** in a single count. If two alternative counts joined in the conjunctive are permissible, **see Lemalu**, and if joinder of alternative allegations in a single count by "and/or" is "appropriate," **see Cabral**, then a single count joining alternative means of committing an offense in the conjunctive is indistinguishably acceptable, the disjunctive "or" being subsumed within the conjunctive "and."
>
> It therefore follows that, under the indictment in the present case, the prosecution was not required to prove separate and distinct cases of murder by commission and omission against Batson in order to establish guilt. Any combination of substantial evidence, legally sufficient to support the trial court's conclusion that Batson intentionally or knowingly caused Amos's death, would mandate affirming Batson's judgment of conviction.

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[1](...continued)
Brown does not argue plain error anywhere in her appeal, we choose to review the points she raises regarding sufficiency of the evidence.

Batson, 73 Haw. at 250-51, 831 P.2d at 932 (footnote omitted, typesetting and emphasis in the original). See also State v. Robinson, 82 Hawai‘i 304, 310, 922 P.2d 358, 364 (1996).

We are thus left with Brown's last contention on appeal, that there was insufficient evidence at trial of the *mens rea* required by HRS § 711-1101(1)(a). In considering whether evidence adduced at trial is sufficient to support a conviction, we are guided by the following principles:

> On appeal, the test for a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact. ***State v. Ildefonso***, 72 Haw. 573, 576, 827 P.2d 648, 651 (1992); ***State v. Tamura***, 63 Haw. 636, 637, 633 P.2d 1115, 1117 (1981). "'It matters not if a conviction under the evidence as so considered might be deemed to be against the weight of the evidence so long as there is substantial evidence tending to support the requisite findings for the conviction.'" ***Ildefonso***, 72 Haw. at 576-77, 827 P.2d at 651 (quoting ***Tamura***, 63 Haw. at 637, 633 P.2d at 1117). "'Substantial evidence' . . . is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion." *See id.* at 577, 827 P.2d at 651 (quoting ***State v. Naeole***, 62 Haw. 563, 565, 617 P.2d 820, 823 (1980)).

State v. Matias, 74 Haw. 197, 207, 840 P.2d 374, 379 (1992). "Furthermore, 'it is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence[.]'" Tachibana v. State, 79 Hawai‘i 226, 239, 900 P.2d 1293, 1306 (1995) (citation omitted).

Taking the evidence in the light most favorable to the State, we discern abundant evidence that Brown acted "with intent to cause physical inconvenience or alarm by a member of members of the public, or recklessly creat[ed] a risk thereof," as required for a violation of HRS § 711-1101(1)(a).

From that perspective, Brown's pending dispute with the department over her entitlements and her already-stormy relationship with Taylor were fertile ground for what was to come. When she was denied priority handling of her case, that ground grew an angry resentment that certainly appears to be a motive more than sufficient for purposive behavior. From the volume and tone of Brown's voice, her gesticulations, and the profanities she directed at the workers and bystanders, one can easily infer an intent to cause physical inconvenience or alarm. In letting her dog loose upon Taylor and the little girl, and in the rather sadistic remarks accompanying that action, Brown betrayed her malicious intent. And, in persisting in her tumultuous behavior despite at least three requests to desist and warnings of police intervention, Brown demonstrated the strength and obstinacy of that intent.[2]

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[2] Brown argues alternatively on appeal that even if she was indeed guilty of disorderly conduct, she was nevertheless guilty of the violation and not the petty misdemeanor, see Hawai`i Revised Statutes § 711-1101(3),because the "[t]he state did not prove and the evidence did not show that [Brown] persisted in disorderly conduct after reasonable warning or request to desist, or that it was [Brown's] intention to cause substantial harm or serious incovenience." The evidence we have outlined clearly shows the contrary of the former contention.

Brown also argues in this respect that there was no evidence that she caused actual physical inconvenience or alarm. This argument, in and of itself, is neither here nor there, for HRS § 711-11011(1)(a) requires only that a perpetrator act "with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof[.]" It is also inaccurate. In making this argument, Brown simply ignores the staff disruption she caused during the incident. The evidence in the light most favorable to the State establishes that of the staff members at the office, Taylor at least was physically inconvenienced by having to flee Brown's outburst and hide out in the back of the office until it subsided. Not to mention the fact that Tabbada and at least one other staff member had to interrupt their duties in an attempt to quell the disruption. Nor can we ignore the fear and concern for personal safety engendered by Brown's actions. Taylor, at least, was physically alarmed. And we are not forgetting the little girl, who was reduced to tears.

III. Conclusion.

For the foregoing reasons, the November 24, 1999 judgment is affirmed.

DATED: Honolulu, Hawaii, March 15, 2001.

On the briefs:

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