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NO. 24643

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JAY ZARGHAMI, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CR. NO. 00309487)

MEMORANDUM OPINION

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

Jay Zarghami (Zarghami) appeals the August 14, 2001 judgment of the district court of the first circuit, the Honorable Leslie A. Hayashi, judge presiding, that convicted him, upon a bench trial, of the petty misdemeanor harassment, a violation of Hawaii Revised Statutes (HRS) § 711-1106(1)(a) (Supp. 2002),¹ and sentenced him to six months of probation. On appeal, Zarghami states the following points of error:

1. The Lower Court Erred When It Allowed the Prosecution to Introduce Evidence of Other Bad Acts.
. . . .
2. The Lower Court Was Wrong to Conclude That There Was No Evidence to Support the Justification Defense and Incorrectly Failed To Place the Burden of Disproving Justification Upon the Defense [(sic)].
. . . .

¹ Hawaii Revised Statutes § 711-1106(1)(a) (Supp. 2002) provides that "[a] person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person: Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]" (Enumeration omitted.)

NOT FOR PUBLICATION

3. The Lower Court Erred in Denying the Defendant's Renewed Motion for Judgment of Acquittal.

Opening Brief at 8-10 (capitalization in the original). We affirm.

I. Background.

On February 23, 2001, the State charged Zarghami as follows:

On or about the 15th day of August, 2000, in the City and County of Honolulu, State of Hawaii, JAY ZARGHAMI, with intent to harass, annoy, or alarm any other person, to wit, CELINA WALKER, did strike, shove, kick or otherwise touch CELINA WALKER in an offensive manner or subject CELINA WALKER to offensive physical contact thereby committing the offense of Harassment in violation of Section 711-1106(1)(a) of the [HRS].

(Capitalization in the original.) Zarghami's bench trial was held on June 26, 2001.

At trial, the State presented one witness, the complainant, Celina Walker (Walker). On direct examination, Walker described what happened on August 15, 2000:

Well, we were in the apartment and I was sitting on the couch in our living room; and [Zarghami] was standing near the kitchen yelling at me and arguing and trying to provoke an argument out of me.

He picked up the chair from our kitchen and he threw it at the wall above me and it fell on me, hit me.

Then he picked my bag up and he also threw it at the wall above me. It fell on me and hit me.

After a few seconds, he went into the other room and I grabbed the cell phone and I ran out of the apartment and I called 9-1-1.

Then he ran out of the apartment and shoved me down while I was running on the pavement. I got up and I dropped the phone.

Then I, I stood up and he was about ten feet away from me and I decided to run back into the apartment. So I started running towards the apartment and he chased me again; and he hit me from behind and I fell into the neighbor's window. Then I fell on the ground.

Then he came and he picked me up and he put me in the apartment, then he shut the door and he ran off.

NOT FOR PUBLICATION

Walker remembered that she was, "Hurt, mostly physical hurt." Ambulance personnel took glass out of Walker's neck and arms and treated "strawberries" on her hands and legs. She declined hospital treatment. Walker was evicted from her apartment as a result of the incident. She later got a restraining order against Zarghami, because

he had somehow found out the street that I lived on and he would repeatedly drive down my street; and I would see him by my car. And when I would come to court, he would say things to me, he would harass me and I just wanted him to leave me alone.

In the process of obtaining the restraining order, Walker had to list prior instances of abuse by Zarghami. When the deputy prosecuting attorney (DPA) solicited Walker's testimony about these, defense counsel objected:

[Defense counsel]: Objection, Your Honor. Lack of foundation as to relevance.

[DPA]: Goes to his intent, Your Honor.

THE COURT: Well, let's specify the time period. As the Court indicated earlier in pre-trial conversations, it still needs to meet the relevancy test.

[DPA]: Thank you.

Walker then testified that "a few weeks" before the subject incident, she and Zarghami were arguing in the bedroom when he slapped her and she bit his hand in response. Walker claimed that because Zarghami falsely told the police he did not hit her, she, and not he, was arrested. The DPA then asked, "And is there anything else within, say, three-month time period?" When Walker started to recount an argument she and Zarghami had at another

NOT FOR PUBLICATION

apartment they had previously shared, defense counsel objected:

[DEFENSE COUNSEL]: Objection, Your Honor. I was under the understanding that they moved into this apartment in May of 2000. So she's not talking about a few weeks here.

[DPA]: I said "months".

[DEFENSE COUNSEL]: I object, Your Honor. Relevance.

THE COURT: Overruled.

[DPA]: You can answer the question.

[WALKER]: In our previous apartment where he had tied my wrists and my ankles together behind my back with some speaker wire. Then he lifted me by the, by the wrists and ankles and he tried to shove me up on the bunk bed. And he didn't quite make it and he dropped me on my head and I had to go to the doctor's and take medication for my neck injury. When the police came, I had cuts on my wrists and on my ankles.

[DPA]: And did you file a police report on that incident?

[WALKER]: I didn't.

On cross-examination, Walker admitted that after the biting incident, she was ordered by the family court to stay away from Zarghami. She also confirmed that she later pled no contest to two counts of violating that order by telephoning Zarghami. Walker agreed that Zarghami did not chase her out of the apartment, as she had written in her statement detailing the August 15 incident, but rather that he pursued her after he heard her leave the apartment. Walker conceded that Zarghami did not take the cellular phone from her then shove her to the ground, as she had reported in her written statement, but rather that he retrieved the phone after she dropped it as she fell to the ground.

After the State rested and the court denied Zarghami's motion for judgment of acquittal, Zarghami testified in his defense. Zarghami remembered that at about 2 a.m. on August 15,

NOT FOR PUBLICATION

2000, he and Walker had an argument in their apartment. Zarghami denied throwing the chair at Walker, but conceded that he kicked the chair across the floor. He admitted throwing Walker's backpack against the wall. But he denied that either object hit her. He revealed that he did these things in order to raise a ruckus. He had tried repeatedly to get Walker to leave the apartment that night because she was violating the stay-away order, but to no avail. He hoped that the noise would induce someone to call the police. Walker had a key to the apartment, and Zarghami had put her name on the lease so she would be held accountable for any property damage. Zarghami claimed Walker "had a history of material damage to living spaces." At some point, Zarghami left the living room area. He heard the door slam. When he returned, he saw that Walker was gone. As he was about to lock the door after her, he noticed that his cellular phone was missing. Zarghami claimed that Walker had taken another cellular phone from him in the past and had thrown it into the ocean. So he went outside, and he saw Walker at the other end of the parking lot. He ran over to her, and she ducked down as if to hide the phone from him. When Zarghami took the phone from Walker, she started swinging at him -- "to hit me." Zarghami evaded Walker's swings, at which point Walker ran towards the apartment. Afraid of what she might do there,

NOT FOR PUBLICATION

Zarghami pursued her. At about four or five feet away from the apartment door, with Walker "running at top speed" right at Zarghami and Zarghami "off like on her front right quarter," Zarghami put his arm straight out and Walker ran into it. Zarghami was surprised that the contact "would have made her go flying like she did." Zarghami insisted that he did it to "[p]rotect myself and to protect anything of mine inside the apartment, to protect the apartment itself." After Walker fell, Zarghami helped her up and into the apartment. Zarghami maintained that the straight arm was his only use of "physical force" during the incident. He specifically denied making her drop the phone by pushing her down on the pavement.

As for the July 29, 2000 biting incident, Zarghami remembered that he was sitting on the floor of their apartment with the newspaper and a pen in hand, looking for apartments for rent. He told Walker that he wanted to move out and that she could not stop him from doing so. Zarghami recalled:

. . . . She was getting flustered, she was getting very mad.
. . . .
. . . . Next thing I knew, the paper was gone, you know, I felt something hit my head and she tried to pull the pen out of my hand. I wasn't letting go of it and so she just kinda put her head, like, in my lap area where my hand was and clamped her teeth down on this part of my hand right here to get me to let go of the pen. . . .

Zarghami explained that he did not want to relinquish the pen because he considered it a potential weapon. He claimed Walker had stabbed her ex-husband with a knife. Zarghami also

NOT FOR PUBLICATION

remembered that when he told Walker he was going to call the police, "she said, 'Oh, yeah?' slapped herself in the face." According to Zarghami, the police later confirmed that Walker had slapped herself, by comparing her hand with the hand print on her face. Zarghami also maintained that the police observed his bleeding hand and the cut on his forehead from her head butt.

After the July 29 incident, Zarghami took out a restraining order against Walker. Zarghami claimed that Walker violated the order three times by telephoning him. During one of the calls, Walker allegedly threatened to "fabricate some charges and to have some kind of Restraining Order put against me because of mental anguish is what she said."

On cross-examination, Zarghami confirmed that his written statement of the August 15 incident specified that he had thrown, not kicked, the chair. He had also written that he "tore some photos." He admitted that their landlord kicked him out of the apartment after the incident. Zarghami agreed that Walker was on the ground when he took his phone back from her. He maintained that his straight arm was intended merely to keep Walker away from him, much like a running back utilizes a straight arm in football.

On redirect examination, Zarghami revealed that Walker had been home from her work -- as a stripper at "Rock-za" -- for

NOT FOR PUBLICATION

about half an hour before the August 15 incident started. Regarding Walker's allegations of his harassing behavior after the subject incident, Zarghami claimed that, on the contrary, Walker took him to her new apartment to talk and try to reach "some amicable understanding[.]"

Zarghami rested after his testimony and renewed his motion for judgment of acquittal. Argument ensued on the motion, then in summation. The court's decision on the motion is not evident from the transcripts, but the motion was apparently denied, for the court ruled immediately after summation:

Okay. At this time, the Court's ready to rule. Having heard the State's witness as well as that of the defendant, it is obviously an issue of credibility.

In this court -- in this case, the Court does find the State's witness to be more credible with respect to the events that occurred on August 15th in the City and County -- City and County of Honolulu.

So the Court does find that the State has met its burden of proof beyond a reasonable doubt to show that the defendant did, with the intent to harass, annoy or alarm Miss Celina Walker by striking, shoving, or otherwise touching her in an offensive manner or subjecting her to offensive physical contact.

The Court does not find from the physical contact that was testified to by Miss Walker and even by the physical contact admitted to by the defendant that there was any justification for either defense of self or defense of property.

So the Court finds that the State has met its burden of proof beyond a reasonable doubt and therefore the Court does find the defendant guilty of this harassment charge on August 15th.

II. Discussion.

On appeal, Zarghami first argues that the court prejudicially erred in admitting evidence of the prior "speaker wire" incident. We disagree. Zarghami was convicted after a bench trial. While the testimony in question may have been

NOT FOR PUBLICATION

irrelevant or potentially prejudicial, “[i]t is well established that a judge is presumed not to be influenced by incompetent evidence[,]” State v. Antone, 62 Haw. 346, 353, 615 P.2d 101, 107 (1980) (citations omitted), and “the normal rule is that if there is sufficient competent evidence to support the judgment or finding below, there is a presumption that any incompetent evidence was disregarded and the issue determined from a consideration of competent evidence only.” State v. Gutierrez, 1 Haw. App. 268, 270, 618 P.2d 315, 317 (1980) (citations omitted); see also State v. Vliet, 91 Hawai‘i 288, 298, 983 P.2d 189, 199 (1999). Furthermore, “[t]he fact that it was a trial without a jury minimized the danger of undue prejudice.” State v. Arakawa, 101 Hawai‘i 26, 35, 61 P.3d 537, 546 (App. 2002); see also Woodring v. United States, 360 F. Supp. 240, 243 (C.D. Cal. 1973) (in a bench trial, “the Court can disregard inadmissible testimony, and has greater discretion in the conduct of the trial, among other things, in matters which might be confusing and prejudicial in the minds of the jury”); People v. Deenadayalu, 772 N.E.2d 323, 329 (Ill. App. Ct. 2002) (“when other-crimes evidence is introduced for a limited purpose, it is presumed that the trial judge considered it only for that purpose” (citation omitted)); State v. Anderson, 824 So. 2d 517, 521 (La. Ct. App. 2002) (“[a] judge, unlike a jury, by virtue of

NOT FOR PUBLICATION

the judge's training and knowledge of the law is fully capable of disregarding any impropriety" (citations and internal quotation marks omitted); Corley v. State, 987 S.W.2d 615, 621 (Tex. Ct. App. 1999) (in a bench trial, "the danger that the trier of fact will consider extraneous offense evidence for anything other than the limited purpose for which it is admitted is reduced, and the likelihood that the extraneous evidence will unfairly prejudice the defendant is diminished").

As decided infra, there clearly was sufficient competent evidence adduced at trial to support the court's judgment. This being so, "there is a presumption that any incompetent evidence was disregarded and the issue determined from a consideration of competent evidence only." Gutierrez, 1 Haw. App. at 270, 618 P.2d at 317 (citations omitted); see also Vliet, 91 Hawai'i at 298, 983 P.2d at 199. Zarghami argues that invocation of the presumption is inappropriate in his case:

The State claims that, even if the evidence were improperly admitted, the court did not rely on the incompetent evidence in its ruling. However, this conveniently ignores the fact that the court overruled the defense's objection. Clearly, the court believed it was free to consider all the evidence of prior bad acts.

Reply Brief at 5 (citations to the briefs and the record omitted). But this argument merely begs the pertinent question. And the court's ruling indicates that it did indeed confine its consideration of the case to evidence of the August 15 incident,

NOT FOR PUBLICATION

and that it decided the case on the respective credibility of the opposing versions of the evidence so cabined:

Okay. At this time, the Court's ready to rule. Having heard the State's witness as well as that of the defendant, it is obviously an issue of credibility.

In this court -- in this case, the Court does find the State's witness to be more credible with respect to the events that occurred on August 15th in the City and Count -- City and County of Honolulu.

(Emphasis supplied.) Nothing otherwise in our independent review of the record appears to rebut the presumption. Accordingly, this first point of error lacks merit:

Given the absence of a jury in the case at bar, and in light of the substantial evidence contained in the record . . . , we are convinced that there is no "reasonable possibility that error might have contributed to conviction." See State v. Kaiama, 81 Hawai'i 15, 22-23, 911 P.2d 735, 742-43 (1996) ("Error is not to be viewed in isolation and considered purely in the abstract. It must be examined in light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction." (Brackets and citation omitted)); [Hawai'i Rules of Penal Procedure] Rule 52(a).

Vliet, 91 Hawai'i at 298, 983 P.2d at 199.

Zarghami's second point of error on appeal contends the court erred in concluding there was no evidence to support his justification defense, thus impermissibly placing a burden of proving the defense upon him. This point is predicated upon the following passage from the court's ruling:

The Court does not find from the physical contact that was testified to by Miss Walker and even by the physical contact admitted to by the defendant that there was any justification for either defense of self or defense of property.

Thereupon, Zarghami asserts:

The court's ruling was basically a finding that the defense had

NOT FOR PUBLICATION

not presented any evidence to support a justification defense. [Zarghami] assigns as error the trial court's finding that [he] had not presented any evidence to show that he was entitled to the justification defense. This error impermissibly lifted the State's burden of disproving the justification defense.

Opening Brief at 10. We disagree. Nothing in the ruling even remotely suggests the court found that there was no justification evidence presented by the defense and hence, there is absolutely no indication the court impermissibly shifted the burden of proof to the defense. This point of error lacks merit.

For his final point of error, Zarghami avers that the court erred in denying his renewed motion for judgment of acquittal. The gravamen of this point is, that there was insufficient evidence adduced at trial that Zarghami intended by his actions to "harass, annoy, or alarm" Walker.

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

NOT FOR PUBLICATION

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)

(ellipsis in the original). "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) (brackets, internal quotation marks and citation omitted).

At bottom, Zarghami's final point of error on appeal contends the court should have believed him, and not Walker. That, however, was the court's kuleana, and not ours. Tachibana, 79 Hawai'i at 239, 900 P.2d at 1306. At any rate, taking the evidence in the light most favorable to the State, it is beyond cavil that there was substantial evidence to support the court's verdict. Matias, 74 Haw. at 207, 840 P.2d at 379.

III. Conclusion.

The August 14, 2001 judgment is affirmed.

DATED: Honolulu, Hawaii, June 6, 2003.

On the briefs:

Dwight C.H. Lum,
for defendant-appellant.

Chief Judge

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge