

NOT FOR PUBLICATION

NO. 26418

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
GENE GUTIERREZ FELICIANO, Defendant-Appellant

NORMA T. YARA  
CLERK, APPELLATE COURT  
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 02-1-1785)

MEMORANDUM OPINION

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

Gene Gutierrez Feliciano (Defendant) appeals the January 28, 2004 judgment of the Circuit Court of the First Circuit (circuit court),<sup>1</sup> as amended on February 26, 2004, that convicted him, upon a jury's verdict, of terroristic threatening in the first degree.<sup>2</sup> Defendant contends there was insufficient evidence that he recklessly disregarded a risk of terrorizing Gwendolyn Kagihara (Kagihara) with the statements that he made on June 14, 2002. We disagree, and affirm.

**I. Background.**

In 1994, Defendant began receiving services from the State Division of Vocational Rehabilitation Services (DVR), in

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<sup>1</sup> The Honorable Michael D. Wilson presided.

<sup>2</sup> Hawaii Revised Statutes (HRS) § 707-716(1)(c) (1993) provides, in pertinent part: "A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening: . . . . Against a public servant[.]" (Enumeration omitted; format modified.) HRS § 707-715(1) (1993) reads, in relevant part: "A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony: With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person[.]" (Enumeration omitted; format modified.)

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order to pursue a graduate degree at the University of Hawai'i (UH). However, in 1995 he was convicted of shoplifting for taking software from the UH bookstore. Defendant insisted that DVR had authorized him to credit the software to DVR money allotted to him, but DVR O'ahu Branch Administrator Kagihara testified to the contrary at the shoplifting trial. After Defendant was convicted of the theft, his health and studies deteriorated. Eventually, Defendant flunked out of graduate school and stopped receiving DVR services. He blamed Kagihara for his troubles.

In May 2002, Defendant called Kagihara and told her that he wanted to meet with her to talk about why she had perjured herself during his shoplifting trial. Kagihara demurred, whereupon Defendant told her, "I'm going to meet with you whether I meet with you in the office, in the dark, at your house, we're going to meet." Kagihara was terrified, so she told her supervisor about the phone call. Consequently, DVR hired a private security firm for its offices and also arranged to have a deputy sheriff on site.

In June 2002, Defendant returned to DVR and reapplied for services. As part of the intake process, Albert Perez (Perez), Defendant's DVR counselor, warned him about one of the exceptions to client confidentiality: "One of the exceptions would be if we believe that you are a risk to yourself or others." Defendant denied being so advised, and claimed that he

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had not been informed of any exceptions to the confidentiality he expected: "I was assured everything he and I discussed was in confidentiality."

On June 14, 2002, during a phone call with Defendant to arrange for neuropsychological testing, Perez heard Defendant interject, "I haven't been able to sleep at night because of what she did to me. I am going to kill her." Defendant repeated, "I am going to kill her." Perez also heard Defendant say, "You guys locking the doors aren't going to keep me away from her. I am going to kill her." However, Defendant remembered telling Perez, instead, "I felt like I could have killed her when she did that to me."

Perez testified about two other times Defendant threatened Kagihara. Perez remembered that on June 10, 2002, during a meeting, Defendant told him in a pressured voice and with clenched fists, "I want her to tell me why . . . she did this to me or I will rip out her tongue." At another meeting on June 19, 2002, Perez expressed concern about Defendant's previous threats against Kagihara. Defendant responded, "I would never threaten anyone, those were promises."

Testimony also revealed that, twice in August 2002, Defendant went to the DVR offices irate and without an appointment and insisted on seeing Kagihara, but was stopped each time by the deputy sheriff.

**II. Standard of Review.**

The standard of review for sufficiency of the evidence is well established:

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 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.

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

(brackets, citations, block quote format and some internal quotation marks omitted).

**III. Discussion.**

Defendant contends there was insufficient evidence that he recklessly disregarded a risk of terrorizing Kagihara:

Mr. Feliciano made his statements on June 14 believing that they were expressions of his feelings that would be held in confidentiality by his counselor and not "threats" unprotected by the normal counselor-patient confidentiality. As Mr. Feliciano was not aware of this exception, he did not consciously disregard a substantial and unjustifiable risk that his conduct would threaten Ms. Kagihara or that the risk that his conduct would result in terrorizing her was substantial and unjustifiable because he was unaware that the statements could be communicated to her. Thus, he did not recklessly disregard a risk of terrorizing Ms. Kagihara and his conviction must be reversed.

Opening Brief at 11. In other words, Defendant argues that the jury should have believed his testimony about what he told Perez on June 14, 2002, and about what Perez told him about client confidentiality during the DVR intake process, and not the testimony of Perez on the same subjects. Clearly, this kind of argument is always stillborn on appeal.

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"The testimony of one percipient witness can provide sufficient evidence to support a conviction. Moreover, it is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses." State v. Pulse, 83 Hawai'i 229, 244-45, 925 P.2d 797, 812-13 (1996) (brackets, citations and internal quotation marks omitted). "It is the jury's province to determine the credibility of witnesses, weigh the evidence and draw justifiable inferences of fact from that evidence." State v. Chun, 93 Hawai'i 389, 397, 4 P.3d 523, 531 (App. 2000) (citation omitted). "While some of these statements were controverted by the defendant, it was the function of the jury to determine whom to believe. It is enough for us to note that there was clearly substantial evidence in the record to support the jury's verdict." State v. Stuart, 51 Haw. 656, 659, 466 P.2d 444, 446 (1970).

**IV. Conclusion.**

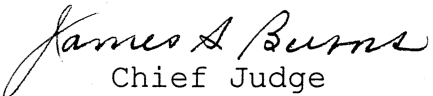
Accordingly, the January 28, 2004 judgment of the circuit court, as amended on February 26, 2004, is affirmed.

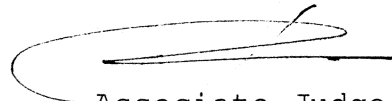
DATED: Honolulu, Hawai'i, July 14, 2005.

On the briefs:

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State of Hawai'i,  
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State of Hawai'i,  
for plaintiff-appellee.

  
Chief Judge

  
Associate Judge

  
Associate Judge