NO. 24125

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

BERNABE SALVADOR, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NOS. 99-0685, 99-2082, AND 90-0252)

SUMMARY DISPOSITION ORDER
(By: Levinson, Nakayama, Ramil, and Acoba, JJ.,
and Moon, C.J., Concurring)

This is an appeal by Defendant-Appellant Bernabe Salvador, who previously filed three separate notices of appeal in Cr. Nos. 90-0252, 99-0685, and 99-2082, all of which are consolidated under Supreme Court No. 24125.[1] This appeal arises from the judgment of the First Circuit Court, the Honorable Karen Ahn presiding, convicting Salvador of terroristic threatening in the second degree in Cr. No. 99-0685.[2]

On appeal, Salvador argues that the circuit court erred by: (1) insufficiently instructing the jury with respect to what constitutes a "true threat", and (2) not instructing the jury that, in the context of a terroristic threatening prosecution,

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[1] By order dated 7/2/02, this court consolidated case Nos. 24124, 24125, and 24126 under No. 24125.

[2] HRS § 707-717 provides that, "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."

the attributes of the defendant and the complainant may be taken into consideration in assessing whether, under the circumstances, the defendant's remark was a "true threat." Salvador also raises an ineffective assistance of counsel claim.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments made and the issues raised by the parties, we vacate the circuit court's judgment of conviction of and sentence for terroristic threatening in the second degree in connection with counts I and II and remand for a new trial as to those offenses.

With respect to the jury instructions, we hold that the circuit court erred by insufficiently instructing the jury with respect to what constitutes a "true threat." In State v. Valdivia, we held that "[a]bsent 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." 95 Hawai'i 465, 478, 24 P.3d 661, 674 (2001). In Valdivia, we explained State v. Chung, 75 Haw. 398, 862 P.2d 1063 (1993):

> Chung judicially narrowed the meaning of the word "threat," as employed in HRS § 707-715, in order to salvage the statutes defining terroristic threatening offenses from unconstitutional overbreadth. As a result, Chung mandates that, in a terroristic threatening prosecution, the prosecution prove beyond a reasonable doubt that a remark threatening bodily injury is a "true threat," such that it conveyed to the person to whom it was directed a gravity of purpose and imminent prospect of execution.

Valdivia, 95 Hawai'i at 476, 24 P.3d at 672 (emphasis added).

Here, the instructions given by the circuit court were devoid of any language regarding imminency. As such, the court's insufficient instructions and Bennett's failure to object constitute plain error.[3] Because "erroneous instructions are presumptively harmful" and because it does not appear from the record as a whole that the error was not prejudicial, we vacate Salvador's convictions of second degree terroristic threatening and remand the matter for new trial. State v. Pinero, 70 Haw. 509, 527, 778 P.2d 704, 716 (1989).

The circuit court also erred by not instructing the jury that, in the context of a terroristic threatening prosecution, the attributes of the defendant and the complainant may be taken into consideration in assessing whether, under the circumstances, the defendant's remark was a "true threat." In Valdivia, we expressed that:

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[3] The primary components of the plain error rule were delineated by Justice Harlan Fiske Stone as follows:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.

United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936) (citations omitted). We have also observed that appellate courts "have the power, *sua sponte*, to notice plain errors or defects in the record affecting substantial rights [though they were] not properly brought to the attention of the trial judge or raised on appeal." State v. Iaukea, 56 Haw. 343, 355, 537 P.2d 724, 733 (1975) (citations omitted); see also State v. Brezee, 66 Haw. 162, 166, 657 P.2d 1044, 1047 (1983); State v. Onishi, 59 Haw. 384, 385, 581 P.2d 763, 765 (1978).

> [I]n order for an utterance to constitute a "true threat," it must be objectively susceptible to inducing fear of bodily injury in a reasonable person at whom the threat is directed and who is familiar with the circumstances under which the threat is uttered. That being the case, the particular attributes of the defendant and the subject of the threatening utterance are surely relevant in assessing whether the induced fear of bodily injury, if any, is objectively reasonable.

Valdivia, 95 Hawai‘i at 479, 24 P.3d at 675 (citation omitted) (emphasis added). In applying these principles to the facts of Valdivia, we concluded that,

> [T]he jury in the present matter should have been instructed that it could consider relevant attributes of both the defendant and the subject of the allegedly threatening utterance in determining whether the subject's fear of bodily injury, as allegedly induced by the defendant's threatening utterance, was objectively reasonable under the circumstances in which the threat was uttered.

Id. In light of Valdivia, it is clear that the circuit court has erred by not instructing the jury that it could consider relevant attributes of Salvador, Dolores Talaban, and Francisco Yap in determining whether the induced fear of bodily injury caused by Salvador's threatening utterance was objectively reasonable. The circuit court's plain error provides an alternative basis for vacating Salvador's convictions and remanding the case for a new trial.

Because Salvador's ineffective assistance of counsel claim is no longer necessary for the resolution of this appeal, we need not address it. Therefore,

IT IS HEREBY ORDERED that the circuit court's judgment of conviction of and sentence for two counts of terroristic

threatening in the second degree is vacated. The matter is remanded for a new trial consistent with this opinion.

DATED: Honolulu, Hawai'i, October 31, 2002.

MOON, C.J., CONCURS IN THE RESULT ONLY.

On the briefs:

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