

NO. 22848

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
TAUTALAASO ALOSIO, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CASE NO. CT1 of 8/11/99 (98-1918) HPD NO. 98-470565)

MEMORANDUM OPINION

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

Defendant-Appellant Tautalaaso Alosio (Alosio) appeals the district court's August 11, 1999 judgment convicting him of Harassment, Hawai'i Revised Statutes (HRS) § 711-1106(1) (a). Alosio was sentenced to a fine of \$50 and four hours of community service work.

We affirm.

BACKGROUND

On August 11, 1999, Alosio was orally charged in the District Court of the First Circuit, Ewa Division, as follows:

Mr. Alosio, you are charged, this is on or about December 25th (twenty fifth), 1998, on the island of Oahu, that you, a person with intent to harass, annoy or alarm another person, struck, shoved, kicked, or otherwise touched another person in an offensive manner or subject [sic] another person to offensive physical contact, in violation of Section 711-1106(1) (a), of the Hawaii Revised Statutes.

A bench trial was held and Officer Kevin Bailey (Officer Bailey) of the Honolulu Police Department testified for Plaintiff-Appellee State of Hawai'i (the State). Alosio's wife, Fale

Alosio (Mrs. Alosio), testified on behalf of Alosio. Neither Alosio, nor Officer Daniel Gooch (Officer Gooch) of the Honolulu Police Department, the alleged victim, testified at trial.

Officer Bailey testified that, on December 25, 1998, he was "on routine patrol" when he "heard Officer Gooch request for more units. Several transmissions came over that these people are irate" and "disorderly, and that they were throwing bottles." Responding to a request for more officers, Officer Bailey arrived on the scene at approximately 10:13 p.m. "Well, when I first got there, I -- I talked with Officer Gooch, and he was explaining the situation. There were several -- we -- we were waiting for several other officers because he had explained that there were numerous individuals over there that were disorderly." Upon entering Alosio's yard, Officer Bailey observed that Alosio "appeared to me to be under the influence of alcoholic beverages and irate." When asked about other people there besides Alosio, Officer Bailey stated that

[t]here was a Samoan female, elderly Samoan female. And then, there was one younger Samoan that pushed past me and hit me in the back. Pushing me like saying, what's going on here, and -- and pushing me forward. And, I had to push her back outta' the way. And, I said something, or I don't know if I told her, I said, "Back off." Or, I instructed her to back off. And then, I -- and, -- and, there was another male inside. I don't quite remember where he was, but I know there was another male inside.

According to Officer Bailey, the atmosphere in the yard "was pretty heated. I do remember [Alosio] sitting there and saying get out. And, it was -- there was a lot of yelling. It was -- it was -- it was a very, what I call, heated situation.

There was a lot of yelling there. At one point I was kinda' scared myself." Alosio yelled at the officers to "[g]et out of his house, and I don't care if you're the police[.]" Officer Gooch told Alosio to "turn down his music . . . three times" in a "[f]irm, authoritative" tone of voice. On direct examination, Officer Bailey testified, in relevant part, as follows:

A There was a lot of yelling, and I know [Alosio] was saying that this -- you know, words to the effect that this was his property. You know, he didn't care if we were the police. And then, I saw him grab towards Officer Gooch [sic] chest area. I don't know whether or not it was just to tell him to get out, or you know, whether or not it was a --a -- I -- I -- it didn't appear to me to be necessarily a striking movement as it was, you know, maybe to grab him to -- to push. You know, but he did grab towards Officer Gooch [sic] chest and tell him it was -- uttering some words. But, at that point, you know, I saw the furtive movement. I just went and grabbed him in a bear hug.

. . . .

A . . . But, I do know I saw contact. That's why I initially grabbed him. I do know I saw contact.

. . . .

Q And, do you know what part of the body that [Alosio] made contact with Officer Gooch?

A His upper chest area. His shirt area.

. . . .

Q And, why did you grab [Alosio] in a bear hug?

A Well, I initially saw him grab the officer. And, at that point I was, like, okay. Enough is enough, you know. He's already made contact. I'm gonna' have to arrest, you know, because he already touched an officer, you know. And, I don't know what his intentions were at that point. So, you know, officer safety. It's basically, you know, stop the incident at that point. But, I felt that, you know, that was my last resort at that point. That I had to, at least, grab, take physical control, and then, you know, get him outta' the environment.

On cross-examination, Officer Bailey testified, in relevant part, as follows:

Q Contact meaning he grabbed the uniform?

A He grabbed the uniform. His hand actually grabbed the uniform, yes, ma'am.

Q Do you recall if he grabbed the sleeve, if he grabbed the chest area?

A It was the chest area.

Q A grabbing movement to the chest?

A Yes, ma'am.

Q Okay. And, you saw the clothing being grabbed basically?

A Yes, ma'am.

Officer Bailey did not see Officer Gooch or any other officer touch Alosio before Alosio grabbed Officer Gooch. Officer Bailey also testified that Alosio was "a pretty big guy" and that Officer Bailey "was intimidated just by his size."

The State then rested its case without calling any other witnesses. After Alosio moved unsuccessfully for a judgment of acquittal, he called his wife to testify.

Mrs. Alosio testified that on December 25, 1998, their family was having a "get-together with family members" when Officer Gooch came to their residence at "[a]bout quarter to ten" at night. She stated that there were four people at the residence when Officer Gooch first arrived. When Officer Gooch first came to the residence, he was alone and that "[a]s soon as he pushed the door open, he says, 'Excuse me. Turn down the radio.' He didn't say, please. Would you turn the radio down. He just said to me, 'Turn the radio off.'" Mrs. Alosio described Officer Gooch's tone of voice as "mad" and that he "had a bad

attitude." After Mrs. Alosio turned down the radio, Officer Gooch "started turning around to go back to his car because I turned the radio down. And then, my husband said, 'Excuse me. Next time you enter my home please knock.' And then, [Officer Gooch] turned around with a bad attitude. And, he said, 'Well, I'm just doing my job.'" Mrs. Alosio admitted that her husband "was annoyed with Officer Gooch 'cause he didn't bother to knock[.]"

Although the volume of the music had not been turned back up, Officer Gooch returned not more than 10 minutes later and "just kicked the door in, and the door came flying inside[.]" Officer Gooch "just stood there, and then he said to the other officers, 'That's him. That's him.'" At that point, five or six other officers came rushing into the yard area. Mrs. Alosio stated that Officer Gooch swore at her.

After the other officers -- police hand -- and handcuffed [Alosio], after [Alosio] was arrested. And then, [Officer Gooch] -- [Officer Gooch] came -- well, not close to my husband, but [Officer Gooch] was -- [Officer Gooch] was about -- about three people away from my husband. [Officer Gooch] was saying, "'What? You think I don't know what's -- what's kaffe (sic) mean.'" . . . [Officer Gooch] was saying, "'What? You're tough now? You -- you think you're tough?'" . . . And, he was also saying -- because I was still saying you guys are -- are -- are doing, you know -- you guys are arres -- false arresting my husband. [Alosio's] not doing anything. And -- and then, [Officer Gooch] said, "'Get the fuck away. You guys gonna' all get arrested.'"

Mrs. Alosio testified that she never saw her husband yell at or grab Officer Gooch.

On cross examination, Mrs. Alosio admitted that her husband had begun drinking beer that day "like around 12" noon

"'til about ten at night." Mrs. Alosio also said that her brother-in-law, who was also later arrested, began drinking beer at about the same time.

Alosio rested his case after his wife's testimony. The trial court then ruled that

[t]he Court has taken into account the statements made by the State, as well as by the Defense.

The Court is still concerned about -- about the veracity or truthfulness of [Mrs. Alosio] . . . in this case. One thing that worries the Court is that she denies that [Alosio] was yelling at Officer Gooch. And, she asserted that . . . [Alosio] was calm. That's totally inconsistent with the totality of the circumstances when you're -- when you have this police officer that allegedly kicks in your door. I [doubt] most people are gonna' be very calm about that. I believe that the situation was considerably more explosive than as -- especially in regard to [Alosio's] reaction as testified to by [Mrs. Alosio] in this particular case.

. . . .

So, the -- the Court will find [Alosio] guilty as charged to the crime of harassment[.]

In sentencing Alosio, the Court stated:

[T]his is an unfortunate situation that evidently got outta' hand, and I believe it got outta' hand because of alcohol. You were drinking from noon to ten o'clock. Police Officer comes in. You don't like him because he asked you to turn your radio -- your radio down. He used words that I believe were probably apologetic. He told you 'I'm just doing my job'. When he first came in, he said 'excuse me. You have to turn -- you have to turn the radio down.' You probably drank too much and you misinterpreted what he was saying.

. . . .

It is the order of a fine of \$50.00 (fifty dollars) and four hours community service work. Good luck.

POINTS ON APPEAL

1. Was the evidence presented adequate to support the conviction of Alosio for the Harassment charge?

2. Did the trial court commit plain error when it did not dismiss the charge on the ground that the offense was *de minimis*?

STANDARD OF REVIEW

1. Sufficiency of the Evidence

Regarding appellate review for insufficient evidence, the Hawai'i Supreme Court has repeatedly stated:

[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.

State v. Quitoq, 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).

It was for the trial judge as fact finder in this case to assess the credibility of the witnesses, including the defendant's, and to resolve all questions of fact. The fact finder may accept or reject any witness's testimony in whole or in part. And in reviewing the sufficiency of the evidence to support the conviction the appellate court "must take that view of the evidence with inferences reasonably and justifiably to be drawn therefrom most favorable to the Government, without weighing the evidence or determining the credibility of the witnesses." Where the verdict of the trial court is supported by substantial evidence, its ruling will not be disturbed on appeal.

State v. Cannon, 56 Haw. 161, 166, 532 P.2d 391, 396 (1975)

(citations omitted).

2. Dismissal Because the Offense is *De Minimis*

A trial court's decision to dismiss a charge because the offense is *de minimis* is reviewed under the abuse of

discretion standard. State v. Ornellas, 79 Hawai'i 418, 423, 903 P.2d 723, 728 (App. 1995) (citing State v. Akina, 73 Hawai'i 75, 78, 828 P.2d 269, 271 (1992)). The appellate court will "reverse the trial court only if the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Id. (internal quotation marks omitted).

3. Plain Error

"We may recognize plain error when the error committed affects substantial rights of the defendant." State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997) (citations and internal quotation signals omitted). See also Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) (1993) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999) (citations omitted).

In our view, the decision to take notice of plain error must turn on the facts of the particular case to correct errors that "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 (1936)].

State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 676 (1988).

RELEVANT STATUTES

HRS § 711-1106(1)(a) (1993) reads as follows: "A person commits the offense of harassment if, with the intent to harass, annoy, or alarm another person, that person: . . . [s]trikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]"

HRS § 702-236(1)(b) (1993) reads as follows: "The court may dismiss a prosecution if, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct: . . . [d]id not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction[.]"

DISCUSSION

1. There was sufficient evidence for the trial court to convict Alosio of Harassment.

In his first point on appeal, Alosio contends that the record does not contain evidence sufficient to support a finding that he 1) intended to harass, annoy or alarm Officer Gooch; and 2) touched or contacted Officer Gooch in an offensive manner.

On appeal, "'this court will not attempt to reconcile conflicting evidence,' [or] . . . interfere with a jury decision based on [the] 'credibility of witnesses or the weight of the evidence.'" State v. Kekauaia, 50 Haw. 130, 133, 433 P.2d 131, 133 (1967) (Levinson, J., concurring) (citations omitted). "The fact finder may accept or reject any witness's testimony in whole or part." State v. Auwae, 89 Hawai'i 59, 64-65, 968 P.2d 1070, 1075-76 (App. 1998) (citation omitted). Additionally, the appellate courts "will not disturb that finding on appeal[, as i]t is the sole province of the [fact finder] to judge the

credibility of witnesses and to weigh the evidence." Id.
(citation omitted).

Examining the requirement of the Harassment offense that an offender "[s]trikes, shoves, kicks, or otherwise touches another person" or otherwise subjects that person to "offensive physical contact," the evidence viewed in the light most favorable to the State is sufficient to prove that Alosio made contact with Officer Gooch.

Alosio also argues that even if he did touch Officer Gooch, there was insufficient evidence to show he "intended to harass, annoy or alarm [Officer Gooch] as required under HRS § 711-1106(1) (a)."

The state of mind of an individual may be read from his or her acts, conduct and inferences fairly drawn from all circumstances. State v. Stocker, 90 Hawai'i 85, 92, 976 P.2d 399, 406 (1999) (citations omitted). On this subject, the commentary on HRS § 711-1106 states, in relevant part, that "[s]ubsection (1) (a) is a restatement of the common-law crime of battery, which was committed by any slight touching of another person in a manner which is known to be offensive to that person. Such contacts are prohibited, if done with requisite intent, in order to preserve the peace." Based on the evidence, the trial court decided that "I believe that the situation was considerably more explosive than . . . as testified to by [Mrs. Alosio] in

this particular case", and that "this [was] an unfortunate situation that evidently got outta' hand[.]" Considering the totality of the situation and circumstances, we conclude that there is enough evidence to support the trial court's finding of intent.

2. The fact that the trial court did not dismiss Alosio's offense as *de minimis* is not plain error.

Alosio's second point on appeal is that the "trial court committed plain error in convicting [Alosio] of Harassment because [Alosio's] actions constituted a de minimis infraction under HRS § 702-236." (Emphasis in original.)

A dismissal of the charge because the offense was *de minimis* is not a defense. It rests within the discretion of the court. State v. Reed, 77 Hawai'i 72, 85, 881 P.2d 1218, 1231 (1994). The commentary on HRS § 702-236 states, "The Legislature deleted the mandatory 'shall' and inserted in lieu thereof the permissive 'may', [sic] in order 'to make the court's power to dismiss a prosecution discretionary upon the finding that the conduct constituted a *de minimis* infraction.'" Supplemental Commentary on HRS § 702-236 (quoting Sen. Conf. Comm. Rep. No. 2, in 1972 Senate Journal, at 741). Based upon the circumstances set forth above, an abuse of discretion would not have occurred had the court denied Alosio's request for such a dismissal. Alosio's acts are the type sought to be prevented by HRS § 711-1106(1) (a) and are not "too trivial to warrant the

condemnation of conviction." See Ornellas, 79 Hawai'i at 423, 903 P.2d at 728 (1995) (concluding that a wife's slap to her husband's face was a harm sought to be prevented under HRS § 709-906 (spouse abuse) and was not too trivial to warrant the condemnation of conviction).

CONCLUSION

Accordingly, we affirm the district court's August 11, 1999 judgment convicting Alosio of Harassment.

DATED: Honolulu, Hawai'i, January 18, 2001.

On the briefs:

Kevin A. Souza,
Deputy Public Defender,
for Defendant-Appellant.

Chief Judge

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge