

NO. 23351

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
MARVIN RAY JACKSON, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-1311)

MEMORANDUM OPINION

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

This is an appeal of a March 9, 2000 Judgment entered by Circuit Court Judge Reynaldo D. Graulty, upon a jury's verdict, convicting Defendant-Appellant Marvin Ray Jackson (Jackson) of the included offense of misdemeanor Assault in the Third Degree, Hawai'i Revised Statutes (HRS) § 707-712 (1993),¹ and sentencing him to probation for one year subject to various special conditions, including imprisonment for thirty days, payment of a crime victim compensation fee of \$1,000, and payment

¹ Hawai'i Revised Statutes (HRS) § 707-712 (1993) provides as follows:

Assault in the third degree. (1) A person commits the offense of assault in the third degree if the person:

- (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or
- (b) Negligently caused bodily injury to another person with a dangerous instrument.

(2) Assault in the third degree is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

of restitution in an amount to be determined by the judiciary's Adult Probation Division. We affirm.

BACKGROUND

On July 8, 1999, Jackson was indicted on one count of Assault in the Second Degree, HRS § 707-711(1)(a) (1993).² On January 18, 2000, a jury returned a guilty verdict of the lesser included offense of misdemeanor Assault in the Third Degree, HRS § 707-712 (1993). In this appeal, Jackson contends that Plaintiff-Appellee State of Hawai'i (the State) failed to present substantial evidence in satisfaction of the State's burden to prove beyond a reasonable doubt that the force used by Jackson was not justifiable.

EVIDENCE

On December 26, 1998, Illka Roinisto (Roinisto), a Hawai'i Pacific University student from Finland, entered the Subway Sandwich Shop on Kalakaua Avenue in Waikiki sometime after 5:00 p.m. While Roinisto stood in a line of three to four people, a man entered the shop and "cut" in front of the patrons already waiting line.

² HRS § 707-711(1)(a) provides, in relevant part, that "[a] person commits the offense of assault in the second degree if: . . . [t]he person intentionally or knowingly causes substantial bodily injury to another[.]"

Roinisto asked the man³ to move to the back of the line. According to Roinisto, the man grabbed his hand and said something to the effect, "[Y]ou fucking faggot, let's go outside and fight[.]" Roinisto declined but nevertheless insisted that the man move to the rear of the line. The man again eventually complied, although he again swore at Roinisto. Roinisto ordered a sandwich and exited the shop. The other man involved was later identified as Jackson.

Roinisto is 5 feet 11 inches in height and weighs 140 pounds. Roinisto testified that his assailant was a little shorter than him and weighed approximately 180 to 200 pounds. Roinisto recalls no more of that incident or of the events transpiring afterwards.

³ Illka Roinisto testified, in relevant part, as follows:

Q. Okay. Now, if you were to see that person again would you be able to recognize him?

A. I'm not absolutely sure. I have [a] really hard time remembering any faces from that day.

Q. Okay. Can you describe the person that you saw in the store that day?

A. I remember he was a big guy. He was, like, [a] really wide person.

Q. What complexion was he, do you recall?

A. Darker than me, I was pretty sure he was Hawaiian or -- just it's really hard for me to tell, but he was darker skin than I have.

At trial, Jackson testified that, on December 26, 1998, he was walking home after completing a workout at the 24-hour Fitness Center on Kapiolani Boulevard. On his way home he stopped at the Subway Sandwich Shop. As Jackson entered the store, he noticed two persons, whom he believed to be a father and son, waiting in line. As Jackson stood in line reading the menu, a male walked in and stood to his right. Jackson testified that the male, whom he later identified as Roinisto, did not say anything. Jackson asked Roinisto if he was waiting for his food, believing Roinisto might have previously ordered. In Jackson's words "[Roinisto] was angry that I had even asked him. So he just looks at me and he says -- he goes, the line is here and here and I was sitting over there." Jackson frowned at Roinisto, then "told him he wasn't in the line." Roinisto asked Jackson what he was going to do about it. Jackson responded by laughing because he thought Roinisto was "being a jerk." Jackson allowed Roinisto to precede him in the line. Jackson then placed his order, retrieved his food, and exited the store.

As Jackson walked home, he observed Roinisto standing at a bus stop near the Waikiki Terrace Hotel. Roinisto was staring at Jackson with an angry look on his face. Jackson approached Roinisto and said, "[O]h, so now I guess you got some

more smart comments to make." Roinisto responded, "[Y]eah, I got plenty." The tone of Roinisto's voice was forceful and he seemed angry. Roinisto then made a "jerk motion," which made Jackson believe Roinisto was about to hit him. "As a reaction [Jackson] swung with [his] left hand and hit [Roinisto] in the face." Roinisto fell to the ground. In Jackson's words, he hit Roinisto "[t]o get him away from me. I guess just to protect myself." Feeling "kind of confused and nervous[,] " Jackson looked at Roinisto on the ground and then walked away. When he "got to the Fort DeRussy Park[,] " he used the cellular phone he was carrying to call his friend to come and pick him up. His friend "took [him] down to the Waikiki [police] substation."

Honolulu Police Department (HPD) Officer Derek Yee was on duty at the substation on December 26, 1998, when Jackson walked in at about 8:00 p.m. and reported having been involved in the aforementioned altercation. Jackson gave a statement in

which he gave his account of the events in question.⁴ The police asked Jackson if he had lost anything. Jackson answered in the negative. He was subsequently informed that the police had some of his belongings in their possession.

In the meantime, HPD Officer Anthony Taglieri (Officer Taglieri) responded to "the area just in front of the Waikiki Terrace Hotel" to investigate an assault-type case. Upon arrival at the scene, Officer Taglieri observed Roinisto lying on the sidewalk with a group of people surrounding him. Roinisto had blood on his face and appeared to be unconscious. Officer

⁴ The statement of Defendant-Appellant Marvin Ray Jackson, which was read into evidence at defense counsel's request by HPD Officer Anthony Taglieri, states as follows:

On 26 December '98, at approximately 7:00 PM I had an exchange of words with a caucasian gentleman at the Subway Sandwich Shop in Waikiki. I don't remember exactly what was said, but he departed the store before I did.

Approximately five minutes later I ran into the same gentleman at the stoplight next to Waikiki Terrace Hotel. I asked him if he had any other smart comments? He replied, yeah, I have plenty. More words were exchanged.

Finally, it came to the point where a fight was unavoidable. I felt that he was beginning to swing with his right hand. I swung with my left hand hitting him in the face and knocking him to the ground.

At that point I continued to walk down Kalakaua toward Waikiki. Even though the gentleman didn't hit me (and I only thought he was going to hit me) -- or in parentheses -- . . . I thought about what had happened and decided to do the responsible thing by going to the Waikiki Police Station to tell them that I had been in a fight.

I didn't mean to cause him any harm and I only hit him to protect myself. I think the right thing to do (other than running from the situation) was to report what had happened.

Later the police informed me that they had found my wallet, keys and digital tapes. I identified the items as mine and they returned the items to me.

Taglieri found a wallet, keys, and a computer disc on the ground nearby. The wallet contained Jackson's driver's license and military identification card. Officer Taglieri then took statements from various people at the scene, including Carey Chun, Jensen Chang, and Daniel Fisher. Officer Taglieri recalled Roinisto stating that he could not hear from one ear and had a difficult time remembering what had happened. Prior to leaving the scene, Officer Taglieri showed the photo identification cards found on the ground to various witnesses who identified the individual pictured as being the other person involved in the assault.

Officer Taglieri then returned to the Waikiki substation where he encountered Jackson. One of Jackson's fingers was wrapped with tape or gauze, and he had cuts on his hand. Officer Taglieri returned the wallet, keys, and computer disc to Jackson.

Scott Monji (Monji), a paramedic, responded to the scene where he noted Roinisto to be awake and oriented to name and place only. Roinisto was confused as to other things. Roinisto had a laceration to his lower lip and his two front teeth were loose. Monji suspected that Roinisto had also suffered a head injury. Monji then assisted in transporting

Roinisto to The Queen's Medical Center where Roinisto was treated for various injuries including a concussion, a laceration to his mouth and chin, a loss of hearing in his right ear, a loss of sensitivity in his lower lip, and a subdural hematoma.

Jackson was charged with misdemeanor assault, which was later upgraded to felony assault based on the severity of Roinisto's injuries. On July 8, 1999, Jackson was indicted on one count of felony, Assault in the Second Degree, HRS § 707-711(1)(a). A jury trial ensued between the dates of January 10, 2000, and January 18, 2000. On January 18, 2000, the jury returned a verdict of guilty of the lesser included offense of misdemeanor Assault in the Third Degree, HRS § 707-712.

POINT ON APPEAL

In accord with State v. Realina, 1 Haw. App. 167, 172, 173, 616 P.2d 226, 233 (1980), the jury was instructed, in relevant part, as follows:

The burden is on the Prosecution to prove beyond a reasonable doubt that the force used by the defendant was not justifiable. If the Prosecution does not meet its burden, then you must find the defendant not guilty.

The use of force upon or toward another person is justified when a person reasonably believes that such force is immediately necessary to protect himself on the present occasion against the use of unlawful force by the other person.

The reasonableness of the defendant's belief that the use of such protective force was immediately necessary shall be determined from the viewpoint of a reasonable person in the defendant's position under the circumstances of which the defendant was aware or as the defendant reasonably believed them to be.

Jackson contends that "THE RECORD IS LACKING IN CREDIBLE EVIDENCE WHICH IS OF SUFFICIENT QUALITY AND PROBATIVE VALUE TO ENABLE A PERSON OF REASONABLE CAUTION TO REACH THE CONCLUSION THAT MR. JACKSON WAS NOT ACTING IN SELF-DEFENSE AS DEFINED UNDER HRS § 703-304."

STANDARD OF REVIEW

Sufficiency of the Evidence

[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. Young, 93 Hawai'i 224, 230, 999 P.2d 230, 237 (2000) (citations omitted) (brackets in original). "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. Jenkins, 93 Hawai'i 87, 99, 997 P.2d 13, 25 (2000) (citations and internal quotation signals omitted). "Under such a review, we give full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact." Id. (citations and internal quotation signals omitted).

State v. Valdivia, 95 Hawai'i 465, ___, 24 P.3d 661 (2001).

DISCUSSION

We conclude that there was substantial evidence presented to prove beyond a reasonable doubt that the force used by Jackson was not justifiable because, as determined from the viewpoint of a reasonable person in Jackson's position under the circumstances of which Jackson was aware of or as Jackson reasonably believed them to be, Jackson did not reasonably

believe that such force was immediately necessary to protect himself on that occasion against the use of unlawful force by Roinisto.

The sole evidence presented by Jackson that the force used by him was justifiable was Jackson's testimony that Roinisto made a "jerk motion" which caused Jackson to believe that Roinisto was about to hit him and "[a]s a reaction [Jackson] swung with [his] left hand and hit [Roinisto] in the face." The jury was authorized to disbelieve Jackson's testimony that Roinisto made a "jerk motion" while believing some of or all of Jackson's other testimony. Moreover, the State introduced the following substantial evidence to prove beyond a reasonable doubt that the force used by Jackson was not justifiable.

Dr. Peter Siesjo (Dr. Siesjo), a neurosurgeon visiting from Sweden, was driving through Waikiki with his family when he observed the assault. Dr. Siesjo testified that upon hearing his wife say that something was happening on the sidewalk, he looked over in time to see a man walk up to another man whose hands were along the side of his body and hit him in the face. The recipient of the punch fell backwards onto the pavement without bracing himself. Dr. Siesjo further testified that in his profession he is aware that people who fall in such a manner do so because they have been rendered unconscious by a blow and,

thus, cannot react to brace their fall. Dr. Siesjo testified that he could not identify the hitter, but recalled that he appeared quite athletic. The person who was hit appeared to be taller and thinner than the hitter.

Christine Siesjo (Mrs. Siesjo), the doctor's wife, was in the front seat of the car when she witnessed the assault. She also described the hitter as very athletic, with short hair and a dark complexion. The person who was hit was taller and thinner. Mrs. Siesjo testified that the hitter

took a couple of step[s] forwards from the back beside [sic]. And -- and the other man, he was standing closer to our car and he was looking a bit to the left like this. Our car was here and to the left, so he didn't see that man coming there. They didn't have any eye contact as I could see.

And then the man with the white top, he took one or perhaps two steps forward and then he hit this man and it was very quick, very suddenly and it's rather short but hard. And that the man fell down, he didn't take up his hands or nothing, didn't defend himself because I think it was very, very suddenly.

Daniel Fisher (Fisher) testified that he was on vacation and staying at the Waikiki Terrace Hotel on December 26, 1998. As Fisher waited to cross the street to his hotel, he observed two men on the other side of the street near the crosswalk. The men were about ten to fifteen yards away. One of the males was well-built, wearing a white tank-top, blue-green shorts, and a backpack. The other male was "average or shorter than average height[,]" "appeared to be thin[,]" and a "drink was in his left hand and that he had his left hand above his

waistline. And . . . the sandwich was in his right hand and that his hand was at approximately his waistline." Fisher witnessed the well-built male punch the thin male on the side of the head and face. The man who was hit immediately fell to the ground and the assailant quickly turned and walked away. Fisher did not see anything precipitate the punch.

Carey Chun (Chun), a bellman at the Waikiki Terrace Hotel, was about 25 to 30 feet from the sidewalk when the assault occurred. He heard a loud crashing sound and looked up to see a male on the ground. The male's eyes were open, but he appeared to be unconscious. His eyes were glassy and blood was coming from his ear. The victim was unresponsive when Chun attempted to ask questions. Chun described the male as medium height, thin build, with long blond hair. On the ground, Chun noticed a wallet, a bunch of loose change, and a computer disc.

Jensen Chang (Chang), another employee of the Waikiki Terrace Hotel, was working as a valet on December 26, 1998, at about 7:00 p.m., when he heard a loud noise. He looked toward the noise and saw a male laying on the ground with another male standing over him. Chang did not hear any yelling prior to seeing the male lying on the ground.

CONCLUSION

Accordingly, we affirm the March 9, 2000 Judgment convicting Defendant-Appellant Marvin Ray Jackson of misdemeanor Assault in the Third Degree, HRS § 707-712.

DATED: Honolulu, Hawai'i, July 16, 2001.

On the briefs:

Rose Anne Fletcher,
Deputy Public Defender,
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Loren J. Thomas,
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Associate Judge