NO. 23022

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
EDUARDO OLEGARIO ZABANAL, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(Traffic No. 4981376MO)

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Lim, and Foley, JJ.)

Following a September 27, 1999 traffic accident in which the red van that Defendant-Appellant Eduardo Olegario Zabanal (Defendant) was driving rear-ended a taxicab, Defendant was cited for and subsequently convicted of operating a motor vehicle with a child under the age of four who was not in a child passenger restraint system, a violation of Hawaiʻi Revised Statutes (HRS) § 291-11.5 (1993 & Supp. 2000). Defendant, pro se, now appeals the November 29, 1999 judgment of conviction and sentence entered by the District Court of the First Circuit[1] (the district court).

We affirm.

[1] Judge Leslie A. Hayashi presided over the trial.

BACKGROUND

Three witnesses testified at Defendant's November 29, 1999 trial. Officer Deena J. Adams (Officer Adams), testified for Plaintiff-Appellee State of Hawai‘i (the State) that on September 27, 1999, she was on routine patrol in the Chinatown area, driving ‘Ewa on Queen Street, when she was flagged down by a taxicab driver. Officer Adams related that after she parked her Cushman vehicle, the taxicab driver approached her and told her that his car had been rear-ended by a red van at the intersection of Queen Street and Fort Street Mall. The taxicab driver then pointed toward a red van, which was being driven by Defendant on Queen Street towards them. Officer Adams testified that she directed Defendant to park his van in the Palomino Restaurant driveway, and thereafter,

> [Defendant] pulled into the driveway, and I was standing right here, and I could see into the van. And he had his children with him, and his wife. But in the middle part of the van, not the very rear, his wife was carrying a toddler, feeding--looked like she was feeding 'em. But it was under the three year old age, and the car seat was in the rear--rear seat of the van, unoccupied.

As a result, Officer Adams cited Defendant for driving with a child not in a safety restraint.

Defendant's wife (Wife) testified that her toddler son was sleeping in his child restraint seat at the time of the accident. However, the impact of the vehicles startled the toddler and he began to cry. Wife testified that after the accident, both vehicles pulled over to the side of the road and

both drivers got out to examine their vehicles. While the vehicles were stopped, she picked up her crying toddler and breastfed him. Wife stated that a police officer arrived at the scene thereafter, and when her husband began moving the van towards the Palomino Restaurant driveway at the direction of the officer, she "put [her toddler son] back in the car seat."

Defendant was the last witness to take the stand. He testified that his van rear-ended the taxicab when the taxicab "suddenly swerved into my lane." Defendant stated that both vehicles stopped, he got out of the van, switched off the engine, and heard his child cry. He didn't know what happened "at my back" thereafter, because he "was concerned of the accident." As he was talking to the taxicab driver, he noticed a police officer "running in the Cushman." Defendant testified that the officer came to him after talking to the taxicab driver

> and said why don't you move your car in the driveway. So that being his[2] direction, I guess I had no choice but to follow the direction of the police officer. So in any case, it was--it was a very close distance, probably five--five to seven yards. Just go inside the driveway. Not really a long trip.

(Footnote added.) On cross-examination of Defendant, the following colloquy transpired:

> [Q] So it is true you moved your car when your child wasn't in the safety restraint.
>
> [A] As I told the [c]ourt, Your Honor, at that point I don't know.

[2/] Although Defendant-Appellant Eduardo Olegario Zabanal refers to the officer in masculine terms, it appears from the record that Officer Deena J. Adams is female.

[Q] So you don't know.

[A] I don't know.

[Q] So it's possible that the officer is right. He did see you in a moving car---

[A] I don't think---

[Q] ---with your child not in a safety restraint.

[A] I don't believe he saw it like that. . . .

Defendant later repeated that he moved the van because he "had to follow the police officer."

In adjudging Defendant guilty, the district court orally ruled as follows:

> Having heard the testimony of the State's witness, as well as that of [Defendant] and his witness, the [c]ourt is faced with an issue of credibility. And in this case, the [c]ourt does find the State's witness to be more credible.
>
> The reason being there seems to be some contradictory testimony given by [Defendant] and his witness concerning the events that occurred. So the [c]ourt does find the State's witness to be more credible in this event. That the officer did go directly towards the taxi driver who flagged her down, and at that time she did direct [Defendant] to move his vehicle.
>
> And at the time [Defendant] was directed to move his vehicle, the child was not in a child restraint, which was in a moving vehicle, being operated on a public street in the City and County of Honolulu, on September 27, 1999.
>
> So the [c]ourt does find that you are guilty of this offense. I think it must have just--the way the events happened, it happened very quickly, and it was not an intentional thing on your part. I think that you saw the officer direct you, and you moved, and your wife had unfortunately taken the child out of the child restraint to breastfed [sic] him at the time.

DISCUSSION

HRS § 291-11.5 provides, in relevant part:

> **Child passenger restraints.** (a) Except as otherwise provided in this section, no person operating a motor vehicle on a public highway in the State shall transport a child under four years of age unless the person operating the motor vehicle ensures that the child is properly

> restrained in a child passenger restraint system approved by the United States Department of Transportation at the time of its manufacture.
>
> . . . .
>
> (e) Violation of this section shall be considered an offense as defined under section 701-107(5)[3] and shall subject the violator to the following penalties:
>
> (1) For a first conviction, the person shall:
>
> (A) Be fined not more than $100;
>
> (B) Be required by the court to attend a child passenger restraint system safety class conducted by the division of driver education; provided that:
>
> (i) The class may include video conferences as determined by the administrator of the division of driver education as an alternative method of education; and
>
> (ii) The class shall not exceed four hours; and
>
> (C) Pay a $50 driver education assessment as provided in section 286G-3[.]

(Footnote added.) Since HRS § 291-11.5 does not specify a state of mind that an offender must possess in order to be found guilty

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[3/] Hawai‘i Revised Statutes (HRS) § 701-107(5) (1993), which is one of the preliminary provisions of the Hawai‘i Penal Code, provides, in relevant part, as follows:

> **Grades and classes of offenses**. . . .
>
> . . . .
>
> (5) An offense defined by this Code or by any other statute of this State constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty, is authorized upon conviction or if it is defined by a statute other than this Code which provides that the offense shall not constitute a crime. A violation does not constitute a crime, and conviction of a violation shall not give rise to any civil disability based on conviction of a criminal offense.

under the statute, it is a strict liability offense. See HRS § 702-212 (1993).[4]

A.

Defendant initially contends that: (1) the district court should have disregarded the testimony of Officer Adams because it was unreliable, inconsistent, full of loopholes,

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[4/] HRS § 702-212 (1993) provides, in relevant part:

> **When state of mind requirements are inapplicable to violations and to crimes defined by statutes other than this Code.** The state of mind requirements prescribed by sections 702-204 and 702-207 through 702-211 do not apply to:
>
> (1) An offense which constitutes a violation, unless the state of mind requirement involved is included in the definition of the violation or a legislative purpose to impose such a requirement plainly appears[.]

The Commentary on HRS § 702-212 notes, in part:

> This section provides for those instances when the culpability provisions of §§ 702-204 and 207 through 211 are not applicable.
>
> Subsection (1) provides that the requirements of culpability are not generally applicable to violations. (Violations are the lowest grade of penal offenses and for which conviction can only result, according to § 701-107 and Chapter 706 in a fine, forfeiture or other "civil" penalty.) An exception is made in two cases: (1) for violations which by definition require culpable commission; and (2) for violations with respect to which a legislative purpose to impose one or more culpability requirements plainly appears. Subsection (1) applies whether the violation is defined in the Penal Code or in some other Title.
>
> The assumption is that, with respect to violations, if culpable commission is required, the relevant state of mind will be stated in the definition of the violation whether the offense appears in the Penal Code or in some other statute. If the law is silent, the court must make an affirmative determination that the application of state of mind requirements with respect to the violation is within the Legislature's purpose. In the absence of such a determination the liability is absolute or strict.

evasive, improbable, and contrary to human experience; and (2) his and Wife's testimony were coherent, consistent, direct, and corroborative as to all material points.

It is well-established, however, "that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trial judge." State v. Buch, 83 Hawai‘i 308, 321, 926 P.2d 599, 612 (1996) (internal quotation marks omitted). Since we are required to give due deference to the right of the trier of fact "to determine credibility, weigh the evidence, and draw justifiable inferences of fact from the evidence adduced," State v. Naeole, 62 Haw. 563, 565, 617 P.2d 820, 823 (1980), we will not disturb the district court's assessment of the credibility of the witnesses at trial.

B.

Defendant argues that assuming the facts to support the district court's judgment existed, he was entitled to a choice of

evils justification defense.[5] The record reveals, however, that Defendant never raised this defense at trial.

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[5] The choice of evils justification defense is set forth in HRS § 703-302 (1993), which provides as follows:

> **Choice of evils.** (1) Conduct which the actor believes to be necessary to avoid an imminent harm or evil to the actor or to another is justifiable provided that:
>
> (a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> (b) Neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.
>
> (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for the actor's conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.
>
> (3) In a prosecution for escape under section 710-1020 or 710-1021, the defense available under this section is limited to an affirmative defense consisting of the following elements:
>
> (a) The actor receives a threat, express or implied, of death, substantial bodily injury, or forcible sexual attack;
>
> (b) Complaint to the proper prison authorities is either impossible under the circumstances or there exists a history of futile complaints;
>
> (c) Under the circumstances there is no time or opportunity to resort to the courts;
>
> (d) No force or violence is used against prison personnel or other innocent persons; and
>
> (e) The actor promptly reports to the proper authorities when the actor has attained a position of safety from the immediate threat.

HRS § 703-301 (1993) provides that "[i]n any prosecution for an offense, justification, as defined in sections 703-302 . . . is a defense." The Commentary on HRS § 703-301 states, in part, that

> [t]his section does not attempt to define the defense of justification. An extended definition is given in the sections which follow. Subsection (1) merely establishes that justification is a defense. This places the burden of producing some credible evidence of the existence of justification on the defendant. If the defendant produces such evidence, or if it appears as part of the prosecution's case, the defendant is entitled to have the defense considered by the jury.

Inasmuch as the record reveals that Defendant did not produce any evidence of justification for his violation of HRS § 291-11.5, he cannot now complain that he was entitled to a choice of evils defense.

C.

Defendant's last argument on appeal is that any offense of HRS § 291-11.5 that he may have committed was de minimis and, therefore, his prosecution should have been dismissed.

HRS § 702-236 (1993) provides, with respect to de minimis infractions, as follows:

> **De minimis infractions.** (1) 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:
>
> (a) Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the offense; or
>
> (b) Did 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; or
>
> (c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.
>
> (2) The court shall not dismiss a prosecution under subsection (1)(c) of this section without filing a written statement of its reasons.

This court has previously held that the abuse of discretion standard is applicable in reviewing a trial court's decision not to dismiss a prosecution as de minimis. State v. Cavness, 80 Hawai'i 460, 467, 911 P.2d 95, 102 (App. 1996). In this case, the record reveals that Defendant never requested that the prosecution against him be dismissed as de minimis. Given these circumstances, we cannot conclude that the district court abused its discretion in not dismissing the prosecution against Defendant as de minimis.

Affirmed.

DATED: Honolulu, Hawai'i, August 30, 2001.

On the briefs:

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