NO. 23426

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI I

STATE OF HAWAI I, Plaintiff-Appellee, v.
HERBERT HOOPONO KAEO, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CR. NO. 99-273289)

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

Defendant-Appellant Herbert Hoopono Kaeo (Kaeo) appeals the March 8, 2000 judgment entered by per diem District Court Judge Christopher P. McKenzie convicting Kaeo of Assault in the Third Degree, Hawaii Revised Statutes (HRS) § 707-712(1)(a) (1993), and sentencing him to probation for one year on the usual conditions, and special conditions of three months in jail, a substance abuse assessment, and avoidance of complainant.[1] We affirm.

RELEVANT STATUTE

HRS § 707-712 states, in relevant part, 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; . . .

[1] The court ordered the mittimus to be issued in two weeks. On March 22, 2000, Defendant-Appellant Herbert Hoopono Kaeo appeared before District Court Judge James H. Dannenberg seeking a stay pending appeal. The court entered a stay "until April 4th. If notice of appeal is timely filed, the stay will continue in effect until resolution of the appeal."

. . . .

(2) Assault in the third degree is a misdemeanor[.]

RELEVANT LAW APPLICABLE TO PROOF OF DEFENSES

HRS § 703-304 (1993) authorizes the use of force in self-protection. HRS § 703-306 (1993) authorizes the use of force for the protection of property. HRS § 703-308 (1993) authorizes the use of force to prevent the commission of a crime. HRS § 703-301(1) (1993) defines each of these as a defense. HRS § 701-115(2)(a) (1993) states that in the case of a defense, "the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in the light of any contrary prosecution evidence, raises a reasonable doubt as to the defendant's guilt[.]"

EVIDENCE AT TRIAL

The complaining witness for Plaintiff-Appellee State of Hawai i (the State) was Velma P. Rodriguez (Rodriguez). She had difficulty being understood when she spoke at the trial. She explained, "Not my fault. I cannot pronounce these words. It's really hard. I get short tongue."

Rodriguez testified that on August 7, 1999, at Neal Blaisdell Park (Blaisdell Park), she was a volunteer for the City and County of Honolulu of the State of Hawai i to "pick up all the rubbish . . . change the bag[,] . . . lock the bathroom[,] get everything ready for everybody[, and] put toilet papers."

On August 7, 1999, Rodriguez crossed the street from a Burger King restaurant to the Blaisdell Park and she saw Kaeo in his car eating a hamburger and drinking a soda. Kaeo's car was between the gate and the street. Rodriguez went to Kaeo, "told him that [she] worked at the park" and, "[i]n a nice way[,]" told Kaeo he had to leave. According to Rodriguez, Kaeo "never like to listen to me. He was all drunk that night." Rodriguez "could smell the beer." Kaeo exited his car, grabbed Rodriguez, hit her, pushed her head onto a pole, and then grabbed her and threw her on the ground. Rodriguez did not hit Kaeo at any time. When asked if she "touched . . . his car on the right side, the windshield wiper[,]" she answered, "Because he went go hit my head on the pole."

Police Officer James Chong (Officer Chong) testified, in relevant part, as follows:

> A [Kaeo] told me that he was eating his hamburger at the - his vehicle was parked at the driveway to Blaisdell Park. He was eating his hamburger. And, [Rodriguez] identified herself to him and told him that he had to leave the park because the park was closed. And, [Kaeo] told her that he wanted to finish up his hamburger before he left.
>
> . . . .
>
> A . . . . I could smell a strong odor of an alcoholic type substance. His eyes was [sic] watery, bloodshot, red. And, he spit several times as he spoke.
>
> . . . .
>
> A He spit several times, or spit was coming out as he spoke.
>
> . . . .
>
> A . . . [H]e had like a redness to his chest area.

. . . .

A [Kaeo] didn't complain of any injuries.

. . . .

A Oh. After, I guess, after he - Rodriguez told him to - that he had to leave, he said he wanted to finish with his hamburger. He said that Rodriguez [broke] her [sic] windshield wipers from his vehicle. At - after that they began to fight.

. . . .

Q Was [Kaeo] cooperative at this point?

A In the beginning part, yes, semi. He appeared irate though. And, he was asked several times to calm down.

. . . .

Q And, when you mean irate, could you describe what you mean?

A Yelling, swearing.

Police Officer Kurt Sato (Officer Sato) testified that Rodriguez had injuries and heavy bleeding from the back of her head that Rodriguez said was caused when Kaeo "pushed her or banged her head against a pole." Officer Sato also testified that Kaeo "appeared to be intoxicated, and he was belligerent . . . . He appeared to be mad about something. I don't know what. But, I tried to calm him down. I couldn't calm him down."

At the conclusion of the State's case, Kaeo moved for a judgment of acquittal and his motion was denied.

As the sole witness for the defense, Kaeo testified that he had come from Waimanalo from a party his sister had for her daughter. He had consumed "about five, six beers." On his way home to Wahiawa, he felt that he should take a break so he "stopped midway, grabbed a sandwich, go to the park, take a

break[.]" He was parked in front of the chained entrance to the park eating his sandwich from a Burger King restaurant when Rodriguez told him he couldn't park there and had to leave. Rodriguez did not identify herself or her authority. Kaeo responded that he wanted to finish his sandwich before leaving. Rodriguez reached through the open window of the car, grabbed Kaeo's shirt and said, "[Y]ou better leave now." Kaeo's shirt ripped. Kaeo introduced the ripped shirt into evidence. Then, Rodriguez grabbed the driver's side mirror to his car and tried to break it off. Kaeo tried to push her off with one hand but could not get her away. When Kaeo tried to open his car door, Rodriguez slammed her weight against the car door causing the car door to slam on Kaeo's fingers. Kaeo found out later that two of the fingers (the pinkie and the one next to it) on his left hand were broken. Kaeo subsequently required surgery. The pinkie finger is permanently in a bent position. Rodriguez then grabbed the windshield wiper on the driver's side, pulled it, and snapped it off. Kaeo introduced into evidence the pieces of the broken windshield wiper. When Kaeo proceeded toward her saying, "[W]hat the F you doing[,]" Rodriguez moved around the front of the car to the passenger side and then, with the broken windshield wiper in her hand, swung at him and hit the fingers of his right hand. Rodriguez then grabbed the other windshield wiper of the car and proceeded to bend it. Kaeo introduced this windshield wiper into

evidence. Kaeo grabbed Rodriguez around the waist to pull her away from the windshield wiper. Rodriguez hit Kaeo in the chest with her fist. Kaeo pushed her. When Rodriguez again attacked him, Kaeo blocked the attack and punched her in the face. Rodriguez fell to the ground. Kaeo does not remember Rodriguez hitting her head on a pole. When Rodriguez tried to get up, Kaeo pinned her down.

On cross-examination, Kaeo testified that he did not tell the police about his injuries or about his hand being caught in the door and that his surgery occurred on September 24, 1999.

On rebuttal, Officer Chong testified that the shirt Kaeo introduced into evidence was not the shirt Kaeo was wearing when he saw Kaeo at the scene on August 7, 1999.

In closing argument, Kaeo argued the defenses of defense of property and self-defense.

TRIAL COURT'S ORAL FINDINGS OF FACT

With the findings specifically challenged in this appeal outlined in bold print, the oral findings of the district court are as follows:

> THE COURT: . . . **I'm finding the following beyond a reasonable doubt and based on the credible evidence that at the time of this incident Mr. Kaeo was intoxicated.** This is based on the - the testimony from the police officers that there was a strong odor of alcohol; that his eyes were watery, and that he was spitting when he talked. The officers, both officers, indicated, and their words were that he was drunk. That he testified that he had five to six beers, and this is as - as much as he drinks.
>
> So, in my view, based on that fact that he is intoxicated, that his recollection of events may be clouded. And, I'm crediting the victim's story in this case that Mr. Kaeo was parked

> improperly; that Ms. Rodriguez identified herself as a City and County worker; that she asked you to leave, to move your car; that you didn't; that you got out of your car, and that you hit and punched Velma Rodriguez; that she sustained the following injuries. A three-centimeter jagged cut to the back of her head, bruises to her head, abrasions to her back shoulder and arms.
>
> **I'm finding that the self-defense and defense-of-others defenses do not apply because Ms. Rodriguez was hit and struck before any of those actions occurred to the - that occurred . . . either to the defendant or the defendant's car. I'm basing this on the impeachment by the officers that the shirt he had on was not the shirt that was introduced into evidence.**
>
> Also, I have some question about the injury to the fingers since he didn't see a doctor for six weeks after the finger was injured.
>
> Therefore, Mr. Kaeo, I'm finding you guilty of Assault in the Third Degree.

(Emphases added.)

POINTS AND QUESTIONS ON APPEAL

Kaeo asserts five points on appeal and questions as follows:

1. The court reversibly erred when it decided that penal liability was not negated. Was the evidence of defense of person or defense of property sufficient?

2. The evidence was insufficient to sustain a conviction.

3. The court reversibly erred when it denied Kaeo's motion for judgment of acquittal. Should the judgment of acquittal have been granted?

4. The findings outlined in bold print above are clearly erroneous. Were the disputed findings clearly erroneous?

5. "The record is insufficiently developed to present insufficiency of trial counsel, at [Kaeo's] request." Is the

record "sufficiently developed to present a claim, requested by [Kaeo,] of insufficiency of trial counsel?"

STANDARD OF REVIEW APPLICABLE
TO THE COURT'S FINDINGS OF FACT

A trial court's findings of fact are reviewed under the "clearly erroneous" standard of review. Dan v. State, 76 Hawai i 423, 428, 879 P.2d 528, 533 (1994). This is true of its implicit and explicit findings.[2] "A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." State v. Okumura, 78 Hawai i 383, 392, 894 P.2d 80, 89 (1995) (citations and internal quotation marks omitted).

> It is for the trial judge as fact-finder to assess the credibility of witnesses and to resolve all questions of fact; the judge may accept or reject any witness's testimony in whole or in part. As the trier of fact, the judge may draw all reasonable and legitimate inferences and deductions from the evidence, and the findings of the trial court will not be disturbed unless clearly erroneous. An appellate court will not pass upon the trial judge's decisions with respect to the credibility of witnesses and the weight of the evidence, because this is the province of the trial judge.

State v. Eastman, 81 Hawai i 131, 139, 913 P.2d 57, 65 (1996) (citations omitted).

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[2] Hawai i Rules of Penal Procedure Rule 23(c) states:

> In a case tried without a jury the court shall make a general finding and shall in addition, on request made at the time of the general finding, find such facts specially as are requested by the parties. Such special findings may be orally in open court or in writing at any time prior to sentence.

The first half of the clearly erroneous test requires substantial evidence. On that issue, the Hawai i Supreme Court has stated as follows:

> We have long held that 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 a 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. Indeed, even if it could be said in a bench trial that the conviction is against the weight of the evidence, as long as there is substantial evidence to support the requisite findings for conviction, the trial court will be affirmed.
>
> "Substantial evidence" as to every material element of the offense charged is credible[3] evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion. And as trier of fact, the trial judge is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence.

State v. Batson, 73 Haw. 236, 248-49, 831 P.2d 924, 931 (1992), *reconsideration denied*, 73 Haw. 625, 834 P.2d 1315 (1992) (citations omitted) (footnote added).

DISCUSSION

A defendant who presented evidence after the denial of his Hawai i Rules of Penal Procedure Rule 29 motion for a judgment of acquittal at the close of the State's evidence thereby waives any error in the denial of his motion. State v. Halemanu, 3 Haw. App. 300, 650 P.2d 587 (1982). Therefore, Kaeo

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[3] In light of the precedent that "[i]t is for the trial judge as fact-finder to assess the credibility of witnesses and to resolve all questions of fact[,]" State v. Eastman, 81 Hawai i 131, 139, 913 P.2d 57, 65 (1996), we question the presence of the word "credible" in this standard of review.

waived his right to challenge the trial court's denial of his motion for judgment of acquittal.

The first question on appeal is whether there is substantial evidence in the record supporting the trial court's findings of fact. The answer is yes.

Kaeo contends that the finding that he was "intoxicated" is clearly erroneous because "(1) Mr. Kaeo was not arrested or charged with an intoxication related offense; (2) in the field, he was not given sobriety tests by the arresting or testifying [officers]; (3) the victim/witness testified that when she encountered Mr. Kaeo he was drinking a soda."

As defined in Black's Law Dictionary (1990), "intoxication" occurs when "an individual does not have the normal use of his physical or mental faculties, thus rendering him incapable of acting in the manner in which an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would act under like conditions." The fact that Kaeo was not arrested or charged with an intoxication-related offense and was not given sobriety tests by the arresting or testifying officers does not prevent the police officers from testifying, and the court from finding, that Kaeo was "intoxicated."

The second question on appeal is whether the evidence raised a reasonable doubt as to Kaeo's guilt. The answer is no.

The dispositive issue at trial was the credibility of the witnesses. The court believed Rodriguez and did not believe Kaeo. As noted above, an appellate court will not pass upon the trial judge's decisions with respect to the credibility of witnesses and the weight of the evidence, because this is the province of the trial judge.

We agree with Kaeo that "[t]he record is insufficiently developed to present insufficiency of trial counsel[.]" Therefore, the question of the ineffective assistance of trial counsel is not an issue decided in this appeal.

CONCLUSION

Accordingly, we affirm the district court's March 8, 2000 judgment convicting Defendant-Appellant Herbert Hoopono Kaeo of Assault in the Third Degree, HRS § 707-712(1)(a) (1993).

DATED: Honolulu, Hawai i, September 27, 2001.

On the briefs:

Stephen M. Shaw
for Defendant-Appellant.

Chief Judge

Bryan K. Sano,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge