

NO. 23654

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
RICHARD RECEP YUCEL, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,
HONOLULU DIVISION
(HPD Report/Citation No. 00-086210)

MEMORANDUM OPINION

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

Defendant-Appellant Richard Recep Yucel (Yucel) appeals the May 31, 2000 judgment of the district court of the first circuit that convicted him of harassment, in violation of Hawaii Revised Statutes (HRS) § 711-1106 (Supp. 2000).¹

^{1/} Hawaii Revised Statutes (HRS) § 711-1106 (Supp. 2000) provides:

Harassment. (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:

- (a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact;
- (b) Insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response or that would cause the other person to reasonably believe that the actor intends to cause bodily injury to the recipient or another or damage to the

(continued...)

On appeal, Yucel contends that the court erred in convicting him because (1) the court did not consider, and the State failed to negate, his justification defense of defense of property; and (2) the oral charge was fatally defective. We disagree with Yucel's contentions and affirm the judgment.

I. BACKGROUND.

At his March 6, 2000 arraignment,² Yucel was orally charged, as follows:

^{1/}(...continued)

- property of the recipient or another;
- (c) Repeatedly makes telephone calls, facsimile, or electronic mail transmissions without purpose of legitimate communication;
 - (d) Repeatedly makes a communication anonymously or at an extremely inconvenient hour;
 - (e) Repeatedly makes communications, after being advised by the person to whom the communication is directed that further communication is unwelcome; or
 - (f) Makes a communication using offensively coarse language that would cause the recipient to reasonably believe that the actor intends to cause bodily injury to the recipient or another or damage to the property of the recipient or another.
- (2) Harassment is a petty misdemeanor.

^{2/} The Honorable Fa'auuga To'oto'o presided over the arraignment and plea.

[PROSECUTOR]: Okay. [Yucel], number 104. [Yucel], on or about March 5, 2000, in the Honolulu District of the City and County of Honolulu, State of Hawaii, with intent to harass, annoy, or alarm another person, you did strike, shove, kick, or otherwise touch another person in an offensive manner, or subject another person to offensive physical contact, thereby committing the petty misdemeanor offense of harassment, in violation of Section 711-1106 of the [HRS].

Yucel stated that he understood the charge and pleaded not guilty. The court thereupon set trial for May 1, 2000. Trial was later continued to May 31, 2000.

Just before the May 31 bench trial³ started, Yucel was again orally charged, as follows:

[PROSECUTOR]: Okay. On March 5th, year 2000, in the City and County of Honolulu, State of Hawaii, you're charged with Harassment, in violation of Section 711-1106 of the [HRS].

Yucel said again that he understood the charge and pleaded not guilty.

Complaining witness Ljubo Kajganic (Kajganic) was the State's first witness. On direct examination, he related that in December 1999, he was looking for a place to stay. A friend introduced him to Yucel, and on Christmas eve he moved into a room in Yucel's apartment. Kajganic shared the room with Srdjan Tabor (Tabor). However, on February 6, 2000, Yucel asked Kajganic to move out of the residence because they were not getting along. Kajganic procured a new apartment and on March 3 started to move his belongings out of Yucel's apartment. By

^{3/} The Honorable Russel S. Nagata presided over the bench trial.

March 5, Kajganic had moved about three-fourths of his belongings. Kajganic had spent the night of March 4 at his new apartment.

Mid-evening on March 5, Kajganic went back to Yucel's apartment to remove the balance of his belongings and return his apartment keys to Yucel. As Kajganic was packing his belongings, Yucel called him into the living room and told him he could not take a certain mattress. But Kajganic maintained the mattress had been left in the apartment by a female friend of his who had told him he could take it. An argument ensued. The dispute was witnessed by Tabor.

At one point during the argument, Kajganic insulted Yucel. Yucel left the living room, called building security and when he returned, told Kajganic he had five seconds to leave the apartment. Yucel also demanded that Kajganic apologize for the insult. Kajganic refused. Then, as Kajganic related it, Yucel "open fistedly jab my throat and struck me I think four times in the -- in the jaw." Tabor jumped between the disputants and separated them, but Yucel attacked Kajganic again in an attempt to grab the apartment keys. According to Kajganic, Yucel "jab me again, and struck me few more times." Kajganic then ran into his room, locked the door and called the police. Building security arrived first, knocked on Kajganic's door and told him he had to leave the apartment. Kajganic agreed, but asked that security escort him out with his belongings. As he was leaving, the

police arrived. They arrested Yucel after speaking with Kajganic. Kajganic experienced pain in his neck and his jaw as a result of the altercation. He claimed his neck was still bothering him as he testified.

On cross-examination, Kajganic maintained that he was still living at Yucel's apartment at the time of the incident:

Q [DEFENSE COUNSEL]. You were no longer living at that apartment when all this took place, right?

A [KAJGANIC]. No. I wouldn't say that. Because I had -- I was given one month notice, which was expire [sic] on the 6th of the -- on the 6th of March.

. . . .

Q [DEFENSE COUNSEL]. But you don't claim you were still living there, do you?

A [KAJGANIC]. I claim -- I do claim.

Kajganic denied that Yucel told him he was trespassing in the apartment. Kajganic also denied that he was a visitor or a guest in Yucel's apartment on the night of March 5:

Q [DEFENSE COUNSEL]. You were that night a visitor, a guest, right, to pick up your stuff?

A [KAJGANIC]. No. I would not say that.

Q [DEFENSE COUNSEL]. But you weren't a tenant, were you?

A [KAJGANIC]. Yes. I would say I was.

Kajganic explained that he and Tabor shared the rent for the room they occupied together.

Kajganic described how he had insulted Yucel: "The only thing I said, 'This conversation is over, you Turkish piece of -- [.]'" He denied walking towards Yucel during the

altercation. He denied clenching his fist. He denied threatening Yucel. He denied grabbing Yucel by the neck. He denied that he had maintained a categorical refusal to leave the apartment. He explained that he needed to pick up the rest of his belongings before leaving. He added that he left the mattress in the apartment: "I gave up on the mattress."

On redirect examination, Kajganic testified that he did not touch the mattress at all during the altercation. He denied that he was trying to take the mattress when Yucel first struck him.

Tabor also testified for the State. On direct examination, he said that he did not know who owned the mattress. He was not sure what rental arrangements Kajganic had with Yucel. His description of the altercation essentially matched that given by Kajganic. He admitted that he still lived in Yucel's apartment, and that he considered both parties friends.

On cross-examination, Tabor was asked about the termination of Kajganic's tenancy:

[DEFENSE COUNSEL:] Q. Did you -- were you ever told or did you ever hear of Mr. Yucel or Mr. Morak [another resident of the apartment] . . . talk to Mr. Kajganic about moving?

A [TABOR]. Yeah.

Q [DEFENSE COUNSEL]. What was said?

A [TABOR]. He told him that he wants him to move out, and he gave him 30-day notice.

Tabor paid the entire room rent for March 2000. Tabor said that Kajganic moved out of Yucel's apartment on March 3, but that "he only moved out like to sleep. . . . He left his things in our apartment, but he moved out to sleep in the other -- the other apartment." Under questioning by the court, Tabor confirmed that rent was paid on the first of each month.

On further cross-examination, Tabor agreed that Kajganic had lost his temper first during the altercation and that Yucel had been polite before the physical contact occurred.

After testimony from one of the police officers who responded to the scene, the State rested. Yucel then "move[d] to dismiss[,]"

on the grounds of permissive use of force for the protection of property, your Honor, under 703-306 of the [HRS]. I think I'm -- I have a situation even from looking at the plaintiff's case or the prosecution's case to prevent theft or any trespasser, trespassory taking of tangible movable property in the act of possession under 306(c), 703-306[(1)(c)]. I have a copy of that document.

. . . .

On the basis of that, I would say some force could be used and to protect the removal of the mattress, particularly after he had asked him four or five times to get out of here. I'm calling security. And that -- that's the basis of my defense for the most part.

The court denied the motion, ruling on the evidence in the light most favorable to the State that the State had "proved a prima facia [sic] case" and had "failed [sic] to negative the defense beyond a reasonable doubt."

Yucel testified first in his defense. He reported that his native country is Turkey, and that he was a "scholar student at [Hawaii Pacific University]." He confirmed that the rental agreement for the apartment was under his name. Yucel's arrangement with Kajganic and Tabor was for Tabor to pay the entire \$320.00 rent for their room to him. Tabor, in turn, was to collect Kajganic's half of the rent on his own account.

Yucel denied that "Kajganic lived there on March the 5th[.]" He explained that Kajganic "was asked to move out at the February, end of February." Kajganic had not paid rent for the month of March. Yucel maintained that Kajganic was supposed to have moved out before the end of February, but had been allowed to stay until March 1 only because they were fellow students and because "[h]e said he will move out in couple of days." Yucel insisted, however, that Kajganic's stay was to encompass "nothing later than March 1st."

Yucel testified that Kajganic did indeed move out of the apartment on March 1. Later on in his testimony, Yucel amended this assertion somewhat; in his words: "He -- you know, he move out definitely, permanently he moved out at the 3rd." Kajganic was not supposed to return. Kajganic was able to come back into the apartment on March 5 only because he had kept the apartment keys. Yucel had repeatedly asked him to remove his belongings and return the keys by March 1, to no avail. When

Kajganic appeared unexpectedly in the apartment on March 5, Yucel allowed him to remove his belongings despite his noncompliance.

Yucel asserted that the mattress they had quarreled over belonged to him. He was therefore "shocked" when Kajganic laid claim to it. Up to that point, there had been no argument. When Yucel insisted that the mattress was his and that it would stay, Kajganic became angry. He said to Yucel, "You little Turkish little shit. I will fuck you. I will fuck your mom, and I will fuck you. You will see that." Kajganic continued to swear at Yucel over a ten-minute course of argument. Yucel pleaded with Kajganic to be reasonable, to just leave the apartment. Kajganic refused to leave without the mattress, and threatened to keep the apartment keys.

Giving up at this juncture, Yucel went back to his room and called building security to come immediately to escort "a visitor" out of the apartment. He then returned to the living room and told Kajganic that he had called building security and that Kajganic should leave to avoid trouble. Kajganic continued, however, to swear at Yucel. After five more minutes of swearing and harassment, Yucel went back to his room and called building security again. He returned to the living room and again warned Kajganic, but Kajganic continued to swear and again refused to leave. Yucel claimed that Kajganic was also threatening him. Then, according to Yucel, "he start to walk on [toward] me." Yucel remained patient, but when Kajganic "got really close" and

held his hands close to Yucel's head, Yucel slapped him with open hands "to the right and the left" of his neck area. Yucel explained that he slapped Kajganic in order to calm him down. He added: "Since he didn't -- since he was trying to take my property, and since he walks towards me, I had to take some action." Yucel denied punching Kajganic with a closed fist. Yucel also alleged that after he slapped Kajganic, Kajganic grabbed his throat. Yucel broke Kajganic's hold and both men "backed off." Kajganic retired to his room, locked himself in and called the police. At that point, building security arrived. After some initial resistance, Kajganic relinquished the apartment keys to building security and allowed them to escort him out of the apartment.

When the police arrived, they questioned both parties and arrested Yucel. Because he was experiencing "severe pain[,]"" Yucel had the police take him first to a hospital emergency room. There he was treated for injuries and referred to a specialist. Yucel claimed he was "under therapy for three weeks."

On cross-examination, Yucel insisted that he had remained calm during most of the encounter. He admitted, however, that he became "very angry" when, in his words, Kajganic "start to repeatedly tell all those bad racial swearings and words, which -- which I asked him reasonably to apologize or to get out." On another subject, Yucel clarified that when he went into his room to call building security those two times, he

picked up his cordless phone and returned to the living room to make the call. During subsequent questionings, Yucel further explained that Kajganic was following him around and swearing at him the whole time, so that when he went into his room, he had to close the door in order to get some distance before picking up his phone.

After presenting the testimony of a building security officer who responded to his calls, Yucel rested his defense. In closing, Yucel's counsel argued as follows:

Your Honor, as I indicated earlier, the Section [HRS] 703-306 establishes rules for the use of force upon or toward a person which had -- who -- which has its purpose the protection of property. I think that's exactly what was happening here. This is some kind of a standard of justification for an actor like [Yucel] who has a belief that he has to use some physical force to prevent certain kind of harm to property, maybe to himself.

I think here he was more concerned maybe both -- both property and his person. Maybe at the time the fellow got that close to him. But just even on the basis of the man insisting on taking the mattress when he had been asked in a nice way for 10 or 15 minutes to get out and let's not have any problems, this is not your mattress, it would seem that he had a reasonable belief that this person was going to do something about that property or to him. And he made a request to decess [sic] from this. And -- and I think the law allows this kind of an action in those kind of circumstances.

Now, the question is what was this man's relation to the property at this point. If I thought -- following this particular statute -- he had been a -- a tenant. I wouldn't say he -- they did live in separate rooms. I wouldn't say they were typical what you call family, a family, or some kind of a situation where the spouse or family-abuse type thing comes in. In fact, as I understand it, the case was arrested like this, but later was reduced to harassment because it didn't fit that.

And what we've shown here is that these people other than being students at [Hawaii Pacific

University] together and sharing the apartment to some degree, not necessarily as roommates, but people using basic space divided into different units. He felt that this man was no longer welcome in that place and was going to take his property. And the way he acted toward him wasn't in a usual way of someone who was not going to cause trouble.

So I -- I kind of think that he had a justifiable grounds for thinking there was some kind of force or something was going to happen to his property that would allow him to slap him the way that he did, to wake him up and say "Hey, you get out of here like I told you." He tried to do it through the security. The security was a little slow in getting there unfortunately. And nevertheless, I -- it's lucky we didn't have worse damage than in this.

But, certainly, the kind of language that this man was using toward this person is the kind of thing that does invite a response like this in many ways. That's exactly -- when you taunt somebody or say things about ethnic backgrounds, it generally bring [sic] about some kind of a harassment-type action. So it's not -- he was asking for it in a sense. But to think that he has deliberately punched him out or something, that -- those facts are not there.

His [sic] is a man who was no longer welcome in that apartment. I think the facts of this have been established that he may have been a guest for a while or a visitor, but at this point, he became a trespasser. And when a trespasser insists that you're not going to get me out of here, and I'm going to take what I want out of here, you have some kind of right to protect your property. And I think that's what he did.

And when he advanced toward him, I would say he even had the right to use a little force to protect himself if he really believes something was going to happened [sic] to him that would be injurious to him. And I think maybe those -- both of those factors are involved. So on the basis of that, I would asked [sic] you to find this gentleman not guilty.

After argument from the State, the court made its

ruling:

At this time, the Court finds as following [sic]: On March 5th, year 2000, in the City and County of Honolulu, in a Beretania Street apartment that [Kajganic] entered the apartment of [Yucel]. At which time, he came to pick up his belongings that he had left after he had left the apartment.

That an argument ensued regarding a left mattress, and -- and which time after argument between [Kajganic] and [Yucel], [Kajganic] issued racial slurs against -- [Kajganic] issued racial slurs against [Yucel]. At which time, [Yucel] left -- left that immediate area, went there to call security, asked them to come up and remove [Kajganic]. At which time, [Yucel] returned back to living room, asked the -- told [Kajganic] to apologize. At which time, [Kajganic] refused to apologize. And now an argument ensued again. And which time, [Yucel] struck [Kajganic] one to three times open hand in the neck area of -- of [Kajganic] without his -- [Kajganic's] consent.

In this particular case, charge here is harassment. Harassment is shown where -- where a person commits harassment if with intent to annoy, harass, or alarm as the Court interprets it have a person fear for his personal safety, a person strikes, kicks, or otherwise touches another person in offensive manner without the -- that person's consent.

Based on the facts of the case, the Court finds that [Yucel] did strike [Kajganic] several times open hand around the neck area without his consent. That this was done intentionally with the intent to cause concern for [Kajganic's] safety.

Also, the Court finds that based on the facts of the case, judging credibility, found that -- finds that -- that there was no furtive movement by the -- by [Kajganic] to either approached [sic] [Yucel] or take any mattress, physically take the mattress out of the premises. Only words were exchanged. And based on that, the Court also finds beyond a reasonable doubt that the State has disproved defense of - defense of self or for property by the fact that in this particular case that there were no furtive movements by [Yucel] -- by [Kajganic] to touch, attempt to strike or touch [Yucel].

Also that security had been called. Even though they were not immediately there, security was coming, and that [Yucel's] actions were not immediate, necessary to prevent the taking of property or protection of self. Therefore, based on that, Court finds [Yucel] guilty as charged.

The court sentenced Yucel to six months of probation upon terms and conditions, including completion of an anger management course and payment of a \$150.00 fine and a \$25.00 criminal injuries compensation fund fee.

II. DISCUSSION.

A. *There Was Substantial Evidence To Negate Yucel's Justification Defense of Defense of Property.*

On appeal, Yucel first contends that the court erred in convicting him because it did not consider, and the State did not negate, his defense that he was acting in defense of his property;⁴ specifically, that he was justified in using force to

^{4/} HRS § 703-306 (1993) provides, in pertinent part:

Use of force for the protection of property.

(1) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:

- (a) To prevent the commission of criminal trespass or burglary in a building or upon real property in the actor's possession or in the possession of another person for whose protection the actor acts; or
- (b) To prevent unlawful entry upon real property in the actor's possession or in the possession of another person for whose protection the actor acts; or
- (c) To prevent theft, criminal mischief, or any trespassory taking of tangible, movable property in the actor's possession or in the possession of another person for whose protection the actor acts.

(2) The actor may in the circumstances specified in subsection (1) use such force as the actor believes is necessary to protect the threatened property, provided that the actor first requests the person against whom force is used to desist from the person's interference with the property, unless the actor believes that:

(continued...)

prevent Kajganic from committing criminal trespass in the first degree:⁵

In the instant case, the court correctly found that Yucel was the owner of the apartment in question and that Kajganic was, at best, an invitee.⁶ Kajganic had already moved into his own apartment and moved at least three-fourths of his belongings, leaving only some t-shirts and documents in Yucel's apartment. Kajganic had not paid rent for the month of March and had already settled the matter of his cleaning deposit. As such, Kajganic returned to the apartment on March 5 as a [sic] invitee, not a tenant. See Atahan v. Muramoto, 91 Hawai'i 345, 984 P.2d 104 (1999) ("Invitees" are persons who are invited to come upon the premises either expressedly [sic] or impliedly). As an invitee, Kajganic held only a revocable license to remain on the property at the pleasure of Yucel, the owner. Yucel subsequently revoked that license by asking Kajganic, several times, to leave the apartment. When Kajganic refused to leave or return the keys to the apartment, he committed the offense of Criminal Trespass in the First Degree, in violation of HRS § 708-813, by remaining in the apartment after being given several lawful orders to leave by the owner, Yucel. At that point, Yucel was permitted to use force to prevent

⁴(...continued)

- (a) Such a request would be useless; or
- (b) It would be dangerous to the actor or another person to make the request; or
- (c) Substantial harm would be done to the physical condition of the property which is sought to be protected before the request could effectively be made.

⁵ HRS § 708-813(1)(a)(i) (Supp. 2000) provides that "[a] person commits the offense of criminal trespass in the first degree if . . . [t]hat person knowingly enters or remains unlawfully . . . [i]n a dwelling[.]" HRS § 708-800 (1993) provides, in relevant part, that "[a] person 'enters or remains unlawfully' in or upon premises when the person is not licensed, invited, or otherwise privileged to do so."

⁶ Yucel bases his contention, that the court found Kajganic to be, at best, an invitee in the apartment, upon the dubious foundation of the court's finding that Kajganic had "entered the apartment of [Yucel]." Opening Brief at 17. We can find no support in the record for this contention.

Kajganic from trespassing on the property. In fact, Kajganic himself testified that Yucel had struck him in an attempt to regain the keys to the apartment. The court apparently failed to consider this aspect of the defense, holding only that Yucel was not justified in using force in protection of the mattress or to protect himself. Therefore, as the State failed to prove that Yucel's use of force was not necessary to prevent Kajganic from committing the offense of criminal trespass, the court erred in convicting Yucel of harassment and his conviction must be reversed.

Opening Brief at 21-22 (footnote supplied).

As the State points out, and as is borne out by Yucel's closing argument (quoted in full, supra), Yucel argues this particular justification defense expressly for the first time on appeal. In contrast, the justification defense presented below was twofold: (1) that Yucel acted in self-defense;⁷ and (2) that he was justified in using force to protect his personal property, the mattress.⁸ Although Yucel contends on appeal that one of the court's oral findings of fact and two of its oral conclusions of law were erroneous, all of which were integral to its rejection of Yucel's self-defense and defense-of-the-mattress arguments, Yucel faults them only because they demonstrate that the court did not consider his criminal trespass justification defense.

^{7/} HRS § 703-304 (1993) provides, in pertinent part, that "the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion."

^{8/} See HRS § 703-306(1)(c), quoted supra.

Clearly, then, Yucel has waived on appeal any challenge to the sufficiency of the evidence, including any challenge to the sufficiency of the evidence to rebut self-defense and defense of the mattress,⁹ other than his challenge to the sufficiency of the evidence to negate his criminal trespass justification defense. See Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7) (2000) ("Points not argued [in the opening brief] may be deemed waived."). See also Leibert v. Finance Factors, Ltd., 71 Haw. 285, 288, 788 P.2d 833, 835 (1990) (findings of fact not specified as error on appeal pursuant to HRAP Rule 28(b)(4)(C) are treated as unchallenged on appeal); HRAP Rule 28(b)(4)(C) (2000); Amfac, Inc. v. Waikiki Beachcomber Investment Co., 74 Haw. 85, 125, 839 P.2d 10, 31 (1992) (conclusion of law not challenged on appeal is treated as binding on the appeals court).

With respect to his criminal trespass justification defense, Yucel argues that the court erred because it did not consider the defense in convicting him. It is no wonder and no error that the court did not, because Yucel never expressly or clearly advanced or argued it below. Cf. Bertelmann v. Taas Assoc., 69 Haw. 95, 103, 735 P.2d 930, 935 (1987) ("A judgment

⁹ With respect to Yucel's self-defense and defense-of-the-mattress justification defenses, we observe, in the light most favorable to the State, State v. Medeiros, 80 Hawai'i 251, 261-62, 909 P.2d 579, 589-90 (App. 1995), evidence below that Kajganic did not approach or otherwise threaten Yucel, or attempt to take the mattress, immediately before Yucel slapped him. We also note the fact that building security had been alerted and was on its way.

will not ordinarily be reversed based on a theory an appellant failed to raise at the trial level unless justice so requires.”) (citation omitted).

Yucel also argues that the State failed to negate his criminal trespass justification defense. We disagree. There was substantial evidence to negate that defense.

In reviewing the sufficiency of the evidence adduced at trial, we are guided by the following principles:

The courts “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.” *State v. Pone*, 78 Hawai‘i 262, 265, 892 P.2d 455, 458 (1995) (quoting *State v. Batson*, 73 Haw. 236, 248, 831 P.2d 924, 931, reconsideration denied, 73 Haw. 625, 834 P.2d 1315 (1992)). Substantial evidence is “evidence which a reasonable mind might accept as adequate to support the conclusion of the fact finder.” *State v. Gabrillo*, 10 Haw.App. 448, 459, 877 P.2d 891, 896 (1994) (quoting *State v. Lima*, 64 Haw. 470, 475, 643 P.2d 536, 539 (1982)) (internal quotation marks and brackets omitted). Matters related to the credibility of witnesses and the weight to be given to the evidence are generally left to the factfinder. *Id.* at 457, 877 P.2d at 895. The appellate court will neither reconcile conflicting evidence nor interfere with the decision of the trier of fact based on the witnesses’ credibility or the weight of the evidence. *Id.* See also *State v. Hopkins*, 60 Haw. 540, 542, 592 P.2d 810, 812 (1979) (stating that it was up to the trial judge as factfinder to assess the credibility of witnesses, including the defendant and resolve all questions of fact). Thus, we need not necessarily concur with a trial court’s particular finding in order to sustain a conviction.

State v. Medeiros, 80 Hawai‘i 251, 261-62, 909 P.2d 579, 589-90 (App. 1995).

Viewing the evidence "in the strongest light for the prosecution[,] "id., we note Kajganic's testimony that Yucel's thirty-day notice to vacate the apartment ended his tenancy on March 6, 2000. We note as well his assertions that he was still living at the apartment on March 5 and that his status on that date was tenant. This being so for our purposes, Kajganic was still a tenant when his March 5, 2000 altercation with Yucel occurred. The fact that he had already moved most of his belongings out of Yucel's apartment does not change this conclusion. Nor does the fact that he had already rented another apartment. The fact that Tabor had paid all of the rent for March was a matter between Tabor and Kajganic. As far as Yucel was concerned, Kajganic was still his tenant on March 5, and would be until March 6. As such, Kajganic had every right to be in the apartment that evening, Yucel's demands that he leave notwithstanding. Viewing the evidence in the light most favorable to the State, Kajganic was not trespassing that evening. Hence, there was substantial evidence to negate Yucel's criminal trespass defense.

B. The Oral Charge Was Not Fatally Defective.

In his opening brief, Yucel states his other point on appeal, one of plain error, as follows:

In the instant case, the oral charge failed to state: (1) the specific subsection of HRS § 711-106 under which Yucel was being charged; (2) to name [sic] the alleged victim; or (3) to charge [sic] the relevant state of mind. Due to these omissions, this

oral charge was wholly inadequate and cannot within reason be seen to have charged an offense.

Opening Brief at 24. HRS § 711-1106 provides:

Harassment. (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:

- (a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact;
 - (b) Insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response or that would cause the other person to reasonably believe that the actor intends to cause bodily injury to the recipient or another or damage to the property of the recipient or another;
 - (c) Repeatedly makes telephone calls, facsimile, or electronic mail transmissions without purpose of legitimate communication;
 - (d) Repeatedly makes a communication anonymously or at an extremely inconvenient hour;
 - (e) Repeatedly makes communications, after being advised by the person to whom the communication is directed that further communication is unwelcome; or
 - (f) Makes a communication using offensively coarse language that would cause the recipient to reasonably believe that the actor intends to cause bodily injury to the recipient or another or damage to the property of the recipient or another.
- (2) Harassment is a petty misdemeanor.

Yucel was orally charged at the March 6, 2000 arraignment and plea:

[PROSECUTOR]: Okay. [Yucel], number 104. [Yucel], on or about March 5, 2000, in the Honolulu District of the City and County of Honolulu, State of Hawaii, with intent to harass, annoy, or alarm another person, you did strike, shove, kick, or otherwise touch another person in an offensive manner, or subject another person to offensive physical contact, thereby committing the petty misdemeanor offense of harassment, in violation of Section 711-1106 of the [HRS].

Yucel was also orally charged just before the start of the May 31, 2000 bench trial:

[PROSECUTOR]: Okay. On March 5th, year 2000, in the City and County of Honolulu, State of Hawaii, you're charged with Harassment, in violation of Section 711-1106 of the [HRS].

Curiously, on this point Yucel's opening brief argues exclusively on the basis of the perfunctory oral charge read to Yucel just before the start of the May 31, 2000 bench trial. It fails to mention the much more extensive oral charge read to him at the March 6, 2000 arraignment and plea. We presume this was mere inadvertent oversight. When reminded of this oversight by the State's answering brief, Yucel argues the point somewhat differently:

The May 31, 2000 [sic; presumably, March 6, 2000], oral charge was also defective for failing to specify the subsection of the offense under which Yucel was being charged and failing to name the alleged victim.

Reply Brief at 3.

Where the issue is raised for the first time on appeal, we will not reverse a conviction based upon a defective charge

"unless the defendant can show prejudice or that the [charge] cannot within reason be construed to charge a crime." State v. Merino, 81 Hawai'i 198, 212, 915 P.2d 672, 686 (1996) (citations and internal quotation marks and block quote format omitted).

We need not tarry long on the first prong of this test. It is obvious from the record that Yucel knew exactly what offense was charged and that he vigorously defended against that charge. There was absolutely no confusion on Yucel's or anyone else's part as to the name of the alleged victim or the kind of harassing conduct (subsection of the offense) Yucel was alleged to have committed.

With respect to the second prong, "[i]t is well settled that an 'accusation must sufficiently allege all of the essential elements of the offense charged,' a requirement that 'obtains whether an accusation is in the nature of an oral charge, information, indictment, or complaint.'" State v. Jendrusch, 58 Haw. 279, 281, 567 P.2d 1242, 1244 (1977)." Id. (brackets omitted).

Here, the March 6, 2000 charge sufficiently alleged all of the essential elements of harassment under HRS § 711-1106(1)(a). We do not agree with Yucel that the subsection of the statute under which an offense is charged is an essential element of the offense. At any rate, the March 6, 2000 oral charge couched the conduct element of the offense in language almost identical to that of subsection (a) of HRS § 711-1106(1).

Further, the name of the victim is not an essential element of an offense. The acts HRS § 711-1106(1) (a) prohibits are committed against "another person[.]" And again, there was not a scintilla of confusion on this point below.

We conclude the oral charge was not defective. Hence, the court did not err in convicting Yucel of the charge.

III. CONCLUSION.

Accordingly, we affirm the May 31, 2000 judgment.

DATED: Honolulu, Hawaii, November 13, 2001.

On the briefs:

Jon N. Ikenaga,
Deputy Public Defender,
for defendant-appellant.

Chief Judge

Mangmang Qiu Brown,
Deputy Prosecuting Attorney,
for plaintiff-appellee.

Associate Judge

Associate Judge