NO. 27767

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
ARTHUR DUNCAN, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CR. NO. 04-1-0319)

MEMORANDUM OPINION
(By: Burns, C.J., Nakamura and Fujise, JJ.)

Defendant-Appellant Arthur Duncan (Duncan) appeals from the Judgment of Conviction and Sentence entered on December 15, 2005,[1] convicting him of Terroristic Threatening in the First Degree, Hawaii Revised Statutes (HRS) § 707-716(1)(d) (1993), and sentencing him to imprisonment for five years with credit for time served, and to "pay a monetary assessment of $500.00 or the actual cost of the DNA analysis, whichever is less, to the DNA registry special fund."

BACKGROUND

Bruce Hart (Hart), a homeless person of Caucasian descent, who was receiving disability benefits, and living in his van, testified that on July 14, 2004, he drove into Lydgate Park on Kauai at around 6:30 or 7:00 a.m. and parked. Hart had some coconuts in his van and planned to drink the coconut milk. He dropped two coconuts outside his van, intending to open them with

[1] The Honorable Kathleen N.A. Watanabe presided.

a machete later. There were no other coconuts in the parking lot and none were three stalls away from his truck. About thirty seconds to one minute later, Duncan pulled up and parked his truck next to Hart's van on the passenger side. Hart saw Duncan walk toward the coconuts. Hart told Duncan, "the coconuts are mine, brah." Duncan responded, "if they're yours why didn't you pick them up[?]" Hart pointed to his open window and explained that he had just dropped them out of his van. Duncan walked back to his truck and took out a machete. He walked back to the coconut he had first approached, bent down, and began to chop it. Hart approached Duncan and said, "didn't you hear me? Those coconuts are mine." Duncan kept chopping. Hart "swore" at Duncan. In response, Duncan swung the machete at Hart's lower left leg, forcing Hart to jump back. Duncan then stood and thrust the machete at Hart. Hart backed up. Duncan came forward and again thrust the machete at Hart. Duncan moved the machete from his right hand to his left and swung across with his right hand, hitting Hart below the ear. Hart moved away from Duncan toward the pay phone. Duncan called out, "go ahead you f'ing haole, go ahead and call the police." When Hart returned to his van from the pay phone after calling the police, Duncan's truck was gone. The coconut Duncan had chopped was also gone, but the pieces that he had chopped were both inside and just outside of Hart's van. Hart did not seek medical attention.

Duncan testified that it was his usual practice to go to Lydgate Park to help clean up the park by picking up trash. When Duncan drove into the parking lot, he saw a red van in the first stall, one coconut three stalls away from the van, a second coconut six stalls away from the van, and a third coconut nine stalls away from the van. About 40-45 minutes later, Duncan drove up to the middle coconut, grabbed his machete out of the side of his seat, went to the coconut and began to chop away the coconut husk to peel it off. When Duncan was almost done, he became aware of a person who had come up suddenly and stood right in front of him. That person was Hart. Because Duncan's knife was hitting the pavement and making sparks as he was chopping the husk, Duncan asked, in "pidgin" English, "well, you like I cut your leg, brah[?]" Duncan explained that his question was meant not as a threat, but as a warning that Hart was standing too close and should be aware of the danger. Hart responded, "well, that's my coconut, you threatening me, I'm calling the cops." Duncan told Hart they could share the coconut, that there were two others in the parking lot. Hart insisted that all the coconuts were his. Duncan responded that it was a public park and the coconut "[n]ever [had Hart's] name on top." Eventually, Duncan told Hart to "go call the fucking cop." After Hart left, Duncan drank some of the coconut milk and then threw the coconut into the back of his truck. Duncan also threw some other

coconuts that were in the lot into the back of his truck and then departed. Duncan denied swinging or thrusting the machete at Hart. He also denied hitting Hart.

On November 15, 2004, Duncan was indicted for Count 1 - Terroristic Threatening in the First Degree, and Count 2 - Assault in the Third Degree, HRS § 707-712 (1)(a) (1993). On September 21, 2005, a jury found Duncan guilty on Count 1, but acquitted him on Count 2.

POINTS ON APPEAL

Duncan argues that the circuit court committed plain error when it (1) failed to instruct the jury on what constitutes a "true threat," (2) failed to instruct the jury to consider the "relevant attributes" of the parties in determining whether Duncan's remarks constituted a "true threat," and (3) allowed the State to present to the jury evidence of Duncan's prior bad acts and/or convictions. Additionally, Duncan argues (4) that because of the evidence of his prior bad acts and/or convictions, he was the victim of (a) prosecutorial misconduct, and (b) ineffective assistance of counsel.

DISCUSSION

A.

In a prior case, the Hawai'i Supreme Court

> granted certiorari in order to clarify that, pursuant to State v. Valdivia, 95 Hawai'i 465, 24 P.3d 661 (2001), and State v. Chung, 75 Haw. 398, 862 P.2d 1063 (1993), the necessity of a jury instruction defining a "true threat" applies to all terroristic threatening prosecutions regardless of whether the charge is based

> exclusively upon the defendant's verbal statements, the defendant's physical conduct, or some combination of the two.

State v. Martins, 106 Hawaiʻi 136, 138, 102 P.3d 1034, 1036 (2004). In Duncan's case the circuit court did not give a "true threat" instruction to the jury. The fact that Duncan's trial counsel did not object at trial to this failure is irrelevant because "it is the duty of the trial court to see that the jury is properly instructed." State v. Nichols, 111 Hawaiʻi 327, 339, 141 P.3d 974, 986 (2006).

Hawaiʻi Rules of Penal Procedure (HRPP) Rule 52(a) (2006) states, in part, that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The Hawaiʻi Supreme Court has stated that "[s]uch error, however, should not be viewed in isolation and considered purely in the abstract. It must be examined in light of the entire proceedings and given the effect to which the whole record shows it is entitled." State v. Sprattling, 99 Hawaiʻi 312, 320, 55 P.3d 276, 284 (2002) (internal quotation marks, citation, and brackets in original omitted). "[E]rroneous jury instructions are presumptively prejudicial unless it affirmatively appears from the record as a whole that the error was harmless beyond a reasonable doubt." Nichols at 339, 141 P.3d at 986. Under the harmless error standard, this court "must determine whether there is a reasonable possibility that the error complained of might have contributed to the conviction." State v. Pauline, 100

Hawai'i 356, 378, 60 P.3d 306, 328 (2002) (internal quotation marks and citation omitted). "If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside." State v. Gano, 92 Hawai'i 161, 176, 988 P.2d 1153, 1168 (1999) (internal quotation marks and citation omitted).

The State argues that the trial court's failure to instruct the jury on what constitutes a "true threat" was harmless beyond a reasonable doubt. In State v. Kuhia, 105 Hawai'i 261, 274, 96 P.3d 590, 603 (App. 2004), this court held that any error in failing to give a "true threat" instruction is harmless beyond a reasonable doubt where, under the description of the encounters by the complaining witnesses, there is no impediment to the defendant's ability to immediately carry out his threats and there is no doubt that the threats were "true threats". There is no doubt that a threat is a true threat where the circumstances in which it was made are so "unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." State v. Chung, 75 Haw. 398, 417, 862 P.2d 1063, 1073 (1993) (citing States v. Kelner, 534 F.2d 1020, 1016-27 (2d Cir. 1976), cert. denied, 429 U.S. 1022 (1976)).

Duncan states that

> the jury should have been instructed that it had to find [Duncan's] statement, "What you like I cut your leg?" and actions "unequivocal, unconditional, immediate and specific" in order to return a verdict of guilty on the Terroristic Threatening offense.
>
> [Duncan] testified that "What you like I cut your leg?" was not meant to be a threat, but in his "keneka"[2] style of english, or pidgin english, he meant it as a warning for [Hart] to back off or he would get cut. Thus, from [Duncan's] point of view, it was not a "true threat". Without this instruction, [Duncan] was deprived of a fair trial.

(Footnote added.)

We conclude that Duncan's point has no merit. The statement by Duncan was not the alleged act of terroristic threatening. Count 1 of the Indictment charged that Duncan "did threaten by word or conduct to cause bodily injury to [Hart] with the use of a dangerous instrument, to wit: a machete, thereby committing the offense of Terroristic Threatening in the First Degree[.]" In closing argument, the deputy prosecutor described the alleged act of threatening as follows: "[Hart] testified that [Duncan] swung the machete at his legs, and twice thrust it at his chest. He may not have said anything to [Hart] while he was doing this, but that conduct is definitely threatening to cause bodily injury."

B.

In a prior case, the Hawai'i Supreme Court stated that

> we must . . . determine whether the circuit court erred in failing to give a relevant attributes instruction. State v. Solomon, 107 Hawai'i 117, 126, 111 P.3d 12, 21 (2005). In [State v.] Valdivia, [95 Hawai'i 465, 24 P.3d 661 (2001),] the defendant was

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[2] In the Hawaiian language "keneka" is a "penny", M.K. PUKUI & S.H. ELBERT, HAWAIIAN DICTIONARY 144 (1986), and "kanaka" is a "person". Id. at 127.

arrested while attempting to flee from police, handcuffed, and taken to the hospital. Valdivia, 95 Hawai'i at 470, 24 P.3d at 666. While seated and awaiting treatment, still handcuffed, and flanked by two police officers, the defendant turned to one officer and said, "I'm gonna kill you and your police uniform." Id. at 471, 24 P.3d at 667. The officer testified that this statement "worr[ied]" him. Id. The defendant was subsequently charged with terroristic threatening in the first degree against a public servant. Id. On appeal after conviction, the defendant argued that the trial court erroneously failed, over his objection, to instruct the jury that "[w]here a threat is directed at a police officer, you may consider that police officers are trained to a professional standard of behavior that ordinary citizens might not be expected to equal." Id. at 479, 24 P.3d at 675. This court agreed that the failure to instruct the jury that the threatened person's status and training as a police officer was relevant was reversible error, holding:

> [I]n order for an utterance to constitute a "true threat," it must be objectively susceptible to inducing fear of bodily injury in a reasonable person at whom the threat is directed and who is familiar with the circumstances under which the threat is uttered. . . . That being the case, the particular attributes of the defendant and the subject of the threatening utterance are surely relevant in assessing whether the induced fear of bodily injury, if any, is objectively reasonable.

Id. This holding was based on our decision in In re Doe, 76 Hawai'i 85, 869 P.2d 1304 (1994), where we reasoned that in considering whether the offense of harassment has been committed against a police officer, the fact that the "object of the [allegedly harassing utterances] is a trained and experienced police officer" maintaining a "professional standard of restrained behavior" is a factor. Id. at 96, 869 P.2d at 1315.

As set forth above, the trial court in this case gave the following true threat instruction without objection:

> A threat does not include any statement which, when taken in context, is not a true threat because it is conditional or made in jest.
>
> An alleged true threat is one that is objectively capable of inducing a reasonable fear of bodily injury in the person at whom the threat was directed and who was aware of the circumstances under which the remarks were uttered.
>
> True threats must be so unambiguous and have such immediacy that they convincingly express an intention of being carried out.
>
> A threat is, on its face and in the circumstances in which it is made, so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.

(Emphasis added.) We agree with the parties that this instruction is defective under Valdivia because it does not make

> clear to the jury that Nichols' and Krau's particular attributes, including their relative size and weight, Nichols' apparent capacity and inclination to carry out his threat, and Krau's status and training as a police officer, were relevant in determining whether Nichols' alleged threats were objectively capable of inducing a reasonable fear of bodily injury under the circumstances.

Nichols, at 338-39, 141 P.3d at 985-86.

Duncan argues that the trial court erred when it failed to instruct the jury that it must consider the "relevant attributes" of the two parties in determining whether Duncan's alleged remark, "you like I cut your leg[?]" constituted a true threat. For two reasons, we disagree. First, as noted above, this statement was not the threat upon which Count 1 was based. Second, the specific question presented is whether the fact "that Duncan spoke pidgin English while Hart did not" was a "relevant attribute" in determining whether Duncan's utterance was "objectively susceptible to inducing fear of bodily injury in a reasonable person at whom the threat is directed and who is familiar with the circumstances under which the threat is uttered[?]" Was it "relevant in assessing whether the induced fear of bodily injury, if any, is objectively reasonable[?]" We conclude that the answer is no.

C.

Defense witness Robert Aki (Aki) saw the incident from afar and testified on direct examination that "I never thought was anything that was violent" and "pretty much [Hart] was in [Duncan's] face at the time." The following is part of the

State's cross-examination of Aki:

Q. Would you say that you weren't a very good witness to what happened in this case?

A. Yeah, because, you know why I - I - I - I don't know how to say if I good witness or bad witness, but I can say one thing I no think [Duncan] is that kind of person to do anything like that. I - I really don't believe that. That's why I'm here.

Q. You don't know [Duncan] very well; do you?

A. Huh?

Q. You don't know [Duncan] very well.

A. Oh, only through what I see at Lydgate. And as far I seen at Lydgate he's a good man to him [sic].

[DEFENSE COUNSEL]: I'm going to object, your Honor. First, she's telling him he knows him for ten years, now you don't know him very well. Is she just fishing or -

THE COURT: Is - is that an objection, [Defense Counsel]?

[DEFENSE COUNSEL]: Yes.

THE COURT: Overruled.

[THE DEPUTY PROSECUTOR]:

Q. If you knew that [Duncan] had threatened somebody in 1995 would that change your opinion on whether he was a good guy?

A. Well, because people change. It doesn't really change my opinion, because I see him for today not for '95.

Q. Okay. If you knew that he assaulted somebody in 1994 would that change your opinion on whether he was a good guy?

A. Well, I just said I - I don't understand that.

[DEFENSE COUNSEL]: I'm going to object to these facts that are not in evidence, your Honor.

THE COURT: This is cross-examination. Overruled. [Deputy Prosecutor].

. . . .

[DEPUTY PROSECUTOR]

Q. You stated that you thought he was a good guy.

A. Well, what - what you talking about now [Duncan]?

Q. Yeah.

A. Yeah, I - I say he's a good guy, because what I know of him now.

Q. Okay. Now -

A. Well, what I know of him as he come to Lydgate. I mean, we don't have to say nothing. He goes and cleans up the park. I mean, he does something that no other guy - no other people that I see come to Lydgate park do.

Q. Okay.

A. He rakes up, cleans up.

Q. And I'm asking you if -

A. And he do things without even asking.

Q. - I'm asking you if you knew other things about him if you're [sic] opinion would change? This is your opinion; right?

A. Yeah.

Q. Okay. If you knew in 1992 or 1994 that he assaulted somebody would that change your opinion?

A. Well, like - like I said that is past, because what I see of him today is different. So, that wouldn't change my opinion.

Q. So, the answer is no.

A. No.

Q. Okay. If you knew in 1988 that [Duncan] assaulted somebody would that change your opinion?

A. Like I said, again, that is the past. I know him of today not - because I - in my past I did things wrong, and I have changed. And I am today - today - I was prison before, and today I work in the County. Now, I change my life. So, me I can see people changing their life. So, for me - for you tell me that I would say that is the past -

Q. Okay. The answer is no.

A. - this is the future. Yeah, it's no.

Q. Okay, and would your opinion remain the same if you knew in 1977 that he assaulted somebody?

A. 1977. What you mean?

Q. Would your opinion still remain the same?

A. Of course, my opinion is the same, because the past is the past.

Duncan argues that the court's allowance of this exchange into evidence was plain error. We conclude that absent a timely and proper objection to Aki's testimony, the court did not err in not striking the testimony or in not instructing the jury to disregard it.

The Hawai'i Rules of Evidence, Chapter 626, HRS (Supp. 2005) states in pertinent part:

> **Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.** (a) Character evidence generally. Evidence of a person's character or trait of a person's character is not admissible for the purpose of proving action in conformity therewith on a particular occasion except:
>
> (1) Character of accused. Evidence of a pertinent trait of character of an accused offered by an accused, or by the prosecution to rebut the same.
>
> . . . .
>
> (b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.
>
> **Rule 405. Methods of Proving Character.** (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

In State v. Iosefa, 77 Hawai'i 177, 880 P.2d 1224 (App. 1994), cert. dismissed, 77 Hawai'i 373, 884 P.2d 1149 (1994),

this court held that a witness for the defense should have been allowed to testify that the defendant, who was charged with sexually assaulting a young girl, was a "peaceful, non-violent person." Id. at 186, 880 P.2d at 1233 (citing State v. Faafiti 54 Haw. 637, 513 P.2d 697 (1973)). Other courts have acknowledged the phrase "good man" to be evidence of the defendant's peaceful character. See Salud v. State, 630 P.2d 1008, 1011 (Alaska App. 1981) ("A reasonable inference from the character evidence presented . . . that he was "a good man," etc., was that he had a reputation for peacefulness since a person who was violent would not be described in those terms."). As a general rule, "[u]nder Hawaii Rule of Evidence 405, cross-examination with regard to specific instances of conduct is permissible only if evidence of character or a trait of character is offered on direct examination." Bright v. Shimoda, 819 F.2d 227, 228 (9th Cir. 1987), cert. denied, 485 U.S. 970 (1988). However, once Aki "opened the door" on Duncan's character, the deputy prosecutor properly impeached Aki by questioning Aki about Duncan's prior bad acts and/or convictions.

D.

In her closing argument, the Deputy Prosecutor stated to the jury: "And if the defense highlights, you know, whose property these coconuts were, or the fact that it seemed silly and is not worth your time, it is worth your time. We would not

be here unless this case was worth your time, because this was a serious matter. Anyone being threatened with a machete is a serious matter." Duncan asserts that the prosecutor engaged in a "deliberate and continuing course of prosecutorial misconduct" by commenting during closing argument that "[w]e would not be here unless this case was worth your time, because this was a serious matter." We disagree.

E.

Duncan notes that

> [t]he jury heard through the [Deputy Prosecutor] that [Duncan] had threatened someone in 1995, and had assaulted others in 1977, 1988, 1992 and 1994. After hearing this, it would have been more than reasonable for the jury to conclude that [Duncan] was a violent man. Yet defense counsel failed to file a motion in limine to preclude the [Deputy Prosecutor] from asking these questions, or as the evidence arose, ask to approach the bench, make a proper objection, move to strike, and/or move for mistrial."

Duncan contends that his trial counsel provided ineffective assistance of counsel when she failed to act to prevent or minimize the harm caused by the introduction of Duncan's prior bad acts and/or convictions. Duncan suggests that his trial counsel could have done a number of things differently, including seeking a motion in limine prior to trial, moving for a mistrial or asking for a cautionary instruction after the prior bad acts were introduced, or moving to strike the questions and Aki's response that Duncan is a "good man" on the grounds that Aki was called as an eyewitness and not a character witness. Duncan also argues that trial counsel should initially have objected to the

questions on the basis of prosecutorial misconduct, prejudice or relevance, rather than "facts that are not in evidence."

The State argues that Duncan's trial counsel was not ineffective because she twice objected to the prosecutor's questioning but both objections were overruled, and would have been overruled even if articulated in the proper form; secondly, the State argues that there was no need for a motion in limine since the record did not reflect the State's intention to admit evidence of the prior convictions and because the order would not have applied once Aki "opened the door". The State further argues that even if Duncan's trial counsel was ineffective, her errors or omissions did not result in the withdrawal or impairment of a potentially meritorious defense.

The relevant precedent is the following:

> Libero argues he was denied effective assistance of counsel in violation of the United States Constitution and Article I, Section 14 of the Hawai'i Constitution . . . .
>
> Defendant bears the burden of establishing an ineffective assistance of counsel by demonstrating: "1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." [State v.]Richie, 88 Hawai'i[19,] 39, 960 P.2d[1227,] 1247[1998]. Customarily, a HRPP [Hawai'i Rules of Penal Procedure) Rule 40 hearing is the proper method to address ineffective assistance of counsel claims. State v. Brantley, 84 Hawai'i 112, 122, 929 P.2d 1362, 1372 (App.1996). See also, Massaro v. United States, 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003). While it is permissible to entertain ineffective assistance of counsel claims for the first time on appeal, the record here is insufficiently developed to determine whether the facts alleged by Libero, if proven, would entitle him to relief. State v. Silva, 75 Haw. 419, 438-39, 864 P.2d 583, 592 (1993).

State v. Libero, 103 Hawai'i 490, 507 , 83 P.3d 753, 770 (App.

2003). We conclude that a HRPP Rule 40 hearing is the proper proceeding to address this point by Duncan.

CONCLUSION

Accordingly, we affirm the December 15, 2005 Judgment of Conviction and Sentence without prejudice to Duncan's right to seek relief pursuant to HRPP Rule 40.

DATED: Honolulu, Hawai'i, April 17, 2007.

On the briefs:

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for Defendant-Appellant.

Tracy Murakami,
Deputy Prosecuting Attorney,
County of Kauai,
for Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge