

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27737

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
JASON CARROLL, Defendant-Appellant

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APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD Cr. No. 161648DL)

MEMORANDUM OPINION

(By: Recktenwald, C.J., Watanabe, and Nakamura, JJ.)

Defendant-Appellant Jason Carroll (Carroll) appeals from the Judgment entered by the District Court of the First Circuit (the district court)¹ on January 17, 2006, convicting and sentencing him for Negligent Failure to Control a Dangerous Dog, in violation of Revised Ordinances of Honolulu (ROH) § 7-7.2 (2005).²

¹ The Honorable Lawrence R. Cohen presided.

² There is no written complaint against Defendant-Appellant Jason Carroll (Carroll) in the record on appeal. The transcripts of the proceedings, however, show that on December 7, 2005, Plaintiff-Appellee State of Hawaii (the State) orally arraigned Carroll as follows:

Mr. Carroll, on or about May 16th of 2005, in the State of Hawaii, City and County of Honolulu, you a dog owner who [sic] committed the offense of Negligent Failure to Control a Dangerous Dog by negligently failing to take reasonable measures to prevent the dog from attacking without provocation a person or animal and such attack resulted in bodily injury to a person other than the owner. This is a first offense as it's being charged and it's a petty misdemeanor.

The State did not specifically charge Carroll with violating a particular ordinance. However, it is evident from the oral charge that Carroll was being accused of violating Revised Ordinances of Honolulu (ROH) § 7-7.2(a) (1990 & Supp. No. 7, 8-05):

Prohibited acts--Conditions on owner--Penalties.

- (a) A dog owner commits the offense of negligent failure to control a dangerous dog, if the owner negligently

(continued...)

The charge against Carroll stemmed from a May 16, 2005 incident in which Carroll's part-Rottweiler dog, Coco, which had been harnessed and secured to a runner line in Carroll's gated backyard, slipped out of its harness, escaped from the gated area, and galloped toward a mail carrier who was sorting through some mail to deposit in Carroll's mailbox.³ Alarmed, the mail carrier began backing up to his truck, all the while "waving the mail and trying to kick with [his] feet at [Coco's] mouth" to

²(...continued)

fails to take reasonable measures to prevent the dog from attacking, without provocation, a person or animal and such attack results in: . . . (2) bodily injury to a person other than the owner. A person convicted under this subsection shall be guilty of a petty misdemeanor for a first offense and a misdemeanor for a subsequent offense and sentenced in accordance with subsections (c), (d), and (e).

ROH § 7-7.1 (1990 & Supp. No. 7, 8-05) defines various terms used in ROH § 7-7.2(a):

"Attack" means aggressive physical contact with a person or animal initiated by the dog which may include, but is not limited to, the dog jumping on, leaping at or biting a person or animal.

"Bodily injury" means the same as that term is defined in HRS Section 707-700.

. . . .
"Dangerous dog" means any dog which, without provocation, attacks a person or animal. A dog's breed shall not be considered in determining whether or not it is dangerous.

. . . .
"Negligently" shall have the same meaning as is ascribed to the term in HRS Section 702-206.

. . . .
"Provocation" means the attack by a dog upon a person or animal was precipitated under the following circumstances:

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(3) The person attacked was teasing, tormenting, abusing or assaulting the dog or at any time in the past had teased, tormented, abused or assaulted the dog[.]

³ According to the undisputed testimony at trial, the mailbox was located on Carroll's property about four feet from the curb. Therefore, the mail carrier had to get out of his mail truck and walk to the mailbox in order to deposit mail for Carroll's household.

keep the lunging dog at bay. When the mail carrier reached his parked truck, he felt for the latch handle of the sliding door and, discovering that it was "stuck[,] " turned briefly to unlatch the door. At that moment, Coco bit the mail carrier's ankle.

Carroll's defense at trial was that Coco was provoked by the mail carrier's "teasing, tormenting, abusing or assaulting" actions. Carroll attempted to call Carol McPhearson (McPhearson), an animal behavior consultant, as an expert witness to testify about Coco's temperament, size, and the types of wounds Coco could inflict--factors which Carroll argued were relevant to determine whether "the incident with the [mail carrier] was one caused by a dangerous dog or one that was caused by a dog that was provoked[.]" The district court, however, precluded McPhearson's testimony at trial,⁴ concluding that the testimony was irrelevant because McPhearson had not examined Coco until months after the incident and "the length of time after which the alleged incident occurred that the proposed witness is to testify is too far away for the Court to find it to be, have any value in its decision-making."

On appeal, Carroll contends that the district court erred in precluding McPhearson's testimony, thereby depriving him of his constitutional due-process right to a fair trial.

We agree with Carroll that McPhearson's testimony was relevant⁵ to his provocation defense and should have been allowed at trial. See Jay M. Zitter, Annotation, Intentional

⁴ The District Court of the First Circuit did allow Carol McPhearson to testify at Carroll's sentencing hearing.

⁵ Hawaii Rules of Evidence (HRE) Rule 401 (1993) defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." HRE Rule 402 (1993) provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible."

Provocation, Contributory or Comparative Negligence, or Assumption of Risk as Defense to Action for Injury by Dog, 11 A.L.R. 5th 127 (1993); State v. Smith, 59 Haw. 565, 567, 583 P.2d 347, 349 (1978), partially overruled on other grounds by State v. Kelekolio, 74 Haw. 479, 518-19, 849 P.2d 58, 76 (1993) (holding that "[a]ll relevant evidence is admissible unless some rule compels its exclusion. Evidence is relevant if it tends to prove a fact in controversy or renders a matter in issue more or less probable.").

However, because the excluded testimony was of limited probative value and the evidence of Carroll's guilt was strong, we conclude that the district court's error was harmless beyond a reasonable doubt.

Carroll's neighbor testified at trial that about a month before the May 16, 2005 incident, she was dropping something into the trash bin near the boundary between her property and Carroll's when Coco bit her thigh and punctured her skin. According to this neighbor, Coco's attack "was just momentary, very quick, unexpected." As a result of the bite, the neighbor received a tetanus shot and x-rays, and "it took a good six weeks for the swelling to subside and discoloration cause it was dark purple[.]" Given this evidence, any expert opinion testimony by McPhearson that Coco was gentle and would not have bitten the mail carrier unless provoked would have been of minimal probative value to the district court in reaching its decision and would not have changed the outcome of the case.

Moreover, the circumstances of the May 16, 2005 incident are inconsistent with the theory that Coco acted "without provocation" within the meaning of ROH § 7-7.2(a) (1990 & Supp. No. 7, 8-05). The mail carrier walked to the mailbox, saw the dog gallop toward him, backed away, and attempted to use the mail and his feet to keep the dog away. Even if these

defensive maneuvers excited the dog, they would not constitute the "teasing, tormenting, abusing or assaulting" required to establish "provocation" under ROH § 7-7.2(a).

The Judgment is affirmed.

DATED: Honolulu, Hawai'i, August 30, 2007.

On the briefs:

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