DISSENTING OPINION BY NAKAMURA, C.J.

In reviewing the sufficiency of the evidence, we must consider the evidence in the light most favorable to the prosecution. State v. Batson, 73 Haw. 236, 248, 831 P.2d 924, 931 (1992).

> 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.

Id. (citations omitted). In a bench trial, the trial court, as the trier of fact, "is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence." Id. at 249, 831 P.2d at 931. It is the province of the trial court, not the appellate courts, to determine the credibility of witnesses and the weight of the evidence. State v. Eastman, 81 Hawaiʻi 131, 139, 913 P.2d 57, 65 (1996).

Applying this standard of review, I believe there was sufficient evidence to support the Family Court's adjudication of Minor-Appellant PP (Minor) as a law violator for having engaged in conduct constituting second-degree terroristic threatening. Accordingly, I respectfully dissent.

I.

After a bench trial, the Family Court adjudicated Minor to be a law violator for committing what would be second-degree terroristic threatening, in violation of Hawaii Revised Statutes (HRS) § 707-717 (1993), if committed by a person over the age of eighteen at the time of the offense.

HRS § 707-717(1) provides that "[a] person commits the offense of terroristic threatening in the second degree if the person commits terroristic threatening other than as provided in section 707-716 [(the section which defines the offense of first-degree terroristic threatening)]."[1] HRS § 707-715 (Supp. 2013), in turn, defines the offense of terroristic threatening in relevant part as follows:

> A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or . . . to commit a felony:
>
> (1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person[.]

II.

"In the case of terroristic threatening, a threat becomes a crime only when it is coupled . . . with a reckless disregard of the risk of terrorizing." State v. Chung, 75 Haw. 398, 412, 862 P.2d 1063, 1071 (1993) (internal quotation marks, brackets, ellipsis points, and citation omitted). "[T]o be subject to criminal prosecution for terroristic threatening, the threat must be conveyed to *either the person who is the object of*

[1]At the time relevant to this case, HRS § 707-716 (Supp. 2012) provided that a person commits first-degree terroristic threatening if the person commits terroristic threatening: (1) by threatening another person on multiple occasions for a similar purpose; (2) by threats made in a common scheme against different persons; (3) against a public servant arising out of the performance of official duties; (4) against a medical services provider engaged in performance of duty; (5) with the use of a dangerous instrument; or (6) by threatening another person protected by a court restraining order or a police order to leave the premises of the protected person, where such orders were issued against the person engaging in the terroristic threatening.

the threat or to a third party." Id. (block quote format altered; ellipsis points and citation omitted). "[A]ctual terrorization is not a material element of the offense of terroristic threatening." Id. at 413, 862 P.2d at 1071 (internal quotation marks and citation omitted). "The question is whether upon the evidence a reasonable trier of fact might fairly conclude that the defendant uttered his threats in reckless disregard of the risk of terrorizing another person." Id. (internal quotation marks, brackets, and citation omitted).

III.

In my view, when viewed in the light most favorable to the State of Hawaiʻi (State), there was sufficient evidence to show that Minor uttered his threats in reckless disregard of the risk of terrorizing Jeffrey Kuewa (Kuewa), a counselor at Central Oahu Youth Services (hereinafter, the "Shelter"). Kuewa had imposed additional discipline of two days of early bedtime on Minor for "screaming . . . at the top of his lungs" after becoming "very angry" and walking outside of the Shelter's boundary. Kuewa noted the additional discipline in his report, but had not informed Minor of the discipline.

Frank Kimitch (Kimitch) worked at the Shelter along with Kuewa. Kimitch advised Minor that Kuewa had disciplined Minor for Minor's misconduct. In the presence of Kimitch and two Shelter clients, Minor engaged in a prolonged rant, lasting five or ten minutes, in which he threatened to kill and sexually

assault Kuewa, when Kuewa "comes in." Minor emphasized his threats by punching the couch "with every breath and every

statement" and "getting really aggressive." About an hour after Minor made these threats, Kimitch observed Minor angrily approach Kuewa with fists clenched and ask about the discipline.[2] Shortly after observing this encounter, Kimitch told Kuewa about the threats Minor had made against Kuewa.

The evidence showed that Minor conveyed the threats to a third party, Kimitch, in reckless disregard of the risk that Kimitch would communicate the threats to Kuewa. Kimitch and Kuewa were co-workers at the Shelter, and Minor's threats were related to Kuewa's performing his duties at the Shelter. Given the nature of Minor's threats against Kuewa, where the threats were made and the people who were present, the frequency of Minor's contact with Kuewa at the Shelter, Minor's punching the couch to emphasize his threats, Minor's angry encounter with Kuewa an hour after making the threats, and Kimitch's working relationship with Kuewa, Minor acted in reckless disregard of the risk that Kimitch would communicate Minor's threats to Kuewa in order to warn Kuewa about the potential danger.

The evidence also showed that Minor recklessly disregarded the risk that his threats would terrorize Kuewa. The Family Court found that Minor, who was sixteen years old when the threats were made, was "roughly five (5) feet and eleven (11) inches tall, stocky and muscular, and capable of causing physical

[2]Kuewa had come to the Shelter on his day off when he was approached by Minor.

injury to Mr. Kuewa[.]"[3] Given the nature, context, and surrounding circumstances of Minor's threats, as described above, there was substantial evidence to support the Family Court's determination that Minor acted in reckless disregard of the risk that his threats would terrorize Kuewa. See State v. Batson, 73 Haw. 236, 254, 831 P.2d 924, 934 (1992).[4] Indeed, when Kimitch told Kuewa about Minor's threats, Kuewa had "big concerns [about] returning to work[.]" Kuewa "got nervous" that a "physical, violent altercation" with Minor was "highly possible" and was afraid that an altercation was "[h]ighly likely to happen," and Kuewa called the police after speaking to his supervisor. Kuewa was "[d]efinitely" concerned for his personal safety.[5]

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[3]Kuewa testified that he was six feet two inches tall and weighed 260 pounds and estimated that Minor was five feet nine or ten inches tall and weighed 210 pounds. The Family Court had the opportunity to observe both Kuewa and Minor in court in finding that Minor was "capable of causing physical injury to [Kuewa]."

[4]In Batson, the Hawaiʻi Supreme Court stated:

> Given the difficulty of proving the requisite state of mind by direct evidence in criminal cases, we have consistently held that proof by circumstantial evidence and reasonable inferences arising from circumstances surrounding the defendant's conduct is sufficient. Thus, the mind of an alleged offender may be read from his acts, conduct and inferences fairly drawn from all the circumstances.

Batson, 73 Haw. at 254, 831 P.2d at 934 (internal quotation marks, brackets, and ellipsis points omitted); see also, State v. Kiese, 126 Hawaiʻi 494, 502, 273 P.3d 1180, 1188 (2012) (noting that criminal intent "can rarely be proved by direct evidence" (format altered; citation omitted)).

[5]Kuewa testified as follows:

> [Deputy Prosecuting Attorney:] Q. Were you concerned for your personal safety if [Minor] had still
>
> (continued...)

[5](...continued)
been (indiscernible) when you returned the next day?

[Kuewa:] A. Definitely.

IV.

In my view, there was also sufficient evidence to show that Minor's threats were "true threats."

To avoid infringing on First Amendment protections, the Hawaiʻi Supreme Court has required that a defendant's remarks constitute "true threats" to be the subject of prosecution. In Chung, the court stated that "[a] statement that amounts to a threat to kill would not be protected by the First Amendment." Chung, 75 Haw. at 415-16, 862 P.2d at 1072 (internal quotation marks, brackets, and ellipsis points omitted). The court described the types of statements that could be prosecuted as "true threats" as follows:

> The word "threat" excludes statements which are, when taken in context, not "true threats" because they are conditional and made in jest. Threats punishable consistently with the First Amendment are only those which according to their language and context conveyed a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected "vehement, caustic and unpleasantly sharp attacks."
>
> Proof of a "true threat" focuses on threats which are so unambiguous and have such immediacy that they convincingly *express* an *intention* of being carried out.
>
> So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied.

Id. at 416-17, 862 P.2d at 1072-73 (brackets, ellipsis points, and citations omitted).

In State v. Valdivia, 95 Hawaiʻi 465, 24 P.3d 661 (2001), the court rejected Valdivia's underlying contention that "the 'imminency' required to establish a 'true threat' is constitutionally restricted to *temporal* immediacy, such that a

'threat' is a 'true' one only if it can be executed 'without lapse of time or delay,' 'instantly,' or 'at once.'" Valdivia, 95 Hawaiʻi at 476, 24 P.3d at 672 (brackets and citation omitted). Valdivia was under arrest, with his hands handcuffed behind his back, and guarded by two armed police officers when he threatened to kill Officer Kawelo and "[his] police uniform." Id. at 471, 474, 24 P.3d at 667, 670. Valdivia argued that given these circumstances, his remarks did not constitute "true threats" because "there was 'no realistic prospect that he would imminently execute the literal words of his remark or that he had the ability to do so.'" Id. at 474, 24 P.3d at 670 (brackets omitted). In rejecting Valdivia's argument, the court clarified Chung and explained that the free speech clause of the United States and Hawaiʻi Constitutions did not "impose a temporal 'immediacy' requirement that must be met before words become subject to criminal prosecution as 'true threats.'" Id. at 476, 24 P.3d at 672.

The court stated:

> We agree with the California Supreme Court that the "imminency" required by [United States v.] Kelner, [534 F.2d 1020 (2d Cir. 1976,] and hence by Chung, can be established by means other than proof that a threatening remark will be executed immediately, at once, and without delay. Rather, as a general matter, the prosecution must prove that the threat was objectively susceptible to inducing fear of bodily injury in a reasonable person at whom the threat was directed and who was familiar with the circumstances under which the threat was uttered. Of course, one means of proving the foregoing would be to establish, as in Chung and Kelner, that the threat was uttered under circumstances that rendered it "so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." But another would be to establish that the defendant possessed "the apparent ability to carry out the threat," such that "the threat would reasonably tend to induce fear of bodily injury in the victim."

> In light of the foregoing, Valdivia's argument that his utterances lacked the requisite "immediacy" because, at the time, he was handcuffed misses the mark, being no more than an assertion that there was no possibility of the threatened evil being accomplished at the instant of its expression. Given the evidence that pepper spray had little or no effect on Valdivia's power of resistance and that it required four police officers to physically apprehend him, the jury could find that Valdivia possessed the apparent ability to carry out his threat and that the threat would reasonably tend to induce fear of bodily injury in Officer Kawelo. Accordingly, we hold that [the] prosecution adduced substantial evidence from which a person of reasonable caution could conclude that Valdivia, in fact, uttered a "true threat."

Id. at 477, 24 P.3d at 673 (brackets, ellipsis points, and citations omitted; emphases added).

In other words, the court in Valdivia held that even if the defendant lacked the ability to carry out the threat immediately, the threat would still constitute a "true threat" if the defendant's apparent ability to carry out the threat sometime in the future would reasonably tend to induce fear of bodily injury in the victim. The focus is on whether given the substance and context of the threat, it would reasonably tend to induce fear of bodily injury in the victim.

Here, as the Family Court found, the evidence showed that Minor was "capable of causing physical injury to Mr. Kuewa," and that "Mr. Kuewa was justified in fearing physical injury from the Minor." Both Kimitch and Kuewa, who were familiar with Minor, took Minor's threats seriously.[6] Kimitch warned Kuewa of Minor's threats after Kimitch observed Minor angrily confront Kuewa about the discipline Kuewa had imposed. Upon learning

[6]Kimitch and Kuewa both had extensive experience working at the Shelter. Kuewa testified that he had worked at the Shelter for eight years, and Kimitch testified that he had worked at the Shelter for ten years.

about Minor's threats, Kuewa became afraid of a violent, physical altercation with Minor, which he believed was "highly possible." Kuewa had "big concerns" about returning to work and was afraid that an altercation with Minor was "[h]igly likely to happen." Kuewa called the police and was concerned for his personal safety. When viewed in the light most favorable to the State, I believe there was sufficient evidence to show that Minor "possessed the apparent ability to carry out his threat, such that the threat would reasonably tend to induce fear of bodily injury in [Kuewa]." See Valdivia, 95 Hawaiʻi at 477, 24 P.3d at 673 (internal quotation marks, ellipsis points, and brackets omitted).

V.

For the foregoing reasons, I believe there was sufficient evidence to show that Minor uttered his threats in reckless disregard of the risk of terrorizing Kuewa and that Minor's threats were "true threats." Therefore, I respectfully dissent from the majority's conclusion that there was insufficient evidence to support the Family Court's adjudication of Minor as a law violator in this case.