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CAAP-12-0000588

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
SCOTT YANG, Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR NO. 10-1-0899)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., and Fujise and Reifurth, JJ.)

Plaintiff-Appellee State of Hawaii (State) charged Defendant-Appellant Scott Yang (Yang) with first-degree terroristic threatening with the use of a semi-automatic firearm (Counts 1 through 4) and abuse of a family or household member (Counts 5 through 8). The complaining witness (CW) for each count was Yang's wife. After a jury trial, the jury found Yang guilty of Counts 6 and 8 and acquitted him of the remaining counts. The Circuit Court of the First Circuit (Circuit Court)^{1/} sentenced Yang to concurrent two-year terms of probation on Counts 6 and 8, subject to the special condition that he serve

^{1/} The Honorable Michael D. Wilson presided.

sixty days in jail. The Circuit Court entered its Judgment on May 21, 2012.

On appeal, Yang contends that the Circuit Court erred in: (1) instructing the jury on self-defense and the defense of others with respect to Count 6; and (2) denying his motion to dismiss, refusing to give a time-specific elements instruction, and denying his motion for judgment of acquittal with respect to Count 8, when there was a variance between the time set forth in the State's response to Yang's notice of alibi and the CW's trial testimony. We affirm.

I.

We resolve the issues raised by Yang on appeal as follows:

1. Contrary to Yang's contention, the Circuit Court did not err in instructing the jury, with respect to Count 6, that the justifications of self-defense and the defense of others were not available if Yang was reckless in believing he was justified in using force or reckless in acquiring or failing to acquire any knowledge or belief which was material to the justifiability of his use of force. A reckless state of mind is sufficient to establish culpability for abuse of a family or household member, State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996), and the Circuit Court's instructions correctly stated the law. See Hawaii Revised Statutes (HRS) § 703-310(1) (2014); State v. Culkin, 97 Hawai'i 206, 216, 35 P.3d 233, 243 (2001) ("HRS § 703-310 quite plainly instructs that self-defense is not available as justification where a defendant believes that the use of force is necessary, but is reckless or negligent in so believing. HRS § 703-310, read in *pari materia* with HRS §§ 703-300 and 703-304, thus reflects the legislature's decision to limit the availability of self-defense as justification to situations in which the defendant's subjective belief that self-defense was necessary is objectively reasonable." (citations and footnote omitted)); Supplemental Commentary on HRS § 703-300; Supplemental Commentary on HRS § 703-310.

2. The Circuit Court did not err in ruling on Yang's motion to dismiss, request for a time-specific elements instruction, and motion for judgment of acquittal with respect to Count 8. The State submitted a response to Yang's notice of alibi defense which stated that "Count VIII is alleged to have occurred on April 7, 2010, at around 6:30PM to 7:00PM, at [Yang's and the CW's residence]." However, at trial, the CW testified that the incident charged in Count 8 took place at 4:00 or 5:00 p.m. Based on this discrepancy between the time set forth in State's response to Yang's notice of alibi and the CW's trial testimony, Yang moved to dismiss Count 8, claiming that he had been prejudiced because he had prepared an alibi for the time between 6:30 and 7:00 p.m. Yang also sought a time-specific elements instruction requiring the State to prove that the crime charged in Count 8 occurred between 6:30 and 7:00 p.m. and moved for a judgment of acquittal.

Based on the CW's testimony that the incident took place at 4:00 or 5:00 p.m., Yang could have moved for a continuance or a mistrial to give him more time to prepare his defense in light of this new evidence. See State v. Sherman, 70 Haw. 334, 341, 770 P.2d 789, 793 (1989) (concluding that the trial court should have granted a continuance requested by the defense in light of the prosecution's violation of Hawai'i Rules of Penal Procedure (HRPP) Rule 12.1). However, Yang did not move for a continuance or a mistrial. Instead, he chose to impeach the CW with her prior inconsistent statements that the incident had occurred at 6:30 to 7:00 p.m., and he moved for dismissal of Count 8. In denying Yang's motion to dismiss, the Circuit Court found that "there was no intent on the part of the government to mislead the defense." We conclude that the Circuit Court did not err in denying Yang's motion to dismiss. See id. ("No one expects the prosecution to supply more information under HRPP 12.1(b), than it has."); HRPP Rule 12.1 (2007) (permitting the court to grant an exception to the requirements of HRPP Rule 12.1 for good cause).

An alibi defense does not make time of the essence or an element of the charged offense. See Real v. Shannon, 600 F.3d 302, 309 (3rd Cir. 2010); People v. Dobek, 732 N.W.2d 546, 565 (Mich. Ct. App. 2007). The Circuit Court did not err in refusing Yang's request for a time-specific elements instruction.

The CW's testimony and other evidence presented provided sufficient evidence to support the charge in Count 8. Therefore, the Circuit Court did not err in denying Yang's motion for judgment of acquittal.

II.

Based on the foregoing, we affirm the Circuit Court's judgment.

DATED: Honolulu, Hawai'i, May 12, 2016.

On the briefs:

Phyllis J. Hironaka
Deputy Public Defender
for Defendant-Appellant

Brian R. Vincent
Deputy Prosecuting Attorney
City and County of Honolulu
for Plaintiff-Appellee


Chief Judge


Associate Judge


Associate Judge