

NO. CAAP-14-0001191

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
JON SHIMOKAWA, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
KĀNEʻOHE DIVISION
(CASE NO. 1DCW-13-0003304)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Leonard and Ginoza, JJ.)

Defendant-Appellant Jon Shimokawa (Shimokawa) appeals from the Notice of Entry of Judgment and/or Order, filed on October 14, 2014, in the District Court of the First Circuit, Kāneʻohe Division (district court).¹ Shimokawa was convicted of Terroristic Threatening in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 707-717(1) (2014).²

On June 23, 2013, an incident occurred between Shimokawa and the complaining witnesses, Scott and Tristen Nakamura, as they were driving over the Pali Highway towards Kailua. Shimokawa is alleged to have been driving aggressively

¹ The Honorable David T. Woo, Jr. presided.

² HRS § 707-717 provides: "Terroristic threatening in the second degree. (1) 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. (2) Terroristic threatening in the second degree is a misdemeanor."

and initiated aggressive verbal exchanges that were made while driving. It is undisputed that the Nakamuras made a 911 call during the incident and while stopped at a stop light on the Kailua side of the Pali Highway, Shimokawa exited his car and approached the Nakamuras' car. The Nakamuras drove to the Kāneʻohe police station and made a police report.

Shimokawa contends the district court erred when it: (1) denied Shimokawa's first motion to dismiss; (2) denied Shimokawa's second motion to dismiss; (3) excluded a time period for purposes of Hawai'i Rules of Penal Procedure (HRPP) Rule 48; (4) admitted a voicemail recording into evidence; (5) weighed the evidence of the case; and (6) made cumulative errors requiring reversal.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Shimokawa's points of error as follows and affirm.

I. Shimokawa's first and second motions to dismiss.

Shimokawa contends the district court erred when it denied his first and second motions to dismiss because Plaintiff-Appellee State of Hawai'i (State) was required to produce tape recorded interviews of Scott Nakamura, Tristen Nakamura, and Shimokawa.³

"A trial court's ruling on a motion to dismiss an indictment is reviewed for an abuse of discretion." State v. Hinton, 120 Hawai'i 265, 273, 204 P.3d 484, 492 (2009) (citation and brackets omitted).

A. HRPP Rule 16

Shimokawa contends that the State violated HRPP Rule 16(b)(1)⁴ when it failed to produce the tape recorded interviews.

³ Shimokawa's first motion to dismiss filed on April 14, 2014, addressed the recorded interviews of Scott and Tristen Nakamura and the second motion to dismiss filed on September 18, 2014, addressed Shimokawa's recorded interview. Both motions relied on similar arguments as a basis for dismissing the case.

⁴ In Shimokawa's memorandum in support of his first motion to dismiss, he contended that he was entitled to discovery under HRPP Rule 16(b)(1)(ii) and (vii). In his memorandum in support of his second motion to dismiss,

HRPP Rule 16(a) provides that "[s]ubject to subsection (d) of this rule, discovery under this rule may be obtained in and is limited to cases in which the defendant is charged with a felony[" (Emphasis added.) HRPP Rule 16(d) provides that "[u]pon a showing of materiality and if the request is reasonable, the court in its discretion may require disclosure as provided for in this Rule 16 in cases other than those in which the defendant is charged with a felony, but not in cases involving violations."

At a March 19, 2014 hearing, the State requested that the case be continued because it "became aware that there may have been an audio recorded interview done during the felony investigation phase of this case, which the State is not in receipt of right now."⁵ The State voluntarily made the information available and requested time to obtain the recordings, and the district court granted a continuance to allow the State to obtain the recordings. Given these circumstances, it does not appear there was any order by the district court requiring disclosure.

Neither party disputes that the prosecution was unable to obtain the recorded interviews of both complaining witnesses and Shimokawa. Shimokawa contends that because the State did not produce the recordings, the district court should have dismissed the case pursuant to HRPP Rule 16(e)(9)(i),⁶ which allows for

Shimokawa contended he was entitled to discovery under HRPP Rule 16(b)(1)(iii) and (vii). In his opening brief, Shimokawa only refers to HRPP Rule 16(b)(1)(i) as a basis for why he was entitled to discovery.

⁵ The State later revealed in a declaration of counsel attached to the memorandum in opposition to Shimokawa's first motion to dismiss, that "[u]pon investigation, it was discovered that on June 23, 201[3] Detective Robin Puahala conducted audio recorded interviews of Scott Nakamura, Tristen Nakamura, and Jon Shimokawa. All recordings were to [have been] submitted in evidence under HPD 13228343."

⁶ HRPP Rule 16(e)(9)(i) provides:

(9) *Sanctions.*

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may order such party to permit the discovery, grant a continuance, or it may enter such other order as it deems just under the circumstances.

sanctions upon a party's failure to comply with HRPP Rule 16 or an order pursuant to the rule.

In State v. Dowsett, 10 Haw. App. 491, 878 P.2d 739 (1994), this court stated:

Obviously, the sanction of dismissal is addressed to the sound discretion of the court. But in exercising the broad discretion as to sanctions under HRPP Rule 16, the trial court should take into account the reasons why the disclosure was not made, the extent of prejudice, if any, the feasibility of rectifying that prejudice by continuance, and any other relevant circumstances.

Id. at 495, 878 P.2d at 742 (citations, brackets, quotation marks, and emphasis omitted)

In this case, the State made a voluntary disclosure about the recorded interviews, but did not produce them to Shimokawa because it could not locate them. The State issued a subpoena to the Honolulu Police Department (HPD) to obtain the recordings, however, HPD informed the State that no recordings were submitted into evidence. In addition, the Deputy Prosecutor attempted to locate Detective Robin Puahala (Puahala) who conducted the interviews. However, Puahala had retired from HPD in 2013. The Deputy Prosecutor also requested that a lieutenant of the Criminal Investigations Division check Puahala's work area to determine if there were any unsubmitted audio recordings. Despite these efforts on the part of the State, the recorded interviews were not located. Given the State's voluntary efforts to disclose the recorded interviews and the lack of an order by the district court requiring disclosure, it is doubtful that there was any violation of HRPP Rule 16.

Further, even if HRPP Rule 16 applied, any prejudice to Shimokawa in this case was minimal. First, Shimokawa contends that he was prejudiced by not having his own recorded interview because the recorded interview would show prior consistent statements. However, under Hawai'i Rules of Evidence (HRE) Rule 613(c), prior consistent statements are only admissible at trial after:

- (1) Evidence of the witness' prior inconsistent statement has been admitted for the purpose of attacking the witness' credibility, and the consistent statement was made before the inconsistent statement; or
- (2) An express or implied charge has been made that the

witness' testimony at the trial is recently fabricated or is influenced by bias or other improper motive, and the consistent statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen; or

(3) The witness' credibility has been attacked at the trial by imputation of inaccurate memory, and the consistent statement was made when the event was recent and the witness' memory fresh.

At the motion to dismiss stage, Shimokawa did not show that his prior consistent statements would have been admissible at trial.⁷

Second, Shimokawa contends that he was prejudiced by not having the recorded interview of Scott Nakamura because the recording would demonstrate the sound of Nakamura's voice so that it could be compared to the 911 recording that was admitted into evidence, showing that Nakamura was the one yelling and aggressively speaking on the 911 recording and not Shimokawa. However, both Scott Nakamura and Shimokawa testified at trial, thus giving the court a context for what each of their voices sounded like. In addition, a recorded voicemail was admitted into evidence, and it was undisputed that Shimokawa was the one speaking on the voice message.

Shimokawa also contends that he was prejudiced because the recorded interview of Scott Nakamura would contain material to potentially impeach Nakamura's statements at trial. Shimokawa's argument is speculative in this regard. Moreover, Shimokawa was given a copy of Scott Nakamura's three-page written statement that Nakamura gave to the police the same day that the recorded interview took place.

In considering all of the facts above, the district court did not abuse its discretion when it denied Shimokawa's first and second motions to dismiss.

B. Due Process

Shimokawa contends that the district court erred when it denied his first and second motions to dismiss because his right to due process was violated when the State did not produce the recorded interviews.

⁷ As further support, the State did not cross-examine Shimokawa at trial or offer other evidence attacking Shimokawa's credibility, thus precluding prior consistent statements from being admitted as evidence.

To support his due process argument, Shimokawa cites to State v. Matafeo, 71 Haw. 183, 787 P.2d 671 (1990), which applies the United States Supreme Court case Brady v. Maryland, 373 U.S. 83 (1963). In Brady, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87 (emphasis added). To "establish a Brady violation, an appellant must make a showing that the suppressed evidence would create a reasonable doubt about the appellant's guilt that would not otherwise exist." State v. Fukusaku, 85 Hawai'i 462, 479, 946 P.2d 32, 49 (1997) (citation and brackets omitted).

In this case, Shimokawa contends that the recorded statements would contain more detail than the written statements the Nakamuras made and would potentially have impeachable material. Shimokawa also contends that his own recorded statement would contain potential prior consistent statements. Shimokawa's arguments do not show that the recorded interviews would have created reasonable doubt about his guilt. Moreover, given the record in this case, the recorded interviews were not so critical to the defense as to have made the trial fundamentally unfair without them. Matafeo, 71 Haw. at 187, 787 P.2d at 673. Therefore, the district court did not violate Shimokawa's due process rights when it denied his first and second motions to dismiss.

C. Inherent power of the court.

Shimokawa contends that the district court should have granted his first and second motions to dismiss under its inherent supervisory powers, citing to State v. Moriwake, 65 Haw. 47, 647 P.2d 705 (1982) as support.

In Moriwake, the Hawai'i Supreme Court iterated that

[s]ociety has a strong interest in punishing criminal conduct. But society also has an interest in protecting the integrity of the judicial process and in ensuring fairness to defendants in judicial proceedings. Where those fundamental interests are threatened, the "discretion" of the prosecutor must be subject to the power and responsibility of the court.

Id. at 56, 647 P.2d at 712 (citation and block format omitted). The court further stated that "[i]n considering whether such power and responsibility were properly exercised, we in turn will accord deference to the conclusion of the trial court[.]" Id.

In this case, given the speculative nature of Shimokawa's arguments, as discussed above, the district court did not abuse its discretion when it denied Shimokawa's motions to dismiss.

II. Rule 48

Shimokawa contends that the district court improperly excluded the time period from July 16, 2014 to October 2, 2014 for purposes of HRPP Rule 48.

HRPP Rule 48(b), "by its terms, can be invoked only by a motion to dismiss made by the defendant." State v. McDowell, 66 Haw. 650, 651, 672 P.2d 554, 556 (1983) abrogation on other grounds recognized by State v. Nesmith, 127 Hawai'i 48, 56-57, 276 P.3d 617, 625-26 (2012).

In this case, Shimokawa filed his second motion to dismiss on September 18, 2014, after the July 16, 2014 order that continued the trial to October 2, 2014, but failed to assert dismissal on HRPP Rule 48 grounds. Shimokawa does not point to anywhere in the record where he filed a motion to dismiss based on a HRPP Rule 48 violation. Therefore, Shimokawa has waived any claim to relief under HRPP Rule 48.

III. Voicemail

Shimokawa contends that the district court erred when it admitted into evidence a voicemail recording left by Shimokawa on Tristen Nakamura's phone because HRE Rule 404(b) excludes evidence of other crimes, wrongs or acts to prove the character of a person. HRE Rule 404(b) provides:

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.

(Emphasis added.)

A few hours after the incident, Shimokawa left a voicemail on Tristen Nakamura's cell phone which stated:

I don't know if I'm getting the right person but I just had an incident with somebody driving a black BMW X5, RYU 123. I know wasn't one girl driving but there was one girl in the passenger seat. For the guy that was driving that car, Bruddah, don't worry, I know who you are. And if you want to play fucking stupid with me, I'll give you another call, next time answer the phone.

At trial the State introduced the voicemail into evidence, not as a basis for the charge of Terroristic Threatening, but to show Shimokawa's state of mind. That is, to show he intended to terrorize Scott Nakamura or acted with a reckless disregard of the risk of terrorizing. Shimokawa objected and upon further offer of proof by the State, the district court admitted the voicemail.

HRS § 707-715 (2014) provides in pertinent part:

§707-715 Terroristic threatening, defined. A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage or harm to property, including the pets or livestock, of another or to commit a felony:

- (1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person[.]

The State, in this case, had the burden of proving that Shimokawa intended to terrorize or that he recklessly disregarded the risk of terrorizing another person. The voicemail was probative of Shimokawa's intent because it showed his aggression, including that he would attempt to contact the Nakamuras even after the incident. We further note that, in the case of a bench trial, "[i]t is well established that a judge is presumed not to be influenced by incompetent evidence." State v. Antone, 62 Haw. 346, 353, 615 P.2d 101, 107 (1980). Therefore, we presume the district court considered the voicemail for the proper purpose of intent. In sum, the district court did not err when it admitted the voicemail into evidence.⁸

⁸ In his opening brief, Shimokawa also contends that the voicemail was more prejudicial than probative. However, because Shimokawa did not state this objection at trial, it is waived. State v. Moses, 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2003) ("As a general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal[.]").

IV. The district court's findings of fact.

Shimokawa contends that the district court erred when it made several erroneous findings of fact. The district court's findings of fact are reviewed under the clearly erroneous standard. Bhakta v. Cty. of Maui, 109 Hawai'i 198, 208, 124 P.2d 943, 953 (2005).

Shimokawa first points to the district court's finding that Shimokawa "did get out of his vehicle to approach the Nakamuras' vehicle and stated to Scott Nakamura What, you almost bang me, you fuckah."

Neither party disputes that Shimokawa exited his vehicle and approached the Nakamura's vehicle, however, at trial, Scott Nakamura testified that he made the statement "What, you almost bang me, you fuckah." Thus, the district court misidentified who made the statement in its findings.

Considering the record as a whole, however, misidentifying who made the statement was a harmless error. State v. Aplaca, 96 Hawai'i 17, 25, 25 P.3d 792, 800 (2001) ("Consistent with the harmless error doctrine, we have frequently stated that error 'must be examined in light of the entire proceedings and given the effect to which the whole record shows it is entitled. In that context, the real question becomes whether there is a reasonable possibility that the error might have contributed to *conviction*.'" (quoting State v. Gano, 92 Hawai'i 161, 176, 988 P.2d 1153, 1168 (1999))).

The remaining district court findings that Shimokawa challenges address the district court's weighing of the evidence and the credibility of Scott Nakamura's testimony over Shimokawa's testimony at trial.

"Matters related to the credibility of witnesses and the weight to be given to the evidence are generally left to the factfinder." State v. Mitchell, 94 Hawai'i 388, 393, 15 P.3d 314, 319 (App. 2000). Because there was a dispute over the evidence and how the events took place during the incident, the district court was required to weigh the evidence and assess the credibility of each witness. The district court stated that in

"examining the testimony of the two parties, I do find Mr. Nakamura more credible and I do find some serious problems with the defendant's testimony[.]"

This 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." Mitchell, 94 Hawai'i at 393, 15 P.3d at 319. Therefore, we will not disturb the district court's findings challenged by Shimokawa.

Therefore, IT IS HEREBY ORDERED that the Notice of Entry of Judgement and/or Order, filed on October 14, 2014 in the District Court of the First Circuit, Kāne'ohe Division, is affirmed.

DATED: Honolulu, Hawai'i, June 15, 2016.

On the briefs:

Mark S. Kawata,
Colleen Mari Jones,
for Defendant-Appellant.

Presiding Judge

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge