NO. CAAP-15-0000012

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
THEODORE ROBERT BRISTOW, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
KONA DIVISION
(Case No. 3DCW-14-0001486)

SUMMARY DISPOSITION ORDER
(By: Foley, Presiding Judge, Fujise and Ginoza, JJ.)

Defendant-Appellant Theodore Robert Bristow (Bristow) appeals from the Notice of Entry of Judgment and/or Order, entered on December 12, 2014 in the District Court of the Third Circuit, Kona Division (District Court).[1]

Bristow was convicted of Harassment, in violation of Hawaii Revised Statutes (HRS) § 711-1106 (2014).[2]

On appeal, Bristow contends (1) there was insufficient evidence to convict him of Harassment and (2) there was insufficient evidence his statements were not protected free

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[1] The Honorable Margaret K. Masunaga presided.

[2] HRS § 711-1106(f) states:

> **§711-1106 Harassment**. (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:
>
> . . . .
>
> (f) Makes a communication using offensively coarse language that would cause the recipient to reasonably believe that the actor intends to cause bodily injury to the recipient or another or damage to the property of the recipient or another.

speech under the United States Constitution and Hawaii Constitution.

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 Bristow's points of error as follows:

(1) When the evidence adduced at trial is considered in the strongest light for the prosecution, State v. Matavale, 115 Hawaiʻi 149, 157-58, 166 P.3d 322, 330-31 (2007), there was sufficient evidence to support Bristow's conviction.

Complaining Witness (CW) testified that Bristow had been his neighbor for ten to twelve years and that their houses were about twenty-four feet apart. On April 25, 2014, the date of the incident, he was awakened at about 11:30 p.m., by Bristow swearing at him and playing loud music. Bristow then turned the music louder and yelled over the music "Fuck you, [CW], I'm going to take care of you" and "How do you like that, fucking [CW]." He and his wife were alarmed by Bristow's actions. CW felt that Bristow was harassing him because he and his wife went to sleep at 10 o'clock and the house was dark. Although there had been loud music from parties at Bristow's house in the past, CW felt this was different because the music was louder and this was Bristow alone making comments that seemed to be directed at CW. CW was alarmed because he "couldn't understand where he's comin' from." CW did not feel that Bristow was going to cause bodily injury to him, but felt that Bristow was a threat to his property or dogs. After the police arrived, Bristow continued to yell, "Fuck you, [CW], I'm going to get you. Fuck you [CW's wife]," and Bristow "started all over again." The music played until the police entered Bristow's house.

CW's wife testified that, shortly after eleven in the evening, she awoke to what sounded like an argument, with Bristow yelling obscenities using CW's first name. Bristow's comments initially only involved CW's first name, but then she heard Bristow say "Fuck you, [CW's wife]" and she became certain Bristow was yelling at them. She then heard loud music with Bristow yelling over the music, "How do you like that, fucking

[CW]." The music was so loud that it almost made the windows rattle. She asked CW if he had had "any conversation" with Bristow; CW denied that he had spoken to Bristow. When Bristow stated that he would "get" CW, and seemed to be fixated on CW, she felt scared and called the police. CW's wife felt she and CW were in danger.

Bristow argues that the State failed to adduce sufficient evidence that CW reasonably believed that Bristow intended to cause bodily injury to CW or CW's wife or intended to cause damage to the CW's property. Bristow also contends the State failed to prove that he acted with the requisite mens rea to harass, annoy or alarm the CW. Bristow claims that he only acted recklessly because he was intoxicated. Bristow does not argue that his statements were not communications using offensively coarse language.

There was substantial evidence as to every material element of the offense of Harassment of sufficient quality and probative value to enable the trier of fact to reasonably conclude that Bristow was guilty of Harassment. Id.

It is undisputed Bristow repeatedly used "offensively coarse language" during this incident. The time of day, the proximity of the houses, the extended length of the shouting and blaring of very loud music, the offensive language and the content of the comments all support the intentional nature of Bristow's actions. "[T]he mind of an alleged offender may be read from his acts, conduct and inferences fairly drawn from all the circumstances." State v. Stocker, 90 Hawaiʻi 85, 92, 976 P.2d 399, 406 (1999) (citation omitted). Finally, this conduct, taken in the light most favorable to the prosecution, would support the finding that Bristow's comments would cause CW to reasonably believe that Bristow intended to cause bodily injury to CW's wife or his property. "And as trier of fact, the trial judge is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence." State v. Batson, 73 Haw. 236, 248-49, 831 P.2d 924, 931 (1992). Bristow's comments could have reasonably led CW to believe that Bristow intended to cause bodily injury to his wife after the CW

threatened "to take care of" and "to get" CW and then made offensive comments to CW's wife.

(2) Bristow has failed to establish that he preserved his argument that his comments were protected free speech under the United States Constitution or the Hawaii Constitution. A review of the record on appeal does not indicate that Bristow raised this issue below. Therefore, the point of error is waived. Hawaiʻi Rules of Appellate Procedure Rule 28(b)(4); Kernan v. Tanaka, 75 Haw. 1, 35, 856 P.2d 1207, 1224 (1993).

Therefore,

IT IS HEREBY ORDERED that the Notice of Entry of Judgment and/or Order, entered on December 12, 2014 by the District Court of the Third Circuit, Kona Division is affirmed.

DATED: Honolulu, Hawaiʻi, June 8, 2016.

On the briefs:

Taryn R. Tomasa,
Deputy Public Defender,
for Defendant-Appellant.

Presiding Judge

Jason R. Kwiat,
Deputy Prosecuting Attorney,
County of Hawaiʻi,
for Plaintiff-Appellee.

Associate Judge

Associate Judge