NO. CAAP-15-000958

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,
v.
CHAU LUONG, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(CASE NO. 1-DCC-15-0004331)

SUMMARY DISPOSITION ORDER
(By: Nakamura, Chief Judge, Reifurth and Ginoza, JJ.)

Defendant-Appellant Chau Luong (Luong) appeals from the Judgment and Notice of Entry of Judgment, filed on November 25, 2015, in the District Court of the First Circuit, Honolulu Division.[1]

Luong was convicted of Criminal Trespass in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 708-813(1)(c) (2014).[2]

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[1] The Honorable Michael Tanigawa presided.

[2] HRS § 708-813(1) states:

§ 708-813 Criminal trespass in the first degree. (1) A person commits the offense of criminal trespass in the first degree if:
(a) That person knowingly enters or remains unlawfully:
(i) In a dwelling; or
(ii) In or upon the premises of a hotel or apartment building;
(b) That person:
(i) Knowingly enters or remains unlawfully in or upon premises that are fenced or enclosed in a manner designed to exclude intruders; and

(continued...)

On appeal, Luong contends there was insufficient evidence that he acted with the requisite mens rea. Specifically, Luong contends that the State failed to establish that he "knowingly" entered or remained unlawfully on the property, as alleged in the charge against him.

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 Luong's point of error as follows and reverse.

Luong contends that because the Complaint and the oral charge read to him before trial alleged that he acted "knowingly," but the District Court found that he acted "recklessly," there was insufficient evidence to convict him. The Complaint alleged that Luong "did knowingly enter or remain unlawfully in or upon the premises of any noncollegiate academic school established and maintained by the Department of Education between 10:00 p.m. and 5:00 a.m., thereby committing the offense of Criminal Trespass in the First Degree[.]" The oral charge was materially similar.

The State recognizes that "[i]nexplicably, both the written and oral charge specified only 'knowing' as the state of mind[,]" even though no state of mind is specified in the statute and thus generally an intentional, knowing, or reckless state of mind is applicable under HRS § 702-204 (2014). The State thus concedes that "principles of due process and notice required the State to prove the case as it charged it, that is, that Defendant knowingly entered or remained unlawfully on school premises."

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[2](...continued)

(ii) Is in possession of a firearm, as defined in section 134-1, at the time of the intrusion; or

(c) That person enters or remains unlawfully in or upon the premises of any public school as defined in section 302A-101, or any private school, after reasonable warning or request to leave by school authorities or a police officer; provided however, such warning or request to leave shall be unnecessary between 10:00 p.m. and 5:00 a.m.

(Emphasis added.)

(Emphasis added.) The State further notes that "[t]here appears to be a legitimate question as to whether the [District Court] misapplied the applicable state of mind[,]" but asserts that there was sufficient evidence to establish that Luong acted with a knowing state of mind.

As the parties agree, unlike HRS § 708-813(1)(a) and (b), no state of mind is specified in HRS § 708-813(1)(c). "When the state of mind required to establish an element of an offense is not specified by the law, that element is established if, with respect thereto, a person acts intentionally, knowingly, or recklessly." HRS § 702-204. Thus, generally, a defendant may be convicted of Criminal Trespass in the First Degree, in violation of HRS § 708-813(1)(c), if the defendant acted intentionally, knowingly, or recklessly.

A charge should set forth the applicable state of mind to satisfy due process requirements. Schwartz v. State, 136 Hawaiʻi 258, 271-72, 361 P.3d 1161, 1174-75 (2015); State v. Nesmith, 127 Hawaiʻi 48, 52-54, 61, 276 P.3d 617, 621-23, 630 (2012). Here, although the written and oral charge only stated that the offense was committed "knowingly," and not "intentionally" and/or "recklessly," it was a valid charge because a person can be convicted of Criminal Trespass in the First Degree with a knowing state of mind. However, as the State concedes, it could not enlarge the charge during trial to encompass "recklessness" after specifying that Luong committed the crime "knowingly." See Nesmith, 127 Hawaiʻi at 52, 54, 276 P.3d at 621, 623 (recognizing that a charge must provide fair notice to the defendant of the nature and cause of the accusation).

During closing argument at trial, after the State initially argued that there is no state of mind required under HRS § 708-813(1)(c), the following discussion ensued:

> THE COURT: But you're not arguing that there's no intent element? You're just arguing that it's reckless?
>
> [DEPUTY PROSECUTOR]: Yes, Your Honor.

> THE COURT: Okay. And so what would -- what about his conduct made it reckless?

(Emphasis added.) The State and defense then provided further argument to the court, primarily regarding whether Luong's conduct was reckless. At one point, the District Court noted:

> THE COURT: . . . Certainly he had notice it was a school ––
>
> . . .
>
> THE COURT: –– a public school.
>
> [DEFENSE COUNSEL]: Yes. Yes.
>
> THE COURT: So it was reckless that he went on to a school since he had notice of that.
>
> [DEFENSE COUNSEL]: Yes.

The District Court then concluded as follows:

> THE COURT: All right. Okay. Thank you. Based upon the credible evidence, I find the officer testified credibly. It seems undisputed that he was on the premises of a school, a public school; that it was between ten and five -- 10:00 P.M. and 5:00 A.M.; that under those circumstances no warning or request to leave is necessary. Defense agrees that it was at least reckless, that he was – that he knew that it was a school, at least reckless disregard of the risk that it was a public school. Um, and therefore I find in favor of the State, find the defendant guilty as charged. Uh, sentencing.

Given this record, it appears that the District Court convicted Luong based on a finding that Luong acted with a "reckless" state of mind. However, because Luong was charged with "knowing" conduct in the Complaint and oral charge, a finding that he acted "recklessly" is insufficient to convict Luong as charged.

Moreover, based on our review of the evidence in the record, we conclude there is not sufficient evidence that Luong acted "knowingly," as charged, particularly that he knowingly entered or remained unlawfully on the property. There was testimony about some fencing around the school, but also that there are a lot of accessible areas that are open. Moreover, although there was general testimony about signs that say there is no trespassing, the evidence indicates the signs are only on the fences and there was no evidence whether there were any signs

in the area where Luong was located or where he may have entered the school. The State's argument before the District Court was essentially that the evidence showed it was dark at the school, there was no one else around, there was some fencing around the school and signs, and there were no indications that it was lawful to be on the school grounds. Even considering the evidence in a light most favorable to the State, as we must, we cannot say that there is sufficient evidence that Luong knowingly entered or remained unlawfully on the school property. Hence, we conclude that remanding this case for further proceedings is unwarranted.

Therefore,

IT IS HEREBY ORDERED that the Judgment and Notice of Entry of Judgment, filed on November 25, 2015 in the District Court of the First Circuit, Honolulu Division is reversed.

DATED: Honolulu, Hawaiʻi, November 22, 2016.

On the briefs:

Walter J. Rodby,
for Defendant-Appellant.

Chief Judge

Loren J. Thomas,
Deputy Prosecuting Attorney,
for Plaintiff-Appellee.

Associate Judge

Associate Judge