

Dissenting Opinion by Ginoza, C.J.

I respectfully dissent because in my opinion the evidence is sufficient to convict Defendant-Appellant Eduaro Prado, aka Era Prado (**Prado**) of the offense of Disorderly Conduct under Hawaii Revised Statutes (**HRS**) §§ 711-1101(1)(a) and (3) (2014).

**(1) Tumultuous behavior**

Prado was charged under HRS §§ 711-1101(1)(a) and (3), and the "Judgement and Notice of Entry of Judgment" (**Judgment**) reflects he was convicted under those provisions. The oral ruling by the District Court of the Third Circuit (**District Court**) indicates the District Court based its conviction of Prado in part on "tumultuous behavior," which is set forth in HRS § 711-1101(1)(a). However, as the majority notes, the District Court also appears to have based its ruling in part on a finding that Prado made "unreasonable noise," which is set forth in HRS §§ 711-1101(1)(b) and (2), which was not part of the charge against Prado.

My analysis is based solely on the charged offense under HRS §§ 711-1101(1)(a) and (3), and I do not rely on the District Court's findings related to unreasonable noise. State v. Nakanelua, 134 Hawai'i 489, 514 n.28, 345 P.3d 155, 180 n.28 (2015) (citing Strouss v. Simmons, 66 Haw. 32, 40, 657 P.2d 1004, 1010 (1982) ("An appellate court may affirm a judgment of the lower court on any ground in the record which supports affirmance.")).

"When reviewing the legal sufficiency of the evidence on appeal, the test is whether, 'viewing the evidence in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact.'" State v. Teale, 139 Hawai'i 351, 355, 390 P.3d 1238, 1242 (2017) (citations omitted).

In Teale, the Hawai'i Supreme Court examined the meaning of "tumultuous behavior" under HRS § 711-1101(1)(a), and held that:

"tumultuous behavior" is most appropriately defined as conduct involving violent agitation or extreme outbursts. This definition is consistent with the Commentary to [Model Penal Code] § 250.2 in that an analysis of whether a defendant's behavior was marked by extreme outbursts or violent agitation requires the trier of fact to focus upon what the defendant personally did, rather than how onlookers or observers reacted in response.

Id. at 357, 390 P.3d at 1244 (emphasis added).<sup>1</sup> The supreme court further noted, however, that:

the result or effect of the defendant's conduct upon members of the public may be significant when determining whether the defendant acted with the intent to physically inconvenience or alarm a member or members of the public or recklessly created a risk thereof, so as to satisfy the mens rea component of HRS § 711-1101(1)(a). The response of the public to the defendant's conduct may also be circumstantial evidence that the defendant's behavior was tumultuous; however, its effect may not make behavior criminal merely because others may create disorder in response.

Id. at 357 n.16, 390 P.3d at 1244 n.16 (citation omitted).

In the instant case, the evidence shows that Prado entered the public lobby area of the office for the County of Hawai'i Mayor and began to yell loudly and assertively, at a

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<sup>1</sup> The Hawai'i Supreme Court also explained that "the term 'tumultuous' should be defined by consideration of behavior which is of a similar gravity to 'fighting, threatening, . . . or violent' conduct." Id. at 359, 390 P.3d at 1246.

volume significantly louder than was normal for an office setting, that he repeatedly pounded on the front desk in the lobby area of the office with his fist, that he was yelling so loudly that people in other areas of the office could hear him, and that several employees of the Mayor's office were alarmed or frightened by Prado's conduct.

Four employees of the Mayor's office testified about the incident. Dennis Kauka, Jr. (**Kauka**) testified that at the time of the incident, he worked at the "front desk" in the waiting area of the Mayor's office, which was "five to ten feet away" from the public unlocked main entrance. Kauka stated that Prado was "[l]oudly and assertively" "yelling to see the Mayor" in a manner "[s]ignificantly louder" than that of other people who visit the office. Kauka further testified that he was alarmed "[b]ecause [Prado] was not calm." Kauka stated that Prado's behavior, which lasted "[a]pproximately 20 to 25 minutes," included Prado yelling after being asked to calm down, pounding the front desk with a closed fist "a few more" times after being asked to calm down, continuing to "pace back and forth[,] " and shouting that he was "going to come in there" while pointing towards an area behind a counter where Kauka sits.

Kaycie Saiki (**Saiki**) testified that on the date of the incident she "heard yelling coming from the front of the entrance, the reception area." She described Prado as "[s]creaming[,] " "making a lot of sounds just huffing and puffing and like hyperventilating[,] " and "pounding his fists on the

counter[.]" Saiki also testified that she could hear Prado's yelling from "another separate office. . . . [T]otally on the other side of a wall." Saiki further testified that Prado's pounding on the counter with his fists and loudly yelling led her to believe he may be hostile, and that she was frightened he might physically harm her.

Martha Rodillas (**Rodillas**) testified that at the time of the incident, she was in her office, which is separated from the waiting area by "a wall and two doors" over a span of "[m]aybe 40 feet." Rodillas stated that she was sitting at her desk and "heard a loud noise coming from the front office. Pounding on the desk. A loud male voice yelling and demanding to see the Mayor and not to call the police." Rodillas testified that she was "very alarmed" by Prado, who was "hyperventilating. Couldn't speak clearly, stumbling on words, stuttering a lot, seemed out of control, and just not himself[,]" "yelling[,]" and "[p]ounding on the reception desk." Rodillas further testified that Prado's conduct was loud enough that people "in the lobby and in the office" could hear.

Wilfred Okabe (**Okabe**) testified that at the time of the incident, he was in his office, which is separated from the waiting area by two doors over a span of approximately fifteen feet. Okabe stated that Prado kept yelling after he asked Prado to calm down two or three times and Prado pounded his fist on the desk several times thereafter. Okabe testified that he was "concerned for the staff that were there" and that Prado's

"escalating" behavior "could have turned into a more -- a confrontation."

Given the evidence in this case, there was sufficient evidence of tumultuous behavior by Prado.

**(2) Members of the public.**

I also conclude that the evidence is sufficient to show that Prado intended "to cause physical inconvenience or alarm by a member or members of the public, or recklessly creat[ed] a risk thereof[.]" HRS § 711-1101(1). Prado's tumultuous behavior was initially addressed toward Kauka, but was violent and extreme enough that it shows an intent to cause physical inconvenience or alarm by other people who were in that office, whether they were employees or not, or recklessly created the risk thereof. In my view, the circumstances in this case are distinguishable from State v. Leung, 79 Hawai'i 538, 904 P.2d 552 (1995), where the defendant was charged with making unreasonable noise under HRS § 711-1101(1)(b), aimed his conduct toward a theater manager and a police officer, and where it was determined that there was no evidence that the defendant caused physical inconvenience to any member of the public or that the public was alarmed. 79 Hawai'i at 540, 544, 904 P.2d at 554, 558.

Thus, I conclude that the employees of the Mayor's office who were physically inconvenienced or alarmed by Prado's conduct were "members of the public" for purposes of the offense under HRS § 711-1101(1)(a).

**(3) Petty Misdemeanor**

Finally, based on the evidence in the record, Prado persisted in his tumultuous behavior after he was requested by Kauka and Okabe to stop. Kauka asked Prado to calm down, but Prado continued to yell and pounded the desk a few more times. Okabe testified that he asked Prado to calm down and stop yelling at least two or three times, but that Prado kept yelling and pounding the desk several times with a closed fist.

Given the record, there was sufficient evidence to convict Prado of a petty misdemeanor under HRS § 711-1101(3).

Therefore, I respectfully dissent and would affirm Prado's conviction for the reasons set forth above.

*Jim M. King*