IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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IN THE INTEREST OF DM

SCWC-20-0000485

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-20-0000485; FC-J NO. 0101376)

MARCH 15, 2023

DISSENTING OPINION BY NAKAYAMA, J.,
WITH WHOM RECKTENWALD, C.J., JOINS

I. INTRODUCTION

In the early morning of June 2, 2019, there was a fight between DM and CW at Hau Bush. The initial fight between DM and CW was broken up by multiple witnesses. Then, DM retrieved a knife from his cousin's car. DM exited the car, brandished the knife, and yelled "who like get stabbed," inflaming CW. At this point, other people at the scene were restraining CW and trying to calm him down. CW broke out from being held back, charged at, and tackled DM. DM stabbed CW as he was being tackled to the ground by CW.

I disagree with the majority's conclusion that substantial evidence does not support DM's adjudication.[1] I also depart from the majority's determination that the family court's self-defense analysis was erroneous. The family court adequately assessed the circumstances from DM's perspective and properly did not apply the "multiple attackers" circumstance. Accordingly, I respectfully dissent.

II. DISCUSSION

A. The family court's Finding of Fact regarding the existence of two altercations is not clearly erroneous.

My disagreement with the majority's analysis stems in part from our differing views of the factual circumstances in this case. The majority concludes that "there were not separate fights between DM and CW. Rather, there was one continuous violent event between DM and CW." I disagree.

The family court's pertinent Findings of Fact (FOF) are:

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[1] Elaborating on the substantial evidence standard in self-defense cases, this court has provided:

> [E]vidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

State v. Matuu, 144 Hawaiʻi 510, 517, 445 P.3d 91, 98 (2019) (quoting State v. Richie, 88 Hawaiʻi 19, 33, 960 P.2d 1227, 1241 (1998)) (brackets in original) (emphasis added).

> 11. [CW] further admitted that he started the fight with [DM], and that he threw the first punch. He stated that others were trying to break it up. [CW] stated that he was trying to get back at [DM], and that at some point the altercation stopped. The Court found this testimony credible.
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> 12. [CW] stated that [DM] went to a vehicle, went inside the vehicle, got a knife, and that [DM] stated "who like get stabbed." [CW] the [sic] immediately approached [DM] again. The Court found this testimony credible.[2]
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> 13. [CW] was stabbed during this second altercation with [DM], and he sustained a stab wound to the area of his left abdomen by [DM], with the knife that [DM] had procured from the vehicle.
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> . . . .
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> 22. The first altercation was partially broken up when [HZC] stepped in between and attempted to break up the fight, which then continued somewhat as a second altercation that the Court views as a continued part of the first altercation.
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> 23. After the fight was broken up, it was at that point that [DM] went over to a vehicle, the Nissan Altima that his cousin had driven him to Hau Bush in. [DM] retrieved a knife that he used for work. Upon retrieving the knife, [DM] exited the vehicle, and yelled out "who like get stabbed."
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> 24. At that point, the Court finds that other people were attempting to calm [CW] down, but they were unsuccessful.
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> 25. The Court finds that [CW] charged at [DM] while [DM] was holding the knife.
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> . . . .
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> 29. After the second altercation, when [DM] extricated himself from the situation, [DM] went to the vehicle, obtained a knife from the vehicle, came back out of the vehicle with the knife, and stated "who like get stabbed." At that point, [CW] charged at [DM].

"[A] trial court's findings of fact are subject to the clearly erroneous standard of review. A finding of fact is

[2] The underlined FOFs are the portions that DM specifically challenged before the ICA.

clearly erroneous when, despite evidence to support the finding, the appellate court is left with a definite and firm conviction that a mistake has been committed." State v. Rapozo, 123 Hawaiʻi 329, 336, 235 P.3d 325, 332 (2010) (quoting State v. Gabalis, 83 Hawaiʻi 40, 46, 924 P.2d 534, 540 (1996)).

Here, after considering the weight and credibility of the evidence, the family court determined that "the altercation stopped" and "the fight was broken up." Thereafter, the family court found a second altercation took place, resulting in DM stabbing CW. Contrary to the majority's conclusion, the following testimony demonstrates that substantial evidence in the record supports the family court's finding of two altercations.

First, CW testified that he had "two rounds" of fighting with DM. Second, a witness, HZC, testified that he "tried to stop" and "broke up" the first fight. HZC explained "a couple people [were] holding [DM and CW] back and then I was in the middle pushing [DM and CW] away. And then I grabbed [DM] and walked away with [DM], and then I thought it was cool." HZC reiterated that he "broke up" the initial fight between DM and CW and HZC believed DM and CW "were cooling down." Third, another witness, EO, testified that people broke up the first fight. EO explained that people were yelling at CW and "telling him to calm down." Fourth, another witness, KJ, similarly

testified that DM and CW were separated, at which point she heard DM say "you like get shanked," which prompted CW to run ten to thirty seconds to get to and tackle DM.

All this testimony supports the family court's finding of two altercations. In light of this evidence, the family court's finding is not clearly erroneous.

B. The ICA correctly concluded that the family court appropriately analyzed self-defense.

1. The family court appropriately analyzed DM's subjective belief that force was necessary.

The majority asserts that "the defendant's subjective belief drives an objective reasonableness standard" in self-defense cases. While it is true that self-defense "depends on the actor's belief that the use of force was necessary . . . to protect oneself," it must fall to the trier of fact to "determine whether the defendant did in fact subjectively believe the use of force was necessary." State v. Lealao, 126 Hawaiʻi 460, 470, 272 P.3d 1227, 1237 (2012) (citing State v. Walsh, 125 Hawaiʻi 271, 299, 260 P.3d 350, 378 (2011)). A defendant's credibility is central to this inquiry, and the trier of fact is not required to simply believe DM at his word. See id. Rather, the trier of fact must make its own determination based on the weight of the evidence "whether the defendant was truthful about his subjective belief of the circumstances." Walsh, 125 Hawaiʻi at 299, 260 P.3d at 378.

This court has noted that the prosecution disproves a self-defense claim beyond a reasonable doubt "when the trier of fact believes [the prosecution's] case and disbelieves the defense." In re Doe, 107 Hawaiʻi 12, 19, 108 P.3d 966, 978 (2005) (quoting State v. Pavao, 81 Hawaiʻi 142, 146, 913 P.2d 553, 557) (App. 1996)). Such is the case here, where the family court made credibility determinations and findings of fact and ultimately ruled that the State had met its burden in disproving DM's self-defense argument. This court should "not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the [trier of fact]." State v. Jenkins, 93 Hawaiʻi 87, 101, 997 P.2d 13, 27 (2000) (quoting State v. Buch, 83 Hawaiʻi 308, 321, 926 P.2d 599, 612 (1996)) (brackets in original).

2. The family court's Findings of Fact were sufficient to consider DM's perspective.

On certiorari, DM specifically contends that the following facts were "supported by the evidence but absent from the Family Court's FOFs" and "were critical to consideration of the subjective prong:"

> 4. After [DM] came out of the car with the knife and stated, "Who like get stabbed?" the other boys approaching [DM] with [CW] backed off.
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> 6. The vast majority of people at the Hau Bush party were from ʻEwa Beach, and [DM] was the only individual from Kalihi.

> 7. [DM]'s only ally was his cousin, who was not in the immediate area of the first and second altercations between [CW] and [DM], and was apparently unaware of the fight.

However, a "trial judge is required to only make brief, definite, pertinent findings and conclusions upon contested matters; there is no necessity for over-elaboration of detail or particularization of facts." State v. Ramos-Saunders, 135 Hawaiʻi 299, 304-05, 349 P.3d 406, 411-12 (App. 2015) (quoting Rezentes v. Rezentes, 88 Hawaiʻi 200, 203, 965 P.2d 133, 136 (App. 1998)). The family court was therefore not required to specifically state all of the potentially relevant facts in the FOFs in order to properly consider the subjective prong of DM's self-defense claim. Although the family court did not state certain potential facts in the FOFs, this does not mean that the family court did not consider DM's testimony. Thus, the omission of certain details from the FOFs did not render the FOFs clearly erroneous.

Moreover, I disagree with the majority's conclusion "that the family court inadequately considered DM's perspective" because the family court "found that DM's subjective belief was objectively unreasonable without appraising DM's point of view." As discussed above, the family court was not required to exhaustively lay out DM's subjective beliefs. Nevertheless, the following FOFs demonstrate that the family court considered DM's point of view. In FOF 41, the family court states "[DM] may

have subjectively believed that such deadly force was necessary." Other FOFs demonstrate why DM may have believed deadly force was necessary. For example, FOF 15 states HZC testified "there were other people in the area that were hitting each other, and that it was chaotic at the scene." FOF 18 found the initial confrontation between DM and CW was started by CW, and that CW was intoxicated on the night of the incident. FOF 20 details that CW responded "fuck Kalihi" after DM stated he was from Kalihi. FOF 36 states: "[DM] claimed he was assaulted not only by the complaining witness but that somebody else had struck him . . . ." Taken together, the FOFs indicate the family court appraised DM's point of view.

3. The family court properly applied the use of deadly force standard.

The majority argues that the family court erred when it ruled that "retrieving the weapon from the vehicle, coming out of the vehicle with the weapon, making the threatening statement and ultimately using the weapon does constitute deadly force." According to the majority, "DM used deadly force at the moment he stabbed CW. Not before." By this logic, "DM could produce his knife and threaten the crowd without those actions constituting deadly force."

Under the Hawaiʻi Penal Code, "[a] threat to cause death or serious bodily injury, by the production of a weapon or

otherwise, so long as the actor's intent is limited to creating an apprehension that the actor will use deadly force if necessary, does not constitute deadly force." Hawai'i Revised Statutes (HRS) § 703-300 (2014) (emphasis added). This section of the code was adopted nearly verbatim from the Model Penal Code (MPC) section 3.11(2).[3] In cases where defendants have brandished a weapon as a form of threat, courts interpreting this provision of the MPC have held that the trier of fact "must determine whether the defendant intended to use the weapon in a deadly manner." See, e.g., Commonwealth v. Cataldo, 668 N.E.2d 762, 765 (Mass. 1996) ("[T]he question of whether a weapon is dangerous as used is always one for the fact finder.") (brackets in original) (citations omitted). Placing this determination of intent within the discretion of the trier of fact mitigates the potential for unnecessary escalation.[4]

Here, the majority gives DM the benefit of the doubt that, when he retrieved the knife and used it to threaten the crowd, he only intended to create an apprehension that he would

[3] MPC § 3.11(2) (1985) provides, in part: "A threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force."

[4] The Massachusetts Supreme Judicial Court explained, "[a]llowing the jury to determine whether a defendant's use of a dangerous weapon in a manner not likely to cause death or great bodily harm constitutes deadly force protects those defending themselves from violence, avoids unnecessary escalation of force, and preserves the vital role of the jury in fact-finding." Cataldo, 668 N.E.2d at 766.

use deadly force. However, the evidence of intent, including DM's words "[w]ho like get stabbed?" and the fact that DM did stab CW with the knife, could lead a reasonable fact finder to conclude that the entire sequence of events from when DM retrieved the knife to DM's use of the knife constituted deadly force. Considering the evidence in the light most favorable to the prosecution, there was substantial evidence for the fact finder's decision.

4. The majority does not adequately consider the objective prong of the self-defense analysis.

I believe the majority's analysis gives insufficient consideration to the objective prong of the self-defense analysis. "Self-defense to a criminal charge contains both a subjective prong and an objective prong: the defendant must believe that force is necessary, and that belief must be reasonable." State v. Sandoval, 139 Hawaiʻi 221, 237, 487 P.3d 308, 324 (2001) (citing State v. Augustin, 101 Hawaiʻi 127, 128, 63 P.3d 1097, 1098 (2002)) (emphasis added).

> The test for assessing a defendant's self-protection justification pursuant to HRS § 703-304 (2014) involves two prongs because HRS § 703-300 (2014) defines "believes" as "reasonably believes":
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> "The first prong is subjective; it requires a determination of whether the defendant had the requisite belief that deadly force was necessary to avert death, serious bodily injury, kidnapping, rape, or forcible sodomy.
>
> . . . .
>
> If the State does not prove beyond a reasonable doubt that the defendant did not have the requisite belief that deadly

> force was necessary, the factfinder must then proceed to the second prong of the test. This prong is objective; it requires a determination of whether a reasonably prudent person in the same situation as the defendant would have believed that deadly force was necessary for self-protection."

State v. Matuu, 144 Hawai'i 510, 520-21, 445 P.3d 91, 101-02 (2019) (quoting State v. Culkin, 97 Hawai'i 206, 215, 35 P.3d 233, 242 (2001) (footnote omitted).

Therefore, even assuming DM subjectively believed deadly force was necessary to avert serious bodily injury, the family court correctly determined the second prong of the test was not met: a reasonably prudent person in DM's situation would not have believed deadly force was necessary for self-protection. Given that the family court correctly found that the first altercation between DM and CW had stopped, the family court properly determined that DM's use of deadly force was not "objectively reasonable under the circumstances of this case, beginning and culminating with getting the knife from the vehicle, coming out of the vehicle instead of staying in the vehicle, making a threatening statement and ultimately resulting in [DM] stabbing [CW]."

Taking into consideration the factual circumstances as the family court found them to be - the first fight, which involved no weapons, had ended; DM was able to remove himself from the fight and enter his cousin's car - DM's subsequent use of deadly force (resulting in DM stabbing CW) was not

objectively reasonable. In other words, I agree with the ICA's conclusion that

> a reasonably prudent person would not conclude, after the fight was broken up, that it was reasonable to go to the vehicle, retrieve a knife, yell out "who like get stabbed," and then stab CW when CW charged [DM]. There is no evidence that CW had any weapons. Although [DM] understandably would be upset by CW having initiated a fight with [DM], [DM] acted in an objectively unreasonable manner by escalating the situation, after the fight was broken up.

(Emphasis added.) Because a reasonably prudent person in the same situation as DM would not have believed that deadly force was necessary to protect himself against serious bodily injury, DM's use of force was not justifiable. See HRS § 703-304(2); see also Matuu, 144 Hawai'i at 521, 445 P.3d at 102 ("[E]ven assuming Matuu had the requisite belief that his use of force was necessary (prong 1), there was substantial evidence in the record to support a finding that a reasonably prudent person in the same situation as Matuu would not have believed that the force exercised by Matuu was immediately necessary for self-protection (prong 2).").

Because DM's use of deadly force was not justifiable under HRS § 703-304(2), it is unnecessary to determine whether this use of deadly force is also not justifiable under HRS § 703-304(5).[5] However, I agree with the ICA that the family

[5] On certiorari, DM relies on Matter of Y.K., 663 N.E.2d 313 (N.Y. 1996), in support of his argument that he did not have a duty to retreat. Matter of Y.K. provides:

court implicitly determined that DM subjectively knew he could avoid the use of deadly force.[6] As the ICA pointed out,

> when [DM] went to his cousin's vehicle to retrieve the knife, the fight was broken up. Although [DM] testified he did not have the keys to his cousin's vehicle, the doors were open, [DM] had his phone with him and his cousin was "somewhere around" the area but [DM] did not attempt to call his cousin. There is no indication that [DM] was chased to his cousin's vehicle and nothing prevented [DM] from remaining in the vehicle and calling his cousin so they could leave the area. Therefore, the record supports the Family Court's ruling that [DM]'s use of deadly force was not justified under HRS § 703-304(5)(b).

(Emphasis added; footnote omitted.) Therefore, I disagree with the majority's contention that the family court misapplied the

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> If the case involves the use of deadly physical force and the fact finder determines that the use of such force was subjectively and objectively reasonable under the circumstances, then the fact finder must determine whether defendant could retreat with safety. If a defendant confronted with deadly physical force knows retreat can be made with complete safety and fails to do so, the defense is lost.

663 N.E.2d at 315 (emphasis added). DM's reliance on Matter of Y.K. is misplaced because the fact finder here determined that DM's use of deadly force was not subjectively and objectively reasonable. Thus, the family court was not required to determine if DM could retreat with safety.

[6] The ICA noted that the family court considered DM's subjective knowledge in FOF 37 and COL 12, which provide:

> [FOF] 37. The Minor could have gone to the vehicle and instead of getting the knife could have extricated himself from the situation if he stayed in the vehicle or he could have left the area but **chose** not to do so.
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> [COL] 12. "The use of deadly force is not justifiable . . . if . . . [t]he actor knows that he can avoid the necessity of using such force with complete safety by retreating[.]" HRS § 703-304(5). Minor left the area to obtain a weapon, the knife, from a vehicle and returned and stated "who like get stabbed." The confrontation was broken up, but Minor **chose** to return with the weapon, ultimately stabbing [CW]. Minor could have waited in the vehicle or left the area with complete safety.

duty to retreat by giving "no consideration to whether DM knew he could retreat with complete safety." To the contrary, DM's actions immediately prior to the act of stabbing CW are relevant to DM's knowledge "in regard to avoiding the necessity of using force." State v. Mark, 123 Hawaiʻi 205, 226, 231 P.3d 478, 499 (2010); but see Majority at 11. Unlike the cases cited by the majority, DM demonstrated his awareness of his ability to retreat with complete safety by actually doing so. DM's retreat to his cousin's car while the fight was broken up is circumstantial evidence of DM's subjective knowledge of his ability to retreat with complete safety. See State v. Murphy, 59 Haw. 1, 19, 575 P.2d 448, 460 (1978) (citations omitted) ("[A] criminal case may be proven beyond a reasonable doubt on the basis of reasonable inferences drawn from circumstantial evidence.").

5. The family court properly did not apply the "multiple attacker" circumstance.

The majority concludes that the family court improperly failed to consider DM's belief that deadly force was necessary to protect himself from multiple attackers. However, the family court did not err because the "multiple attacker" circumstance is not applicable.

Citing to State v. DeLeon, 143 Hawaiʻi 208, 426 P.3d 432 (2018), DM contends that his use of deadly force was

justified because he faced multiple attackers. In DeLeon, defendant was charged with Murder in the Second Degree after a confrontation with several people led to the defendant shooting a victim. 143 Hawaiʻi at 209-10, 426 P.3d at 433-34. At issue was whether the criminal histories of two others involved in the confrontation were erroneously excluded when a dispute existed over who was the initial aggressor. Id. at 213, 426 P.3d at 437. This court stated:

> Generally, self-defense using deadly force is not a lawful action to stop a simple assault, and thus, there is no dispute as to who was the first aggressor. See HRS § 703-304(2) (use of deadly force is justifiable if the actor believes that deadly force is necessary to protect himself against death, serious bodily injury, kidnapping, rape, or forcible sodomy); cf. State v. Pearson, 288 N.C. 34, 40, 215 S.E.2d 598, 603 (N.C. 1975) (exception to general rule where "there is a great disparity in strength between the defendant and the assailant, or where the defendant is attacked by more than one assailant.")

Id. at 218, 426 P.3d at 442. This court noted that the defendant "used deadly force on an unarmed attacker," but "there is a factual dispute as to whether [the defendant] was being attacked by multiple assailants, which is an exception to the general rule that a claim of self-defense fails when deadly force is used to stop a simple assault." Id. at 218, 426 P.3d at 442.

However, substantial evidence demonstrates that DM was not being approached by multiple attackers when he used deadly force. CW was the only person who charged DM when DM was holding the knife, and the other people there were trying to

prevent CW from doing so. Thus, DM's reliance on DeLeon is misplaced and the "multiple attacker" circumstance is not applicable in this case.

III. CONCLUSION

For the foregoing reasons, I would affirm the ICA's Judgment on Appeal, which affirmed the family court's Order Re: Motion for Reconsideration of Order Adjudicating Minor of Attempted Assault in the First Degree and Restitution Filed October 29, 2019, and the Findings of Fact and Conclusions of Law entered by the family court on July 24, 2020.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama