NO. 22725

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
EDDIE T. KAUPE, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT,
WAILUKU DIVISION
(CASE NOS. CT1-3 OF 7/21/99)

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

Defendant-Appellant Eddie T. Kaupe (Kaupe) appeals the July 21, 1999, district court judgment. Kaupe was found guilty of Simple Trespass[1] (Hawaiʻi Revised Statutes (HRS) § 708-815 (1993)), Harassment (HRS § 711-1106(1)(a) (Supp. 2000)), and Terroristic Threatening in the Second Degree (HRS § 707-717(1) (1993)). Kaupe was sentenced as follows: a $250.00 fine for Simple Trespass; six months of probation, substance abuse evaluation, 30 days of jail, and a $25.00 fee for Harassment; and one year of probation, substance abuse evaluation, 30 days of jail, and a $50.00 fee for Terroristic Threatening in the Second Degree -- all sentences to run concurrently.

[1] Kaupe was charged with Criminal Trespass in the Second Degree (HRS § 708-814(1)(b) (Supp. 2000)), but was found guilty of the included offense of Simple Trespass.

Kaupe contends the district court erred in convicting him of Harassment without substantial evidence of intent, of Terroristic Threatening in the Second Degree because his statement was not a true threat, and of Simple Trespass without substantial evidence that he knowingly remained unlawfully on the premises. Kaupe also contends that his terroristic threatening conviction must be vacated because the district court failed to obtain a knowing, intelligent, and voluntary waiver from him of his right to a jury trial. We disagree and affirm the July 21, 1999, district court judgment.

I. BACKGROUND

Lorraine Koyonagi (Koyonagi), one of the State's witnesses, was employed as a waitress at the Ale House in Kahului, Maui, on September 22, 1998. Koyonagi testified that as she was at a computer punching in an order for one of her tables, she turned around and saw Kaupe approach her from the opposite direction. Kaupe touched Koyonagi's front "bottom crotch part" and said, "hey, what's up." Koyonagi responded, "what are you doing, don't do that." Koyonagi went back to her computer, and Kaupe went into the bathroom. When he exited the bathroom, Kaupe returned to Koyonagi and touched her on her buttocks. Over Koyonagi's expressed protest, Kaupe went on to touch Koyonagi a third time. After this touching, Koyonagi went to the manager

and told the manager about the incidents. Koyonagi did not know Kaupe and did not give him permission to touch her.

Henry Stant (Stant), also a State's witness, testified that he was employed and working at the Ale House on the evening of September 22, 1998. Stant testified that his duties were to check identification and keep people from becoming disorderly in the restaurant and bar. According to Stant, the manager of the Ale House told Stant, "Henry, we have a problem, there's somebody in the bar, I've already spoken to him, I've asked him to leave, he refuses to leave, he slapped one of our waitresses repeatedly, I've asked him to stop, he won't stop, this guy's being belligerent, we got to cut him off, we got to get him out of the room[.]" Stant then approached this person, who turned out to be Kaupe. Stant identified himself to Kaupe: "hey, bruddah, I work for the bar." Stant was wearing an Ale House hat and a bright white Ale House t-shirt. Stant told Kaupe that the manager had already asked Kaupe to leave the premises, so Kaupe had to go. Stant testified Kaupe's response was that "he didn't do anything wrong, that he works for the government, that he's a prison guard, that he puts people in jail, that I have no right to talk to him like this[.]"

Stant testified that Kaupe refused to leave until he finished his beer. Stant picked up Kaupe's beer, took it to the end of the bar, and asked Kaupe to follow him. Kaupe would not

get up or leave; he remained seated at a table with several of his friends. Stant gave Kaupe's beer to the bartender, went over and sat down with Kaupe, and told him that the police had been called. Kaupe told Stant, "fuck you, I'm not leaving, if you want, drag me out of the bar." Kaupe became more agitated while waiting for the police and, at one point, said, "I got to kill this guy." Stant believed Kaupe was referring to him because the only other people at Kaupe's table were Kaupe's friends. Kaupe then challenged Stant to a fight, saying, "come on, right now, let's go, me and you, right now." Stant and Kaupe walked to the exit at the back of the bar. When Kaupe stepped out of the back door, Stant closed the door behind him. Stant then walked toward the front door of the establishment and could see Kaupe running toward the front door. As Stant opened up the front door, a police car drove up and Kaupe "raised his hands, walked calmly to the street and said, 'I didn't do anything.'"

Kaupe was charged with Harassment, Criminal Trespass in the Second Degree, and Terroristic Threatening in the Second Degree. Kaupe waived his right to a jury trial, and a bench trial was held on July 21, 1999. The trial court found Kaupe guilty of Harassment, Terroristic Threatening in the Second Degree, and Simple Trespass (an included offense of Criminal Trespass in the Second Degree).

II. STANDARDS OF REVIEW

A. Sufficiency of the Evidence

We review the sufficiency of evidence on appeal as follows:

> [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.
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> State v. Quitoq, 85 Hawai'i 128, 145, 938 P.2d 559, 576 (1997) (quoting State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996)) (emphasis omitted). "'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Eastman, 81 Hawai'i at 135, 913 P.2d at 61.

State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998).

B. Findings of Fact

We review the district court's findings of fact in a pretrial ruling according to the following standard:

> Appellate review of factual determinations made by the trial court deciding pretrial motions in a criminal case is governed by the clearly erroneous standard. A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made.

State v. Wilson, 92 Hawai'i 45, 48, 987 P.2d 268, 271 (1999) (quoting State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995)).

C. Conclusions of Law

We review conclusions of law under the right/wrong standard. Wilson, 92 Hawai‘i at 48, 987 P.2d at 271.

D. Constitutionally Protected Free Speech

> Whether speech is protected by the first amendment to the United States Constitution, as applied to the states through the due process clause of the fourteenth amendment, is a question of law which is freely reviewable on appeal. The same proposition holds true with respect to article I, section 4 of the Hawai‘i Constitution (1978). Correlatively, "our customary deference to the trial court upon essentially a factual question is qualified by our duty to review the evidence ourselves in cases involving a possible infringement upon the constitutional right of free expression."

In re John Doe, 76 Hawai‘i 85, 93-94, 869 P.2d 1304, 1312-13 (1994) (internal quotation marks, citations, footnotes, and brackets omitted).

E. Jury Waiver

The adequacy of a jury waiver is a mixed question of fact and law, which a court of appeals reviews de novo. United States v. Duarte-Higareda, 113 F.3d 1000, 1002 (9th Cir. 1997). "[W]here it appears from the record that a defendant has waived a constitutional right, the defendant carries the burden of proof to show otherwise by a preponderance of the evidence." State v. Ibuos, 75 Haw. 118, 121, 857 P.2d 576, 578 (1993).

III. DISCUSSION

A. There Was Substantial Evidence to Prove Kaupe Intended to Harass, Annoy or Alarm.

Kaupe contends there was not substantial evidence to show he intended to harass, annoy, or alarm Koyonagi as required under HRS § 711-1106(1)(a).[2] In State v. Sadino, 64 Haw. 427, 642 P.2d 534 (1982), the Hawai'i Supreme Court held:

> [S]ince intent can rarely be proved by direct evidence, proof by circumstantial evidence and reasonable inferences arising from circumstances surrounding the act is sufficient to establish the requisite intent. Thus, the mind of an alleged offender may be read from his acts, conduct and inferences fairly drawn from all the circumstances.

Id. at 430, 642 P.2d 536-37 (citations omitted).

Kaupe and Koyonagi were strangers. Kaupe touched Koyonagi's "bottom crotch part" and was told by Koyonagi not to do that. After being specifically told not to touch her, Kaupe nevertheless went ahead and touched Koyonagi's buttocks. Kaupe didn't stop at the second touching, but went on to touch Koyonagi a third time. Although Kaupe claims he was merely attempting to greet and introduce himself to Koyonagi, the district court found that Kaupe touched Koyonagi with the intent to "harass, annoy or

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[2] HRS § 711-1106(1)(a) defines Harassment as follows:

> **§711-1106 Harassment.** (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:
>
> (a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]

alarm her" and that the touching was offensive to Koyonagi. The district court found Koyonagi's testimony to be credible.

There was substantial evidence on the record that Kaupe's "acts, conduct, and inferences fairly drawn from all the circumstances" showed he intended to harass, annoy, or alarm Koyonagi by touching her in an offense manner.

B. There Was Substantial Evidence that Kaupe Committed the Offense of Terroristic Threatening in the Second Degree.

Kaupe contends there was not substantial evidence that he committed Terroristic Threatening in the Second Degree; namely, that his threat did not constitute a "true threat."

Terroristic Threatening is defined, in relevant part, under HRS § 707-715 (1993), as follows:

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

Hawai‘i Revised Statutes § 707-717(1) defines Terroristic Threatening in the Second Degree as follows:

> **§707-717 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.[3]

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[3] HRS § 707-716 (1993) defines Terroristic Threatening in the First Degree as follows:

> **§707-716 Terroristic threatening in the first degree.** (1) A person commits the offense of terroristic threatening in the first

Kaupe cites to State v. Chung, 75 Haw. 398, 862 P.2d 1063 (1993), in support of the proposition that the threat "I got to kill this guy" does not possess the attributes of a "true threat" and, as such, is constitutionally protected free speech under the first amendment. Chung addressed terroristic threatening and whether a threat is a true threat or protected speech. Chung set forth the following standard for determining what constitutes a "true threat":

> [P]roof of a "true threat" . . . focus[es] on threats which are so unambiguous and have such immediacy that they convincingly express an intention of being carried out. . . .
>
> . . . So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied.

Id. at 416-17, 862 P.2d at 1073 (emphasis in original) (quoting United States v. Kelner, 534 F.2d 1020, 1026-27 (2d Cir. 1976)).

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degree if the person commits terroristic threatening:

(a) By threatening another person on more than one occasion for the same or a similar purpose; or

(b) By threats made in a common scheme against different persons; or

(c) Against a public servant, including but not limited to an educational worker, who for the purposes of this section shall mean an administrator, specialist, counselor, teacher, or other employee of the department of education, or a volunteer as defined by section 90-1, in a school program, activity, or function that is established, sanctioned, or approved by the department of education, or a person hired by the department of education on a contractual basis and engaged in carrying out an educational function; or

(d) With the use of a dangerous instrument.

(2) Terroristic threatening in the first degree is a class C felony.

With Stant standing or sitting at Kaupe's table, Kaupe stated "I got to kill this guy" to his friends so that Stant could hear. The district court found that this threat was directed at Stant. Soon thereafter, Kaupe challenged Stant to a fight. The district court found Stant a credible witness and held that Kaupe did threaten Stant "with bodily injury and that he was going to kill him." There was substantial evidence that the threat to "kill" on its face, coupled with the circumstances (Kaupe's challenge to fight Stant), rendered the threat unambiguous, unconditional, immediate, specific, imminent -- in short, a true threat.

C. There Was Substantial Evidence that Kaupe Committed Simple Trespass.

Kaupe contends there was no substantial evidence to prove he committed Simple Trespass. Specifically, Kaupe asserts there was not the requisite proof that he knowingly remained unlawfully on the premises.

Simple Trespass is defined under HRS § 708-815 as:

> **§708-815 Simple trespass.** (1) A person commits the offense of simple trespass if the person knowingly enters or remains unlawfully in or upon premises.
> (2) Simple trespass is a violation.

To enter or remain unlawfully has been defined under HRS § 708-800 (1993), in relevant part, as follows:

> **§708-800 Definitions of terms in this chapter.**
> . . . .
> "Enter or remain unlawfully." A person "enters or remains unlawfully" in or upon premises when the person is not licensed, invited, or otherwise privileged to do so. A person who, regardless of the person's intent, enters or

> remains in or upon premises which are at the time open to the public does so with license and privilege unless the person defies a lawful order not to enter or remain, personally communicated to the person by the owner of the premises or some other authorized person.

Stant testified that the manager of the Ale House, clearly someone with authority to expel a person from the bar, had personally communicated to Kaupe a direct request that he exit the premises:

> [M]y manager at the time . . . came up to me and said, Henry, we have a problem, there's somebody in the bar, I've already spoken to him, I've asked him to leave, he refuses to leave, he slapped one of our waitresses repeatedly, I've asked him to stop, he won't stop, this guy's being belligerent[.] [Emphasis added.]

Stant also testified that he was employed by the Ale House as a bouncer and was wearing a bright white Ale House t-shirt and an Ale House hat the night of the incident, and that his first words to Kaupe were "hey, bruddah, I work for the bar." Stant said to Kaupe, "bruddah, you know, the manager said you got to go, you slapped one of our waitresses, you laid your hands on an employee, you got to split, you got to get out of here." Kaupe responded, "I'm not leaving until I'm finished with this beer." When Kaupe continued refusing to leave, Stant walked back to Kaupe's table and told him the police had been called and told him again that he had to leave. Stant testified that Kaupe replied, "fuck you, I'm not leaving, if you want, drag me out of the bar."

In its findings, the district court recited the facts as Stant and the other witnesses presented them. In regards to

the charge of Criminal Trespass in the Second Degree, the court held:

> I think the state is aware that they have not proven that this is a commercial premises; further, I haven't heard any testimony regarding an owner or leasee [sic] of the commercial premises. I guess that would be the manager, but the manager was not called. And I haven't heard as well that Mr. Stant was an authorized representative of the Ale House.

The court went on, however, to hold that the State had proven its case for the included charge of Simple Trespass.

The district court found that Stant was employed as a bouncer at the Ale House and was on duty the evening of September 22, 1998. Kaupe has acknowledged that Stant is a "bouncer." A bouncer is employed to eject disorderly persons from a bar.[4] The district court found that Kaupe had been asked to leave the bar at least two times by Stant. The court stated that Stant was a very credible, honest witness.

There was substantial evidence that Stant was on duty, was a bouncer, was in proper uniform, did identify himself to Kaupe, and was an authorized agent of the Ale House who personally communicated to Kaupe a lawful order to leave the premises, and that Kaupe knowingly remained unlawfully on the Ale House premises after its bouncer asked him to leave.

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[4] The American Heritage Dictionary 103 (1994) defines "bouncer" as:

> **bouncer** *n. Slang.* A person employed to expel disorderly persons from a pubic place, esp. a bar.

The Oxford American Dictionary 96 (1980) defines "bouncer" as:

> **bouncer** *n.* . . . 2. a man employed to eject undesirable customers from a club etc.

D. Kaupe Knowingly, Intelligently, and Voluntarily Waived His Right to a Jury Trial.

The right to a jury trial is guaranteed by the sixth amendment to the United States Constitution and article I, section 14 of the Hawai'i Constitution. This right may be waived if such waiver is made knowingly and voluntarily. State v. Swain, 61 Haw. 173, 175, 599 P.2d 282, 284 (1979); see also Hawai'i Rules of Penal Procedure (HRPP) Rule 5(b)(3) and HRS § 806-61 (1993).[5] In Swain, the Hawai'i Supreme Court held:

> Although the Sixth Amendment does not require that a judge interrogate the defendant as to the voluntariness of his waiver of a right to jury trial, it must at least be shown from the record or from the totality of circumstances that the defendant was aware of and understood his right and voluntarily waived it.

Id. at 175, 599 P.2d at 284. The waiver of a jury trial must be made either in writing signed by the defendant or orally in open court. HRPP 5(b)(3); HRS § 806-61; State v. Young, 73 Haw. 217,

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[5] HRPP Rule 5(b)(3) states in relevant part:

> **Rule 5. Proceedings Before the District Court.**
> . . . .
> **(b) Offenses Other Than Felony.**
> . . . .
> (3) Jury Trial Election. In appropriate cases, the defendant shall be tried by jury in the circuit court unless the defendant waives in writing or orally in open court the right to trial by jury.

HRS § 806-61 states:

> **§806-61 Waiver of jury.** The defendant in any criminal case may, with the consent of the court, waive the right to a trial by jury either by written consent filed in court or by oral consent in open court entered on the minutes. Any case in which a trial by jury is waived may be tried by the court without a jury both as to the facts and the law, and when the trial has been had there shall be no further trial upon the facts, except upon the granting of a new trial according to law.

222, 830 P.2d 512, 515 (1992). A colloquy on the record between the court and the defendant, or the totality of the circumstances, needs to show that the defendant's waiver was "knowing and voluntary." Ibuos, 75 Haw. at 121, 857 P.2d at 578; State v. Sadler, 80 Hawai‘i 372, 374, 910 P.2d 143, 145 (App. 1996); Swain, 61 Haw. at 175, 599 P.2d at 284; Young, 73 Haw. at 221, 830 P.2d at 514.

The Hawai‘i Supreme Court in State v. Friedman, 93 Hawai‘i 63, 69, 996 P.2d 268, 274 (2000), expressly declined to adopt a "bright line rule" regarding the requirements for a valid jury waiver. In its analysis of a Ninth Circuit decision (United States v. Duarte-Higareda, 113 F.3d 1000 (9th Cir. 1997)), the court in Friedman specifically discussed four requirements the Ninth Circuit decided a defendant should be informed of regarding jury waiver: "(1) twelve members of the community compose a jury, (2) the defendant may take part in jury selection, (3) a jury verdict must be unanimous, and (4) the court alone decides guilt or innocence if the defendant waives a jury trial." Friedman, 93 Hawai‘i at 69, 996 P.2d at 274 (internal quotation marks omitted). The Friedman court rejected this four-part test and noted that Duarte-Higareda does not stand for the proposition that its suggested colloquy is required in every case. Friedman, 93 Hawai‘i at 69, 996 P.2d at 274. "Rather than adhering to a rigid pattern of factual determinations, we have long observed

that the validity of a waiver concerning a fundamental right is reviewed under the totality of the facts and circumstances of the particular case." Id.

The court in Friedman went on to state:

> Although the trial court did not inform Friedman of certain aspects of the right to a jury trial . . . Friedman's mere assertion that he did not possess a "complete understanding of his jury trial right," by itself, does not establish that his jury waiver was not voluntary and knowing. Under the totality of the circumstances, Friedman has not met his burden of demonstrating that his waiver was involuntary. He has failed to direct us to any "salient fact" bearing upon his ability to understand his jury waiver that would have created the need for an extensive colloquy by the trial court, and, thus, his argument is without merit. See [United States v.] Cochran, 770 F.2d [850] at 853 [9th Cir. 1985] (holding that the district court's failure to conduct a colloquy informing the defendant of all aspects of the right to a trial by jury does not ipso facto constitute reversible error); . . . State v. Redden, 199 W.Va. 660, 487 S.E.2d 318, 326 (1997) (holding that trial court's colloquy that only advised the defendant that judge alone decides guilt or innocence in a bench trial was sufficient for the defendant to knowingly and voluntarily waive his right to a jury trial under the totality of the circumstances)[.]

Id. at 70, 996 P.2d at 275 (emphasis added and citation omitted).

In this case, the following exchange between Kaupe and the trial court took place on the record:

> [THE COURT]: Okay, Mr. Kaupe, you have a lawyer? Do you have a lawyer?
>
> [KAUPE]: Actually, not right now, Your Honor.
>
> THE COURT: Do you want a lawyer?
>
> [KAUPE]: Actually, I'm in the process of getting me an outside lawyer.
>
> THE COURT: You're going to hire your own lawyer?
>
> [KAUPE]: Yes, sir.
>
> THE COURT: You understand that if you want to you can apply for the Public Defender's services?
>
> [KAUPE]: Yes, sir.

THE COURT: If you qualify the Public Defender will be your lawyer free of charge; do you understand?

[KAUPE]: Yes, sir.

THE COURT: Do you want to do that?

[KAUPE]: No.

THE COURT: You're going to get your own lawyer?

[KAUPE]: Yes, sir.

THE COURT: And have you had a chance to discuss your case with your lawyer yet?

[KAUPE]: Uh. Actually, he just told me to plead not guilty.

THE COURT: Oh, he told you to plead not guilty, okay. Pleas of not guilty will be entered.

[PROSECUTOR]: (Inaudible) right to a jury trial. Count C6.

THE CLERK: Pardon me?

[PROSECUTOR]: B, terroristic threatening in the second degree. It's a full misdemeanor.

THE COURT: I see. You have a right to a trial by jury. Do you want [a] jury trial?

[KAUPE]: No, sir.

THE COURT: You discussed this with your attorney?

[KAUPE]: No, sir. I'll just go ahead and dismiss the jury trial. I just want to go ahead (inaudible).

THE COURT: If you plead not guilty you're going to have a trial.

[KAUPE]: Yes.

THE COURT: You have a right to be tried before a judge and a jury.

[KAUPE]: I just want to have a judge there.

THE COURT: You just want only a judge?

[KAUPE]: Yes, sir.

THE COURT: You give up your right to a jury trial?

[KAUPE]: Yes, sir.

THE COURT: Okay. Then we'll set your case for trial in the Wailuku District Court.

[KAUPE]: Yes, sir.

Kaupe was informed he had a right to a jury trial. Kaupe waived that right orally in open court, affirming five times that he did not want a jury trial. In response to being told that he had a right to a trial before a judge and a jury, he expressly stated twice that he only wanted a judge to be there, indicating he understood the difference between a jury trial and a bench trial. Kaupe is an adult corrections officer who would be familiar with the judicial system.[6]

We take into account the totality of facts and circumstances surrounding the case, including the defendant's background, experience, and conduct. Friedman, 93 Hawai‘i at 70, 996 P.2d at 275. Kaupe does not "direct us to any 'salient fact' bearing upon his ability to understand his jury waiver that would have created the need for an extensive colloquy by the trial court, and, thus, his argument is without merit." Id.

Accordingly, we conclude that Kaupe knowingly and intelligently waived his right to a jury trial.

[6] Stant testified Kaupe taunted that he worked for the government, that he was a prison guard, and that he put people in jail.

IV. CONCLUSION

The July 21, 1999, judgment of the district court is affirmed.

DATED: Honolulu, Hawai‘i, February 26, 2001.

On the briefs:

Jon N. Ikenaga,
Deputy Public Defender,
for defendant-appellant.

Acting Chief Judge

Richard K. Minatoya,
Deputy Prosecuting Attorney,
County of Maui,
for plaintiff-appellee.

Associate Judge

Associate Judge