NO. 26247

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
VAN HOM JOHNSON, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD TRAFFIC NO. 003125751)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Watanabe and Nakamura, JJ.)

Defendant-Appellant Van Hom Johnson (Johnson) appeals from the Judgment filed on November 26, 2003, in the District Court of the First Circuit (district court). After a bench trial before the Honorable Clarence A. Pacarro, Johnson was convicted of reckless driving[1] in violation of Hawaii Revised Statutes (HRS) § 291-2 (Supp. 2004)[2]. Judge Pacarro sentenced Johnson to pay a fine of $250, $25 to the Criminal Injury Compensation Fund, and a $7 driver's education fee.

On appeal, Johnson claims that 1) the evidence was insufficient to support his conviction; 2) the court erred in

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[1] District Court Judge Clarence A. Pacarro also found that Defendant-Appellant Van Hom Johnson (Johnson) had committed violations for speeding, following too closely, improper lane change, and failing to properly signal, but ruled that these violations merged with the reckless driving conviction. Judge Pacarro acquitted Johnson of the charge of refusal to provide identification.

[2] Hawaii Revised Statutes (HRS) § 291-2 (Supp. 2004) provides in relevant part that: "[W]hoever operates any vehicle . . . recklessly in disregard of the safety of persons or property is guilty of reckless driving of vehicle . . . ."

rejecting his choice of evils defense; 3) the court erred in rejecting his entrapment defense; 4) the court committed plain error in not dismissing the reckless driving charge based on the theory of selective prosecution; and 5) the court committed plain error in not dismissing the reckless driving charge as a de minimus infraction. After a careful review of the record and the briefs submitted by the parties, we conclude that Johnson's claims are without merit and affirm the district court's Judgment.

I.

The evidence, viewed in the light most favorable to the prosecution, can be summarized as follows.

On March 31, 2003, at about 8:00 p.m., Honolulu Police Department (HPD) Officers Lance Yashiro and Robert Steiner were on traffic patrol on South King Street. Each was in a car equipped with a blue police light. Officer Steiner signaled and attempted to change lanes in front of Johnson's truck. Johnson sped up to block Officer Steiner's lane change, requiring Officer Steiner to accelerate to complete the lane change.

After Officer Steiner's car got in front of Johnson's truck, Johnson began to tailgate Officer Steiner's car. Officer Yashiro, who was trailing both vehicles, radioed Officer Steiner and asked if Officer Steiner knew the driver of the truck that

was tailgating him. Officer Steiner replied that he did not know who was following him.

Out of concern for Officer Steiner's safety, Officer Yashiro told Officer Steiner to speed up. Officer Yashiro wanted Officer Steiner to get away from Johnson's truck until they "could find out what was going on." Officer Steiner increased his speed and executed several lane changes in an attempt to elude Johnson's truck. Johnson, however, continued to tailgate Officer Steiner. Officer Yashiro paced Johnson's truck and determined that Johnson was traveling 55 miles per hour which was 25 miles per hour over the posted speed limit. Officer Yashiro saw Johnson, still in pursuit of Officer Steiner, change lanes without signaling, forcing a vehicle in the lane entered by Johnson's truck to brake suddenly. Officer Yashiro activated his blue light, and Johnson pulled into a parking lot.

Johnson got out of his truck and approached Officer Yashiro. Officer Yashiro asked Johnson to get back in his truck but Johnson refused. Johnson also initially refused to provide his driver's license, vehicle registration, and proof of insurance, as requested by Officer Yashiro. Johnson was irate and argumentative, telling Officer Yashiro that he should have stopped the other police car instead of Johnson.

II.

Johnson's claim that there was insufficient evidence to support his reckless driving conviction is dependent on two subsidiary arguments. First, he argues that the oral charge of reckless driving was insufficient because it "did not include a recitation of the underlying facts constituting the offense." Second, to cure this deficiency, Johnson argues that the charge was limited by Officer Yashiro's testimony that "the Reckless Driving was the unsafe lane change which caused the other vehicle to brake suddenly." Based on these subsidiary arguments, Johnson contends that the trial court could not consider evidence that he tailgated Officer Steiner, engaged in multiple lane changes, and was speeding in determining whether he was guilty of reckless driving. Rather, he contends that the trial court could only consider evidence pertaining to the last lane change preceding his being stopped by Officer Yashiro -- evidence which he claims was insufficient to establish the offense of reckless driving.

We reject Johnson's subsidiary arguments as well as his claim that the evidence was insufficient. Because Johnson did not challenge the adequacy of the reckless driving charge in the trial court, we liberally construe the charge in favor of validity. State v. Cordeiro, 99 Hawai'i 390, 406-07, 56 P.3d 692, 708-709 (2002). Johnson has failed to meet his burden of showing that the charge cannot, within reason, be construed to

charge a crime or that he was prejudiced by the charge. Id. The charge tracked the language of the statute and can reasonably be construed to charge a crime. Id. Nor was Johnson surprised by the State's evidence or its argument that conduct beyond the final lane change supported the reckless driving charge. Johnson was prepared to confront and had a motive to contest the State's evidence because, in addition to the reckless driving charge, his trial involved alleged violations for speeding, following too closely, improper lane change, and failing to properly signal. Johnson was also aware of the State's position that his entire course of conduct supported the reckless driving charge. The State had conceded that if Johnson was convicted of the reckless driving charge, the other moving violations would merge into the reckless driving offense.

The reckless driving charge was not deficient, and thus the State was not restricted in its proof. Moreover, we reject Johnson's contention that the State's ability to prove the reckless driving charge should be limited by Officer Yashiro's opinion of the basis for that charge.[3] The trial court was free to consider all the evidence of Johnson's driving behavior in deciding the reckless driving charge. We conclude that viewing

[3] Officer Lance Yashiro's opinion was stated in a non-responsive answer to a question posed in cross-examination.

the evidence in the light most favorable to the State, there was ample evidence to support Johnson's reckless driving conviction.

III.

Johnson argues that the trial court erred in rejecting his choice of evils defense under HRS § 703-302 (1993) and his entrapment defense under HRS § 702-237 (1993). Both defenses were based on Johnson's testimony that his pursuit of Officer Steiner only began after Officer Steiner cut in front of Johnson's truck, requiring Johnson to hit his brakes to avoid a collision. According to Johnson, he then chased Officer Steiner's car so that he could read Officer Steiner's license plate and report Officer Steiner's dangerous driving.

The trial court properly rejected Johnson's choice of evils defense. For that defense to apply, the harm or evil sought to be avoided by the defendant's conduct must be <u>greater than</u> that sought to be prevented by the law defining the charged offense. HRS § 703-302(1)(a). Even under Johnson's version of what happened, the evil Johnson sought to avoid -- Officer Steiner's reckless driving -- was not greater than, but was equal to, the evil sought to be prevented by the reckless driving offense with which Johnson was charged. In addition, the choice of evils defense was not available to Johnson because he was reckless or negligent in appraising the necessity for his conduct. HRS § 703-302(2). It was reckless and negligent for

Johnson to think that it was necessary for him to drive recklessly and endanger the safety of others in order to report another reckless driver.

The trial court also properly rejected Johnson's entrapment defense. Johnson contends that he was entrapped into speeding and breaking the law because Officer Steiner sped up and attempted to get away from Johnson. We disagree. Officer Steiner's conduct in attempting to elude Johnson did not induce or encourage Johnson to speed or drive recklessly. The evidence showed that Officer Steiner sped up to get away from Johnson's tailgating, not to induce Johnson to follow. Moreover, a reasonable person in Johnson's position would not have been persuaded or induced to exceed the speed limit and drive recklessly in order to keep pace with a marked police car. State v. Reed, 77 Hawai‘i 72, 82, 881 P.2d 1218, 1228 (1994) (stating that in applying the entrapment defense, "[t]he focus is on the police conduct and its probable effect on a 'reasonable person'").

IV.

Johnson claims that the trial court erred in failing to dismiss his reckless driving charge on the ground that he was selectively prosecuted. In support of his selective prosecution claim, Johnson notes that Officer Steiner was not prosecuted. Johnson also contends that his prosecution was "intended to

retaliate against him for the exercise of his First Amendment right of freedom of speech" because he had threatened to report Officer Steiner's reckless driving. Johnson failed to raise his selective prosecution claim below and we therefore review for plain error.

The record does not support Johnson's claim. Johnson did not meet his burden of showing that he was singled out for prosecution while others similarly situated were not. Id. at 87, 881 P.2d at 1233. Officer Steiner was not similarly situated. Unlike Johnson, Officer Steiner was an on-duty police officer, did not engage in aggressive tailgating, and was attempting to elude someone tailgating his car. Johnson also did not show that his prosecution was based on an unjustified standard, such as race or religion. Id. There was ample evidence establishing that Johnson had committed the offense of reckless driving. In addition, Officer Yashiro pulled Johnson over before Johnson threatened to report Officer Steiner. These circumstances refute Johnson's contention that his prosecution was in retaliation for his exercise of his First Amendment rights.

V.

Johnson argues that the trial court erred in failing to dismiss his reckless driving charge as a de minimis infraction pursuant to HRS § 702-236 (1993). Johnson did not move for dismissal on this ground in the trial court. Based on our review

of the record, we conclude that Johnson has not shown his entitlement to any relief under HRS § 702-236.

Therefore,

IT IS HEREBY ORDERED that the November 26, 2003 Judgment of the District Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai‘i, February 22, 2005.

On the briefs:

Bentley C. Adams, III,
Deputy Public Defender,
for Defendant-Appellant.

Mark Yuen,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Chief Judge

Associate Judge

Associate Judge