IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM
Plaintiff-Appellee

vs.

ARTHUR SCOTT ROOT
Defendant-Appellant

OPINION

Supreme Court Case No. CRA98-018
Superior Court Case No. CFO 153-98

Filed: October 20, 1999

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Appeal from the Superior Court of Guam.
Argued and submitted on August 17, 1999
Hagåtña, Guam

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BEFORE: BENJAMIN J.F. CRUZ, Chief Justice, PETER C. SIGUENZA, Associate Justice and JOSE LEON GUERRERO Associate Justice Pro Tempore.

CRUZ, C.J.:

[1] Defendant-Appellant Arthur Scott Root (hereinafter, "Root") appeals the trial court's denial of his Motion for Judgment of Acquittal Notwithstanding the Verdict and the judgment entered against him after trial. Root argues that there was insufficient evidence to support the guilty verdict as to the charge of Terrorizing. Root also claims that he was denied effective assistance of counsel on two separate grounds.

FACTUAL AND PROCEDURAL BACKGROUND

[2] On February 27, 1998, Root's father, Rolland Knut Root (hereinafter "Rolland"), heard what he considered to be a gunshot originating in his home. Rolland then saw Root with a gun. Thereafter, Rolland and Root engaged in a verbal altercation during which Root allegedly uttered a threat to Rolland and pointed the gun at him. Shortly thereafter, Rolland left the residence in order to file a formal complaint at the Central Precinct in Agana. Upon returning to his residence, Rolland then discovered a hole in his refrigerator and a bullet inside the appliance. Subsequently, he summoned the police and an officer responded and took the bullet into custody.

[3] On March 12, 1998, Root was indicted and charged with Terrorizing, as a Third Degree Felony, with a Special Allegation of Possession or Use of a Deadly Weapon in the Commission of a Felony, and with Possession of a Firearm Without a Firearm's Identification Card, also as a Third Degree Felony. At the close of the People's case, Root moved for a Judgment of Acquittal on all charges. The court reserved its ruling on the Terrorizing charge and denied the motion as to the other

charges. The jury subsequently returned a guilty verdict on the Terrorizing charge and acquitted him of the remaining charges. Root then renewed his motion for a Judgment of Acquittal Notwithstanding the Verdict on the Terrorizing charge. The trial court's denial of this motion *inter alia* resulted in this appeal.

ANALYSIS

A. Sufficiency of the Evidence.

[4] This court has jurisdiction pursuant to 7 GCA sections 3107 and 3108 (1994). The trial court's ruling on the motion for judgment of acquittal is reviewed *de novo. People v. Cruz,* 1998 Guam 18, ¶ 8. In conducting this review, courts apply the same test as that used to challenge the sufficiency of the evidence. *Id.* at ¶ 9. Accordingly, the evidence presented against Root shall be reviewed in a light most favorable to the People to determine whether, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

[5] This review does not require the court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt . . . ." *People v. Quinata,* 1999 Guam 6, ¶ 9 (citations omitted). Quite the contrary, in accordance with the standard set forth in *Jackson,* this Court's review shall give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id*. (*quoting Jackson v. Virginia*, 443 US 307, 319, 99 S.Ct. 2781, 2789 (1979)).

[6] In the instant case, Root was charged and convicted of Terrorizing as a Third Degree Felony pursuant to 9 GCA section 19.60 (a) and (b) (1994). This statute provides,

Terrorizing; Defined & Punished.

> (a) A person is guilty of terrorizing if he communicates to any person a threat to commit or to cause to be committed a crime of violence dangerous to human life, against the person to whom the communication is made or another, and the natural and probable consequence of such a threat, is to place the person to whom the threat is communicated or the person threatened in reasonable fear that crime will be committed.
>
> (b) Terrorizing is a felony of the third degree.

Id.

[7] Although the Guam Legislature used the term "terrorizing," in drafting 9 GCA section 19.60 (a) and (b), other jurisdictions use the term "terroristic threat" in statutes that seek to prohibit the same conduct. In those jurisdictions, courts have expressly stated that it is not an essential element of the offense of making a terroristic threat that the victim actually be placed in fear of imminent harm. *See generally Smith v. State*, 757 S.W.2d 554 (1988). In *Smith*, the defendant was tried and convicted of seven counts of terroristic threats. *Id*. at 555. The charges stemmed from an incident whereby the defendant waved a gun around and threatened to kill everyone in the building. *Id.* Despite the fact that no evidence was presented to prove that all seven people who were in the building were terrorized, the court upheld the conviction. *Id*. at 556. The court held that, "[t]he conduct prohibited by this section is the communication of the threat with the purpose of terrorizing another. It is not necessary that the recipient of the threat actually be terrorized." *Id.*[1]

[8] Similarly, in *Boone v. State*, 274 S.E. 2d 49, 51 (1980), two brothers held a rifle and a shotgun on two undercover agents. An agent testified that one defendant threatened that, "if we were the law, he was going to blow us away." *Id.* at 50. Addressing the level and nature of the agent's

[1] Ark. Code Ann. § 5-13-301 (a) (1) (1987) provides: "A person commits the offense of terroristic threatening in the first degree if, with the purpose of terrorizing another person, he threatens to cause death or serious physical injury or substantial property damage to another person."

fear, the court held that, "the crime of terroristic threats focuses solely on the conduct of the accused and is completed when the threat is communicated to the victim with intent to terrorize." *Id.* at 51. The court affirmed the convictions. *Id.* .

[9] We note that in addition to the People's oral argument, and those presented in their brief, the trial transcript contains an argument by the People that cites *People v. Kenneth James Borja*, CFO521-96 (Super. Ct. Guam, Feb., 26, 1988), a case from the Superior Court.[2] In *Borja*, the defendant threw gasoline on a woman and threatened to set her on fire. *Id.* at 4. He said, "I will kill you. I will pour gasoline on you and light you up." *Id.* In response, she replied, "[y]ou wouldn't dare." *Id*. at 3. Among other things, the defendant was charged with Terrorizing. Relative to the issue of the victim's fear, the trial court's issued a Decision and Order that held,

> the language of 9 G.C.A. §19.60 does not require that the Government prove the victim is actually placed in fear, rather, the statute simply requires that the threat made by the Defendant is such that the natural and probable consequence of such threat, is to place the person to whom the threat is communicated . . . in reasonable fear that the crime will be committed.

Id. at 4. (emphasis in original).

[10] We agree. Subjective fear need not be proven in order to establish Terrorizing under 9 GCA section 19.60. Therefore, Root's contention that there was insufficient evidence is without merit. Moreover, circumstantial evidence in the case indicated that Rolland was, in fact, subjectively fearful. For instance, the testimony of the officer regarding Rolland's appearance, his rapid departure from his home, and his inability to deny being threatened demonstrated such fear. The evidence also collectively demonstrates that under the circumstances his fear was reasonable. Based

[2] Transcript at p. 103, (Extract of Trial Proceedings, July 1, 1998).

on the foregoing, we find that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt and that sufficient evidence supported the verdict.

B. Ineffective assistance of counsel based on the failure to challenge the chain of custody.

[11] We now turn to Root's claim of ineffective assistance of counsel. "Whether a defendant has received ineffective assistance of counsel is a question of law." *People v. Quintanilla*, 1998 Guam, 17, ¶ 8. "Where this legal query turns significantly on the facts of a particular case, the issue becomes a question of fact as well." *People v. Kintaro*, 1999 Guam 15, ¶ 10. Appellant's claim of ineffective assistance of counsel shall be reviewed de novo. *Quintanilla*, 1998 Guam 17 at ¶ 8.

[12] We note that, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. To determine whether this right to counsel has been violated, this Court has employed a two-part test. *Quintanilla*, 1998 Guam 17 at ¶ 8. First, a convicted defendant must show that counsel's performance was deficient. *Id.* Secondly, the defendant must prove that defense counsel's deficient performance must have prejudiced the defendant so as to result in the denial of a fair trial. *Id.*

[13] Pursuant to the first prong of the test, it is the role of this court to "'judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" *Quintanilla*, 1998 Guam 17 at ¶ 9, quoting *Strickland*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066. In turn, "'[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.'" *Id.* (citations omitted).

[14] Although an ineffective assistance of counsel claim may be heard on direct appeal, we have previously held that it is more properly brought as a writ of habeas corpus. *People v. Ueki*, 1999

Guam 4, ¶ 5. Indeed, courts will often decline to reach the merits of ineffective assistance of counsel claims because such claims require "an evidentiary inquiry beyond the official record." *Id.* For instance, in *Ueki*, this Court held that the ineffective assistance of counsel claim could not be brought on direct appeal because the record was not sufficiently complete to make a proper finding. *See Id* . at ¶ 32. The record in this case is comprised of 1) The Reporter's Transcript of Proceedings from the grand jury indictment proceeding; 2) The excerpt of trial transcript; and 3) The transcript from the sentencing hearings. For purposes of reviewing Root's claim of error regarding the introduction of evidence, we find that the record is sufficient as the following shall demonstrate.

[15] Root argues that his counsel should have objected to the admission of the bullet cartridge into evidence on the basis of an alleged defect in the chain of evidence. Root contends that this failure constituted ineffective assistance of counsel. Particularly, in his brief, Root implies that there was a strong possibility that the People could not establish the chain of custody over the bullet cartridge. As to this assertion of error, we have observed that discrepancies relating to the chain of evidence are relevant to the *weight* of the evidence proffered, not its admissibility. *See United States v. Robinson,* 967 F.2d 287, 291 (9th Cir. 1992).

[16] Where a defect in the chain of custody of evidence is alleged, the general rule holds that the prosecution must introduce sufficient proof so that a reasonable juror could find that the evidence is in substantially the same condition as when it was seized. *U.S. v. Harrington*, 923 F.2d 1371 (1991). In addition, a court may admit evidence if there is a reasonable probability that the evidence has not been changed in important respects. *Id.*

[17] The record in this case reveals that Officer Tracey L. Volta, the police officer who originally responded to Rolland's call, testified that upon arriving at the scene he was directed to Rolland's refrigerator. *Id.* at 31. He testified that he observed a hole in the exterior of the refrigerator. *Id.* at 31-32. Volta then testified to opening the refrigerator, finding the bullet, and then confiscating the bullet and turning it into the Property Section. *Id.* Volta later testified that People's Exhibit 3 was a photograph of the bullet cartridge that he confiscated from Rolland's refrigerator. *Id.* at 34.

[18] Based on the foregoing facts, sufficient testimony was elicited at trial to justify the admission of the bullet cartridge evidence. However, we note that Root's counsel did not have the benefit of hindsight as we do. He did not know that the People would put forth the relevant evidence. Therefore, there may well have been an error in deciding to make the original stipulation. However, our analysis has determined that no prejudice resulted. Thus, we need not determine whether or not the decision to stipulate was in error because the second prong requires that the error, if indeed there was one, must cause prejudice. *Quintanilla,* 1998 Guam 17 at ¶ 8. Accordingly, the claim of ineffective assistance of counsel is unfounded as to this particular contention.

C. Failure to Assert the Defense of Insanity and/or Intoxication.

[19] Lastly, Root contends that there was clear and repeated testimony by Rolland that the Defendant was paranoid and insane from drug use at the time of the incident. In *Wood v. Zahradnick*, 430 F.Supp. 107, 109-110 (1977), the defendant, who had a mental history that indicated below normal intelligence and possible retardation, raped and murdered his neighbor while possibly under the influence of heroin. At trial, his counsel failed to explore the possibility of the defendant's incompetency to stand trial or his sanity at the time of the offense. *Id*. at 110. The court held this failure constituted ineffective assistance of counsel. *Id*. at 113.

[20] The court in *Wood* explained that the defendant's long history of mental difficulties was easily ascertainable and highly relevant. *Id*. at 110-112. The court also emphasized that the defendant was on trial for murder and the insanity defense may have been his only valid defense. *Id*. at 111-112. Accordingly, it held that it was completely satisfied that the issue of the defendant's mental status "should have been explored and counsel's failure to do so deprived the petitioner of his right, secured by the Sixth Amendment, to effective assistance of counsel." *Id.* at 111.

[21] In the instant case, Rolland testified that Root had a history of alcohol and drug abuse.[3] This statement was echoed by Root himself at the sentencing hearing. Although, "it is not for the lawyer to fabricate defenses, . . . he does ha*ve an affirmative obligation to make suitable inquiry to determine whether valid ones exist."* *Woods*, 430 F. Supp. at 111 (citations omitted.) The record simply is not complete to the extent necessary to decide this issue on the merits. *See Ueki*, 1999 Guam 4 at ¶ 32. We are unable to ascertain whether counsel practiced due diligence in deciding not

[3] Transcript at p. 23, (Extract of Trial Proceedings, June 30, 1998)

to pursue this type of defense.

CONCLUSION

[22] There was sufficient evidence to sustain the conviction for Terrorizing. Accordingly, the trial court's decision relative to the denial of Appellant's Motion is **AFFIRMED**. Furthermore, because the record clearly demonstrated that there was no prejudicial error as to the admission of the bullet, we find that there was no ineffective assistance of counsel in that specific regard. As to the second claim of ineffective assistance of counsel, the record is insufficient to decide the merits. We, therefore, deny the claim pursuant to *Ueki*. Based on the foregoing, Appellant's requests for a new trial based on his claims for ineffective assistance of counsel are **DENIED**. The trial court conviction is hereby **AFFIRMED**.

PETER C. SIGUENZA
Associate Justice

JOSE I. LEON GUERRERO
Associate Justice Pro Tempore

BENJAMIN J.F. CRUZ
Chief Justice