IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

IRENE OLKERIIL,
Appellant,
v.
REPUBLIC OF PALAU,
Appellee.

Cite as: 2023 Palau 4
Criminal Appeal No. 22-003
Appeal from TCC No. 22-0009

Decided: January 12, 2023

Counsel for Appellant ..... James W. Kennedy
Counsel for Appellee ..... Ernestine K. Rengiil

BEFORE: OLDIAIS NGIRAIKELAU, Chief Justice
JOHN K. RECHUCHER, Associate Justice
FRED M. ISAACS, Associate Justice

Appeal from the Court of Common Pleas, the Honorable Honora E. Remengesau Rudimch, Associate Justice, presiding.

OPINION[1]

PER CURIAM:

[¶ 1] The Court of Common Pleas convicted Appellant Irene Olkeriil ("Olkeriil") for Disorderly Conduct. Olkeriil appeals her conviction because she believes that her trial counsel was ineffective by failing to object to a

[1] Appellant did not properly request oral argument in this appeal: pursuant to the Rules of Appellate Procedure, a request for oral argument must be made on the cover sheet of the opening brief. Nonetheless, this Court finds that the appeal is appropriate for submission on the briefs. *See* ROP R. App. P. 34(a).

deficient citation and not allowing her to testify, and that the evidence is insufficient to sustain a finding that she engaged in "tumultuous behavior."

[¶ 2] For the reasons set forth below, we **AFFIRM**.

BACKGROUND

[¶ 3] On January 6, 2022, Olkeriil visited the offices of the Friends of the Palau National Marine Sanctuary ("FPNMS") during working hours and asked to speak with Jennifer Koskelin Gibbons ("Koskelin") in the conference area of the FPNMS building. This building is accessible to the public. Koskelin refused to speak with Olkeriil and asked her to leave the premises. Olkeriil was upset and angry with Koskelin because of personal matters, and engaged in a verbal altercation with Koskelin. Two other employees of FPNMS, Adora Nobuo and Christen Turang Udui, were present during this altercation. The three FPNMS employees described Olkeriil as angry, upset, and stated that Olkeriil made disparaging or insulting statements towards Koskelin. Koskelin repeatedly requested that Olkeriil leave the premises, which Olkeriil only did when Koskelin called the police. On that same day, the police issued a citation against Olkeriil, which stated that she violated 17 PNC § 4402 for Disorderly Conduct.

[¶ 4] On March 23, 2022, the Court of Common Pleas heard the case. The trial court orally found that "tumultuous behavior" consists in disruptive, troubled or disorderly behaviors, and that Olkeriil's conduct in the FPNMS building met that standard. The trial court pointed specifically to the fact that Olkeriil demanded to talk to Koskelin and refused to leave, that she was aggressive and agitated, that she made the FPNMS employees uncomfortable, and that her statements could be deemed insulting. The trial court then convicted Olkeriil and imposed a sentence of a hundred (100) dollars fine and three (3) months of probation for Disorderly Conduct.

STANDARD OF REVIEW

[¶ 5] We review the sufficiency of the evidence underlying a criminal conviction for clear error, asking whether "the evidence presented was sufficient for a rational fact-finder[] to conclude that the appellant was guilty beyond a reasonable doubt as to every element of the crime." *Xiao v. Republic*

of Palau, 2020 Palau 4 (quoting *Wasisang v. Republic of Palau*, 19 ROP 87, 90 (2012)). In doing so, we must view the evidence in the light most favorable to the prosecution, and give due deference to the trial court's opportunity to hear the witnesses and observe their demeanor. *Aichi v. ROP*, 14 ROP 68, 69 (2007). The Appellate Division should not reweigh the evidence. *Id.* It should only determine whether there was any reasonable evidence to support the judgment. *Id.* (quotation marks omitted). Even if this Court would have decided the case differently than the trier of fact, the conviction must be upheld. *Id.*

DISCUSSION

[¶ 6] Olkeriil argues (1) that her trial counsel was ineffective because he failed to object to a vague charging document and was unfamiliar with court procedures, (2) that we should reconsider our previous decision declining to require a colloquy on the record regarding the right to testify, and (3) that the evidence was not sufficient to support her conviction.

[¶ 7] Palau's Constitution affords criminal defendants "the right to counsel." ROP Const. art. IV, § 7. To give effect to this guarantee, courts have construed it to confer a right to effective assistance of counsel, *see McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970), and to give rise to a constitutional claim where counsel's performance was deficient and the deficiency prejudiced the defense. *See Republic of Palau v. Decherong*, 2 ROP Intrm. 152, 168 n.8 (1990); *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984).

[¶ 8] This Court has established a presumption against a claim of ineffective assistance of counsel on direct appeal. Indeed, these claims rely on facts outside the trial record: the "reasons for counsel's decisions, the extent of trial counsel's alleged deficiencies, and the asserted prejudicial impact on the outcome at trial." *United States v. Gallegos*, 108 F.3d 1272, 1279-80 (10th Cir. 1997). These issues "generally are not litigated at trial" and an appellate court "lacks a mechanism for developing a factual record regarding counsel's decisions and actions." *Saunders v. Republic of Palau*, 8 ROP Intrm. 90 (1999). Thus, the *Saunders* court held that ineffective assistance-of-counsel claims may be raised on direct appeal only when the record is sufficiently developed to permit meaningful appellate review of the claims.

[¶ 9] As a preliminary matter, we refuse to reconsider *Saunders*, where we declined to adopt a rule requiring a colloquy on the record regarding the right to testify, and instead committed this decision to the sound discretion of the presiding trial judge. An ineffective assistance of counsel claim cannot arise from the mere fact that the defendant did not testify, but rather requires an analysis of whether counsel competently discharged his duty to "advis[e] the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide." *Saunders*, 8 ROP Intrm. at 93 (quoting *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992)).

[¶ 10] Under the above-stated rules, the record is not sufficiently developed to show that trial counsel incompetently discharged his duty to advise Olkeriil of her right to testify. There is no extrinsic evidence regarding communications between Olkeriil and trial counsel, the strategic considerations that may have informed trial counsel's decisions and actions, the content of Olkeriil's possible testimony, or the impact of trial counsel's decisions on the trial as a whole. The only evidence Olkeriil brings forward from the record is that trial counsel admitted he is unfamiliar with court procedures and expressed a desire to be quick when questioning a witness. The mere decision not to call Olkeriil to testify is not a sufficient basis for an ineffective counsel claim. Therefore, the record in this case is devoid of any indication that trial counsel incompetently discharged his duty to advise Olkeriil of her right to testify.

[¶ 11] Additionally, there is no evidence that trial counsel's failure to object to the charging document prejudiced Olkeriil's defense. An accused is constitutionally entitled to "be informed of the nature of the accusation" charged regardless of the form of the charging document. Palau Const. art. IV, § 7. The constitutional right of a defendant to know the nature and cause of the accusation means that the offense charged must be set forth with sufficient certainty so that the defendant will be able to intelligently prepare a defense. *Franz v. Republic of Palau*, 8 ROP Intrm. 52 (1999). Nonetheless, this Court has found that

> . . . [b]ecause citations are used only in the case of simple misdemeanors, and, in the usual case, are written by police officers soon after the offense is committed, a reference to the time and

> place of the offence and the provision violated is sufficient to put the defendant on notice of the charges relating to a particular incident

An Guiling v. Republic of Palau, 11 ROP 132 (2004).

[¶ 12] In this case, Olkeriil received a citation indicated that she was being charged with a single count of disorderly conduct for her behavior. She signed onto the citation form on January 6, 2022. Therefore, she had proper notice of the allegations against her. Because the citation was not deficient, trial counsel's failure to object to the citation could not prejudice Olkeriil.

[¶ 13] Finally, Olkeriil's last argument is that the evidence is insufficient to demonstrate the elements of the offense, because "tumultuous behavior" should mean more than "doing something disruptive," such as fighting, threatening, or violence. Olkeriil barely develops this argument and does not provide any case law supporting it. Nonetheless, we find that the evidence, reviewed in the light most favorable to the prosecution, is sufficient to support Olkeriil's conviction.

[¶ 14] 17 PNC § 4402(1) states that "[a] person commits the offense of disorderly conduct if, with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof, the person . . . [e]ngages in fighting or threatening, or in violent or tumultuous behavior." The trial court interpreted tumultuous behavior to mean "disruptive acts, troubled or disorderly behaviors." Under basic principles of statutory interpretation, "[t]he first step in statutory interpretation is to look at the plain language of a statute. . . . [I]f statutory language is clear and unambiguous, the courts should not look beyond the plain language of the statute and should enforce the statute as written." *Lin v. Republic of Palau*, 13 ROP 55, 58 (2006). The statute is entirely unambiguous and clearly encompasses four different conducts: fighting, threatening, violence, as well as tumultuous behavior. As such, we agree with the trial court's definition of tumultuous behavior, and reject Olkeriil's argument that disruptive acts without fighting, threats, or violence cannot be tumultuous.

[¶ 15] The trial court heard testimony from the two employees present at the scene, Nobuo and Turang Udui, as well as Koskelin. Nobuo and Turang Udui described Olkeriil as angry, upset, agitated, loud, and aggressive. They

recounted what Olkeriil said to Koskelin, including disparaging statements regarding Koskelin's birth. Turang Udui and Koskelin stated that Olkeriil stood behind the conference table, grabbed the back of a chair, and "shook it a little." All three witnesses testified that Koskelin repeatedly asked Olkeriil to leave, but that she did not do so. All the witnesses reported feeling alarmed or stunned by Olkeriil's behavior. Nobuo even testified that when the confrontation started, she took her phone from her office to call the police out of fear that the situation would escalate. Olkeriil intentionally caused alarm to Koskelin, Nobuo, and Turang Udui, by engaging in tumultuous behavior. Thus, the evidence properly supports the elements of the offense.

CONCLUSION

[¶ 16] We **AFFIRM** the Court of Common Pleas' judgment.