NO. 21720

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee

v.

OLIVER HAANIO, JR., Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 97-0987)

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

Defendant-Appellant Oliver Haanio, Jr., (Defendant or Haanio) appeals the circuit court's June 19, 1998 Judgment, upon a jury verdict, convicting him of the included offense of Robbery in the Second Degree (Robbery Second), Hawaiʻi Revised Statutes (HRS) § 708-841 (1993), and sentencing him to a ten-year term of imprisonment. We affirm.

FACTS

In its April 28, 1997 Complaint, Plaintiff-Appellee State of Hawaiʻi (the State) alleged that

> [o]n or about the 12th day of April, 1997, in the City and County of Honolulu, State of Hawaiʻi, [Haanio] while in the course of committing a theft, did attempt to kill or intentionally inflict or attempt to inflict serious bodily injury upon Gilbert Kamoku, thereby committing the offense of Robbery in the First Degree,

> in violation of Section 708-840(1)(a) of the Hawai‘i Revised Statutes.[1]

(Footnote added.)

Haanio's trial commenced on January 21, 1998, and ended on January 27, 1998. At the trial, the State's witnesses testified to the following facts.

Gilbert Kamoku (Kamoku), the victim, was drinking beer on River Street on April 12, 1997. He drank at a steady pace during the day and, by that evening, he had drunk a lot. Later that evening, "something happened too fast" which made his mind blank out. Kamoku woke up at Queen's Hospital after he had been in a coma for five days. The incident has slowed Kamoku's memory and changed his speech.

On the day of the incident, Kamoku's right front pocket contained a wallet which held an unknown amount of food stamps, dollar bills, a bus pass, and an identification card.

Detective Theodore Coons testified in relevant part as follows:

> Q. Okay. Now, did you ever find a wallet in this case?

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[1] Hawai‘i Revised Statutes (HRS) § 708-840(1)(a) (1993) states in relevant part as follows: "A person commits the offense of robbery in the first degree if, in the course of committing theft . . . [t]he person attempts to kill another, or intentionally or knowingly inflicts or attempts to inflict serious bodily injury upon another."

HRS § 707-700 (1993) states, "'Serious bodily injury' means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." It also states that "'bodily injury' means physical pain, illness, or any impairment of physical condition."

> A. No. There was no wallet discovered at the scene or on the victim or in his clothing.
>
> Q. Okay. What about any money or food stamps?
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> A. No.
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> Q. What about a bus pass?
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> A. My understanding about that bus pass is that the MICTs [Mobile Intensive Care Technicians[2]] that met the victim at the scene located the bus pass. That's how the victim was initially identified. And from my understanding the MICTs took that to the hospital.

Kamoku testified that he never got his wallet back or its contents and never gave anyone permission to take them.

Humphrey Goods (Goods) and Robert Morris (Morris), witnesses to the incident, were sitting on the wall on River Street by Pauahi Street. At some point during the evening, Defendant approached Goods and Morris and tried to pick a fight with Morris. Morris did not want to fight and ran around a car to avoid Defendant. At the time of the encounter, Defendant appeared to be intoxicated and staggered when he chased Morris. Some time later, Defendant left and walked down the street.

Goods observed Defendant approach Kamoku who was sitting on the wall drinking by himself. Defendant and another male by the name of "Frank" stood next to Kamoku. Goods could not hear the conversation between Defendant and Kamoku. Goods saw Defendant hitting Kamoku until Kamoku fell forward to the ground. Goods observed that Defendant's first punch was to the

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[2] *See* HRS § 321-23.3(6) (Supp. 1999).

side of Kamoku's head. Once Kamoku was on the ground, Defendant kicked him repeatedly.

Charlotte Hammons (Hammons) was collecting cans in the area that night. Earlier in the evening, Hammons observed Defendant drinking with Kamoku and Kamoku giving money to Defendant. Defendant then went to the store and returned to Kamoku with beer. Both Kamoku and Defendant continued to drink until Defendant stood up and told Kamoku "he wanted more money." Hammons then observed Defendant choking Kamoku's neck with one hand and lifting him off the ground. When Defendant released the choke hold, Kamoku fell to the ground. While Kamoku was on the ground, Defendant hollered at him and kicked him. Defendant then walked towards Goods and Morris and again challenged Morris to a fight. Morris again walked away to avoid Defendant. Defendant and his companion, Frank, then proceeded to a latrine on the Beretania Street side of Aʻala Park.

At this point, Kamoku was seen lying face down, bleeding and choking on the ground with his right pants pocket turned inside out. Hammons' boyfriend, an individual by the name of "Nick," then came to the aid of Kamoku and someone called an ambulance and the police to the scene.

Chaney Morita (Morita), an ambulance technician, upon arriving at the scene at about 10:16 p.m., observed that Kamoku was lying face down, with blood around the area of his head, on

the sidewalk fronting 1139 River Street. Morita observed that Kamoku had a lot of blood coming from his nose and mouth, and Kamoku's head had a hematoma or a big lump or contusion. Morita classified Kamoku's condition as critical since Kamoku was unresponsive and failed to wake up.

Police Officer John Jervis (Officer Jervis) was summoned to the River Street area regarding an assault. Upon arriving at the scene, he observed Police Officer Mike Garcia in the area and two ambulance technicians attending to Kamoku.

Officer Jervis began questioning people around the area and obtained Defendant's name and a description of Defendant from Goods. Goods then pointed in the direction of Aʻala Park where Defendant was walking. Officer Jervis observed Defendant stopping next to a utility pole and looking in Officer Jervis' direction for about a minute or so, before resuming his walk.

Officer Jervis then drove to the park where Defendant was located and arrived at about the same time as Police Officer James Yee (Officer Yee). When the officers approached, Defendant was walking with two other males. The officers allowed the two males to leave because the officers believed that the two males were not involved in the case. When the officers approached Defendant, Officer Yee told Defendant to "hold on, I want to talk to you." Defendant then stated, "I never hit him. I never hit anybody." The officers observed that Defendant appeared

intoxicated, had an abrasion on the knuckle of his right ring finger, and a blood-like substance on his right shoe. The police then informed Defendant why he was being stopped.

In "a field show up," Goods, Hammons, and Jennifer Garcia[3] were each separately driven in a police car past Defendant. Each identified Defendant as the person who assaulted Kamoku. Defendant was then arrested and transported to the police station. Defendant's shoes, socks, and T-shirt were recovered as evidence because these items appeared to have blood stains. Although a lab request was made, these items were never tested to determine if the stains were Defendant's blood.

Kamoku arrived at the Queen's Medical Center comatose, barely breathing, with bruises on his face. Dr. Mihe Yu examined Kamoku and concluded that he had a severe concussion which could cause chronic headaches and a protracted loss of memory. Kamoku was also put on a breathing machine since he had trouble breathing due to his head injury. Kamoku's CAT scans revealed that there were no signs of blood or bleeding which would indicate a head injury or trauma. Furthermore, there were no signs of a skull fracture or broken bones. A blood test showed that Kamoku had a blood alcohol content of 0.23.

[3] Officer John Jervis testified that Jennifer Garcia was one of the eyewitnesses who identified Defendant-Appellant Oliver Haanio, Jr. Jennifer Garcia was not called to testify at trial.

At the police station while he was being booked, Defendant made several statements. During the process, Defendant stated, "I didn't do it. I just got off the bus." Defendant then asked what were the charges against him. When Defendant was told that he might be charged with murder, he responded "that he didn't kill anybody, and all he did was fight with two guys and has two witnesses." He also stated "that he was a golden glove boxer" and the blood on his shirt was his own.

Defendant was given an Intoxilyzer test at about 12:55 a.m. on April 13, 1997, which showed a blood alcohol content of 0.172. While being tested, Haanio referred to his injured knuckle and stated that his knuckle got that way because "he punches bags, some hard bags and some soft bags."

After the State rested, the defense also rested without presenting any evidence. Defendant then moved for a judgment of acquittal. His motion was denied.

The court then presented the parties with the court's supplemental proposed jury instructions regarding included offenses. The State did not request, and the defense objected to, the court's giving its proposed Supplemental Instruction Nos. 5[4] (Robbery in the Second Degree), 6[5] (Assault in the First

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[4] Instruction No. 5 states:

> If and only if you find the defendant not guilty of the offense of Robbery in the First Degree or you are unable to reach

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Degree), and 7A[6] (Assault in the Second Degree).[7]

(continued)

a unanimous verdict as to that offense, then you must determine whether the Defendant is guilty or not guilty of the included offense of Robbery in the Second Degree.

A person commits the offense of Robbery in the Second Degree if, in the course of committing theft, he recklessly inflicts serious bodily injury upon another.

There are two material elements of the offense of Robbery in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt.

These two elements are:

1. That the Defendant was in the course of committing theft; and

2. That, while doing so, the Defendant recklessly inflicted serious bodily injury on Gilbert Kamoku.

[5] Instruction No. 6 states:

If and only if you find the defendant not guilty of the offense of Robbery in the First Degree or you are unable to reach a unanimous verdict as to that offense, and you find the defendant not guilty of the offense of Robbery in the Second Degree or you are unable to reach a unanimous verdict as to that offense, then you must determine whether the Defendant is guilty or not guilty of the included offense of Assault in the First Degree.

A person commits the offense of Assault in the First Degree if he intentionally or knowingly causes serious bodily injury to another person.

There are two material elements of the offense of Assault in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These two elements are:

1. That the Defendant caused serious bodily injury to Gilbert Kamoku; and

2. That the Defendant did so intentionally or knowingly.

[6] Instruction No. 7A states:

If and only if you find the defendant not guilty of the offense of Robbery in the First Degree or you are unable to reach a unanimous verdict as to that offense, and you find the defendant

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(continued)

not guilty of the offense of Robbery in the Second Degree or you are unable to reach a unanimous verdict as to that offense, and you find the defendant not guilty of the offense of Assault in the First Degree or you are unable to reach a unanimous verdict as to that offense, then you must determine whether the defendant is guilty or not guilty of the included offense of Assault in the Second Degree.

A person can commit the offense of Assault in the Second Degree in two distinct ways. He commits this offense if: (1) he intentionally or knowingly causes substantial bodily injury to another person; or (2) he recklessly causes serious bodily injury to another person.

As to each of the two forms of the offense of Assault in the Second Degree, there are two material elements.

As to each of the two forms of the offense, the two elements are:

1. That the Defendant caused substantial bodily injury to Gilbert Kamoku; and

2. That the Defendant did so intentionally or knowingly.

As to the second form of the offense, the two elements are:

1. That the Defendant caused serious bodily injury to Gilbert Kamoku; and

2. That the Defendant did so recklessly.

You may not find the Defendant guilty of the offense of Assault in the Second Degree unless both elements of at least one of the forms of this offense have been proved beyond reasonable doubt by the prosecution.

"Substantial bodily injury" means bodily injury which causes:

(a) a major avulsion, laceration, or penetration of the skin; or

(b) a chemical, electrical, friction, or scalding burn of second degree severity; or

(c) a bone fracture; or

(d) a serious concussion; or

(continued)

However, the court decided to give the instructions over Haanio's objections and stated its reasoning as follows:

> THE COURT: I will find a rational basis in the evidence for the jury to find that rather than intending to kill or attempting to kill or to inflict serious bodily injury that the defendant may have acted recklessly in inflicting the injuries he did on the victim.
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> . . . .
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> THE COURT: All right. Again I think there is a substantial basis in the evidence for the jury to acquit of the charged offense and convict of the included offense of assault in the second degree. Either because they find that the defendant intentionally or knowingly caused substantial bodily injury or that he recklessly caused substantial bodily injury or that he recklessly caused serious bodily injury.

The trial court subsequently informed Haanio regarding the included offenses and advised him that these offenses carried smaller penalties than the charged offense. Although Haanio responded that he did not want any included offense instructions given in his case, the trial court gave the included offense instructions. The jury found Haanio guilty of the included offense of Robbery Second.[8] The court sentenced Haanio to imprisonment for ten years.

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> (e) a tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs.

[7] The instructions as actually read to the jury are essentially the same as proposed by the court to the parties prior to their being read to the jury.

[8] HRS § 708-841(1)(c) (1993), states in relevant part that "[a] person commits the offense of robbery in the second degree if, in the course of committing theft: . . . [t]he person recklessly inflicts serious bodily injury upon another."

DISCUSSION

A.

DENIAL OF THE POST-EVIDENCE MOTION FOR JUDGMENT OF ACQUITTAL

Haanio contends that the circuit court erred in denying his oral motion for judgment of acquittal at the close of all of the evidence. We disagree.

> The standard to be applied by the trial court in ruling upon a motion for a judgment of acquittal is whether, upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. An appellate court employs the same standard of review.
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> State v. Pone, 78 Hawai'i 262, 265, 892 P.2d 455, 458 (1995).
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> The test on appeal is not whether guilt was established beyond a reasonable doubt, but whether substantial evidence existed to support the jury's conclusion. State v. Jackson, 81 Hawai'i 39, 46, 912 P.2d 71, 78 (1996). "'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." State v. Batson, 73 Haw. 236, 248, 831 P.2d 924, 931, reconsideration denied, 73 Haw. 625, 834 P.2d 1315 (1992) (citations omitted). Under such a review, we give "full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact." State v. Yabusaki, 58 Haw. 404, 411, 570 P.2d 844, 848 (1977).

State v. Duldulao, 86 Hawai'i 143, 146, 948 P.2d 564, 567 (1997).

Haanio states that the charge of Robbery in the First Degree (Robbery First) required the State to prove that he committed theft, and argues that "there was a lack of substantial evidence that Haanio committed theft." In his opening brief, Haanio notes that Kamoku had previously given money to Haanio to buy more beer and Haanio brought the beer back and shared it with Kamoku; "none of the purported eyewitnesses, neither Goods,

Hammons, or Morris, ever saw Haanio reach into Kamoku's pockets or take anything from Kamoku"; none of the missing items was ever found on Haanio or in his vicinity;[9] and the right pocket could have been turned inside out by Kamoku while searching for something.

The law, however, requires the State to prove only that Haanio was "in the course of committing theft." HRS § 708-842 (1993) states "[a]n act shall be deemed 'in the course of committing a theft' if it occurs in an attempt to commit theft, in the commission of theft, or in the flight after the attempt or commission." Viewing the evidence in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, there was substantial evidence of sufficient quality and probative value to enable a person of reasonable caution to support the conclusion that Haanio was in the course of committing a theft when he physically assaulted Kamoku. Therefore, the circuit court was right when it denied Haanio's motion for a judgment of acquittal.

[9] The alleged items that were taken from Gilbert Kamoku were food stamps, dollar bills, a bus pass, and a wallet.

B.

INSTRUCTIONS ON ASSAULT IN THE FIRST DEGREE
AND ASSAULT IN THE SECOND DEGREE AS
INCLUDED OFFENSES OF ROBBERY FIRST

Haanio contends that the jury instructions regarding the offense of Assault in the First Degree (Assault First) and the HRS §§ 707-711(1)(a) and (b) types of Assault in the Second Degree (Assault Second) should not have been given because these offenses are not included offenses of the HRS § 708-840(1)(a) type of Robbery First.

The statutory provision defining the relevant included offenses is HRS § 701-109 (1993). It states as follows:

> (4) A defendant may be convicted of an offense included in an offense charged in the indictment or the information. An offense is so included when:
>
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
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> (c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

Pursuant to HRS § 708-840(1)(a), the elements of Robbery First are:

(a) in the course of committing theft; and

(b) attempts to kill another, or intentionally or knowingly inflicts or attempts to inflict serious bodily injury upon another.

Pursuant to HRS § 707-710(1) (1993), the elements of Assault First are "intentionally or knowingly causes serious bodily injury to another person."

Pursuant to HRS § 707-711(1)(a) (1993), the elements of Assault Second are "intentionally or knowingly causes substantial bodily injury to another" and pursuant to HRS § 707-711(1)(b), the elements of Assault Second are "recklessly causes serious bodily injury to another person[.]"

A comparison of the elements as charged or stated in this case is as follows:

ROBBERY FIRST 708-840(1)(a) Class A	ROBBERY SECOND 708-841(1)(c) Class B	ASSAULT FIRST 707-711(1)(a) Class B	ASSAULT SECOND 707-711(1)(b) Class C
attempts to kill			
in the course of committing theft	in the course of committing theft		
intentionally[10]	recklessly	intentionally or knowingly	intentionally or knowingly or recklessly
inflicts	inflicts	causes	causes
or attempts to inflict			
serious	serious	serious	serious or substantial
bodily injury	bodily injury	bodily injury	bodily injury
upon another	upon another	to another	to another

Clearly, Assault First and Assault Second are not included offenses of Robbery Second.

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[10] Act 68, Session Laws 1998, which does not apply in the instant case because the crime was committed prior to its effective date of April 29, 1998, added the words "or knowingly." The Supplemental Commentary on HRS § 708-840 (Supp. 1999) explains that

> Act 68, Session Laws 1998, amended § 708-840 by including in the offense of robbery in the first degree, situations where a person knowingly inflicts or attempts to inflict serious bodily injury on another in the course of committing a theft. The legislature believed that since robbery was essentially an assault committed during the course of a theft, the statutory scheme involving the highest degree of robbery, robbery in the first degree, should be consistent with that of the assault statutes, and thus, robbery in the first degree should include both the intentional and knowing states of mind. Act 68 made the offense of robbery in the first degree consistent with the offense of assault in the first degree. House Standing Committee Report No. 1231-98.

To the extent that the evidence shows that serious bodily injury was in fact inflicted, it appears that Assault First and Assault Second are included offenses of Robbery First. To the extent that the evidence shows that serious bodily injury was in fact only attempted, Assault First and Assault Second are not included offenses.[11] In this case, there was no evidence of a mere attempt to inflict injury.

If both Robbery Second and Assault First are included offenses of Robbery First, does it make a difference and, if so, on what basis would the trial judge decide which one to instruct the jury to consider first? State v. Reyes, 5 Haw. App. 651, 658 n.5, 706 P.2d 1326, 1330 n.5 (1985), does not answer this question. This is not an issue raised by Haanio in this appeal.

It is unnecessary for us to decide whether Assault First and Assault Second are included offenses of Robbery First because the instructions as to these offenses were harmless beyond a reasonable doubt. The jury was instructed in relevant part as follows:

> If, and only if, you find the defendant not guilty of the offense of robbery in the first degree or you are unable to reach a unanimous verdict as to that offense, and you find the defendant not guilty of the offense of robbery in the second degree or you are unable to reach a unanimous verdict as to that offense, then you must determine whether the defendant is guilty or not guilty of the included offense of assault in the first degree. . . .

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[11] There is a similar problem in comparing Robbery in the First Degree and Robbery in the Second Degree. The words "or attempts to inflict" are in Robbery First but are not in Robbery Second. In cases like the instant case, where there is no evidence of an attempt to inflict, we suggest that prosecutors not allege it and that courts not include it in their instructions to the jury.

> If, and only if, you find the defendant not guilty of the offense of robbery in the first degree or you are unable to reach a unanimous verdict as to that offense and you find the defendant not guilty of the offense of robbery in the second degree or you are unable to reach a unanimous verdict as to that offense and you find the defendant not guilty of the offense of assault in the first degree or are unable to reach a unanimous verdict as to that offense, then you must determine whether the defendant is guilty or not guilty of the included offense of assault in the second degree.

Pursuant to that instruction, the jury in this case did not reach the issues of Assault First and Assault Second. State v. Holbron, 80 Hawai'i 27, 47, 904 P.2d 912, 932 (1995).

C.

INSTRUCTION ON ROBBERY SECOND AS AN INCLUDED OFFENSE OF ROBBERY FIRST

1. Rational Basis

As noted above, the Complaint in this case charged that Haanio "while in the course of committing a theft, did attempt to kill or intentionally inflict or attempt to inflict serious bodily injury upon" Kamoku.

In relevant part, HRS § 708-841(1)(c) (1993), states that "[a] person commits the offense of robbery in the second degree if, in the course of committing theft . . . [t]he person recklessly inflicts serious bodily injury upon another."

HRS § 701-109(5) (1993) states that "[t]he court is not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."

Haanio contends that "[i]f the State's witnesses were to be believed, then Haanio's actions could only be considered 'intentional,' not 'reckless'. . . . The only reason for giving the lesser on 'reckless' conduct would be as a sop to compromise. Which is what [Haanio] did not want." We disagree.

HRS § 702-206(1)(c) (1993) states that "[a] person acts intentionally with respect to a result of his conduct when it is his conscious object to cause such a result." HRS § 702-206(3)(c) states that "[a] person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result."

The question is not whether Haanio acted intentionally or recklessly when he injured Kamoku. The question is whether Haanio acted intentionally or recklessly when he "inflicted serious bodily injury" upon Kamoku. It is one thing to intend injury. It is another to intend "serious" injury.

2. Trial Court's Discretion

Haanio states that his right to put on a meaningful defense, *see* State v. Mitake, 64 Haw. 217, 225, 638 P.2d 324 (1981), and State v. Davenport, 55 Haw. 90, 102, 516 P.2d 65 (1973), gives him the right to put on an "all or nothing" defense and the trial court violated his right when, over his tactical

objection and without the State's request, it gave the jury an instruction on Robbery Second as an included offense.

The Hawai‘i Supreme Court has ruled that

> [i]n the specific context of included offense instructions, it is also the established law of this jurisdiction that "the prosecution as well as [the] defendant may request an instruction on a lesser included offense," . . . , and that such an instruction may be given "over both the prosecution's and the defendant's objection." . . . However, prior to the present matter, no appellate decision in this jurisdiction has expressly addressed the question whether, under any circumstances, a defendant can, as a tactical matter, legitimately seek to preclude the trial court from giving included offense instructions.
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> . . . .
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> Thus, in order to reconcile the competing interests of the prosecution and defendants, as well as to ensure that juries are appropriately instructed in criminal cases, we hold as follows: The trial judge must bring all included offense instructions that are supported by the evidence to the attention of the parties. The trial judge must then give each such instruction to the jury unless (1) the prosecution does not request that included instructions be given and (2) the defendant specifically objects to the included offense instructions for tactical reasons.[13] If the prosecution does not make a request and the defendant makes a tactical objection, the trial judge must then exercise his or her discretion as to whether the included offense instructions should be given. The trial judge's discretion should be guided by the nature of the evidence presented during the trial,[14] as well as the extent to which the defendant appears to understand the risks involved.
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> ———————————
>
> [13] The trial judge must enter into a colloquy, on the record, directly with the defendant to insure that the defendant understands the effect and potential consequences of waiving the right to have the jury instructed regarding included offenses.
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> [14] For example, although there may be sufficient evidence to support a guilty verdict as to a charged offense, if the weight of the evidence is to the contrary but supports guilt as to an included offense, the trial judge would be justified in giving an instruction regarding the included offense, even if it has not been requested by the prosecution and the defendant has expressly objected to it for tactical reasons.

State v. Kupau, 76 Hawai‘i 387, 393-96, 879 P.2d 492, 498-01 (1994) (citations omitted).

In Kupau, the Hawai'i Supreme Court stated the following two requirements.

First, footnote 13 of Kupau states that before the trial court decides whether or not to give the included offense instruction, the trial court "must enter into a colloquy, on the record, directly with the defendant to insure that the defendant understands the effect and potential consequences of waiving the right to have the jury instructed regarding included offenses." Kupau, 76 Hawai'i at 395-96, n.13, 879 P.2d at 500-01, n.13. Clearly, the court must "insure that the defendant understands[.]"[12]

Second, in its body, the Kupau opinion states that "[t]he trial judge's discretion should be guided by . . . the extent to which the defendant appears to understand the risks involved." Kupau, 76 Hawai'i at 396, 879 P.2d at 500-01. In other words, understanding comes in degrees and the trial judge must determine the degree of the defendant's understanding. On a scale of 1 to 100, the defendant's understanding could be anywhere from 50.1 to 100. The Kupau rule requires that the defendant's understanding be at least 50.1. As long as the defendant's understanding is at least 50.1, the court has no duty to increase that understanding.

[12] It appears the court assumes that all defendants can be made to understand at least to the minimum degree required.

The Kupau rule causes the trial court's discretionary decision to give or not to give the included offense instruction to depend in part on the court's assessment of "the extent to which the defendant appears to understand the risks involved" without giving any guidance as to how the degree of the defendant's understanding affects the court's discretion. Absent a defined impact by the degree of the defendant's understanding on the court's discretion, the purpose of the assessment of the degree of the defendant's understanding is minimized.

In Kupau, neither the prosecution nor the defense requested the included offense instruction, the trial court did not enter into the colloquy on the record or give the included offense instruction, and the defendant was convicted of the charged offense. Without the colloquy, there was no evidence or finding of "the extent to which defendant appear[ed] to understand the risks involved" in not giving the included offense instruction. The Hawai‘i Supreme Court affirmed this court's vacation of the conviction and remand for a new trial.

In Haanio's case, there was such a colloquy and the record shows that Haanio clearly and fully understood the effect and potential consequences of waiving his right to have the jury instructed regarding the included offense.

In Kupau, the Hawai‘i Supreme Court also expressly noted that "[t]he trial judge's discretion should be guided by the nature of the evidence presented during the trial" and,

"although there may be sufficient evidence to support a guilty verdict as to a charged offense, if the weight of the evidence is to the contrary but supports guilt as to an included offense, the trial judge would be justified in giving an instruction regarding the included offense." Kupau, 76 Hawai‘i at 396 n.14, 879 P.2d at 501 n.14. These limitations on the trial judge's discretion ignore the impact of the result of the "colloquy."

With respect to "the weight of the evidence" being more supportive of the included offense than the charged offense, Kupau did not specify on what basis that "weight" should be determined and whether that determination is a finding of fact or conclusion of law.[13]

The possibilities range anywhere between the weight of the evidence being heavily in favor of the charged offense and heavily in favor of the included offense. Footnote 14 of Kupau states that "although there may be sufficient evidence to support a guilty verdict as to a charged offense, if the weight of the evidence is to the contrary but supports guilt as to an included offense, the trial judge would be justified in giving an instruction regarding the included offense[.]" Kupau, 76 Hawai‘i 396 n.14, 879 P.2d 501 n.14. In other words, the trial court has

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[13] "[I]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence[.]" State v. Buch, 83 Hawai‘i 308, 321, 926 P.2d 599, 612 (1996) (quoting Domingo v. State, 76 Hawai‘i 237, 242, 873 P.2d 775, 780 (1994) (citation and internal quotation marks omitted)).

the discretion[14] to give the included offense instruction when the "weight" of the evidence is 51-49 or more in favor of the included offense. The Hawai‘i Supreme Court's Kupau opinion did not indicate whether the trial judge has discretion when the "weight" of the evidence is 50-50 or 51-49 or more in favor of the charged offense.

In Haanio's case, we conclude that the trial court acted within the confines of its discretion when it instructed the jury on the included offense of Robbery Second.

CONCLUSION

Accordingly, we affirm the circuit court's June 19, 1998 Judgment, upon a jury verdict, convicting

[14] Under an unlimited abuse of discretion standard of review, if in two separate jury trials everything (the judge, the prosecutor, the defense counsel, the evidence, the arguments, the defendant or the victim, the lack of the prosecution's request for the included offense instruction, the defendant's objection to the included offense instruction for tactical reasons, and the defendant's clear understanding of the effect and potential consequences of the waiver) is the same except the jury and the defendant or the victim, the included offense instruction could be given in one case and not the other and both decisions would have to be affirmed on appeal. The more a definitive boundary is placed on the trial court's discretion, the more the undesirable uncertainty created by "depends which judge hears your case" can be eliminated.

Defendant-Appellant Oliver Haanio of the included offense of Robbery in the Second Degree.

DATED: Honolulu, Hawai‘i, July 28, 2000.

On the briefs:

Dwight C. H. Lum
for Defendant-Appellant.

Caroline M. Mee,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Chief Judge

Associate Judge

Associate Judge