NO. 23168

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellant, v.
DENNIS STANLEY BAKER, Defendant-Appellee

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 99-0380(1))

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

Defendant-Appellant Dennis Stanley Baker (Baker) appeals the judgment entered by Circuit Court Judge Artemio C. Baxa on January 28, 2000, upon a jury's verdict, convicting Baker as charged of Resisting Arrest, Hawaiʻi Revised Statutes (HRS) § 710-1026(1) (1993), and three counts of Assault Against a Police Officer, HRS § 707-712.5 (1993). We affirm.

BACKGROUND

On November 10, 1998, at about 10:00 p.m., paramedics responded to a call in Makawao, Maui, alleging that Baker had a possible heart attack. Based upon a report that Baker was combative towards the paramedics, the police were called. Prior to arriving at Baker's residence, Police Officers Rockwell Silva, Mario Bonilla, and Lauren Natividad (Officers Silva, Bonilla, and

Natividad, respectively) learned that there was an outstanding bench warrant for Baker's arrest.

Paramedic Edward Hill (Hill) testified that Baker "was very surprised that we were there, said that he was fine and that he didn't really need us." Shortly after arriving, the paramedics learned that Baker had just been in the hospital after suffering a heart attack and that Baker had left the hospital against medical advice before his treatment was completed. The paramedics then checked Baker's blood pressure, pulse, and respiratory rate and concluded that all were fine. When they tested his heart on a heart monitor, however, they "noticed a couple of little changes in his -- the pattern that the heart produces when it beats." Since these irregular patterns sometimes indicate a problem with the heart, the paramedics attempted to convince Baker to return to the hospital. Hill testified that Baker "didn't want to go. He was polite. He wasn't belligerent or anything, but he didn't want to go, said he was fine."

Officer Silva asked the paramedics if anything was wrong with Baker and they responded in the negative. According to Officer Silva, he "didn't see [Baker] to be physically combative. He was -- he's loud spoken. But he didn't show no signs of physical combativeness." While the paramedics were

"leaving loading up their equipment[,]" Officer Silva informed Baker of the outstanding bench warrant and placed him under arrest. When Baker stood up and turned around, Officer Silva "presumed that [Baker] was giving himself up to us because he acknowledged . . . the bench warrant." When Baker "started walking up the stairway to the front porch[,]" Officer Silva followed him, grasped his right arm, and said, "[S]ir, you're under arrest. You need to come with me." At that point, Baker "changed totally" and "pushed [Officer Silva] off of the stairs." Baker then darted up the stairs and attempted to open the door. When Officer Silva pursued Baker and grabbed him, Baker "back kicks" Officer Silva's thigh. Officer Silva further testified, in relevant part, as follows:

> A. . . . I grabbed a hold over [Baker's] shoulder. When [Baker] got the door open, I reached around to grab him, and then he shoved my arm up against the frame of the doorway. . . . [Baker] had a shirt on and I held on to his shirt. And he just slipped his body off that shirt -- that shirt off.
>
> . . . .
>
> . . . Then I entered the house and grabbed [Baker] again at this time [Baker's] putting up a struggle. There's a couch that was to the right. Both of us fell on to the couch, and [Baker's] still hitting. Me I'm telling him you need to calm down throughout.
>
> Q. Where is he hitting you at on your body?
>
> A. Well, his arms are moving up and down. He's hitting me in the torso area, and I'm telling him calm down. You need to calm down. You're under arrest. Why are you doing this? And he yells you guys ain't taking me in, you know.

Officers Bonilla and Natividad eventually assisted Officer Silva by turning Baker over on his stomach and placing

handcuffs on him. Officer Silva testified that he had an abrasion on his arm caused when it "was slammed up against the door frame" and "extreme pain to [his] thigh area where [he] was kicked."

The officers escorted Baker to the Wailuku police station. When Baker told the desk sergeant of his having had a heart problem several days prior, the desk sergeant instructed Officer Silva to take Baker to the emergency room as a safeguard.

Baker was charged by an amended complaint filed on August 5, 1999. Baker's August 27, 1999 Motion in Limine sought to exclude or preclude testimonial or documentary evidence of Baker's conviction in 1995 for abuse of family household member. Baker's motion asked the court to "direct and command the prosecutor to instruct his witnesses to refrain from 'volunteering' the excluded evidence, upon pain of a dismissal of the complaint with prejudice."

On November 4, 1999, Plaintiff-Appellee State of Hawai‘i (the State) filed its Motion in Limine to bar evidence "regarding the disciplining of one of the officers involved in this case by the Maui Police Department in an unrelated matter[.]" In the motion, the State argued that if the court allowed Baker to use this evidence to support an argument that the police officer was the first aggressor, "the State should be

allowed to present evidence that [Baker] has a prior conviction for Abuse of a Family/Household Member in 1995." The family member was Baker's wife.

The court denied Baker's motion and granted the State's motion on the condition that if on cross-examination Baker admitted the prior conviction, the court would allow no further evidence on the subject.

In the opening argument to the jury, Baker's defense was described as follows: "And after you've heard all the evidence from both sides, you will not be able to find beyond a reasonable doubt that my client had this requisite state of mind to assault these officers or the requisite state of mind to resist arrest."

Dr. James Muto (Dr. Muto), a medical doctor with an expertise in cardiology, had treated Baker at the hospital for his earlier heart attack. Dr. Muto testified that Baker "had an anterior lateral heart attack. That means that the front, the tip and the left side and some of the interior wall of his heart was dying. So it was a big kind of heart attack. It's a -- it's a bad one." Baker's symptoms included chest discomfort, chest pressure, and sweating and discomfort radiating down his arm. In the words of Dr. Muto, Baker "was howling, you know, because he was in a lot of pain, and he was real scared." Baker was given a

variety of medications including Ativan, Valium, and Librium. That night, Baker hallucinated and "got really agitated." Baker "just kept getting worse and worse and worse. And just wanted to go home." Baker was given a triple dose (300 milligrams) of Librium "so he would just lay down and stop trying to wreck the room." Baker "was scaring the nurses. He was trying [to] pull out his IVs. He was going a little crazy, [a]nd he wanted to go home." "[Baker] had morphine. He had triple the dose of Librium and he still two hours after each time we pumped him full of medication or three hours he was up like driving everybody crazy."

Based upon his conclusion that if Baker went home he would have died, what Dr. Muto

> did is had the nurses gave [sic] him a lot of drugs through the IV to sedate him, and he would go to sleep for couple hours and then wake up and again would start to get a little crazy, agitated, and I figured that what was happening is we were getting an odd reaction to one of the medications.
>
> And it doesn't happened [sic] very often. But sometimes what you can have happen to a person when you give him Ativan or Librium is they can -- you can have the opposite effect.
>
> Normally they get sleepy and tranquil and they'll watch TV and call their friends, and they will tell them they are having a heart attack. And then call in the kids.
>
> But this just this gentleman he was going nuts. Okay. He was doing the complete opposite. He was trying to rip out his IV and go home. So what we were having is the opposite effect with these drugs, and that's not common, but it's a side effect, unfortunately, we see with these medications.
>
> And I looked in the PDR, which is the Physician's Desk Reference. It has all the information about these drugs and the side effects, ...

> But under Librium we have a side effect that's called acute rage, and I think that's the best two words I can use to describe what happened to this guy in ICU because this guy was uncontrollable.

Not being a "jail warden," after keeping Baker in the hospital for two and one-half days, Dr. Muto had no alternative but to allow Baker, contrary to medical advice, to check himself out of the hospital and return home.

When asked whether "the combination of these medicines [would] affect [Baker's] ability to make decisions[,]" Dr. Muto responded in the affirmative because in the emergency room, although Baker was in pain, he would follow commands and did not want to go home, and the change occurred "[a]fter we loaded up the drugs[.]"

In Dr. Muto's words,

> I guess what [the drug] kind of does is it inhibits you. You know, all your normal checks and balances, you know, some people say, God I'd like to punch you. Man, I can't stand you, right, and you -- on these drugs, you'll do it. But if weren't [sic] on it, you might not.

Dr. Muto also testified that "[t]he half life of Librium is 24 to 48 hours. . . . That means 48 hours after his last dose, 50 percent of this drug is still in his system."

During the trial, during cross-examination of Officer Silva by the defense, a question was asked and answered as follows:

> Q. . . . It's true, is it not, that you were discipline [sic] in 1995 for excessive force?
>
> A. Yes.

On recross-examination, a question was asked and answered as follows:

> Q. The incident that led to you being suspended, was an incident in which a handcuffed arrestee, was shoved against a wall; correct?
>
> A. Correct.

Only Dr. Muto testified for the defense. Baker decided not to testify. After Dr. Muto testified, the State asked the court "to instruct the jury to strike all testimony from [Officer Silva] . . . regarding his prior instance of discipline with the Maui Police Department." The State noted that the reason stated by the defense for presenting the evidence was that Baker "was defending himself against the aggressions of" Officer Silva. The court denied the motion. The State then asked permission to bring in rebuttal evidence as to Baker's prior conviction for abuse of a family household member. The court also denied this motion.

In rebuttal, Dr. John Mills (Dr. Mills), a medical doctor and an expert in emergency medicine, testified that he saw Baker in the early morning hours of November 11, 1998, and saw no sign of intoxication by drugs or alcohol at that time.

There was no request for, and the court did not provide, jury instructions on pathological intoxication. The court instructed the jury, in relevant part, as follows:

> Instruction number 26.
>
> Non self-induced intoxication is a defense to negate the conduct alleged or the state of mind sufficient to establish an element of the offenses charged, if the defendant, by reason of such intoxication, lacked the substantial capacity either to appreciate the wrongfulness of the conduct or to conform his conduct to the requirements of law at the time of the offense.
>
> The burden is upon the prosecution to prove beyond a reasonable doubt that the defendant as a result of such intoxication did not lack substantial capacity to: (1) appreciate **their own**[1] [sic] the wrongfulness of his conduct or; (2) conform his conduct to the requirements of the law.
>
> If the prosecution fails to meet its burden, then you must find the defendant not guilty.
>
> "Nonself-induced intoxication" means intoxication caused by substances that the defendant did not knowingly introduce into his body.
>
> "Intoxication" means a disturbance of mental or physical capacity resulting from the introduction of substances into the body.

(Emphasis added; footnote added.)

The jury found Baker guilty of all counts. For each count, the court sentenced Baker to probation for one year upon special terms and conditions including forty-five days in jail, one hundred hours of community service, participation in an anger management program until clinically discharged, and payment of a $200 Crime Victim Compensation fee.

On February 14, 2000, Baker timely filed this appeal.

On July 3, 2000, Baker filed a Motion to Remand for Hearing on Motion for Withdrawal and Substitution of Counsel. An accompanying Declaration of Counsel stated, "[Baker] wished to

[1] These two words "their own" are in the transcript but not in the written instructions given to the jury.

raise the issue of ineffective assistance of trial counsel, a Deputy Public Defender, concerning counsel's failure to: 1) elicit medical opinions from the defense expert on the defense theory of involuntary intoxication, 2) cross-examine State's witnesses about exculpatory evidence, 3) object to prosecutorial misconduct." This motion was granted on July 3, 2000.

POINTS ON APPEAL

1. The trial court committed plain error when it failed to instruct the jury on the defense of "pathological intoxication."

2. The trial court erred by tendering an insufficient instruction on "nonself-induced intoxication."

3. At trial, defense counsel provided ineffective assistance of counsel in violation of Article I, Section 14 of the Hawai‘i Constitution and the Sixth Amendment of the United States Constitution.

RELEVANT STATUTE

HRS § 702-230 (1993) states, in relevant part, as follows:

> (2) Evidence of the nonself-induced or pathological intoxication of the defendant shall be admissible to prove or negative the conduct alleged or the state of mind sufficient to establish an element of the offense. Evidence of self-induced intoxication of the defendant is admissible to prove or negative conduct or to prove state of mind sufficient to establish an element of an offense. Evidence of self-induced intoxication of the defendant is not admissible to negative the state of mind sufficient to establish an element of the offense.
>
> . . . .

> (4) Intoxication which (a) is not self-induced or (b) is pathological is a defense if by reason of such intoxication the defendant at the time of the defendant's conduct lacks substantial capacity either to appreciate its wrongfulness or to conform the defendant's conduct to the requirements of law.
>
> (5) In this section:
>
> (a) "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body;
>
> (b) "Self-induced intoxication" means intoxication caused by substances which the defendant knowingly introduces into the defendant's body, the tendency of which to cause intoxication the defendant knows or ought to know, unless the defendant introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of a penal offense;
>
> (c) "Pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the defendant does not know the defendant is susceptible and which results from a physical abnormality of the defendant.

RELEVANT STANDARDS OF REVIEW

A. Plain Error

> "We may recognize plain error when the error committed affects substantial rights of the defendant." State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997) (citations and internal quotations signals omitted). *See also* Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) (1993) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999) (quoting State v. Maumalanga, 90 Hawai'i, 58, 63, 976 P.2d 372, 377, *reconsideration denied* (1999) (quoting State v. Davia, 87 Hawai'i [249,] 253, 953 P.2d [1347,] 1351 (1998))).

"As a general rule, jury instructions to which no objection has been made at trial will be reviewed only for plain error." State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642

(1998) (citing [State v.] Pinero, 75 Haw. [282,] 291-2, 859 P.2d [1369,] 1374 [(1993)]).

"[T]his court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." Sawyer, 88 Hawai‘i at 330, 966 P.2d at 642 (citing State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 676 (1988)).

"This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system--that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes." State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993) (quoting State v. Fox, 70 Haw. 46, 55-56, 760 P.2d 670, 675-76 (1988)). "If the substantial rights of the defendant have been affected adversely, the error will be deemed plain error." Sawyer, 88 Hawai‘i at 330, 966 P.2d at 642; (citing Pinero, 75 Haw. at 291-2, 859 P.2d at 1374).

B. Jury Instructions

"When jury instruction or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially

insufficient, erroneous, inconsistent, or misleading," State v. Kinnane, 79 Hawai'i 46, 49, 897 P.2d 973, 976 (1995) (citations omitted; emphasis in original). *See also* State v. Hoey, 77 Hawai'i 17, 38, 881 P.2d 504, 525 (1994).

"[E]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial." State v. Pinero, 70 Haw. 509, 527, 778 P.2d 704, 716 (1989) (quoting Turner v. Willis, 59 Haw. 319, 326, 582 P.2d 710, 715 (1978)).

"[E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the affect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error may have contributed to conviction." State v. Heard, 64 Haw. 193, 194, 638 P.2d 307, 308 (1981) (citations omitted). If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside. *See* Yates v. Evatt, 500 U.S. 391, 402-03, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991).

"An 'accused is entitled to an instruction on every defense supported by the evidence, no matter how inconclusive the

evidence may be, provided that evidence would support consideration of that issue by the jury.'" State v. Ortiz, 93 Hawai‘i 399, 404, 4 P.3d 533, 538 (App. 2000) (citation omitted).

C. Ineffective Assistance of Counsel

"In assessing claims of ineffective assistance of counsel, the applicable standard is whether, viewed as a whole, the assistance provided [was] within the range of competence demanded of attorneys in criminal cases." Dan v. State, 76 Hawai‘i 423, 427, 879 P.2d 528, 532 (1994) (internal quotation marks and citation omitted).

> [T]he defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.
>
> Determining whether a defense is 'potentially meritorious' requires an evaluation of the possible, rather than the probable, effect of the defense on the decision maker. . . . Accordingly, no showing of 'actual' prejudice is required to prove ineffective assistance of counsel.

Barnett v. State, 91 Hawai‘i 20, 27, 979 P.2d 1046, 1052-53 (1999) (ellipsis in original, citations and internal quotation marks omitted).

In order to establish the ineffective assistance of counsel on appeal, a petitioner must show that (1) his appellate counsel omitted an appealable issue, and (2) in light of the entire record, the status of the law, and the space and time limitations inherent in the appellate process, a reasonably

competent, informed and diligent criminal attorney would not have omitted that issue. *See* Briones v. State, 74 Haw. 442, 465-67, 848 P.2d 966, 977-78 (1993).

"In reviewing a claim of ineffective assistance of counsel, the standard for determining adequacy of representation is whether the assistance provided, viewed as a whole, is within the range of competence demanded of attorneys in a criminal case." State v. Hirano, 8 Haw. App. 330, 338, 802 P.2d 482, 486 (1990) (citation omitted).

DISCUSSION

A.

Baker argues that his counsel's and "the trial court's failure to tender an instruction on the defense of 'pathological intoxication' essentially removed from the State its burden of negating, beyond a reasonable doubt, that [Baker] was 'pathologically intoxicated' at the time of his alleged criminal conduct." In his view, a reasonably competent, informed, and diligent criminal attorney would not have omitted this pertinent defense. Therefore, Baker alleges he was deprived of his substantial right to obtain a fair trial.

Once evidence of the defense of pathological intoxication has been introduced, the prosecution has the burden

of disproving it beyond a reasonable doubt.[2] In other words, until evidence of the defense of pathological intoxication has been introduced, the prosecution has no burden of disproving it.

As noted above, the HRS § 702-230(5)(c) definition of "pathological intoxication" requires (a) an intoxication grossly excessive in degree, given the amount of the intoxicant, (b) to which the defendant does not know [he or she] is susceptible, and (c) which results from a physical abnormality of the defendant.

In Baker's case, Dr. Muto's testimony that the drug has a possible side effect called acute rage, that Baker received three times the normal amount of the drug, and that it takes 24 to 48 hours for 50 percent of the drug to be discharged from a person's system is evidence contrary to (a). Moreover, even assuming there is evidence of (a) and (b), there is no evidence of (c).

B.

Jury instruction no. 26 stated, in relevant part, as follows:

> Non self-induced intoxication is a defense to negate the conduct alleged or the state of mind sufficient to establish an element of the offenses charged, if the defendant, by reason of such intoxication, lacked the substantial capacity either to appreciate the wrongfulness of the conduct or to conform his conduct to the requirements of law at the time of the offense.

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[2] In a parallel situation, once evidence of justification has been introduced, the prosecution has the burden of disproving it. State of Hawaii v. McNulty, 60 Haw. 259, 262, 588 P.2d 438, 442 (1978).

> The burden is upon the prosecution to prove beyond a reasonable doubt that the defendant as a result of such intoxication did not lack substantial capacity to: (1) appreciate . . . the wrongfulness of his conduct or; (2) conform his conduct to the requirements of the law.

Baker contends that these two paragraphs erroneously combine the language of subsections (2) and (4) of HRS § 702-230. He contends that

> by combining the language of subsections (2) and (4), the jury may have erroneously believed that once the State had proved beyond a reasonable doubt that [Baker] did not lack the substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law, the State had also relieved itself of proving [Baker's] state of mind sufficient to establish the elements of the offenses charged.

We disagree. Instruction no. 18 instructed the jury that the relevant state of mind for Resisting Arrest is "intentionally." Instructions nos. 19, 20, and 21 instructed the jury that the relevant state of mind for Assault Against a Police Officer is "intentionally, knowingly or recklessly[.]" Nothing in this instruction negatively affected those instructions.

C.

Baker also contends

> that the first line of [the instruction] erroneously used the language provided for in [HRS § 702-230(2)] which, as previously discussed, simply allows evidence of "non self-induced intoxication" to be admitted at trial. [Baker] submits that the first line of [the instruction] should have either: (1) omitted the portion that read, "to negate the conduct alleged or the state of mind sufficient to establish an element of the offenses charged;" or, (2) simply stated: "Non self-induced intoxication is a defense **which negatives penal liability** if the defendant lacked the substantial capacity either to appreciate the wrongfulness of the conduct or to conform his conduct to the requirements of the law at the time of the offense."

(Emphasis in original.) The State responds that the instruction was requested by Baker and was either proper or harmless.

Only the first paragraph of the instruction is in question. We hold that in Baker's case, although the first paragraph of the instruction could have been better worded, the instruction as a whole was not prejudicially insufficient, erroneous, inconsistent, or misleading.

D.

Baker argues that

> even assuming that [Baker] had "knowingly" introduced the drugs into his body, the prosecution should have had the burden of proving beyond a reasonable doubt that [Baker] knew, or should have known, of the effects these substances would have on him, and that these substances were not introduced into his body pursuant to medical advice.

This argument has no basis in the record. There is no evidence that Baker introduced any relevant substances into his body. Medical personnel did the introducing.

The jury was instructed that "nonself-induced intoxication" means intoxication caused by substances that the defendant did not knowingly introduce into his body. Baker contends that the court's definition of "nonself-induced intoxication" was prejudicially insufficient, erroneous, and misleading because it is not the opposite of "self-induced intoxication." Baker argues that the jury instruction should have stated that "'[n]onself-induced intoxication' means intoxication caused by substances that the defendant did not knowingly introduce into his body, OR THE DEFENDANT INTRODUCED THE SUBSTANCES PURSUANT TO MEDICAL ADVICE." (Emphasis in

original.) We disagree. There being no evidence that Baker himself introduced any relevant substances into his body, the proposed instruction is not supported by the evidence. We hold that in Baker's case, although the first paragraph of the instruction could have been better worded, the instruction as a whole was not prejudicially insufficient, erroneous, inconsistent, or misleading.

E.

Baker also contends that none of the material terms of the instruction were properly defined for the jury. He specifically cites "substantial capacity" and "disturbance of mental or physical capacity." The State responds that the undefined terms have plain meaning. We agree with the State.

Baker contends that the trial court should have instructed the jury as to the defense of "voluntary act" pursuant to HRS §§ 702-200 and -201. He argues that by the omission of this instruction, "the State was relieved of its burden of proving beyond a reasonable doubt that [Baker's] conduct was voluntary and not caused by the excessive amounts of prescribed medication introduced into his body pursuant to medical advice." We disagree. HRS § 702-200 (1993) states, in relevant part, as follows:

> **Requirement of voluntary act or voluntary omission.** (1) In any prosecution it is a defense that the conduct alleged does not include a voluntary act or the voluntary omission to perform an act of which the defendant is physically capable.

> (2) . . . [A] defense based on intoxication which is pathological or not self-induced which precludes or impairs a voluntary act or a voluntary omission shall be treated exclusively according to this chapter.

In other words, in Baker's case, HRS § 702-230 is the relevant statute and, as noted above, the jury was instructed regarding it.

CONCLUSION

Accordingly, we affirm the circuit court's January 28, 2000 Judgment convicting Baker of Resisting Arrest, HRS § 710-1026(1), and three counts of Assault Against a Police Officer, HRS § 707-712.5.

DATED: Honolulu, Hawai'i, June 25, 2001.

On the briefs:

Jock M. Yamaguchi
for Defendant-Appellant.

Chief Judge

Richard K. Minatoya,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.

Associate Judge

Associate Judge