NO. 25604

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
ASHLEY C. DARRIS, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CR. NO. 02-1-0203)

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

Ashley Curtis Darris (Defendant) appeals the January 15, 2003 judgment of the circuit court of the third circuit[1] that convicted him, upon a jury's verdict, of assault in the third degree,[2] and sentenced him to one year of probation upon terms and conditions including six months in jail, stayed pending appeal. We affirm.

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[1] The Honorable Riki May Amano, judge presiding.

[2] Hawaii Revised Statutes (HRS) § 707-712 (1993) provides:

> (1) A person commits the offense of assault in the third degree if the person:
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> (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or
>
> (b) Negligently causes bodily injury to another person with a dangerous instrument.
>
> (2) Assault in the third degree is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

I. Discussion.

Defendant first contends the court committed plain error when it submitted a standard verdict form to the jury which "included *no mention* of the state's burden to disprove Defendant's self-defense claim." Opening Brief at 15 (emphasis in the original). Defendant cites no apposite authority to back up this contention, and we are not aware of any. Indeed, Defendant admits that "the trial judge did instruct the jurors that they needed to determine whether the state had disproved the defense of self-defense[,]" id., and we conclude this was sufficient. Montalvo v. Lapez, 77 Hawai'i 282, 292, 884 P.2d 345, 355 (1994) ("In analyzing alleged errors in special verdict forms, the [jury] instructions and the interrogatories on the verdict form are considered as a whole." (Citation omitted.)).

By the same token, Defendant's next point of error on appeal, that his trial counsel rendered ineffective assistance of counsel in failing to object to the verdict form, is without merit. There being no such defect in the verdict form, it cannot be said "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." State v. Aplaca, 74 Haw. 54, 67, 837 P.2d 1298, 1305 (1992) (citations and footnote omitted).

Defendant avers the court erred in denying his motion for a new trial, because the jury was allegedly confused about the contingent issue of mutual affray. See Hawaii Revised Statutes (HRS) § 707-712(2) (1993). Defendant's summary statement of this point of error should suffice for our purposes:

> The trial judge abused her discretion in refusing to grant a new trial when deliberating jurors expressed confusion with the *mutual affray* special interrogatory and sought clarification, but then nonetheless reached a verdict while awaiting such clarification, even though such jury asked the court to still clarify their confusion despite having reached a verdict; within three minutes of receiving a clarification response the jurors then appeared in court to report that they were voting "yes" on the special interrogatory while their written question to the court had stated that they would be answering "no." Although counsel did not object to the approach used by the judge at trial, the trial judge took no steps to investigate these unusual facts further or to ensure that the confused jurors understood the meaning of a Yes vs. No response to the special interrogatory.

Opening Brief at 4 (citations to the record omitted; emphasis in the original). This point of error is unavailing.

First, and to be clear on the predicate facts, the record does not unambiguously indicate that the jury had reached a decision, specifically on the contingent issue of mutual affray, before the court clarified the issue. And it is not at all clear that the jury stated they would be answering "no" to the special interrogatory on mutual affray. On the contrary, it quite obviously appears the jury was merely posing a hypothetical. Moreover, we observe that the court's instruction and special interrogatory to the jury on mutual affray were, as Defendant's trial counsel admitted below, "recommended by me"; as was the court's clarifying response to the jury's communication

regarding the mutual affray instruction. Cf. State v. Timoteo, 87 Hawai‘i 108, 115, 952 P.2d 865, 872 (1997) ("Defense counsel should not be allowed to sandbag the trial judge by requesting and approving an instruction they know or should know will result in an automatic reversal, if given." (Citation and block quote format omitted.)).

At any rate, the court polled the jury after receiving the verdict, not only as to the jury's guilty verdict on the offense charged, but also as to the jury's "yes" answer to the mutual affray special interrogatory, and each juror confirmed his or her agreement with both. Any error was therefore harmless beyond a reasonable doubt. See State v. Holbron, 80 Hawai‘i 27, 32, 904 P.2d 912, 917 (1995).

Citing State v. Modica, 58 Haw. 249, 250-51, 567 P.2d 420, 421-22 (1977), Defendant next argues that the State's decision to charge him with assault in the third degree -- when it could have charged him with abuse of family or household members under HRS § 709-906(1) (Supp. 2003)[3] in this case of assault upon his girlfriend's daughter -- violated his due process and equal protection rights. We disagree. The Modica rule applies only where "the elements of proof essential to

[3] HRS § 709-906(1) (Supp. 2003) provides in pertinent part that, "It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member . . . . For the purposes of this section, 'family or household member' means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit."

either conviction are exactly the same," Modica, 58 Haw. at 251, 567 P.2d at 422 (citations omitted), and that is not the case here. Compare HRS § 707-712(1) (1993) with HRS 709-906(1). As the Modica court observed, "Statutes may on occasion overlap, depending on the facts of a particular case, but it is generally no defense to an indictment under one statute that the accused might have been charged under another. Under those circumstances, the matter is necessarily and traditionally subject to the prosecuting attorney's discretion." Modica, 58 Haw. at 251, 567 P.2d at 422 (citations omitted).

Defendant states his final point of error on appeal, as follows:

> The trial judge imposed an improperly excessive sentence under HRS § 641-16 [1993][4] when she sentenced [Defendant] on this misdemeanor assault in the third degree to the maximum possible probationary jail sentence of six months in jail,[5] where the facts

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[4] HRS § 641-16 (1993) provides, in pertinent part:

> In case of a conviction and sentence in a criminal case, if in its [the supreme court or the intermediate court of appeals] opinion the sentence is illegal or excessive it may correct the sentence to correspond with the verdict or finding or reduce the same, as the case may be. . . .
>
> No order, judgment, or sentence shall be reversed or modified unless the court is of the opinion that error was committed which injuriously affected the substantial rights of the appellant. . . .

[5] HRS § 706-624(2)(a) (1993) provides, in relevant part:

> (2) Discretionary conditions. The court may provide, as further conditions of a sentence of probation, to the extent that the conditions are reasonably related to the factors set forth in section 706-606 and to the extent that the conditions involve only deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 706-606(2), that the defendant:

(continued...)

> establish that [Defendant] had no prior conviction for any violent offense, but only a petty misdemeanor, and the complainant had – prior to the altercation - kicked the accused across a table causing him to crash to the floor - particularly where conviction under the alternative offense of Abuse of family or household members under [HRS] § 709-906 would have carried a mandatory minimum sentence of only two days in jail.[6]

Opening Brief at 4-5 (citation to the record omitted; footnotes supplied). We decline Defendant's invitation to reduce his sentence under the authority of HRS § 641-16, because we are not "of the opinion that error was committed which injuriously affected the substantial rights of the appellant." Id.

In our view, gleaned from an examination of the record, the six-month jail term the court imposed as a condition of Defendant's probation was "reasonably related to the factors set forth in [HRS § 706-606 (1993),[7]]" and involved "only

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[5](...continued)

> (a) Serve a term of imprisonment not exceeding one year in felony cases, and not exceeding six months in misdemeanor cases. . . .

[6] See HRS § 709-906(5)(a) (Supp. 2003).

[7] HRS § 706-606 (1993) provides:

> The court, in determining the particular sentence to be imposed, shall consider:
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> (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
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> (2) The need for the sentence imposed:
>
> (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
>
> (b) To afford adequate deterrence to criminal conduct;
>
> (c) To protect the public from further crimes of the defendant; and

(continued...)

deprivations of liberty or property as are reasonably necessary for the purposes indicated in [HRS § 706-606(2).]" HRS § 706-624(2) (1993). To mention just a few of the galaxy of circumstances that led to our perspective, we note the plethora of punches the forty-three-year-old Defendant administered to the left side of the sixteen-year-old complainant's head, which resulted in generalized swelling and bruising over that side of her head along with bleeding in an orb that was swollen shut. We would be remiss if we did not also mention that the prior conviction Defendant acknowledges -- "only a petty misdemeanor," Opening Brief at 4 -- was in fact for the offense of violation of an order for protection. In addition, Defendant was previously twice ordered to complete "anger management," obviously to no avail. All in all, we cannot conclude that the court abused its discretion in sentencing Defendant, State v. Griffin, 83 Hawai'i 105, 107, 924 P.2d 1211, 1213 (1996), nor that "error was committed which injuriously affected the substantial rights of the appellant." HRS § 641-16.

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[7](...continued)

> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
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> (3) The kinds of sentences available; and
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> (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

II. Conclusion.

Accordingly, the January 15, 2003 judgment of the court is affirmed.

DATED: Honolulu, Hawai‘i, December 16, 2004.

On the briefs:

Lionel M. Riley,
for defendant-appellant.

Sandra L. S. Freitas,
Deputy Prosecuting Attorney,
County of Hawai‘i,
for plaintiff-appellee.

Acting Chief Judge

Associate Judge

Associate Judge