NO. 27858

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
NATHAN PATRICK FUJIOKA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 04-1-2309)

SUMMARY DISPOSITION ORDER
(By: Recktenwald, C.J., Watanabe, and Foley, JJ.)

Defendant-Appellant Nathan Patrick Fujioka (Fujioka) appeals from the judgment entered by the Circuit Court of the First Circuit[1] (the circuit court) on March 8, 2006, convicting and sentencing him for two counts of Forgery in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 708-852 (Supp. 2006).[2]

Fujioka alleges that the circuit court failed to give proper jury instructions at trial, and he received ineffective assistance from his trial counsel, Mayla J.E. Blakley (Blakley). Specifically, Fujioka contends that: (1) "the trial court

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[1] The Honorable Dexter D. Del Rosario presided.

[2] Hawaii Revised Statutes (HRS) § 708-852 (Supp. 2006) states, now as it did when Defendant-Appellant Nathan Patrick Fujioka was charged, in pertinent part:

> **Forgery in the second degree.** (1) A person commits the offense of forgery in the second degree if, with intent to defraud, the person falsely makes, completes, endorses, or alters a written instrument, or utters a forged instrument, or fraudulently encodes the magnetic ink character recognition numbers, which is or purports to be, or which is calculated to become or to represent if completed, a deed, will, codicil, contract, assignment, commercial instrument, or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status.

commit[ted] plain error when it failed to consider, or discuss with Fujioka, Forgery in the Third Degree[3] and Criminal Simulation[4] as included offenses of Forgery in the 2nd Degree"; (2) "the trial court commit[ted] plain error when it failed to consider[] or discuss with Fujioka, Ignorance or Mistake of Fact [as a] Defense[5]"; and (3) Blakley failed to provide effective assistance of counsel. (Footnotes added.)

We resolve Fujioka's arguments as follows:

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[3] HRS § 708-853 (1993) states, in pertinent part:

> **Forgery in the third degree.** (1) A person commits the offense of forgery in the third degree if, with intent to defraud, the person falsely makes, completes, endorses, or alters a written instrument, or utters a forged instrument.

[4] HRS § 708-855 (1993) states:

> **Criminal simulation.** (1) A person commits the offense of criminal simulation if, with intent to defraud, the person makes, alters, or utters any object, so that it appears to have an antiquity, rarity, source, or authorship that it does not in fact possess.
>
> (2) In subsection (1), "utter" means to offer, whether accepted or not, an object with representation by acts or words, oral or in writing, relating to its antiquity, rarity, source, or authorship.
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> (3) Criminal simulation is a misdemeanor.

[5] HRS § 702-218 (1993) states:

> **Ignorance or mistake as a defense.** In any prosecution for an offense, it is a defense that the accused engaged in the prohibited conduct under ignorance or mistake of fact if:
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> (1) The ignorance or mistake negatives the state of mind required to establish an element of the offense; or
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> (2) The law defining the offense or a law related thereto provides that the state of mind established by such ignorance or mistake constitutes a defense.

(1) Pursuant to HRS § 701-109(4) (1993),[6] criminal simulation is not a lesser included offense of Forgery in the Second Degree, and there is no evidence in the record to support a jury instruction for criminal simulation. It is true that Forgery in the Third Degree is a lesser included offense of Forgery in the Second Degree. Nevertheless, the circuit court's failure to instruct the jury on Forgery in the Third Degree is harmless error because the jury convicted Fujioka of Forgery in the Second Degree, which is both the charged offense and an offense greater than the lesser offense. State v. Haanio, 94 Hawai'i 405, 415-16, 16 P.3d 246, 256-57 (2001). Therefore, we disagree with Fujioka's arguments regarding the jury instructions on lesser included offenses.

(2) Despite Fujioka's testimony that he did not intend to deposit forged checks, the circuit court did not err when it failed to sua sponte instruct the jury on the defense of ignorance or mistake of fact. In State v. Locquiao, 100 Hawai'i 195, 58 P.3d 1242 (2002), the Hawai'i Supreme Court held that "where a defendant has adduced evidence at trial supporting an instruction on the statutory defense of ignorance or mistake of

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[6] HRS § 701-109(4) (1993) states, in pertinent part:

> **Method of prosecution when conduct establishes an element of more than one offense. . . .**
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> . . . .
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> (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:
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> (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
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> (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.

fact, the trial court must, at the defendant's request, separately instruct as to the defense, notwithstanding that the trial court has also instructed regarding the state of mind requisite to the charged offense."[7] Id. at 208, 58 P.3d at 1255 (emphasis added). Unlike in Locquiao, Fujioka's trial counsel did not request an instruction on the defense of ignorance or mistake of fact. The jury was specifically instructed on the State's burden to prove, beyond a reasonable doubt, that Fujioka committed the offense of Forgery in the Second Degree with "intent to defraud." Based on Locquiao, the circuit court did not commit prejudicial error.

(3) For his claims of ineffective assistance of trial counsel, Fujioka specifically argues that Blakley: (a) failed to raise objections and to properly examine the witnesses, (b) filed no pre-trial motions, (c) failed to raise and ask for the included offense jury instructions, (d) failed "to file a[] Hawaii Rules of Penal Procedure (HRPP) Rule 14[8] Motion to Sever the Prejudicial Joinder of Counts I and II[,]" and (e) failed to raise the defense of ignorance or mistake of fact and to ask for instructions for the defense. (Footnote added.)

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[7] The Hawai'i Supreme Court in State v. Locquiao, 100 Hawai'i 195, 58 P.3d 1242 (2002), reached this holding by agreeing with those jurisdictions that have "held that the trial court must separately instruct the jury as to the ignorance-or-mistake-of-fact defense, when properly raised, in order to draw the jury's attention to the defendant's theory of the case." Id. at 207, 58 P.3d at 1254 (emphasis added).

[8] Hawai'i Rules of Penal Procedure Rule 14 states:

> **Rule 14. RELIEF FROM PREJUDICIAL JOINDER.**
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> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in a charge or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

With respect to (a) and (b), we conclude that Fujioka failed to meet his burden of showing that Blakley's alleged failure to object, examination of the witnesses, and failure to file pre-trial motions constituted ineffective assistance of counsel. Specifically, Fujioka failed to meet his two-fold burden of establishing that the alleged errors or omissions of defense counsel: (1) reflected lack of skill, judgment, or diligence, and (2) resulted in either the withdrawal or substantial impairment of a potentially meritorious defense. State v. Antone, 62 Haw. 346, 348-49, 615 P.2d 101, 104 (1980). With respect to (c) and (d), we conclude that the record does not support these claims. Finally, with respect to (e), we conclude that Blakley's failure to request the ignorance-or-mistake-of-fact-defense jury instruction may have constituted ineffective assistance of counsel. After examining the record on appeal, it is unclear why Blakley did not raise the defense of ignorance or mistake of fact and ask for instructions regarding this defense.

Accordingly, we affirm the judgment convicting and sentencing Fujioka, but without prejudice to the filing of a subsequent HRPP Rule 40 petition on Fujioka's claim of ineffective assistance of counsel based on the contention that Blakley failed to raise the defense of ignorance or mistake of fact and ask for instructions regarding the defense. State v. Silva, 75 Haw. 419, 439, 864 P.2d 583, 592-93 (1993).

DATED: Honolulu, Hawai'i, August 7, 2007.

On the briefs:

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