

*** NOT FOR PUBLICATION ***

NO. 25102

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

ANDREW BOUTHILLIER, Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 00-01-0159(2))

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy JJ.)

The defendant-appellant Andrew Bouthillier appeals from the judgment of the circuit court of the second circuit, the Honorable Shackley F. Raffeto presiding, filed on April 16, 2002, convicting him of and sentencing him for negligent homicide in the third degree, in violation of Hawai'i Revised Statutes (HRS) § 707-704 (1993). On appeal, Bouthillier contends: (1) that the circuit court plainly erred in failing to include attendant circumstances as, according to Bouthillier, a "material element" of simple negligence in the jury instruction defining negligent homicide in the third degree; (2) that the circuit court plainly erred in failing to give a specific unanimity instruction, per State v. Arceo, 84 Hawai'i 1, 928 P.2d 843 (1996), that all jurors must agree on the specific act that established the conduct element of the charged offense, in violation of his right to a unanimous verdict implicit in the due process clause of article I, section 5 of the Hawai'i Constitution; and (3) that the circuit court plainly erred in failing to include in the jury instruction regarding possible verdicts for count I a "not

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guilty" option next to the lesser included offense of negligent homicide in the third degree, thereby "truncat[ing] [his] presumption of innocence by instructing the jury that it could only find a guilty verdict" as to that offense.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we resolve Bouthillier's appeal as follows:

(1) The circuit court correctly declined to "include attendant circumstances as a material element of 'simple negligence'" in the jury instruction pertaining to negligent homicide in the third degree because there is no "attendant circumstances" element of that offense. The only elements material to the offense of negligent homicide in the third degree, each of which the prosecution was required to prove beyond a reasonable doubt, were (1) that Bouthillier operated a motor vehicle and (2) that death of another person resulted. "Simple negligence" was the state of mind requisite to each element. "Operat[ion of] a motor vehicle" constituted the "conduct" element, and "death of another person" constituted the "result of conduct" element of the offense. See Hawai'i Revised Statutes § 702-205 (1993). See also State v. Aganon, 97 Hawai'i 299, 303, 36 P.3d 1269, 1273 (2001) ("We note that not all offenses, as defined by the legislature, have all three possible elements.")

(2) The circuit court did not plainly err in failing to submit to the jury a specific unanimity instruction pursuant to

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Arceo because Bouthillier was engaged in a continuous course of conduct. While Bouthillier's driving might be "divisible into conceptually distinct motor activity" -- (1) driving at a speed greater than is reasonable and prudent, (2) failing to exercise due care in the operation of a vehicle, (3) driving at a speed in excess of the posted speed limit, (4) driving to the left side of the center of the roadway in overtaking and passing another vehicle, or (5) driving to the left side of the roadway under unlawful conditions -- "it nevertheless constitutes a 'series of acts set on foot by a single impulse and operated by an unintermittent force' and not separate and distinct culpable acts." State v. Hironaka, 99 Hawai'i 198, 207-08, 53 P.3d 806, 815-16 (2002). See also State v. Valentine, 93 Hawai'i 199, 208, 998 P.2d 479, 488 (2000); State v. Apao, 95 Hawai'i 440, 447, 24 P.3d 32, 39 (2001); State v. Kealoha, 95 Hawai'i 365, 376-78, 22 P.3d 1012, 1023-25 (App. 2000); State v. Rapoza, 95 Hawai'i 321, 330, 22 P.3d 968, 977 (2001).

(3) The verdict form included the only three possible unanimous outcomes -- not guilty of any offense, guilty as charged, or guilty of the lesser included. Finding Bouthillier "not guilty" of Count I, by necessity, entailed finding him not guilty of both the charged offense of negligent homicide in the second degree and the lesser included offense of negligent homicide in the third degree. Thus, there was no reason for the circuit court to include an option for "not guilty of the included offense of negligent homicide in the third degree" on the verdict form, inasmuch as it did not include an option for

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"not guilty of negligent homicide in the second degree."

Therefore, IT IS HEREBY ORDERED that the order from which this appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, January 20, 2005.

On the briefs:

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for the defendant-appellant
Andrew Bouthillier

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