NO. 23648

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
GEORGE K. SIAMANI, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-2483)

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

Defendant-Appellant George K. Siamani (Siamani) appeals from the July 14, 2000 Amended Judgment/Guilty Conviction and Sentence, entered by Circuit Court Judge Wendell K. Huddy, pursuant to a jury verdict, convicting Siamani of, in Count I, Robbery in the Second Degree, Hawaii Revised Statutes (HRS) § 708-841 (1993), and in Count II, of Kidnapping as a class B felony,[1] HRS § 707-720(1)(e) (1993), and sentencing him to imprisonment for ten years for each count, with a mandatory minimum of three years and four months.[2]

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[1] Hawaii Revised Statutes (HRS) §§ 707-720(2) and 707-720(3) (1993) provide that "kidnapping is a class A felony" except that "[i]n a prosecution for kidnapping, it is a defense which reduces the offense to a class B felony that the defendant voluntarily released the victim, alive and not suffering from serious or substantial bodily injury, in a safe place prior to trial."

[2] The July 11, 2000 Judgment sentenced Defendant-Appellant George K. Siamani (Siamani) as follows: "MANDATORY MINIMUM: TWO (2) YEARS AND FOUR (4) MONTHS INCARCERATION[.]" The July 14, 2000 Amended Judgment sentenced Siamani as follows: "MANDATORY MINIMUM: THREE (3) YEARS AND FOUR (4) MONTHS INCARCERATION."

Siamani presents two points on appeal. First, Siamani contends that there was insufficient evidence of Kidnapping, where the evidence showed that the offense of Kidnapping merged into the offense of Robbery in the Second Degree. Second, Siamani contends that the trial court erred in instructing the jury regarding the definition of the word "terrorize."

We affirm.

BACKGROUND

On December 20, 1999, Siamani was charged by complaint with the offenses of Robbery in the Second Degree, HRS § 708-841(1)(b)[3], and Kidnapping, HRS § 707-720(e)[4]. At Siamani's jury trial, which commenced on April 25, 2000, the following evidence was adduced.

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[3] HRS § 708-841(1)(b) states, in relevant part, as follows: "A person commits the offense of robbery in the second degree if, in the course of committing theft: . . . [t]he person threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property[.]"

[4] HRS § 707-720 states, in relevant part, as follows:

> (1) A person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to:
>
> . . . .
>
> (e) Terrorize that person or a third person; . . .
>
> . . . .
>
> (3) In a prosecution for kidnapping, it is a defense which reduces the offense to a class B felony that the defendant voluntarily released the victim, alive and not suffering from serious or substantial bodily injury, in a safe place prior to trial.

Todd Piosalan (Piosalan) testified that, on October 31, 1999, at approximately 11:30 a.m., he drove his four-door sedan to Mona's Market at the intersection of Waiakamilo Road and Dillingham Boulevard. Piosalan pulled his car into the last stall in front of the market and, before he exited, Siamani entered the front passenger side of the car, took hold of Piosalan's pants belt loop and ordered, "Give me your money." Piosalan told Siamani that he had no money. From the front passenger seat, Siamani "attempted to pat down [Piosalan's] front pockets." Piosalan stated that when he tried to push Siamani's hand away, Siamani "got mad that I did that and so he yelled at me and said, 'You want' -- 'Do you want to see your family' or 'Do you have kids?' Do you want to see your family again? Do you want your wife to see you defaced?'"

After Siamani yelled at Piosalan, Piosalan let Siamani finish patting down Piosalan's pockets until Siamani reached Piosalan's right back pocket, where Piosalan's wallet was located. At that point, Piosalan again attempted to push away Siamani's hand, and Siamani "got really upset then. . . . [Siamani] leaned -- or he pulled his hand back and leaned back and jerked forward as if he was gonna hit [Piosalan]. And then [Siamani] got in [Piosalan's] face and . . . said, 'Do you want to see what's in my pocket?'" Piosalan "felt intimidated" by Siamani's "actions, the things [Siamani] said, and the way

[Siamani] acted." Siamani continued to hold onto Piosalan's belt loop throughout this exchange.

After Siamani gestured toward hitting Piosalan, "[a]t that point Piosalan knew [Siamani] was really mad and if [Piosalan] didn't cooperate with him [Siamani] was gonna explode on [Piosalan] or something, get really upset." Piosalan was afraid. Siamani removed the wallet from Piosalan's back pocket, looked through the wallet, and told Piosalan to drive. "About five minutes" had elapsed at this point from the time that Siamani first entered Piosalan's car.

Piosalan stated that he "had no choice" but to drive away with Siamani in the car because he believed that Siamani would "probably get really upset with [him]" and Piosalan "didn't want to get hurt in any way[.]" Piosalan asked Siamani where he should drive, and Siamani replied, "Just drive." Siamani searched through Piosalan's glove compartment and a tray on the floor of the car while Piosalan drove.

Piosalan indicated on a map the path he drove, trying to remain in populated areas. Siamani directed Piosalan when and where to turn and Piosalan complied until Siamani directed Piosalan to turn left onto a dead end street. Piosalan instead turned right, and in response, Siamani struggled unsuccessfully with Piosalan to turn the steering wheel toward the left.

Siamani then "yelled a little bit and cussed, and that was about it."

Siamani then directed Piosalan to drive straight toward an unpopulated area, but Piosalan turned left because he saw only warehouses in the area toward which Siamani ordered him, and he was afraid to go in that direction. At that point, Siamani "got mad again and told [Piosalan] to drop him off under the freeway." Siamani got out of the car near a bridge and slowly walked away, taking twenty dollars that he had removed from Piosalan's wallet. Piosalan was fearful for his life throughout the encounter, which lasted "about 15 minutes."

Piosalan drove around the immediate vicinity to find a police officer. He saw an officer driving opposite him on Dillingham Boulevard, but when he was unsuccessful in attracting the officer's attention, he decided to drive approximately two miles to his home to call 911. About forty-five minutes later, a police officer arrived at Piosalan's home and took his statement. At this time, Siamani's appearance was still fresh in Piosalan's mind.

During the fifteen-minute incident, Piosalan had been able to view Siamani's face from close proximity. On November 30, 1999, Piosalan met with a forensic police sketch artist to have a composite drawing of Siamani developed. This drawing was released by Crime Stoppers news release and produced

an anonymous tip on December 2, 1999, identifying Siamani as the man in the sketch. Thereafter, Piosalan viewed a photographic lineup of six photographs, including one of Siamani. Piosalan testified that he looked at the photographic array and it took him only five seconds to positively identify Siamani, whose photograph was fifth in the lineup.

> [Prosecutor] Okay. So had you even taken a look at No. 6?
>
> [Piosalan] No.
>
> Q. Why didn't you go on to look at No. 6?
>
> A. There was no need to.
>
> Q. Okay.
>
> A. As I said, I just went across and came to the fifth one and that was him.
>
> Q. Okay. And when you say "that was him," is it correct to say that -- that is definitely the person, or that's -- out of the six pictures, that's the one that looks most like the person?
>
> A. No, that was definitely him.
>
> Q. And, in fact, you wrote down on that photographic lineup form that you were positive that that was him; is that right?
>
> A. Yes.
>
> Q. And are you positive that that is the man who got in the car and who took $20 from you without permission?
>
> A. Yes, it is.

Following the presentation by Plaintiff-Appellee State of Hawai‘i (the State) of its case-in-chief, the court denied Siamani's motion for judgment of acquittal, deciding that the State had established a *prima facie* case for robbery and for kidnapping as a class B, rather than class A, felony.

Siamani presented the defense of alibi. Siamani, his mother, Virginia M. Siamani (Mrs. Siamani), and his sisters, Virginia Siamani (Virginia) and Geanette Siamani (Geanette), testified on Siamani's behalf.

Mrs. Siamani remembered the events of October 31, 1999, because it was her birthday and Halloween, and her family has an annual celebration on that day. Mrs. Siamani testified that she remembered first seeing Siamani at about 8:30 that morning because he was in the kitchen "grumbling." After an argument with his mother, Siamani went upstairs at "about 9:30, 10 o'clock." She remembered that at about 10:30 he came back downstairs and grumbled "'[c]ause he wanted to leave. He wanted to be dropped off to Pua Lane where his girlfriend stay by Ott Lane, between there. So he wanted me to drop him off at that time to make sure that he gets there." Mrs. Siamani did not take him at that time, but instead told him to go back upstairs while she cooked. She stated that "[h]e went back upstairs and he stayed there[,]" and "he was playing the radio and the TV loud."

Mrs. Siamani testified that Siamani did not leave the house and that he would not walk "because [Siamani] doesn't wanna walk. He always wants to be chauffeured around. He's very lazy. He wants to make sure everybody sees him coming in a car." She agreed to drop him off at 4:30 when she dropped Geanette off at work because it would be "on the same route."

Virginia stated that she also remembered the events of October 31, 1999, because "[t]hat was my mom's birthday, and my sister was moving into the household." She remembered Siamani arguing with their mother that day and testified that she also argued with Siamani at about one o'clock that afternoon. Virginia testified that between the time she awoke at eight o'clock that morning and her argument with Siamani at one o'clock, Siamani was at home, "[c]oming in the kitchen, going upstairs, arguing with [their] mom." She stated that she was positive that Siamani was at home until one o'clock.

Geanette also recalled that Siamani was at home on October 31, 1999, stating that "it was my mom's birthday, and my sister was moving in, and [Siamani] was acting stupid, ignorant." She awoke that morning at approximately 10:30 and remembered Siamani arguing "off and on" with their mother. She testified that Siamani did not leave the house that day until he left with her and Mrs. Siamani at 4:30. She knew this "'cause he kept coming back and forth that whole day, like arguing."

Siamani testified that he remembered the date in question "'[c]ause it's my mom's birthday" and he recalled acting unpleasantly toward his family members. He asked his mother to take him to Mayor Wright Housing to look for his girlfriend, but he "couldn't" go because his "mom wouldn't take [him]." He recounted, "I never left the house till about 4:30, couple

minutes before 4:30, that's when my mom took me to Mayor [Wright Housing] and then dropped off my sister . . . ." When asked directly whether he committed the offenses against Piosalan, Siamani responded, "It's not true, because I was not there. Maybe somebody else did. And like I said, I [sic] sorry that he was robbed, but it wasn't me because I was home, and I know this for one fact."

RELEVANT STANDARDS OF REVIEW

A.

Sufficiency of Evidence

The Hawai‘i Supreme Court has long held that

> evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or a jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact. . . .
>
> "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. Eastman, 81 Hawai‘i 131, 135, 913 P.2d 57, 61 (1996) (citations, quotations, and internal brackets omitted).

B.

Jury Instructions

> "When jury instructions 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.] Arceo, 84 Hawai‘i [1,] 11, 928 P.2d [843,] 853 [(1996)] (citations and internal quotation marks omitted); *see also* State v. Kupau, 76 Hawai‘i 387, 393, 879 P.2d 492, 498 (1994). If the instructions requested by the parties are inaccurate or incomplete but are

necessary "in order for the jury to 'have a clear and correct understanding of what it is that they are to decide[,]'" then the trial court has the duty either to correct any defects or to fashion its own instructions. State v. Okumura, 78 Hawai‘i 383, 411, 894 P.2d 80, 108 (1995) (citations omitted); *accord* State v. Kinnane, 79 Hawai‘i 46, 50, 897 P.2d 973, 977 (1995).

Nevertheless, the "trial court is not required to instruct the jury in the exact words of the applicable statute but to present the jury with an understandable instruction that aids the jury in applying that law to the facts of the case." State v. Apao, 59 Haw. 625, 645, 586 P.2d 250, 263 (1978), *subsequent resolution*, 66 Haw. 682, 693 P.2d 405 (1984). Erroneous 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. Robinson, 82 Hawai‘i 304, 310, 922 P.2d 358, 364 (1996). If that standard is met, however, "the fact that a particular instruction or isolated paragraph may be objectionable, as inaccurate or misleading, will not constitute ground for reversal." [State v.] Pinero, 75 Haw. [282,] 292, 859 P.2d [1369,] 1374 [(1993)]. Whether a jury instruction accurately sets forth the relevant law is a question that this court reviews *de novo*. Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai‘i 494, 504, 880 P.2d 169, 179 (1994).

State v. Sawyer, 88 Hawai‘i 325, 330, 966 P.2d 637, 642 (1998).

Furthermore,

[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 effect 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, 1892-93, 114 L.Ed.2d 432] . . . (1991)[.]

Arceo, 84 Hawai‘i at 11-12, 928 P.2d at 853-54 (quoting State v. Holbron, 80 Hawai‘i 27, 32, 904 P.2d 912, 917, *reconsideration denied* 80 Hawai‘i 187, 907 P.2d 773 (1995) (some citations omitted) (brackets in original) (emphasis deleted)); see also State v. Loa, 83 Hawai‘i 335, 350, 926 P.2d 1258, 1273 (1996); State v. Robinson, 82 Hawai‘i 304, 310-11, 922 P.2d 358, 364-65 (1996).

State v. Vanstory, 91 Hawai'i 33, 979 P.2d 1059, 1069 (1999) (quoting State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997)).

DISCUSSION

A.

Substantial evidence supports the jury's conclusion that the offense of Kidnapping did not merge with the offense of Robbery.

Siamani contends that "[t]he evidence presented in this case supports the conclusion that the facts comprising the kidnapping were necessarily and incidentally committed during the robbery and were part and parcel of a continuing course of conduct." We disagree. This court has concluded that

> a kidnapping that is necessarily and incidentally committed during a robbery cannot be the basis of a charge of kidnapping in addition to a charge of robbery. That is so because crimes involving the same facts are included offenses. *See* HRS § 701-109(4)(a). Conversely, a kidnapping that was not necessarily and incidentally committed during a robbery may be charged as a separate offense in addition to the robbery charge.

State v. Correa, 5 Haw. App. 644, 649, 706 P.2d 1321, 1325 (1985).

To prove the offense of Robbery in the Second Degree, the prosecution was required to prove beyond a reasonable doubt that Siamani, while in the course committing theft, threatened the imminent use of force against Piosalan with intent to compel acquiescence to the taking of or escaping with Piosalan's property.[5] The charge of Kidnapping, however, required proof

[5] HRS § 708-841(1)(b) (1993).

that Siamani intentionally or knowingly restrained Piosalan with intent to terrorize him.[6]

On the issue of possible merger of these offenses, the court specifically instructed the jury as follows:[7]

> Furthermore, for you to find the defendant guilty of both offenses, Count I[,] Robbery in the Second Degree, and Count II, Kidnapping, you must also unanimously agree that the prosecution has proven beyond a reasonable doubt that:
>
> 1. The two offenses were not part and parcel of a continuing and uninterrupted course of conduct; and
>
> 2. The defendant did not have one intention, one general impulse, one plan, that is commit only the offense of Robbery in the Second Degree.
>
> If the prosecution has failed to prove beyond a reasonable doubt both numbers 1 and 2, then the Kidnapping charge has merged into the Robbery charge and you must return a guilty verdict only on the charge of Robbery in the Second Degree, Count I.

The evidence permitted the jury to find that Siamani first robbed Piosalan by threatening him in the course of removing the wallet from Piosalan's pocket, and thereafter kidnapped Piosalan by intentionally restraining him with the intent to terrorize him. In other words, Siamani's kidnapping of Piosalan was not "necessarily" committed during the robbery, whether or not it arose "incidentally" to it.

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[6] HRS § 707-720(e) (1993).

[7] The court read its instructions to the jury and gave the jury a written copy of the instructions it read.

B.

The trial court's definition of the term "terrorize" was erroneous but harmless.

There is ample evidence on the record to substantiate a guilty conviction for the charge of Kidnapping. The question, however, is whether the jury was adequately instructed regarding the elements of the offense.

Siamani points out that "[t]he court erred when it instructed the jury that 'terrorize' means the risk of causing another person serious alarm for his or her personal safety." Although we agree that the words "the risk of" should not have been in the instruction, we conclude that the inclusion of them in this case was harmless error.

A defendant in a criminal case can be convicted only upon proof beyond a reasonable doubt of every material element of the crime charged. State v. Jenkins, 93 Hawai'i 87, 108, 997 P.2d 13, 34 (2000). Accordingly, the trial court must not instruct the jury "in a manner that would relieve the prosecution of its burden of proving every element of the offense charged." Id.

The court instructed the jury regarding the material elements of HRS § 707-720(1)(e), in relevant part, as follows:

> In Count II of the complaint, [Siamani] is charged with the offense of Kidnapping.
>
> A person commits the offense of Kidnapping if he intentionally or knowingly restrains a person with intent to terrorize that person.

> There are three material elements of the offense of Kidnapping, each of which the prosecution must prove beyond a reasonable doubt.
>
> These three elements are:
>
> 1. That on or about October 31, 1999, in the City and County of Honolulu, State of Hawaii, [Siamani] restrained a person; and
>
> 2. That [Siamani] did so intentionally or knowingly; and
>
> 3. That [Siamani] did so with the intent to terrorize that person.
>
> Restrain means to restrict a person's movement in such a manner as to interfere substantially with his liberty.
>
> Terrorize means the risk of causing another person serious alarm for his or her personal safety.
>
> . . . .
>
> The defendant has introduced evidence to show that he was not present at the time and place of the commission of the offenses charged in Count I and II of the complaint. The state has the burden of establishing beyond a reasonable doubt the defendant's presence at that time and place.
>
> If, after consideration of all the evidence in the case, you have a reasonable doubt as to whether the defendant was present at the time the crime was committed, you must find the defendant not guilty.

In his opening brief,

> Siamani submits that the definition given by the court below substantially changes the meaning of the term "terrorize" and permits the jury to find that Siamani intended only the 'risk of causing' another serious alarm for personal safety, a lesser standard than that required . . . .
>
> . . . .
>
> . . . The State was required to prove that Siamani actually intended to cause another serious alarm for personal safety. Merely proving that Siamani intended "the risk of causing" another serious alarm for personal safety was insufficient as a matter of law for a conviction under the Kidnapping statute.

In this case, the evidence that the robber/kidnapper terrorized the victim was clear and undisputed. The sole dispute was whether Siamani was the robber/kidnapper. We agree that in the court's definition of "terrorize," the presence of the phrase

"the risk of" was wrong. However, "[w]hen jury instructions 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 and emphasis in original deleted). In Siamani's case, in light of the evidence presented by the State and the alibi defense asserted by Siamani, we conclude that the erroneous instruction was not prejudicially erroneous.

CONCLUSION

Accordingly, we affirm the July 14, 2000 Amended Judgment/Guilty Conviction and Sentence.

DATED: Honolulu, Hawai‘i, December 11, 2001.

On the briefs:

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Chief Judge

James M. Anderson,
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Associate Judge

Associate Judge