

**Electronically Filed
Intermediate Court of Appeals
CAAP-14-0000753
09-MAY-2016
08:20 AM**

NO. CAAP-14-0000753

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JAY BLANCO, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 12-1-1199)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., and Fujise and Reifurth, JJ.)

Defendant-Appellant Jay Blanco appeals from the March 11, 2014 Judgment of Conviction and Probation Sentence ("Judgment")^{1/} and the May 6, 2014 Amended Judgment of Conviction and Sentence ("Amended Judgment"),^{2/} entered in the Circuit Court of the First Circuit ("Circuit Court"). The Judgment stated that Blanco was convicted of both charged offenses: (1) Assault in the Second Degree ("Assault 2"), in violation of Hawaii Revised Statutes ("HRS") §§ 707-711(1)(b) and/or 707-711(1)(d) (Supp. 2011), and (2) Terroristic Threatening in the First Degree ("TT1"), in violation of HRS § 707-716(1)(e) (Supp. 2011). The Circuit Court sentenced Blanco to five years of probation and imposed a crime victim compensation fee. Additionally, as a special condition of probation, Blanco was to serve four months of imprisonment with credit for time served.

^{1/} The Honorable Michael D. Wilson presided.

^{2/} The Honorable Shirley M. Kawamura entered the Amended Judgment "for Michael D. Wilson."

Almost two weeks after filing his Notice of Appeal with this court, Blanco filed a "Motion to Modify Sentence and Amend Judgment" with the Circuit Court. In the motion, Blanco asked that the Circuit Court amend the Judgment to reflect the fact that he was, in fact, only convicted on one count of Assault 2, pursuant to HRS § 701-109(1)(a), and, to modify his imprisonment sentence by crediting him with time already served, pursuant to HRS § 706-621(2)(i). On May 6, 2014, the Circuit Court entered the Amended Judgment, which deleted the reference to Blanco's conviction for TT1. And in an order dated May 14, 2014, the Circuit Court granted the motion in part, amending the Judgment while declining to modify the sentence.

On appeal, Blanco argues that the Circuit Court (1) plainly erred by failing to instruct the jury on the lesser-included offense of Assault in the Third degree, in violation of HRS § 707-712 ("Assault 3"), and the "included offense" of Assault in the Third Degree by mutual affray, in violation of HRS § 707-712, and (2) reversibly erred by convicting him of Assault 2 where the State of Hawai'i failed to disprove his defense of self-defense.

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments they advance, the issues they raise, and the relevant statutory and case law, we resolve Blanco's appeal as follows, and affirm.

(1) The State charged Blanco with committing Assault 2, in violation of HRS §§ 707-711(1)(a), (b), and/or (d). Blanco argues that the Circuit Court plainly erred by failing to instruct the jury on the lesser-included offense of Assault 3. We disagree.

The case turns on the HRS § 707-711(1)(d) charge ("Dangerous Instrument Assault 2 offense"). There was no evidence that provided a rational basis to reject the Dangerous Instrument Assault 2 offense and convict on the lesser-included offense in violation of HRS § 707-712(b) ("Dangerous Instrument Assault 3 offense"). The jury could have acquitted Blanco, if it did not believe that he had used the dangerous instrument at all,

but it could not, on the evidence presented, find that the dangerous instrument was used only in a negligent manner.

The evidence that Blanco used the dangerous instrument against the Complaining Witness ("CW") was the CW's testimony that Blanco approached the CW at Ala Moana Beach Park and accused the CW of looking at his wife/girlfriend, retrieved a knife from his car, opened it, chased the CW down, and hit the CW while the CW was on the ground; Sandy Anderson's testimony that she saw Blanco chasing the CW while holding a folding knife; Zachariah Anderson's testimony that Blanco hit CW with the knife "between two and five times"; and Dr. Torrey Lisa Goodman's testimony that the CW presented with a very deep, full-thickness laceration, approximately nine centimeters long on his left arm, an injury that she found to be consistent with the CW's explanation at the time that he had been attacked and slashed with a switchblade. None of the testimony supports a theory of negligence, or, consequently, a Dangerous Instrument Assault 3 instruction. Finally, Blanco argued that he did not stab the CW, not that he negligently stabbed him.^{3/} Therefore, the verdict of guilty based on HRS § 707-711(1)(d) stands independent of the HRS §§ 707-711(1)(a) and/or (b) charge, regardless of any error regarding the failure to give an instruction on the lesser of the HRS §§ 707-711(1)(a) and/or (b) charge.

(2) When viewed in the light most favorable to the State, *In re PP*, 133 Hawai'i 235, 238-39, 325 P.3d 647, 650-51 (App. 2014), the testimonies of Sandy Anderson, Zachariah Anderson, Eric Nakamura, Officer Stephen Kardash, and Dr. Torrey Lisa Goodman presented sufficient evidence to convict Blanco of Assault 2 under HRS § 707-711(1)(a), (b), and/or (d). See Haw. Rev. Stat. §§ 707-711 & -712.

^{3/} Blanco argues that the court plainly erred by failing to instruct the jury on the "lesser-included offense" of Assault in the Third Degree by mutual affray under HRS § 707-712(2). Mutual affray, however, is not a lesser-included offense of Assault 3, but, rather, a mitigating defense to misdemeanor Assault 3. *State v. Kikuta*, 125 Hawai'i 78, 95, 253 P.3d 639, 656 (2011). Because we conclude that the court did not err in failing to provide a lesser-included offense instruction relating to the Dangerous Instrument Assault 2 offense, we do not reach the mutual affray instruction issue.

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

Therefore, IT IS HEREBY ORDERED that the Amended Judgment, entered on May 6, 2014, in the Circuit Court of the First Circuit, is affirmed.

DATED: Honolulu, Hawai'i, May 9, 2016.

On the briefs:

Jon N. Ikenaga,
Deputy Public Defender,
for Defendant-Appellant.

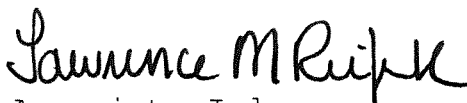
Brian R. Vincent,
Deputy Prosecuting Attorney,
City & County of Honolulu,
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge