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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee

vs.

JAMES GAVIN BAXLEY, Defendant-Appellant

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NO. 22805

APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 99-0052)

JULY 29, 2003

MOON, C.J., LEVINSON AND NAKAYAMA, JJ.,  
CIRCUIT JUDGE ALM, ASSIGNED BY REASON OF VACANCY, AND  
ACOPA, J., DISSENTING IN PART AND CONCURRING IN PART

**OPINION OF THE COURT BY NAKAYAMA, J.**

Defendant-Appellant James Gavin Baxley appeals from his acquittal, the Honorable Frances Q. F. Wong presiding, of attempted assault in the second degree, Hawai'i Revised Statutes (HRS) §§ 705-500 (1993)<sup>1</sup> and 707-711(1)(d) (1993)<sup>2</sup> (Count I),

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<sup>1</sup> HRS § 705-500 provides:

(1) A person is guilty of an attempt to commit a crime if the person:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or

(b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.

(2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

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terroristic threatening in the first degree, HRS § 707-716(1) (d) (1993)<sup>3</sup> (Count II), and kidnapping, HRS § 707-720(1) (e) (1993)<sup>4</sup> (Count III), on the ground of lack of penal responsibility pursuant to HRS § 704-400 (1993).<sup>5</sup> Baxley argues that the circuit court: (1) erred by acquitting him of Count III, kidnapping, on the ground of mental disease, disorder, or defect excluding penal responsibility when there was insufficient

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(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

<sup>2</sup> HRS § 707-711(1) (d) provides:

(1) A person commits the offense of assault in the second degree if:

. . . .

(d) The person intentionally or knowingly causes bodily injury to another person with a dangerous instrument[.]

<sup>3</sup> HRS § 707-716(1) (d) provides:

(1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:

. . . .

(d) With the use of a dangerous instrument.

<sup>4</sup> HRS § 707-720(1) (e) provides:

(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[.]

<sup>5</sup> HRS § 704-400 provides in relevant part:

(1) A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of law.

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evidence to prove the elements of kidnapping in the first instance; (2) erred by refusing to admit evidence regarding the possible existence of a surveillance videotape of the incident; (3) plainly erred by relying on records and materials gathered by the Adult Probation Division regarding his mental examination; and (4) erred by finding that, but for the victim's actions, she would have suffered substantial bodily injury and/or death. We hold that this court lacks jurisdiction over this appeal and, therefore, dismiss Baxley's appeal.

**I. BACKGROUND**

On January 11, 1999, Baxley was charged with attempted assault in the second degree, terroristic threatening in the first degree, and kidnapping for allegedly trapping and threatening to mutilate and kill Michelle Marciel, a 7-Eleven employee, on December 26, 1998.

On January 27, 1999, Baxley filed a motion giving notice that he would be relying on the defense of mental disease, disorder, or defect excluding penal responsibility [hereinafter, "insanity"] pursuant to HRS § 704-404 (1993 & Supp. 1999).<sup>6</sup> The

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<sup>6</sup> HRS § 704-404 provides in relevant part:

(1) Whenever the defendant has filed a notice of intention to rely on the defense of physical or mental disease, disorder, or defect excluding responsibility, or there is a reason to doubt the defendant's fitness to proceed, or reason to believe that the physical or mental disease, disorder, or defect of the defendant will or has become an

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court, upon Baxley's motion, ordered a mental evaluation to determine whether Baxley was fit to proceed to trial. Pursuant to HRS § 704-404, the court appointed three qualified persons to examine Baxley's mental condition. All three medical examiners found Baxley fit to proceed to trial. However, they also found that Baxley had a history of mental disorder and recommended that the court commit Baxley to the Hawai'i State Hospital for treatment. On May 24, 1999, the court found Baxley was fit to proceed with trial.

On June 2, 1999, Baxley filed a motion to dismiss the attempted assault and kidnapping charges, premised on the contention that the evidence was insufficient to support the charges. Baxley asserted that a surveillance camera was located on the premises, and the police neglected to obtain the videotape. He sought to introduce evidence that the tape existed and that it contained potentially exculpatory evidence, which would demonstrate that Baxley may not have made "jabbing" motions with the knife, thereby negating one of the elements of attempted assault. At the hearing on the motion, the 7-Eleven manager testified that the surveillance camera had not been working for approximately a year prior to and on the date of the incident

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issue in the case, the court may immediately suspend all further proceedings in the prosecution.

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involving Baxley. Moreover, the manager stated that the camera was located in a secured box and the key to open the box had been missing for an indeterminate time. Baxley argued that, with regard to the kidnapping charge, there was no evidence that he restrained Marciel or commanded that she enter and remain in the back storage room. No witnesses were called and no evidence was adduced at the hearing to support this argument. On July 30, 1999, the court denied Baxley's motion to dismiss and ruled that it would not disturb the preliminary hearing finding that probable cause existed to show Baxley committed attempted assault, terroristic threatening, and kidnapping. The court also found that there was no evidence that a videotape existed, and thus there was no videotape for the police to recover.

At the jury-waived trial, the following evidence was adduced. On December 26, 1998, Baxley walked into the 7-Eleven store, picked up a 40-ounce bottle of beer, and walked out of the store ignoring the assistant manager's request that Baxley pay for the beer. The assistant manager called the police to report the theft. At approximately 10:00 p.m., police officers returned to the store with Baxley and asked the employees if Baxley was the man they observed taking the beer. After positively identifying Baxley, the police officers made Baxley pay for the beer, escorted Baxley out of the store and told him not to

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return. Later that same evening, Baxley returned. Marciel was behind the counter at the cash register when she observed Baxley entering the store. Marciel immediately called 911. Baxley entered the store, walked directly toward Marciel and stated, "Give me my fucking tape player." Baxley demanded that Marciel return his tapes and his tape player. Marciel did not know what Baxley was talking about and told Baxley so. Baxley eventually pulled a knife, with a three-inch blade, out of his pocket and stated, "What would you do if I fucking killed you?" Baxley proceeded to climb up on the counter, "jabbed" the knife in Marciel's direction several times, and threatened to kill her. Marciel eventually crouched behind the counter, crawled out from under the counter, and headed to the safety of the back storage room where she could shut a door, keep Baxley out, and still have a limited view of Baxley and the store. Baxley approached the door and Marciel could hear Baxley threatening to mutilate her if she called the police. Marciel did not attempt to escape out the rear service door because the area behind the store was enclosed by three walls. If Baxley arrived at the back first, Marciel would have been trapped outside with no escape route.

The court also heard testimony from Olaf Gitter, Ph.D., who was appointed by the court to examine Baxley. Dr. Gitter opined that Baxley was "cognitively and volitionally and

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substantially impaired at the time of the alleged offenses.”

Dr. Gitter diagnosed Baxley as suffering from schizophrenic disorder, alcohol dependence, and adverse reaction to medication. He recommended that Baxley be committed to the state hospital for treatment.

At the end of the prosecution’s case, Baxley moved for a judgment of acquittal on the ground of insufficient evidence for the attempted assault and kidnapping charges. The court denied Baxley’s motion and subsequently acquitted Baxley of all charges on the ground of insanity pursuant to HRS § 704-400. Judgment was entered on August 25, 1999 and Baxley timely appealed.

**II. STANDARD OF REVIEW**

**A. Jurisdiction**

“The existence of jurisdiction is a question of law that we review de novo under the right/wrong standard.” Lester v. Rapp, 85 Hawai’i 238, 241, 942, P.2d 502, 505 (1997) (quoting State ex. rel. Bronster v. Yoshina, 84 Hawai’i 179, 183, 932 P.2d 316, 320 (1997)).

**B. Sufficiency of the evidence**

[E]vidence 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 jury. The test on appeal is not whether

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guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

State v. Young, 93 Hawai'i 224, 230, 999 P.2d 230, 237 (2000) (citations omitted) (brackets in original).

State v. Valdivia, 95 Hawai'i 465, 471, 24 P.3d 661, 667 (2001).

We have stated that 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. Jenkins, 93 Hawai'i 87, 99, 997 P.2d 13, 25 (2000).

**III. DISCUSSION**

Baxley argues that the circuit court erred by (1) acquitting him of Count III, kidnapping, on the ground of insanity, (2) refusing to admit evidence regarding the possible existence of a surveillance videotape of the incident, (3) relying on records and materials gathered by the Adult Probation Division regarding his mental examination, and (4) finding that, but for the victim's actions, she would have suffered substantial bodily injury and/or death.

Because Baxley would remain committed to the custody of the Director of Health based on the circuit court's acquittals as to Counts I and II, which were supported by substantial evidence that would have warranted convictions but for Baxley's affirmative defense of insanity, and because Baxley has not



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challenged the sufficiency of the evidence supporting Counts I and II on appeal, he is not aggrieved by the circuit court's acquittal of Count III, and, therefore, this court lacks jurisdiction to address the sufficiency of evidence supporting Count III. Moreover, this court lacks jurisdiction over the consideration of the Adult Probation Division records because there is no statutory provision that allows the issue of dangerousness to be appealed directly to this court following an acquittal.

**A. Because Baxley is not aggrieved, this court lacks appellate jurisdiction to review Baxley's appeal from an acquittal by reason of insanity.**

Appellate jurisdiction "in a criminal case is purely statutory and exists only when given by some constitutional or statutory provision." State v. Kalani, 87 Hawai'i 260, 261, 953 P.2d 1358, 1359 (1998) (quoting State v. Fukusaku, 85 Hawai'i 462, 490, 946 P.2d 32, 60 (1997) (quoting State v. Wells, 78 Hawai'i 373, 376, 894 P.2d 70, 73, reconsideration denied, 78 Hawai'i 474, 896 P.2d 930 (1995))). HRS § 641-11 (1993)<sup>7</sup>

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<sup>7</sup> HRS § 641-11 provides:

Any party deeming oneself aggrieved by the judgment of a circuit court in a criminal matter, may appeal to the supreme court, subject to chapter 602 in the manner and within the time provided by the Hawaii Rules of Appellate Procedure. The sentence of the court in a criminal case shall be the judgment. All appeals, whether heard by the intermediate appellate court or the supreme court, shall be filed with the clerk of the supreme court and shall be

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provides the statutory basis upon which a defendant may appeal from a judgment of the circuit court. Particularly significant in this statute is the requirement that the defendant be "aggrieved." Baxley is not an aggrieved party because his acquittal does not adversely impact his rights.

An aggrieved party has been defined by this court in a civil context as "one who is affected or prejudiced by the appealable order." Waikiki Malia Hotel, Inc. v. Kinkai Properties, Ltd., 75 Haw. 370, 393, 862 P.2d 1048, 1061 (1983) (quoting Montalvo v. Chang, 64 Haw. 345, 351, 641 P.2d 1321, 1326 (1982)). In the context of a family court decision, this court has stated that an aggrieved party is

[o]ne whose legal right is invaded by an act complained of, or whose pecuniary interest is directly affected by a decree or judgment. One whose right of property may be established or divested. The word "aggrieved" refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of a burden or obligation.

State ex rel. Marsland v. Town, 66 Haw. 516, 522 n.3, 668 P.2d 25, 30 n.3 (1983) (quoting Black's Law Dictionary 60 (5th ed. 1979)); see also S. Utsunomiya Enters., Inc. v. Moomuku Country Club, 75 Haw. 480, 494, 866 P.2d 951, 960 (1994) (defining "[a]n aggrieved party [as] one who is affected or prejudiced by the appealable order"), reconsideration denied, 76 Hawai'i 247, 871

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subject to one filing fee.

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P.2d 795 (1994); Inter-Island Resorts, Ltd. v. Akahane, 44 Haw. 93, 99, 352 P.2d 856, 860 (1960) (noting that an appeal may not be taken by a party not aggrieved by the judgment appealed from).

A defendant may also be entitled to an appeal under other limited conditions. In State v. Minn, 79 Hawai'i 461, 464, 903 P.2d 1282, 1285 (1995), the prosecution argued that this court lacked jurisdiction under HRS § 641-11 because the defendant failed to obtain permission before bringing an interlocutory appeal. This court explained that because double jeopardy was at issue, the court had appellate jurisdiction. Id. The Minn court relied upon an earlier case in which we expressly adopted the rule that we would review appeals affecting a criminal defendant's rights under the double jeopardy clause because it "involve[d] important rights which would be irreparably lost if review had to await final judgment." State v. Baranco, 77 Hawai'i 351, 353-54, 884 P.2d 729, 731-32 (1994). In short, without such review, the defendant's right against double jeopardy could not be protected.

Because Baxley would remain in the custody of the Director of Health pursuant to his acquittals as to Counts I and II, he has failed to demonstrate that he has been prejudiced by virtue of his acquittal of Count III. This court, therefore, is without jurisdiction to address the substance of Baxley's

arguments.

**B. This court lacks jurisdiction over the consideration of the Adult Probation Division records because a post-acquittal hearing must be requested if a criminal defendant disputes a finding of present dangerousness.**

Baxley argues that the trial court reviewed records unavailable to defense counsel in making its commitment determination. He asserts that records compiled by the Adult Probation Division and reviewed for purposes of determining mental status at the time the crimes were committed cannot be used in connection with the determination of dangerousness for purposes of commitment. Baxley failed to request a post-acquittal hearing to address the issue of dangerousness in a proceeding separate from the trial proceedings. Because Baxley did not follow the procedural mechanisms set forth in HRS 704-411(a) (1993), we cannot review this aspect of the trial court's decision.

HRS § 704-400 provides a mechanism through which an individual can avoid penal responsibility based upon a finding of mental disease, disorder, or defect. See HRS § 704-400. HRS § 704-402(1) states that "[p]hysical or mental disease, disorder, or defect excluding responsibility is an affirmative defense." HRS § 704-402(1); see also State v. Young, 93 Hawai'i 224, 231, 999 P.2d 230, 237 (2000) (recognizing that HRS § 704-400 is an

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affirmative defense). A defendant who raises this defense is entitled to three court-appointed examiners who are required to examine and report "upon the physical and mental condition of the defendant." HRS § 704-404(2). This was the procedure followed by the trial court. Each of the three examiners concluded that Baxley was "significantly impaired in his ability to appreciate the wrongfulness of his behavior (cognitive capacity) and to conform his behavior to the requirements of law (volitional capacity)."<sup>8</sup> The trial court issued a verdict of acquittal based, in part, on the testimony of Baxley's own expert, Dr. Gitter. Thus, Baxley properly raised and presented the affirmative defense, and the court's findings of fact and conclusions of law reflect its determination that Baxley was not penally responsible for his conduct.

The legal effect of an acquittal is to find the defendant not responsible for the conduct charged. HRS § 704-411. In the event of such an acquittal, the court shall enter one of three orders.<sup>9</sup> Implicated in this case is HRS § 704-

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<sup>8</sup> The three examiners were James Tom Greene, Ph.D., David S. Roth, M.D., and Olaf K. Gitter, Ph.D. Baxley called Dr. Gitter to testify regarding Baxley's substantial incapacity to appreciate the wrongfulness of his conduct and his substantial incapacity to conform his conduct to the law.

<sup>9</sup> The three orders are: commitment to the custody of the director of health upon a finding of present dangerousness, HRS § 704-411(1)(a); conditional release upon a finding that the defendant can be given proper supervision and care, HRS § 704-411(1)(b); and discharge from custody upon a finding of the absence of present dangerousness, HRS § 704-411(1)(c).

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411(a), in which the court "shall order a defendant to be committed to the custody of the director of health to be placed in an appropriate institution . . . if the court finds that the defendant presents a risk of danger to oneself or others and the defendant is not a proper subject for conditional release[.]" HRS § 704-411(a). Although evidence supporting an acquittal predicated on penal irresponsibility may be "relevant to and probative of present dangerousness, they are not substitutes" for a finding of present dangerousness. Commentary to HRS § 704-411 (1993). Thus, it is incumbent upon the court to differentiate between present dangerousness and the mental state of the defendant at the time of the events leading to the underlying charges. The Commentary to HRS § 704-411 points out that, although the HRS § 704-404 examiners are primarily focused on the conduct related to the underlying charges, "they may be able to indicate the risks which the defendant presents." Commentary to HRS § 704-411. The evidence the court relied upon, in committing Baxley to the care of the Director of Health, included the testimony of Baxley's expert witness. In his written report, which was received in evidence at the trial, Dr. Gitter stated:

In my opinion, the defendant presents a moderate risk of danger to the person of others and to himself. This opinion is based on the instant alleged offenses, his documented history of becoming assaultive when under the influence of alcohol, his documented history of alcohol dependence and his history of non-compliance with psychiatric outpatient

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treatment, his history of intermittent acute psychotic episodes and his history of one hanging attempt two years ago and his perceived suicidality when first admitted to OCCC.

The trial court fulfilled its responsibilities under HRS § 704-411.

The proper course of action by a party who disagrees with a court's finding of dangerousness is a post-acquittal hearing in the trial court. Commentary to HRS § 704-411. The Commentary expressly states that, "[w]here either the prosecution or the defense believes that the evidence at the trial (including stipulations) is not dispositive of the issue of present danger, each is free to move for a separate post-acquittal hearing on that issue." Id. There is no statutory provision pursuant to which a defendant following an acquittal may appeal the issue of dangerousness directly to this court.

Baxley argues that the circuit court erred by improperly relying upon the records of the Adult Probation Division in determining present dangerousness. The remedy Baxley seeks is vacation of the court's finding and a remand to an untainted judge. Because we lack appellate jurisdiction to hear this case, we may not comment on whether the court erred or not. The proper route for Baxley is to seek a post-acquittal hearing to determine the issue of present dangerousness.

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**IV. CONCLUSION**

Based on the foregoing, we hold that this court lacks jurisdiction over Baxley's appeal. We, therefore, dismiss this appeal for want of appellate jurisdiction.

Walter R. Schoettle,  
formerly for defendant-  
appellant, on the briefs

Tae Chin Kim, counsel of  
record for defendant-appellant

Donn Fudo, Deputy  
Prosecuting Attorney,  
for plaintiff-appellee,  
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