

\*\*\* NOT FOR PUBLICATION \*\*\*

NO. 24775

IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII, Plaintiff-Appellee,

vs.

URIEL M. BAYER, Defendant-Appellant.

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 99-0882)

SUMMARY DISPOSITION ORDER

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

The defendant-appellant Uriel M. Bayer appeals from the judgment of conviction and sentence of the first circuit court, the Honorable Karen S.S. Ahn presiding, filed on November 19, 2001. Bayer contends: (1) that the circuit court erred in refusing to grant his motion for severance and separate trial of the charged offense of criminal property damage in the first degree, in violation of Hawai'i Revised Statutes (HRS) § 708-820(1)(a) (Supp. 2002) (Count II); (2) that the circuit court erred in failing to dismiss the charged offense of terroristic threatening in the first degree, in violation of HRS § 707-716(1)(a) (1993) (Count III); (3) that the circuit court abused its discretion in denying Bayer's motion for a mistrial when the complaining witness testified that Bayer was supposedly familiar with martial arts; (4) that the circuit court committed four separate acts of reversible error regarding its jury instructions by (a) giving an instruction regarding the flight of the accused, (b) omitting the "separate consideration of evidence" instruction, (c) resubmitting a corrected form of the "criminal

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property damage" instruction after the jury had commenced its deliberations, and (d) giving the "self-defense deadly force" instruction containing an "immediate necessity" requirement; and finally (5) that the circuit court cumulatively committed the aforementioned alleged errors regarding jury instructions such that the court denied Bayer his constitutional right to a fair trial.

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 affirm the circuit court's judgment of conviction and sentence.

We conclude that, inasmuch as Bayer did not renew his motion for severance at the close of the prosecution's case or at the close of all evidence, he has waived any claim regarding his motion to sever. See State v. Balanza, 93 Hawai'i 279, 288, 1 P.3d 281, 290 (2000). The circuit court also correctly denied Bayer's motion to dismiss Count III because there was ample evidence to support a finding of probable cause for the charge. See State v. Chung, 75 Haw. 398, 409-10, 862 P.2d 1063, 1070 (1993) (citations omitted); State v. Wong, 97 Hawai'i 512, 517, 40 P.3d 914, 919 (2002); HRS § 707-716(1)(a) (1993). Further, the circuit court did not abuse its discretion in denying Bayer's motion for mistrial, inasmuch as it struck the complainant's remark about Bayer's knowledge of martial arts from the record. See State v. Peseti, 101 Hawai'i 172, 175 n.5, 65 P.3d 119, 122 n.5 (2003); State v. Melear, 63 Haw. 488, 497, 630 P.2d 619, 626 (1981) (citing State v. Amarin, 58 Haw. 623, 629, 574 P.2d 895, 899 (1978); State v. Kahalewai, 55 Haw. 127, 516 P.2d 336 (1973)); State v. Lagat, 97 Hawai'i 492, 40 P.3d 894 (2002).

The circuit court did not commit reversible error in

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any of its jury instructions. The flight instruction was not erroneous because it was supported by case law and appropriate in light of the evidence. See Territory v. Leong Kun, 29 Haw. 90, 96 (1926); State v. Brown, 97 Hawai'i 323, 336, 37 P.3d 572, 585 (App. 2001); State v. Moniz, 92 Hawai'i 472, 476, 992 P.2d 741, 745 (App. 2000). The circuit court did not reversibly err in omitting the instruction on separate consideration of the evidence, inasmuch as Bayer failed to object to the omitted instruction prior to jury deliberations and the omission did not constitute plain error. See Hawai'i Rules of Penal Procedure (HRPP) Rule 30(f) (2000); State v. Uyesugi, 100 Hawai'i 442, 450, 60 P.3d 843, 851 (2002); State v. Culkin, 97 Hawai'i 206, 214, 35 P.3d 233, 241 (2001); State v. Aqanon, 97 Hawai'i 299, 302, 36 P.3d 1269, 1272 (2001) (citation omitted); State v. Nakamura, 65 Haw. 74, 79, 648 P.2d 183, 187 (1982), overruled on other grounds by State v. Tafoya, 91 Hawai'i 261, 982 P.2d 890 (1999); State v. Faafiti, 54 Haw. 637, 645-46, 513 P.2d 697, 703 (1973); State v. Stuart, 51 Haw. 656, 660-61, 466 P.2d 444, 447 (1970); State v. Dizon, 47 Haw. 444, 458, 390 P.2d 759, 767 (1964); State v. Shon, 47 Haw. 158, 168, 385 P.2d 830, 837 (1963); State v. Ayala, 46 Haw. 349, 351, 379 P.2d 590, 591 (1963).

With respect to the question whether a defendant is entitled to rely with impunity on a patently erroneous jury instruction, we hold that the circuit court did not err in correctly reinstructing the jury and denying Bayer's motion for mistrial, and we adopt the reasoning of the Colorado Court of Appeals, which has dealt squarely with the foregoing issue on facts that are strikingly similar to those of the present matter. See People v. Bastin, 937 P.2d 761 (Colo. Ct. App.), cert. denied, 937 P.2d 761 (Colo. 1996). Inasmuch as the circuit court

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neither unfairly misled Bayer nor precluded defense counsel from arguing a meritorious defense to the jury, the circuit court did not err in reinstructing the jury regarding the offense of criminal property damage. Moreover, the circuit court's instructions regarding the use of deadly force in defense of self and others were not prejudicially insufficient, erroneous, inconsistent, or misleading. HRS §§ 703-300, 703-304, 707-700 (1993); see also Troyer v. Adams, 102 Hawai'i 399, 409, 77 P.3d 83, 93 (2003) (citation omitted); State v. Estrada, 69 Haw. 204, 225-26, 738 P.2d 812, 826-27 (1987) (citations omitted).

Finally, inasmuch as we have held that the circuit court's jury instructions did not individually prejudice Bayer, we hold that the instructions did not result in any cumulative prejudice.

Therefore,

IT IS HEREBY ORDERED that the circuit court's judgment of conviction and sentence is affirmed.

DATED: Honolulu, Hawai'i, December 29, 2003.

I concur in the result.

On the briefs:

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deputy prosecuting  
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plaintiff-appellee

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