NO. 22970

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

VERNON SILK, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-0677)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

The defendant-appellant Vernon Silk appeals from the first circuit court's judgment of conviction of and sentence for the offenses of assault in the third degree, in violation of Hawai'i Revised Statutes (HRS) § 707-712 (1993),[1] kidnaping with intent to terrorize, in violation of HRS § 707-720(e) (1993),[2]

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[1] HRS § 707-712 provides in relevant part:

> (1) A person commits the offense of assault in the third degree if the person:
> (a) Intentionally, knowingly, or recklessly causes bodily injury to another person[.]
> . . .
> (2) Assault in the third degree is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

"Bodily injury" means "physical pain, illness, or any impairment of physical condition." HRS § 707-700 (1993).

[2] HRS § 707-720 provides in relevant part as follows:

> (1) A person commits the offense of kidnaping if the person intentionally or knowingly restrains another person with the intent to:
> . . .
> (d) [i]nflict bodily injury upon that person[;] or

(continued...)

and kidnaping with intent to inflict bodily injury, in violation of HRS § 707-720(d) (1993), see supra note 2, filed on October 12, 1999. On appeal, Silk contends that the circuit court erred in: (1) permitting the prosecution to adduce testimony regarding his "abusiveness" of the complainant, Tammy Ongory; (2) precluding him from introducing evidence concerning Ongory's alleged psychiatric disorder and history of drug abuse; (3) refusing to instruct the jury pursuant to two of his proposed jury instructions; and (4) denying his motion for a mistrial predicated on the jury's initial failure to complete the special verdict forms with regard to two interrogatories pertinent to each of the two kidnaping counts.

Silk's points of error are without merit, see infra note 6. However, we hold that the circuit court's response to a jury communication regarding the state of mind requisite to the charged kidnaping offenses was plainly erroneous, in that it articulated a prejudicially insufficient and misleading statement of the law; because, on the record before us, we cannot say that there was no reasonable possibility that the error contributed to the jury's convictions of the two kidnaping offenses, the error therefore affected Silk's substantial rights and was not harmless beyond a reasonable doubt. Accordingly, although we uphold Silk's conviction of third degree assault, we vacate the circuit

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[2](...continued)

> . . .
> (e) [t]errorize that person or a third person[.]
> . . . .
> (3) In a prosecution for kidnaping, 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.

Both "serious bodily injury" and "substantial bodily injury" are defined terms, see HRS § 707-700 and infra note 3; however, neither are implicated by the present appeal.

court's judgment of conviction and sentence with regard to the two charged kidnaping offenses and remand this matter for a new trial consistent with this opinion.

I. BACKGROUND

On April 12, 1999, Silk was charged by complaint with one count of attempted assault in the first degree, in violation of HRS §§ 705-500 (1993) and 707-710 (1993), and two counts of kidnaping, in violation of HRS §§ 707-720(1)(e) and 707-720(1)(d), respectively, see supra note 2. The complaint alleged that, on April 3, 1999, Silk (1) attempted to cause serious bodily injury to the complainant, Tammy Ongory, (2) intentionally or knowingly restrained her with the intent to terrorize her, and (3) intentionally or knowingly restrained her with the intent to inflict bodily injury upon her.

In February 1999, Ongory and Silk met and soon became romantically involved.[3] During mid-March 1999, they began to live together, sharing a room in the home of Silk's aunt, Thelma Pihana (Aunt Thelma). Also residing in the Pihana house were: Aunt Thelma's husband, Edward Sonny Pihana (Uncle Eddie); their son, Edward Charlie Pihana (Uncle Charlie); their young grandson, Cameron; and two other adult men, for whom Aunt Thelma opened her house as "a care home." The Pihana house is a two-storey Kailua home, comprised of numerous rooms. Ongory and Silk rented one of the rooms on the second floor.

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[3] The testimony adduced from the numerous eyewitness participants in the incident leading to the complaint in the present matter conflicted with regard to numerous details; however, inasmuch as the jury's verdict -- convicting Silk of assault in the third degree, see supra note 1, as an included offense of the attempted first degree assault charge, and of the two charged kidnaping offenses, see supra note 2; **see also RA vol. 1 at 409-413; RA vol. 2 at 23** -- reflects that it found the complainant's testimony worthy of belief, we summarize her version of events.

After living at the Pihana house for "one or two weeks," Ongory moved out because Silk "was being mean" to her and she "was afraid." Uncle Charlie helped Ongory move to the apartment of Christy Mckee, Silk's "second cousin," which was situated a short five or six-minute walk from the Pihana house. Although Ongory informed Silk that she would be moving out of the Pihana house, she did not share with him where she was moving, and, when she moved her belongings to Mckee's apartment, she did so while Silk was at work.

During the two weeks Ongory was at Mckee's residence, Silk telephoned the apartment and loitered around the apartment complex; Ongory, however, did not speak with him. Aunt Thelma also tried to contact Ongory, but she refused to receive Aunt Thelma's telephone calls because she "didn't want to be involved or having anything to do with [Silk]." Eventually, Aunt Thelma visited the apartment, spoke with Ongory, and requested that she "come back over" to the Pihana house and "resume being [Silk's] girlfriend." Ongory testified that she did not want to do so and that Aunt Thelma knew as much.

On April 3, 1999, Silk again visited the apartment complex. Ongory agreed to see him "because [she] just wanted to get it over with and have a conclusion, because the auntie wanted [her] to come back, and so did he, and [she] just wanted it to end already." Silk asked her to return to the Pihana house and get "back together" with him. Because Mckee and her five children were present in the apartment, Ongory agreed to talk with Silk at the Pihana house.

In the upstairs room of the Pihana house that they had shared together, Ongory and Silk discussed their relationship. During the conversation, Ongory remarked that Silk "need[ed] to

seek help," which, according to her, "pissed [him] off." Ongory told Silk she "needed to go"; Silk responded by closing the door and latching it. Silk said, "You're not leaving this fucking room," and remarked that, if she "was not going to be with him," she was "not going to be with nobody." As Ongory moved towards the door in an attempt to leave, Silk "forcefully" threw her on the bed "like a rag doll."

Ongory testified that Silk "jumped over [her] on the bed and held [her] down and put his hands over [her] mouth." She was crying and trying to scream for help. Silk told her to "shut up," became progressively angry, and "started squeezing [her] face." Ongory testified that "he put his hands around [her] mouth and [her] nose, [that she] couldn't breathe, and so [she began] scratching him and digging, trying to keep him off [her], because [she] was suffocating." Ongory also testified that Silk "got real pissed and he put a pillow over [her] face . . . [a]nd then he put a rag or one shorts, one boxer shorts[,] in [her] mouth." Ongory also testified that when she couldn't breathe, due to the boxer shorts being stuffed in her mouth, she "thought [she] was gonna die." During the entire affray, Silk was atop Ongory, holding her down and attempting to silence her. Ongory testified that Silk was "squeezing [her] face, [her] mouth -- like how when you see in movies where the bad guy or whatever it is, they're squeezing the kid? Like that -- ", which she demonstrated by taking her own fingers and squeezing her own face by the cheeks and lips. Her testimony, however, is unclear regarding the point during the incident at which Silk squeezed her face.

Although the testimony concerning what precisely happened next is conflicting, Ongory's account was that Aunt

Thelma came to the door, tried to open it, and couldn't, and that Uncle Charlie forced the latched door open. Ongory heard Aunt Thelma "yelling at [Silk] to stop, that he's going to kill [her], stop doing that, stop suffocating [her]." Aunt Thelma and Uncle Charlie attempted to intercede, slapping and screaming at Silk as they tried to pull him off Ongory. Silk did not release Ongory until Uncle Eddie arrived in the room and started "whacking him with a stick." At that point, Silk "still was trying to choke [Ongory], but [they] already went fall to the ground, and he was trying to use [her] as one shield for catch all the cracks from Uncle Eddie, so he wouldn't catch them." Ongory testified that she could not, at that point, get away from Silk because he was grasping her neck, but that he was no longer holding a pillow over her face.

Ongory told Silk that the police would soon arrive. Before leaving the room, however, Silk, according to Ongory, "tried to take [her] away with him": "He had me by the neck, telling me he going take me, and I said no, no, I going meet you after, I told him like that, just for he went let me go kind, and went work, and he went." As a result of the incident, Ongory was injured with "lacerations inside [her] face and [her] mouth, and bruises, and . . . small cuts and abrasions on [her] face." Ongory did not seek medical attention for any of her injuries.

At trial, Silk proposed the following two jury instructions, which the circuit court refused over his objection:

> If you find that defendant has committed the offenses of: Kidnaping or one of its included offenses, and the offense of Attempted Assault in the First Degree or one of its included offenses, you must determine whether, beyond a reasonable doubt, the acts constituting the Kidnaping or its included offense, occurred separately in time from the acts constituting Attempted Assault in the First Degree or its included offense.

and

> If you find that the same acts constitute more than one of the offenses charged [or their lesser included offenses], you must find the defendant guilty of only one offense.

As authority for both instructions, Silk cited State v. Caprio, 85 Haw. 92, 105, 937 P.2d 933, 946 (App. 1997), and HRS § 701-109 (1993).

In connection with the necessity that the jury predicate its conviction, if any, of the charged offenses or their respective included offenses on findings that Silk committed separate and distinct culpable acts paired with the requisite mental states, the circuit court instructed the jury as follows:

> As to Count II, Kidnaping or its included offense, before you may find the defendant guilty, you must also unanimously agree beyond a reasonable doubt on any acts of restraint as to that count. Furthermore, for you to find the defendant guilty of Count II, Kidnaping or its included offense, and Count III, Kidnaping or its included offense, you must also agree unanimously beyond a reasonable doubt that the act of restraint in Count II was separate and distinct from the act of restraint in Count III. If you do not so find, then you may find defendant guilty of either Count II or its included offense, or Count III or its included offense, but not both.
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> As to Count III, Kidnaping or its included offense, before you may find the defendant guilty, you must also unanimously agree beyond a reasonable doubt on any act of restraint as to that count. . . .
>
> . . . .
>
> The State charges the defendant with three offenses allegedly arising from the same incident. For you to find the defendant guilty of any one charge, you must from the evidence unanimously find beyond a reasonable doubt that the defendant had a separate and distinct intent to commit that crime.
>
> The test to determine whether the defendant intended to commit more than one offense is whether the evidence shows one general intent, or separate and distinct intents. Where there is one intention, one general impulse and one plan, there is but one offense.
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> The burden is on the prosecution to prove beyond a reasonable doubt that the defendant had separate and distinct intents to commit each offense. You must find the defendant guilty only for the charge to which the prosecution has met this burden.

The circuit court also instructed the jury that its verdict must be unanimous.

During its deliberations, the jury transmitted the following written communication to the circuit court: "In the matter of Count II and Count III, do all definitions of intent (3) need to be met or only one (1)?" Attached to the jury's communication was a copy of the court's instruction regarding the definition of an "intentional" state of mind.[4] The circuit court advised the prosecution and defense counsel that it would respond, "Only one" to the jury's question and solicited objections. The prosecution did not object, noting that it "[thought] that the definition as given is kind of a three-part form because it gives varying ways to define and understand intent." The prosecutor further opined that "I think it's reasonable for [the jury] to believe that one fits the case, but the others -- I think that they only need to be confident of one."[5] Defense counsel did not object to the circuit court's response to the communication. The circuit court, consequently, returned the jury's communication, answering, "Only one."

Shortly thereafter, the jury communicated that it had reached a verdict, which was deficient in form because the

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[4] The instruction reads:

> A person acts intentionally with respect to his conduct when it is his conscious object to engage in such conduct.
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> A person acts intentionally with respect to attendant circumstances when he is aware of the existence of such circumstances or believes or hopes that they exist.
>
> A person acts intentionally with respect to a result of conduct when it is his conscious object to cause such a result.

On the copy attached to the jury's communication, the paragraphs were numerically designated (i.e., "1," "2," and "3"), and the word "aware" in paragraph two was underlined, presumably by the jury foreperson.

[5] The prosecutor was obviously mistaken. See, e.g., State v. Kalama, No. 22457, slip. op. at 13-14 (Haw. Sept. 29, 2000); State v. Jenkins, 93 Hawai'i 87, 111, 997 P.2d 13, 37 (2000); State v. Klinge, 92 Hawai'i 577, 584-85, 994 P.2d 509, 516-17 (2000); State v. Hoang, 86 Hawai'i 48, 58, 947 P.2d 360, 370 (1997).

foreperson had not completed the second pages of the special verdict forms in connection with the two kidnaping charges; the circuit court then instructed the jury to continue its deliberations and to complete the forms. The jury did so and convicted Silk of the included offense of third degree assault, see supra note 1, as well as the charged offenses of kidnaping with the intent to terrorize and kidnaping with the intent to inflict bodily injury, see supra note 2.

II. STANDARDS OF REVIEW

A. 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. Kinnane, 79 Hawai'i 46, 49, 897 P.2d 973, 976 (1995) (quoting State v, Kelekolio, 74 Haw. 479, 514-15, 849 P.2d 58, 74 (1993) (citations omitted)). . . . See also State v. Hoey, 77 Hawai'i 17, 38, 881 P.2d 504, 525 (1994).
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> > "'[E]rroneous 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. Pinero, 70 Haw. 509, 527, 778 P.2d 704, 716 (1989)[.] . . .
> >
> > > [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, 114 L.Ed.2d 432 (1991).]
>
> [State v.]Arceo, 84 Hawai'i [1,] 11-12, 918 P.2d [843,] 853-54[.] . . .

State v. Jenkins, 93 Hawai'i 87, 99-100, 997 P.2d 13, 25-26 (2000) (quoting State v. Cabrera, 90 Hawai'i 359, 364-65, 978 P.2d 797, 802-03 (1999) (quoting State v. Maumalanga, 90 Hawai'i 58, 62-63, 976 P.2d 372, 376-77 (1998) (quoting State v. Cullen,

86 Hawai‘i 1, 8, 946 P.2d 955, 962 (1997)))) (some brackets added, some omitted, and some in original) (some ellipses points added and some in original) (some citation omitted).

B. Statutory Interpretation

> "[T]he interpretation of a statute . . . is a question of law reviewable de novo." . . . Arceo, 84 Hawai‘i [at] 10, 928 P.2d [at] 852 . . . (quoting State v. Camara, 81 Hawai‘i 324, 329, 916 P.2d 1225, 1230 (1996) (citations omitted)). See also State v. Toyomura, 80 Hawai‘i 8, 18, 904 P.2d 893, 903 (1995); State v. Higa, 79 Hawai‘i 1, 3, 897 P.2d 928, 930, reconsideration denied, 79 Hawai‘i 341, 902 P.2d 976 (1995); State v. Nakata, 76 Hawai‘i 360, 365, 878 P.2d 669, 704, reconsideration denied, 76 Hawai‘i 453, 879 P.2d 556 (1994), cert. denied, 513 U.S. 1147, 115 S.Ct. 1095, 130 L.Ed.2d 1063 (1995).
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> Gray v. Administrative Director of the Court, State of Hawai‘i, 84 Hawai‘i 138, 144, 931 P.2d 580, 586 (1997) (some brackets added and some in original). See also State v. Soto, 84 Hawai‘i 229, 236, 933 P.2d 66, 73 (1997). Furthermore, our statutory construction is guided by established rules:
>
> > When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
> >
> > When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .
> >
> > In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.
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> Gray, 84 Hawai‘i at 148, 931 P.2d at 590 (quoting State v. Toyomura, 80 Hawai‘i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2) (1993). "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).

State v. Kotis, 91 Hawai‘i 319, 327, 984 P.2d 78, 86 (1999) (quoting State v. Dudoit, 90 Hawai‘i 262, 266, 978 P.2d 700, 704 (1999) (quoting State v. Stocker, 90 Hawai‘i 85, 90-91, 976 P.2d

399, 404-05 (1999) (quoting Ho v. Leftwich, 88 Hawai‘i 251, 256-57, 965 P.2d 793, 798-99 (1998) (quoting Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai‘i 217, 229-30, 953 P.2d 1315, 1327-28 (1998))))) (some brackets and ellipses points added and some in original).

C. Plain Error

> "We may recognize plain error when the error committed affects substantial rights of the defendant." State v. Cullen, 86 Hawai‘i 1, 8, 946 P.2d 955, 962 (1997) (citations and internal quotation signals omitted). See also Hawai‘i Rules of Penal Procedure (HRPP) Rule 52(b) (1993) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

Jenkins, 93 Hawai‘i at 101, 997 P.2d at 27 (quoting State v. Staley, 91 Hawai‘i 275, 282, 982 P.2d 904, 911 (1999) (quoting Maumalanga, 90 Hawai‘i at 63, 976 P.2d at 377 (quoting State v. Davia, 87 Hawai‘i 249, 253, 953 P.2d 1347, 1351 (1998)))).

III. The Circuit Court's Response To The Jury's Communication Was Plainly Erroneous

Silk's points of error lack merit.[6] Nevertheless, we

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[6] Silk's first point of error is without merit because the testimony that he urges was inadmissible pursuant to Hawai‘i Rules of Evidence (HRE) Rule 404(b) was not HRE Rule 404(b) evidence at all: the testimony was that Silk was "mean" to Ongory and that she had asserted that he needed to seek some "help." Inasmuch as her testimony did not identify or even allude to a specific "bad" act, it did not constitute Rule 404(b) evidence. Moreover, her testimony was adduced in the context of explaining Silk's conduct -- to wit, her observation that the remark about Silk's needing "help" seemed to "set him off" -- and, thus, the evidence was relevant. Because of its vagueness, we do not believe that the prejudicial effect of the testimony substantially outweighed its probative value; therefore, it was not inadmissible under HRE Rule 403.

With regard to Silk's second point of error, evidence of Ongory's psychiatric disorder, if any, was irrelevant and, in any event, Silk made no proffer of any evidence to support his assertion that she suffered from a psychiatric disorder that would either impair her competence as a witness or bears upon her truthfulness, thereby undermining her credibility. Similarly, Ongory's history of drug abuse was no more relevant than Silk's and, in any event, Silk was permitted to testify regarding Ongory's alleged drug use on the day of the incident.

Silk's third point of error -- that the circuit court erred by refusing to instruct the jury that it could not predicate conviction of either of the kidnapping offenses on the "same act" supporting a conviction for attempted

(continued...)

must hold that the circuit court's response to the jury's communication regarding the state of mind requisite to the charged kidnaping offenses constituted plain error.

As noted supra in section I, the jury inquired, during its deliberations, whether, with regard to the two kidnaping charges, "all definitions of intent (3) need to be met or only one (1)." The jury referred to the circuit court's instruction predicated on HRS § 702-206(1) (1993), which provides in relevant part that:

> (a) A person acts intentionally with respect to his [or her] conduct when it is his [or her] conscious object to engage in such conduct.
> (b) A person acts intentionally with respect to attendant circumstances when he [or she] is aware of the existence of such circumstances or believes or hopes

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[6](...continued)
first degree assault, or its included offense of third degree assault -- is without merit. Silk relies upon State v. Caprio, 85 Haw. 91, 937 P.2d 933 (App. 1997), which based its holding upon HRS § 701-109 (1993); Silk does not invoke principles of double jeopardy. In Caprio, the ICA held that, the defendant's conviction of both the kidnapping and the sexual assault offenses violated HRS §§ 701-109(1)(a) and 701-109(4), insofar as "the [d]efendant's leg restraint of [the c]omplainant occurred concurrently with his acts of sexual assault[,]" and, therefore, "the jury could not rely on the same leg restraint" to satisfy both the "restraint" required by the kidnapping offense and the "strong compulsion" required by the sexual assault offenses. Id. at 94, 106, 937 P.2d at 935, 947. In other words, Caprio presented a factual scenario wherein it was impossible to commit the sexual assault offenses without also necessarily committing the kidnapping offense and, therefore, the kidnapping offense was an included offense of the sexual assault offenses. See HRS § 701-109(4)(a). However, here, the offenses are not included within each other, inasmuch as both of the kidnapping offenses require proof of restraint whereas third degree assault requires proof of causation of bodily injury and, moreover, distinct factual evidence was adduced at trial supporting each charge. See HRS § 701-109(4). As a final matter, we note that the circuit court did instruct the jury regarding merger of the charged offenses. See, State v. Hoey, 77 Hawai'i 17, 38, 881 P.2d 504, 525 (1994) (merger occurs "under circumstances in which (1) there is but one intention, one general impulse, and one plan, (2) the two offenses are part and parcel of a continuing and uninterrupted course of conduct, and (3) the law does not provide that specific periods of conduct constitute separate offenses," (citations omitted)).

With respect to Silk's final point of error alleging improper jury deliberations, the circuit court did not abuse its discretion in denying Silk's motion for a mistrial and resubmitting the matter to the jury for further deliberation to complete the special verdict forms. See, e.g., State v. Manipon, 70 Haw. 175, 177, 765 P.2d 1091, 1092-93 (1989) ("When an . . . improper verdict is returned by the jury, the court should permit the jury to correct the mistake before it is discharged" (quoting Dias v. Vanek, 67 Haw. 114, 117, 679 P.2d 133, 135 (1984) (ellipsis points added))).

> that they exist.
> (c) A person acts intentionally with respect to a result of his [or her] conduct when it his [or her] conscious object to cause such a result.

The circuit court responded to the jury's communication, "Only one."

HRS § 702-204 (1993) provides in relevant part that "a person is not guilty of an offense unless the person acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense." Pursuant to HRS § 702-205 (1993), "[t]he elements of an offense are such (1) conduct, (2) attendant circumstances, and (3) results of conduct, as . . . [a]re specified by the definition of the offense[.]" Accordingly, HRS § 702-206 defines "intentionally," "knowingly," "recklessly," and "negligently" in connection with each of three foregoing elements, each of which, if statutorily required by an offense defined in the HPC, must be proved beyond a reasonable doubt. See, e.g., State v. Kalama, No. 22457, slip. op. at 13-14 (Haw. Sept. 29, 2000); Jenkins, 93 Hawai'i at 111, 997 P.2d at 37; State v. Klinge, 92 Hawai'i 577, 584-85, 994 P.2d 509, 516-17 (2000); State v. Hoang, 86 Hawai'i 48, 58, 947 P.2d 360, 370 (1997).

In count II of the complaint, Silk was charged with "kidnaping with intent to terrorize," see supra note 2, which is not defined by the HPC as including a "result of conduct" element and, thus, does not require that the prosecution prove beyond a reasonable doubt that a person was actually terrorized. Rather, the offense of "kidnaping with intent to terrorize" requires only that a person intentionally or knowingly restrain another person with the intent to terrorize the restrained person or a third person. The act of restraint is the "conduct" element of the offense and, accordingly, may be established by proof beyond a

reasonable doubt that the defendant committed an act, the conscious object of which was to restrain another person (if found to be committed "intentionally"), or, alternatively, that the defendant was aware that his or her act was of a restraining nature (if found to be committed "knowingly"). See HRS §§ 702-206(1)(a), supra, and 702-206(2)(a) ("[a] person acts knowingly with respect to his [or her] conduct when he is aware that his [or her] conduct is of that nature"). Although whether a defendant's conduct is terroristic is an attendant circumstance of the offense, HRS § 707-720(1) requires that this element be satisfied by no less than proof that the defendant intended, when restraining another person, to terrorize that person or a third person. Thus, a "knowing" state of mind does not satisfy this element of the offense but, rather, is merely an alternative state of mind that will satisfy the requirements of HRS § 702-204 with regard to the "conduct" element of the offense. Accordingly, in the words of HRS § 702-206(1), in order to convict a defendant of kidnaping with the intent to terrorize, the prosecution must prove beyond a reasonable doubt that the defendant was aware, believed, or hoped that his conduct, the conscious object of which was to restrain another person, was terrorizing either the person restrained or a third person.

In light of the foregoing, it is evident that, in a hypertechnical sense, the circuit court's response was correct with regard to the offense of kidnaping as charged in count II, insofar as: (1) the offense does not have a "result of conduct" element and, therefore, the definition of "intentionally" set forth in HRS § 702-206(1)(c) does not apply; (2) the "conduct" element may be satisfied by either an "intentional" or a "knowing" state of mind, and, therefore, the definition of

"intentionally" set forth in HRS § 702-206(1)(a) does not necessarily apply because the jury may convict on a finding that Silk acted "knowingly" with regard to his conduct, rather than intentionally; and, consequently, (3) the "only one" of the three definitions of "intentionally" that must be found by the jury is that which adheres to the attendant circumstance of the offense, to wit, that Silk was aware, believed, or hoped that, while restraining Ongory, his conduct was terrorizing her.

The foregoing analysis similarly applies to the offense of kidnaping with the intent to inflict bodily injury, see supra note 2, charged in count III of the complaint. The offense does not have a "result of conduct" element, inasmuch as the statute does not require the actual infliction of bodily injury. Accordingly, the definition of "intentionally," as set forth in HRS § 702-206(1)(c), does not apply. The state of mind statutorily specified as to the "conduct" element of the offense -- i.e., an act of restraint -- is either "intentional" or "knowing," and, therefore, HRS § 702-206(1)(a) does not necessarily apply, insofar as the jury may conclude that the defendant knowingly, rather than intentionally, restrained another person. And, consequently, the "only one" of the definitions of "intentionality" that must be found by the jury is that set forth in HRS § 702-206(1)(b), pertaining to the attendant circumstance of the offense: to wit, that the defendant was aware, believed, or hoped that his or her conduct was causing bodily injury to the person restrained.

However, because the circuit court's terse response to the jury's communication did not clearly communicate that the "only one" of the definitions that the jury was required to find was that which defined the "intentional" state of mind with

regard to the attendant circumstance of the two kidnaping offenses, it therefore constituted an incomplete and misleading statement of the law. Pursuant to the circuit court's response, there is a reasonable possibility that the jury could have found that Silk acted "intentionally" with regard to his conduct -- e.g., that his conscious object in, say, latching the door, was to restrain Ongory. And, having found the presence of "only one" of the definitions of "intentionality," the jury could have assumed that its deliberations with regard to whether Silk possessed the requisite state of mind to commit the offense of "kidnaping with intent to terrorize" were complete without so much as considering, much less finding beyond a reasonable doubt -- as required by the HPC --, whether Silk was aware, believed, or hoped that his conduct was terrorizing Ongory. Similarly, there is a reasonable possibility that, having found that Silk's conscious object while he held Ongory down on the bed was to restrain her, the jury, heeding the circuit court's response, did not consider whether Silk was aware, believed, or hoped that his conduct was causing bodily injury. Given such reasonable possibilities, we hold that the circuit court's insufficient and misleading answer to the jury's communication was not harmless beyond a reasonable doubt, affected Silk's substantial rights, and, consequently, was plainly erroneous.

IV. CONCLUSION

In light of the foregoing, we vacate the circuit court's judgment of conviction and sentence with regard to the two charged kidnaping offenses and remand the matter for a new trial consistent with this opinion.

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