

DISSENTING OPINION OF ACOBA, J.

The majority affirms Defendant-Appellant Darwin Ramirez's conviction of attempted murder in the first degree. See Hawai'i Revised Statutes (HRS) §§ 705-500 (1993) and 707-701(1)(a) (1993). The subject charge involves the attempted murder of "[m]ore than one person in the same or separate incident." HRS § 707-701(1)(a). In my view, there is no evidence to establish Ramirez's intent to kill two or more persons in the same or separate incident. Therefore, I dissent.

In order to convict Ramirez of attempted murder in the first degree, Plaintiff-Appellee State of Hawai'i (the prosecution) must prove, beyond a reasonable doubt, that Ramirez intended to cause the death of Donald Marumoto and Gary Santos and that he engaged in conduct that constituted a substantial step toward the commission of that crime. See HRS §§ 705-500 and 707-701(1)(a).

According to Kalani Agosto, a co-defendant and one of the prosecution's witnesses, Ramirez planned to "mob" Marumoto and Santos and take their money. Along with the co-defendants, Ramirez attacked the two complainants. Ramirez, Agosto, and Mark Calicdan each had a baseball bat. Chris and Anastacio (Tacio) Martinez were also involved, but unarmed. Ramirez hit Marumoto on the head with his bat, but did not strike Santos. Calicdan

struck Marumoto on a shoulder with his bat. Chris assailed Santos with his fists. Agosto struck Marumoto in the stomach and on the back and Santos on the back with his bat. Tacio did not assault anyone, but took Marumoto's money.

Ramirez, Agosto, Calicdan, and Tacio were each indicted for one count of attempted murder in the first degree, that is, attempted murder of Marumoto and Santos and, in the alternative, for two counts of attempted murder in the second degree, one of Marumoto and the other of Santos. Agosto, testifying for the prosecution, stated that it was not part of the plan to try to murder anyone and that they did not bring the bats with them as part of the plan to attack Marumoto and Santos. Tacio, testifying for Ramirez, stated that his understanding of why they were meeting Marumoto and Santos was to threaten Santos because he had been harassing Ramirez. Chris, testifying for Calicdan, stated that they were only planning to scare Marumoto and Santos, that he and others were there in the event Marumoto and Santos tried to harm Ramirez, and that Agosto was the one who did not follow the plan. It is undisputed that Ramirez did not strike Santos. No one testified that Ramirez planned to kill Marumoto and Santos or that there was a plan to murder both of them.

Agosto pled guilty to two counts of attempted manslaughter pursuant to a plea agreement. Agosto had struck both men. Pursuant to a plea agreement, Tacio pled no contest to

two counts of attempted assault in the first degree. Calicdan was found guilty of second degree assault of Marumoto and first degree assault of Santos. Ramirez was convicted of attempted murder in the first degree and sentenced to life imprisonment without the possibility of parole.

In my view, there was no evidence to support, or from which can be inferred, Ramirez's intent to kill Marumoto and Santos. I agree that Ramirez's intent to cause Marumoto's death can be inferred from the fact that Ramirez hit Marumoto in the head with a baseball bat. Hence, there was sufficient evidence to convict Defendant of attempted murder in the second degree of Marumoto, see HRS §§ 705-500 and 707-701.5 (1993), that is, attempting to cause the death of another person.

However, there was no evidence that Ramirez attacked Santos. There was no evidence that Ramirez planned to kill Marumoto and Santos in the same or separate incident. Agosto, the prosecution's own witness, denied that there was a plan to murder Marumoto and Santos. Because no evidence supports Ramirez's intent to kill both Marumoto and Santos, Ramirez cannot be guilty of attempted murder in the first degree. See HRS § 701-114 (1993) (providing that "no person may be convicted of an offense unless the following are proved beyond a reasonable doubt: (a) Each element of the offense; (b) The state of mind required to establish each element of the offense"). According

to the majority, Ramirez may be held responsible for attempted murder of Santos as an accomplice. However, Ramirez's accomplice liability also requires proof of his intent to kill both Marumoto and Santos or of his intention to promote or facilitate that offense. See HRS §§ 702-221(1) and (2)(c) (1993),<sup>1</sup> 702-222 (1993),<sup>2</sup> and 702-223 (1993).<sup>3</sup> As indicated, evidence of the

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<sup>1</sup> HRS § 702-221(1) and (2)(c) provides as follows:

**Liability for conduct of another.** (1) A person is guilty of an offense if it is committed by his [or her] own conduct or by the conduct of another person for which he [or she] is legally accountable, or both.

(2) A person is legally accountable for the conduct of another person when:

- . . .  
(c) He [or she] is an accomplice of such other person in the commission of the offense.

(Emphasis added.)

<sup>2</sup> HRS § 702-222 provides in pertinent part as follows:

**Liability for conduct of another; complicity.** A person is an accomplice of another person in the commission of an offense if:

(1) With the intention of promoting or facilitating the commission of the offense, the person:

- (a) Solicits the other person to commit it;  
or  
(b) Aids or agrees or attempts to aid the other person in planning or committing it[.]

(Emphasis added.)

<sup>3</sup> HRS § 702-223 provides as follows:

**Liability for conduct of another; complicity with respect to the result.** When causing a particular result is an element of an offense, an accomplice in the conduct causing the result is an accomplice in the commission of that offense, if the accomplice acts, with respect to that result, with the state of mind that is sufficient for the commission of the offense.

(Emphasis added.) As indicated above, the offense for which Ramirez was charged was the murder of two or more persons in the same or separate incident.

requisite intents are lacking. While there may have been evidence of Ramirez's intent to cause Marumoto's death and to aid in an assault on Santos, see HRS §§ 707-710 (1993), et seq., the evidence did not support his conviction for attempted murder of both victims in the same or in a separate incident.