

NO. 23208

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

WAYMAN K. KAUA, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-0404)

SUMMARY DISPOSITION ORDER

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

The defendant-appellant Wayman K. Kaua appeals from the judgment of conviction and sentence of the first circuit court, filed on February 1, 2000. On appeal, Kaua argues that the circuit court misinstructed the jury regarding the elements of attempt offenses, failed to instruct the jury regarding applicable included offenses, erroneously instructed the jury regarding an inapplicable included offense, and incompletely and inconsistently instructed the jury regarding its evaluation of Kaua's credibility as a witness and his interest in the outcome of his 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 by the parties, we resolve Kaua's points of error on appeal as follows.

First, the circuit court's jury instructions regarding attempt offenses were not misleading, insufficient, confusing, or erroneous, insofar as they adequately informed the jury of the

statutory elements of the attempt offenses and the state of mind requisite to each element. See State v. Sawyer, 88 Hawai'i 325, 334-35, 966 P.2d 637, 646-47 (1998) (rejecting defendant's claim that separate jury instructions regarding the "material elements" of attempted second degree murder and HRS § 705-500 (1993) criminal attempt culpability failed to direct the jury to find that the defendant intended to cause death and did not require that the jury examine defendant's conduct under the circumstances as he believed them to be at the time of the offense).

Second, to the extent that the circuit court may have erred in failing to instruct the jury as to any offenses that Kaua alleges to be included offenses in any of the counts in the present matter, the error, if any, is harmless beyond a reasonable doubt. See State v. Haanio, 94 Hawai'i 405, 413, 16 P.3d 246, 254 (2001); State v. Holbron, 80 Hawai'i 27, 47, 904 P.2d 912, 932 (1995).

Third, assuming that attempted assault in the first degree, pursuant to HRS §§ 705-500 and 707-701(1)(b) (1993), is an included offense of the charged offense of attempted murder in the first degree, the circuit court did not err in instructing the jury with respect to attempted first degree assault, insofar as there was a rational basis in the record to warrant acquittal of the charged and any greater included offenses but, at the same time, to warrant conviction of attempted assault in the first degree. Cf. State v. Moore, 82 Hawai'i 202, 211, 921 P.2d 122, 131 (1996) (assuming without deciding that assault in the first degree and in the second degree may, in some circumstances, be included offenses of attempted murder); State v. Smith, 91 Hawai'i 450, 467, 984 P.2d 1276, 1293 (App.) (holding that trial court should not have instructed the jury with regard to

attempted first degree and second degree assault as included offenses of attempted first degree murder because record lacked a rational basis to warrant such an instruction), cert. denied, 92 Hawai'i 632, 994 P.2d 564 (1999).

Assuming arguendo that attempted first degree assault can be an included offense of attempted first degree murder, see Moore, supra, we observe that a reasonable jury could, on the present record, acquit Kaua of the latter and convict him of the former. The evidence at trial supports a reasonable juror concluding that Kaua lacked the requisite state of mind for conviction of attempted first degree murder, as well as attempted manslaughter based upon extreme mental or emotional disturbance, insofar as several witnesses testified that Kaua did not intend to kill anyone. However, given the testimony that he discharged a firearm in the direction his wife had indicated police officers were located, but that he did not actually observe any police officers himself, the jury could have rationally concluded that Kaua intentionally engaged in the conduct of discharging the firearm and that his conscious object in doing so was to cause serious bodily injury to another person or, alternatively, that he was aware that his conduct was of such a nature that it was practically certain it would cause serious bodily injury to another person. See HRS §§ 702-206(1)(c) (1993) and 702-206(2)(c) (1993) (defining intentional and knowing states of mind as to results of conduct) and HRS § 705-500.

Finally, the circuit court's jury instructions regarding the jury's assessment of Kaua's credibility and his interest in the result of his trial were not prejudicially erroneous, misleading, confusing, or inconsistent. Cf. State v. Moeller, 50 Haw. 110, 123-24, 433 P.2d 136, 145 (1967) (jury is

not to be informed of the consequences of its verdict); State v. Apilando, 79 Hawai'i 128, 142, 900 P.2d 135, 149 (1995) (a criminal defendant's credibility is to be assessed by the trier of fact as would that of any other witness). Therefore,

IT IS HEREBY ORDERED that the first circuit court's judgment of conviction and sentence, filed on February 1, 2000, from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, May 1, 2001.

On the briefs:

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