

DISSENTING OPINION BY RAMIL, J.,
IN WHICH MOON, C.J., JOINS

I respectfully dissent from the majority's opinion because I believe the jury was adequately instructed in the present case.

The standard we apply in reviewing the adequacy of jury instructions is whether, "when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent or misleading[,]" State v. Valentine, 93 Hawai'i 199, 203, 998 P.2d 479, 483 (2000); the critical question being whether there is a reasonable possibility that the error may have contributed to the conviction. Id. The failure to give the mistake-of-fact instruction did not contribute to the conviction in this case since the jury was sufficiently instructed on the prosecution's burden of proving that Locquiao knowingly possessed methamphetamine. The ICA was correct in noting that "if the jury believed Locquiao's testimony that he did not know that the 'glass material' allegedly handed to him by the other man was an 'ice pipe' or that it contained methamphetamine, the jury would have found that Locquiao did not 'knowingly' possess methamphetamine" and would have found him not guilty. State v. Locquiao, No. 23706, (Haw. Ct. App. Jul. 30, 2002). The court's failure to give the mistake-of-fact instruction is harmless because the jury found that the prosecution proved all the elements of the crime beyond a reasonable doubt. Even had the court instructed the jury on the mistake-of-fact defense, the jury's conclusion would be the same -- i.e., that Locquiao was

not ignorant as to what the "glass material" was and that he possessed the requisite intent to be found guilty of the crime. Cf. State v. Haanio, 94 Hawai'i 405, 415-16, 16 P.3d 246, 256-57 (2001) (holding that the failure to give an included offense instruction is harmless where the defendant is found guilty of the greater offense because the prosecution proved the elements of the greater offense beyond a reasonable doubt).

Courts that have required the mistake-of-fact instruction base its necessity on the ground that the purpose of the instruction is to draw the jury's attention to the defendant's theory of the case and to inform the jury of the validity of the mistake-of-fact defense. See majority at 21-22. In my view, it is unnecessary to point out non-affirmative defenses to the jury, which simply state that if the defendant can negate an element of the crime the jury must find him not guilty. Such an instruction is indistinguishable from one that requires the prosecution to prove all the elements of the crime beyond a reasonable doubt. Requiring such a duplicative instruction would not only be superfluous, but would also serve to confuse the jury since the mistake-of-fact defense is subsumed within the intent instruction.

Because I find no reversible error was committed in this case, I respectfully dissent. Accordingly, I would dismiss the certiorari proceeding as improvidently granted.