NO. 24232

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Plaintiff-Appellee

vs.

JONATHAN LUM, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-11-0401)

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

Defendant-Appellant Jonathan Lum (Defendant) appeals from a March 28, 2001 judgment of conviction and sentence of the first circuit court (the court)[1] on one count of robbery in the first degree, Hawai‘i Revised Statutes (HRS) § 708-840(1)(b)(ii) (1993 & Supp. 2001).[2] We affirm the judgment.

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[1] The Honorable Wilfred K. Watanabe presided over this matter.

[2] HRS § 708-840(1)(b)(ii) reads:

> (1) A person commits the offense of robbery in the first degree if, in the course of committing theft:
> . . . .
> (b) The person is armed with a dangerous instrument and:
> . . . .
> (ii) The person threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property.

On July 18, 2000, at 10:10 a.m., the jury transmitted Jury Communication No. 1, asking, "What happens if because of a lack of evidence one person is unable to make a decision?" The court suggested advising the jury, "Please deliberate further with a view to reaching a unanimous decision." The defense objected to the latter part of the court's proposal and suggested asking the jury, "Would further time help in deliberation[?]" The defense also stated that "then we could also refer them to the instruction on page 31."

The court's supplemental instruction rendered in response to Jury Communication No. 1, issued at 11:03 a.m. that same day was, "Please refer to page 31 of your instructions and continue deliberations."[3] The court noted that its supplemental instruction was given "over [D]efendant's objection."

At 1:23 p.m. on the same day, the jury issued Jury Communication No. 3,[4] asking, "On pg. 16, element 3; If the

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[3] The instruction on page 31 read:

> A verdict must represent the considered judgment of each juror, and in order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.
>
> Each of you must decide the case for yourself, but it is your duty to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violating your individual judgment. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest belief as to the weight or effect of evidence for the mere purpose of returning a verdict.

[4] The record does not contain a Jury Communication No. 2.

defendant kept the knife in his pocket, could that still be considered 'imminent use of force' if the victim was aware of the knife?"[5] The court proposed advising the jury, "There must have been the threat of the imminent use of force. Please rely on your collective recollection of the facts of this case." The prosecution did not object to the instruction. The defense, however, stated, "[W]e don't object to the first sentence of the response, but we would object to the second sentence because the question is just asking for a clarification of the element -- one of the elements of robbery." The court instructed the jury at 2:05 p.m. as it initially indicated it would.

On appeal, Defendant argues that "[t]he combined effect of the court's responses to the jury communications was prejudicially erroneous because it [sic] constituted an improper 'Allen' instruction to reach a unanimous verdict on the charged offense, in violation of the holdings in State v. Fajardo, 67 Haw. 593, 699 P.2d 20 (1985) and State v. Villeza, 72 Haw. 327, 817 P.2d 1054 (1991)."

With respect to Communication No. 1, inasmuch as the court responded, "Please refer to page 31 of your instructions and continue deliberations," it essentially provided the response

[5] By pointing to page 16, the jury was apparently referring to the instruction on Robbery in the First Degree. The instruction informed the jury of the elements of robbery, and specifically stated that element three was "[t]hat . . . Defendant threatened the imminent use of force against anyone who is present, with the intent to compel acquiescence to the taking of or escaping with the property."

suggested by Defendant, and Defendant cannot now claim on appeal that the court's decision to follow his request was error. See Struzik v. City and County of Honolulu, 50 Haw. 241, 245, 437 P.2d 880, 883 (1968) ("Even assuming that the verdict of the jury was erroneous, appellant, having invited the error by requesting the trial court to give those two instructions to the jury, should not be permitted to avail herself of the error." (Citations omitted.)); Kealoha v. Tanaka, 45 Haw. 457, 462, 370 P.2d 468, 471 (1962) ("[I]nvited error cannot be complained of and this applies to jury instructions with full force and effect." (Citation omitted.)).

In any event, because the court's response was what this court has advised trial judges to do in a similar situation, the court's response was not erroneous. In Fajardo, the jury was deadlocked. See 67 Haw. at 594, 699 P.2d at 21. The trial court advised the jury to continue its deliberations and stated, in part, "If you cannot reach a verdict, this case must be tried again[,]" id., and "[e]ach juror who finds himself to be in the minority should reconsider his views in the light of the opinion of the jurors of the majority." Id. at 595, 699 P.2d at 21.

In "revers[ing]" and remanding the case, this court ruled that the foregoing statements constituted error, but that, "[h]ad the trial court simply repeated an instruction given earlier to the jury on how to go about its deliberations, we feel

that no prejudicial effect would have befallen Appellant." Id. at 601, 699 P.2d at 25.

Except for a comma, typographical differences, and the use of a synonym in place of one word, the sample instruction provided in Fajardo is identical to the instruction on page 31 referred to by the court in the instant case. See supra note 3. Therefore, the court in the instant case did not err.

Defendant also argues that, instead of asking the jurors to re-read the instruction on page 31, the court should have told the jurors to re-read the instruction regarding the lesser included offense of Theft in the Second Degree. Defendant's argument, however, is premised on an assumption that the jury was "deadlocked" regarding the crime of first degree robbery. Assuming arguendo that "the jury communication reflected a lack of unanimity on the part of the jury," the communication, as the prosecution points out, "did not indicate what charge the jury was divided upon." Therefore, had the court followed Defendant's advice on appeal, it may have confused the jury, depending on whether the jury was deadlocked or not or, if deadlocked, deadlocked on robbery in the first degree or a lesser included offense.

Finally, Villeza is plainly inapposite. In Villeza, this court "reversed," not because the trial court had told the jury to re-read the instructions, but because the trial court had

erroneously informed the jury that it needed to unanimously decide that further deliberation would be fruitless. See 72 Haw. at 335-36, 817 P.2d at 1059.

Although Defendant assigns error to the court's response to Communication No. 3, he fails to present clear argument as to why the court's response was erroneous. We therefore may decline to address this assignment of error. See Hawai‘i Rules of Appellate Procedure Rule 28(b)(7) ("Points not argued [on appeal] may be waived."); State v. Moore, 82 Hawai‘i 202, 206 n.1, 921 P.2d 122, 126 n.1 (1996) (explaining that appellate courts have "prerogative to disregard" a claim unsupported by "discernable argument"); Bank of Hawai‘i v. Shaw, 83 Hawai‘i 50, 52, 924 P.2d 544, 546 (App. 1996) ("We will disregard a point of error if the appeal fails to present discernable argument on the alleged error." (Citation omitted.)). In any event, the sentence, "Please rely on your collective recollection of the facts of this case," is neutral in its direction and not prejudicial under the circumstances. The first sentence of the response to which Defendant does not object appears correct and sufficient.

As to all points raised by Defendant, there was no reversible error. Therefore,

IT IS HEREBY ORDERED that the court's March 28, 2001 judgment of conviction and sentence is affirmed.

DATED: Honolulu, Hawai'i, March 27, 2002.

On the briefs:

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defendant-appellant.

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