

\*\*\* NOT FOR PUBLICATION \*\*\*

NO. 24847

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

DANIEL COPPERUD, Defendant-Appellant.

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 01-1-0909)

SUMMARY DISPOSITION ORDER

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

The defendant-appellant Daniel Copperud appeals from the judgment of the circuit court of the first circuit, the Honorable Karl Sakamoto presiding, filed on December 18, 2001, convicting him of and sentencing him for the offense of assault in the second degree, in violation of Hawai'i Revised Statutes (HRS) § 707-711(1)(b) (1993). On appeal, Copperud contends: (1) that the circuit court erred in convicting him of assault in the second degree where there was insufficient evidence that he consciously disregarded a substantial and unjustifiable risk that he would cause the complainant serious bodily injury; (2) that the circuit court plainly erred in accepting his trial counsel's waiver of his constitutional right to require the State of Hawai'i [hereinafter, "the prosecution"] prove that he had acted with the requisite reckless state of mind with respect to his conduct, see HRS §§ 702-206(3)(a) and 702-206(3)(d) (1993), without first engaging him in a colloquy to ensure that such a waiver was knowing and intelligent; (3) that his trial counsel rendered constitutionally ineffective assistance; and (4) that

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the circuit court's sentence was illegal because its restitution order (a) failed to enter findings and conclusions that the restitution it imposed was reasonable and in an amount that he could afford to pay, (b) failed to take into account the \$85,000 civil settlement amount that Copperud paid the complainant, and (c) left the amount of restitution open-ended by allowing an additional amount to be determined by the Adult Probation Division and approved by the circuit court.

The prosecution counters: (1) that there was sufficient evidence to support Copperud's conviction of second-degree assault; (2) that the circuit court did not commit plain error by failing to engage Copperud in a colloquy to determine whether he agreed with his trial counsel's strategy to concede that he had acted with the requisite reckless state of mind; and (3) that Copperud's trial counsel provided him with constitutionally effective assistance. The prosecution concedes, however, that the circuit court did fail to "make the necessary findings of fact and conclusions with regard to its order of restitution."

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, we resolve Copperud's appeal as follows:

(1) There was sufficient evidence to support Copperud's conviction based on the circuit court's finding that he had acted with the requisite reckless state of mind. See State v. Batson, 73 Haw. 236, 248, 831 P.2d 924, 931, reconsideration denied, 73

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Haw. 625, 834 P.2d 1315 (1992). "A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature." HRS § 702-206(3)(a). "A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result." HRS § 702-206(3)(c). Although Copperud did not "desire[] by his conduct to cause a prohibited harmful result," he was "aware that he was engaging in [the] given conduct[,]" State v. Pinero, 70 Haw. 509, 522 n.7, 778 P.2d 704, 713 n.7 (1989), the result of which, as Copperud concedes, "constituted serious bodily injury."

(2) Defense counsel did not waive Copperud's constitutional rights by electing to concede at trial that Copperud had acted recklessly with respect to conduct, and the circuit court did not err in acknowledging such a concession. A concession is not a waiver or a stipulation. The prosecution was still required to prove beyond a reasonable doubt that Copperud's state of mind as to each element of the offense was reckless, and the circuit court, as the trier of fact, was still required to find that Copperud acted with the requisite reckless state of mind. The circuit court's determination that Copperud had acted with the requisite reckless state of mind was not based solely on Bakke's concession prior to or during trial, inasmuch as the circuit court found that Copperud's actions were "unquestionably reckless" and clearly would have made the same finding without defense counsel's concession.

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(3) Copperud was not denied effective assistance of counsel. Inasmuch as the circuit court expressly found that Copperud had acted with the requisite reckless state of mind, defense counsel's concession did not "result[] in either the withdrawal or substantial impairment of a potentially meritorious defense[.]" State v. Poaipuni, 98 Hawai'i 387, 394-95, 49 P.3d 353, 360-61 (2002). Accordingly, Bakke's concession that Copperud's conduct was reckless did not fall outside the range of competence demanded of attorneys in criminal cases, in general, nor did it constitute a specific error or omission reflecting counsel's lack of skill, judgment, or diligence, in particular.

(4) The circuit court erred in imposing restitution without entering into the record findings of fact and conclusions that the amount and manner of repayment was reasonable and that Copperud could afford to pay it. "[I]t is incumbent upon the [sentencing] court to enter into the record findings of fact and conclusions that the manner of payment is reasonable and one which [the defendant] can afford." State v. Gaylord, 78 Hawai'i 127, 153, 890 P.2d 1167, 1193 (1995) (quoting State v. Johnson, 68 Haw. 292, 297, 711 P.2d 1295, 1299 (1985)). The circuit court likewise erred when it left the amount of restitution open-ended by allowing an additional amount to be determined by the Adult Probation Division and approved by the circuit court.

"[R]equisite specificity should be provided by the sentencing court and ought not be left to subsequent administrative determination," because "[w]ithout express legislative authority, the court cannot delegate the sentencing function to another

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person or entity." Id. (citations omitted).

Therefore, IT IS HEREBY ORDERED that the judgment of the circuit court is affirmed, the portion of the sentence ordering restitution is vacated, and the matter is remanded for a restitution hearing and the entry of a restitution order that includes findings of fact and conclusions that the amount and manner of payment is reasonable and that Copperud can afford to pay it.

DATED: Honolulu, Hawai'i, November 17, 2004.

On the briefs:

Jon Ikenaga, deputy  
public defender, for  
the defendant-appellant  
Daniel Copperud

Daniel Shimizu, deputy  
prosecuting attorney, for  
the plaintiff-appellee  
State of Hawai'i