NO. 25014

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee

vs.

PETER TAKEDA, Defendant-Apellant

and

GERVEN SORINO, Defendant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-1-1728)

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

Defendant-Appellant Peter Takeda appeals from the February 26, 2002[1] judgment of conviction and sentence of the Circuit Court of the First Circuit (the court)[2] determining him guilty of Count V, attempted murder in the first degree, pursuant to Hawaiʻi Revised Statutes (HRS) §§ 705-500 (1993),[3] 707-

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[1] The Judgment of Guilty Conviction and Sentence was initially filed on February 26, 2002, but was later amended March 21, 2002. The March 21, 2002 amended judgment added, "No further action taken on Counts I, II, III, & IV due to the conviction in Count V."

[2] The Honorable Karl K. Sakamoto presided over the trial in this case.

[3] HRS § 705-500 provides in relevant part as follows:

> **Criminal Attempt.** (1) A person is guilty of an attempt to commit a crime if the person:
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> . . . .
>
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.

701(1)(b) (1993),[4] and 707-656 (1993 & Supp. 2002),[5] and of Count VI, carrying, using or threatening to use a firearm in the commission of a separate felony, HRS §§ 134-6(a) and (e) (1993),[6] the separate felony being attempted murder in the first degree. As to the relevant counts on appeal, Takeda was sentenced as to Count V, life without the possibility of parole, and Count VI, twenty years' imprisonment. For the reasons discussed herein, we

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[4] HRS § 707-701(1)(b) states as follows:

> **Murder in the first degree.** (1) A person commits the offense of murder in the first degree if the person intentionally or knowingly causes the death of: . . . (b) A peace officer, judge, or prosecutor arising out of the performance of official duties[.]

[5] HRS § 707-656 states in pertinent part as follows:

> **Terms of imprisonment for first and second degree murder and attempted first and second degree murder.** (1) Persons convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment without the possibility of parole.

[6] HRS § 134-6(a) and (e) provides in relevant part:

> **Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty.** (a) It shall be unlawful for a person to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not; provided that a person shall not be prosecuted under this subsection where the separate felony is:
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> (1) A felony offense otherwise defined by this chapter;
>
> . . . .
>
> (e) Any person violating subsection (a) . . . shall be guilty of a class A felony. Any person violating this section by carrying or possessing a loaded firearm or by carrying or possessing a loaded or unloaded pistol or revolver without a license issued as provided in section 134-9 shall be guilty of a class B felony. Any person violating this section by carrying or possessing an unloaded firearm, other than a pistol or revolver, shall be guilty of a class C felony.

affirm Takeda's convictions on Counts V and VI.[7]

On appeal, Defendant contends that (1) the court should have granted the defense's motion for new trial because the court's failure to instruct the jury on the extreme mental and emotional disturbance (EMED) defense as to Count V was error, (2) the court's instructions were prejudicially erroneous inasmuch as they failed to instruct the jury that it must be unanimous as to at least two of the same "victims" named in Count V, (3) Defendant was deprived of his right of confrontation because two of the complainants named in Count V as "John Doe" and "Bradley Yamada" did not testify, (4) the court erred in failing to dismiss Counts I, II, III, and IV after the jury found Defendant guilty of Count V, (5) the court abused its discretion in allowing a Sergeant Tavares to testify about the situation faced by the residents of apartment 614 (614) after the court had precluded the witnesses from testifying as to the three reckless endangering counts in Cr. No. 01-1-1394, a separate criminal case, and (6) the prosecutor committed misconduct in arguing that shots fired into 614 placed someone in danger of death.

As to Defendant's first argument, the court did not abuse its discretion when it denied Defendant's motion for new trial. The "granting or denial of a motion for new trial rests within the discretion of the trial court and will therefore not be disturbed absent a clear abuse of discretion." State v.

[7] Defendant does not appeal his convictions for Counts VII and VIII relating to firearms and ammunition. Accordingly, those convictions are affirmed.

Jackson, 81 Hawai‘i 39, 48, 912 P.2d 71, 80 (1996) (citing State v. Furutani, 76 Hawai‘i 172, 178-79, 873 P.2d 51, 57-58 (1994)).

Because Defendant failed to object to the lack of an EMED instruction at trial and did not request that the jury be so charged, this court may only address the issue if plain error existed. State v. Staley, 91 Hawai‘i 275, 282, 982 P.2d 904, 911 (1999) (refusing to notice plain error when the trial court failed to read the entire jury instruction). This court may notice "plain error" even when not presented by the appellant. Hawai‘i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (2003). However, plain error should be applied "sparingly and with caution because the rule represents a departure from the presupposition of the adversary system[.]" State v. Fox, 70 Haw. 46, 55, 760 P.2d 670, 675 (1988) (noticing plain error when the prosecution used statements of the defendant which were communicated by his attorney in the course of a plea agreement to discredit defendant's testimony in court). "This court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Vanstory, 91 Hawai‘i 33, 42, 979 P.2d 1059, 1068 (1999) (brackets, citation and internal quotation marks omitted) (refusing to notice plain error because court's omission of definition of semiautomatic firearm in the jury instructions was not prejudicial).

As mentioned, the defense did not submit or request an EMED defense instruction. The defense did not refer in opening or closing argument to an EMED defense. On appeal, the defense acknowledges that there was ample evidence adduced at trial to support an EMED instruction. Thus, Defendant could have requested an EMED instruction, but did not do so. Defendant's strategy at trial was apparently to show that there was insufficient physical evidence to prove that Defendant had the requisite intent to commit attempted murder. Defendant's strategy eschewed an EMED defense just as it had rejected the defenses of self-defense and lack of penal responsibility.[8] Under the facts of this case, we do not recognize plain error, assuming arguendo it would apply. Defendant maintains he was not obligated to request an EMED instruction and, thus, the plain error rule does not apply because under State v. Haanio, 94 Hawai'i 405, 415, 16 P.3d 246, 256 (2001), the court had an independent duty to instruct as to all defenses shown by the evidence. However, Haanio pertained to the court's duty to instruct as to all included offenses shown by the evidence. Id. (holding that "trial courts must instruct juries as to any included offenses when there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense"). Haanio did

[8] Prior to the court's reading of jury instructions, the defense explicitly waived both self-defense under HRS § 703-304 (1993) and the "mental" defense of insanity under HRS § 704-402 (1993) entitled "physical or mental disease, disorder, or defect excluding responsibility is an affirmative defense[.]"

not establish a court's duty to instruct as to all defenses having a basis in the evidence.

As to Defendant's second argument, this court has held that "a specific unanimity instruction is not required if (1) the offense is not defined in such a manner as to preclude it from being proved as a continuous offense and (2) the prosecution alleges, adduces evidence of, and argues that the defendant's actions constituted a continuous course of conduct." State v. Apao, 95 Hawai'i 440, 447, 24 P.2d 32, 39 (2001); see also State v. Valentine, 93 Hawai'i 199, 208, 998 P.2d 479, 488 (2000) (no specific unanimity instruction required if a defendant's conduct constituted a continuing course of conduct); State v. Rapoza, 95 Hawai'i 321, 330, 22 P.3d 968, 977 (2001) (holding that the defendant's discharge of the firearm was a single "continuous offense and therefore a specific unanimity instruction was not required).

The attempted first degree murder offense was not statutorily defined in such a manner as to preclude it from being proved as a "continuous offense." See HRS §§ 705-599 (1993), 707-701(1)(b) and 706-656. Plaintiff-Appellee State of Hawai'i (the prosecution) adduced evidence of a continuous offense.[9] The prosecution, in effect argued that Defendant's actions involved a

[9] Defendant's conduct of discharging his firearm many times over the course of approximately six hours could be considered a continuous series of acts motivated by a single impulse -- Defendant believed he was shooting at assassins who were threatening to kill him. Defendant's conduct consisted of shooting at Officers Kelley, Santos, Mendoza, Kissel, Abbley, and Taira, firing over a hundred rounds of the 38 caliber gun. "There were several shots going off continuously every few minutes."

continuous course of conduct.[10] Consequently, the court did not err in not giving a specific unanimity instruction to the jury.

As to Defendant's third argument, the prosecution may have chosen not to call "John Doe" and "Bradley Yamada" in its case-in-chief, but this in no way precluded Defendant from calling these witnesses. Defendant points to no out-of-court statements of these witnesses that were received into evidence. Thus, Defendant's right to confrontation would not appear to be implicated. See, e.g., United States v. Heck, 499 F.2d 778, 789 n.9 (9th Cir.), cert. denied, Heck v. United States, 419 U.S. 1088 (1974) ("A defendant has no right to confront a witness who provides no evidence at trial. Nor is the government required to call all witnesses to a crime." (Citations and internal quotation marks omitted.)).

As to Defendant's fourth point of error, the court did not err in failing to dismiss Counts I, II, III, and IV after the jury found Defendant guilty of Count V. According to the court's instructions, once the jury found Defendant guilty of Count V, it was not to consider the other murder charges. As such, under these circumstances, this court's determination of this issue is inconsequential. See, e.g., HRS § 701-111(1)(a) (1993) (stating that subsequent prosecution barred when "former prosecution

[10] In closing argument the prosecutor stated, "He [(Defendant)] was expecting a body count because of the three guys and the group of people with him - with the three guys that he was shooting at[,] firing shots over that length of time, he expected some of them had been killed." On rebuttal the prosecutor also argued that Defendant "set out to murder more than one person when he . . . took aim at those people, pulled the trigger of a gun, reloaded, saw them again, targeted them again, pulled the trigger again over and over."

resulted in . . . a conviction . . . and the subsequent prosecution is for[. . .a]ny offense of which the defendant could have been convicted on the first prosecution").

With respect Defendant's fifth point of error, the court did not abuse its discretion by allowing Sergeant Tavares to testify about the situation faced by the residents of 614 after the court had precluded the residents themselves from testifying. The evidence complained about by the Defendant is not evidence of "other crimes, wrongs or acts . . . to prove the character of the person or conformity therewith." Hawai‘i Rules of Evidence (HRE) Rule 404(b). The evidence was of what happened to the residents of the neighboring apartment. Thus, the evidence was excludable if at all under HRE 403. The evidence Defendant sought to exclude was probative of the actions taken by Sergeant Tavares, as the prosecutor argued that Defendant's counsel had called into question the conduct of the police officers. It cannot be said under these circumstances that the court abused is discretion in allowing such evidence. See State v. Baron, 80 Hawai‘i 107, 113, 905 P.2d 613, 619, reconsideration granted in part and denied in part, 80 Hawai‘i 187, 907 P.2d 773 (1995) (holding that admissibility of evidence under HRE 403 is "eminently suited to the trial court's exercise of its discretion").

As to Defendant's final point of error, the prosecutor did not commit misconduct by arguing that shots fired in 614 placed someone in danger of death. See State v. Clark, 83

Hawai‘i 289, 304, 926 P.2d 194, 209 (1996) (holding that "[p]rosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a fair trial). As the prosecutor was responding to arguments made by Defendant's attorney during closing argument, it was not unreasonable for the prosecutor to have commented on the evidence in this manner. See id. (stating that "a prosecutor, during closing argument, is permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence"). Therefore,

In accordance with Hawai‘i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the March 21, 2001 amended judgment of conviction and sentence, from which the appeal is taken, is affirmed.

DATED: Honolulu, Hawai‘i, December 30, 2003.

On the briefs:

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