NO. 22429

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
NATHAN ORTIZ, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-2142)

MEMORANDUM OPINION
(By: Burns, C.J., and Watanabe, J.;
and Lim, J., dissenting)

Defendant-Appellant Nathan Ortiz (Ortiz) appeals the circuit court's March 17, 1999 Judgment, upon a jury's verdict, finding him guilty of Attempted Assault in the Second Degree, Hawaiʻi Revised Statutes (HRS) §§ 705-500 (1993) and 707-711(1)(a) (1993), and sentencing him to incarceration for five years, with credit for time served, and to pay restitution of $6,862.26. We affirm.

BACKGROUND

An October 8, 1998 Indictment charged Ortiz with the following three counts: Count I, Attempted Assault in the Second Degree, HRS §§ 705-500 (1993) and 707-711(1)(a) (1993), on or about April 9, 1998; Count II, Harassment, HRS §§ 711-1106(1)(b) and/or (f) (Supp. 1999), on or about April 8, 1998; and Count III, Harassment, HRS §§ 711-1106(1)(b) and/or (f) (Supp. 1999), on or about April 8, 1998.

On January 7, 1999, a jury convicted Ortiz of Count I and acquitted him of Counts II and III.

FIRST POINT ON APPEAL

The Hawai‘i Supreme Court's opinion in Tachibana v. State, 79 Hawai‘i 226, 900 P.2d 1293 (1995), requires that before the defendant waives his or her constitutional right to testify, the trial court must conduct a colloquy with the defendant and obtain the defendant's on-the-record voluntary, knowing, and intelligent waiver of that right (Tachibana Requirement).

In Ortiz's case, during the presentation of evidence by the defense, the following discussion occurred between defense counsel and the court:

> [DEFENSE COUNSEL]: Will the Court be informing [Ortiz] of his right to testify?
>
> THE COURT: The Court will give him his Tachibana warning only if he decides not to testify.
>
> [DEFENSE COUNSEL]: Okay.
>
> THE COURT: Is he going to testify?
>
> [DEFENSE COUNSEL]: As a [sic] right now, he's planning to testify, yes.

Ortiz testified in relevant part as follows:

> Q. What were you upset about?
>
> A. Stuff she would say and do throughout the course of our, I guess, relationship.
>
> Q. What kind of stuff would she say?
>
> . . . .
>
> A. Just like a lot of derogatory stuff, picking.
>
> Q. Okay. On that afternoon, what were you trying to do to her?

A. Trying to shut her up. I had enough.

Q. Were you trying to break any bones?

A. No.

In this appeal, Ortiz contends that the court plainly erred when it did not engage him in a Tachibana colloquy before he testified. We disagree.

A defendant in a criminal case has certain rights unless he or she decides to waive them. In Hawai‘i, before the defendant waives certain rights, the trial court must conduct a colloquy to insure that the waiver is made voluntarily, knowingly, and intelligently. Examples are:

1. Right to testify, Tachibana, supra.

2. Right to an included offense instruction. State v. Kupau, 76 Hawai‘i 387, 395-96 n.13, 879 P.2d 492, 500-01 n.13 (1994).

3. Right to trial by jury. State v. Young, 73 Haw. 217, 220-21, 830 P.2d 512, 514 (1992); and State v. Ibuos, 75 Haw. 118, 121, 857 P.2d 576, 578 (1993).

4. Right to counsel. State v. Vares, 71 Haw. 617, 622-23, 801 P.2d 555, 558 (1990); State v. Hoey, 77 Hawai‘i 17, 33, 881 P.2d 504, 520 (1994); and State v. Merino, 81 Hawai‘i 198, 219, 915 P.2d 672, 693 (1996).

5. Rights lost by pleading guilty or nolo contendere. Hawai‘i Rules of Penal Procedure (HRPP) Rule 11; Conner v. State, 9 Haw. App. 122, 126-28, 826 P.2d 440, 443-44 (1992).

The primary reason for the pre-waiver colloquy requirement is the difficulty in determining at a post-conviction relief hearing whether such a waiver occurred and the resulting waste of judicial resources. Tachibana, 79 Hawai'i at 235, 900 P.2d at 1302.

The United States Constitution affords a Fifth Amendment right not to "be compelled in any Criminal Case to be a witness against himself[.]" Similarly, the Hawai'i Constitution, affords an Article I, Section 10, right not to "be compelled in any criminal case to be a witness against oneself." In other words, both constitutions assure a defendant in a criminal case the right to remain silent.

In Tachibana, the defendant did not testify. He did not waive his constitutional right to remain silent. He waived his right to testify. The Hawai'i Supreme Court ruled, in relevant part, as follows:

> [A defendant's] right to testify in his [or her] own defense is guaranteed by the constitutions of the United States and Hawai'i and by a Hawai'i statute.
>
> . . . .
>
> State v. Silva, 78 Hawai'i 115, 122, 890 P.2d 702, 709 (App. 1995) . . . .
>
> . . . .
>
> [I]n order to protect the right to testify under the Hawai'i Constitution, trial courts must advise criminal defendants of their right to testify and must obtain an on-the-record waiver of that right in every case in which the defendant does not testify.[7] . . .
>
> . . . .

> [T]he ideal time to conduct the colloquy is immediately prior to the close of the defendant's case. Therefore, whenever possible, the trial court should conduct the colloquy at that time.[9]
>
> ———————————
>
> [7] In conducting the colloquy, the trial court must be careful not to influence the defendant's decision whether or not to testify and should limit the colloquy to advising the defendant
>
> > that he [or she] has a right to testify, that if he [or she] wants to testify that no one can prevent him [or her] from doing so, [and] that if he [or she] testifies the prosecution will be allowed to cross-examine him [or her]. In connection with the privilege against self-incrimination, the defendant should also be advised that he [or she] has a right not to testify and that if he [or she] does not testify then the jury can be instructed about that right.
>
> State v. Neuman, 179 W.Va 580, 585, 371 S.E.2d 77, 82 (1988) (quoting People v. Curtis, 681 P.2d at 514).
>
> [9] Of course, the trial court judge cannot independently foresee when the defense is on the verge of resting and conduct the colloquy at that precise moment. Consequently, the trial courts will require the cooperation of defense counsel to enable them to conduct the colloquy immediately prior to the close of the defendant's case.
>
> Furthermore, although the ultimate colloquy should be conducted after all evidence other than the defendant's testimony has been received, it would behoove the trial court, prior to the start of trial, to (1) inform the defendant of his or her personal right to testify or not to testify and (2) alert the defendant that, if he or she has not testified by the end of the trial, the court will briefly question him or her to ensure that the decision not to testify is the defendant's own decision. Such an early warning would reduce the possibility that the trial court's colloquy could have any inadvertent effect on either the defendant's right not to testify or the attorney-client relationship.

Id. at 231-32, 236-37, 900 P.2d at 1298-99, 1303-04 (footnotes 6 and 8 omitted).

In contrast to Tachibana, Ortiz testified. Ortiz contends that Tachibana also requires that before the defendant

waives his or her constitutional right to remain silent, the trial court must conduct a colloquy with the defendant and obtain an on-the-record voluntary, knowing, and intelligent waiver of that right. Ortiz further contends that the court failed to perform its duty in his case.

The Tachibana Requirement mandates a pre-silence colloquy. Ortiz presents the question whether a pre-testimony colloquy is likewise mandated.

In People v. Mozee, 723 P.2d 117, 124 (Colo. 1986), the Colorado Supreme Court decided that the answer is no. In essence, it concluded that the unlikelihood that a defendant did not know of his or her right to remain silent made it unnecessary to require a pre-testimony colloquy.

As noted above, the last sentence of Tachibana's footnote 7 states that "the defendant should also be advised that he [or she] has a right not to testify and that if he [or she] does not testify then the jury can be instructed about that right." The words "should also be advised" do not mandate a colloquy. This is especially true in light of the use of the word "must conduct a colloquy" in the Tachibana Requirement.

Similarly, the wording of Tachibana's footnote 9 quoted above first mentions both the "personal right to testify or not to testify" but then states that if the defendant

> has not testified by the end of the trial, the court will briefly question him or her to ensure that the decision not to testify is the defendant's own decision. Such an early warning would reduce

> the possibility that the trial court's colloquy could have any inadvertent effect on either the defendant's right not to testify or the attorney-client relationship.

The concern for "any inadvertent effect" is limited to "the defendant's right not to testify[.]" This limitation implies a significantly lesser concern for the defendant's right to testify. This is especially true in light of the use of the words "must conduct a colloquy" in the Tachibana Requirement.

The trial court did not do something that it "should" have done, i.e., conduct a pre-testimony colloquy. Ortiz did not object. The resulting question is whether the trial court committed plain error when it did not conduct a pre-testimony colloquy.

Ortiz was indicted on October 8, 1998, arrested on October 19, 1998, and released on $15,000 bail.

HRPP Rule 52(b) states that "[p]lain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Therefore, an appellate court "may recognize plain error when the error committed affects substantial rights of the defendant." State v. Davia, 87 Hawai‘i 249, 253, 953 P.2d 1347, 1351 (1998)(citing State v. Cullen, 86 Hawai‘i 1, 8, 946 P.2d 955, 962 (1997)). The appellate 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) (citing State v. Sawyer, 88 Hawai‘i 325, 330, 966 P.2d 637, 642 (1998)).

> This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system--that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes.

Vanstory, 91 Hawai‘i at 42, 979 P.2d at 1068 (citing State v. Kelekolio, 74 Haw. 479, 514-15, 849 P.2d 58, 74-75 (1993)).

Ortiz has not contended and there is no indication on the record that his waiver of his right to remain silent was not voluntary, knowing, and intentional. Ortiz has not stated how his testimony harmed his case and there is no indication in the record that it was harmful to his case. Therefore, the record shows an error that was harmless beyond a reasonable doubt rather than a plain error.

SECOND POINT ON APPEAL

In 1996, the Hawai‘i Supreme Court held

> that when separate and distinct culpable acts are subsumed within a single count charging a sexual assault -- any one of which could support a conviction thereunder -- and the defendant is ultimately convicted by a jury of the charged offense, the defendant's constitutional right to a unanimous verdict is violated unless one or both of the following occurs: (1) at or before the close of its case-in-chief, the prosecution is required to elect the specific act upon which it is relying to establish the "conduct" element of the charged offense; or (2) the trial court gives the jury a specific unanimity instruction, i.e., an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt.

State v. Arceo, 84 Hawai‘i 1, 32-33, 928 P.2d 843, 874-75 (1996).

On April 6, 2000, the Hawai‘i Supreme Court stated that

> [i]n the absence of an express election by the prosecution, Arceo mandates that the jury be given a specific unanimity instruction "when separate and distinct culpable acts are subsumed within a single count . . . any of which could support a conviction thereunder[.]" 84 Hawai‘i at 32-33, 928 P.2d at 874-75.

State v. Jenkins, 93 Hawai‘i 87, 113, 997 P.2d 13, 39 (2000).

On May 2, 2000, the Hawai‘i Supreme Court held that a specific unanimity instruction was not required where it was shown that the defendant, who had been charged with one count of prohibited possession of a firearm and was convicted of attempted prohibited possession of a firearm, had grabbed for a police officer's firearm "in a continuous struggle for possession and control of the firearm" during "a single episode[.]" State v. Valentine, 93 Hawai‘i 199, 208-09, 998 P.2d 479, 488-89 (2000). In distinguishing Arceo, the Hawai‘i Supreme Court stated that

> [t]he Arceo decision dealt with a situation in which the prosecution had adduced evidence regarding independent incidents, during each of which the defendant engaged in conduct that could constitute the offense charged, and each of which could have been, but were not, charged as separate offenses. Inasmuch as these independent instances of culpable conduct were submitted to the jury in a single count that charged one offense, we held that a specific unanimity instruction was necessary to ensure that each juror convicted the defendant on the basis of the same incident of culpable conduct.
>
> Thus, two conditions must converge before an Arceo unanimity instruction, absent an election by the prosecution, is necessary: (1) at trial, the prosecution adduces proof of two or more separate and distinct culpable acts; and (2) the prosecution seeks to submit to the jury that only one offense was committed. Moreover, it bears repeating that the purpose of an Arceo unanimity instruction is to eliminate any ambiguity that might infect the jury's deliberations respecting the particular conduct in which the defendant is accused of engaging and that allegedly constitutes the charged offense.
>
> In the present matter, there was no danger that the jury would be confused regrading the conduct of which Valentine was accused and that constituted the charged offense. The prosecution offered only one theory of the proof adduced at trial; Valentine

> grabbed for the officer's firearm as the two struggled with each other. Moreover, the evidence adduced at trial did not establish more than one incident during which Valentine engaged in conduct constituting an attempt to possess the officer's firearm. To the contrary, the evidence concerned only a single episode between Valentine and Officer Leffler, during which the two allegedly engaged in a continuous struggle for possession and control of the firearm. Consequently, our decision in Arceo is not implicated by the present matter, which concerns but a single incident of culpable conduct, and, therefore, the circuit court was not required to read the jury a specific unanimity instruction.

Id. at 208-09, 998 P.2d at 488-89 (citations omitted).

We agree that the trial court erred when it did not instruct the jury that it could not consider an act as being a separate and distinct culpable act absent a unanimous decision that the separate and distinct culpable act in fact occurred. Ortiz contends that the trial court's failure to give a unanimity instruction to the jury was a plain error.

In the past, HRPP Rule 52(b) concepts of "plain error" (court erred but counsel failed counsel's duty to object) or HRPP Rule 52(a) concepts of "harmless error" (court erred and counsel did not have a duty to object or had a duty and did not fail it) have been applied to jury instructions, depending on whether counsel objected. Valentine, 93 Hawai‘i at 205, 998 P.2d at 485; State v. Kaiama, 81 Hawai‘i 15, 911 P.2d 735 (1996). But, as is noted in Valentine,

> it may be plain error for a trial court to fail to give any . . . instruction even when neither the prosecution nor the defendant have requested it . . . because . . . "the ultimate responsibility properly to instruct the jury lies with the circuit court and not with trial counsel." [State v.]Arceo, 84 Hawai‘i[1,] at 33, 928 P.2d[843,] at 875[(1996) (citations omitted)].

Valentine, 93 Hawai‘i at 205, 998 P.2d at 485.

In light of the above, with respect to jury instructions, the distinction between "harmless error" and "plain error" is a distinction without a difference. We conclude that the standard of review applicable in all cases when jury instructions or the omission thereof are challenged on appeal is as follows:

> "[T]he standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading."
>
> "[E]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial."
>
> [E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error may have contributed to conviction.
>
> If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.

State v. Cabrera, 90 Hawai‘i 359, 364-65, 978 P.2d 797, 802-03 (1999) (citations omitted).

In Ortiz's case, we apply the above-quoted standard of review and conclude that the court's error in failing to give a unanimity instruction was harmless beyond a reasonable doubt.

In his closing argument to the jury, defense counsel admitted and argued, in relevant part, as follows:

> He did hit and strike her, and he caused her pain. But it was not his intent to cause substantial bodily injury. I mean what evidence has the State shown to prove that he attempted to cause substantial bodily injury?"

. . . .

> I would argue to you that, even if you look at [Ortiz's] punching B.J. and stomping, by Kathy's definition of her on the ground and the chair, that alone, that is not a substantial step. So the State did not prove beyond a reasonable doubt that it was Nathan Ortiz's intent to cause substantial bodily injury. I mean just look at Nathan's size. Do you think if, you know, a punch from him -- if he really wanted to, he could really harm her. But you heard her testify. She had no broken bones. We don't even know -- it sounded like no further treatment after she was released the one day after.
>
> Now, I'm not trying to put down that, you know, she didn't receive pain and suffering. She did. But it was not to the extent of an Attempted Assault Second. Nathan Ortiz is guilty of Assault in the Third Degree because he caused pain to B.J. Wofford.

In his Opening Brief, Ortiz admits and argues that

> the evidence established that ORTIZ engaged in four, distinct, physical acts of conduct toward Bernadette Wofford on the day in question. As the prosecutor outlined in closing, ORTIZ's conduct consisted of "delivering blows straight on to her face"; "stomping her three, four, five times on the head"; "block[ing] efforts from people who tried to help [Wofford]"; and pick[ing] up the desklike chair . . . about to hit her". Thus, ORTIZ engaged in numerous acts, each of which could have been determined by the jury to have constituted a substantial step in the course of conduct intended to culminate in the commission of assault in the second degree."[1]

(Footnote added.)

Plainly stated, Ortiz did not challenge any of the State's evidence of any of the separate and distinct culpable acts. The sole factual question he argued to the jury was whether the State's evidence of the separate and distinct

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[1] Defendant-Appellant Nathan Ortiz engaged in more than "four, distinct, physical acts of conduct[.]" It appears that each punch to Bernadette Wofford's face, each stomp on her head, and each block of a person who tried to help her, was a separate and distinct culpable act which could have supported a conviction.

The unanimity instruction rule motivates the State of Hawai‘i to seek a separate count for each separate and distinct culpable act which can support a conviction. In other words, in this case the State could have sought a separate count for the threat with the chair, and for each punch, each stomp, and each block. Nothing in Hawai‘i Revised Statutes § 701-109 (1993) prohibits the defendant from being charged and convicted for each separate and distinct culpable act.

culpable acts proved that Ortiz intended to cause substantial bodily injury to Wofford.

Based on the record, we conclude that the lack of a unanimity instruction is harmless beyond a reasonable doubt because there is no reasonable possibility that it may have contributed to conviction. Ortiz admitted his "distinct, physical acts of conduct." The sole contested question of fact is whether it was "his intent to cause substantial bodily injury." Under the circumstances, there is no reasonable possibility that some jurors answered "yes" based only one or more but not all of the physical assaults and that other jurors answered "yes" based on all of the physical assaults or a different combination of less than all of the physical assaults.

THIRD POINT ON APPEAL

Ortiz contends that the court abused its discretion and/or violated procedural due process when it denied Ortiz's motion to discharge his trial attorney due to an irreconcilable breakdown in the attorney-client relationship.

Immediately prior to jury selection, defense counsel advised the court that "Ortiz requested that [defense counsel] make an oral motion for a mental exam on his behalf because he feels that at the time of the incident, that he may have not been . . . mentally all there so he wanted a mental exam." The court denied the motion. Defense counsel then advised the court:

> I would make an oral motion to withdraw as Mr. Ortiz's attorney. He has informed me that he is not happy with the way that I've been representing him. He says that I've been threatening him and that I'm not representing him in his best interest in protecting his constitutional rights[.]

Ortiz then advised the court "that I had [this defense counsel] once before" and explained why he wanted a change. He stated, "Man to man I dig him, but I don't think he [is] representing me adequately." The primary conflict involved Ortiz's request for mental exam by "a three-doctor panel." Ortiz told the court:

> I like be afforded the right to have one panel, a three-doctor panel, to tell you, not you guys make the decision, oh, no more enough evidence. I never did be seen by one three-panel.
>
> I like -- you guys going just shut me down because I never have them? But that can help me in my defense. And I not trying to play games, Your Honor.

In Ortiz's words, "I've been threatened by, eh, if you ask the judge for do that, he going lock you up, the three-panel stuff." Other problems pertained to Ortiz wanting defense counsel to do things that were either irrelevant or unauthorized.

The court decided that "there's an insufficient factual and legal basis for granting the motion to withdraw so that [the] motion is denied." Ortiz contends that

> [t]he Hawai‘i Supreme Court has instructed that when an indigent defendant requests that his or her court-appointed attorney be replaced, the trial court has a duty to conduct a "penetrating and comprehensive examination" of the defendant on the record, in order to ascertain the bases for the defendant's request. State v. Kane, 52 Haw. 484, 487-88, 479 P.2d 207, 209 (1971). This inquiry is necessary to protect "the defendant's right to effective representation of counsel[,]" id., and "must be sufficient to enable the court to determine if there is good cause to warrant substitution of counsel." State v. Soares, 81 Hawai‘i 332, 355, 916 P.2d 1233, 1256 (App. 1996).

In this case, Ortiz told the court why he wanted dismissal of counsel and the court determined that his reasons

were not good cause. We conclude that the court neither violated the Kane/Soares requirement nor abused its discretion when it denied Ortiz's request for a change of counsel.

FOURTH POINT ON APPEAL

Ortiz contends that the cumulative weight of all of the trial court's errors warrants a new trial. We disagree.

CONCLUSION

Accordingly, the March 17, 1999 Judgment is affirmed.

DATED: Honolulu, Hawai‘i, October 23, 2000.

On the briefs:

Hayden Aluli
for Defendant-Appellant.

Chief Judge

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge