

NO. 22686

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
AGAPITO NAVOR, JR., Defendant-Appellant

APPEAL FROM THE FIFTH CIRCUIT COURT  
(CR. NO. 91-0012)

MEMORANDUM OPINION

(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

Defendant-Appellant Agapito Navor, Jr. (Navor) appeals, pro se, from the fifth circuit court's July 6, 1999, Findings of Fact; Conclusions of Law; Order Denying Motion for Rule 35 Relief from Illegal Sentence. We affirm.

**I. BACKGROUND**

Evelyn Kuhaulua (Kuhaulua) testified that she and Navor started dating in 1985. They were romantically involved for about five and a half years, during which time they had a daughter. During their five-year relationship, Navor and Kuhaulua broke up many times. Also during their relationship, Navor and Kuhaulua made plans to get married several times. In September 1990, after a fight with Navor, Kuhaulua met Michael Bersie (Bersie) and became intimately involved with him.

Kuhaulua testified that in January 1991 she and her daughter moved in with Navor and his parents because Kuhaulua thought it was the right thing to do for her daughter. Sometime around January 23, 1991, Navor and Kuhaulua moved from Navor's parents' house to their own apartment. Navor and Kuhaulua had an argument on January 23. At a party for Kuhaulua's niece on January 26, 1991, Bersie asked for Kuhaulua's hand in marriage in front of 150-200 people and Kuhaulua accepted. Kuhaulua did not return home that night and did not call Navor.

Stormy Bradley (Bradley), Navor's co-worker, testified that Navor left work on January 27 to go to a Super Bowl party. At the party, Navor found out about Kuhaulua's engagement to Bersie. When Navor returned to work after the party, he was depressed, crying, and furious.

Kuhaulua testified that Navor came to Bersie's house at about 8:00 p.m. on January 27 and she went outside to talk to him. Kuhaulua got in Navor's car, and they went for a ride. Navor started driving recklessly, speeding and weaving all over the road, and Kuhaulua wanted out of the car. Kuhaulua repeatedly told Navor, "Stop this car and let me out!" Navor was driving about 55-60 miles per hour. When Kuhaulua told him to stop, he would slow down to around 40 and say, "get out." Navor

took Kuhaulua to the Kihapana swinging bridge area and stopped the car. Navor grabbed his rifle and started yelling at Kuhaulua and hitting the windshield with the rifle. He then pointed the rifle at her and said he was going to kill her. Kuhaulua testified that she "begged and pleaded for my life. And [Navor] kept on insisting he was going to kill me. And . . . I said, 'If you can explain to our daughter why you did it then go ahead and do it.'" Navor then jumped back in the car, yelled to Kuhaulua that he was going to kill Bersie, and drove away towards Bersie's house.

Navor "broke into" the residence of Bersie, shot Bersie in the neck, and killed him.

On January 30, 1991, Navor was charged with Kidnapping (Count I), Terroristic Threatening in the First Degree (Count II), Burglary in the First Degree (Count III), and Murder in the Second Degree (Count IV).

On November 15, 1991, Navor was found guilty by a jury of:

Unlawful Imprisonment in the Second Degree (Count I), a violation of Hawai'i Revised Statutes (HRS) § 707-722 (1993), for knowingly restraining Kuhaulua;

Terroristic Threatening in the First Degree (Count II), a violation of HRS §§ 707-715 (1993) and 707-716(1)(d) (1993), for threatening by word or conduct to cause bodily injury to Kuhaulua with the intent to terrorize her, or in reckless disregard of the risk of terrorizing her, with the use of a dangerous instrument (a rifle);

Burglary in the First Degree (Count III), a violation of HRS § 708-810(1)(c) (1993), for entering or unlawfully remaining in the residence of Bersie with the intent to commit therein a crime against a person and, in so doing, recklessly disregarded the risk that the residence was the dwelling of another; and

Manslaughter (Count IV), a violation of HRS § 707-702 (1993), for intentionally or knowingly causing the death of Bersie when, at the time Navor caused his death, Navor was under the influence of extreme mental or emotional disturbance for which there was a reasonable explanation.

On February 14, 1992, Navor was sentenced to twenty-six years of imprisonment: one year of imprisonment for Count I, five years of imprisonment for Count II, ten years of imprisonment for Count III, and ten years of imprisonment for Count IV, to run consecutively. Navor was also ordered to serve a thirteen-year mandatory minimum sentence of imprisonment (three years for Count II and five years each for Counts III and IV).

On May 13, 1992, Navor filed a Motion for Reconsideration of Sentence and/or to Correct Illegal Sentence pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 35. State v. Navor, 82 Hawai'i 158, 920 P.2d 372 (App. 1996). On May 3, 1993, the circuit court granted Navor's motion in part by vacating the mandatory minimum term of imprisonment imposed for Count II. Id. at 160, 920 P.2d at 374. Not satisfied with the circuit court's reduction, Navor appealed the decision. On

June 17, 1996, this court issued a published opinion (1) affirming the circuit court's vacating of the Count II mandatory minimum and (2) vacating the mandatory minimum terms imposed for Counts III and IV because Navor had not been given reasonable notice that the State intended to seek mandatory minimum sentences pursuant to HRS § 706-660.1 (1993). Navor, supra.

On June 18, 1999, Navor filed a Motion for Rule 35 Relief from Illegal Sentence in the circuit court pursuant to HRPP Rule 35, seeking relief from his alleged illegal sentence. Navor argued that:

(a) the Court sentenced him illegally pursuant to HRS § 701-109 (1993) and applicable case law;

(b) the charged offenses against him occurred at the same time and thus should not be treated as separate crimes;

(c) he should not be convicted of multiple charges and counts in the commission of the same crime;

(d) all the offenses share the same elements;

(e) he can only be convicted of one of the four charged offenses; and

(f) to remedy the HRS § 701-109 violations, the convictions for three of the four offenses must be reversed and the court must resentence him to the lesser included offense.

On July 6, 1999, the circuit court entered its Findings of Fact; Conclusions of Law; Order Denying Motion for Rule 35

Relief From Illegal Sentence. The court concluded as a matter of law that Navor misapprehended the effect of HRS § 701-109 as it related to his case. Specifically, the court held that the elements of all four counts are plainly different and the facts required to establish the elements of each offense are plainly different.<sup>1</sup> Based on its findings and conclusions, the court denied the motion without hearing, concluding that the motion was "patently frivolous, and without a trace of support in the record or in the law."

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<sup>1</sup> In its Conclusions of Law, the circuit court properly concluded that:

3. Count I - Unlawful Imprisonment in the Second Degree - was established by proof that [Navor] knowingly restrained Abilynn Kuhaulua. Count II - Terroristic Threatening in the First Degree - was established by proof that [Navor]: (1) threatened, by word or conduct, to cause bodily injury to Abilynn Kuhaulua, (2) with the intent to terrorize, or in reckless disregard of the risk of terrorizing, and (3) with the use of a dangerous instrument.

4. Count III - Burglary in the First Degree - was established by proof that [Navor]: (1) intentionally entered or remained unlawfully in a building; and (2) intended to commit therein a crime against a person; and (3) recklessly disregarded a risk that the building was the dwelling of another, and the building was such a dwelling. Count IV - Manslaughter - was established by proof that [Navor] intentionally or knowingly caused the death of Michael Bersie, where at the time [Navor] caused the death, [Navor] was under the influence of extreme mental or emotional disturbance for which there was a reasonable explanation.

. . . . .

7. The elements of each offense, upon which [Navor] was convicted, are plainly different from the elements of each other offense. The facts required to establish the elements of each offense, upon which [Navor] was convicted, are plainly different from the facts required to establish the elements of each other offense. Thus, no offense, upon which [Navor] was convicted, is an included offense of any other offense upon which [Navor] was convicted. [Navor] was properly convicted of all four offenses.

Emphasis in original.

Navor timely filed a Notice of Appeal on July 19, 1999.

## **II. STANDARDS OF REVIEW**

### **A. Rule 35 Motion for Reduction of Sentence**

We review the trial court's disposition of a Rule 35 motion for reduction of sentence by scrutinizing the judicial process by which the punishment was determined. We need not find an abuse of discretion. State v. Irebaria, 60 Haw. 309, 312, 588 P.2d 927, 929 (1979).

### **B. Conclusions of Law**

We review conclusions of law de novo, under the right/wrong standard. Under the right/wrong standard, this court "examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answer to it." State v. Kapiko, 88 Haw. 396, 401, 967 P.2d 228, 233 (1998) (internal quotation marks omitted; brackets in original and added).

## **III. DISCUSSION**

Navor contends that each of the four offenses of which he was convicted were included offenses of each other under HRS § 701-109, that double jeopardy bars such convictions, and that he has therefore been illegally sentenced.

In determining what constitutes included offenses, we are directed by HRS § 701-109 (1993), which states in relevant part:

**§701-109 Method of prosecution when conduct establishes an element of more than one offense.** (1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:

(a) One offense is included in the other, as defined in subsection (4) of this section; or

. . . .

(e) The offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of conduct constitute separate offenses.

. . . .

(4) A defendant may be convicted of an offense included in an offense charged in the indictment or the information. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

. . . .

(c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

Counts I and II against Navor pertain to his conduct against Kuhaulua, while Counts III and IV pertain to Navor's conduct against Bersie. Counts I (unlawful imprisonment) and II (terroristic threatening) cannot be included offenses of the Counts III (burglary) and IV (Manslaughter) offenses, nor can Counts III and IV be included offenses of the Counts I and II offenses -- each set requiring at least one additional fact distinct from the other. HRS § 701-109(4)(a). Therefore, the



included offense analysis for Counts I and II will be separate from the analysis of Counts III and IV.

Under HRS § 701-109(4)(a) (the "same facts" test), "the general rule is that an offense is included if it is impossible to commit the greater without also committing the lesser." State v. Friedman, 93 Hawai'i 63, 72, 996 P.2d 268, 277 (2000) (internal quotation marks omitted).

The facts needed to prove Unlawful Imprisonment in the Second Degree (Count I) were that Navor knowingly restrained Kuhaulua. HRS § 707-722(1) (1993).

The facts needed to prove Terroristic Threatening in the First Degree (Count II) were that Navor committed terroristic threatening against Kuhaulua with the use of a dangerous instrument. HRS § 707-716(1)(d). A person commits Terroristic Threatening if the person threatens, by word or conduct, to cause bodily injury to another, with the intent to terrorize, or in reckless disregard of the risk of terrorizing, another. HRS § 707-715(1) (1993).

A person could commit Unlawful Imprisonment in the Second Degree (knowing restraint) without threatening by word or conduct to cause bodily injury to another with the use of a dangerous weapon. A person could commit Terroristic Threatening in the First Degree (Count II) without knowingly restraining another person. Counts I and II are not established by the same

or less than all the facts required to establish their commission.

The facts needed to prove Burglary in the First Degree (Count III) were that Navor intentionally entered or unlawfully remained in the residence of Bersie with the intent to commit therein a crime against a person and, in so doing, recklessly disregarded the risk that the residence was the dwelling of another. HRS § 708-810(1)(c).

The facts needed to prove Manslaughter (Count IV) were that Navor intentionally or knowingly caused the death of Bersie, when at the time Navor caused his death, Navor was under the influence of extreme mental or emotional disturbance for which there was a reasonable explanation. HRS § 707-702.

A person could commit Burglary in the First Degree without causing the death of another. A person could commit Manslaughter without entering or remaining unlawfully in the dwelling of another.

There are several factors we look at in evaluating whether an offense is included pursuant to HRS § 701-109(4)(a). The degree of culpability, the legislative statutory scheme, and the end result are all considerations under HRS § 701-109(4)(a). Friedman, 93 Hawai'i at 72, 996 P.2d at 277.

The Hawai'i Supreme Court has stated that "[r]egarding the degree of culpability, the rule is that the lesser included offense cannot have a mental state greater than or different from that which is required for the charged offense." Id. at 72, 996 P.2d at 277 (emphasis added). The mental state for Unlawful Imprisonment in the Second Degree is to "knowingly restrain" another person. It is therefore different from the mental state for Terroristic Threatening in the First Degree (to "intentionally terrorize" or to "recklessly disregard the risk of terrorizing" another person). The mental state for Burglary in the First Degree is intent to commit a crime against a person while in the dwelling of another, which is different from the mental state for Manslaughter (to intentionally or knowingly cause the death of another).

Although Counts I and II are under the same statutory scheme, "Offenses Against the Person," the end result of Unlawful Imprisonment in the Second Degree is being restrained, while the end result of Terroristic Threatening in the First Degree is being terrorized.

Counts III and IV are not under the same statutory scheme. Burglary in the First Degree is under "Offenses Against Property Rights," while Manslaughter is under "Offenses Against the Person." The end result of Burglary in the First Degree is

entering or remaining unlawfully in a dwelling of another, while the end result of Manslaughter is causing the death of another.

Counts I and II and Counts III and IV each require at least one different fact from the other, have different mental states, and different end results. Counts I and II are therefore not included offenses of each other under HRS § 701-109(4) (a), nor are Counts III and IV.

Under HRS § 701-109(4) (c)<sup>2</sup>, a broader test is applied in determining what constitutes included offenses as "there may be some dissimilarity in the facts necessary to prove the lesser offense, but the end result is the same." Friedman, 93 Hawai'i at 73, 996 P.2d at 278 (internal quotation marks omitted). There are not just dissimilarities in the facts required to prove Counts I and II, and Counts III and IV, but the end results are different. Under HRS § 701-109(4) (a) and (c), the counts of which Navor was convicted are not included in each other.

Navor contends that the offenses with which he was charged occurred at the same time and thus should not be treated as separate offenses. Under HRS § 701-109(1) (e), although "the same conduct of a defendant may establish an element of more than one offense . . . [t]he defendant may not . . . be convicted of more than one offense if . . . [t]he offense is defined as a

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<sup>2</sup> HRS § 701-109(4) (b) (1993) does not apply in this case because none of the offenses of which Navor was convicted were "an attempt to commit the offense charged or to commit an offense otherwise included therein[.]"

continuing course of conduct and the defendant's course of conduct was uninterrupted[.]" See State v. Caprio, 85 Hawai'i 92, 104, 937 P.2d 933, 945 (1997).

Unlawful Imprisonment in the Second Degree and Terroristic Threatening in the First Degree are not by statute defined as continuing offenses. Additionally, Navor's course of conduct was interrupted. The unlawful imprisonment occurred as Kuhaulua, begging to be let out, was restrained in Navor's car while he sped recklessly down the road and refused to stop. The terroristic threatening occurred after Navor stopped the car -- when Kuhaulua got out of the car at the "swinging bridge" and Navor pointed the rifle at her and threatened to kill her.

Navor contends he has received multiple punishments for the same offense and thus been subjected to double jeopardy.<sup>3</sup> The double jeopardy clauses of both our state and federal constitutions protect a defendant "against multiple punishments for the same offense." State v. Lessary, 75 Haw. 446, 454, 865 P.2d 150, 154 (1994) (internal quotation marks omitted).

We use the "same conduct" test to determine if a defendant is being prosecuted twice for the same offense. Id. at 460, 865 P.2d at 156. Under the "same conduct" test, the State must rely on different acts to prove the conduct element of each

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<sup>3</sup> Although Navor contends he received multiple punishments for the same offense, his argument is actually that there was only one course of conduct and that his offenses are either included in one another or merged.

offense. Id. at 461, 865 P.2d at 157. Where two different criminal acts (although separated in time by only a few seconds) are supported by different factual evidence, they may constitute separate offenses. Caprio, 85 Hawai'i at 105-106, 937 P.2d at 946-47. Navor's acts constituting unlawful imprisonment and terroristic threatening were sufficiently separated in time, and supported by different facts, to constitute separate offenses. In State v. Mendonca, 68 Haw. 280, 711 P.2d 731 (1985), the Hawai'i Supreme Court held that:

Where . . . two different criminal acts are at issue, supported by different factual evidence even though separated in time by only a few seconds, one offense by definition cannot be "included" in the other. The defendants can properly be punished for both, under different, or the same statutory provisions.

Id. at 284, 711 P.2d at 735 (emphasis in original) (quoting State v. Pia, 55 Haw. 14, 19, 514 P.2d 580, 584-85 (1973)). Navor's acts constituting burglary were concluded prior to his acts constituting Manslaughter. See State v. Mahoe, 89 Hawai'i 284, 972 P.2d 287 (1998).

The circuit court did not err by concluding that Counts I and II were not included offenses of each other and Counts III and IV were not included offenses of each other; that no double jeopardy violation occurred; and that Navor's sentences were not illegal.

**IV. CONCLUSION**

The Findings of Fact; Conclusions of Law; Order Denying Motion for Rule 35 Relief from Illegal Sentence entered by the circuit court on July 6, 1999, is affirmed.

DATED: Honolulu, Hawai'i, March 19, 2001.

On the briefs:

Agapito Navor, Jr.  
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Acting Chief Judge

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Associate Judge

Associate Judge