NO. 23424

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
PYATT GILBERT TRENT, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-2456)

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

Defendant-Appellant Pyatt Gilbert Trent (Trent) appeals the March 24, 2000 judgment of the family court of the first circuit[1] that convicted him, upon a jury's verdict, of four (counts I, II, IV, and VI) of six counts of the offense of violation of an order for protection, in violation of Hawaii Revised Statutes (HRS) §§ 586-5.5 and 586-11 (Supp. 1999).[2] We affirm.

---

[1] The Honorable Dexter D. Del Rosario, judge presiding.

[2] Hawaii Revised Statutes (HRS) § 586-5.5 (Supp. 1999) provided, in pertinent part, that "[i]f after hearing all relevant evidence, the court finds that the respondent has failed to show cause why the [temporary restraining order entered upon the filing of a petition for an order for protection pursuant to HRS § 586-3 (1993)] should not be continued and that a protective order is necessary to prevent domestic abuse or a recurrence of abuse, the court may order that a protective order be issued for such further period as the court deems appropriate, not to exceed three years from the date the protective order is granted." HRS § 586-11 (Supp. 1999) provides, in relevant part, that "[w]henever an order for protection is granted pursuant to this chapter, a respondent or person to be restrained who knowingly or intentionally violates the order for protection is guilty of a misdemeanor."

I. Background.

On March 23, 1999, the court[3] issued an order for protection (the Order) against Trent, pursuant to HRS § 586-5.5, for the protection of petitioner Nicole C. Kano (Kano). Kano had been Trent's girlfriend for about three-and-a-half years. They broke up sometime in September or October of 1998. They had a daughter, who was two-and-a-half years old at the time the Order was issued. The Order was to expire on March 23, 2000. The Order provided, in pertinent part, as follows:

> [Trent] has agreed to a restraining order, but denies [Kano's] allegations of domestic abuse, and no finding of abuse is herein made.
> . . . .
> The parties cannot together agree to change any part of this [O]rder without a prior court order. [Kano] cannot alone change or decide not to enforce this Order without a prior court order. [Kano] is prohibited by HRS, section 702-222,[4] from

---

[3] The Honorable Rodney K.F. Ching, judge presiding.

[4] HRS § 702-222 (1993) provides:

> A person is an accomplice of another person in the commission of an offense if:
>
> (1) With the intention of promoting or facilitating the commission of the offense, the person:
>
> (a) Solicits the other person to commit it; or
>
> (b) Aids or agrees or attempts to aid the other person in planning or committing it; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make reasonable effort so to do; or
>
> (2) The person's conduct is expressly declared by law to establish the

> intentionally soliciting or aiding [Trent] in violating this Order by failing to report a violation, by initiating contact, by allowing contact or by coming withing [(sic)] the prohibited distances of [Trent] (unless otherwise provided for by this Order). Any participation by [Kano] to solicit or aid [Trent's] violation of this Order is not a defense to any criminal prosecution against any party for a violation of this Order.
> . . . .
> [Trent] is prohibited from contacting [Kano].
> [Trent] is prohibited from telephoning, writing or otherwise electronically communicating (by recorded message, pager, etc.), including through third parties, with [Kano].
> [Trent] is prohibited from coming or passing within 100 yards of any place of employment or where [Kano] lives and within 100 feet of each other at neutral locations. In the event the parties happen upon each other at a neutral location, the subsequent arriving party shall leave immediately or stay at least 100 feet from the other. When the parties happen upon each other at the same time at a neutral location, [Trent] shall leave immediately or stay at least 100 feet from [Kano]. **Do not violate this order even if [Kano] invites you to be at the place of employment or where the other lives.**
> Notwithstanding the foregoing Order, [Trent] may have LIMITED contact with [Kano] by telephone for the purpose of visitation with their minor child.
> . . . .
> [Kano] shall promptly report any violation of this Order to the Police Department (phone 911)[.]
> . . . .
> The terms and conditions of this Order were explained by the Court to the parties in open court. The parties acknowledged that they understood the terms and conditions of the [O]rder and the possible criminal sanctions for violating it. The Parties have notice of this Order.
> . . . .
> ANY VIOLATION OF THIS FAMILY COURT PROTECTIVE ORDER IS A MISDEMEANOR, WHICH MAY BE PUNISHABLE BY IMPRISONMENT OF UP TO ONE (1) YEAR AND/OR A FINE OF UP TO $2,000. [HAWAI'I REVISED STATUTES SECTION 586-11.]

(Enumeration, manual strike-throughs and form check-off boxes omitted; bold and capitalized emphases and brackets for citation in the original; footnote supplied.)

---

person's complicity.

At the hearing on the Order, the court read the Order to Trent and Kano. Both of them signed a proof of service of the Order, and stated that they understood and agreed to the terms of the Order. At his jury trial, Trent testified that before the hearing with the judge, a court officer named "Ruth Rutherford" (Rutherford)[5] explained the terms of the Order to him. Trent claimed that Rutherford told him, "you cannot talk with [Kano] except for anything to do with your daughter[.]" He denied that Rutherford told him the Order restricted contact with Kano to contact concerning visitation with their daughter. He also maintained that Rutherford assured him the Order did not prohibit him from frequenting Ala Moana Center, where Kano worked in a Lens Crafters store: "[S]he said you can, it is a common area[.]" Rutherford's only caution was, "just don't go to her store[.]" Kano testified at trial that she did not remember talking to anyone named Rutherford before the hearing on the Order. She did confirm, however, that "[s]omebody from adult services branch" spoke with her and Trent and had them "sign the papers."

On August 23, 1999, the State charged Trent, via complaint, with six counts of violating the Order. Kano recorded the alleged violations in her daily planner. Although Kano thus documented the incidents soon after each occurred, she testified

[5] Apparently, Defendant-Appellant Pyatt Gilbert Trent (Trent) is referring to Rose M. Rutherford of the Adult Services Branch.

at trial that she did not report them immediately to the police because, "I didn't wanna see [Trent] go to jail." Also, "I was afraid that he would get more mad. I didn't want him to get into trouble." When asked whether she was "aware that these violations needed to be immediately reported[,]" Kano maintained, "I was totally unaware of that." Kano said she finally reported the incidents to the police because, "I got fed up with being harassed. I just wanted for us to move on with our lives and just, you know, have a normal life."

In his opening statement, Trent's attorney told the jury:

> You know, the prosecutor is right. This is a case about defiance. It is about defiance, and if [Trent] defies [the Order], if the evidence, if the State presents evidence and if all the evidence that's presented in this case, both theirs and ours after your consideration, if all of it comes out the way the State says, then I agree he's guilty because you cannot defy an order for protection. That is what he is charged with doing.
>
> In more exact words, the words that you will receive in the charge are that he intentionally or knowingly violated the [O]rder. Not just that he violated it, but that he intended to violate it or that he knew that he was violating it when he committed those acts (indiscernible). So, it is very much the issue in this case as to whether there was defiance. If there was, he's guilty. If there wasn't, he's not.
>
> . . . .
>
> Evidence will be presented of [Trent's] state of mind, his understanding of [the Order], and why he interpreted the [O]rder in the way that he did, and why in his mind certain of these incidents we will present evidence, first of all did not happen, and the others that did happen were within what he was permitted in the [O]rder.

Count I alleged an April 16, 1999 violation of the Order. Kano testified that Trent "called me at work and he

wanted to tell me that he found a new girlfriend and he just wanted to tell me that before anybody else did. He also wanted to explain to me what he was doing in the parking lot [of the Lens Crafters store] the night before." During this phone call, Trent never mentioned their daughter, or visitation with their daughter. Kano did not call the police at that time. On cross-examination, Kano explained that she noted this phone call in her daily planner because "he was explaining to me why he was in the parking lot of my working place the night before, because I don't know if he was sitting there watching me, I don't know what he was doing, and I wasn't going to call him to find out. He called me to explain himself."

Trent testified, on the other hand, that Kano called him, to ask "what ta' fuck was I doing in the parking lot of Ala Moana Center watching her[.]" Trent claimed that Kano also accused him of "fooling around and stuff like that[.]" Eventually, Trent admitted to Kano that he had been in the parking lot with his girlfriend. "I told her, you know, it's a public place, we weren't there to look at you, we were in the mall." On cross-examination, Trent maintained that during the phone call, he was just being "courteous and answer[ing] her questions." Trent admitted, however, that there had been no discussion of visitation with their daughter.

The incident underlying Count II took place on May 6, 1999. Trent called Kano at work and yelled at her, angry that

their daughter had suffered multiple mosquito bites while in her care. Their daughter was with Trent the day of the call. Trent called Kano "a bitch and et cetera[,]" and advised her that she should "stop sleeping around with everybody at work[.]" Kano hung up and took a break from work. During the break, Kano called Trent's mother from a streetside pay phone near the Lens Crafters store to complain about Trent's phone call. While she was talking on the phone, Kano saw Trent driving by very slowly, about five feet away from her. The two made eye contact. According to Kano, Trent shook his head at her in disgust and looked "very angry at me . . . like, . . . he hated me." Trent, who lived nearby with his mother, arrived home while Kano was still on the phone with his mother. Kano could hear him there still yelling, calling her "slut," "bitch" and "lesbian," among other things. Kano asked Trent's mother why he had to pass by her work place. Trent retorted, "what is she gonna do, call the cops, it's a public place and I'm allowed." Kano wrote down the incident in her daily planner later that evening. She did not contact the police at that time. Kano remembered that Trent did not mention visitation with their daughter during the incident.

Trent admitted making the May 6, 1999 telephone call to Kano. He did not believe he was violating the Order in doing so. Although the call did not concern visitation, the conversation was about the well-being of their daughter. A while after he

hung up the phone, Trent went to the Longs Drug Store at Ala Moana Center to buy calamine lotion for their daughter's mosquito bites and to pick up a few other items. Trent admitted that he drove by Kano on his way home, and that he was within one hundred yards of her work place at the time. But Trent pointed out that there was construction going on at Ala Moana Center at the time, which made it inconvenient to exit the shopping center by any other route. Trent believed, at any rate, that his proximity on May 6, 1999 was not a violation of the Order, because Rutherford had told him, "just don't go to her store."

Count IV concerned a July 4, 1999 argument. On that day, Kano was throwing a birthday party for her daughter. Kano had invited Trent's mother and sister to the party, but not Trent. Trent called Kano just before she left for the party, angry that his mother and sister had been invited but that he had not. Kano tried to explain to Trent that she had not invited him because of the Order. In a very harsh and "mad" tone of voice, Trent told Kano, "tell your fucking family that I'm not afraid of jail, . . . you and your friends are gonna get a wake-up call." Kano was frightened and hung up the phone. Trent called again, but Kano hung up as soon as she heard his voice. The phone "kept ringing and ringing," but Kano left for the birthday party. Kano confirmed that there was no mention of visitation during the incident. Kano did not call the police about this incident,

either, but she did note the unpleasantness in her daily planner that evening.

Trent admitted that he had phoned Kano on July 4, 1999, and that the call had nothing to do with visitation with their daughter. Trent also admitted that he told Kano, "you should just wake the fuck up[,]" but explained that he was simply trying to express his disapproval of her inappropriate associates and lifestyle. Trent denied telling Kano he was not afraid of jail.

Count VI concerned a July 17, 1999 imbroglio. After work that day, at about 9:30 p.m., Kano was walking with a male co-worker to his car parked in the basement parking lot of Ala Moana Center. When they pulled out of their parking stall, a truck flashed its high lights at them about three or four times. Kano recognized Trent sitting in the truck and asked her friend to drive her to her car. "[My friend] waited for me, so I pulled out and I came here. My friend pulled out, he was behind him. I thought [Trent] had left already, but he was up on this ramp. He came down and he blocked me." Kano got out of her car and confronted Trent. Very angry, Kano asked Trent, "What ta' hell [are you] doing here[?]" Trent's rejoinder: "He said that I better stop fucking around with the guy I was with." In response to Kano's query, Trent told her he was meeting a friend, but Kano did not see anyone else around. As Kano drove away from the shopping center, she noticed that Trent had pulled up alongside her car. He motioned for her to roll down her window. She did,

and told him to "leave me alone already, I'm gonna call the cops[.]" Trent told her, "go ahead, [I'll] take the year and then pau[.]" At that point, Kano was "fed up already" and called the police on her cell phone. Kano met with a police officer later that evening to report the violation. In two subsequent meetings with the police, Kano reported the other five alleged violations.

Trent explained that he had been in the basement parking lot of Ala Moana Center to pick up a friend, Kailone Fierling (Fierling). Trent claimed that Kano drove up to his vehicle when he was stopped at a stop sign in the parking lot. When he saw Kano approaching, Trent told Fierling to recline his seat back because he did not want to get Fierling involved in their chronic conflict. The arguments previously recounted by Kano ensued. Trent maintained that because "I was picking up a friend and we were going someplace[,]" he did not think he was violating the Order. Trent confirmed, however, that "it's possible that [I] could have just exited and left Ala Moana" instead of stopping to confront Kano.

During defense counsel's recross-examination of Kano, the following occurred:

> [DEFENSE COUNSEL}: Did you intentionally or knowingly fail to report the violations that you believed happened of the [Order]?
> [PROSECUTOR]: Objection, your Honor, relevance.
> THE COURT: Sustained.
> [PROSECUTOR]: Your Honor, ask to approach on this subject?
> THE COURT: Okay, approach.

(Bench Conference)

> [PROSECUTOR]: (inaudible)
> [DEFENSE COUNSEL]: (inauduble)
> THE COURT: The questioning by defense counsel is focused on whether [Kano] had in some way violated [the Order] or in some way aided [Trent] in violating the [O]rder by not promptly reporting the incidents. [State's Exhibit 1, the Order,] specifically provides on page 2, first paragraph, that in [(sic)] participation by the plaintiff to solicit or aid the defendant's violation of this order is not a defense to any criminal prosecution against any party for a violation of this order.
>
> It also provides under (d), contact between the parties, referring to the defendant, it indicates in bold, do not violate this order even if the plaintiff invites you to be at the place of employment (indiscernible). This line of questioning is not relevant. It's not relevant to a defense, it's not relevant to whether [Trent] has violated the [Order]. It suggests to the jury that there's some burden in that based on the conduct of [Kano] that they cannot find [Trent] guilty on these charges.
>
> So, what the Court is going to do because they've [(sic)] been repeated objections and the Court had sustained it, and defense counsel has continued to ask these questions, the Court is considering instructing the jury that any participation by the complaining witness to solicit a defendant violating this order is not a defense to criminal prosecution for the offenses charged in this case, but I will leave that to the State to make an offer of an appropriate instruction and leave that for the settlement [of jury] instructions.
>
> And again, I wanna caution you, [defense counsel], that the Court has continued to sustain this objection and you continue to ask these questions focusing on the conduct of [Kano], that you may require the Court to correct the impression that you may have left by instructing the jury on this matter (indiscernible).

The State in fact proposed a supplemental jury instruction like the one presaged by the court in the foregoing colloquy. The court also proposed a like instruction, the court's special instruction number three:

> Any participation by NICOLE KANO to solicit or aid the Defendant's violation of the Order for Protection is not a defense to any criminal prosecution against the Defendant for a violation of the Order for Protection.

During the settlement of jury instructions, the court decided to give the jury its special instruction number three, over defense counsel's objection:

> [DEFENSE COUNSEL}: Your Honor, the defense objects to Court Special 3. We believe that is not a correct statement of law and it is not appropriate, and even if it is that it is not appropriate to give as a Court's instruction. We understand that this is language that is taken from [State's Exhibit 1] which is [the Order]. That exhibit is already in evidence.
>
> The language that is contained in Court's Special 3 then will be in front of the jury as part of the evidence in this case, and to make it part of the Court's instruction may give the jury the impression that the Court is favoring the prosecution over the defense, or is making a comment on the defense's, the defense in this case regarding state of mind.
>
> And also that it may cause some confusion to the jury if given as an instruction because when you say that [Kano's] participation is not a defense to any criminal prosecution, they may construe that to mean that I cannot even use evidence of her participation as part of my defense on the state of mind element, which is permissible.
>
> If the Court's instruction is going to, if the Court will insist on giving Court's Special 3, I would request that language be added to it to make clear to the jury that although participation is not a defense, that it does not exonerate [Trent], that evidence of her participation may nevertheless be considered when the jury is deliberating on whether or not the State has met its burden of proof on all elements including state of mind.
>
> THE COURT: The Court has considered in drafting this instruction whether this should be submitted as an instruction, and the Court is gonna set forth for the record the reason for including this as an instruction.
>
> Contrary to the defense position that this instruction would mislead the jury, this instruction is being provided so as to not to [(sic)] mislead the jury, and for these reasons: during the examination of [Kano], the defense counsel questioned [her] regarding her alleged failure to terminate contact with [Trent], or her alleged initiation of contact with [Trent].
>
> The State made repeated objection to these questions on the grounds that [the Order] was against [Trent] and not against [Kano], and that [the Order] restrained [Trent's] conduct and not [Kano's], and for these reasons, these questions were not relevant as to whether [Trent] was guilty of violating [the Order].
>
> Despite the Court having sustained these

> objections, defense counsel continued to ask similar questions throughout the trial. The prosecution again objected, and at one point asked to approach the bench and expressed her concern that while the Court has sustained her previous objections, counsel was concerned that the questioning by the defense counsel, or continued questioning by defense counsel on matters which the Court has already ruled inadmissible would unfairly prejudice the State because it may create the inference and thereby mislead the jury in believing [Kano] had certain legal obligations under [the Order], or that she was an accomplice to violation of [the Order].
>
> The Court notes that at the initiation of the presentation of evidence, defense counsel and the State had proceeded to stipulate to State's Exhibit 1, and State's Exhibit 1 on page 2 specifically provided under the last [section] of the first paragraph that any participation by the plaintiff to solicit or aid the defendant's violation of this order is not a defense to any criminal prosecution against any party for a violation of this order.
>
> So defense counsel, prior to asking these questions was aware of [the Order], had not disputed this portion of the [O]rder, and in fact, had proceeded to stipulate to this provision, and despite the Court sustaining the objection, continued to proceed as he had done.
>
> So, the Court believes that it is defense's conduct during the trial that necessitated the Court giving this instruction so as not to mislead the jury, and the Court believes that [the Order] which, in which there is no dispute as to its validity or its effect at the time of the violation and it's [(sic)] applicability to this case is the law applicable to [Trent], and for that reason, I'm giving this instruction.

Accordingly, the jury was so instructed.

Defense counsel ended the trial on the same note with which he had started it. His closing argument commenced as follows:

> Thank you, your Honor. As we said in opening, yes, this is about defiance because as the State showed you the elements that it needs to prove beyond a reasonable doubt. It's not enough that [Trent] may have violated [the Order]. He has to have intentionally or knowingly violated [the Order]. In other words, defy it. He said I know I'm not supposed to do this, I don't care, I'm gonna do it anyway. That's if you know that you're not supposed to do something and you do it anyway ---

. . . .
Then that's a crime.

(Ellipses in the original omitted.) His closing argument closed as follows:

> [Trent] is not defying the [O]rder, he's not defying the law. He's . . . relying on the law. He's saying she's violating, I'm saying I'm not. Let's let the law decide because I think I'm doing what the [O]rder says. Well, if he honestly thought he was doing what the [O]rder said but he was mistaken, then he was not aware that he was violating it. Like I said, the law allows an honest mistake.

The jury retired to its deliberations on January 13, 2000. The next morning, the jury returned verdicts of guilty in counts I, II, IV and VI. The jury acquitted Trent in counts III and V.[6]

II. Issues Presented.

Trent presents the following three points of error on appeal: (1) The court erred in giving the jury the court's special instruction number three; (2) the court committed plain error in not giving the jury an instruction on the defense of mistake of fact; and (3) defense counsel rendered ineffective assistance of counsel in not requesting a jury instruction on the defense of mistake of fact.

---

[6] Count III of the complaint involved an allegation of a May 16, 1999 telephone call in which Trent asked complaining witness Nicole C. Kano (Kano) why he could not be present when their daughter was dropped off and picked up for visitation. Count V alleged a July 9, 1999 telephone call in which Trent told Kano about his grandmother's death and asked for a "truce" between them.

II. Discussion.

Trent first asserts that the court erred in giving the jury the court's special instruction number three. "When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Kinnane, 79 Hawai'i 46, 49, 897 P.2d 973, 976 (1995) (emphasis, citations and internal quotation marks omitted).

On this point, Trent first argues that the court's special instruction number three

> improperly commented on the evidence because it was conclusive in nature and connoted a predetermination as to the evidence. By so instructing the jury, the court took upon itself an advocate's role and as a result, the State's position was unfairly bolstered. Further, this instruction constituted argument which was more appropriate for the [S]tate to raise in closing rather than the court.

(Citation and internal quotation marks omitted.) We disagree. Trent concedes that the instruction was not an incorrect statement of the law, and we cannot conclude that it was. As for Trent's contention that the court argued and assumed the role of advocate for the State in giving the instruction, we do not discern any partisan argument or advocacy in the instruction, and Trent offers us no guidance in this respect, other than the conclusory arguments just quoted. Partisan argument and advocacy do not follow, *ipso facto*, the giving of a proper instruction

that prevents a defendant from continuing to assert an improper defense.

At any rate,

> [i]n determining the sufficiency of a particular instruction, or part of a charge, it is not to be considered apart from its context, or the rest of the charge. Both in civil and in criminal cases the instructions of the court must be read together as one connected whole, to ascertain whether they correctly declare the law. The omissions or inaccuracies of one instruction may be cured by the contents of the other instructions, or some of them, and if, when the instructions of the court are considered as a whole, they correctly state the law and are not inconsistent or misleading, the fact that a particular instruction or isolated paragraph may be objectionable, as inaccurate or misleading will not be ground for reversal.

State v. Travis, 45 Haw. 435, 438, 368 P.2d 883, 885-86 (1962) (citations and internal quotation marks omitted). From this perspective, we observe the court instructed the jury that

> [i]f I have said or done anything which has suggested to you that I am inclined to favor the claims or positions of either party, or if any expression or statement of mine has seemed to indicate an opinion relating to what witnesses are, or are not, worthy of belief or what facts are or are not established or what inferences should be drawn therefrom, I instruct you to disregard it.

We presume the jury followed this instruction, State v. Amorin, 58 Haw. 623, 629, 574 P.2d 895, 899 (1978), and nothing in the record of this case rebuts that presumption. "The other instructions provided a barrier to any improper inferences from the court's comment that may have prejudiced Defendant." State v. Nomura, 79 Hawai'i 413, 417, 903 P.2d 718, 722 (App. 1995).

On this point of error, Trent also argues that in giving the jury its special instruction number three, the court

> unfairly negated [Trent's] defense that he did not believe he intentionally or knowingly violated [the Order] . . . . [B]y conclusively instructing the jury that [Kano's] participation in aiding or soliciting [Trent's] violation was not a defense, the [court] may have mislead the jury into believing that it was not relevant evidence at all, when in fact, it was relative to [Trent's] state of mind.

Here again, we disagree. The argument is based upon mere speculation. There is nothing in the instruction that expresses or implies what Trent contends "may have" been expressed or implied. And nothing in the record indicates the jury was misled as Trent avers the jury "may have" been. In any event, the court also instructed the jury that "you must consider all of the evidence in determining the facts in this case," and we presume the jury heeded the court in this respect. Travis, 45 Haw. at 438, 368 P.2d at 885-86; Nomura, 79 Hawai'i at 417, 903 P.2d at 722; Amorin, 58 Haw. at 629, 574 P.2d at 899.

Trent next contends the court committed plain error[7] in not giving the jury an instruction on the defense of mistake

[7] "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." State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993) (citation omitted). "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). Hawai'i Rules of Penal Procedure (HRPP) Rule 52(a) (2000) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." HRPP Rule 52(b) (2000) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

of fact afforded by HRS § 702-218 (1993).[8] Trent explains that he did not intentionally or knowingly violate the Order because he thought, variously, that if Kano contacted him he could talk to her and not violate the no-contact provisions of the Order, that as long as he had a *bona fide* destination he was not in violation of the proximity restrictions of the Order, and that if he was picking up a friend he was likewise not in violation of the proximity restrictions of the Order. We disagree with Trent's contention.

First, the court's jury instructions were not "prejudicially insufficient, erroneous, inconsistent, or misleading." Kinnane, 79 Hawai'i at 49, 897 P.2d at 976 (citations and internal quotation marks omitted; emphasis in the original). The court instructed the jury that, in order to find Trent guilty of the offense of violation of an order for protection, it must find beyond a reasonable doubt that Trent, *inter alia*, "engaged in conduct which was prohibited by [the Order,]" and "engaged in said conduct intentionally or

---

[8] HRS 702-218 (1993) provides:

> In any prosecution for an offense, it is a defense that the accused engaged in the prohibited conduct under ignorance or mistake of fact if:
>
> (1) The ignorance or mistake negatives the state of mind required to establish an element of the offense; or
>
> (2) The law defining the offense or a law related thereto provides that the state of mind established by such ignorance or mistake constitutes a defense.

knowingly." If the jury so found upon the evidence at trial, *ipso facto* the jury fully considered and directly rejected Trent's one and only defense. Cf. State v. Cavness, 80 Hawai'i 460, 464, 911 P.2d 95, 99 (App. 1996) ("Because Cavness asserted the mistake of fact defense, the State was also required to negative the defense." (Footnote omitted.)); State v. Locquiao, No. 23706, slip op. at 14 (Haw. App. filed July 30, 2002) (where the defendant claimed he did not know that the glass item handed to him was a methamphetamine pipe or that it contained the drug, the trial court's failure to give a mistake of fact jury instruction was harmless beyond a reasonable doubt because the trial court instructed the jury that it must find the material elements of the offenses and their applicable states of mind beyond a reasonable doubt); State v. Vinge, 81 Hawai'i 309, 316-17, 916 P.2d 1210, 1217-18 (1996) (a trial court does not abuse its discretion when it refuses to give the defendant's requested eyewitness identification instruction, where the opening statements, the cross-examination of the prosecution witnesses, the arguments to the jury, and the general instructions of the court adequately directed the jury's attention to the issue of identification).

Second, we acknowledge that a criminal defendant is

> entitled to an instruction on every defense or theory of defense having any support in the evidence, provided such evidence would support the consideration of that issue by the jury, no matter how weak, inconclusive or unsatisfactory the evidence may be.

State v. Moore, 82 Hawai‘i 202, 210, 921 P.2d 122, 130 (1996) (citation and internal quotation marks omitted; emphasis in the original). However, we conclude the evidence in this case did not support the giving of a mistake of fact jury instruction. Trent does not urge on appeal that he did not know what he was doing or was mistaken about what he was doing. Trent does not deny that he knowingly or intentionally did what he did. Nor does Trent deny that what he did violated the Order. Trent avers, instead, that he believed what he did was not legally prohibited. The Commentary on HRS § 702-218 explains:

> This section of the Code deals with ignorance or mistake of fact or law, but is not intended to deal with the limited problem of the defense afforded a person who engaged in conduct under the mistaken belief that the conduct itself was not legally prohibited. That problem is dealt with exclusively by HRS § 702-220.

Following the logic, we further conclude the evidence in this case did not support a mistake of law jury instruction under HRS § 702-220 (1993).[9] Trent did not at any point act "in

---

[9] HRS § 702-220 (1993) provides:

> In any prosecution, it shall be an affirmative defense that the defendant engaged in the conduct or caused the result alleged under the belief that the conduct or result was not legally prohibited when the defendant acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in:
>
> (1) A statute or other enactment;
> (2) A judicial decision, opinion, or judgment;
> (3) An administrative order or administrative grant of permission; or
> (4) An official interpretation of the public officer or body charged by law with responsibility for the

reasonable reliance upon an official statement of law, afterward determined to be invalid or erroneous," contained in any of the repositories specified in HRS § 702-220.

We conclude the court did not err, plainly or otherwise, in not giving a mistake of fact instruction to the jury. Our conclusion also disposes of Trent's final point of error on appeal, that defense counsel rendered ineffective assistance of counsel in failing to request a mistake of fact instruction. "The burden of establishing ineffective assistance of counsel rests upon the appellant. His burden is twofold: First, the appellant must establish specific errors or omissions of defense counsel reflecting counsel's lack of skill, judgment or diligence. Second, the appellant must establish that these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Antone, 62 Haw. 346, 348-49, 615 P.2d 101, 104 (1980) (footnote and citations omitted). Upon our conclusion, it cannot be said that Trent has met his burden in either respect.

---

interpretation, administration, or enforcement of the law defining the offense.

III. Disposition.

The March 24, 2000 judgment of the court is affirmed.

DATED: Honolulu, Hawaii, November 13, 2002.

On the briefs:

Linda C.R. Jameson,
Deputy Public Defender,
State of Hawaii,
for defendant-appellant.

Donn Fudo,
Deputy Prosecuting Attorney,
City & County of Honolulu, for
plaintiff-appellee.

Chief Judge

Associate Judge

Associate Judge