NO. 23481

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
ERNEST K. COSTA BRUM, III, aka Kenny Boy,
Defendant-Appellant

APPEAL FROM THE FIFTH CIRCUIT COURT
(CR. NO. 99-0089)

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

Defendant-Appellant Ernest K. Costa Brum, III, a.k.a. "Kenny Boy" (Brum), was charged by Indictment on June 22, 1999, with the following:

> Count I, Assault in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 707-710 (1993);
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> Count II, Resisting Arrest, in violation of HRS § 710-1026(1)(a) (1993);
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> Counts III and V, Harassment, in violation of HRS § 711-1106 (Supp. 2000); and
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> Count IV, Attempted Assault Against a Police Officer, in violation of HRS §§ 705-500 (1993) and 707-712.5(1)(a) (1993).

Following a jury trial in the Circuit Court of the Fifth Circuit[1] (the circuit court), Brum was convicted as charged on all counts. Brum was sentenced to ten years of imprisonment as to Count I, six months of imprisonment each as to

[1]The Honorable George M. Masuoka presided.

Counts II and IV, and thirty days of imprisonment each as to Counts III and V, all periods to run concurrently. Judgment was entered on April 4, 2000.

Brum contends that insufficient evidence was adduced at trial to support a conviction under Count I (Assault in the First Degree); the circuit court plainly erred by failing to instruct the jury on HRS § 707-711(b), Assault in the Second Degree (recklessly); and he was denied the right to effective assistance of counsel. We disagree with Brum's contentions and affirm the April 4, 2000, Judgment of the circuit court.

I. BACKGROUND

The following evidence was adduced at trial. John Teves, Jr. (Teves), a part-time employee of Rob's Good Times Grill (the grill), testified at trial that on June 4, 1999, Brum arrived at the grill "agitated" and asked Teves if there was anyone that "wanted action" or "him slapping them around." Teves said no. Brum's younger brother, Duncan (Duncan), stood at the door of the grill talking with a man. Brum didn't like what the man was saying to Duncan and told Duncan that he would slap the man's head. Teves told Brum, "[w]e don't allow that here." Duncan told Brum, "[n]o act like that already, I told you about that. Go home if you like get in trouble."

Wilmar Sagocio (Wilmar) testified he was at the grill that night attending a going away party for his brother, Junior

Sagocio (Junior). In addition to Wilmar and Junior, the following were present at the party: their sister, Darlene Iwai; brother-in-law, Frank Iwai; their Uncle's girlfriend, Mary; and David Kawai (collectively "the group").

Wilmar testified that at some point during the evening, Brum approached the group, touched Junior on the back, and said something to upset him. Wilmar told Junior to let it go and then got up to use the bathroom. Brum approached Wilmar in the bathroom and was "jumping around asking [Wilmar] if [Wilmar] knew where the rab -- the rab (phonetic) was." Wilmar understood that to mean drugs. Wilmar told Brum, "I don't know what you're talking about, I don't deal with that stuff." Brum asked Wilmar about three times if Wilmar knew where the rab was. Because Brum was standing between Wilmar and the door, Wilmar had to "force" himself out of the bathroom so he could go back to his table.

Wilmar testified that he then walked outside the grill to "catch a breath of air," and Brum followed him, continuing to question him in the same manner. Junior came outside and told Brum to leave. Following a short altercation with Brum outside, Wilmar went back inside the grill and headed for the bar to order a beer.

Conflicting testimony was adduced at trial regarding what happened next. Wilmar testified that as he approached the bar, all he felt was "one kick to my stomach." Responding to the

kick, Wilmar grabbed Brum and tried to control him. Wilmar did not see Brum approach before Wilmar was kicked. Wilmar testified that he did not take off his shirt in the bar, did not know that Brum had returned to the grill premises, and did not threaten Brum in any way before being kicked.

The grill owner, Robert Silverman (Silverman), testified that after walking outside to see why his patrons were outside, he went back inside the bar. Wilmar went back into the bar right before Silverman. Brum was already in the bar "sitting on the side." After Wilmar and Brum made eye contact, Wilmar ran toward Brum. Silverman testified that Brum "jumped up, kicked [Wilmar], and then they kind of locked up and then it was broken up at that point." Prior to the kick, Silverman saw Wilmar look at Brum, run over, and take off "his shirt on his way." When Brum and Wilmar made eye contact, Silverman could see "that they were going after each other." Silverman saw both men running toward each other before Brum kicked Wilmar.

Teves testified that he talked with Wilmar and Junior outside the grill following the outside altercation. Teves told them to return inside and have a good time, not realizing that Brum was already in the grill. Teves was standing at the door of the bar and heard someone yell "fight." When he turned around, Brum and Wilmar were running toward each other. Teves saw Wilmar

taking off his shirt as the two men approached one another. It appeared to Teves that both men wanted to fight each other.

Officer Bryson Ponce (Officer Ponce) testified that on June 4, 1999, he responded to a disturbance-type call at the grill. Inside the grill, Officer Ponce observed Officer Dean Martin (Officer Martin) (collectively, "the officers") trying to grab Brum's arms in order to put handcuffs on Brum and place him under arrest. Officer Ponce grabbed Brum's legs to stop Brum from kicking. Brum was "okay for a while," but then started kicking again when Officer Ponce "let off."

Officer Ponce testified that while being escorted out of the grill, Brum was trying to stay inside and "plead his case" to the officers; Brum was "really agitated and swearing" and at one point spit in Officer Martin's face. The officers had to "almost carry him out." Brum continued kicking his legs and tried to kick Officer Ponce. Near the entrance of the grill, Brum continued to resist leaving; Brum swung around, and he and Officer Martin tripped and fell to the concrete sidewalk. Brum was finally placed in leg shackles. While being placed in the patrol car, Brum tried to "head butt" Officer Ponce. Officer Ponce had to take Brum down to the ground and hold him there until he settled down.

Officer Ponce testified that he transported Brum to the Lihue Police Station (the police station). Brum seemed calm

inside the patrol car, but "turned violent again" once they reached the police station. Officer Ponce opened the car door, and Brum spit in his face two times, leaned back, and tried to kick Officer Ponce with shackled legs. During the booking process, Brum was uncontrollable; Brum refused to walk, constantly swore, threatened to kick the police officers' asses, and flailed his body around.

Officer Martin testified that he went to the grill to respond to a disturbance-type call and a possible drunk driver call in the parking lot. He was walking toward the drunk driver location when a female patron from the grill came out yelling, "[t]hey're fighting, they're fighting." When Officer Martin walked into the grill, he observed Brum face down on the ground and two other males on top of him, holding Brum down to restrain him. Officer Martin knelt down on top of Brum, took out his handcuffs to handcuff Brum, identified himself as a police officer, and told Brum to relax. Brum was twisting his body in an attempt to get off whoever was on top of him. Officer Martin struggled to get Brum handcuffed. After Officer Martin stood Brum up and proceeded to walk him out of the grill, Brum turned, looked Officer Martin directly in the face, and spit in his face. While Officer Martin led Brum out of the grill, the struggle continued and the two fell against a table and over some chairs. Brum struggled with his body twisting and legs kicking "the

entire time" as they walked out of the grill until both Brum and Officer Martin fell to the concrete outside the grill.

Officer Martin testified that he checked on Wilmar inside the grill and observed him with his shirt off, lying down in a booth holding his stomach and moaning. Wilmar testified that he was admitted to Wilcox Memorial Hospital at about 5:00 a.m. the following morning.

Dr. Robert Weiner (Dr. Weiner) testified that he was the general surgeon called by the emergency room doctor on June 5, 1999, to operate on Wilmar in response to an x-ray showing "free air" in Wilmar's abdominal cavity. Dr. Weiner immediately had the operating room staff called in because he knew "something was ruptured, some hollow organ inside the abdominal cavity." Dr. Weiner found a perforation in Wilmar's "jejunum" (the small intestine that crosses over the bony spine in the upper abdomen). There was also a partial laceration of the thickness of the stomach, some contusion of the omentum (a fatty layer that lies over the other organs), and fluid from the intestine present in the abdominal cavity. Dr. Weiner testified that a perforation in the small intestine can be life threatening because intestinal material from a perforation would leak into the otherwise sterile body cavity causing an infection. Leaking did occur in this case. Dr. Weiner opined that a blunt trauma to the midsection, such as a strong kick, would cause this type of

injury because it would tend to crush the small intestine against the bony spine. Dr. Weiner stated that the seriousness of the injury would increase if the recipient of the kick were moving toward the kick at the time of impact or if the kicker were to run and jump as he or she kicked.

II. STANDARDS OF REVIEW

A. Plain Error

Hawai‘i Rules of Penal Procedure Rule 52(b) states that "[p]lain errors 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) (internal quotation marks omitted). See also Hawai‘i Rules of Evidence Rule 103(d) (same).

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) (internal quotation marks omitted).

B. Sufficiency of the Evidence

Regarding appellate review for insufficient evidence, the Hawai‘i Supreme Court has repeatedly stated:

> [E]vidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support the conviction; the same standard applies whether the case was before a judge or jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.
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> State v. Quitog, 85 Hawai‘i 128, 145, 938 P.2d 559, 576 (1997) (quoting State v. Eastman, 81 Hawai‘i 131, 135, 913 P.2d 57, 61 (1996)) (emphasis omitted). "'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Eastman, 81 Hawai‘i at 135, 913 P.2d at 61.

State v. Richie, 88 Hawai‘i 19, 33, 960 P.2d 1227, 1241 (1998).

C. Jury Instruction

"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 [were] prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Valentine, 93 Hawai‘i 199, 204, 998 P.2d 479, 484 (2000) (internal quotation marks omitted). However,

> error 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.

Id. (citations omitted) (quoting State v. Cabrera, 90 Hawai‘i 359, 365, 978 P.2d 797, 803 (1999)).

D. Ineffective Assistance of Counsel

"In assessing claims of ineffective assistance of counsel, the applicable standard is whether, viewed as a whole, the assistance provided was within the range of competence demanded of attorneys in criminal cases." Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (internal quotation marks and brackets omitted).

> [T]he defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.
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> Determining whether a defense is potentially meritorious requires an evaluation of the possible, rather than the probable, effect of the defense on the decision maker. . . . Accordingly, no showing of actual prejudice is required to prove ineffective assistance of counsel.

Barnett v. State, 91 Hawai‘i 20, 27, 979 P.2d 1046, 1053 (1999) (ellipsis in original, internal quotation marks and citations omitted) (quoting State v. Fukusaku, 85 Hawai‘i 462, 480, 946 P.2d 32, 50 (1997)).

"In reviewing a claim of ineffective assistance of counsel, the standard for determining adequacy of representation is whether the assistance provided, viewed as a whole, is within the range of competence demanded of attorneys in a criminal

case." State v. Hirano, 8 Haw. App. 330, 338, 802 P.2d 482, 486 (1990).

III. DISCUSSION

A. Jury Instruction

Brum contends the circuit court's failure to instruct the jury on Assault in the Second Degree was plain error. The State argues that since the jury was given an instruction on Assault in the Third Degree (HRS § 707-712), any error on the part of the circuit court in failing to instruct the jury that it could find Brum guilty of Assault in the Second Degree (pursuant to HRS § 707-711(b) (1993)) was harmless. "Erroneous 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." State v. Pinero, 70 Haw. 509, 527, 778 P.2d 704, 716 (1989) (internal quotation marks omitted).

Brum was charged with Assault in the First Degree in violation of HRS § 707-710, which provides:

> **§707-710 Assault in the first degree.** (1) A person commits the offense of assault in the first degree if the person intentionally or knowingly causes serious bodily injury to another person.
>
> (2) Assault in the first degree is a class B felony.

Hawaii Revised Statutes § 707-711 (1993), Assault in the Second Degree, provides:

> **§707-711 Assault in the second degree.** (1) A person commits the offense of assault in the second degree if:

(a) The person intentionally or knowingly causes substantial bodily injury to another;

(b) The person recklessly causes serious bodily injury to another person;

(c) The person intentionally or knowingly causes bodily injury to a correctional worker, as defined in section 710-1031(2), who is engaged in the performance of duty or who is within a correctional facility;

(d) The person intentionally or knowingly causes bodily injury to another person with a dangerous instrument; or

(e) The person intentionally or knowingly causes bodily injury to an educational worker who is engaged in the performance of duty or who is within an educational facility. For the purposes of this section, "educational worker" means any administrator, specialist, counselor, teacher, or employee of the department of education, or a person who is a volunteer in a school program, activity, or function that is established, sanctioned, or approved by the department of education or a person hired by the department of education on a contractual basis and engaged in carrying out an educational function.

(2) Assault in the second degree is a class C felony.

Hawaii Revised Statutes § 707-712 (1993), Assault in the Third Degree, provides:

§707-712 Assault in the third degree. (1) A person commits the offense of assault in the third degree if the person:

(a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or

(b) Negligently causes bodily injury to another person with a dangerous instrument.

(2) Assault in the third degree is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

Hawaii Revised Statutes § 702-206 (1993) defines terms within HRS §§ 707-710, 707-711, and 707-712 as follows:

§702-206 Definitions of states of mind.

(1) "Intentionally."

(a) A person acts intentionally with respect to his conduct when it is his conscious object to engage in such conduct.

(b) A person acts intentionally with respect to attendant circumstances when he is aware of the existence of such circumstances or believes or hopes that they exist.

(c) A person acts intentionally with respect to a result of his conduct when it is his conscious object to cause such a result.

(2) "Knowingly."

(a) A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature.

(b) A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist.

(c) A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

(3) "Recklessly."

(a) A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature.

(b) A person acts recklessly with respect to attendant circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances exist.

(c) A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.

(d) A risk is substantial and unjustifiable within the meaning of this section if, considering the nature and purpose of the person's conduct and the circumstances known to him, the disregard of the risk involves a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation.

The circuit court gave the following instruction to the jury regarding Count I:

> In Count I of the indictment the Defendant is charged with the offense of assault in the first degree. A person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person. There are two material elements of the offense of assault in the first degree, each of which the prosecution must prove beyond a reasonable doubt.
>
> These two elements are: one, that on or about the 4th day of June, 1999, in the County of Kauai, State of Hawaii,

the Defendant caused serious bodily injury to another person; and two, the Defendant did so intentionally or knowingly.

Serious bodily injury means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.

If and only if you find the Defendant not guilty of assault in the first degree or you are unable to reach a unanimous verdict as to this offense, then you must consider whether the Defendant is guilty or not guilty of the included offense of assault in the second degree.

A person commits the offense of assault in the second degree if he intentionally or knowingly causes substantial bodily injury to another person. There are two material elements of the offense of assault in the second degree, each of which the Prosecution must prove beyond a reasonable doubt.

These two elements are: one, that on or about the 4th day of June, 1999, in the County of Kauai, State of Hawaii, the Defendant caused substantial bodily injury to another person; and two, that the Defendant did so intentionally or knowingly.

Substantial bodily injury means bodily injury which causes: A, a major avulsion, laceration, or penetration of the skin; or, B, a tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal argument [sic] -- organs.

If and only if you find the Defendant not guilty of the assault in the first degree and assault in the second degree, or you are unable to reach a unanimous verdict as to theses [sic] offenses, then you must consider whether the Defendant is guilty or not guilty of the included offense of assault in the third degree.

A person commits the offense of assault in the third degree if he intentionally, knowingly, or recklessly, causes bodily injury to another person. There are two material elements of the offense of assault in the third degree, each of which the Prosecution must prove beyond a reasonable doubt.

These two elements are: one, that on or about the 4th day of June, 1999, in the County of Kauai, State of Hawaii, the Defendant caused bodily injury to another person; and two that the Defendant did so intentionally, knowingly, or recklessly.

Brum contends the circuit court's failure to instruct the jury that they could find Brum guilty of the included offense

of Assault in the Second Degree if the jury found Brum "recklessly" caused serious bodily injury to Wilmar was plainly erroneous. Brum argues there was a rational basis in the evidence to support an instruction that he acted recklessly in causing serious bodily injury to Wilmar. The State agrees this instruction should have been given, but disagrees with Brum that the failure to give this instruction prejudiced Brum.

Brum relies on State v. Kupau, 76 Hawai‘i 387, 879 P.2d 492 (1994). In Kupau, the defendant was charged and convicted of Assault in the Second Degree. The Hawai‘i Supreme Court found the trial court erred by failing to present to the jury an instruction on the included offense of Assault in the Third Degree. Here, however, the jury was given an included offense instruction on HRS § 707-712 (Assault in the Third Degree) by which they could have found that Brum intentionally, knowingly, or recklessly caused bodily injury to Wilmar. The jury could have found that Brum recklessly caused bodily injury to Wilmar, but instead they found the evidence proved beyond a reasonable doubt that Brum intentionally or knowingly caused serious bodily injury to Wilmar. As the Hawai‘i Supreme Court stated in Kupau, "[i]f Kupau merely acted recklessly with respect to his *conduct* . . . then he can be guilty at most of assault in the third degree even if his conduct resulted in [the victim] suffering substantial bodily injury." Id. at 391, 879 P.2d at 496.

Therefore, assuming arguendo that the jury instruction regarding HRS § 707-711(1)(b) was erroneously omitted, we conclude after reviewing the record as a whole that the instructions given were not "prejudicially insufficient, erroneous, inconsistent, or misleading." Valentine, 93 Hawai'i at 204, 998 P.2d at 484.

B. Sufficiency of the Evidence

Brum contends there was insufficient evidence to support a conviction under Count I, Assault in the First Degree. Brum specifically contends there was no evidence presented to support a finding that he caused "serious bodily injury" as opposed to "substantial bodily injury" as required by HRS § 707-700 (1993).[2]

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[2]HRS § 707-700 provides in relevant part as follows:

> **§707-700 Definitions of terms in this chapter.** In this chapter, unless a different meaning plainly is required:
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> "Bodily injury" means physical pain, illness, or any impairment of physical condition.
>
> . . . .
>
> "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.
>
> . . . .
>
> "Substantial bodily injury" means bodily injury which causes:
> (1) A major avulsion, laceration, or penetration of the skin;
> (2) A chemical, electrical, friction, or scalding burn of second degree severity;
> (3) A bone fracture;
> (4) A serious concussion; or
> (5) A tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs.

At trial, evidence was adduced that Wilmar sustained a perforated jejunum, a lacerated small intestine that allowed fluid to leak into his abdominal cavity. Dr. Weiner testified that a perforated small intestine leaking intestinal material could have been fatal. Wilmar's injury was consistent with a blunt force trauma (such as a strong kick) to the midsection.

Viewing the evidence in a light most favorable to the State, substantial evidence supported the jury's finding that Brum intentionally or knowingly caused Wilmar bodily injury, which created a substantial risk of death. HRS §§ 707-710 & 707-700.

C. Ineffective Assistance of Counsel

Brum claims that denial of his constitutional right to effective assistance of trial counsel guaranteed by the United States and Hawai‘i Constitutions[3] mandates reversal. Brum points to "three specific errors or omissions to Defendant's arguments" as evidence of ineffective assistance of counsel. First, Brum contends his counsel failed to adequately cross-examine Wilmar regarding the amount of alcohol Wilmar consumed on June 4, 1999, and how it may have affected Wilmar's ability to recall the events of that evening. Second, Brum contends his counsel failed to subpoena an impartial witness, who would have testified that

[3]Brum relies on the sixth and fourteenth amendments to the United States Constitution and article I, § 14, of the Hawai‘i Constitution.

Brum was not the first aggressor and was peaceful and nonviolent prior to the incident. Third, Brum contends his counsel failed to present a foundation for the introduction of defense Exhibits D-1a and D-1b.

The proper standard for claims of ineffective assistance of counsel on appeal is whether "viewed as a whole, the assistance provided was within the range of competence demanded of attorneys in criminal cases." Dan, 76 Hawai‘i at 427, 879 P.2d at 532 (internal quotation marks and brackets omitted).

> General claims of ineffectiveness are insufficient and every action or omission is not subject to inquiry. Specific actions or omissions alleged to be error but which had an obvious tactical basis for *benefitting* defendant's case will not be subject to further scrutiny. If, however, the action or omission had no obvious basis for benefitting the defendant's case *and* it "resulted in the withdrawal or substantial impairment of a potentially meritorious defense," then [it] . . . will be evaluated as . . . information that . . . an ordinary competent criminal attorney should have had.

Id. at 427, 879 P.2d at 532 (emphases and ellipses in original) (quoting Briones v. State, 74 Haw. 442, 462-63, 848 P.2d 966, 976 (1993)). "[M]atters presumably within the judgment of counsel, like *trial strategy*, will rarely be second-guessed by judicial hindsight." Richie, 88 Hawai‘i at 39-40, 960 P.2d at 1247-48 (internal quotation marks omitted, emphasis in original).

Brum contends that his counsel's failure to adequately cross-examine Wilmar regarding the level of alcohol Wilmar consumed on June 4, 1999, and how it may have affected Wilmar's

ability to recall events was a specific error that amounted to ineffective assistance of counsel. Brum argues this failure impaired his self-defense claim. Brum, however, gives no indication what Wilmar's answers may have been to this cross-examination. Brum contends Wilmar was the only witness to refute the statements of Teves and Silverman that Wilmar removed his shirt as he ran toward Brum ("an indication of a desire to fight"), and the cross-examination of Wilmar as to the amount of alcohol he recalled consuming was important to Wilmar's ability to recall the events. According to Brum, if Wilmar had been adequately cross-examined, the jury may have disbelieved Wilmar and believed Brum's claim of self-defense.

Substantial evidence was adduced at trial that Brum arrived at the grill "agitated" and asked Teves if there was anyone that "wanted action" or that he could slap around. Both Teves and Silverman testified that Wilmar took off his shirt prior to running toward Brum. Officer Martin testified that Wilmar's shirt was off immediately following the incident. Dr. Weiner testified under cross-examination that moving toward a kick would increase one's chances of being seriously injured from the kick. Therefore, evidence was elicited that Brum may have acted in self-defense. There is nothing in this record to indicate that Brum's counsel's failure to cross-examine Wilmar on his alcohol consumption amounted to a "substantial impairment of

a potentially meritorious defense." Dan, 76 Hawai‘i at 427, 879 P.2d at 532.

Brum contends that his counsel's failure to subpoena a witness amounted to ineffective assistance. This witness allegedly would have testified that Brum was not the first aggressor and was peaceful and nonviolent prior to the incident. Without this witness's testimony, there was still substantial evidence that Wilmar took off his shirt and approached Brum prior to the kick from Brum. This record is insufficient to conclude that Brum's counsel's failure to subpoena this witness to bolster his self-defense claim amounted to a "substantial impairment of a potentially meritorious defense." Id.

Finally, Brum contends that his counsel's failure to present proper foundation for the introduction of Exhibits D-1a and D-1b (the exhibits) constituted ineffective assistance. Brum contends that the exhibits were photographs taken on June 4, 1999, depicting Brum's observable injuries following his arrest. There is substantial evidence in the record that Brum became violent following his kick to Wilmar, resisted arrest inside the grill, struggled with the police officers as they placed him in the patrol car, "head butted" Officer Ponce as he was taken out of the patrol car, and became violent, flailing his body during the booking process at the police station. Therefore, the failure to introduce evidence regarding Brum's injuries did not

amount to a "substantial impairment of a potentially meritorious defense." Id.

IV. CONCLUSION

Based on the foregoing, we affirm the April 4, 2000, Judgment of the circuit.

DATED: Honolulu, Hawai‘i, January 11, 2002.

On the briefs:
June C. Ikemoto
for defendant-appellant.

Chief Judge

Tracy Murakami,
Deputy Prosecuting Attorney,
County of Kauai,
for plaintiff-appellee.

Associate Judge

Associate Judge