NO. 24152

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
WALTER HELMKE, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-1-1139)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Walter Helmke (Helmke) was charged with Attempted Murder in the Second Degree. The February 21, 2001 Judgment, entered by Circuit Court Judge Dexter D. Del Rosario upon a jury verdict, convicted Helmke of the included offense of Assault in the Second Degree, Hawaii Revised Statutes (HRS) § 707-711 (1993), and sentenced to probation. A condition of probation was imprisonment for one year.

The jury was instructed, in relevant part, as follows:

> If and only if you find the defendant not guilty of Attempted Murder in the Second Degree, or you are unable to reach a unanimous verdict as to this offense, then you must determine whether defendant is guilty or not guilty of the offense of Assault in the First Degree.
>
> . . . .
>
> If and only if you find 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 determine whether defendant is guilty or not guilty of the offense of Assault in the Second Degree.

Helmke contends that the trial court reversibly erred when it denied his request for a jury instruction on the included offense of Assault in the Third Degree, HRS § 707-712 (1993). Based on the following precedent, we conclude that Helmke's point is without merit.

> [T]he trial court's failure to give appropriate included offense instructions requested by a party constitutes error, as does the trial court's failure to give an appropriate included offense instruction that has not been requested. Such error, however, is harmless when the jury convicts the defendant of the charged offense or of an included offense greater than the included offense erroneously omitted from the instructions. The error is harmless because jurors are presumed to follow the court's instructions, and, under the standard jury instructions, the jury, "in reaching a unanimous verdict as to the charged offense [or as to the greater included offense, would] not have reached, much less considered," State v. Holbron, 80 Hawai'i 27, 47, 904 P.2d 912, 932 (1995)[,] the absent lesser offense on which it should have been instructed. Id. (holding that the trial court's erroneous instruction on the nonexistent include offense of "attempted reckless manslaughter" was "harmless beyond a reasonable doubt" where the jury reached a unanimous guilty verdict as to the charged offense of attempted murder in the second degree). To the extent that [State v.] Kupau[, 76 Hawai'i 387, 879 P.2d 492 (1994)] held that the failure to give an included offense instruction was plain error even when the defendant was convicted of the charged offense, see 76 Hawai'i at 396, 879 P.2d at 501, it conflicts with the rationale of Holbron, which we reaffirm here and, in that aspect, can no longer be regarded as controlling.

State v. Haanio, 94 Hawai'i 405, 415-16, 16 P.3d 246, 256-57 (2001) (footnote and citation omitted).

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

IT IS HEREBY ORDERED that the judgment from which the appeal is taken, filed on February 21, 2001, is affirmed.

DATED: Honolulu, Hawai‘i, July 8, 2002.

On the briefs:

Linda C. R. Jameson,
Deputy Public Defender,
for Defendant-Appellant.

Chief Judge

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge