

NO. 24562

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
EARL MCKINNIE, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 00-1-0020)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Earl McKinnie (McKinnie) appeals from the August 22, 2001, Judgment entered by the Circuit Court of the First Circuit (the circuit court).<sup>1</sup> McKinnie was charged with and convicted of the following:

Counts I and VII, Robbery in the Second Degree in violation of Hawaii Revised Statutes (HRS) § 708-841(1)(b) (1993)<sup>2</sup>; and

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<sup>1</sup>The Honorable Wilfred K. Watanabe presided.

<sup>2</sup>HRS § 708-841 (1993) provides in relevant part:

**§708-841 Robbery in the second degree.** (1) A person commits the offense of robbery in the second degree if, in the course of committing theft:

. . . .

(b) The person threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property[.]

(2) Robbery in the second degree is a class B felony.

Counts II-VI, Kidnapping in violation of HRS  
§ 707-720(1)(c) (1993).<sup>3</sup>

On appeal, McKinnie contends the circuit court (1) reversibly erred when it refused to give McKinnie's jury instruction on merger and his special interrogatory; (2) erred by denying his motion to merge the kidnapping offenses into the robbery offenses; and (3) relied on insufficient evidence for the kidnapping conviction. McKinnie claims that the cumulative weight of these errors deprived him of his right to a fair trial. We disagree with McKinnie's contentions and affirm the August 22, 2001 Judgment of the circuit court.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve McKinnie's points of error as follows:

(1) McKinnie contends the circuit court reversibly erred by giving insufficient jury instructions regarding the merger issue and erred in denying his post-trial motion to merge the robbery and kidnapping offenses. The charge of Robbery in

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<sup>3</sup>HRS § 707-720 (1993) provides in relevant part:

**§707-720 Kidnapping.** (1) A person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to:

    . . .  
    (c) Facilitate the commission of a felony or flight thereafter[.]

    . . .  
    (3) In a prosecution for kidnapping, it is a defense which reduces the offense to a class B felony that the defendant voluntarily released the victim, alive and not suffering from serious or substantial bodily injury, in a safe place prior to trial.

the Second Degree, HRS § 708-841(1)(b), stated that in the course of committing a theft, McKinnie did threaten the imminent use of force against persons present with the intent to compel acquiescence to the taking of or escaping with the property.<sup>4</sup> The charges of Kidnapping, HRS § 707-720(1)(c), stated that McKinnie intentionally or knowingly restrained Barbara Uchima (Count II), Jacob Acojido (Count III), Jerryl Bayang (Count IV), Hwan Kim (Count V), and Elisa Tugade (Count VI) with intent to facilitate the commission of a felony (Robbery in the Second Degree).

The State in its opening and closing arguments stated that McKinnie committed the charges of Robbery in the Second Degree by threatening Uchima, Acojide, Bayang, Kim, and Tugade with a gun, and committed the charges of Kidnapping by restraining these same persons with duct tape. At trial, McKinnie testified he used a toy gun "[j]ust to do the robbery, just to frighten 'em" and used the duct tape because he figured he "had to tie 'em up in order to get away." Hawaii Revised Statutes § 701-109, regarding merger, was not implicated because McKinnie's threats with a gun and restraint by duct tape constituted "separate offenses under the law" of Robbery in the

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<sup>4</sup>Count I charged McKinnie with theft from McDonald's Restaurant, and Count VII charged McKinnie with theft from Jacob Acojido.

Second Degree and Kidnapping. State v. Matias, No. 25001, 2003 WL 22054109, at \*5 (Hawai'i Sept. 4, 2003).

Accordingly, the circuit court did not err when it denied McKinnie's request for a merger instruction and his post-trial motion to merge offenses. "[W]hen read and considered as a whole, the instructions given [were] not prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Kinnane, 79 Hawai'i 46, 49, 897 P.2d 973, 976 (1995).

(2) McKinnie contends the evidence adduced at trial did not support a reasonable finding that there was proof beyond a reasonable doubt that he intended to kidnap. The record contains substantial credible evidence upon which the jury found that McKinnie possessed the separate and distinct intents to restrain Uchima, Acojido, Bayang, Kim, and Tugade with intent to facilitate the commission of a felony, to wit, the robbery. Viewing the evidence in the light most favorable to the State, and in full recognition of the province of the trier of fact, we conclude that "a reasonable mind might fairly conclude guilt beyond a reasonable doubt." State v. Pone, 78 Hawai'i 262, 265, 892 P.2d 455, 458 (1995). We affirm the circuit court's denials of McKinnie's motions for a judgment of acquittal.

We therefore affirm the August 22, 2001 Judgment of the Circuit Court of the First Circuit.

DATED: Honolulu, Hawai'i, September 29, 2003.

On the briefs:

Richard S. Kawana  
for defendant-appellant.

Acting Chief Judge

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

Associate Judge

Associate Judge