

NOT FOR PUBLICATION

NO. 25051

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JOSEPH POOMAIHEALANI, Defendant-Appellant,
and
JOHN POOMAIHEALANI and BRANDON LIZARDO, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-1-1714)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Joseph Poomaihealani

(Poomaihealani) appeals from the March 13, 2002 Judgment of the Circuit Court of the First Circuit¹ (circuit court).

Poomaihealani was charged with the following:

Count I: Murder in the Second Degree in violation of Hawaii Revised Statutes (HRS) §§ 707-701.5 (1993)² and 706-656 (Supp. 2003);³

¹The Honorable Wilfred K. Watanabe presided.

²Hawaii Revised Statutes (HRS) § 707-701.5 (1993) provides:

§707-701.5 Murder in the second degree. (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.

(2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656.

³HRS § 706-656 (Supp. 2003) provides in relevant part:

§706-656 Terms of imprisonment for first and second degree murder and attempted first and second degree murder.

· · · ·
(2) Except as provided in section 706-657, pertaining to

(continued...)

Count II: Carrying, Using, or Threatening to Use a
Firearm in the Commission of a Separate Felony in
violation of HRS § 134-6(a) and (e) (Supp. 2003),⁴

³(...continued)

enhanced sentence for second degree murder, persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with possibility of parole. The minimum length of imprisonment shall be determined by the Hawaii paroling authority; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

If the court imposes a sentence of life imprisonment without possibility of parole pursuant to section 706-657, as part of that sentence, the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

⁴HRS § 134-6(a) and (e) (Supp. 2003) provides:

§134-6 Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty. (a) It shall be unlawful for a person to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not; provided that a person shall not be prosecuted under this subsection where the separate felony is:

- (1) A felony offense otherwise defined by this chapter;
- (2) The felony offense of reckless endangering in the first degree under section 707-713;
- (3) The felony offense of terroristic threatening in the first degree under section 707-716(1)(a), 707-716(1)(b), and 707-716(1)(d); or
- (4) The felony offenses of criminal property damage in the first degree under section 708-820 and criminal property damage in the second degree under section 708-821 and the firearm is the instrument or means by which the property damage is caused.

. . . .
(e) Any person violating subsection (a) or (b) shall be guilty of a class A felony. Any person violating this section by carrying or possessing a loaded firearm or by carrying or possessing a loaded or unloaded pistol or revolver without a license issued as provided in section 134-9 shall be guilty of a class B felony. Any person violating this section by carrying or possessing an unloaded firearm, other than a pistol or revolver, shall be guilty of a class C felony.

(continued...)

Count III: Possession Prohibited of Any Firearm by a Person Convicted of Certain Crimes in violation of HRS § 134-7(b) and (h) (Supp. 2003),⁵ and

Count IV: Assault in the First Degree in violation of HRS § 707-710 (1993).⁶

The jury found Poomaihealani guilty of Counts I, II, and III, and the circuit court declared a mistrial as to Count IV. On appeal, Poomaihealani contends the circuit court erred (1) in failing to give Poomaihealani's requested jury instruction No. 2 pertaining to self-defense as a defense to the prohibited possession of a firearm charge; (2) in failing to give

⁴(...continued)

A conviction and sentence under subsection (a) or (b) shall be in addition to and not in lieu of any conviction and sentence for the separate felony; provided that the sentence imposed under subsection (a) or (b) may run concurrently or consecutively with the sentence for the separate felony.

⁵HRS § 134-7(b) and (h) (Supp. 2003) provides:

§134-7 Ownership or possession prohibited, when; penalty.

. . . .

(b) No person who is under indictment for, or has waived indictment for, or has been bound over to the circuit court for, or has been convicted in this State or elsewhere of having committed a felony, or any crime of violence, or an illegal sale of any drug shall own, possess, or control any firearm or ammunition therefor.

. . . .

(h) Any person violating subsection (a) or (b) shall be guilty of a class C felony; provided that any felon violating subsection (b) shall be guilty of a class B felony. Any person violating subsection (c), (d), (e), (f), or (g) shall be guilty of a misdemeanor.

⁶HRS § 707-710 (1993) 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.

Poomaihealani's requested jury instruction No. 3 pertaining to the defense of others as a defense to all the charges; and (3) in ordering the jury to continue deliberating in response to Jury Communication No. 8. We disagree with Poomaihealani's contentions and affirm the 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 issue as raised by the parties, we resolve Poomaihealani's points of error as follows:

(1) The circuit court did not err in not instructing the jury on self-defense or defense of others with respect to Count III as these defenses are inapplicable to the charge of Possession Prohibited of any Firearm by a Person Convicted of Certain Crimes. The law regarding self-defense and defense of others, HRS §§ 703-304 (1993) & 703-305 (1993), allows for the use of force upon or toward the person of another in various circumstances. Hawaii Revised Statutes § 703-300 (1993) defines force as "any bodily impact, restraint, or confinement, or the threat thereof." The law of self-defense and defense of others involves the use of force against another, not the act of possession as in this case.

(2) Poomaihealani contends the circuit court erred in failing to instruct the jury on the defense of others as a defense to Murder in the Second Degree. Assuming *arguendo* that

this instruction should have been given, any error was harmless because the jury was instructed as to self-defense for the same charge and failed to acquit on self-defense grounds.

Poomaihealani framed his defense in terms of defending himself and others jointly. In finding Poomaihealani guilty, the jury rejected his self-defense theory. "This negative finding by the jury on the question of self-defense precludes the possibility that Appellant was justified in using deadly force to defend . . . the third person[s]." Evans v. State, 945 S.W.2d 153, 158 (Tex. Crim. App. 1997).

(3) The circuit court's response to Jury Communication No. 8 was not prejudicially insufficient, erroneous, inconsistent, or misleading. State v. Miyashiro, 90 Hawai'i 489, 492, 979 P.2d 85, 88 (App. 1999); State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999).

Accordingly, we affirm the March 13, 2002 Judgment of the Circuit Court of the First Circuit.

DATED: Honolulu, Hawai'i, July 30, 2004.

On the briefs:

Keith S. Shigetomi
for defendant-appellant.

Chief Judge

Mark Yuen,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge