

NO. 25090

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

Cr. No. 01-1-0857

STATE OF HAWAI'I, Plaintiff-Appellee, v.
WARREN K. ELICKER, Defendant-Appellant

and

Cr. No. 01-1-0864

STATE OF HAWAI'I, Plaintiff, v.
WARREN K. ELICKER, Defendant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Warren K. Elicker (Elicker) appeals from the April 10, 2002 Judgment of the Circuit Court of the First Circuit^{1/} (the circuit court), convicting him of and sentencing him for one count of Kidnapping with intent to commit a sexual offense, in violation of Hawaii Revised Statutes § 707-720(1)(d) (1993).^{2/}

¹ Judge Dexter D. Del Rosario entered the Judgment.

² Hawaii Revised Statutes § 707-720(1)(d) (1993) provides as follows:

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

. . . .

(d) Inflict bodily injury upon that person or subject that person to a sexual offense[.]

Relying on the Hawai'i Supreme Court's Arceo opinion,^{3/} Elicker asserts that his conviction should be vacated because "the [circuit] court committed plain error in failing to instruct the jury with respect to the offense of kidnapping that all twelve of its members must agree that the same underlying criminal act had been proved beyond a reasonable doubt."

Elicker's argument is unpersuasive for the following three reasons:

First, the prosecution, in both its opening and closing statements, did choose one single, distinct act on which to rely --Elicker's confinement of the complaining witness in her guest bedroom closet.

Second, before the complaining witness was taken to the guest bedroom, there was no hint of any intent on Elicker's part to subject her to a sexual offense. There was therefore no

³ In State v. Arceo, 84 Hawai'i 1, 32-33, 928 P.2d 843, 874-75 (1996), the Hawai'i Supreme Court held that

when separate and distinct culpable acts are subsumed within a single count . . . --any one of which could support a conviction thereunder--and the defendant is ultimately convicted by a jury of the charged offense, the defendant's constitutional right to a unanimous verdict is violated unless one or both of the following occurs: (1) at or before the close of its case-in-chief, the prosecution is required to elect the specific act upon which it is relying to establish the "conduct" element of the charged offense; or (2) the trial court gives the jury a specific unanimity instruction, *i.e.*, an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt.

(Footnote omitted.)

danger that the members of the jury would convict Elicker based on his previous acts.^{4/}

Third, the defense never objected to the absence of an Arceo "unanimity" instruction and, therefore, the lack of the instruction will be reviewed on appeal for "plain error." State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998).

Nothing in the record suggests that Elicker's "substantial rights" were "affected adversely" by the absence of the instruction or that the alleged error "seriously affect[ed] the fairness, integrity, or public reputation of [the] judicial proceedings[.]" Id.

The circuit court, therefore, did not "plainly err" by not giving the jury a "unanimity" instruction. The April 10, 2002 Judgment, convicting Elicker of and sentencing him for one count of Kidnapping with intent to commit a sexual offense, is affirmed.

DATED: Honolulu, Hawai'i, July 24, 2003.

On the briefs:

Winston D.M. Ling
for defendant-appellant.

Mangmang Qiu Brown, Deputy
Prosecuting Attorney, City
and County of Honolulu,
for plaintiff-appellee.

⁴ The complaining witness and her husband were originally bound, blindfolded, and gagged in their living room by Defendant-Appellant Warren K. Elicker (Elicker) and his accomplice. While in the living room, the couple was threatened with violence by Elicker, but there were no sexual undertones.