

NOT FOR PUBLICATION

NO. 25370

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
TALITIGA VAIASO, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-2466)

MEMORANDUM OPINION

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

Defendant-Appellant Talitiga Vaiaso (Vaiaso) appeals from the Judgment entered by the Circuit Court of the First Circuit (the circuit court) on September 3, 2002.¹ Vaiaso was found guilty after a jury trial of the following offenses:

- Count I: Criminal Trespassing in the First Degree in violation of Hawaii Revised Statutes (HRS) § 708-813 (Supp. 2004) as a lesser included offense to the charge of Burglary in the First Degree.
- Count II: Robbery in the Second Degree committed against Steven Teraoka in violation of HRS § 708-841 (1993) as a lesser included offense to the charge of Robbery in the First Degree.
- Count III: Kidnapping Sabrina Wandell in violation of HRS § 707-720(1)(e) (1993).
- Count IV: Kidnapping Steven Teraoka in violation of HRS § 707-720(1)(e).

¹ The Honorable Marie N. Milks presided.

The circuit court sentenced Vaiaso to imprisonment of one year on Count 1, ten years on Count 2, and 20 years on each of Counts 3 and 4, all terms to run concurrently.

On appeal, Vaiaso argues that 1) the Deputy Prosecuting Attorney (DPA) impermissibly commented on Vaiaso's decision not to testify at trial; and 2) the circuit court erred in refusing to give the jury an instruction regarding the possible merger of the robbery and kidnapping counts. We affirm.

I. BACKGROUND

A. Trial Evidence

The following pertinent evidence was adduced at trial. On October 22, 2001, Steven Teraoka (Teraoka) was in the apartment of his friend, Sabrina Wandell (Wandell). Teraoka was in the living room and Wandell was in her bedroom. At about 11:00 p.m., Vaiaso knocked on the door, said he was looking for "Jack," and asked to be let in. Teraoka responded that there was no "Jack" there but Vaiaso insisted that he be let in. Teraoka went to Wandell's bedroom and informed her that someone was at the door.

Wandell went to the door but could not understand what Vaiaso was saying. As Wandell put her hand on the doorknob, the door opened. Vaiaso shoved Wandell into a dresser that was behind the door. Vaiaso had no shirt on, was carrying a t-shirt, and had a large scar across his chest. Vaiaso wanted to see

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"Jack" and claimed that "Jack" had "ripped him off." Vaiaso accused Teraoka and Wandell of having the money that "Jack" took from Vaiaso and demanded they give the money back. Neither Teraoka nor Wandell had ever seen Vaiaso before and they did not know who Vaiaso was talking about when he referred to "Jack."

Vaiaso pushed Teraoka and then Wandell onto a couch in the living room and forced Wandell to sit on Teraoka's lap. Wandell was crying and her body was shaking. Both Teraoka and Wandell were terrified and feared for their safety. Vaiaso continued to demand that Teraoka and Wandell give Vaiaso his money back and threatened to shoot or stab them. Teraoka and Wandell denied having Vaiaso's money.

Teraoka testified that he reached for his wallet in his back pocket to prove to Vaiaso that he did not have Vaiaso's money. Apparently unsure of what Teraoka was doing, Vaiaso punched Teraoka and pointed a pair of scissors at Teraoka's face to warn him against doing anything unexpected. Teraoka explained that he was only reaching for his wallet and slowly pulled it out. Teraoka showed Vaiaso that Teraoka only had seven dollars in the wallet. Vaiaso took the seven dollars.

After taking Teraoka's money, Vaiaso calmed down and engaged in "small talk" with Wandell and Teraoka. Vaiaso sat in a chair next to the couch. At one point, Vaiaso took out a gold chain from a waist pack he was wearing and handed it to Teraoka.

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Vaiaso offered the gold chain to Teraoka in exchange for the seven dollars Vaiaso had taken. Vaiaso asked if Teraoka could sell the chain. Teraoka shrugged his shoulders and put the chain down.

Vaiaso began to get agitated again. Wandell testified that Vaiaso told Wandell and Teraoka to get sheets and cover everything up because Vaiaso was going to kill "Jack" and there was going to be blood all over. Vaiaso went to the kitchen and grabbed a big carving knife. Vaiaso held the knife in an aggressive manner as he talked to Teraoka and Wandell. Both Teraoka and Wandell testified that Vaiaso obtained the knife after he had taken the seven dollars from Teraoka and that the knife had nothing to do with Vaiaso's taking the seven dollars. The police arrived at Wandell's apartment a short time after Vaiaso grabbed the knife.

The police were responding to a call from Wandell's neighbor. The neighbor testified that he heard someone knocking on Wandell's door at about 11:00 p.m. The neighbor described the person's voice as "very demanding" and "frightening." The neighbor heard what sounded like "shoving and slapping and things breaking" in Wandell's apartment and called the police.

Honolulu Police Department Officers Robert Oakes, Boyd Kamikawa, and Kurt Ng arrived at Wandell's apartment within minutes after receiving calls from dispatch. Officer Oaks

knocked on Wandell's door and identified himself as a police officer. Vaiaso called out that everything was okay and that they were "just fooling around." Officer Oaks requested that someone come to the door and speak to him in person. Vaiaso slid the knife he was holding to the side of his chair and signaled Wandell to go to the door.

Officer Oaks testified that when Wandell came to the door she appeared very distraught and upset. Officer Oaks asked Wandell to step outside and speak to the officers who were behind him. Officer Oaks then entered the apartment and saw both Vaiaso and Teraoka sitting down. Vaiaso was calm and said everything was fine, but Teraoka appeared to be terrified. Officer Kamikawa entered the apartment and advised Officer Oaks that Wandell had indicated that Vaiaso might have a gun or a knife. Officer Oaks directed Vaiaso to stand up, and Officer Oaks saw a knife on the left side of the chair in which Vaiaso had been sitting. Vaiaso was escorted out of the apartment. Officer Oaks saw a t-shirt on the floor which Teraoka identified as belonging to Vaiaso. Officer Oaks nudged the t-shirt with his foot and a glass pipe, commonly used to smoke crystal methamphetamine, rolled out.² Officer Oaks found a pair of scissors under the t-shirt.

² The glass pipe contained residue which was determined by laboratory analysis to be .022 grams of a substance containing methamphetamine. The glass pipe and residue formed the basis for Counts V and VI of the complaint which charged Defendant-Appellant Talitiga Vaiaso (Vaiaso) with Promoting a Dangerous Drug in the Third Degree (Count V) and with the Unlawful Use of Drug Paraphernalia (Count VI). The jury acquitted Vaiaso of these counts.

From the time Vaiaso pushed Wandell and Teraoka onto the couch until the police arrived, Wandell had remained seated in Teraoka's lap on the couch. Teraoka testified that he did not attempt to move from the couch because he was afraid Vaiaso would hurt him. Wandell testified that Vaiaso blocked her way, that she and Teraoka were "paralyzed with fear," and that she felt Vaiaso would kill them if they attempted to leave the apartment.

After the prosecution's case was completed, Vaiaso rested without calling any witnesses.

B. The DPA's Closing Argument

In her closing argument, the DPA asked the jury to pretend that the case had been captured on videotape. The DPA used the videotape analogy as a means of distinguishing between the burglary, robbery, and kidnapping charges and to show how the evidence of Vaiaso's conduct, when viewed chronologically, related to each of these charges. The DPA began by stating:

This case all comes down to credibility, ladies and gentlemen, the credibility of the witnesses that took the stand here

. . . .

Now, for argument purpose, I'm gonna ask you at this time to look at the case and pretend that it was all caught on videotape. Now, let's look at -- let's start running the tape.

The DPA reviewed the testimony presented by Teraoka, Wandell, and Wandell's neighbor concerning Vaiaso's knocking at the door, his entry into Wandell's apartment, and his shoving Teraoka and Wandell onto the couch. The DPA then stated, "Now,

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stop the tape right there. The first charge in this case, ladies and gentlemen, is Burglary in the First Degree." The DPA proceeded to describe the elements necessary to prove Burglary in the First Degree and the evidence of Vaiaso's conduct up to the point where he pushed Teraoka and Wandell onto the couch that proved these elements. After doing so, the DPA continued:

Now, ladies and gentlemen, if we stopped the tape right there and we go no further, the world ended, whatever, something happened to the tape, we heard no other testimony, at the very minimum what the state has shown here is that the defendant is guilty of Burglary in the First Degree.

Now, let's start the tape running again.

The DPA reviewed the testimony regarding what happened from the time Vaiaso pushed Teraoka and Wandell onto the couch until Vaiaso took seven dollars from Teraoka's wallet. The DPA then stated, "Now, stop the tape right there again. The second charge in this case is Robbery in the First Degree." The DPA proceeded to describe the elements of Robbery in the First Degree and the evidence that proved these elements from the time Vaiaso pushed Wandell and Teraoka onto the couch until Vaiaso took the seven dollars from Teraoka. The DPA continued by stating:

Now, ladies and gentlemen, if we don't start the tape again and we end it right there at that point in time, the state is arguing to you that it has proven Robbery in the First Degree. That snapshot of what happened in the living room on the tape at that point in time is Robbery in the First Degree.

At that point, Vaiaso's counsel objected and asked to approach the bench, where the following colloquy took place:

[Vaiaso's counsel]: Your Honor, the first time she [the DPA] said she stopped the tape assumed no more testimony, I let it

go. This time she said you stop the tape, she didn't say about no testimony, but I think that - the technique of actually -- is a commentary upon the defendant not testifying, so. . .

THE COURT: She used the word "evidence," I didn't hear "testimony." But she is talking about the testimony.

[Vaiaso's counsel]: I see. I see. Let's assume it was evidence, there's no more evidence. It sounds like a commentary.

[DPA]: Your Honor, when I started this entire argument to the jury, I said suppose this whole incident was caught on a videotape.

THE COURT: Yes.

[DPA]: And we're playing the videotape.

THE COURT: Yes. So objection's [(sic)] noted.

The DPA used the same videotape technique in discussing the evidence related to the kidnapping charges against Vaiaso.

C. The Merger Instruction

Vaiaso's counsel proposed a jury instruction on whether the burglary, robbery, and kidnapping counts merged.³ The

³ The proposed instruction read as follows:

Defendant's Supplemental Proposed Jury Instruction No. 14

If and only if, you find that the prosecution has proven beyond a reasonable doubt that the Defendant TALITIGA VAIASO committed the offense of ROBBERY IN THE FIRST DEGREE or the included offense of ROBBERY IN THE SECOND DEGREE in Count II and that the prosecution has proven beyond a reasonable doubt that the Defendant committed the offense of KIDNAPPING or the included offense of Unlawful Imprisonment in the First Degree or Unlawful Imprisonment in the Second Degree in Counts III or IV and that the prosecution has proven beyond a reasonable doubt that the Defendant committed the offense of BURGLARY IN THE FIRST DEGREE or the included offense of CRIMINAL TRESPASS IN THE FIRST DEGREE in Count I, then you must answer the following two questions with respect to these offenses on a special interrogatory form:

1. Did the prosecution prove beyond a reasonable doubt that Defendant, TALITIGA VAIASO, did not act with one intention and one plan in committing these offenses?

Yes _____

No _____

circuit court ruled that it would withhold giving a merger instruction until the jury returned its verdicts so that the interrogatories could be tailored to the jury's verdicts. Vaiaso's counsel stated that he "preferred" that the merger instruction be given before the jury began deliberating, but that his main concern was that the jury decide the merger issue.

The jury returned verdicts finding Vaiaso guilty of the included offense of Criminal Trespass in the First Degree to the charge of Burglary in the First Degree on Count I; guilty of the included offense of Robbery in the Second Degree to the charge of Robbery in the First Degree on Count II; guilty as charged of Kidnapping Sabrina Wandell on Count III; and guilty as charged of Kidnapping Steven Teraoka on Count IV.⁴ After the jury returned its verdicts, Vaiaso's counsel again requested that a merger instruction be given, focusing his arguments on the possible merger of the robbery and kidnapping counts. The DPA opposed the

2. Did the prosecution prove beyond a reasonable doubt that these offenses were not part of a continuing and uninterrupted course of conduct?

Yes ____
No ____

You must answer each of these questions separately. A "yes" answer must be unanimous. If you are not unanimous in your answer to any of these questions, then you must answer the question "No."

⁴ The jury also answered special interrogatories finding that Vaiaso had not released Sabrina Wandell (Wandell) or Steven Teraoka (Teraoka) voluntarily. As a result, Vaiaso's conviction on Count III for kidnapping Wandell and Vaiaso's conviction on Count IV for kidnapping Teraoka were both class A felonies pursuant to Hawaii Revised Statutes (HRS) § 707-720(2) (1993).

instruction, arguing that the robbery and kidnapping counts involved separate incidents since Vaiaso clearly obtained the knife after the robbery had been completed.

The circuit court refused to give a merger instruction. The court noted that in returning a guilty verdict on the included offense of Robbery in the Second Degree, the jury determined that a dangerous weapon had not been used in committing the robbery. The court concluded that the robbery count and kidnapping counts involved separate acts and different states of mind. Although denying Vaiaso's request for a merger instruction, the court permitted Vaiaso's counsel to submit a revised instruction to preserve the issue for appeal. Vaiaso's counsel submitted two revised merger instructions. The first only asked the jury to determine whether the robbery and kidnapping counts involving Teraoka merged and excluded the kidnapping count involving Wandell from the merger inquiry. The second asked whether all the counts on which the jury had returned guilty verdicts merged.

Vaiaso subsequently filed a "Motion to Dismiss for Violation of HRS 701-109(1)(e)," arguing that the kidnapping counts (Counts III and IV) should be dismissed because they merged with the robbery count (Count II). On September 18, 2002, the circuit court issued written findings of fact and conclusions of law denying Vaiaso's motion to dismiss.

II. DISCUSSION

A.

Vaiaso argues that the DPA's technique of using an imaginary videotape to discuss the evidence in her closing argument constituted an improper comment on Vaiaso's decision not to testify at trial. We disagree.

In State v. Padilla, 57 Haw. 150, 158, 552 P.2d 357, 362 (1976), the Hawai'i Supreme Court established the test for determining whether the prosecution had impermissibly commented on a defendant's failure to testify at trial. The court held that the test is "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Id. (internal quotation marks and citation omitted).

We conclude that the DPA's use of the videotape technique was not intended by the DPA nor naturally interpreted by the jury as a comment on Vaiaso's failure to testify. The DPA made no direct or indirect reference to the fact that Vaiaso had not testified. The DPA simply used the videotape technique as a means of relating evidence of Vaiaso's conduct as it unfolded in chronological order to the burglary, robbery, and kidnapping charges against him. The DPA's theory was that evidence of Vaiaso's conduct during discrete periods was sufficient to prove

a particular charge. The DPA used the videotape technique to make this point to the jury. Thus, the DPA argued that evidence of Vaiaso's conduct from the time Vaiaso entered Wandell's apartment until he pushed Wandell and Teraoka onto the couch was sufficient to prove the charge of Burglary in the First Degree; that evidence of Vaiaso's conduct from the time he pushed Wandell and Teraoka onto the couch until he took seven dollars from Teraoka's wallet was sufficient to prove the charge of Robbery in the First Degree; and that evidence of Vaiaso's conduct after Vaiaso obtained the seven dollars from Teraoka until the police arrived was sufficient to prove the charges that he kidnapped Wandell and Teraoka.

We conclude that the language used by the DPA in closing argument was clearly not a comment on Vaiaso's failure to testify. The circuit court properly rejected the objection of Vaiaso's counsel.

B.

Count II of the complaint filed by the State of Hawai'i (the State) charged Vaiaso with committing Robbery in the First Degree against Teraoka in violation of HRS § 708-840(1)(b)(ii) (Supp. 2004), which provides that:

(1) A person commits the offense of robbery in the first degree if, in the course of committing theft:

. . . .
(b) The person is armed with a dangerous instrument and:
. . . .

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- (ii) 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.

The jury found Vaiaso guilty of the included offense of Robbery in the Second Degree. As the jury was instructed, the difference between the greater and included robbery offenses is that Robbery in the Second Degree does not require that the defendant was "armed with a dangerous instrument" while in the course of committing theft. The jury was also instructed that for both Robbery in the First Degree and Second Degree, the prosecution was required to prove that Teraoka was the person present against whom Vaiaso had threatened the imminent use of force.

Vaiaso was charged and found guilty in Count III of Kidnapping Wandell and in Count IV of Kidnapping Teraoka in violation of HRS § 707-720(1)(e), which provides that:

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

. . . .
(e) Terrorize that person or a third person[.]

On appeal, Vaiaso argues that the circuit court erred in failing to instruct the jury on the possible merger of the robbery and kidnapping counts pursuant to HRS § 701-109(1)(e) (1993).⁵ In State v. Hoey, 77 Hawai'i 17, 38, 881 P.2d 504, 525

⁵ HRS § 701-109(1)(e) (1993) provides that:

§ 701-109 Method of prosecution when conduct establishes an element of more than one offense. (1) When the same conduct of a

(1994), the Hawai'i Supreme Court held:

It is possible for kidnapping and robbery charges against a defendant to merge, pursuant to HRS § 701-109(1)(e), under circumstances in which (1) there is but one intention, one general impulse, and one plan, and (2) the two offenses are part and parcel of a continuing and uninterrupted course of conduct, and (3) the law does not provide that specific periods of conduct constitute separate offenses.

Kidnapping and robbery charges do not merge where the defendant's acts of kidnapping extended beyond those "necessarily and incidentally committed during a robbery." State v. Correa, 5 Haw. App. 644, 649, 706 P.2d 1321, 1325 (1985); State v. Schroeder, 76 Hawai'i 517, 529-30, 880 P.2d 192, 203-05 (1994). If a defendant commits separate acts that independently violate different statutes, there is no merger even if the acts were committed in the context of a single criminal scheme or transaction. State v. Hoopii, 68 Haw. 246, 251-52, 710 P.2d 1193, 1197 (1985). When the evidence supports the finding of merger, however, the question of merger is one of fact for the jury to decide. Hoey, 77 Hawai'i at 38, 881 P.2d at 526.

1.

As a preliminary matter, we note that Vaiaso does not contend on appeal that there was insufficient evidence to convict

defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:

-
- (e) The offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of conduct constitute separate offenses.

him of the included offense of Robbery in the Second Degree in Count II or of the Kidnapping charges in Counts III and IV. This is for good reason. The State introduced ample evidence to support the jury's verdicts on each of these counts. Thus, Vaiaso is not entitled to the dismissal of any of these counts on the ground that there was insufficient evidence to support them. State v. Alston, 75 Haw. 517, 526-529, 865 P.2d 157, 163-64 (1994).

2.

We further note that Vaiaso was not charged with or found guilty of robbing Wandell. The only person Vaiaso was charged with and found guilty of both robbing and kidnapping was Teraoka. Under circumstances similar to Vaiaso's case, this court in Correa stated that only guilty verdicts on counts that charged the defendant with robbery and kidnapping of the same victim could possibly overlap and be subject to merger. 5 Haw. App. at 648, 706 P.2d at 1324.

We conclude that the guilty verdict returned against Vaiaso on Count III for kidnapping Wandell could not merge with the guilty verdict on Count II for robbing Teraoka. These two counts required proof of different intentions. The jury was instructed that in order to find Vaiaso guilty of kidnapping Wandell, it had to find that he "intentionally or knowingly restrained Sabrina Wandell," while in order to find Vaiaso guilty

of robbing Teraoka, it had to find that Vaiaso, in the course of committing theft, "intentionally or knowingly used or threatened the imminent use of force against Steven Teraoka." The jury's guilty verdicts established that it found that Vaiaso had acted with these two distinct intents. See Alston, 75 Haw. at 531-32, 865 P.2d at 165 (1994). Accordingly, the circuit court did not err in refusing to give a merger instruction as to Count III.

3.

The remaining question is whether the circuit court erred in failing to instruct the jury on the possible merger of the robbery and kidnapping counts involving Teraoka (Counts II and IV). We need not reach this issue because assuming arguendo that the circuit court erred, any such error was harmless beyond a reasonable doubt.⁶

There was compelling evidence that Vaiaso's kidnapping of Teraoka extended beyond Vaiaso's robbing of Teraoka. Vaiaso's robbery was complete when he took the seven dollars from Teraoka's wallet. This is shown by Vaiaso's subsequent offer of

⁶ We note that even if the court's failure to give a merger instruction was not harmless error, a new trial would not be required because the State of Hawaii (the State) could obviate the error by electing to dismiss either the robbery count (Count II) or the kidnapping count (Count IV) involving Teraoka. State v. Caprio, 85 Hawai'i 92, 107-08, 937 P.2d 933, 948-49 (App. 1997). There was sufficient evidence to support the jury's verdicts on the robbery and kidnapping counts. HRS § 701-109(1) does not prohibit prosecution on multiple counts but only multiple convictions on counts that merge.

the gold chain to Teraoka in exchange for the seven dollars.⁷ Vaiaso's offer of the gold chain could not have been in furtherance of the robbery. After obtaining the money from Teraoka, however, Vaiaso continued to restrain Teraoka and Wandell, including brandishing a large knife in a threatening manner. Both Teraoka and Wandell testified that Vaiaso brandished the knife after taking Teraoka's seven dollars and that the knife had nothing to do with Vaiaso's taking of the money. The police recovered the knife next to the seat in which Vaiaso had been sitting.

In finding Vaiaso guilty of only the included offenses of Criminal Trespass in Count I and Robbery in the Second Degree in Count II, the jury implicitly found that Vaiaso had acted with separate intentions and engaged in separate acts in robbing and kidnapping Teraoka. The jury's finding that Vaiaso was guilty of Criminal Trespass rather than Burglary in the First Degree as charged in Count I shows that the jurors did not believe Vaiaso intended to rob Teraoka when Vaiaso entered the apartment.⁸ This is consistent with the evidence that when Vaiaso first

⁷ There was undisputed evidence that Vaiaso gave Teraoka a gold chain sometime after Vaiaso took Teraoka's money. The gold chain was found in Wandell's apartment and introduced in evidence.

⁸ The jury was instructed that Burglary in the First Degree required proof that Vaiaso "had the intent to commit a crime" when he unlawfully entered the building, while Criminal Trespass did not require proof of this intent.

entered the apartment, his intent was not to rob anyone, but to retrieve his own money that "Jack" had "ripped off."

The jury's finding that Vaiaso was guilty of Robbery in the Second Degree rather than Robbery in the First Degree shows that the jury did not believe Vaiaso had used the scissors, the alleged dangerous instrument, in robbing Teraoka.⁹ This is consistent with the evidence that Vaiaso pointed the scissors at Teraoka in response to what Vaiaso viewed as Teraoka's furtive action in reaching for Teraoka's wallet, with Vaiaso's intent to rob only arising after he saw the money in Teraoka's wallet. By the time Teraoka showed Vaiaso the money, however, Vaiaso had already restrained both Teraoka and Wandell by shoving them onto the couch and engaging in threatening behavior. It can be inferred from the jury's verdicts that the jury determined that Vaiaso's robbery and kidnapping of Teraoka were not based on one intention and were not part of an uninterrupted and continuous course of conduct. See Alston, 75 Haw. at 531-32, 865 P.2d at 165 (concluding that a merger instruction pursuant to HRS § 701-109(1)(e) was not required where the jury's findings relevant to the merger issue can be inferred from its verdicts).

⁹ The jury was instructed that Robbery in the First Degree required proof that Vaiaso was "armed with a dangerous instrument" while in the course of committing theft, while Robbery in the Second Degree did not require a dangerous instrument.

Given these circumstances and considering the record as a whole, we conclude that there is no reasonable possibility that the outcome of Vaiaso's case would have been different if the circuit court had submitted an instruction on the possible merger of the robbery and kidnapping counts involving Teraoka to the jury. Any error in the circuit court's failure to give such an instruction was harmless beyond a reasonable doubt. See State v. Libero, 103 Hawai'i 490, 501-02, 83 P.3d 753, 764-65 (App. 2003) (holding that there was no plain error in failing to give a merger instruction where the record showed that the defendant's assault and attempted murder convictions did not stem from an uninterrupted course of conduct), cert. denied, 103 Hawai'i 479, 83 P.3d 742 (2004).

III. CONCLUSION

We affirm the September 3, 2002 Judgment of the Circuit Court of the First Circuit.

DATED: Honolulu, Hawai'i, January 13, 2005.

On the briefs:

Mark Yuen,
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Chief Judge

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Associate Judge

Associate Judge