

NO. 25821

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
WAYNE PAINOVICH, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-2158)

SUMMARY DISPOSITION ORDER

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

Defendant/Appellant Wayne Painovich (Painovich) appeals the Judgment filed on April 23, 2003 in the Circuit Court of the First Circuit (circuit court).¹ Painovich was charged with Robbery in the Second Degree, pursuant to Hawaii Revised Statutes (HRS) §708-841(1)(a) (1993),² for stealing a Snickers bar from an ABC store and pushing the Assistant Manager of the store. After a jury trial, Painovich was found guilty as charged.

On appeal, Painovich contends the circuit court erred (1) in denying his motion for a judgment of acquittal and (2) by

¹ The Honorable Dexter D. Del Rosario presided at trial, and the Honorable Michael Wilson presided at sentencing.

² Hawaii Revised Statutes (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:
- (a) The person uses force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance[.]
. . . .
 - (2) Robbery in the second degree is a class B felony.

not giving the jury an instruction defining "force" as it related to the robbery charge.

Upon careful review of the record and the briefs submitted by the parties, we hold as follows:

(1) The circuit court did not err in denying Painovich's motion for judgment of acquittal because based "upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, 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) (brackets omitted) (quoting State v. Alston, 75 Haw. 517, 528, 865 P.2d 157, 164 (1994)).

(2) The circuit court did not err by not giving a jury instruction defining force because "[a]s a general rule, jury instructions to which no objection has been made at trial will be reviewed only for plain error." State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998). "If the substantial rights of the defendant have been affected adversely, the error will be deemed plain error." State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999). During his closing argument, Painovich's counsel admitted that "nobody defines force for you. It's kinda unfortunate, but our legislature has not defined force, and what you have to do then is use your common sense." Neither party objected to the omission of the definition of force from the jury

instructions. Failure to give a jury instruction defining force was not plain error.

Therefore,

IT IS HEREBY ORDERED that the Judgment filed on April 23, 2003, in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, October 21, 2004.

On the briefs:

Richard D. Gronna
for defendant-appellant.

Daniel H. Shimizu,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Acting Chief Judge

Associate Judge

Associate Judge