NO. 24998

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
NORMAN E. ANDUHA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 01-1-1240)

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

Defendant-Appellant Norman E. Anduha (Anduha) appeals from the Judgment entered by the Circuit Court of the First Circuit (the circuit court) on March 7, 2002,[1/] which convicted and sentenced him, based on a December 7, 2001 jury verdict, for Attempted Murder in the Second Degree, in violation of Hawaii Revised Statutes (HRS) §§ 707-701.5 (1993),[2/] 706-656 (Supp. 2004),[3/] and 705-500 (1993);[4/] Place to Keep Firearm Loaded with

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[1/]The Honorable Michael A. Town entered the Judgment and presided over the trial from which this appeal stems.

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

> **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.

[3/]HRS § 706-656 (Supp. 2004) currently provides, as it did when Defendant-Appellant Norman E. Anduha (Anduha) was charged, in relevant part, as follows:

> **Terms of imprisonment for first and second degree murder and attempted first and second degree murder.** . . .

(continued...)

Ammunition, in violation of HRS § 134-6(d) and (e) (Supp. 2004);[5] and Carrying, Using or Threatening to Use a Firearm in

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[3](...continued)

. . . .

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

[4]HRS § 705-500 (1993) provides:

Criminal attempt. (1) A person is guilty of an attempt to commit a crime if the person:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or

(b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.

(2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

[5]HRS § 134-6(d) and (e) (Supp. 2004) currently provides, as it did when Anduha was charged, in relevant part, as follows:

Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty. . . .

. . . .

(d) It shall be unlawful for any person on any public highway to carry on the person, or to have in the person's possession, or to carry in a vehicle any firearm

(continued...)

the Commission of a Separate Felony, in violation of HRS § 134-6(a)[6] and (e) (Supp. 2004).

Anduha contends that the circuit court erred by: (1) excluding the ninety-eight-day period between August 13, 2001, when his former attorney, Donald Wilkerson (Wilkerson), orally moved to withdraw as counsel, and November 19, 2001, the

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[5](...continued)
loaded with ammunition; provided that this subsection shall not apply to any person who has in the person's possession or carries a pistol or revolver and ammunition therefor in accordance with a license issued as provided in section 134-9.

(e) . . . . 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.

[6]HRS § 134-6(a) (Supp. 2004) currently provides, as it did when Anduha was charged, in relevant part, as follows:

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.

(Brackets in original.)

new trial date set by the circuit court upon granting Wilkerson's motion, in computing his right under Hawai'i Rules of Penal Procedure (HRPP) Rule 48 to be tried within six months of the date of his arrest "because there was no 'order' specifically excluding the 98 days[,]" as required by HRPP Rule 48(d)(1)(2000); (2) failing to instruct the jury that its verdict must be (a) unanimous to convict him of Attempted Murder in the Second Degree, and (b) unanimous as to each of the material elements of the Attempted Murder charge; (3) refusing to suppress evidence of the rifle, the case, and the ammunition allegedly used to commit the Attempted Murder offense because it was recovered as a result of a statement by Anduha that was illegally obtained by police officers after Anduha had invoked his right to counsel; and (4) permitting Plaintiff-Appellee State of Hawai'i to present to the jury during its closing argument photographs of the complaining witness's gunshot wound that had never been admitted into evidence, thereby exposing the jury to an outside influence that substantially prejudiced his right to a fair trial.

Upon careful review of the record, the briefs submitted by both parties, and the relevant statutes, rules, and case law, we resolve Anduha's contentions as follows:

A.

HRPP Rule 48(b)(1)[2/] requires that criminal charges be dismissed, with or without prejudice in the discretion of the court, if trial is not commenced within six months or 180 days of the date of arrest or filing of the charges. See State v. Ikezawa, 75 Haw. 210, 214, 857 P.2d 593, 595 (1993). Pursuant to HRPP Rule 48(c)(1), however, "periods that delay the commencement of trial and are caused by collateral or other proceedings concerning the defendant" are excluded from the calculation of the six-month period. Furthermore, HRPP Rule 48(d)(1) provides, in relevant part, as follows:

> For purposes of subsection (c)(1) of this rule, the period of time, from the filing through the prompt disposition of the following motions filed by a defendant, shall be deemed to be periods of delay resulting from collateral or other proceedings concerning the defendant: motions . . . for withdrawal of counsel including the time period for appointment of new counsel if so ordered[.]

(Emphasis added.)

Anduha claims that because the circuit court failed to enter a specific order excluding the ninety-eight-day period

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[2/]Hawai'i Rules of Penal Procedure Rule 48(b)(1) (2000) provides, in relevant part, as follows:

> **DISMISSAL.**
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> . . . .
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> **(b) By court.** Except in the case of traffic offenses that are not punishable by imprisonment, the court shall, on motion of the defendant, dismiss the charge, with or without prejudice in its discretion, if trial is not commenced within 6 months:
>
> (1) from the date of arrest if bail is set or from the filing of the charge, whichever is sooner, on any offense based on the same conduct or arising from the same criminal episode for which the arrest or charged was made[.]

between Wilkerson's August 13, 2001 oral motion to withdraw and the new trial date of November 19, 2001, the circuit court was precluded from subsequently excluding that period in calculating his right to a speedy trial under HRPP Rule 48. We disagree with Anduha's interpretation of HRPP Rule 48(d)(1).

Under Hawai'i law, delays caused by the withdrawal and appointment of new defense counsel are *per se* excludable for purposes of HRPP Rule 48 analysis. State v. Samonte, 83 Hawai'i 507, 515-16, 928 P.2d 1, 9-10 (1996); State v. Senteno, 69 Haw. 363, 368, 742 P.2d 369, 373 (1987). Contrary to Anduha's argument, the "if so ordered" language contained in HRPP Rule 48(d)(1) pertains to the order appointing new counsel and does not impose a requirement that a separate order be entered before a period of delay can be excluded for HRPP Rule 48 purposes. The lack of a separate order therefore did not preclude the circuit court from excluding the period of delay that began with Wilkinson's withdrawal motion and ended with the appointment of new counsel for Anduha.

Based on our review of the record, however, we conclude that the circuit court's exclusion of the ninety-eight-day period between August 13, 2001 and November 19, 2001 in determining Anduha's Rule 48 motion was wrong. The record indicates that after Wilkinson orally moved to withdraw as counsel on August 13, 2001, the circuit court filed a written order on August 29, 2001, appointing Jerry I. Wilson as Anduha's new attorney, effective

August 24, 2001. Therefore, the circuit court should have excluded only the eleven-day period from August 13 to 24, 2001 (and not the period from August 24, 2001 to November 19, 2001) in its Rule 48 calculation.

Since the circuit court had already excluded the seven-day period from August 13, 2001 (the day Wilkerson orally moved to continue trial and informed the court that he would be filing a motion to withdraw as counsel) to August 20, 2001 (the day of the hearing on Wilkerson's motion to continue trial and withdraw as counsel), the circuit court should have excluded only the additional three-day period from August 21, 2001 to August 24, 2001 in determining Anduha's Rule 48 motion. See Senteno, 69 Haw. at 368, 742 P.2d at 373.

The circuit court also concluded that the following time periods were excludable in determining Anduha's Rule 48 motion:

- The time period from October 5, 2001, when Jerry I. Wilson (Wilson), the attorney appointed to replace Wilkerson, filed a Motion for Withdrawal and Substitution of Counsel, to October 18, 2001 (thirteen days), the conclusion of said motion;

- The time period from October 18, 2001 to October 26, 2001 (seven days), when Anduha was without counsel; and

- The time period from November 9, 2001, when Richard D. Gronna, the attorney appointed to replace Wilson, orally moved for a continuance to November 26, 2001 (seventeen days), the firm trial date set by agreement of the parties.

Based on the foregoing discussion, a total of forty-seven days was excludable from the 188 days that had elapsed between Anduha's arrest on May 22, 2001 and the commencement of Anduha's trial on November 26, 2001. For Rule 48 purposes, therefore, 141 days had elapsed before Anduha's trial began, and no violation of Anduha's Rule 48 speedy trial right occurred.

B.

Anduha argues that his conviction is fatally flawed because the court failed to specifically instruct the jury that in order to convict him of Attempted Murder, the jurors had to be unanimous on that count and all the elements of that count. Because Anduha did not object to the jury instructions at trial, we will review the instructions that he alleges were erroneously given only for plain error. State v. Aganon, 97 Hawai'i 299, 302, 36 P.3d 1269, 1272 (2001).

Our review indicates that there is no merit to Anduha's argument. Although the circuit court did not give a specific unanimity instruction for the Attempted Murder offense, the court gave a general unanimity instruction that was applicable to all offenses with which Anduha was charged. Additionally, the circuit court repeatedly instructed the jury that it needed to unanimously find all of the elements of Attempted Murder in the Second Degree before considering different defenses raised by Anduha or determining whether Anduha was guilty of a lesser

included offense. The court also polled the jury to ensure that its verdict was in fact unanimous.

Considering the jury instructions as a whole, therefore, we conclude that there is no merit to Anduha's argument.

C.

The circuit court found, by clear and convincing evidence, that the rifle, rifle case, and round of ammunition that Anduha had given to his brother after the alleged shooting of the complaining witness would inevitably have been discovered by police as soon as Anduha's sister-in-law learned that Anduha had been charged with the shooting. The court therefore concluded that although the rifle, rifle case, and round of ammunition were recovered based on an inadmissible statement made by Anduha to police, the evidence was properly admitted under the inevitable discovery exception to the exclusionary rule.

Based on our review of the record, we conclude that the legal recovery of the inadmissible evidence was too speculative to support the application of the inevitable discovery doctrine. See Taylor v. State, 274 Ga. 269, 553 S.E.2d 598 (2001); People v. Lomas, 812 N.E.2d 39, 48 (Ill. App. 2004); Williams v. State, 372 Md. 386, 813 A.2d 231 (2002). The circuit court therefore erred in admitting the evidence.

However, in considering whether an evidentiary error contributed to Anduha's conviction, the error should not be

"viewed in isolation and considered purely in the abstract" but must instead "be examined in light of the entire proceedings and given the effect to which the whole record shows it is entitled." State v. Gano, 92 Hawai'i 161, 176, 988 P.2d 1153, 1168 (1999) (quoting State v. Heard, 64 Haw. 193, 194, 638 P.2d 307, 308 (1981)).

In light of the overwhelming and undisputed eyewitness testimony adduced at trial that Anduha fired a rifle at the complaining witness and acknowledged "gett[ing] him[,]" we conclude that the admission of the evidence of the rifle, rifle case, and round of ammunition was harmless beyond a reasonable doubt.

D.

Similarly, we conclude that if any error were committed when the jury was allowed, during closing arguments, to view photographs of the complaining witness's wounds that had not been previously admitted into evidence, such error was harmless. The jury had already seen the gunshot wounds on the complaining witness's flesh, and the photographs merely illustrated what the jury had already seen.

In light of the foregoing discussion, we affirm Anduha's conviction and sentence. However, we note that the Judgment entered on March 7, 2002 fails to reflect one of the statutes that Anduha was convicted of violating, HRS § 707-500,

which defines criminal attempt, and we remand this case to the circuit court for entry of an amended judgment.

DATED: Honolulu, Hawaii, November 29, 2005.

On the briefs:

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Cynthia A. Kagiwada
for defendant-appellant.

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