NO. 25494

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
TONY KWAK, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-2283)

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

Tony Jin Kwak (Defendant) appeals the November 1, 2002 judgment of the Circuit Court of the First Circuit (circuit court)[1] that convicted him, upon a jury's verdict, of the included offense of reckless manslaughter.[2]

After a painstaking review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we dispose of Defendant's points of error on appeal as follows:

1. Defendant contends the circuit court erred when it explained to the jury the justification defense of defense of others, but then instructed the jury that defense of others was not a defense at trial. Defendant avers there was substantial evidence at trial to support the defense and the jury should have been instructed to consider it; as given, the circuit court's

---

[1] The Honorable Michael A. Town presided.

[2] At the close of the State's case, the circuit court granted Defendant's oral motion for a judgment of acquittal, but only as to the charge of murder in the second degree. The circuit court allowed the included offenses to go to the jury.

instructions constituted an impermissible comment on the evidence and confused the jury. We disagree.

There was not a scintilla of evidence adduced at trial to support the defense of defense of others. Remarks of counsel are not evidence. State v. Lira, 70 Haw. 23, 29, 759 P.2d 869, 873 (1988) ("where evidentiary support for the asserted defense, or for any of its essential components, is clearly lacking, it would not be error for the trial court either to refuse to charge on the issue or to instruct the jury not to consider it" (citations and internal quotation marks omitted)). Hence, the circuit court's instructions were neither incorrect nor an impermissible comment on the evidence. Furthermore, the instructions did not confuse the jury; rather, the instructions told the jury, clearly and correctly, exactly what not to do.

Accordingly, we conclude that, "when read and considered as a whole, the instructions given [were not] prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998) (citations and internal quotation marks omitted).

2. Next, Defendant assigns as error the circuit court's October 25, 2002 order that denied his May 13, 2002 motion for a new trial. In his motion, Defendant argued that his trial counsel rendered ineffective assistance by failing to investigate and call certain lay and expert witnesses, and by jettisoning a credible alternative defense. Defendant's point

lacks merit.

Although hindsight through rose-colored glasses may appear to be 20/20, "[s]pecific actions or omissions alleged to be error but which had an obvious tactical basis for benefitting the defendant's case" -- and that is the case here -- "will not be subject to further scrutiny." State v. Uyesugi, 100 Hawai'i 442, 449, 60 P.3d 843, 850 (2002) (citation and block quote format omitted). In denying Defendant's motion for a new trial, the circuit court did not commit "a clear abuse of discretion." State v. Pauline, 100 Hawai'i 356, 365, 60 P.3d 306, 315 (2002) (citation and internal quotation marks omitted).

3. Defendant also avers that the circuit court plainly erred during jury selection when it read to the jury pool a pretrial publicity statement, drafted and proffered by his own trial attorney, which contained the statement, "Some of the media reported Mr. Cullen died from a kick to his chest." "By telling the jury pool what was reported in the media, especially a modus operandi that adopted the State's theory of the case," Defendant argues, "the court tainted the jury." Opening Brief at 42. Defendant's averment is unavailing.

After the circuit court read the statement to the jury pool and took down the names of those who had heard about the case, the circuit court instructed the jury pool on the purpose in reading the statement:

> Anybody I missed? Okay. We may be asking some of you

> questions up here at the bench, what you might have heard, and we'll get with you later. The whole idea is to get a fair and impartial juror. Whatever you might see or later learn about the case outside is not evidence, it's not to be brought into the courtroom. If it is brought into the courtroom, we want to find out if you can put it aside. The only evidence you're gonna hear is in this courtroom for very good reasons.

In addition, the circuit court warned and later formally instructed the petit jury not to witness nor pay heed to any media coverage of the case. The circuit court also formally instructed the jury, "You must consider only the evidence which has been presented to you in this case and such inferences therefrom as may be justified by reason and common sense." We presume the jurors followed these instructions, State v. Amorin, 58 Haw. 623, 629, 574 P.2d 895, 899 (1978), and there is no indication in the record to the contrary.

Given the foregoing jury instructions, and the further safeguards employed during *voir dire* and jury selection, we are confident the circuit court "took sufficient steps to shield the proceedings from the prejudicial effect of the publicity." Pauline, 100 Hawai'i at 367, 60 P.3d at 317 (citations and internal quotation marks omitted). At any rate, because the reading of the pretrial publicity statement "did not adversely affect [Defendant's] substantial rights, we decline to notice it as plain error." State v. Sugihara, 101 Hawai'i 361, 367, 68 P.3d 635, 641 (App. 2003) (original brackets, citations and internal quotation marks omitted).

4. Defendant contends the circuit court's jury

instructions on the included offense of reckless manslaughter were prejudicially erroneous. The circuit court instructed the jury as follows:

> The Defendant, Tony Kwak, is charged with the offense of Manslaughter based on recklessness.
>
> A person commits the offense of Manslaughter if he recklessly causes the death of another person.
>
> There are two material elements of the offense of Manslaughter, each of which the prosecution must prove beyond a reasonable doubt.
>
> These two elements are:
>
> 1. That, on or about October 6, 2001, in the City and County of Honolulu, State of Hawaii, the Defendant, Tony Kwak, intentionally, knowingly or recklessly kicked Robert Cullen; and
>
> 2. That the Defendant, Tony Kwak, recklessly caused the death of Robert Cullen.

Defendant argues that the inclusion of the intentional and knowing *mens rea* in the first element misstated the material elements of reckless manslaughter and rendered them internally inconsistent, thus confusing the jury. Defendant also claims that the circuit court, by using the word "kicked" in the first element, adopted the State's theory of the case and impermissibly commented on the evidence. Neither of Defendant's points deserve favor.

Hawaii Revised Statutes (HRS) § 707-702(1)(a) (1993) provides: "A person commits the offense of manslaughter if: He recklessly causes the death of another person[.]" (Enumeration omitted; format modified.) In addition, "When the definition of an offense specifies the state of mind sufficient for the commission of that offense, without distinguishing among the

elements thereof, the specified state of mind shall apply to all elements of the offense, unless a contrary purpose plainly appears." HRS § 702-207 (1993). However, "When the law provides that recklessness is sufficient to establish an element of an offense, that element also is established if, with respect thereto, a person acts intentionally or knowingly." HRS § 702-208 (1993). This is because "intent, knowledge, recklessness, and negligence are in a descending order of culpability[.]" Commentary on HRS § 702-208. Thus, even if error, the inclusion of the intentional and knowing *mens rea* was harmless beyond a reasonable doubt.

As for the inclusion of the word "kicked" in the first element of the offense, we cannot see how that constituted an adoption of the State's theory of the case or an impermissible comment on the evidence, inasmuch as the instruction told the jury, "There are two material elements of the offense of Manslaughter, each of which the prosecution must prove beyond a reasonable doubt." In any event, a kick was the only instrumentality of death express or reasonably implicit in the evidence adduced at trial.

Accordingly, we conclude that, "when read and considered as a whole, the instructions given [were not] prejudicially insufficient, erroneous, inconsistent, or misleading." Sawyer, 88 Hawai'i at 330, 966 P.2d at 642 (citations and internal quotation marks omitted).

5. For his final point of error on appeal, Defendant contends the evidence at trial was insufficient to prove he consciously disregarded a substantial and unjustifiable risk, see HRS § 707-702(1)(a); HRS § 702-206(3) (1993), that his conduct would induce *commotio cordis*, thereby causing death. Defendant reasons that, because the evidence established that *commotio cordis* is an exceedingly rare syndrome, he could not have been aware of and thus consciously disregard the risk of its occurrence. This contention is grounded in a fundamental misapprehension of the material elements of the offense.

HRS § 707-702(1)(a) does not require the State to prove that Defendant consciously disregarded a substantial and unjustifiable risk of causing death by *commotio cordis*. The State is only required to prove that Defendant "recklessly cause[d] the death of another person[.]" HRS § 707-702(1)(a). Death -- and not the particular medical mechanism of death -- is the material element of the offense to which the reckless state of mind must apply. HRS § 702-207.

With this proper understanding, and viewing the evidence in the light most favorable to the State, State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996), we conclude that where an angry Defendant, fresh from a violent melee in a bar, suddenly runs up and kicks a bent-over and unsuspecting man hard in the upper chest, fracturing the sternum and bruising the heart, there is substantial evidence, id., albeit circumstantial,

id. at 140-41, 913 P.2d at 66-67 (circumstantial evidence can prove state of mind), that Defendant consciously disregarded a substantial and unjustifiable risk of causing death. HRS § 707-702(1)(a); HRS § 702-206(3). Cf. Eastman, 81 Hawai'i at 141, 913 P.2d at 67 ("substantial evidence showing that Eastman slapped Bautista on the side of her head also supports a finding that, at a minimum, Eastman consciously disregarded a substantial and unjustifiable risk of physically abusing Bautista"); State v. Ah Choy, 70 Haw. 618, 624, 780 P.2d 1097, 1101-02 (1989) (given "the very serious nature and location of the wound, and the violent use of a ten inch long knife in the attack, there was sufficient evidence for the jury to reasonably infer that Appellant clearly intended to kill"); In re Doe, 106 Hawai'i 530, 539, 107 P.3d 1203, 1212 (App. 2005) ("where an assailant punches and kicks another so ferociously in the face that the lip is split clean through, four teeth are bashed in, the eye is hemorrhaged and pushed inward, and the orbital floor is fractured causing blurred and diplopic vision lasting almost eleven months, there is substantial evidence that the assailant was, at the very least, aware that it is practically certain that his conduct will cause the result required for his conviction of assault in the first degree, serious bodily injury" (footnote, citations and internal quotation marks omitted)); State v. Libero, 103 Hawai'i 490, 501, 83 P.3d 753, 764 (App. 2003) ("the grave nature of the assault, Libero's inflicting multiple blows to Nancy's head with a heavy

branch and leaving Nancy in an undeveloped area, was sufficient for the jury to reasonably infer that Libero intended to kill Nancy" (citation omitted)).

Therefore,

IT IS HEREBY ORDERED that the circuit court's November 1, 2002 judgment is affirmed.

DATED: Honolulu, Hawai'i, August 1, 2006.

On the briefs:

Peter Van Name Esser and
Richard T. Pafundi,
for Defendant-Appellant.

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

James A. Burns
Chief Judge

Associate Judge

Daniel R. Foley
Associate Judge