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NO. 27289

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Plaintiff-Appellee, v.
GUY R. RAYMOND, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 04-1-0203)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Nakamura and Fujise, JJ.)

Defendant-Appellant Guy R. Raymond (Raymond) appeals from the judgment entered on April 13, 2005 in the Circuit Court of the Second Circuit.[1]

On April 29, 2004, Plaintiff-Appellee State of Hawaiʻi (the State) charged Raymond with Burglary in the First Degree, Hawaii Revised Statutes (HRS) § 708-810(1)(c) (1993), and Robbery in the First Degree, HRS § 708-840(1)(b) (Supp. 2005). Judge Joel E. August presided over the first jury trial from October 22, 2004 to November 1, 2004. A hung jury resulted in a mistrial. Raymond was represented by Deputy Public Defender Gregory Ball (DPD Ball). At the second jury trial, Raymond appeared *pro se* with DPD Ball serving as standby counsel.[2] Raymond questioned the witnesses. When Raymond testified, he was

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[1] The Honorable Shackley F. Raffetto presided.

[2] At the trial, Deputy Public Defender Gregory Ball (DPD Ball) referred to himself as "backup counsel". In this appeal, DPD Ball is referred to as "standby" counsel.

questioned by DPD Ball.

The jury decided that Raymond was not guilty of Burglary in the First Degree, but was guilty of the included offense of Attempted Theft in the Second Degree. The court sentenced Raymond to incarceration for a term of five years, to be served concurrently with an existing sentence, with a mandatory minimum period of imprisonment of one year and eight months without the possibility of parole, and ordered Raymond to pay a crime victim compensation fee of $100.00.

Raymond filed a notice of appeal on May 10, 2005 and the case was assigned to this court on May 23, 2006.

In accordance with Hawai'i Rules of Appellate Procedure Rule 35 (2006), and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties, we resolve the points on appeal as follows:

I.

The court gave the jury Instruction No. 18 which states in part: "A person acts intentionally with respect to his conduct when it is his conscious object to engage in such conduct." During deliberations, the jury asked the court to "[p]lease define word 'intent' or expand on instruction #18." The court answered that "[a] person acts intentionally with respect to his conduct when it is his mental decision to do something." Raymond contends that it is legally inaccurate,

vague, and misleading to define "conscious object to engage in such conduct" as "mental decision to engage in such conduct" and that "any alteration of the legal definition of intent correspondingly altered the State's burden in proving the case beyond a reasonable doubt." The State responds that the court's answer has substantially the same meaning as the original wording of the jury instruction. We agree with the State.

II.

At both trials, the court instructed the jury in part as follows: "You must not reveal to the court or to any other person how the jury stands, numerically or otherwise, until you have reached a unanimous verdict and it has been received by the court." During deliberation, the jury at the second trial asked the court, "Does our decision must [sic] be unanimously [sic] or not[?]" The court answered, "In order for the jury to find the defendant not guilty or guilty, the jury must unanimously agree." Raymond contends this was plain error because it suggested that the jury only had two options, to produce a unanimous verdict of guilty, or a unanimous verdict of not guilty, with no mention of the possibility of a mistrial due to a hung jury. We disagree. It answered the question that was asked. Moreover, the jury also was instructed that "[y]ou may take such time as you feel is necessary for your deliberations. You may inform the court if you have any questions about or do not understand the court's instructions."

III.

The court instructed the jury in part as follows:

> A person can commit Attempted Theft in the Second Degree by one of two alternate means. The prosecution may prove the offense of Attempted Theft in the Second Degree by either means.
>
> For the first means, a person commits the offense of Attempted Theft in the Second Degree if, with the intent to commit Theft in the Second Degree, he intentionally engages in conduct which constitutes a substantial step in a course of conduct intended or known to cause him to obtain or exert unauthorized control over property of another, from the person of another, with intent to deprive the person of the property.
>
> . . . .
>
> For the second means of Attempted Theft in the Second Degree, a person commits the offense of Attempted Theft in the Second Degree if, with the intent to commit Theft in the Second Degree, he intentionally engages in conduct which constitutes a substantial step in a course of conduct intended or known to cause him to obtain or exert unauthorized control over property of another, the value of which exceeds three hundred (300) dollars, with intent to deprive the person of the property.
>
> There are two material elements for the second means of the offense of Attempted Theft in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt.
>
> These two elements are:
>
> . . . .
>
> 2. That [Raymond] intentionally engaged in conduct which was a substantial step in a course of conduct intended or known to be practically certain by [Raymond] to cause him to obtain or exert unauthorized control over property of another, to wit, JAMES DIMEO, the value of which exceeded three hundred (300) dollars, with intent to deprive JAMES DIMEO of the property.
>
> Conduct shall not be considered a substantial step unless it is strongly corroborative of [Raymond's] intent to commit Theft in the Second Degree. A person commits the offense of Theft in the Second Degree if he obtains or exerts unauthorized control over property of another, the value of which exceeds three hundred (300) dollars, with intent to deprive the person of the property.
>
> There are three material elements of the offense of Theft in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt.
>
> The three elements are:
>
> . . . .
>
> 3. That [Raymond] knew or believed the value of the property exceeded three hundred (300) dollars.

Raymond contends that "absent an interrogatory, it would be erroneous to presume" that the jury found him guilty on the basis of the first means and this instruction about the second means was plain error because, when it described the three material elements of the offense of Theft in the Second Degree, it failed to instruct that the State was required to prove that the actual value of the property was in excess of $300.

In light of the following precedent, we conclude that "plain error" is not, and "harmless error" is, the question.

> [W]e hold that, although as a general matter forfeited assignments of error are to be reviewed under the HRPP [Hawaiʻi Rules of Penal Procedure] Rule 52(b) plain error standard of review, in the case of erroneous jury instructions, that standard of review is effectively merged with the HRPP Rule 52(a) harmless error standard of review because it is the duty of the trial court to properly instruct the jury. As a result, once instructional error is demonstrated, we will vacate, without regard to whether timely objection was made, if there is a reasonable possibility that the error contributed to the defendant's conviction, i.e., that the erroneous jury instruction was not harmless beyond a reasonable doubt.

State v. Nichols, 111 Hawaiʻi 327, 337, 141 P.3d 974, 984 (2006), (footnote omitted).

In light of the fact that this instruction told the jury three times that the value of the property must exceed three hundred dollars, we conclude that the error, if any, is harmless.

IV.

Raymond contends that the evidence is insufficient to prove Attempted Theft in the Second Degree by either possible means. First, Raymond argues that there is no evidence that the value of the property taken actually exceeded three hundred

dollars or that Raymond knew or believed that the value of the property taken exceeded three hundred dollars. However, when Raymond cross-examined Dimeo, he asked Dimeo, "Do you recall when Officer Urquijo rolled up on the scene and he did an interview with you if you mentioned anything to him about this $3,500 Rolex watch of yours?" Second, Raymond argues that there is no evidence that Dimeo's watch was taken "from [Dimeo's] person." However, Dimeo testified that Raymond "proceeded to remove my Rolex" and that Raymond "proceeded to steal my watch, take it off my wrist[.]" Consequently, we conclude that this point has no merit.

CONCLUSION

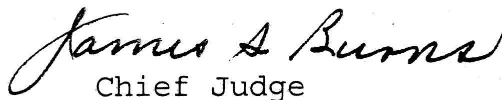
Therefore, IT IS HEREBY ORDERED that the judgment entered on April 13, 2005 is affirmed.

DATED: Honolulu, Hawai'i, February 7, 2007.

On the briefs:

Kirsha K.M. Durante,
Deputy Public Defender,
for Defendant-Appellant.

Artemio C. Baxa,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.



Chief Judge

Associate Judge

Associate Judge