

DISSENTING OPINION BY NAKAMURA, J.

The majority justifiably relies on this court's prior decision in State v. Palisbo, 93 Hawai'i 344, 3 P.3d 510 (App. 2000), in rejecting the arguments of Defendant Appellant William N.S. Mainaupo, Jr. (Mainaupo). Under Palisbo, Mainaupo was not entitled to his requested instruction on a mistake-of-fact defense. I respectfully dissent, however, because I disagree with Palisbo.

Mainaupo challenges his conviction for unauthorized control of a propelled vehicle (UCPV). Mainaupo's defense was that he honestly (albeit mistakenly) believed that Doug, the person who gave him permission to use the car, was the owner of the car. Mainaupo claims that the trial court erred in refusing to instruct the jury on his asserted mistake-of-fact defense and instead instructing the jury that he had a legal duty to obtain consent to operate the vehicle directly from its registered owner. I agree with Mainaupo's claim and therefore would vacate his conviction and remand for a new trial.

I.

In Palisbo, this court interpreted the version of the UCPV statute in effect after the Hawai'i Legislature amended it in 1996.<sup>1</sup> That version of the statute, Hawaii Revised Statutes (HRS) § 708-836 (1993 & Supp. 1996), provided:

(1) A person commits the offense of unauthorized control of a propelled vehicle if the person intentionally exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent or by changing the identity of the vehicle without the owner's consent.

---

<sup>1</sup> The 1996 amendments to Hawaii Revised Statutes (HRS) § 708-836 took effect on June 17, 1996. 1996 Haw. Sess. Laws Act 195, § 4, at 448. In State v. Palisbo, 93 Hawai'i 344, 3 P.3d 510 (App. 2000), Defendant Palisbo was charged with committing the offense of unauthorized control of a propelled vehicle (UCPV) on or about August 23, 1996. Id. at 347, 3 P.3d at 513.

**NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER**

(2) "Propelled vehicle" means an automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle.

(3) It is an affirmative defense to a prosecution under this section that the defendant:

- (a) Received authorization to use the vehicle from an agent of the owner where the agent had actual or apparent authority to authorize such use; or
- (b) Is a lien holder or legal owner of the propelled vehicle, or an authorized agent of the lien holder or legal owner, engaged in the lawful repossession of the propelled vehicle.

(4) For the purposes of this section, "owner" means the registered owner of the propelled vehicle or the unrecorded owner of the vehicle pending transfer of ownership.

(5) Unauthorized control of a propelled vehicle is a class C felony.

(Emphases added.) For purposes of my analysis, the version of the UCPV statute construed in Palisbo is not materially different from the current version of the UCPV statute, HRS § 708-836 (Supp. 2006), which is applicable to Mainaapu's case.<sup>2</sup>

This court held in Palisbo that under the UCPV statute, "criminal liability attaches if the defendant failed to obtain consent to operate the vehicle from the vehicle's owner." Id. at 347, 3 P.3d at 513. This court stated that the purpose of the Legislature's 1996 amendments to the UCPV statute was to close a large, unintended loophole that previously permitted defendants to avoid conviction by alleging that a friend loaned them the car. Id. at 352, 3 P.3d at 518. This court concluded that the

---

<sup>2</sup> There have been two amendments to the version of HRS § 708-836 construed in Palisbo. In 1999, HRS § 708-836(1) was amended to add "knowingly" as a state of mind for the UCPV offense so that offense would be committed if "the person intentionally or knowingly exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent . . ." 1999 Haw. Sess. Laws Act 11, § 1, at 11-12. In 2001, the following proviso was added to the definition of "owner" in HRS § 708-836(4): "provided that if there is no registered owner of the propelled vehicle or unrecorded owner of the vehicle pending transfer of ownership, 'owner' means the legal owner." 2001 Haw. Sess. Laws Act 87, § 2, at 138.

effect of the 1996 amendments was as follows:

Hence, the effect of the most recent amendments to HRS § 708-836 is to place upon a non-owner driver of a vehicle the legal duty of obtaining consent to operate the vehicle directly from the registered owner; the violation of such a duty will subject the non-owner to criminal liability unless he or she can prove by a preponderance of the evidence that permission to use the vehicle was obtained from an agent who had actual or apparent authority to allow such use from the registered owner.

Id. at 353, 3 P.3d at 519 (footnotes omitted).

Under Palisbo, the prosecution meets its burden of proving the UCPV offense by showing that the defendant intentionally drove someone else's vehicle and did so without the registered owner's consent. Id. at 347, 3 P.3d at 513. Because the defendant has the duty of obtaining consent directly from the vehicle's registered owner, the defendant is subject to criminal liability if he or she fails to do so. Id. at 347, 353, 3 P.3d at 513, 519. According to Palisbo's interpretation of the UCPV statute, it is no defense that the defendant obtained consent from someone the defendant believed was the vehicle's owner if that belief turns out to be wrong. This is the defense raised by Mainaupo. Pursuant to Palisbo, the mistake-of-fact defense would only apply in the narrow situation where the defendant was dealing with the registered owner and mistakenly interpreted the owner's words or actions as amounting to consent to use the vehicle, even though no consent had actually been given.<sup>3</sup>

Although Palisbo provides a plausible interpretation of the UCPV statute and its legislative history, I do not agree with that interpretation. Based on my reading of the UCPV statute and

---

<sup>3</sup> The affirmative defenses under the UCPV statute are not relevant to Defendant-Appellant William N.S. Mainaupo, Jr. (Mainaupo). He does not contend that Doug, the person from whom he purportedly obtained consent to use the car, was an agent of the true registered owner, Nancy Cordova. HRS § 708-836(3)(a) (Supp. 2006). Nor was Mainaupo involved in the lawful repossession of the car. HRS § 708-836(3)(b) (Supp. 2006).

its legislative history, it is not enough for the prosecution to prove that the registered owner of the vehicle did not consent to the defendant's use. Rather, I believe the prosecution is required to prove that the defendant knew or was aware that the registered owner of the vehicle did not consent to the defendant's use. This necessarily means that a defendant who honestly (but mistakenly) believes that the person who gave the defendant consent was the vehicle's registered owner is not guilty of the UCPV offense. Accordingly, I conclude that Mainaupo was entitled to his requested instruction on a mistake-of-fact defense and that the trial court erred in failing to give the requested instruction.

II.

The following test is applied in interpreting a statute:

When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 94 Hawai'i 31, 41, 7 P.3d 1068, 1078 (2000).

The current version of the UCPV statute, HRS § 708-836 (Supp. 2006), which is applicable to Mainaupo's alleged offense, provides:

**§ 708-836 Unauthorized control of propelled vehicle.** (1) A person commits the offense of unauthorized control of a propelled vehicle if the person intentionally or knowingly exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent or by changing the identity of the vehicle without the owner's consent.

(2) "Propelled vehicle" means an automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle.

**NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER**

(3) It is an affirmative defense to a prosecution under this section that the defendant:

- (a) ~~Received authorization to use the vehicle from an~~ agent of the owner where the agent had actual or apparent authority to authorize such use; or
- (b) Is a lien holder or legal owner of the propelled vehicle, or an authorized agent of the lien holder or legal owner, engaged in the lawful repossession of the propelled vehicle.

(4) For the purposes of this section, "owner" means the registered owner of the propelled vehicle or the unrecorded owner of the vehicle pending transfer of ownership; provided that if there is no registered owner of the propelled vehicle or unrecorded owner of the vehicle pending transfer of ownership, "owner" means the legal owner.

(5) Unauthorized control of a propelled vehicle is a class C felony.

(Emphases added.) The statute requires that the defendant "intentionally or knowingly exert[ed] unauthorized control" over someone else's vehicle. In my view, a defendant cannot intentionally or knowingly exert "unauthorized" control unless the defendant intended or knew that his or her use of the vehicle was without the owner's consent. Thus, I believe that under the most natural and common reading of the statutory language, proof that the defendant knew that his or her use of the vehicle was without the owner's consent is required.

Additional support for this interpretation of the UCPV statute comes from HRS § 702-207 (1993), which provides guidance on how to apply the mental state specified in an offense to its elements. HRS § 702-207 provides:

**§ 702-207 Specified state of mind applies to all elements.**  
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 creates a presumption that the "intentionally or

knowingly" mental state specified in HRS § 708-836 applies to both the requirement that the defendant exerted control over another's vehicle and the requirement that the defendant engaged in such act without the consent of the owner.

III.

A.

The legislative history of HRS § 708-836 clearly reflects that the Legislature amended the UCPV statute in 1996 to close a "loophole" in the statute that made it difficult to successfully prosecute defendants caught driving in stolen vehicles. Although the Legislature's purpose to close the loophole is clear, I am not convinced that the Legislature intended to go so far as to impose criminal liability where the defendant honestly (but mistakenly) believed that the person who gave the defendant consent was the vehicle's registered owner.

Prior to the 1996 legislative session, HRS § 708-836 did not contain a definition of the term "owner." However, HRS § 708-800 (1993), which defined terms for all statutes within HRS Chapter 708, defined "owner" in relevant part to mean "a person, other than the defendant, who has possession of or any other interest in, the property involved, even though that possession or interest is unlawful[.]" Under that definition of owner, a person in possession of a stolen car could conceivably qualify as its "owner" and thus qualify as a person who could consent to the defendant's use of the car. The version of HRS § 708-836 in effect at the start of the 1996 session also contained an affirmative defense for a defendant who could show that he or she "reasonably believed that the owner would have authorized the [defendant's] use [of the vehicle] had the owner known of it." HRS § 708-836 (1993) (emphasis added).

In 1996, the Legislature sought to close the perceived loophole created by the then-existing definition of "owner" and the affirmative defense. The Legislature enacted Act 195 which amended HRS § 708-836 by defining "owner" for purposes of the statute to mean "the registered owner of the propelled vehicle or the unrecorded owner of the vehicle pending transfer of ownership." 1996 Haw. Sess. Laws Act 195, § 2, at 448. Act 195 also eliminated the former affirmative defense and replaced it with affirmative defenses for a defendant receiving authorization to use the vehicle by an agent of the owner and for a defendant engaged in the lawful repossession of the vehicle. Id. at 447-48.<sup>4</sup>

The version of the bill that emerged from a conference committee to become Act 195 contained a preamble that explained the reasons for the Legislature's actions. The preamble referred to the large number of automobiles stolen in the state, particularly on Oahu, the dramatic increase in the car theft rates, and the significant economic losses to insurers and consumers. 1996 Haw. Sess. Laws Act 195, § 1, at 447. The preamble then discussed the problems with the then-existing law

---

<sup>4</sup> The new affirmative defenses enacted in 1996, which remain unchanged in the current UCPV statute, provide as follows:

(3) It is an affirmative defense to a prosecution under this section that the defendant:

- (a) Received authorization to use the vehicle from an agent of the owner where the agent had actual or apparent authority to authorize such use; or
- (b) Is a lien holder or legal owner of the propelled vehicle, or an authorized agent of the lien holder or legal owner, engaged in the lawful repossession of the propelled vehicle.

1996 Haw. Sess. Laws Act 195, § 2, at 447-48; HRS § 708-836(3) (Supp. 2006).

**NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER**

that the amendments to the UCPV statute sought to address:

Under the current unauthorized control of a propelled vehicle law, a defendant caught operating a stolen vehicle may escape conviction if he can prove by a preponderance of the evidence that he reasonably believed that the vehicle's owner would have authorized the use had the owner known of it. "Owner" is presently defined by the law as a person having possession of the property involved, even if that possession is unlawful.

Therefore, even if the police arrest someone driving a stolen vehicle, that person may escape conviction by stating that he or she received permission to use the vehicle from another person and that he or she was unaware that the vehicle had been stolen. Experienced car thieves are aware of this loophole and exploit it to their advantage, telling the police that a person known only to them by a first name and whose whereabouts are presently unknown, gave them permission to use the vehicle.

The purpose of this Act is to amend the affirmative defense provided in section 708-836(3), Hawaii Revised Statutes, and to amend the definition of "owner", for the purposes of this section, to mean the registered owner of the vehicle or the unrecorded registered owner of the vehicle pending transfer of ownership.

Id.<sup>5</sup>

In my view, the loophole closed by the 1996 amendments was one that had permitted a defendant to avoid conviction by claiming that he or she obtained permission to use the car from someone who possessed the car in circumstances where the

---

<sup>5</sup> The original version of the bill that would develop into Act 195 sought to amend HRS § 708-836 by defining "owner" for purposes of the statute as "the registered or the legal owner of the propelled vehicle" and by eliminating any affirmative defense. The preamble to the original bill, Senate Bill No. 2186, explained the purpose of the proposed amendments as follows:

The purpose of this Act is to require persons who borrow or use another person's vehicle to obtain express permission from the registered or legal owner of the vehicle or the lessee of the vehicle if the vehicle is leased. This will require the borrower of the vehicle to affirmatively ascertain through documentation, such as vehicle registration cards, which must be kept in the vehicle, and, in the case where the lender is unknown to the borrower, photo identification through driver's licenses, whether the person lending the vehicle is the registered or legal owner of the vehicle or the lessee of the vehicle.

This statement of purpose was not included in the preamble to the version of the bill that became Act 195.



defendant knew the person giving permission was not the car's owner. After the 1996 amendments, a defendant cannot rely on consent received from a person in possession of the car who the defendant knows is not the car's owner unless the defendant can affirmatively show that the person was the agent of the car's owner with actual or apparent authority to consent. I do not construe the 1996 amendments, however, as precluding a defendant from raising the defense that he or she obtained permission from someone who possessed the car that the defendant honestly believed was the car's owner.

B.

In the 1999 legislative session, Senate Bill No. 922 (S.B. No. 922) was introduced to amend the state of mind required for the UCPV offense to include a knowing and reckless state of mind. At that time, HRS § 708-836 (Supp. 1998) required proof that the defendant "intentionally exert[ed] unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent." The Senate Judiciary Committee report on S.B. No. 922 stated that under the then-existing UCPV statute, the prosecution may be unable to prove the offense if the defendant "claims that he thought he had permission from another person whom he believed was the owner or agent of the car owner." Sen. Stand. Comm. Rep. No. 887, in 1999 Senate Journal, at 1319. Although the committee recognized the difficulty the prosecution may have in proving cases in which this defense was raised, it was unwilling to lower the mental state required for the offense to recklessness. Id. The committee amended S.B. No. 922 by deleting the "reckless" state-of-mind provision so that S.B. No. 922, as revised, only added "knowingly" as a state of mind for the offense. Id. I read the Senate Judiciary Committee report

as meaning that the committee understood that under the amended bill, a defendant's claim that he or she had permission from another person who the defendant believed was the vehicle's owner remained as a potential defense and an obstacle to a successful prosecution.<sup>6</sup>

The Senate Judiciary Committee report on S.B. No. 922 stated as follows:

The purpose of this bill, as received by your Committee, is to amend the state of mind required for the offense of unauthorized control of propelled vehicle to include a knowing and reckless state of mind.

Your Committee finds that in unauthorized control of propelled vehicle cases the State must prove that the defendant intentionally exerted the unauthorized control over the vehicle. Thus, if a defendant claims that he thought he had permission from another person whom he believed was the owner or the agent of the car owner, the State may be unable to prove beyond a reasonable doubt that the defendant "intentionally" exerted unauthorized control of a propelled vehicle. Your Committee recognizes the difficulty the State may have in prosecuting such cases. However, your Committee believes that "recklessness" is a less culpable state of mind that does not rise to the same level as "intentionally" or "knowingly" and that a reckless violation should not be punished in the same manner as an intentional or knowing violation of the statute.

Testimony in support of this measure was submitted by the Department of the Prosecuting Attorney of the City and County of Honolulu and the Honolulu Police Department. Testimony in opposition to this measure was submitted by the Office of the Public Defender.

Upon further consideration, your Committee has amended this measure by deleting the "reckless" state of mind provision.

---

<sup>6</sup> It seems clear to me that inserting the reckless state of mind in the original Senate Bill No. 922 (S.B. No. 922) was directed at making it easier for the prosecution to refute the defendant's claim that the defendant had permission from another person who the defendant believed was the vehicle's owner. Including a reckless state of mind for the UCPV offense would make it easier to defeat such a claim because the defendant's belief that the person who consented was the vehicle's owner would not provide a defense if that belief was formed recklessly. However, the prosecution would only need to refute the claim that the defendant believed the person who consented was the vehicle's owner if the prosecution, under the then-existing statute, was required to prove that the defendant's intent was to act without the owner's consent.

**NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER**

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 922, as amended herein, and recommends that it pass Third Reading in the form attached hereto as S.B. No. 922, S.D. 1.

Id. (emphasis added).

The amended bill, Senate Bill No. 922, Senate Draft 1 (S.B. No. 922, S.D. 1), was passed by the Senate and referred to the House Committee on Judiciary and Hawaiian Affairs. Despite the absence of any further amendments to S.B. No. 922, S.D. 1, the House committee report stated that the bill, which now only added the "knowing" state of mind to the then-existing UCPV statute, would "address" the problem of a defendant claiming he thought he had permission from another person who the defendant believed was the owner or the agent of the owner. Hse. Stand. Comm. Rep. No. 1459, in 1999 House Journal, at 1599. The House committee report, however, did not elaborate on how including the "knowing" state of mind would address this problem. The House committee report stated as follows:

The purpose of this bill i[s] to amend the state of mind required for the offense of unauthorized control of propelled vehicle to include a knowing state of mind.

Your Committee received testimony in support of this bill from the Department of the Prosecuting Attorney for the City and County of Honolulu and the Honolulu Police Department. Comments were received from the Office of the Public Defender.

Your Committee finds that in the prosecution of a charge of unauthorized control of propelled vehicle the State must prove that the defendant intentionally exerted unauthorized control over the vehicle. Consequently, the State may be unable to prove guilt beyond a reasonable doubt when the defendant claims that he thought he had permission from another person whom he believed to be the owner or the agent of the automobile owner. The inclusion of the "knowing" state of mind to the offense would address this problem.

As affirmed by the record of votes of the members of your Committee on Judiciary and Hawaiian Affairs that is attached to this report, your Committee is in accord with the intent and

**NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER**

purpose of S.B. No. 922, S.D. 1, and recommends that it pass Second Reading and be placed on the calendar for Third Reading.

Id. (emphasis added). S.B. No. 922, S.D. 1, was reported out of the House Committee on Judiciary and Hawaiian Affairs without any amendments, was passed by the House, and signed into law as Act 11 by the Governor. 1999 Haw. Sess. Laws Act 11, at 11-12.

Given the apparent conflicting views expressed in the Senate and House committee reports on the effect of Act 11 (S.B. No. 922, S.D. 1) on the UCPV offense, and in the absence of an explanation of how adding the "knowing" state of mind would address the problem of the prosecution's potential inability to prove guilt where the defendant claims he thought he had permission from a person who the defendant believed was the owner, I maintain that HRS § 708-836 must be construed in accordance with its most natural reading. When construed in this fashion, proof that the defendant knew that his or her use of the vehicle was without the owner's consent is required and the defendant's claim that he or she mistakenly believed that the person who gave the defendant consent was the vehicle's owner is a viable defense.

IV.

Of course, the Legislature is free to define the UCPV offense to eliminate the need to prove the defendant's state of mind on whether the defendant lacked the owner's consent. For example, the statute could say:

A person commits the offense of unauthorized control of a propelled vehicle if the person intentionally or knowingly operates another's propelled vehicle and engages in such action without the owner's consent. Proof that the accused knew or intended that he or she lacked the consent of the vehicle's owner is not required, and as to this element, the prosecution need only prove that the owner, in fact, had not consented.

I do not believe, however, that as written, the current version of HRS § 708-836 makes the defendant's state of mind over whether he or she had the consent of the registered owner irrelevant.

V.

Under my reading of HRS § 708-836, Mainaupo's claim that he mistakenly believed that Doug, the person who gave him permission to use the car, was the owner of the car provides a potential defense to the UCPV charge. A defendant is entitled to an instruction on a defense or theory of defense having sufficient support in the evidence to warrant the jury's consideration, no matter how weak, inconclusive, or unsatisfactory the evidence may be. State v. Locquiao, 100 Hawai'i 195, 205, 58 P.3d 1242, 1252 (2002). Here, based on Mainaupo's testimony, there was sufficient evidence to warrant a mistake-of-fact instruction, and the trial court erred in refusing to give the instruction.

In Locquiao, the Hawai'i Supreme Court held that the trial court's erroneous failure to instruct on the mistake-of-fact defense was not harmless error even where the instruction on the material elements for the offense properly stated the requisite state of mind. Id. at 206-08, 58 P.3d at 1253-55. The court held:

[W]here a defendant has adduced evidence at trial supporting an instruction on the statutory defense of ignorance or mistake of fact, the trial court must, at the defendant's request, separately instruct as to the defense, notwithstanding that the trial court has also instructed regarding the state of mind requisite to the charged offense. We believe that to hold otherwise would render HRS § 702-218(1) nugatory.

Id. at 208, 58 P.3d at 1255. Because the trial court erred in failing to instruct on Mainaupo's mistake-of-fact defense, his conviction must be vacated pursuant to Locquiao. Id.

VI.

I also conclude that the trial court erred in instructing the jury that "a non-owner driver of a vehicle has a legal duty to obtain consent to operate the vehicle directly from the registered owner of the vehicle." The trial court's instruction comes almost verbatim from language in Palisbo, 93 Hawai'i at 353, 3 P.3d at 519. However, based on my reading of the UCPV statute, the trial court's instruction on the non-owner driver's duty was prejudicial and misleading because it improperly undermined Mainaupo's mistake-of-fact defense.

VII.

For the foregoing reasons, I would vacate Mainaupo's conviction and remand for a new trial. I therefore respectfully dissent.

*Craig H. Nakamura*