NO. 28304

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
KERRY N. SANDERS, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CRIMINAL NO. 04-1-2261)

SUMMARY DISPOSITION ORDER
(By: Recktenwald, C.J., Watanabe and Fujise, JJ.)

On November 15, 2004, the State of Hawai'i (State) charged Defendant-Appellant Kerry N. Sanders (Sanders) with "intentionally or knowingly caus[ing] the death of Jonathan Nunes," thereby committing Murder in the Second Degree in violation of Hawaii Revised Statutes (HRS) §§ 707-701.5 (1993) and 706-656 (1993 & Supp. 1996). The charge stemmed from an incident in which Sanders stabbed Nunes during a confrontation between the two men.

A jury found Sanders guilty of the included offense of Manslaughter, HRS § 707-702 (Supp. 2003). The Circuit Court of the First Circuit[1] (circuit court) sentenced Sanders to twenty years of imprisonment with credit for time served, and restitution to the Crime Victim Compensation Commission. Sanders now appeals from the Judgment of Conviction and Sentence entered by the circuit court on November 8, 2006.

On appeal, Sanders argues that "[t]he trial court erroneously refused to instruct the jury concerning Sanders'

---

[1] The Honorable Karl K. Sakamoto presided.

requested instruction no. 8[,]"[2] because "[a] defendant is entitled to an instruction on every defense or theory of defense having any support in the evidence . . . no matter how weak, inconclusive or unsatisfactory the evidence may be[,]" and "[t]here was evidence that Sanders did not act voluntarily to cause Jonathan's death."

After a careful review of the record and briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised, we resolve Sanders's point of error as follows:

Sanders presented sufficient evidence to be entitled to an instruction regarding the voluntariness of his actions, and accordingly the circuit court erred in not giving Sanders's requested instruction. HRS §§ 702-200 and -201 (1993); State v. Locquiao, 100 Hawai'i 195, 205, 58 P.3d 1242, 1252 (2002) ("This court has consistently held that a defendant is entitled to an instruction on every defense or theory of defense having any support in the evidence, provided such evidence would support the consideration of that issue by the jury, no matter how weak, inconclusive or unsatisfactory the evidence may be.") (citation and internal quotation marks omitted).

In his statement to police, which was admitted into evidence at trial, Sanders suggested at several points that he

---

[2] Sanders's requested instruction no. 8 provided as follows:

> In any prosecution it is a defense that the conduct alleged does not include a voluntary act. A "voluntary act" means a bodily movement performed consciously or habitually as the result of effort or determination of the defendant.
>
> The burden is on the prosecution to prove beyond a reasonable doubt that the conduct includes a voluntary act. If the prosecution does not meet its burden then you must find the defendant not guilty. If the prosecution has done so, then you must find that the "voluntary act" defense does not apply.

stabbed Nunes as a reflexive response to being punched in the side of the head by Nunes:

> [Sanders]: . . . I turn around, [Nunes] said something to me, and he just rush me. He was saying something to me, then he just rush -- rushed at me, and I just backed up. And after he hit me -- and I don't know how I had the knife, you know, 'cause my hands are down like this to my side like that.
>
> . . . .
>
> So I was holding -- I was holding it down to my side, and he -- and he rushed me, he swung at me. He hit my head, and my hand came -- my hand must've came up like this.
>
> . . . .
>
> Yeah. Hit just about the glasses right here. So I . . . I reach -- I come back like this, right, to keep 'em from hitting me, right, 'cause I was gonna -- I was on my way to go get Linda at this time to have her come upstairs 'cause I didn't want her -- I didn't want him to hurt her. You know what I mean? So I was like -- I was like Linda -- I was about to say, Linda, come on, let's go. He said something, he swings at me. Next thing I know, my hand goes up and I hear something like, Oh, shit. And then I just get Linda and I go upstairs, and I put the knife away . . . .
>
> . . . .
>
> Q [by Detective Anderson]: Is it possible that in the -- in the moment of hitting you in the head and you -- you had a -- just had a reflex action, and your hand just --
>
> [Sanders]: That might've happened.
>
> . . . .
>
> [Sanders]: That might've happened, but I know I didn't --
>
> Q: Not consciously --
>
> [Sanders]: -- consciously try to --
>
> Q: Reflex --
>
> [Sanders]: -- stab 'em or try to kill 'em.
>
> Q: But reflexively your hand -- and that knife was close enough to -- to poke into 'em when that happened?
>
> [Sanders]: Yeah, 'cause his stomach was almost touching me.[3]

---

[3] We note that in other portions of his statement, Sanders suggested that he acted in self-defense. Even if the defenses of no voluntary act and self-defense are inconsistent, Sanders was entitled to an instruction on both theories if the evidence supported it. State v. Lira, 70 Haw. 23, 29, 759 P.2d 869, 873 (1988).

A witness to the confrontation, Linda Ticman (Ticman), provided testimony that was consistent with Sanders's suggestion that his raising the knife was a "reflex action." Ticman testified that she saw Nunes punch Sanders four times on the left side of Sanders's head near the temple. After the second punch, she saw that Sanders was holding a knife. At the time of the third punch and fourth punch, Ticman saw "an arm go up," and thought it was Sanders's. She saw Sanders raise the knife with his arm extended straightforward, but did not see him swing the knife. Ticman testified that she did not see the stabbing, but heard Nunes yelling for help.

Sanders's statement, as corroborated by Ticman, was sufficient to raise the issue of whether Sanders's action in raising the knife was voluntary, or an involuntary reflex made in reaction to Sanders being struck in the head by Nunes. HRS § 702-201 (1993) defines a "voluntary act" as "a bodily movement performed consciously or habitually as the result of the effort or determination of the defendant." The commentary on HRS § 702-201 (1993) states, in part, that this definition

> is intended to exclude from the category of voluntary action such bodily movements as (a) reflex or convulsions, (b) bodily movements during unconsciousness or sleep, (c) conduct during hypnosis or resulting from hypnotic suggestion, and (d) any other bodily movement that is not a product of the effort and determination of the defendant, either conscious or habitual.

In essence, Sanders is suggesting that his arm involuntarily rose upwards when he was hit in the head by Nunes, and that, as a result, the knife stabbed Nunes. While that theory may be implausible, there was enough evidentiary support for it in the record to require that the court instruct the jury with regard to the theory. See Brown v. State, 955 S.W.2d 279, 280 (Tex. Crim. App. 1997) (because there was evidence that the discharge of a firearm by defendant was precipitated by another individual bumping into the defendant, it was reversible error to

deny the defendant a jury instruction on voluntariness); see also Locquiao, 100 Hawai'i at 201, 59 P.3d at 1248 (defendant entitled to an ignorance-or-mistake-of-fact instruction in a prosecution for promoting dangerous drugs and possessing drug paraphernalia when defendant testified that a man who he had never met before offered to demonstrate how to light a "glass material" object in the restroom of a poolhall).

In denying Sanders's requested instruction, the circuit court appeared to incorrectly conclude that, as a matter of law, a reflex action would be a voluntary act for the purposes of HRS § 702-201. The State had argued against giving the instruction on the following basis:

> And regarding Defense Requested Instruction No. 8 regarding voluntary act, the closest thing to any support on the record is during his statement a detective suggested that maybe it was reflexes. But a voluntary act includes a body movement performed consciously or habitually as a result of effort and determination of the defendant. So habitually would seem to include a reflex action. Thus, there is no support for the requested instruction, and it would suggest that the act was not voluntary.

The circuit court found that "[f]or the reasons set forth by the State, the Court will deny your request for submitted instructions." However, as we discuss above, that interpretation of the statute is inconsistent with the commentary to § 702-201, which provides that the definition of "voluntary act" is "intended to exclude from the category of voluntary action such bodily movements as . . . reflex or convulsions . . . ." When § 702-201 is read in light of this commentary, see HRS § 701-105 (1993), the circuit court's refusal to give Sanders's proposed jury instruction was erroneous.

The State suggests that the circuit court's error in failing to give the instruction was harmless because "the jury was obligated to find beyond a reasonable doubt each of the elements of the charged offense, or in this case, the included offense of manslaughter." The supreme court in Locquiao rejected

a similar argument made in the context of a failure to give an ignorance-or-mistake-of-fact instruction. 100 Hawai'i at 208, 58 P.3d at 1255 ("Inasmuch as the jury was not given the opportunity *expressly* and *separately* to consider Locquiao's defense of ignorance or mistake of fact at trial, 'there is a reasonable possibility that the circuit court's error may have contributed to Locquiao's conviction.'") (emphasis in original; brackets and citation omitted). The involuntary act defense presented here, like the ignorance-or-mistake-of-fact defense at issue in Locquiao, is a non-affirmative defense that the State must disprove beyond a reasonable doubt. HRS §§ 701-115(2)(b), (3) (1993) and 702-200 (1993); Locquiao, 100 Hawai'i at 206, 58 P.3d at 1253. Given the rationale underlying the court's analysis in Locquiao, 100 Hawai'i at 208, 58 P.3d at 1255 ("the legislature intended that a jury consider, separate and apart from the substantive elements, whether a defendant's mistaken belief should negate the requisite culpability for the charged offense"), we conclude that the circuit court's error in failing to give Sanders's proposed involuntary act instruction was not harmless beyond a reasonable doubt.

Accordingly, we vacate the Judgment of Conviction and Sentence entered by the circuit court on November 8, 2006 and remand this matter for a new trial.

DATED: Honolulu, Hawai'i, March 12, 2008.

On the briefs:

Keith S. Shigetomi
for Defendant-Appellant.

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Chief Judge

Associate Judge

Associate Judge