

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 29183

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant,  
Cross-Appellee, v.  
JOHN SIUFANUA, Defendant-Appellee,  
Cross-Appellant

K. HAMAKADO  
CLERK, APPELLATE COURTS  
STATE OF HAWAI'I

2009 OCT 30 AM 8:05

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 07-1-1100)

MEMORANDUM OPINION

(By: Nakamura, C.J., Watanabe, and Fujise, JJ.)

On May 2, 2008, the Circuit Court of the First Circuit (circuit court)<sup>1/</sup> entered an "Order Denying Defendant's Motion for Judgment of Acquittal and Granting Defendant's Motion for New Trial" (Order). Both Plaintiff-Appellant/Cross-Appellee State of Hawaii (State) and Defendant-Appellee/Cross-Appellant John Siufanua (Siufanua) appeal from the Order. The State appeals the portion of the Order that granted Siufanua's motion for a new trial. Siuafuna cross-appeals the portion of the Order that denied his motion for judgment of acquittal.

I.

The State charged Siufanua by complaint with first-degree burglary, in violation of Hawaii Revised Statutes (HRS) § 708-810(1)(c) (1993)<sup>2/</sup> (Count I), and first-degree robbery, in

---

<sup>1/</sup> The Honorable Dexter D. Del Rosario presided.

<sup>2/</sup> HRS § 708-810(1)(c) provides:

(1) A person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and:

. . . .

(c) The person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

violation of HRS § 708-840(1)(b)(ii) (Supp. 2008)<sup>3/</sup> (Count II). After a jury trial, Siufanua was found not guilty of the first-degree burglary charged in Count I and guilty of the first-degree robbery charged in Count II.

On November 16, 2007, Siufanua filed two motions: 1) a motion for judgment of acquittal on the first-degree robbery charged in Count II; and 2) a motion for a new trial on that count. The State opposed both motions. On May 2, 2008, the circuit court entered the Order. The circuit court concluded that there was sufficient credible evidence to support the jury's guilty verdict on Count II and accordingly denied Siufanua's motion for judgment of acquittal. On the other hand, the circuit court granted Siufanua's motion for a new trial, concluding that it "must" order a new trial because the jury's verdicts on the burglary and robbery counts were "irreconcilably inconsistent."

On appeal, the State asserts that the circuit court erred in granting Siufanua's motion for a new trial because the jury's verdicts were not irreconcilably inconsistent. On cross-appeal, Siufanua argues that the circuit court erred in denying his motion for judgment of acquittal because there was a fatal variance between the complaint and the evidence adduced at trial.

For the reasons discussed below, we affirm the circuit court's decision to grant a new trial, but for reasons different than cited and relied upon by the circuit court. We dismiss Siufanua's cross-appeal because we lack jurisdiction over it.

---

<sup>3/</sup> HRS § 708-840(1)(b)(ii) provides in relevant part:

(1) A person commits the offense of robbery in the first degree if, in the course of committing theft . . . :

(b) The person is armed with a dangerous instrument and:

. . . .

(ii) The person threatens the imminent use of force against the person of anyone present with intent to compel acquiescence to the taking of or escaping with the property[.]

II.

A.

The complaint alleged that Siufanua: 1) committed first-degree burglary by intentionally and unlawfully entering the residence of Dennis Ikaika (Ikaika) with intent to commit a crime against a person or property rights therein, and in reckless disregard of the risk that it was a dwelling (Count I); and 2) committed first-degree robbery by "threatening the imminent use of force against the person of Dennis Ikaika, a person who was present, with intent to compel acquiescence to the taking of or escaping with the property," while armed with a dangerous instrument and in the course of committing theft (Count II).

Ikaika testified at trial that on April 11, 2007, shortly after midnight, he was sleeping in his studio apartment. He had fallen asleep with the front door unlocked. Ikaika awoke to find two men<sup>4/</sup> in his apartment. One man stood near Ikaika swinging Ikaika's hammer, which had been sitting on a nearby chair. The man with the hammer asked Ikaika, "[Y]ou want me to whack you?" and also whether Ikaika wanted to be hit on the forehead with the hammer. The other man was holding a shovel.

Ikaika told the men, "What you guys doing in my apartment? Get out of here." The man with the hammer replied, "[S]hut up, we going to jack your apartment." The man with the hammer told the man with the shovel to "whack" Ikaika if he moved. The two men then rummaged through Ikaika's apartment. The man with the shovel took some DVDs and left the apartment; the man with the hammer knocked Ikaika's TV on the floor before leaving.

Ikaika testified that he ran out of his apartment and chased after the two men. Ikaika caught up to them a few blocks away by a traffic light. Ikaika told them, "[C]ome on, I'm not in my bed. I'm standing here now. Let's go." The two men were younger than Ikaika. Ikaika testified that the man who had the

---

<sup>4/</sup> In his testimony, Ikaika referred to the intruders as "gentlemen," "young gentlemen," and "boys." For the sake of convenience, we will use the terms "men" and "man" where referring to the intruders.

hammer in Ikaika's apartment was still holding the hammer, but the other man no longer was in possession of the shovel. Ikaika noticed the DVDs on the ground. When the man who previously had the shovel attempted to pick up the DVDs, Ikaika pushed that man to the ground.

Security guards for a housing project approached Ikaika and the two men and asked them what was going on. A security guard wrestled with the man with the hammer and took it away from him. The two men that Ikaika chased from his apartment ran away. Ikaika wanted to follow them, but the security guards told Ikaika to wait because the police had been called.

One of the security guards, Ropeti Ale (Ale), testified at trial that on the night of the incident, he saw an older man chasing two younger men. Ale and two other security guards approached the three men. Ale saw that one of the younger men was holding a hammer in his right hand. Ale told the man with the hammer, whom Ale later identified as Siufanua, to put the hammer away, and Ale began to reach for the hammer. According to Ale, Siufanua pulled away from Ale, causing Ale to become afraid that Siufanua might hit Ale with the hammer. Ale was shown a hammer at trial and identified it as the same hammer with which Siufanua had threatened Ale and the older man. Ale's partner reached over and grabbed the hammer away from Siufanua. Ale then told everyone to wait for the police, who were on their way. After hearing this, Siufanua and his companion ran away.

At trial, Ale made an in-court identification of Siufanua as the person with the hammer Ale had encountered. Ale testified that he had seen Siufanua four or five times in the area of the housing project and had also seen Siufanua in the parking lot about ten to thirty minutes before the incident on April 11, 2007. Ale stated that there was no doubt in his mind that Siufanua was the person Ale saw holding the hammer in the early morning on April 11, 2007. Ale also testified that he positively identified Siufanua as the man with the hammer from a six-person photographic lineup presented to him by the police on May 16, 2007, and at a preliminary hearing held on June 8, 2007.

Ikaika testified that on April 26, 2007, he was shown a photographic lineup by the police. Ikaika selected photograph number 5, which was a photograph of Siufanua. Ikaika testified that he "wasn't hundred percent sure" that the photograph he selected depicted the person who confronted him with the hammer, but Ikaika stated that the photograph he selected "went look like the person." Ikaika further testified that he was unable to identify Siufanua as the man with the hammer during the June 8, 2007, preliminary hearing. Ikaika did not recognize Siufanua at trial, and Ikaika stated that he had never seen Siufanua before in his life.

After the State rested, the defense presented evidence in the form of the stipulated testimony of Officer Rodney Uganiza, which defense counsel read to the jury. The stipulated testimony read to the jury including the following:

If called to testify, Officer Rodney Uganiza would testify that on April 11th, 2007, he took a verbal statement from Ropeti Ale . . . Ale stated that he saw Ikaika push one of the males, a Black male, onto the ground. Ale stated that he then noticed the other male, later known to be Pepe Siufanua,<sup>5/</sup> holding a hammer in his right hand. [Ale] stated that he then proceeded to grab the hammer and asked [Siufanua] to put it down, but [Siufanua] turned around and acted as if he was to take a swing when another security officer grabbed the hammer. Ale stated that as they were wrestling, CDs were dropping from one of the males. Ale stated that the two males then ran away.

No limitations were placed on the jurors' consideration of the stipulated testimony.

B.

The circuit court instructed the jury on the material elements for first-degree burglary and first-degree robbery. The circuit court's burglary instruction stated:

In Count I of the complaint, the defendant, John Siufanua, is charged with the offense of burglary in the first degree.

A person commits the offense of burglary in the first degree if he intentionally enters a building unlawfully, with intent to commit therein a crime against a person or against property rights, and he recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

---

<sup>5/</sup> Ale identified Siufanua at trial as "Pepe Siufanua," and the complaint listed "Pepe" as an "also known as" for Siufanua.

There are four material elements of the offense of Burglary in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These four elements are:

1. That, on or about April 11, 2007, on the island of Oahu, the defendant intentionally entered a building, the residence of Dennis Ikaika situated at . . . , unlawfully; and

2. That, when the defendant unlawfully entered the building, the defendant, at that time, had the intent to commit therein a crime against a person or against property rights; and

3. That the defendant recklessly disregarded the risk that the building situated at . . . was the dwelling of another; and

4. That the building was a dwelling of another.

(Emphasis added.)

The circuit court's robbery instruction stated:

In Count II of the complaint, the defendant, John Siufanua, is charged with the offense of robbery in the first degree.

A person commits the offense of robbery in the first degree if, in the course of committing theft, he is armed with a dangerous instrument, and he threatens the imminent use of force against the person of anyone who is present, with intent to compel acquiescence to the taking of or escaping with the property.

There are three material elements of the offense of robbery in the first degree, each of which the prosecution must prove beyond a reasonable doubt.

These three elements are:

1. That, on or about April 11, 2007, on the island of Oahu, the defendant was in the course of committing theft; and

2. That, while doing so, the defendant was armed with a dangerous instrument; and

3. That, while doing so, the defendant threatened the imminent use of force against anyone who is present[,] with intent to compel acquiescence to the taking of or escaping with the property.

A person commits theft if he obtains or exerts unauthorized control over the property of another with intent to deprive the person of the property.

An act shall be deemed in the course of committing a theft, if it occurs in an attempt to commit theft, in the

commission of theft, or in the flight after the attempt or commission.

(Emphasis added.)

The jury found Siufanua not guilty of the first-degree burglary charged in Count I and guilty of the first-degree robbery charged in Count II.

III.

A.

The State argues that the circuit court erred in granting Siufanua's motion for a new trial. In particular, the State contends that the circuit court's basis for granting the motion--that the jury's not guilty verdict on the burglary charge was "irreconcilably inconsistent" with the jury's guilty verdict on the robbery charge--was erroneous.

"As a general proposition, inconsistent verdicts are not per se grounds for reversal." Briones v. State, 74 Haw. 442, 474, 848 P.2d 966, 981 (1993) (Levinson, J., concurring) (internal quotation marks and brackets omitted) (quoting State v. Liuafi, 1 Haw. App. 625, 643, 623 P.2d 1271, 1282 (1981)). In his concurring opinion in Briones, Justice Levinson cited numerous authorities in support of this general proposition, including United States v. Powell, 469 U.S. 57 (1984).

In Powell, the United States Supreme Court reaffirmed the rule it had previously announced in Dunn v. United States, 284 U.S. 390 (1932), that "a criminal defendant convicted by a jury on one count could not attack that conviction because it was inconsistent with the jury's verdict of acquittal on another count." Powell, 469 U.S. at 58. The Court explained in detail the rationale supporting this rule as follows:

As the Dunn Court noted, where truly inconsistent verdicts have been reached, "[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." Dunn, supra, 284 U.S., at 393, 52 S.Ct., at 190. The rule that the defendant may not upset such a verdict embodies a prudent acknowledgment of a number of factors. First, as the above quote suggests, inconsistent verdicts--even verdicts that acquit on a predicate offense while convicting on the compound offense--should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached

its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause. See Green v. United States, 355 U.S. 184, 188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957); Kepner v. United States, 195 U.S. 100, 130, 133, 24 S.Ct. 797, 804, 805, 49 L.Ed. 114 (1904).

Inconsistent verdicts therefore present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course. Harris v. Rivera, supra, indicates that nothing in the Constitution would require such a protection, and we therefore address the problem only under our supervisory powers over the federal criminal process. For us, the possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest. This possibility is a premise of Dunn's alternative rationale--that such inconsistencies often are a product of jury lenity. Thus, Dunn has been explained by both courts and commentators as a recognition of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch. See, e.g., United States v. Maybury, 274 F.2d 899, 902 (CA2 1960) (Friendly, J.); Bickel, Judge and Jury-Inconsistent Verdicts in the Federal Courts, 63 Harv. L. Rev. 649, 652 (1950). Cf. Duncan v. Louisiana, 391 U.S. 145, 155-156, 88 S.Ct. 1444, 1450-1451, 20 L.Ed.2d 491 (1968).

The burden of the exercise of lenity falls only on the Government, and it has been suggested that such an alternative should be available for the difficult cases where the jury wishes to avoid an all-or-nothing verdict. See Bickel, supra, at 652. Such an act is, as the Dunn Court recognized, an "assumption of a power which [the jury has] no right to exercise," but the illegality alone does not mean that such a collective judgment should be subject to review. The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable.

We also reject, as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them. Such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake. Jurors, of course, take an oath to follow the law as charged, and they are expected to follow it. See Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). To this end trials generally begin with voir dire, by judge or counsel, seeking to identify those jurors who for whatever reason may be unwilling or unable to follow the law and render an impartial verdict on the facts and the

evidence. But with few exceptions, see McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984); Smith v. Phillips, 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982), once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. Courts have always resisted inquiring into a jury's thought processes, see McDonald v. Pless, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915); Fed. Rule Evid. 606(b) (stating that jurors are generally incompetent to testify concerning jury deliberations); through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.

Finally, we note that a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. See Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); Fed. Rule Crim.Proc. 29(a); cf. Jackson v. Virginia, 443 U.S. 307, 316, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). This review should be independent of the jury's determination that evidence on another count was insufficient. The Government must convince the jury with its proof, and must also satisfy the courts that given this proof the jury could rationally have reached a verdict of guilty beyond a reasonable doubt. We do not believe that further safeguards against jury irrationality are necessary.

Id. at 64-67 (emphases added) (footnote omitted; ellipsis points and brackets in original).

In the context of civil cases, the Hawai'i Supreme Court has stated that a conflict in the jury's answers to questions in a special verdict will warrant a new trial only if the answers given are irreconcilably inconsistent. Shanghai Investment Co. v. Alteka Co., 92 Hawai'i 482, 496-97, 993 P.2d 516, 530-31 (2000). In Briones, a criminal case, the Hawai'i Supreme Court held that a new trial was required when the jury entered guilty verdicts on counts that required proof of mutually exclusive states of mind. 74 Haw. at 453-59, 468-69, 848 P.2d at 972-75, 979. Briones, however, was based on HRS § 701-109(1)(c) (1993), which provides, in relevant part, that a defendant may not be convicted of more than one offense if "inconsistent

findings of fact are required to establish the commission of the offenses[.]"<sup>6/</sup>

The parties have not cited, and we have not found, a Hawai'i case that addresses the situation presented here: An attack by a criminal defendant on a jury's general guilty verdict on one count based on a claim that the guilty verdict is inconsistent with the jury's acquittal on another count. However, we need not decide whether inconsistent verdicts in this situation require setting aside the guilty verdict and the grant of a new trial because we agree with the State's argument that the verdicts in this case were not irreconcilably inconsistent.

B.

The circuit court cited the civil decision in Shanghai Investment in support of its decision to grant Siufanua's motion for a new trial. In Shanghai Investment, the Hawai'i Supreme Court stated:

a conflict in the jury's answers to questions in a special verdict will warrant a new trial only if those answers are irreconcilably inconsistent, and the verdict will not be disturbed if the answers can be reconciled under any theory. When faced with a claim that the verdicts are inconsistent, the court must search for a reasonable way to read the verdicts as expressing a coherent view of the case, and must exhaust this effort before it is free to dismiss the jury's verdict and remand the case for a new trial.

Shanghai Investment, 92 Hawai'i at 496-97, 993 P.2d at 530-31 (brackets and ellipsis points omitted) (quoting Carr v. Strode, 79 Hawai'i 475, 489, 904 P.2d 489, 503 (1995)). "The consistency of the jury's verdicts must be considered in light of the judge's instructions to the jury." Carr, 79 Hawai'i at 489, 904 P.2d at

---

<sup>6/</sup> HRS § 701-109(1)(c) states:

(1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:

. . . .

(c) Inconsistent findings of fact are required to establish the commission of the offenses[.]

503 (quoting Toner v. Lederle Laboratories, 828 F.2d 510, 512 (9th Cir. 1987)).

In granting Siufanua's motion for a new trial, the circuit court concluded the because the State prosecuted the case on the theory that the robbery took place inside Ikaika's apartment, it was bound by principles of estoppel to that theory. The circuit court further concluded that the only issue for the jury to decide with respect to the burglary charge was whether Siufanua was the male with the hammer who entered Ikaika's apartment. The circuit court interpreted the jury's verdict of not guilty on the burglary charge as meaning that the jury must have found that Siufanua was not the person in Ikaika's apartment. The circuit court, however, concluded that in order to find Siufanua guilty of the robbery count, the jury was required to find that Siufanua was the person with the hammer in Ikaika's apartment. Based on this analysis, the circuit court concluded that the verdicts were irreconcilably inconsistent and as a result, it must set aside the guilty verdict. The relevant conclusions of the circuit court are as follows:

15. Thus, in order to find [Siufanua] guilty of robbery in the first degree, the jury was required to find beyond a reasonable doubt that [Siufanua] committed a theft inside Ikaika's apartment.
16. To find [Siufanua] not guilty of burglary in the first degree, however, means that the prosecution did not prove that [Siufanua] was the male with the hammer inside Ikaika's apartment beyond a reasonable doubt. This is so because, as to the offense of Burglary in the First Degree, the only issue for the jury to decide was whether [Siufanua] was the male with the hammer who entered Ikaika's apartment.
17. It is inconsistent for the jury to find that [Siufanua] was not in Ikaika's apartment as to the offense of Burglary in the First Degree but was in Ikaika's apartment as to the offense of Robbery in the First Degree. The Court finds that there is no reasonable way to read the verdicts as expressing a coherent view of the case in light of the prosecution's evidence and arguments presented at trial.
18. Thus, the jury's verdict is irreconcilably inconsistent, and as a result, this Court must set aside the jury's verdict and grant [Siufanua's] Motion for a New Trial.

We conclude that the circuit court erred in its analysis. Contrary to the circuit court's analysis, whether Siufanua was the male with the hammer who entered Ikaika's apartment was not the only issue for the jury to decide with respect to the burglary count. The jury was instructed that in order to find Siufanua guilty of first-degree burglary, it had to find beyond a reasonable doubt that Siufanua intentionally entered Ikaika's residence unlawfully and that at the time of the unlawful entry, Siufanua "had the intent to commit therein a crime against a person or against property rights."

The State argues that given the jury instructions, the jury could have found that Siufanua was the person with the hammer inside Ikaika's apartment, but nevertheless could have acquitted him of the burglary count based on the jury's belief that the State failed to prove that Siufanua had the intent to commit in Ikaika's apartment a crime against a person or property rights at the time Siufanua entered the apartment.<sup>2/</sup> Therefore, the jury's verdicts were not irreconcilably inconsistent.

We agree with the State's argument. Ikaika testified that the two men were already in his apartment when he awoke and first noticed them. Thus, there was no direct evidence presented on how the man with the hammer obtained entry into the apartment or what his state of mind was at the time of entry. Given the absence of direct evidence, the jury could have found that

---

<sup>2/</sup> In response to Siufanua's motions for judgment of acquittal and for new trial, the Deputy Prosecuting Attorney (DPA) represented that he had spoken to several jurors, including the foreperson, after the trial, and the DPA related what the jurors had told the DPA in explaining why the jury had acquitted Siufanua of burglary and convicted him of robbery. The circuit court ruled that it was barred from considering the DPA's representations concerning what the jurors had told the DPA about their deliberations under Hawaii Rules of Evidence (HRE) Rule 606 (1993). HRE Rule 606(b) provides:

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. Nor may the juror's affidavit or evidence of any statement by the juror indicating an effect of this kind be received.

The circuit court was correct in refusing to consider the DPA's representations regarding what the jurors had told the DPA, and we likewise refuse to consider those representations in rendering our decision on appeal.

although Siufanua was the person with the hammer in Ikaika's apartment, the State failed to prove that at the time of Siufanua's unlawful entry into the apartment, Siufanua had the intent to commit a crime against a person or property rights therein.

Siufanua asserts that under a 2006 statutory amendment, which was in effect at the time of the charged burglary, "[a] person engages in conduct 'with intent to commit therein a crime against a person or against property rights' if the person formed the intent to commit within the building a crime against a person or property rights before, during, or after unlawful entry into the building." HRS § 708-812.5 (Supp. 2008). Siufanua argues that pursuant to HRS § 708-812.5, the first-degree burglary offense does not require proof that the defendant formed the intent to commit a crime against a person or property rights at the time of the unlawful entry. He therefore contends that we should reject the State's theory that the jury could have acquitted Siufanua of burglary because it found the State failed to prove that Siufanua had the intent to commit a crime against a person or property rights at the time he entered Ikaika's residence.

We are not persuaded by Siufanua's arguments. As previously noted, the consistency of the jury's verdicts must be determined in light of the instructions given to the jury. Carr, 79 Hawai'i at 489, 904 P.2d at 503. The jury was not instructed on the law as set forth in HRS § 708-812.5. Siufanua provides no logical reason why we should evaluate whether a jury's verdicts were inconsistent based on laws or legal standards that were not given to the jury. We decline to do so and instead evaluate whether the jury's verdicts were irreconcilably inconsistent based on the laws and legal standards that the jury was instructed to apply.

C.

Siufanua argues that the jury instructions were erroneous because they allowed the jury to convict Siufanua of robbery based on a theory not alleged in the complaint. We conclude that the jury instructions were erroneous because they

expanded the possible basis for conviction beyond that alleged in Count II and that the erroneous instructions require a new trial. Therefore, although we disagree with the circuit court grant of a new trial on the ground of inconsistent verdicts, we nevertheless affirm its decision to grant a new trial. State v. Taniguchi, 72 Haw. 235, 239, 815 P.2d 24, 26 (1991) ("[W]here the [trial court's] decision . . . is correct it must be affirmed by the appellate court even though the [trial court] gave the wrong reason for its action.").

Count II of the complaint charged Siufanua with committing robbery by "threaten[ing] the imminent use of force against the person of Dennis Ikaika, . . . with intent to compel acquiescence to the taking of or escaping with the property." The circuit court's jury instructions, however, expanded the possible basis for conviction beyond the threatened use of force against Ikaika by describing this element as requiring proof that Siufanua "threaten[ed] the imminent use of force against anyone who is present, with intent to compel acquiescence to the taking of or escaping with the property."

In the typical case, where the trial evidence only shows that one person was threatened, this type of discrepancy between the charge and the jury instructions is immaterial. In this case, however, the State presented evidence that Siufanua not only threatened Ikaika, but also threatened Ale when Siufanua was attempting to escape with the stolen property. Moreover, in closing argument, the prosecutor stated:

Mr. Ale remembers this incident because it was [Siufanua] who was carrying the hammer. And Mr. Ale testified that he tried to take that hammer away from [Siufanua], and [Siufanua] jerked back and threatened Mr. Ale. When somebody threatens to whack you with a hammer, you remember. You may not know his name, but you remember and recognize his face.

Under the particular facts of this case, because of the erroneous jury instructions, the jury may have found Siufanua guilty of robbery based on a threat against Ale rather than a threat against Ikaika. We conclude that there is a reasonable possibility that the erroneous jury instructions may have contributed to Siufanua's conviction. Accordingly, we affirm the

circuit court's grant of a new trial, and we remand the case for further proceedings consistent with this Memorandum Opinion.

IV.

We lack jurisdiction over Siufanua's cross-appeal which challenges the circuit court's denial of Siufanua's motion for judgment of acquittal. "The right to an appeal is strictly statutory." State v. Ontiveros, 82 Hawai'i 446, 449, 923 P.2d 388, 391 (1996). HRS § 641-11 (Supp. 2008) authorizes a criminal defendant such as Siufanua to appeal from the "judgment of a circuit court in a criminal matter." HRS § 641-11 further provides that "[t]he sentence of the court in a criminal case shall be the judgment." Siufanua has not been sentenced in this case and thus he cannot appeal pursuant to HRS § 641-11.

The circuit court's denial of Siufanua's motion for judgment of acquittal is an interlocutory order. To immediately appeal an interlocutory order, Siufanua was required to obtain the circuit court's certification permitting the appeal. HRS § 641-17 (Supp. 2008). This he failed to do. Accordingly, we lack jurisdiction over Siufanua's cross-appeal.

V.

We affirm the Order to the extent that it grants Siufanua's motion for a new trial, but for reasons different than cited and relied upon by the circuit court. We dismiss Siufanua's cross-appeal because we lack jurisdiction over it.

DATED: Honolulu, Hawai'i, October 30, 2009.

On the briefs:

Stephen K. Tsushima,  
Deputy Prosecuting Attorney,  
City & County of Honolulu,  
for Plaintiff-Appellant,  
Cross-Appellee.

Karen T. Nakasone,  
Deputy Public Defender,  
for Defendant-Appellee, Cross-  
Appellant.

*Craig H. Nakamura*  
Chief Judge

*Corinne K. Wetanaka*  
Associate Judge

*Aunwa O. Fujita*  
Associate Judge