

*** NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER ***

NO. 26499

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,
vs.
RUDY VINIGAS, Defendant-Appellant.

NORIMA T. YARA
CLERK OF APPELLATE COURTS
STATE OF HAWAI'I

2006 NOV 28 AM 11:05

FILED

APPEAL FROM THE FIRST CIRCUIT COURT
(Crim. No. 03-1-0329)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.,
and Acoba, J., dissenting)

The defendant-appellant Rudy Vinigas appeals from the March 9, 2004 judgment of the circuit court of the first circuit, the Honorable Sandra A. Simms presiding, convicting him of and sentencing him for assault in the first degree in violation of Hawai'i Revised Statutes (HRS) § 707-710(1) (1993) (a lesser included offense within the original charge, which was attempted murder in the second degree in violation of HRS §§ 705-500 and 707-701.5(1) (1993)).

On appeal, Vinigas contends that the circuit court erred in: (1) advising the jury, in response to its communication during deliberation, that it could not find him guilty of assault in the third degree in conjunction with "serious bodily injury"; and (2) refusing his proposed jury instructions regarding (a) the lesser included offense of assault in the second degree and (b) the defense of "protective force."

Upon carefully reviewing the record and the briefs and having given due consideration to the arguments advanced and the issues raised, we affirm the circuit court's March 9, 2004

judgment for the following reasons:

(1) We detect no legally significant difference between the two versions of the self-defense instruction. Notwithstanding the fact that it nearly tracks the language of HRS § 703-304(3) (Supp. 2001), the struck language ("A person employing protective force may estimate the necessity thereof under the circumstances as he reasonably believed them to be when the force is used without retreating.") merely echoes the principle that the jury must gauge the necessity of protective force from the point of view of a reasonable person under the instant circumstances, which was already conveyed to the jury through the earlier admonition that "[t]he reasonableness of the defendant's belief . . . shall be determined from . . . the defendant's position under the circumstances." The repetition for which Vinigas campaigned might have imparted a trace of additional clarity; nevertheless, we believe that the instruction given was not "prejudicially insufficient, erroneous, inconsistent, or misleading," see State v. Gonsalves, 108 Hawai'i 289, 292, 119 P.3d 597, 600 (2005) (internal quotation signals omitted), and we must presume that the jurors heeded all instructions, e.g., State v. Haanio, 94 Hawai'i 405, 415, 16 P.3d 246, 256 (2001), and accorded all of the instructions equal emphasis regardless of the number of times they were repeated, see Court's General Instruction No. 1 ("Do not give greater emphasis to any . . . sentence . . . simply because it is repeated in these instructions.").

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(2) Inasmuch as the jury convicted Vinigas of the greater offense of assault in the first degree, any error by the circuit court in refusing instructions regarding lesser included offenses -- which we need not reach in the present matter -- was harmless. See Haanio, 94 Hawai'i at 415-16, 16 P.3d at 256-57 (quoting State v. Holbron, 80 Hawai'i 27, 47, 904 P.2d 912, 932 (1995)). Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, November 28, 2006.

On the briefs:

Stephen K. Tsushima,
Deputy Prosecuting Attorney,
for the plaintiff-appellee
State of Hawai'i

Salina Kanai Althof,
Deputy Public Defender,
for the defendant-appellant
Rudy Vinigas

