NO. 26732

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

CHRISTOPHER AKI, Defendant-Appellant.



APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 02-1-2753)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ. and Acoba, J., concurring in the result only)

Defendant-Appellant Christopher Aki (Aki) appeals from the judgment and sentence of the Circuit Court of the First Circuit[1] (circuit court) filed on July 2, 2004. At trial, Aki was found guilty of manslaughter under Hawai'i Revised Statues (HRS) § 707-702 (Supp. 1996).[2]

On appeal, Aki raises the following nine points of error:

(1) The circuit court erred in denying his June 30, 2003 motion to suppress when it wrongly concluded that:

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[1] The Honorable Virginia Lea Crandall presided over Aki's judgment and sentence, as well as the denial of Aki's motion to suppress (see infra).

[2] HRS § 707-702(1)(a) (Supp. 1996), which was in effect at the time of the victim's death, provides in pertinent part:

(1) A person commits the offense of manslaughter if:

(a) He recklessly causes the death of another person[.]

. . . .

(3) Manslaughter is a class A felony.

The above-quoted text did not change in the 2003 amendment to this statute.

(a) Aki did not need to be informed of his rights to assistance of counsel and against self-incrimination pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), during his initial interview with the Honolulu Police Department (HPD) at approximately 10:00 A.M. on December 13, 2002;

(b) Aki validly waived his right to counsel during his second, "Mirandized," interview with HPD taking place at approximately 6:00 P.M. on December 13, 2002; and

(c) all of Aki's statements made following his initial police interview were not suppressible as "fruit of the poisonous tree";

(2) The circuit court committed reversible error in excluding "double hearsay" statements from a proposed defense witness, Eldefonso (Pancho) Cacatian, who stated during a March 12, 2004 interview with investigators from the Office of the Public Defender, that his brother, Dennis Cacatian, admitted to Pancho that he killed the victim, Kahealani Indreginal (Kahealani). These hearsay-within-hearsay statements were admissible under Hawai'i Rules of Evidence (HRE) Rules 803(b)(24) (Supp. 2002),[3] 804(b)(3) and (8) (Supp. 2002),[4] the sixth

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[3] HRE Rule 803(b)(24) provides (italics in original):

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(continued...)

amendment to the United States Constitution ("sixth amendment"),[5]

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[3](...continued)

(24) *Other Exceptions.* A statement not specifically covered by any of the exceptions in this paragraph (b) but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

[4] HRE Rules 804(b)(3) and (8) provide (italics in original):

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement;

. . . .

(8) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

[5] The Sixth amendment of the U.S. Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to
(continued...)

and Haw. Const. art. I, § 14;[6]

(3) The circuit court improperly excluded as untrustworthy statements by Pancho during an April 24, 2004 HPD interview with Detective Sheryl Sunia regarding (a) a firearm and pocketknife possessed by Dennis Cacatian and (b) Dennis's "sickness" involving "girls", because such statements were admissible under HRE Rules 803(b)(24) and 804(b)(8), the sixth amendment, and Haw. Const. art. I, § 14;[7]

(4) The circuit court abused its discretion in denying Aki's request to have Dennis Cacatian "invoke his [Fifth] Amendment right against self-incrimination in the presence of the

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[5](...continued)
a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

[6] Haw. Const. art. I, § 14 provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, or of such other district to which the prosecution may be removed with the consent of the accused; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against the accused, provided that the legislature may provide by law for the inadmissibility of privileged confidential communications between an alleged crime victim and the alleged crime victim's physician, psychologist, counselor or licensed mental health professional; to have compulsory process for obtaining witnesses in the accused's favor; and to have the assistance of counsel for the accused's defense. Juries, where the crime charged is serious, shall consist of twelve persons. The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment.

[7] Aki does not state exactly how the sixth amendment and Art. I, § 14 of the Hawai'i Constitution affect the admissibility of his proffered evidence; for example, he does not quote the supposedly pertinent language therefrom either in his points of error or in the argument section of his brief.

jury," because HRE Rule 513 (1993)[8] "did not forbid such a practice" in this situation;

(5) The circuit court erred in refusing Aki's proposed jury instruction that Dennis Cacatian was called to testify as a witness, "invoked his right not to answer questions[,]" and "may not be compelled to give testimony that might be self-incriminating[,]" such that "the jury will not be hearing from the witness";

(6) The circuit court's jury instruction as to the availability of Dennis Cacatian,[9] stating that Dennis was "not available to be called as a witness by either side" and that "[t]he jury may not draw any inference from [his] non-appearance as a witness[,]" "was error, because it was prejudicially insufficient[]";

(7) The circuit court plainly erred in issuing its jury instruction defining the offense of "[r]eckless [m]anslaughter by omission[,]" because (a) the jury should have been provided with an interrogatory to determine whether it found reckless manslaughter either by "commission" or "omission," and

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[8] HRE Rule 513 provides in pertinent part:

> **(a) Comment or Inference Not Permitted.** The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
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> **(b) Claiming Privilege Without Knowledge of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(Underline emphases added.) (Boldface emphases in original.)

[9] See Point of Error No. 4 supra.

(b) "a specific finding of omission would have limited Aki's penalty to that of a petty misdemeanor under HRS § 663-1.6(a) [(1993)]";[10]

(8) The circuit court plainly erred by issuing the reckless-manslaughter-by-omission instruction "because it permitted a finding of guilt based on reckless conduct, where HRS § 663-1.6(a) requires knowledge, thereby violating HRS § 702-207 [(1993)] and Aki's right to constitutional due process[]";[11] and

(9) "The court's instruction defining [r]eckless [m]anslaughter by omission was plain error, because it permitted a finding of guilt based on the reckless failure to attempt to obtain aid, and State v. Holbron[, 80 Hawai'i 27, 904 P.2d 912 (1995)][,] clearly states that there can be no crime of reckless attempt."

In its cross-appeal, Plaintiff-Appellee/Cross-Appellant State of Hawai'i solely appeals from the circuit court's issued jury instruction No. 4, concerning potential defense witness

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[10] HRS § 663-1.6(a), Hawaii's "Good Samaritan" law, imposes a "duty to assist" upon the general public in certain situations, and provides that

> [a]ny person at the scene of a crime who knows that a victim of the crime is suffering from serious physical harm shall obtain or attempt to obtain aid from law enforcement or medical personnel if the person can do so without danger or peril to any person. Any person who violates this subsection is guilty of a petty misdemeanor.

[11] HRS § 702-207 provides:

> 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.

Dennis Cacatian, who immediately invoked his constitutional right against self-incrimination outside of the presence of the jury. The instruction reads, as noted supra: "[t]he [c]ourt has determined that Dennis Cacatian is not available to be called as a witness by either side in this case. The jury may not draw any inference from [his] non-appearance as a witness."

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold as follows:

(1) The circuit court properly denied Aki's motion to suppress. First, after careful review of the totality of the circumstances, we hold that while Aki was subjected to "interrogation" at the time of his first HPD interview on the morning of December 13, 2002, the "interrogation" was not "custodial," such that Miranda warnings were therefore not required. See State v. Ah Loo, 94 Hawai'i 207, 210, 10 P.3d 728, 731 (2000). More specifically, with respect to the issue of "custody," while the questions of the police were undisputedly sustained in nature, they were not coercive. See State v. Ketchum, 97 Hawai'i 107, 126, 34 P.3d 1006, 1025 (2001). Upon sedulous examination of the record, we hold that substantial evidence existed to support the circuit court's findings of fact that no coercive questioning took place, and we are not left with a definite and firm conviction that a mistake has been made. State v. Edwards, 96 Hawai'i 224, 231, 30 P.3d 238, 245 (2001) (finding of fact is not clearly erroneous if there is substantial evidence to support it).

Second, Aki cannot now assert that he invalidly waived his right to counsel during his second police interview on the evening of December 13, 2002, because:

(a) this argument is raised for the first time on appeal (State v. Kotis, 91 Hawai'i 319, 344, 984 P.2d 78, 103 (1999) ("[i]t is . . . . established that an issue raised for the first time on appeal will not be considered by the reviewing court[]" (emphasis added))); and

(b) there is no properly asserted point of error as foundation for the argument, in violation of Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (2004),[12] inasmuch as (i) the actual assertion of error appears in a heading rather than the main text of the opening brief, and (ii) the "assertion of error" within the heading is devoid of any reference to the challenged conclusion of law upon which the error is premised.

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[12] HRAP Rule 28(b)(4) (2004), the version in effect at the time Aki's opening brief was filed, provides in pertinent part:

> (b) *Opening brief.* . . . . the appellate shall file an opening brief, containing . . . .
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> . . . .
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> (4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency.
>
> . . . .
>
> Points not presented in accordance with this section will be disregarded.

(Underline emphases added.)

Third, even assuming arguendo that Aki's first police interview was "poisoned" by a lack of required Miranda warnings, the circuit court nonetheless properly denied Aki's motion to suppress because the "poisonous tree" bore no suppressible "fruit." Upon careful review of the pertinent transcripts, we find no such poisonous, derivative evidence stemming from the first, non-Mirandized police interview, in that Aki repeatedly denied having anything to do with the disappearance of death of Kahealani on the day she was last seen alive. In other words, no evidence was adduced as the result of the exploitation of a previous illegal act of the police (i.e., by using information from the first police interview). See State v. Fukusaku, 85 Hawai'i 462, 475, 946 P.2d 32, 45 (1997). Thus, the circuit court did not err in concluding that "even assuming arguendo that the initial statement were [sic] suppressed, the subsequent statements are not suppressible as fruit of the poisonous tree because those statements were not obtained by exploiting any supposed initial illegality[,]" (Conclusion of Law No. 7), and the circuit court properly denied Aki's motion to suppress.

(2) The circuit court did not abuse its discretion in in refusing to admit two double hearsay statements purportedly made by declarant Dennis Cacatian (that Dennis was responsible for Kahealani's death), which Aki had proferred at trial to exculpate himself and inculpate Dennis. With respect to HRE Rule 804(b)(3) (statements against penal interest), upon careful review of the record, we note that Dennis was the declarant in only one of the double hearsay statements. In any event, when

examining the statements themselves (made by Dennis's brother, Pancho Cacatian), Pancho's cryptic letters to the prosecution and the defense written the same month as the double hearsay statements were made, and Pancho's interview with HPD during Aki's trial, there are numerous inconsistencies and a complete lack of any corroborating circumstances which clearly indicate the trustworthiness of the proferred double hearsay statements. HRE Rule 804(b)(3). Similarly, there being no indicia of trustworthiness that can be gleaned from these statements, a fortiori, we hold that there are no circumstantial guarantees of trustworthiness equivalent to specifically enumerated hearsay exceptions within the "catch-all" HRE Rules 803(b)(24) and 804(b)(8), such that the circuit court did not abuse its discretion in refusing to admit the double hearsay statements in evidence.

(3) The circuit court did not abuse its discretion in rejecting the three hearsay statements ostensibly made by declarant Pancho Cacatian regarding Dennis's (a) pocketknife, (b) firearm, and (c) "sickness" involving "girls." Assuming arguendo that the statements were trustworthy for purposes of the catch-all hearsay exceptions HRE Rules 803(b)(24) and 804(b)(8), all three statements run afoul of the identical requirements in HRE Rules 803(b)(24)(A) and 804(b)(8)(A) that the statements must be more probative than any other evidence that Aki could have procured through reasonable efforts.

As to the proferred hearsay statements regarding (1) Dennis's pocketknife and (2) Dennis's firearm, upon painstaking

review of the record, we conclude that the declarant was effectively Aki himself, inasmuch as Pancho was merely confirming to the police that the weapons did exist. In any event, at trial, Aki himself testified as to seeing Dennis holding a knife at the scene of the crime, as well as to Dennis holding a gun to Aki's head and demanding his silence under threat of death to Aki and his family. Thus, the proferred hearsay statements were less probative than Aki's own eyewitness testimony. As to the proferred hearsay statement regarding Dennis's purported "sickness" involving "girls," we hold that Pancho's vague statement is less probative than the evidence of Dennis's predatory and deviant sexual tendencies that was adduced at trial, such as that Dennis was a registered sex offender and had multiple prior rape and burglary convictions in which a firearm was involved.

Assuming arguendo that the proferred hearsay statements carried "equivalent circumstantial guarantees of trustworthiness" to the enumerated hearsay exceptions because (1) Pancho was speaking to law enforcement officers and (2) he had no motive to lie, we hold that the circuit court did not abuse its discretion in rejecting the proferred hearsay evidence, albeit for the wrong reasons. See State v. Koch, 107 Hawai'i 215, 224, 112 P.3d 69, 78 (2005) (quoting State v. Propios, 76 Hawai'i 474, 486, 879 P.2d 1057, 1069 (1994)).

(4) Addressing Points of Error Nos. 4, 5, and 6 together, we hold that the plain language of HRE Rule 513, which forbids improper comment on the claim of any privilege and

expressly calls for holding proceedings such that claims of privilege are to be made without the knowledge of the jury to the extent practicable, controls. Specifically, we hold that in light of HRE Rule 513, the circuit court did not err when (a) refusing to compel Dennis Cacatian to assert his constitutional privilege against self-incrimination in the presence of the jury, (b) refusing an instruction that Dennis asserted the privilege, and (c) adhering to the intent of HRE Rule 513 when instead issuing a neutralizing instruction that Dennis was not being called by either side, and that no inference was to be drawn from his non-appearance as a witness.

We also hold that Aki's cited authority of Gray v. State, 796 A.2d 697, 717-18 (Md. 2002) (which allows for either a fifth amendment invocation in front of the jury or a jury instruction about the invocation), is inapposite. Upon independent review, we hold that the rule of Gray is in direct conflict with HRE Rule 513, which demands that claims of privilege be made without knowledge of the jury whenever practicable and proscribes judicial comment on the claiming of privileges. We also note that the Intermediate Court of Appeals has squarely addressed Gray, the ICA observing that the Gray rule is counter to HRE Rule 513, and also that Maryland has no equivalent to HRE Rule 513. See State v. Sale, 110 Hawai'i 386, 394 n.12, 133 P.3d 815, 823 n.12 (2006), cert. denied, 111 Hawai'i 10, 135 P.3d 1053 (2006).

(5) The circuit court did not err in defining the offense of manslaughter and did not err in prohibiting the

issuance of an interrogatory to the jury to determine whether Aki was convicted of "manslaughter by commission" or "manslaughter by omission," because regardless of the alternative giving rise to criminal liability, the punishment is the same. We first observe that, contrary to Aki's contentions, the two statutes at issue, HRS § 663-1.6(a) (the alleged "specific" statute) and HRS § 707-702 (the purported "general" statute), do not concern the same subject matter, in that HRS § 663-1.6(a) provides for criminal liability when a potential rescuer knows that a person is suffering from serious physical harm at the scene of a crime but does not obtain or attempt to obtain aid, while HRS § 707-702 provides for criminal liability when the reckless act or omission of a person results in the death of another. See State v. Putnam, 93 Hawai'i 362, 370, 3 P.3d 1239, 1247 (2000). Assuming arguendo that the statutes do concern the same subject matter, there is no "plainly irreconcilable" conflict between them. A violation of the duty to assist under HRS § 663-1.6(a), standing alone, is a petty misdemeanor. But when used as the basis of a penal liability by omission offense as per HRS § 702-203(2) (penal liability may be based on an omission where "[a] duty to perform the omitted act is otherwise imposed by law[]"), the duty to assist becomes an element of the separate offense. Thus, in the case of a manslaughter charge, if it is proven beyond a reasonable doubt that a person recklessly violated the duty to assist imposed by HRS § 663-1.6(a), and that this reckless omission caused the victim's death, then the criminal defendant is guilty of a Class A felony. While the duty to assist and

manslaughter statutes may "overlap," effect is readily given to both statutes without impliedly repealing either. Moreover, as the prosecution correctly notes, "[HRS § 663-1.6(a)] imposes penal liability without regard to the ultimate result of [the victim's] *serious physical harm*, whereas penal liability for reckless manslaughter is imposed only when the ultimate result is death." (Citation omitted.) (Italics in original.) Because HRS § 663-1.6(a) is merely an element of the manslaughter-by-omission offense in the instant case, Aki had no corresponding "right," as he urges on appeal, "to be sentenced in accordance with HRS § 663-1.6(a) if the jury found guilt by omission." (Emphasis added.) Thus, Aki's seventh argument is without merit.

(6) The circuit court's "manslaughter by omission" instruction was not erroneous, because the question of the existence of the duty to assist under HRS § 663-1.6(a) is of no relevance to the question of the state of mind necessary to find guilt for manslaughter. As per the plain language of HRS § 663-1.6(a), and as properly reflected in the language of the jury instruction issued, the requirement of "knowledge" within HRS § 663-1.6(a) strictly concerns the existence of the duty to assist, as opposed to any state of mind required to violate the duty. Under HRS § 663-1.6(a), once the potential rescuer knows that there is a victim who is suffering from serious physical injury at the scene of a crime, the duty attaches if the potential rescuer may render aid without danger to any person. The intent of the rescuer has nothing to do with the existence of the duty. There being no "conflicting states of mind" within this

instruction, contrary to Aki's assertions, Aki's eighth argument is without merit.

(7) Manslaughter by omission via failure to fulfil the "Good Samaritan" duty to assist imposed by law is a valid offense. In his final argument on appeal, Aki appears to contend that the reckless-manslaughter-by-omission instruction was erroneous because it allowed for a finding of guilt based upon "reckless failure to attempt to obtain aid," such that the principles of Holbron, 80 Hawai'i at 45, 904 P.2d at 930 (holding that "there can be no offense of 'attempted manslaughter' within the meaning of HRS § 707-702(1)(a)"), were violated.

Aki accurately quotes the relevant portion of the Holbron court's summation of what it described as "one of the most frequently cited scholarly dissertations on the application of attempt liability to the legal construct of manslaughter[]":

> (1) by its very nature, a criminal attempt presupposes a desired or "intended consequence"; (2) recklessness and "desire or intention" are mutually exclusive; (3) when the elements of a criminal offense are so defined that the "consequence" of the actor's conduct is produced recklessly, "it is impossible to conceive of an attempt"; (4) it is the essence of involuntary manslaughter "that the consequence be produced ... recklessly"; (5) therefore, "there can be no attempt to commit involuntary manslaughter" . . . .

Holbron, 80 Hawai'i at 35, 904 P.2d at 920 (citing J.C. Smith, Two Problems in Criminal Attempts, 70 Harv. L. Rev. 422 (1957)). The court generally adopted the reasoning of the law review article in its holding. Holbron, 80 Hawai'i at 45, 904 P.2d at 930 (citing, inter alia, the Two Problems article). In support of his "argument," Aki baldly asserts that under the reasoning of Holbron, "the reckless manslaughter by omission instruction herein exhibits the same legal conundrum [as in Holbron,]" and

". . . . there can likewise NOT be a ***reckless failure to attempt to obtain aid***[.]" (Emphases and capitalization in original.) However, by comparing inchoate offenses with actual crimes, Aki is "comparing apples and oranges." As noted in Holbron, attempting to involuntarily cause death is logically impossible. As per HRS § 707-500 (1993),[13] some sort of "intentional" conduct (as opposed to knowing, reckless, or negligent conduct) is required in order to be found guilty of criminal attempt; a person obviously cannot intentionally act in an involuntary manner. The Holbron "conundrum" of intentionally attempting to involuntarily commit manslaughter does not apply to the "completed" act of manslaughter by omission, i.e., voluntarily and recklessly failing to obtain or attempt to obtain aid, where the failure to perform the duty caused death. In the instant jury instruction, the requirement of recklessness relates to the failure to perform the duty, not to the obtaining of aid as required by the duty. Thus, Aki's final argument is unavailing.

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[13] HRS § 705-500 provides in pertinent part:

> (1) A person is guilty of an attempt to commit a crime if the person:
>
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or
>
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.
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> (2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(8) As to the prosecution's cross-appeal, because we hold that the court did not err in instructing the jury that Dennis Cacatian was unavailable to be called as a witness by either side, and that the jury was not to draw any inference from his non-appearance as a witness, we hold that the prosecution's cross-appeal is meritless. Therefore,

IT IS HEREBY ORDERED that the judgment and sentence of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, September 27, 2006.

On the briefs:

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

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CONCURRENCE BY ACOBA, J.

I concur in the result only.