

DISSENT BY ACOBA, J.

I respectfully disagree and would grant certiorari. In my view this case merits further review inasmuch as there are significant issues of statutory construction and of consistency of the opinion of the Intermediate Court of Appeals (the ICA) with precedent. Even were the majority to remain unpersuaded as to the merits were certiorari granted, I believe the questions sufficiently important to warrant the issuance of a published opinion. For these reasons I believe certiorari should be accepted.

Petitioner/Defendant-Appellant Manuel Kupahu Jr. (Manuel) and Petitioner/Defendant-Appellant Robert Kupahu (Robert) each filed an application for writ of certiorari on December 18, 2006, requesting that this court review the ICA's August 17, 2006 opinion affirming the May 12, 2004 judgment of the first circuit court (the court) convicting Manuel and Robert of Assault in the First Degree, Hawai'i Revised Statutes (HRS) § 707-710 (1993).¹ See State v. Meyers, 112 Hawai'i 278, 292, 145 P.3d 821, 835 (App. 2006).

Manuel and Robert twice moved for a judgment of acquittal on the Assault in the First Degree charge. The court

¹ HRS § 707-710 entitled "Assault in the first degree" provides:

(1) A person commits the offense of assault in the first degree if the person intentionally or knowingly causes serious bodily injury to another person.

(2) Assault in the first degree is a class B felony.

(Emphasis added.)

denied the motions. The ICA concluded that (1) "[t]he evidence showed that the . . . eight fractured ribs [suffered by Edward Van Lier Ribbink (Edward)] resulted in a protracted impairment of the function of his lungs and, accordingly, that [Edward] suffered serious bodily injury[,]" id. at 287, 145 P.3d at 830 (citing State v. Hilpipre, 395 N.W.2d 899, 903-04 (Iowa Ct. App. 1986); Walker v. State, 742 P.2d 790, 791 (Alaska Ct. App. 1987)) (emphasis added), and (2) "Dr. Ritson's testimony regarding the complications [Edward] could have suffered from his fractured ribs was relevant to prove the included offense of Attempted Assault [in the First Degree]," id. at 289, 145 P.3d at 832 (citation omitted).²

The test on appeal for the denial of a motion for judgment of acquittal is identical to that for sufficient evidence to support the conviction, see State v. Okumura, 78 Hawai'i 383, 403 n.15, 894 P.2d 80, 100 n.15 (1995), that is, "[s]ubstantial evidence as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." State v. Aplaca, 96 Hawai'i 17, 21, 25 P.3d 792, 796 (2001) (citations omitted).

I.

I believe certiorari may be granted on two independent grounds. The first is the issue of whether there was sufficient

² As a third conclusion, the ICA stated that "Robert's trial counsel was not ineffective for failing to object to Dr. Ritson's testimony on the ground of relevance." Meyer, 112 Hawai'i at 291, 145 P.3d at 834.

evidence of first degree assault and the second is the issue of whether the court's failure to give a limiting instruction as to the doctor's testimony regarding possible complications from the complainant's injuries was plain error.

II.

As to the first issue, "[t]he sole 'element' of [Assault in the First Degree, HRS § 707-710(1),] is a result of conduct." State v. Malufau, 80 Hawai'i 126, 129, 906 P.2d 612, 615 (1995) (citing HRS § 702-205 (1993)), opinion amended on reconsideration, 80 Hawai'i 126, 906 P.2d 612 (1995). "When the definition of an offense includes the result of conduct as an element of the offense, the prosecution bears the burden of proving beyond a reasonable doubt that the specified result actually occurred." Id. (citing HRS § 701-114 (1993))³ (emphasis added). The specific result that must have actually occurred was serious bodily injury. "Serious bodily injury" is defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or

³ HRS § 701-114 entitled, "Proof beyond a reasonable doubt" states:

(1) Except as otherwise provided in section 701-115, no person may be convicted of an offense unless the following are proved beyond a reasonable doubt:

- (a) Each element of the offense;
- (b) The state of mind required to establish each element of the offense;
- (c) Facts establishing jurisdiction;
- (d) Facts establishing venue; and
- (e) Facts establishing that the offense was committed within the time period specified in section 701-108.

(2) In the absence of the proof required by subsection (1), the innocence of the defendant is presumed.

(Emphasis added.)

impairment of the function of any bodily member or organ." HRS § 707-700 (1993 & Supp. 2005). Under the plain language of HRS § 707-700, "serious bodily injury," as pertinent here, means bodily injury which causes "protracted loss or impairment of the function of any bodily member or organ."

A.

In my view the writ applications raise serious questions of whether there was substantial evidence that loss or impairment of the function of the lungs actually occurred. As noted before, the ICA said that it was Edward's fractured ribs that "resulted in a protracted impairment of the function of his lungs[.]" Meyers, 112 Hawai'i at 287, 145 P.3d at 830 (emphasis added). Edward did suffer rib fractures, but there is no evidence that the lungs themselves were affected by the assault.

A "bone fracture" such as a fractured rib is an enumerated injury under the definition of "substantial bodily injury" pursuant to HRS § 707-700,⁴ rather than a serious bodily injury. There was no evidence of the "loss" of the function of the lungs. There was no evidence of "impairment" of the function of the lungs themselves. As the ICA itself related, "Dr. Ritson conceded that, unless ribs were considered internal organs, there was no damage to [Edward's] internal organs[.]" Meyers, 112

⁴ Pursuant to HRS § 707-700, "substantial bodily injury" is defined as "bodily injury which causes: (1) A major avulsion, laceration, or penetration of the skin; (2) A burn of at least second degree severity; (3) A bone fracture; (4) A serious concussion; or (5) A tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs. (Emphasis added.)

Hawai'i at 285, 145 P.3d at 828 (emphasis added). In fact, Dr. Ritson declared that there was no "significant injury other than to the ribs themselves." Furthermore, Edward indicated, as set forth by the ICA, that "he did not develop pneumonia, suffer a punctured lung, or suffer a puncturing of any other organ." Id.

Edward testified to suffering "pain and discomfort" and having "to breathe very shallowly" as a result of pain from the fractured ribs, not because of injury to his lungs. Id. at 287, 145 P.3d at 830. It would appear the definition of "substantial bodily injury" encompasses shallow breathing "caused," see id., by the pain and discomfort that resulted from the fractured ribs. The Commentary to HRS § 707-700 explains that the "substantial bodily injury" definition was added "to account for injuries far more serious than bodily injury--which includes any physical pain, illness, or impairment--but do not approximate the risk of death, permanent loss or disfigurement that constitute 'serious bodily injury.'" Commentary on HRS § 707-700 (emphasis added).

Edward was able to breathe without assistance despite his injuries. Hence, the normal functioning of his lungs themselves was not impaired. In any event the Commentary indicates "substantial bodily injury" would include some "impairment" so long as impairment does not "approximate . . . permanent loss" of function. Id. There was no evidence of any approximate permanent loss of function. The pain and discomfort and shallow breathing Edward experienced and any associated "impairment" as a result of the rib fractures would appear to

fall within the definition of "substantial bodily injury," see id., not serious bodily injury.

B.

Furthermore, to conclude that Edward's fractured ribs and accompanying pain and discomfort constituted a "serious bodily injury" may lead to an inconsistent and contradictory result. See State v. Griffin, 83 Hawai'i 105, 109, 924 P.2d 1211, 1215 (1996) (stating that "'the legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality'" (quoting Malufau, 80 Hawai'i at 137, 906 P.2d at 623 (citation and internal quotation marks omitted)) (brackets omitted)). Under the ICA's interpretation, every bone fracture could constitute "serious bodily injury" inasmuch as every fracture necessarily impairs the function of the affected limb or area during the healing period. The distinction then between First and Second Degree Assault would be obliterated. See HRS § 707-710(1); HRS § 707-711(1)(a) (Supp. 2005).

Additionally, reading "serious bodily injury" and "substantial bodily injury" in pari materia, Edward's fractured bones constituted a specific "substantial bodily injury," HRS § 707-700, excluded from the definition of Assault in the First Degree, HRS § 707-710(1). Thus, it would seem that fractured ribs or the associated pain that "causes" "shallow breathing" cannot constitute "serious bodily injury" under HRS § 707-700 as indicated in the commentary to that section. See HRS § 1-16

(1993) ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in to explain what is doubtful in another.").

C.

Moreover, the foreign cases the ICA cites to support its conclusion, Hilpipre, 395 N.W.2d 899, and Walker, 742 P.2d 790, are obviously inapposite. The assault statutes from Alaska and Iowa only recognize two levels of injury, which are similar to Hawaii's definitions of "bodily injury" and "serious bodily injury." They do not contain a third category of injury equivalent to Hawaii's "substantial bodily injury" definition under HRS § 707-700. Compare HRS § 707-700, Alaska Stat. § 11.81.900 (2006), Iowa Code Ann. § 708.4 (1985).⁵

D.

In sum, there is a significant question under HRS § 707-700, of whether there was substantial evidence to show that Edward suffered "serious bodily injury" "so that a reasonable mind might fairly conclude guilt beyond a reasonable doubt[,]" Aplaca, 96 Hawai'i at 21, 25 P.3d at 796 (citations omitted), as to the charges for Assault in the First Degree, HRS § 707-710(1). The fractured ribs, accompanying pain and discomfort, and associated shallow breathing because of the pain that Edward sustained would seem to constitute "substantial bodily injury"

⁵ By comparison, the current version of the Iowa Code Annotated includes rib fractures within the definition of "serious injury." Iowa Code Ann. § 702.18 (2006).

under HRS § 707-700 and the assault offenses scheme. Accordingly, I would grant certiorari on this ground.

III.

As to the second issue, in my view the court may also have erred in failing to give a limiting instruction as to Dr. Ritson's testimony on complications that might arise from Edward's injury. The ICA observed that "Dr. Ritson testified that [Edward's] broken ribs exposed [Edward] to the risk of complications such as developing pneumonia or suffering a collapsed lung[,] but that "[t]he evidence showed that [Edward] ultimately did not experience these potential complications." Meyers, 112 Hawai'i at 288, 145 P.3d at 831. Because Assault in the First Degree requires that the prosecution prove that "serious bodily injury" actually resulted, so much of the testimony of Dr. Ritson, which did not pertain to injuries that Edward suffered was not relevant to the Assault in the First Degree charge. See Malufau, 80 Hawai'i at 130, 906 P.2d at 616.

This case, however, parallels Malufau in which this court noted that "expert medical testimony regarding what the severity of a person's injuries would have been absent medical attention could be relevant to prove that a defendant committed the offense of attempted assault in the first degree[" Id. at 130 n.6, 906 P.2d at 616 n.6. Therefore, under Malufau, Dr. Ritson's testimony which did not pertain to actual injuries can be relevant to Attempted Assault in the First Degree. See id.

But Malufau mandates that "when such evidence is

admitted to prove that a defendant committed the offense of attempted assault in the first degree, the defendant will be entitled to a limiting instruction to ensure that the jury understands that the evidence cannot be used to establish that 'serious, permanent, disfigurement' actually occurred." Id. (internal citations omitted) (emphasis added). Therefore, under Malufau, a limiting instruction would seem necessary to ensure that Dr. Ritson's testimony regarding possible complications was not considered by the jury in connection with the Assault in the First Degree charge. Id.

Neither Manuel nor Robert requested a limiting instruction at trial. But with regard to jury instructions and plain error,

the real question becomes whether there is a reasonable possibility that error might have contributed to conviction. If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.

State v. Nichols, 111 Hawai'i 327, 334, 141 P.3d 974, 981 (2006) (citations omitted). In this case, there was no dispute that Edward suffered the actual injury of fractured ribs. Thus, Dr. Ritson's testimony regarding potential injuries which could have occurred as a complication of the fractured ribs undoubtedly affected the jury's view of the evidence. See Malafau, 80 Hawai'i at 132, 906 P.2d at 618 ("In light of the scant relevant evidence presented that [the complainant's] injury amounted to a 'serious, permanent disfigurement [under HRS § 707-700],' we believe that it was highly probable that [the doctor's]

irrelevant testimony had a substantial influence on the jury's verdict. Therefore, we cannot say that the circuit court's error in admitting the irrelevant testimony of [the doctor] was harmless." (Emphasis added).

The ICA attempted to distinguish Malufau, indicating that "the State here presented considerable evidence that [Edward's] eight broken ribs constituted serious bodily injury." Meyers, 112 Hawai'i at 290, 145 P.3d at 833. However, as discussed supra, there was no evidence, let alone "considerable evidence," that Edward suffered "serious bodily injury" inasmuch as the accompanying "pain and discomfort" and shallow breathing that Edward testified to experiencing would appear to fall within the definition of "substantial bodily injury." See Commentary to HRS § 707-700. Furthermore, to reiterate, the evidence shows that Edward did not experience the potential complications testified to by Dr. Ritson. Meyers, 112 Hawai'i at 288, 145 P.3d at 831.

I note that were their convictions for first degree assault vacated, it is constitutionally permissible for Manuel and Robert to be retried as to the "lesser included offenses" of Assault in the Second Degree and Assault in the Third Degree. See Malufau, 80 Hawai'i at 136-37, 906 P.2d at 622-23 (holding that "remanding a case for retrial on lesser included offenses following an appellate determination that insufficient evidence . . . of a greater offense was presented at trial does not offend the double jeopardy clause of the United States Constitution" or

the Hawai'i Constitution).

On the grounds stated above I believe the cases warrant further review and, therefore, I would grant certiorari.

A handwritten signature in black ink, appearing to be "S. J. ...", written in a cursive style.