

DISSENTING OPINION BY ACOBA, J.

I respectfully dissent.

In my view, as Petitioner/Defendant-Appellant Guy R. Raymond (Petitioner) contends, the supplemental jury instruction of the circuit court of the second circuit (the court) redefining "intentionally" constituted reversible error. Hence, I would vacate the April 13, 2007 judgment of the Intermediate Court of Appeals (ICA) that affirmed the court's April 13, 2005 judgment convicting Petitioner of attempted theft in the second degree and remand for a new trial.

I.

The jury's third communication requested that the court "define word 'intent' or expand on instruction #18 [sic]" which dealt with acting "intentionally." Jury instruction No. 18 stated:

A person acts intentionally with respect to his conduct when it is his conscious object to engage in such conduct.

A person acts intentionally with respect to attendant circumstances when he is aware of the existence of such circumstances or believes or hopes that they exist.

A person acts intentionally with respect to a result of his conduct when it is his conscious object to cause such a result.

(Emphasis added.) The language of this instruction is taken verbatim from the portion of the Hawai'i Penal Code contained in Hawai'i Revised Statutes (HRS) § 702-206(1) (1993). Prior to issuing its supplemental instruction to the jury, the court discussed its proposed instruction with counsel for both parties.

The court proposed issuing a supplemental jury

instruction containing a modified definition of the word "intentionally." The court's modified definition instructed that "A PERSON ACTS INTENTIONALLY WITH RESPECT TO HIS CONDUCT WHEN IT HIS MENTAL DECISION TO DO SOMETHING." (Emphasis added.) Petitioner's standby counsel, as well as the court itself, acknowledged that, as used in the definition of "intent," the terms "mental" and "conscious" were different. Petitioner's standby counsel stated that the phrase "conscious object" in the original Jury Instruction No. 18 "seems to be more concrete" and ironically that the court's use of the "mental decision" language "would be a pro-defense definition[.]" The court as well acknowledged the difference between the words "mental" and "conscious" but decided to give the proposed definition, stating that this "[m]ight be a good issue" on appeal.¹ Thus, the court agreed that there were cognizable differences between the definition of "intentional" contained in Jury Instruction No. 18 and the definition supplied by the court.

¹ Whether Petitioner objected to the court's supplemental jury instruction is irrelevant because in State v. Nichols, 111 Hawai'i 327, 141 P.3d 974 (2006), this court agreed that "in light of our consistent precedent regarding the duty of the trial court to instruct the jury, the ICA gravely erred in concluding that the duty of the trial court is limited to avoiding plain error" with respect to jury instruction. Id. at 335, 141 P.3d at 982. "[O]nce instructional error is demonstrated, we will vacate, without regard to whether timely objection was made, if there is a reasonable possibility that the error contributed to the defendant's conviction, i.e., that the erroneous jury instruction was not harmless beyond a reasonable doubt." Id. at 337, 141 P.3d at 984 (footnote omitted) (emphasis added).

As indicated, here, the court apparently treated its instruction as having been objected to by Petitioner.

II.

A.

Petitioner argues that "the [court's] definition misled the jury in its efforts to determine whether [Petitioner] acted intentionally with respect to the necessary elements of [a]ttempted [t]heft in the [s]econd [d]egree." The standard of review applicable to issues involving jury instructions provides that:

When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading. . . . [T]he real question becomes whether there is a reasonable possibility that error might have contributed to the 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. Frisbee, 114 Hawai'i 76, 79-80, 156 P.3d 1182, 1185-86 (2007) (emphases added). Because "the [court's] response to a jury communication is the functional equivalent of an instruction," State v. Gonsalves, 108 Hawai'i 289, 293, 119 P.3d 597, 601 (2005) (internal quotation marks and citation omitted), the standard applicable to jury instructions is also applicable to jury communications.

Conviction of an offense, as described in HRS § 701-114(1) (1993) "requires proof beyond a reasonable doubt of each element of the offense, as well as the state of mind required to establish each element of the offense." State v. Klinge, 92 Hawai'i 577, 584-85, 994 P.2d 509, 516-17 (2000). Thus,

Respondent/Plaintiff-Appellee State of Hawai'i (Respondent) had the burden of proving that Petitioner acted with the requisite state of mind, in this case, an "intentional" state of mind, in order to convict Petitioner of attempted theft in the second degree. The definition of "intentionally" provided by the court significantly differs from the definition provided in the penal code with respect to the substitution of the phrase "mental decision" for the phrase "conscious object" and the words "to do something" for "to engage in such conduct[.]"

"Conscious" is defined in relevant part as "marked by full recognition, candid acceptance, or frank espousal of a given role and often by pervasive conviction in filling it[;] . . . assumed, determined, treated, or executed with awareness, care, purpose, or consideration[.]" Webster's Third New Int'l Dictionary 482 (1961) (emphases added). "Object" is defined in relevant part as "something (as an end, aim, or motive) by which the mind or any of its activities is directed: something on which the purposes are fixed as the end of action or effort: something that is sought for: final cause[.]" Id. at 1555 (emphases added).

In contrast, "mental" is defined in relevant part as "of or relating to intellectual as contrasted with emotional activity: of or relating to the process or mode of thought or capacity for thought[,]. . . of, relating to, or being intellectual as contrasted with overt physical activity [,]. . .

occurring or experienced in the mind: not voiced or given other sensory expression[.]” Id. at 1411 (emphases added). Similarly, the definition of “mental” cited by Respondent in Random House Webster’s Dictionary 847 (1995), defines “mental” as “of or pertaining to the mind; performed by . . . the mind.” (Internal quotation marks omitted.) (Emphasis added.) “Decision” is defined in relevant part as “a determination arrived at after consideration[,] . . . deciding upon a course of action[.]” Webster’s Third New Int’l Dictionary at 585 (emphases added). Respondent cites Random House Webster’s Dictionary at 351, which defines “decision” as “[t]he act or process of deciding; the act of making up one’s mind; something that is decided, resolution[.]” (Internal quotation marks omitted.)

Based on these definitions, the word “mental” is far broader than the word “conscious,” as mental generally connotes thought or intellectual matters and is used to contrast with matters that are emotional or physical. Webster’s Third New Int’l Dictionary at 1411. On the other hand, “conscious” is associated with “awareness, care, purpose, or consideration[.]” and therefore connotes deliberateness and purposeful action. Id. at 482. Although the definition of “decision” includes consideration, this is insufficient to circumscribe the wide ambit of the preceding word, “mental,” which modifies it. As Petitioner aptly asserts, “‘mental decision’ is vague and implies that the individual need only think about an act before doing

it," thereby failing to "convey the necessary nexus between an individual's thought process and the fulfillment of a specific objective[.]"

The error of the court's redefinition is compounded by the use of the phrase "to do something" in conjunction with "mental decision." That phrase "to do something" is boundless and indiscriminate in its focus. When used as part of the phrase "mental decision to do something," it fails to communicate the requirement that the defendant's thought is given precisely to the accomplishment of a specific objective. In contrast, the term "'[c]onscious object' suggests that it is an individual's thought process to achieve a particular goal," thereby conveying the critical link between a specific thought and the particular action contemplated in that thought.

B.

Appellee contends that the term "'mental decision' in substance, is a reflective process of the mind by which a person is deciding or has decided doing something or has resolved doing something" and when read with the rest of the court's supplemental instruction, "substantially means the same thing" as the first paragraph of Jury Instruction No. 18. But, with all due respect, as described above, the term "mental" is decidedly more general and indiscriminate in its focus than the term "conscious"; furthermore, the court's definition lacks any term that connotes reflection or "a reflective process" that results

in a specific objective. Additionally, when attached to the undifferentiated phrase "to do something," the challenged instruction lacks any of the parameters set forth in the statutory definition.

III.

Given the foregoing, the term "mental determination" was not synonymous with the term "conscious object" used in the statutory definition of "intentionally." As Petitioner maintains, the contrast between the terms "mental determination" and "conscious object" "directly impacted the jury's ability to properly assess whether [Petitioner] possessed the necessary mental state to act "intentionally" under [HRS § 702-206(1)]" because the general definition set forth in the supplemental instruction lowered the threshold of the requisite mental state for attempted theft in the second degree. Thus as Petitioner notes, the court's redefinition of the word "intentionally" using the term "mental decision" "implies that the individual need only think about an act before doing it."

On the other hand, using the term "conscious object" denotes that the individual acts with "pervasive conviction" or "purpose" in executing the act. Webster's Third New Int'l Dictionary at 482. In essence, the court's redefinition of the word "intentionally" was erroneous in that it could encompass all four culpable states of mind defined in the penal code - intentionally, knowingly, recklessly and negligently (and more) -

because "mental" refers to anything that originates in the mind and "to do something" lacks any of the directed focus attempted to be conveyed in the statute. Thus, the phrase "mental decision to do something" refers to an outcome of any mental process made by a person and is a substantial departure from the statutory definition employed by the drafters of the code. In short, the term "mental decision" is erroneous as it would connote to the jury any state of mind under the code and any other mental state that may be conjured up by the jury during its deliberations. Therefore, the court's supplemental instruction to the jury regarding the definition of "intentionally" was prejudicially inconsistent and misleading. Frisbee, 114 Hawai'i at 79-80, 156 P.3d at 1185-86.

IV.

Here, Petitioner was convicted of attempted theft in the second degree, which requires a determination by the jury that Petitioner "intentionally engage[] in conduct which . . . constitutes a substantial step in a course of conduct intended to culminate in the person's commission of" theft "(a) [o]f property from the person of another; [or] (b) [o]f property or services the value of which exceeds \$300[.]" HRS § 705-500; HRS § 708-831(1). For the reasons set forth before, the court's redefinition of "intentionally" is so general as to be common to and descriptive of all states of mind under the penal code as well as any state of mind conceivable that is not mentioned in

the penal code. There is a reasonable possibility that the court's erroneous definition of that term might have contributed to Petitioner's conviction. Frisbee, 114 Hawai'i at 79-80, 156 P.3d at 1185-86. Accordingly, the court's instruction was prejudicial to Petitioner.

The danger of redefining what already is defined is clear. The fact that the drafters took pains to specifically delineate the characteristics of each culpable state of mind in the penal code evidences their intent that other possible formulations of mental states be excluded. Permitting redefinition of an already statutorily defined term markedly departs from the express language and manifest intent of the statute. With all due respect, such a course is poor practice, poor policy, and sets poor precedent.

A handwritten signature in black ink, appearing to be a stylized name, possibly "J. M. ...".