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SCMF-11-0000315

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the Publication and Distribution
of the
Hawai'i Pattern Jury Instructions - Criminal

ORDER APPROVING PUBLICATION AND DISTRIBUTION
OF HAWAI'I PATTERN JURY INSTRUCTIONS - CRIMINAL
(By: Recktenwald, C.J., for the court¹)

Upon consideration of the Standing Committee on Pattern Criminal Jury Instructions' request to publish and distribute the (1) addition of Criminal Instructions 5.04 and 5.04A; and (2) renumbering of Criminal Instructions 5.05 (formerly 5.04) and 5.05A (formerly 5.04A) of the Hawai'i Pattern Jury Instructions - Criminal,

IT IS HEREBY ORDERED, that the request is granted and the attached criminal jury instructions 5.04, 5.04A, 5.05 and 5.05A are approved for publication and distribution.

¹ Considered by: Recktenwald, C.J., Nakayama, Acoba, Duffy, and McKenna, JJ.

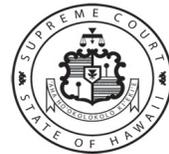
IT IS FURTHER ORDERED that this approval for publication and distribution is not and shall not be considered by this court or any other court to be an approval or judgment as to the validity or correctness of the substance of any instruction.

DATED: Honolulu, Hawai'i, May 25, 2011.

FOR THE COURT:

/s/ Mark E. Recktenwald

Chief Justice



5.04 MERGER – CONTINUING AND UNINTERRUPTED COURSE OF CONDUCT:

H.R.S. § 701-109(1)(e)

If and only if you find the Defendant guilty of both (name of offense) in Count (count number) and (name of offense) in Count (count number), then you must answer the following questions on a special interrogatory that will be provided to you:

(1) Did the prosecution prove beyond a reasonable doubt that the Defendant did not commit (name of offense) in Count (count number) and (name of offense) in Count (count number) as part of a continuing and uninterrupted course of conduct?

(2) Did the prosecution prove beyond a reasonable doubt that the Defendant committed (name of offense) in Count (count number) and (name of offense) in Count (count number) with separate and distinct intents, rather than acting with one intention, one general impulse, and one plan to commit both offenses?

Your answers to these questions must be unanimous.

Notes

This instruction addresses only the form of merger contemplated by HRS § 701-109(1)(e) and the cases construing it. Generally, offenses will merge pursuant to § 701-109(1)(e) whenever “(1) there is but one intention, one general impulse, and one plan, (2) the ... offenses are part and parcel of a continuing and uninterrupted course of conduct, and (3) the law does not provide that specific periods of conduct constitute separate offenses.” State v. Hoey, 77 Hawai’i 17, 38 (1994) (citations omitted). The instruction incorporates only the factual determinations required by Hoey. For merger to occur, both questions posed by the instruction must be answered in the negative.

All factual issues involved in the merger determination must be decided by the trier of fact. Hoey, 77 Hawai’i at 27 n. 9. Where § 701-109(1)(e) applies, the failure to give a merger instruction is plain error. State v. Matias, 102 Hawai’i 300, 306 (2003).

**5.04A MERGER – CONTINUING AND UNINTERRUPTED COURSE OF CONDUCT:
SPECIAL INTERROGATORY**

If and only if you find the Defendant guilty of both (name of offense) in Count (count number) and (name of offense) in Count (count number), then you must answer the following questions. Your answers must be unanimous.

Question 1. Did the prosecution prove beyond a reasonable doubt that the Defendant did not commit (name of offense) in Count (count number) and (name of offense) in Count (count number) as part of a continuing and uninterrupted course of conduct?

_____ Yes _____ No

Question 2. Did the prosecution prove beyond a reasonable doubt that the Defendant committed (name of offense) in Count (count number) and (name of offense) in Count (count number) with separate and distinct intents, rather than acting with one intention, one general impulse, and one plan to commit both offenses)?

_____ Yes _____ No

DATE

SIGNATURE OF FOREPERSON

5.04-5.05. Murder in the Second Degree--By Omission--Generic: H.R.S. §§ 707-701.5 and 702-203(2)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Murder in the Second Degree.

A person commits the offense of Murder in the Second Degree if he/she causes the death of another person by intentionally or knowingly failing to (specify the duty), a duty imposed by law upon a (specify the relationship that creates the duty), intending or knowing that the failure to perform that duty would cause the death of the other person.

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

These four elements are:

1. That the Defendant was (specify factual finding(s) necessary to raise a legal duty);
and
2. That, on or about (date) in the [City and] County of (name of county), the Defendant intentionally or knowingly failed to (specify the duty), a duty imposed by law upon a (specify the relationship that creates the duty); and
3. That the Defendant failed to perform that duty intending or knowing that his/her failure would cause the death of the other person; and
4. That the Defendant's failure to perform that duty caused the death of the other person.

Notes

H.R.S. §§ 707-701.5, 707-702, 702-203(2), 702-206(1) and (2). *State v. Robinson*, 82 Hawai'i 304, 922 P.2d 358 (1996), *State v. Cabral*, 77 Hawai'i 216, 883 P.2d 638 (App.1994); *State v. Cabral*, 8 Haw.App. 506, 810 P.2d 672 (1991), *aff'd* 72 Haw. 603, 822 P.2d 957 (1991); *State v. Tucker*, 10 Haw.App. 43, 861 P.2d 24 (1993), *cert. gr.*, *remanded on other issues*, 10 Haw.App. 73, 861 P.2d 37 (1993).

For definition of states of mind, see instructions:

6.02 - "intentionally"

6.03 - "knowingly"

The Committee discussed whether element two of the instruction could be satisfied by merely showing a voluntary omission. *But see* H.R.S. § 702-200(1).

5.04A 5.05A. Murder in the Second Degree--Murder Alleged by Commission and Omission in One Count--Generic: Parent/Minor Child (With Included Offense and Defense): H.R.S. §§ 707-701.5 and 702-203(2) [Renumbered as 9.07B]