CONCURRING AND DISSENTING OPINION OF FUJISE, J.

Defendant-Appellant Patrick Deguair, Jr. (Deguair) raises six points on appeal in challenging his four convictions for Kidnapping in violation of Hawaii Revised Statutes (HRS) § 707-720(1)(e) (1993). As to five of the six points, I agree with the majority's opinion. However, I write separately to respectfully disagree with the majority regarding Deguair's point of error regarding the mitigating defense and would sustain the trial court's decision to submit Count II to the jury to decide, and the jury's decision that the prosecution disproved, Deguair's mitigating defense because I believe substantial evidence supporting the jury's verdict was presented.

Deguair argues that the trial court should have granted his motion for judgment of acquittal and reduced the Kidnapping charge in Count II to a class B felony. His position is that the jury, as a matter of law, could not find the evidence sufficient to overcome the mitigating defense of voluntary release. The jury was issued special interrogatories[1] to which they responded in the affirmative, finding that the prosecution carried its burden and disproved this defense.

The crime of Kidnapping is a class A felony. HRS § 707-720(2) (1993). However, it is a defense, reducing the offense to a class B felony, if "the defendant voluntarily released the victim, alive and not suffering from serious or substantial bodily injury, in a safe place prior to trial." HRS

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[1] The three interrogatories issued to the jury were,

1. Has the prosecution proven beyond a reasonable doubt that prior to trial the Defendant did not release Paul Beltran voluntarily?

2. Has the prosecution proven beyond a reasonable doubt that prior to trial the Defendant did not release Paul Beltran alive and not suffering from serious or substantial bodily injury?

3. Has the prosecution proven beyond a reasonable doubt that prior to trial the Defendant did not release Paul Beltran in a safe place?

Only one of these interrogatories needed to be answered in the affirmative to reject Deguair's defense. State v. Mara, 102 Hawai'i 346, 356-57, 76 P.3d 589, 599-600 (App. 2003) (Where the jury found only the first of these interrogatories, "[w]e conclude that the evidence is sufficient to support a finding, beyond a reasonable doubt, that Mara "(a) did not release" Nguyen.").

§ 707-720(3) (1993). In my view, this unambiguous language, when applied to the evidence in this case, created a jury question regarding whether there was a voluntary release by Deguair of the victim in Count II, Paul Beltran (Beltran).

The facts on this point are straightforward: Deguair and his fellow robbers herded the persons present in the business being robbed away from the robbers' activities in taking valuables from various locations therein. During this process, Beltran attempted to escape, whereupon two of the robbers chased, caught, and handcuffed him. When the robbers left, Beltran was left with the others, still handcuffed. The others were not bound.

Deguair's motion for judgment of acquittal was based on the argument that he and his cohorts "voluntarily released" all of the victims when they left the crime scene because the victims' movements were no longer restrained when the robbers left. However, mere abandonment of the victims, especially when it is only a consequence of the robber-kidnappers fleeing the scene of the crime, does not come within the plain language of the term "voluntarily released."

The term "voluntarily released" is not defined in the Penal Code. "[W]hen a term is not statutorily defined, this court may resort to legal or other well accepted dictionaries as one way to determine its ordinary meaning." Estate of Roxas v. Marcos, 121 Hawai'i 59, 66, 214 P.3d 598, 605 (2009) (citation and internal quotation marks omitted). Common usage of the term "voluntary" is "proceeding from the will or from one's own choice or consent," Merriam-Webster's Collegiate Dictionary, 1402 (11th ed. 2003) (Webster's) or "[d]one by design or intention," Black's Law Dictionary 1806 ((10th ed. 2014) (Black's). "Released" conveys "to set free from restraint, confinement, or servitude," Webster's at 1051, or "[t]he action of freeing or the fact of being freed from restraint or confinement," Black's at 1480.

In my view, a voluntary release involves a choice and an action performed by the kidnapper. Other jurisdictions have so held.

> Releasing a person in a safe place "implies a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety." State v. Jerrett, 309 N.C. 239, 262, 307 S.E.2d 339, 351 (1983). Mere relinquishment of dominion or control over the person is not sufficient to effectuate a release in a safe place. State v. Love, 177 N.C. App. 614, 625, 630 S.E.2d 234, 242 (2006).

State v. Karshia Bliamy Ly, 658 S.E.2d 300, 305 (N.C. Ct. App. 2008). See also Davis v. State, 246 S.W.3d 862, 869 (Ark. 2007) (victim left in her home bound and gagged; "was left to be rescued by others. In other words, she was not released by her kidnapper.") and Harrell v. State, 65 S.W.3d 768, 772 (Tex. App. 2001) (Defendant "must first have performed 'some overt and affirmative act' which brought home to his victim that she had been 'fully released from captivity.'" in order to qualify for voluntary release mitigating defense.).

Granted, departure from the plain language of the statute is permissible when reliance thereon would be "clearly inconsistent with the purposes and policies of the statute." State v. McKnight, 131 Hawai'i 379, 389, 319 P.3d 298, 308 (2013) (citation and internal quotation marks omitted). However, reading the language of HRS § 707-720(3) as I propose, is not contrary to the legislative intent to encourage, by providing an incentive to kidnappers, "to proceed less dangerously once the criminal course of conduct has begun." Commentary on §§ 707-720 to 722. This interpretation assures that leniency is afforded to those who actually do limit the harm by some act of forbearance or aid, rather than rewarding those who simply take their leave of the scene of their crime without apparent thought to those they have left behind. It is consistent with the intent to encourage consideration, if not mercy, to the victims of their crime, that we reward those who actually exhibit consideration to their victims and do not reward those who, after accomplishing their criminal goal, leave their victims to fend for themselves. This is especially true where, as here, neither Beltran nor his co-workers had the ability to free him from the handcuffs placed on him by the robbers.

Moreover, the focus on the actor's intent and action rather than that of the victim is consistent with the approach

taken by the legislature in other parts of the Penal Code. For example, in setting the possible penalties for attempted crimes, the legislature decided that, except for the crime of murder, the same penalties are available as those for completed crimes because the focus is on the defendant's characteristics, i.e., intent and action, and not the actual outcome of the crime. HRS § 705-502 (1993).[2]

Similarly, the mitigating defense to murder of extreme mental or emotional disturbance requires that the disturbance have a reasonable explanation. HRS § 707-702(2) (Supp. 2013).[3] That reasonable explanation "shall be determined from the viewpoint of a reasonable person in the circumstances as the defendant believed them to be" and not what the victim knew of the circumstances. Id. (emphasis added). Thus, a defendant who thinks his or her partner is having an affair could be eligible for this defense, even if the partner was not so engaged.

Another example is the offense of Terroristic Threatening, where culpability attaches for threatening speech or conduct when the actor has the intent to, or recklessly disregards the risk of, terrorizing the victim, whether or not the victim is actually terrorized. HRS § 707-715 (1993); see

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[2] The Commentary on § 705-502 notes,

> For purposes of sentencing, the Code equates the criminal attempt with the most serious substantive offense attempted. . . . The court's order should be determined by the need for correction as demonstrated by the anti-social disposition (propensities) of the defendant. This being the case, there is generally no difference in the sanctions which ought to be available to the court when a crime is attempted but not consummated.

(Formatting altered).

[3] HRS § 707-702(2) provides,

> In a prosecution for murder or attempted murder in the first and second degrees it is an affirmative defense, which reduces the offense to manslaughter or attempted manslaughter, that the defendant was, at the time the defendant caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a reasonable person in the circumstances as the defendant believed them to be.

also State v. Nakachi, 7 Haw. App. 28, 32, 742 P.2d 388, 391 (1987) ("Actual terrorization is not a material element[.]").

While these three examples arise from different statutory contexts, they are all from the Penal Code and all have in common the focus on the accused's knowledge and intent, and not that of the victims of the crime. All illustrate how the Penal Code imposes liability or grants lenity based on the accused's actions and/or knowledge. Thus, it is not inconsistent to read the voluntary release defense at issue here in a similar fashion. Where the kidnapper has taken some volitional action, that is to say, exhibited in some way that he or she has meant to set the victim of the crime free, mitigation is appropriate. Conversely, if the kidnapper does nothing to actually release the victim, no such reward is warranted. A defendant who merely leaves the scene of the crime, without more, has not exhibited such an intent nor has taken such an action. As at least one court has said,

> 'voluntary release in a safe place,' should not be weighed from a standpoint of physical condition of a victim and that victim's ability to ultimately vacate or escape the immediate prevalence of the accused. It seems appropriate that any judgment or finding regarding 'voluntary release in a safe place,' must be viewed, weighed and determined solely from the conduct of the accused and not as to possibilities within speculated grasps of the victim. Being without square-on case law guidance, we conclude that an accused, in order to avail himself of the mitigating effect of § 20.04(b), must have performed some overt and affirmative act that brings home to the victim that he/she has been fully released from captivity. That release must occur in a place and manner which realistically conveys to the victim that he/she is now freed from captivity and is now in circumstances and surroundings wherein aid is readily available.

Wiley v. State, 820 S.W.2d 401, 411 (Tex. App. 1991).

I would affirm the judgment.