

DISSENTING AND CONCURRING OPINION BY GINOZA, J.

I respectfully dissent from the majority opinion in regard to Defendant-Appellant Ted DeOliveira's (DeOliveira) point of error involving the jury instructions in this case. In light of the charges as alleged by Plaintiff-Appellee State of Hawai'i (State), the proceedings below, and the record, I conclude that the jury instructions were insufficient and that there is a reasonable possibility that the instructional error may have contributed to DeOliveira's conviction for Burglary in the First Degree (Burglary I) under Hawaii Revised Statutes (HRS) § 708-810(1)(c) (2014).

The following standard applies with regard to appellate review of jury instructions:

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. Erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial. However, error is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, 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, brackets and block format omitted).

The State's Complaint against DeOliveira alleged two counts: (1) Burglary I; and (2) Assault in the Second Degree (Assault II), in violation of HRS § 707-711(1)(b) (2014). For the Burglary I charge, the State alleged that:

On or about the 7th day of April, 2012, in the City and County of Honolulu, State of Hawaii, TED DEOLIVEIRA did intentionally enter unlawfully in a building, to wit, the residence of Anne Angyal . . . with intent to commit therein a crime against a person or property rights, and did recklessly disregard the risk that the building was the dwelling of another, and the building is such a dwelling, thereby committing the offense of Burglary in the First Degree, in violation of Section 708-810(1)(c) of the Hawaii Revised Statutes.

(Emphasis added.)¹ For the Assault II charge, the State charged DeOliveira as follows:

On or about the 7th day of April, 2012, in the City and County of Honolulu, State of Hawaii, TED DEOLIVEIRA did recklessly cause substantial bodily injury to Anne Angyal, thereby committing the offense of Assault in the Second Degree, in violation of Section 707-711(1)(b) of the Hawaii Revised Statutes.

(Emphasis added.) Under HRS § 707-711(1), when substantial bodily injury is alleged, the State can allege the defendant caused such injury intentionally, knowingly, or recklessly.² The State chose to charge the assault in this case using the "reckless" standard.

DeOliveira argued below and contends on appeal that the Circuit Court should have instructed the jury that, because Burglary I requires the "intent to commit therein a crime," HRS § 708-810(1) (emphasis added), the jury could not find him guilty of Burglary I based on the accompanying assault charge, which the State charged as Assault II only under a reckless state of mind.

The State's position is that the manner in which it charged the Assault II is consistent with its theory of the case, *i.e.* that DeOliveira intended to cause bodily injury to Angyal, but was reckless with regard to the degree of injury Angyal actually suffered.

¹ HRS § 708-812.5 (2014) provides that "[a] person engages in conduct 'with intent to commit therein a crime against a person or against property rights' if the person formed the intent to commit within the building a crime against a person or property rights before, during, or after unlawful entry into the building." (Emphasis added).

² HRS § 707-711 provides in relevant part:

§707-711 Assault in the second degree. (1) A person commits the offense of assault in the second degree if:

- (a) The person intentionally or knowingly causes substantial bodily injury to another;
- (b) The person recklessly causes serious or substantial bodily injury to another;

. . . .

(Emphasis added.)

The majority concludes that the Circuit Court did not err because *inter alia* DeOliveira's proposed jury instruction would have been inaccurate in that the jury could have relied on the assault in convicting DeOliveira of Burglary I if the jury found that DeOliveira possessed an intentional state of mind in committing the assault. The majority points to HRS § 702-208 (2014), which states in pertinent part that "[w]hen the law provides that recklessness is sufficient to establish an element of an offense, that element also is established if, with respect thereto, a person acts intentionally or knowingly."

Although I agree with the majority that DeOliveira's proposed instruction overreached in seeking to completely bar the jury from considering the alleged assault as the underlying intended crime for purposes of the Burglary I count, I believe the jury nonetheless was insufficiently instructed in this regard. In my view, the jury should have been instructed that, in order to rely on the assault as the underlying crime for the Burglary I offense, it must find that DeOliveira intentionally assaulted Angyal, and not that he did so only recklessly. There were no instructions along these lines, and to the contrary, the instructions to the jury underscored the reckless standard in regard to the Assault II charge, as well as the lesser included offense of Assault in the Third Degree (Assault III) of which the jury ultimately convicted DeOliveira.

As to the Assault II charge, the jury was instructed as follows:

In Count 2, the Defendant is charged with the offense of [Assault II].

A person commits the offense of [Assault II] if he recklessly causes substantial bodily injury to another person.

There are two material elements of the offense of [Assault II], each of which the prosecution must prove beyond a reasonable doubt.

These two elements are:

1. That, on or about April 7, 2012, in the City and County of Honolulu, State of Hawaii, the Defendant caused substantial bodily injury to Anne Angyal; and
2. That the Defendant did so recklessly.

(Emphasis added.) With regard to the lesser included offense of Assault III, the jury was instructed:

As to Count 2, if, and only if, you find the Defendant not guilty of [Assault II], or you are unable to reach a unanimous verdict as to this offense, then you must consider whether the Defendant is guilty or not guilty of the included offense of [Assault III].

A person commits the offense of [Assault III] if he ~~intentionally, knowingly, or~~ recklessly causes bodily injury to another person.

There are two material elements of the offense of [Assault III], each of which the prosecution must prove beyond a reasonable doubt.

These two elements are:

1. That, on or about April 7, 2012, in the City and County of Honolulu, State of Hawaii, the Defendant caused bodily injury to Ann Angyal; and
2. That the Defendant did so recklessly.

(Emphasis added, ~~strikeout~~ in original.) Of note, while reading the Assault III instruction to the jury, the Circuit Court advised the jury,

I'm sorry. I'm going to ask you to take your pencils, and as to the second paragraph, you are to strike the words "intentionally" and "knowingly" and "or." For purposes of Count 2, those words are irrelevant and have no meaning.

(Emphasis added.) Thus, rather than an instruction indicating that the jury could find intentional conduct as supporting the included offense of Assault III, the jury was expressly told that the word "intentionally" was irrelevant and had no meaning.

Without an instruction to the jury that it was required to find that DeOliveira intentionally assaulted Angyal if it based a Burglary I conviction on the charged Assault II or the lesser included offense of Assault III, the instructions given were insufficient and misleading. The jury instructions for both Assault II and Assault III only instructed that the State must prove that DeOliveira caused the alleged injury recklessly. Although the State argued to the jury that they could rely on the assault as the underlying intended crime -- because the State asserted that DeOliveira acted intentionally in committing the assault and was reckless in terms of the injury that resulted -- the jury was not instructed as such and instead was provided inconsistent and/or confusing instructions on this issue. See

Nichols, 111 Hawai'i at 340 n.8, 141 P.3d at 987 n.8 (recognizing that arguments by counsel cannot cure defects in jury instructions and that "[a]rguments by counsel are likely to be viewed as statements of advocacy, whereas a jury instruction is a definitive and binding statement of the law") (quoting State v. Perkins, 626 N.W.2d 762, 773 (Wis. 2001)) (block format omitted).

Moreover, given the proceedings, the actual findings made by the jury, and the record, it appears that the insufficient instructions may have been prejudicial to DeOliveira because it is reasonably possible that the jury improperly considered a reckless assault as the underlying crime for the Burglary I conviction. At trial, the State asserted a dual theory for the underlying crime to support the Burglary I offense: that DeOliveira intended to steal recording equipment in Angyal's bedroom and/or he intended to assault Angyal. The context of this case is that Angyal and DeOliveira had previously been in a relationship that had ended approximately eight months to a year prior to the incident, that they had worked with each other as musicians, and that approximately seven to ten days prior to the incident, DeOliveira had visited Angyal at her residence for dinner. DeOliveira does not dispute that in the early morning hours of April 7, 2012, he broke into Angyal's apartment while she slept by removing jalousie panes and entering through a window by the door. However, the testimony of DeOliveira and Angyal conflict in significant ways.

Angyal testified *inter alia* that after DeOliveira entered her residence, he said "I come in peace and aloha," anointed her with eucalyptus oil, walked past her into her room and picked up some recording equipment, and she in turn told him he could not take her things and that he needed to leave. Thereafter, Angyal asserts that DeOliveira grabbed her necklace and started to punch her in the head. DeOliveira, on the other hand, claims *inter alia* that he had been wandering around on foot that night after not being able to return to a Pagoda hotel room where he was staying with his girlfriend, that he had been

drinking and had been beaten up while walking around, and that he ended up by Angyal's apartment and decided to go there because he was in an emergency situation. He does not dispute removing jalousie panels to enter her apartment, but he denies touching the recording equipment and claims the confrontation with Angyal became physical after she became worried that she would be evicted if her roommate saw DeOliveira in the apartment, that she started grabbing DeOliveira, trying to get him to leave, at which point he started to flail his arms.

The jury did not convict DeOliveira of the Assault II charge (*i.e.*, recklessly causing substantial bodily injury), but instead convicted him of the lesser included offense of Assault III (*i.e.*, recklessly causing bodily injury). The jury also answered "[n]o" to a special interrogatory which asked "[d]id the prosecution prove beyond a reasonable doubt that the fight or scuffle was not entered into by mutual consent?" The jury's finding on the special interrogatory indicates they may have believed that the physical altercation was entered into by mutual consent, which is consistent with DeOliveira's testimony as to how the physical altercation occurred. Moreover, under DeOliveira's version of the incident, his conduct in the physical altercation with Angyal was not intentional. Thus, if the jury relied on the assault as the underlying crime for the Burglary I offense, it may have found DeOliveira guilty of Burglary I based on a recklessly committed assault. Despite that both parties argued during closing arguments whether the assault could form the underlying crime to support a burglary conviction, closing arguments cannot cure defects in jury instructions.³ Nichols, 111 Hawai'i at 340 n.8, 141 P.3d at 987 n.8.

Thus, given the charges against DeOliveira, the State's theory of the case, and the proceedings below, it is my view that the jury instructions were insufficient and confusing regarding

³ Also, the jury was instructed that "[i]n the event that a statement or argument made by a lawyer contradicts or misstates these instructions, you must disregard that statement or argument and follow these instructions."

the extent that the assault charge could satisfy the "intent to commit therein a crime" element for the Burglary I offense, and further, the error was not harmless.

With regard to DeOliveira's second point of error, asserting that the Circuit Court should have given the jury a special interrogatory to ensure that it did not rely on the assault as the underlying intended crime for the Burglary I offense, I do not believe a special interrogatory would have been necessary as long as the jury had been properly instructed, as set forth above.

With regard to DeOliveira's third point of error, I concur with the majority that the Circuit Court did not err in denying DeOliveira's motion for judgment of acquittal on the Burglary I conviction. Viewing the evidence in the light most favorable to the State, as is required for purposes of reviewing *this issue*, Angyal testified that after DeOliveira broke into her apartment, he went into her bedroom and started to take recording equipment. She also testified that when she told DeOliveira he could not take her things, he grabbed her necklace and started to punch her. Under the applicable standard of review for this issue, Angyal's testimony was sufficient to support a conclusion by the jury that DeOliveira intentionally entered unlawfully into her residence with intent to commit therein a crime against a person or against property rights.

I note, however, that concluding there was sufficient evidence to deny DeOliveira's motion for judgment of acquittal on Burglary I does not dilute the concerns stated above regarding the jury instructions in this case. In reviewing whether the jury instructions were sufficient, erroneous jury instructions are presumed to be harmful and if there is a reasonable possibility that the error may have contributed to the conviction, the judgment of conviction must be set aside. Nichols, 111 Hawai'i at 334, 141 P.3d at 981. Even if there was sufficient evidence, based on Angyal's testimony, to support the Burglary I conviction, this does not rule out the reasonable

possibility in this case that the jury instead believed DeOliveira's testimony, at least to the extent that he did not try to take the recording equipment and did not intentionally hit Angyal, and thus that the jury improperly relied on a reckless assault as the underlying crime in convicting DeOliveira of Burglary I. This possibility is made more likely by the jury's finding that the State failed to prove that "the fight or scuffle was not entered into by mutual consent[,]" which is more consistent with DeOliveira's testimony than Angyal's testimony.

For the reasons set forth above, I respectfully dissent in part and concur in part with the majority opinion. Based on my dissent, I would set aside DeOliveira's conviction for Burglary I and remand for a new trial on that count.