IN THE SUPREME COURT OF THE STATE OF HAWAI I

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STATE OF HAWAI I,
Respondent/Plaintiff-Appellee

vs.

JASON KELIIKOAIKAIKA KALAOLA,
Petitioner/Defendant-Appellant

NO. 29163

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CR. NO. 07-1-1337)

AUGUST 19, 2010

MOON, C.J., NAKAYAMA, AND
RECKTENWALD, JJ.; WITH ACOBA, J., CONCURRING
SEPARATELY AND DISSENTING, WITH WHOM DUFFY, J., JOINS

OPINION OF THE COURT BY RECKTENWALD, J.

Petitioner/Defendant-Appellant Jason Keliikoaikaika Kalaola was charged with one count of failure to disperse in violation of Hawai i Revised Statutes (HRS) § 711-1102 (1993),[1] following an incident at Aloha Tower Marketplace (ATM) in which police were called to respond to an unruly crowd. At trial, the

[1] HRS § 711-1102 (1993) provides in pertinent part:

> **Failure to disperse**. (1) When six or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm, a peace officer may order the participants and others in the immediate vicinity to disperse.
>
> (2) A person commits the offense of failure to disperse if the person knowingly fails to comply with an order made pursuant to subsection (1).

State presented evidence concerning Kalaola s conduct on both the second and first floors of ATM, and argued that Kalaola s failure to disperse from either floor was independently sufficient to support a conviction. The jury found Kalaola guilty, and a timely appeal followed. On appeal, the ICA concluded that the trial court erred in improperly instructing the jury, but held that there was sufficient evidence to support the conviction. State v. Kalaola, No. 29163, 2009 WL 1507291, at *2-3 (App. May 29, 2009). Accordingly, the ICA vacated the circuit court s judgment and remanded the case for a new trial. Id. at *3.

Kalaola timely petitioned this court for a writ of certiorari to review the ICA s June 26, 2009 judgment. In his application, Kalaola argues that the conviction was not supported by sufficient evidence and that, accordingly, it should be reversed rather than remanded for a new trial. The State did not petition this court for review of the ICA s judgment remanding to the circuit court for further proceedings, and did not file a response to Kalaola s application to this court. Accordingly, the ICA s finding of trial error with regard to the jury instructions is undisputed. The remaining question is whether the evidence presented at trial was sufficient to support Kalaola s conviction.

We hold that sufficient evidence was presented to establish that Kalaola failed to disperse from the first floor of ATM, but that there was insufficient evidence to establish that

Kalaola failed to disperse from the second floor. We further hold that the double jeopardy clause of the Hawai i Constitution does not bar a retrial of Kalaola with regard to his alleged failure to disperse from the first floor, for which there clearly was sufficient evidence adduced at trial to support a conviction under HRS § 711-1102.

Although no Hawai i cases address double jeopardy in the context of the specific factual situation at issue here, we are guided by our prior double jeopardy cases. In a variety of cases involving reprosecution after a jury verdict, this court has repeatedly recognized that, as long as there was sufficient evidence presented to support the conviction of the defendant for the charged offense, the double jeopardy clause bars a retrial only when there was in fact an acquittal, whether express or implied. Such was not the case here, since the jury convicted Kalaola.

We therefore vacate Kalaola s conviction and remand for a new trial with regard to the events that transpired on the first floor.

I. Background

The following facts, taken from the record on appeal and the transcripts of the proceedings before the trial court, are relevant to the consideration of the issues presented here.[2]

[2] For the purposes of this analysis, we consider the evidence in the light most favorable to the State. See State v. Richie, 88 Hawai i 19, 33, 960 P.2d 1227, 1241 (1998) (Evidence adduced in the trial court must be (continued...)

Kalaola was charged by way of complaint with one count of failure to disperse in violation of HRS § 711-1102(1). The complaint against Kalaola alleged:

> On or about the 19th day of May, 2007, in the City and County of Honolulu, State of Hawaii, [Kalaola], as one (1) of six (6) or more persons participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm, or as a person in the immediate vicinity, failed to obey a law enforcement officer s order to disperse, in violation of Section 711-1102(1) of the [HRS].

At trial, the State s only witnesses were police officers who encountered Kalaola at ATM on the night of the alleged incident. For example, Officer Keani Alapa (Officer Alapa) testified he was dispatched to ATM because of a report of approximately 50 people fighting. Upon arriving at ATM, Officer Alapa and Officer Ryan Kaio (Officer Kaio) encountered multiple fights going on, approximately maybe 50 to 75 people fighting on the second floor of ATM. Officer Alapa testified that he observed fighting over pretty much the whole area of the second floor.

Officer Alapa testified that he observed Kalaola on the second floor calling people out, challenging people to fight. Officer Alapa further testified that he addressed the general group of which Kalaola was a part and ordered them to leave at least ten times. Officer Alapa testified that Kalaola did not

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[2](...continued)
considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction) (quoting State v. Quitog, 85 Hawai i 128, 145, 938 P.2d 559, 576 (1997)) (brackets omitted).

leave at that time, but that the officers eventually got a lot of people to leave the second floor and (inaudible) proceed down to the parking lot where some other incidents ignited down there. Officer Alapa testified that it took approximately 20 minutes before the crowd started to go downstairs, and that he also eventually proceeded to the first floor, where he saw [Kalaola] again on the sidewalk.

Sergeant Albert Lee (Sergeant Lee) testified that, when he arrived at ATM, he saw about 50 people streaming out, they were still all yelling at each other, had some small fights breaking out. He testified that he also saw Kalaola streaming out of the second floor, yelling and swearing. Sergeant Lee testified that he approached Kalaola and told him to leave the area. Sergeant Lee further testified that, when he approached Kalaola, Kalaola was yelling and cursing at other people in the area, and that Sergeant Lee had to tell [Kalaola] at least maybe ten more times to leave. Sergeant Lee also testified that there were other fights breaking out in the parking lot of ATM, with which he had to assist. He further testified that, when he came back to the front of ATM, there were still other people fighting in the general area[,] and that he again asked [Kalaola] to leave and he wouldn t. Sergeant Lee testified that he then had Kalaola arrested for failure to disperse.

At the conclusion of the trial, the circuit court instructed the jury, with regard to the offense of failure to

disperse, as follows:

> . . .
> A person commits the offense of Failure to Disperse if he is one of six or more persons participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm, or he is a person in the immediate vicinity, and he knowingly fails to comply with a law enforcement officer s order to disperse.
> There are three material elements to the offense of Failure to Disperse, each of which the prosecution must prove beyond a reasonable doubt.
> These elements are:
> 1. That, on or about the 19th day of May, 2007, in the City and County of Honolulu, State of Hawai i, [Kalaola] was one of six or more persons participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm, or he was a person in the immediate vicinity; and
> 2. [Kalaola] failed to comply with a law enforcement officer s order to disperse; and
> 3. [Kalaola] did so knowingly.

(Emphasis added).

Although Kalaola requested that the circuit court include the statutory definition of disorderly conduct in the jury instructions, the circuit court did not instruct the jury on the definition of disorderly conduct.

The circuit court also gave the jury the following unanimity instruction, which was based on State v. Arceo, 84 Hawai i 1, 928 P.2d 843 (1996):

> The law allows the introduction of evidence for the purpose of showing that there is more than one act upon which proof of an element of an offense may be based. In order for the prosecution to prove an element, all twelve jurors must unanimously agree that the same act has been proved beyond a reasonable doubt.

During closing argument, the Deputy Prosecuting Attorney (DPA) referred to the Arceo instruction in arguing that there were multiple acts to support conviction. Specifically, the DPA relied on the instruction to argue that both the events

on the first floor and the events on the second floor could support conviction:

> In order for the Prosecution to prove an element, all twelve jurors must unanimously agree that the same act has been proved beyond a reasonable doubt.
>
> What this means, ladies and gentlemen, is whenever there is more than one act upon which proof of an element may be based.
>
> Basically, ladies and gentlemen, what that means is, number one, the incident on the second floor and, number two, the incident on the first floor.
>
> The incident on the second floor is when [Kalaola] was engaging in was calling people out and Officer Alapa told [Kalaola] to disperse and [Kalaola] did not so [sic].
>
> Officer Alapa chose not to arrest [Kalaola] at that time. He chose not to arrest anybody at that time because he was outnumbered and it was not safe for either him or Kaio to effectuate arrests.
>
> Their priority at that particular point was getting people was to calm down the situation and getting people to leave the second floor.
>
> The second incident, this is the incident with Sergeant Lee downstairs.
>
> At that particular and, ladies and gentlemen, that (inaudible) that all twelve of you must agree that one of these incidents happened.
>
> Basically, you cannot (inaudible) where six of you agree that the second floor incident happened, six of you agree that the first floor incident happened and [Kalaola] is guilty.
>
> What that means is that twelve of you must agree that the second floor incident happened or the first floor happened or both happened.
>
> Ladies and gentlemen, both did happen in this case, [Kalaola] failed to comply with Officer Alapa s orders to disperse on the second floor and he failed to comply with Sergeant Lee s orders to disperse on the first floor.[3]

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[3] Similarly, defense counsel argued in closing that the purpose of the Arceo instruction was to ensure unanimity with regard to the alleged failure to disperse from the first floor versus the alleged failure to disperse from the second floor:

> I want to bring you back to Instruction No. 17, . . . and that would be the instruction in which you must unanimously agree that the same act has been proven beyond a reasonable doubt. So I do want to highlight that there are several allegations of what happened and what transpired throughout the night, the early morning of May 19th.
>
> There s what supposedly happened on the second floor and there s supposedly what happened on the first floor. You all must unanimously agree to the

(continued...)

(Emphasis added).

On April 18, 2008, the jury found Kalaola guilty on one count of failure to disperse. A timely appeal followed. In a May 29, 2009 Summary Disposition Order, the ICA concluded that the circuit court erred in (1) failing to properly instruct the jury on the statutory definition of disorderly conduct and (2) failing to adequately instruct the jury that the knowingly state of mind applied to all the elements of the offense. State v. Kalaola, No. 29163, 2009 WL 1507291, at *2 (App. May 29, 2009). The ICA further concluded that there was sufficient evidence to establish each of the alternative means of committing the offense that was presented to the jury. Id. Finally, the ICA concluded that, assuming arguendo the case involved multiple acts, the circuit court gave a specific unanimity instruction which obviated the need for an election and there was sufficient evidence to prove that Kalaola engaged in conduct constituting the charged offense. Id. at *3. Accordingly, the ICA vacated the circuit court s April 18, 2008 judgment and remanded the case for a new trial. Id.

II. Standards of Review

A. Sufficiency of the Evidence

We review the sufficiency of evidence on appeal as

[3](...continued)
exact incident in which Jason Kalaola allegedly failed to disperse and you ve got to agree upon that beyond a reasonable doubt.

follows:

> [E]vidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

State v. Richie, 88 Hawai i 19, 33, 960 P.2d 1227, 1241 (1998) (quoting State v. Quitog, 85 Hawai i 128, 145, 938 P.2d 559, 576 (1997)). Substantial 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." Id. (citation omitted).

B. Constitutional Questions

We review questions of constitutional law de novo, under the right/wrong standard. Jou v. Dai-Tokyo Royal State Ins. Co., 116 Hawai i 159, 164-65, 172 P.3d 471, 476-77 (2007) (internal quotation marks and citation omitted).

III. Discussion

A. The prosecution presented substantial evidence that Kalaola failed to disperse from the first floor of ATM, but failed to present substantial evidence that Kalaola failed to disperse from the second floor of ATM

A person commits the offense of failure to disperse if he or she (1) was one of six or more persons [] participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm, or was in the immediate vicinity of such a disturbance; (2) was ordered by a

law enforcement officer to disperse; (3) failed to comply with that order; and (4) acted knowingly with respect to the foregoing elements. HRS § 711-1102. Accordingly, the prosecution was required to prove the foregoing elements and state of mind beyond a reasonable doubt. See State v. Assaye, 121 Hawai i 204, 216, 216 P.3d 1227, 1239 (2009) (HRS § 701-114(1)(a) and (b) (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.) (quoting State v. Manewa, 115 Hawai i 343, 357-58, 167 P.3d 336, 350-51 (2007)).

In analyzing the evidence in this case, it is important to distinguish between alternative means and multiple acts. In State v. Jones, 96 Hawai i 161, 183-84, 29 P.3d 351, 373-74 (2001), this court explained that we use the term alternative means to describe the legal concept of statutory alternatives for proving a single element of the offense charged. 96 Hawaii at 171 n.14, 29 P.3d at 361 n.14 (first emphasis in original; second emphasis added). Put another way, an alternative means case is one in which a single offensemay be committed in more than one way[.] Id. at 170, 29 P.3d at 360 (emphasis added). Accordingly, the instant case is an alternative means case in the sense that a single element of the offense of failure to disperse may be committed in more than one way, i.e., where the defendant is one of six or more persons participating in a course of disorderly conduct, or where the defendant is in the

immediate vicinity of such a disturbance.

This is also a multiple acts case[4]. Multiple acts refer to separate and distinct culpable acts that could support separate counts of an indictment or complaint[,] but that are submitted to the jury in a single count. Jones, 96 Hawai i at 169, 29 P.3d at 359 (emphasis added). Thus, in multiple acts cases, [e]ach separate and distinct culpable act or independent incident that may be charged as a separate count includes the conduct, attendant circumstances, and result of conduct that may be present. Id.at 171, 29 P.3d at 361.

The distinct multiple acts here are: (1) Kalaola s alleged failure to leave the second floor of ATM after being ordered to do so by Officer Alapa, and (2) Kalaola s alleged failure to leave the first floor after being ordered to do so by Sergeant Lee. In sum, the jury was presented with two acts, i.e., the alleged failures to disperse on the second and first floors of ATM, either of which could have been committed via two statutory alternative means, i.e., participating in disorderly conduct or being in the vicinity of disorderly conduct.

With this framework as a background, we will evaluate

[4] On appeal, the State argued that [Kalaola] was engaged in a single violation of the statute through a continuing course of conduct comprising failure to disperse in its totality[.] However, in its closing argument, the State argued that Kalaola s failure to disperse from either floor was independently sufficient to support a conviction. Thus, the State did not argue that Kalaola had engaged in a continuing course of conduct constituting failure to disperse, but rather argued that either of two separate incidents, number one, the incident on the second floor and, number two, the incident on the first floor[,] could support a conviction. Accordingly, because the State argued this as a multiple acts case, we do not consider whether Kalaola s alleged failure to disperse could constitute a continuing course of conduct.

the sufficiency of the evidence with regard to each floor. First, we conclude that there was insufficient evidence that Kalaola violated HRS § 711-1102 by failing to disperse from the second floor of ATM. Officer Alapa did not testify concerning how long Kalaola remained on the second floor after Officer Alapa ordered the crowd to disperse, other than observing that he saw Kalaola again on the first floor at least 20 minutes later. Kalaola s presence on the first floor at least 20 minutes later indicates that Kalaola complied with Officer Alapa s order to disperse. Accordingly, there is not substantial evidence that Kalaola knowingly failed to comply with Officer Alapa s order to disperse on the second floor of ATM.[5]

However, there was sufficient evidence that Kalaola violated HRS § 711-1102 by failing to disperse from the first floor of ATM. First, there was substantial evidence as to both of the statutory alternative means, i.e., that Kalaola was one of

> six or more persons [] participating in a course of disorderly conduct or that he was in the immediate vicinity of such a disturbance.

See HRS § 711-1102(1). Sergeant Lee testified that he saw about 50 people streaming out of ATM, with some small fights breaking out[,] and that he saw Kalaola streaming out of the second floor, yelling and swearing. Sergeant Lee further

[5] Each element of the offense must be proved beyond a reasonable doubt. HRS § 701-114(1)(a). Because we conclude that there was insufficient evidence that Kalaola knowingly failed to comply with Officer Alapa s order to disperse on the second floor, we need not address whether there was sufficient evidence concerning each of the remaining elements as to the second floor, including whether there was sufficient evidence of each of the statutory alternative means.

testified that, when he approached Kalaola on the first floor, Kalaola was yelling and cursing at other people, and that there were still other people fighting in the general area[.] When viewed in the light most favorable to the prosecution, Sergeant Lee s testimony is sufficient to enable a person of reasonable caution to support a conclusion that six or more persons [were] participating in a course of disorderly conduct, and that Kalaola was either participating in such conduct or in the immediate vicinity. See HRS § 711-1102.

Second, there is substantial evidence that Sergeant Lee ordered Kalaola to disperse. Sergeant Lee testified that he approached Kalaola and told him to leave the area. He further testified that he had to tell [Kalaola] at least maybe ten more times to leave. Accordingly, when viewed in the light most favorable to the prosecution, Sergeant Lee s testimony provides substantial evidence that Kalaola was ordered to disperse. See In re Doe, 95 Hawai i 183, 196, 20 P.3d 616, 629 (2001) (citation omitted) (noting that the testimony of a single witness, if found by the trier of fact to have been credible, will suffice to provide substantial evidence).

Third, there is substantial evidence that Kalaola failed to comply with Sergeant Lee s order, because Sergeant Lee testified that he had to tell [Kalaola] at least maybe ten more times to leave, and that he asked [Kalaola] to leave and he wouldn t. Accordingly, Sergeant Lee s testimony provides

substantial evidence that Kalaola failed to leave when ordered to do so, i.e., that he failed to comply with Sergeant Lee s order to disperse. See id.

Finally, there is substantial evidence that Kalaola acted knowingly with respect to the foregoing elements. [T]he mind of an alleged offender may be read from his or her acts or conduct and the inferences fairly drawn from all of the circumstances. State v. Pudiquet, 82 Hawai i 419, 425, 922 P.2d 1032, 1038 (1996) (internal quotation marks omitted) (quoting State v. Leung, 79 Hawai i 538, 544, 904 P.2d 552, 558 (App. 1995)). In the instant case, Sergeant Lee testified that he approached Kalaola and told him to leave the area, but that Kalaola refused. Thus, an inference may be fairly drawn from Sergeant Lee s testimony that Kalaola both knew of the order to disperse, and knowingly failed to comply with it.

Accordingly, there is substantial evidence that Kalaola failed to disperse from the first floor of ATM.

B. Double jeopardy does not bar retrial of Kalaola

The remaining question is whether Kalaola can be retried in these circumstances. Kalaola initially suggested, in his opening brief to the ICA, that he could be retried on the alternative theor[y] that was supported by sufficient evidence. However, during oral argument in this court, Kalaola suggested

double jeopardy could bar retrial.[6] In view of the fact that this issue was eventually raised by Kalaola and is discussed at length by the dissent, we address it to provide guidance to the circuit court. As set forth below, we conclude that double jeopardy does not bar retrial with regard to Kalaola s failure to disperse from the first floor, for which there was clearly sufficient evidence adduced to support a conviction.

1. Double jeopardy principles

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall be subject for the same offence to be twice put in jeopardy of life or limb[.] Similarly, article I, section 10 of the Hawaii Constitution provides that no person shall . . . be subject for

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[6] The question of whether double jeopardy precludes Kalaola s retrial was not raised by Kalaola in his briefs to the ICA or application to this court. To the contrary, after arguing in his opening brief that there was insufficient evidence to support the conviction in its entirety, Kalaola then argued:

> Even if, however, the State adduced sufficient evidence for one of the alternative theories, it is impossible to determine which alternative theory the jury based its verdict upon because the circuit court did not provide an interrogatory to the jury. Based on the nature of the evidence and the arguments in the case, it is probable that the jurors based their decision on an alternative that was not supported by sufficient evidence. As such, Kalaola s rights to a unanimous verdict and due process under article I, § 5 of the Hawaii State Constitution have been violated and Kalaola s conviction must remanded [sic] for trial on the viable alternative.

Kalaola s counsel repeated that suggestion in his opening argument to this court, MP3: Oral Argument, Hawaii Supreme Court, at 27:55-28:19, 29:58-30:20 (Jan. 7 2010), available at http://www.courts.state.hi.us/courts/oral_arguments/archive/oasc29163.html, a position with which the State agreed, id. at 48:51-49:14. It was not until defense counsel s rebuttal closing that counsel suggested there might be a double jeopardy issue. Id. at 59:04-1:00:17.

the same offense to be twice put in jeopardy[.]

This court has described the purpose underlying the prohibition against double jeopardy as follows:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

State v. Quitog, 85 Hawai i 128, 140, 938 P.2d 559, 571 (1997) (quotation marks omitted) (quoting Green v. United States, 355 U.S. 184, 187-88 (1957)).

This court has also recognized that there are three separate and distinct aspects to the protections offered by the double jeopardy clause. Id.at 141, 938 P.2d at 572. Thus,

[d]ouble jeopardy protects individuals against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. Id. (citations and quotation marks omitted; emphasis added); see also State v. Whiting, 88 Hawai i 356, 359, 966 P.2d 1082, 1085 (1998). Consistent with the prohibition against reprosecution following an acquittal, double jeopardy presents an absolute bar to retrial where, inter alia, the defendant has been acquitted, whether expressly or impliedly, notwithstanding a subsequent reversal of the judgment on appeal[,] State v. Feliciano, 62 Haw. 637, 644, 618 P.2d 306, 311 (1980), superseded by statute on other grounds

as stated in State v. Rumbawa, 94 Hawai i 513, 517, 17 P.3d 862, 866 (App. 2001), and where the insufficiency of evidence is such that the appellate court finds that the government failed to prove its case beyond a reasonable doubt[,] State v. Bannister, 60 Haw. 658, 660, 594 P.2d 133, 135 (1979) (quoting Burks v. United States, 437 U.S. 1, 16 n.10 (1978)).

However, the protections of the double jeopardy clause are not absolute. State v. Miyazaki, 64 Haw. 611, 618, 645 P.2d 1340, 1345 (1982); see also United States v. Tateo, 377 U.S. 463, 466 (1964) (Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he [has] obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.)[7]. For example, [t]he double jeopardy clause does not preclude retrial where a defendant was not acquitted of the charged offense[,] Whiting, 88 Hawai i at 359, 966 P.2d at 1085, and imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside[,] for reasons other than insufficiency of the evidence,

[7] The dissent correctly observes that federal precedents set forth minimum protections, and do not control the state constitution[.] Dissenting opinion at 55. However, this court has cited with approval the principles derived from each of the federal cases relied upon herein. See, e.g., State v. Hamala, 73 Haw. 289, 293, 834 P.2d 275, 277 (1992) (quoting Tateo, 377 U.S. at 466), overruled on other grounds by State v. Rogan, 91 Hawai i 405, 984 P.2d 1231 (1999); Feliciano, 62 Haw. at 644, 618 P.2d at 311 (citing Green v. United States, 355 U.S. 184, 190-91 (1957)); Bannister, 60 Haw. at 660, 594 P.2d at 135 (quoting Burks, 437 U.S. at 16 n.10).

State v. Jess, 117 Hawai i 381, 439 n.28, 184 P.3d 133, 191 n.28 (2008) (quotation marks omitted) (quoting United States v. DiFrancesco, 449 U.S. 117, 131 (1980)). As set forth below, such reasons are typically referred to as trial error. See, e.g., Burks, 437 U.S. at 14-15 & n.8. (noting that reversal for trial error is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct).

In the instant case, we conclude that the lack of substantial evidence concerning Kalaola s failure to disperse from the second floor of ATM does not bar remand with regard to Kalaola s failure to disperse from the first floor of ATM, for which there clearly was sufficient evidence adduced at trial.

2. The jury neither expressly nor impliedly acquitted Kalaola of the charged offense

It is clear that a defendant may not be retried for any offense of which he has been acquitted, whether expressly or impliedly, notwithstanding a subsequent reversal of the judgment on appeal. Feliciano, 62 Haw. at 644, 618 P.2d at 311; see also State v. Mundon, 121 Hawai i 339, 355, 219 P.3d 1126, 1142 (2009) (That a jury s verdict of acquittal bars a subsequent retrial on those same offenses is perhaps the most fundamental rule in the history of double jeopardy jurisprudence.) (citation and some quotation marks omitted). In a case involving reversal of a conviction on a lesser included offense, this court has explained

that two rationales support the prohibition against reprosecution following an acquittal:

> First, the concept of double jeopardy is enhanced in that after an acquittal, a defendant is freed of the threat of renewed prosecution on the more serious offense. . . . Second, such a rule does not inhibit a defendant in his decision of whether to appeal his conviction. The Commentary to HRS [§] 701-110[8] states, If the defendant faces reprosecution for an offense of which he has been acquitted, he may be unfairly hampered in his decision about whether to contest the validity of the conviction for the lesser offense. Under the rule we discuss today, the appellant would not be coerced into waiving his right to appeal his conviction on the lesser included offense for fear of being reprosecuted on the more serious offense.

Feliciano, 62 Haw. at 644, 618 P.2d at 311 (emphasis added).

In the instant case, however, there was no express jury verdict of acquittal. Kalaola was charged with one count of failure to disperse in violation of HRS § 711-1102(1), and was convicted on that count. Although the prosecution argued that Kalaola committed two distinct acts of failing to disperse, the jury did not return an express verdict of acquittal with regard

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[8] HRS § 701-110 (1993) provides, in pertinent part:

> **When prosecution is barred by former prosecution for the same offense.** When a prosecution is for an offense under the same statutory provision and is based on the same facts as a former prosecution, it is barred by the former prosecution under any of the following circumstances:
>
> (1) The former prosecution resulted in an acquittal which has not subsequently been set aside. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination by the court that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside on appeal by the defendant.
>
> . . .

to either act. Moreover, as discussed further infra, the jury s guilty verdict did not impliedly acquit Kalaola with regard to his alleged failure to disperse from either floor.

In Green v. United States, 355 U.S. 184, 190-91 (1957), which this court cited with approval in, inter alia, Feliciano, see 62 Haw. at 644, 618 P.2d at 311, the United States Supreme Court explained that, in certain circumstances, a conviction on a lesser-included crime must, for double jeopardy purposes, be taken as an implied acquittal of the greater charge. Consistent with that holding, this court has concluded that a defendant who has been convicted of a lesser included offense than that charged is deemed to have been acquitted of the greater charge. Feliciano, 62 Haw. at 644, 618 P.2d at 311; see also State v. Pesentheiner, 95 Hawai i 290, 301, 22 P.3d 86, 97 (App. 2001) (noting that a criminal defendant is protected from being retried for an offense whenever a jury impliedly acquits him of that offense by finding him guilty of a lesser included offense).

In Green, the defendant was indicted on two counts, one of which charged that he had committed arson, and one of which charged him with murder in the first degree. 355 U.S. at 185. A jury found the defendant guilty of arson and of the lesser-included offense of second degree murder. Id. at 186. The jury did not find [the defendant] guilty on the charge of murder in the first degree[,] and [i]ts verdict was silent on that

charge. Id. On appeal, the District of Columbia Circuit Court of Appeals reversed the conviction for second degree murder because it was not supported by sufficient evidence, and the case was remanded for a new trial. Id.

On remand, the defendant was tried again for first degree murder under the original indictment. Id. He raised the defense of former jeopardy, based [not] on his previous conviction for second degree murder but instead on the original jury s refusal to convict him of first degree murder. Id. at 186, 190 n.11. The defendant s double jeopardy defense was rejected by the trial court, and a new jury found [the defendant] guilty of first degree murder[.] Id. at 186. On appeal, the Court of Appeals rejected his defense of former jeopardy . . . and affirmed the conviction. Id. The United States Supreme Court granted certiorari, id., and conclude[d] that this second trial for first degree murder placed [the defendant] in jeopardy twice for the same offense in violation of the Constitution[,] id.at 190.

In so doing, the Court noted that [a]t [the defendant s] first trial the jury was authorized to find him guilty of either first degree murder . . . or, alternatively, of second degree murder . . . . Id. at 189-90 (emphasis added). The Court concluded that, [i]n substance the situation was the same as though [the defendant] had been charged with these different offenses in separate but alternative counts of the

indictment. The constitutional issues at stake here should not turn on the fact that both offenses were charged to the jury under one count. Id. at 190 n.10. The Court explained that:

> [The defendant] was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gauntlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury s verdict as an implicit acquittal on the charge of first degree murder. . . . In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.

Id. at 190-91 (emphasis added).

Similarly, in Feliciano, the defendant was charged with attempted murder, and was found guilty of reckless endangering in the second degree. 62 Haw. at 637-38, 618 P.2d at 307. This court concluded that the conviction for reckless endangering resulted from an erroneous jury instruction, and reversed. Id. at 638, 618 P.2d at 308. We further held that retrial on the attempted murder charge [was] barred by HRS [§] 701-110. Id. This court noted that [t]he jury conviction in the first trial on the lesser included offense automatically acquitted the appellant of the greater charge in the indictment and retrial on the greater offense is barred. Id. at 644, 618 P.2d at 311 (emphasis added).

Thus, the doctrine of implied acquittals has developed primarily in the context of reviewing convictions on lesser-included offenses. See id.; see also State v. Loa, 83 Hawai i

335, 361, 926 P.2d 1258, 1284 (1996) (noting, where the circuit court instructed the jury on a non-existent lesser-included offense, [t]he jury having acquitted [the defendant] of [the] charge[d offense] by virtue of its verdict [of guilt on the lesser-included offense], we hold that [the defendant] may not be retried for it.). The ICA has declined to extend the doctrine of implied acquittals to other contexts. In State v. Pesentheiner, 95 Hawai i 290, 291, 22 P.3d 86, 87 (App. 2001), cert. denied May 4, 2001 (no Westlaw citation available; available at http://www.state.hi.us/jud/opdate2001.htm), the defendant was charged with harassment, which required that he have acted with the intent to harass, annoy, or alarm any other person[.] The district court, in a bench trial, found the defendant guilty as charged, but determined that the defendant s actions were reckless. Id. The ICA determined that the district court s ruling demonstrates its genuine confusion as to the intent element of the harassment charge[,] and therefore concluded that the conviction could not stand. Id. at 301, 22 P.3d at 97.

The defendant urged that his conviction should be reversed. In considering whether double jeopardy would bar reprosecution of the defendant on the theory that the district court had acquitted him of the harassment charge by not finding the requisite state of mind, the ICA explained:

> [A]ny [] implication in this case that the court made a finding of fact inconsistent with guilt must founder. The court s erroneous assumption that

> recklessness was sufficient for conviction rendered it unnecessary, under the assumption, to go further in considering the evidence than a finding that [the defendant] recklessly waved his arms. Had the court applied the correct mens rea standard in its consideration of the evidence, it would have been further required to assess the weight and credibility of [the police officer s] description of theactus reus. As we have observed, the court s ruling is devoid of any mention of the issue. Under these circumstances, we cannot say that the court made a definitive finding of fact, invariably inconsistent with guilt, that might bar retrial.
>
> Instead, having concluded that sufficient evidence was adduced at trial to sustain the charge, we apply the usual rule for trial error[.]

Id. (some emphasis in original and some added).

There are strong policy reasons in favor of requiring that the trier of fact make some determination in a defendant s favor before a reviewing court will presume an acquittal. In addressing criticism that reversal for trial error may make it

> quite possible that the jury would have acquitted [the defendant] if not for the trial error that required reversal, it has been noted that:
>
> while estimating the impact of a trial error always presents uncertainties, whether the result is a conviction or an acquittal, only in the latter situation is there concrete evidence, in the form of a not guilty verdict, that the jury may have resolved factual issues in favor of the defendant s innocence. That concrete evidence entitles the defendant to the benefit of the doubt that conclusively presumes his innocence, while a conviction, even where probably influenced by trial error, offers no such starting point for assuming the jurors would have found defendant not guilty except for the error.

Wayne R. LaFave, et al., Criminal Procedure § 25.3(b) at 631-32 (3d ed. 2007) (emphasis added).

In the instant case, as explained supra, Kalaola was not expressly acquitted by the jury. Moreover, Kalaola s conviction on the charge of failure to disperse cannot be assumed

to include an implied acquittal on either of the acts offered by the prosecution to support his conviction. Kalaola was not convicted on a lesser-included offense, such that his conviction must be interpreted as an implied acquittal on the greater charge. See Green, 355 U.S. at 190-91; Feliciano, 62 Haw. at 643-44, 618 P.2d at 311. In addition, the jury did not refuse to convict Kalaola on the basis of either act, nor was the jury required to choose between the act on the first floor and the act on the second floor in order to convict, such that a conviction on one must be interpreted as an implied acquittal on the other. See Green, 355 U.S. at 190-91. Finally, there is no indication that the jury "made a definitive finding of fact, invariably inconsistent with guilt, that might bar retrial." See Pesentheiner, 95 Hawaiʻi at 301, 22 P.3d at 97. Accordingly, the purposes underlying the double jeopardy prohibition against retrial following acquittal, i.e., avoiding the threat of renewed prosecution and a chilling effect on the decision to appeal, are not implicated in the circumstances of this case. See Feliciano, 62 Haw. at 644, 618 P.2d at 311. Based on the foregoing, cases concerning implied acquittals are plainly inapposite.[9]

[9] We therefore agree with the dissent's conclusion that the holdings in Feliciano, Whiting and Loa are inapposite, dissenting opinion at 62-64, insofar as they concerned implied acquittals in the context of lesser-included offenses. However, this conclusion supports the inference that the doctrine of implied acquittals does not extend to the circumstances of the instant case.

Although, the dissent speculates that "it is possible that [Kalaola] could be retried for conduct the jury had rejected as a basis for legal liability in the first trial[,]" since "[i]t is impossible to know for which multiple acts the jury convicted [Kalaola]," dissenting opinion at 43 (emphasis added), such speculation is insufficient to implicate the

(continued...)

State v. Mundon, 121 Hawaiʻi 339, 219 P.3d 1126 (2009) is not to the contrary. Mundon was charged with, inter alia, two counts of terroristic threatening in the first degree (TT1). Id. at 354, 219 P.3d at 1141. The language of the indictment as to each count was identical, and the prosecution adduced evidence as to two separate acts of TT1 at trial. Id. However, "each specific act was not assigned to a specific count[.]" Id. at 355, 219 P.3d at 1142. The jury "convicted Mundon of one count of TT1 and acquitted him of the other." Id. at 354, 219 P.3d at 1141 (emphasis added).

This court noted that, because no specific unanimity instruction was given, "there is a 'genuine possibility' that different jurors concluded that Mundon committed different acts." Id. Accordingly, this court held that "the trial court plainly erred in failing to provide such an instruction." Id. at 355, 219 P.3d at 1142. This court further noted that "Mundon's conviction on one of the TT1 counts and acquittal on another (where the specific act supporting each count was never specified) raises double jeopardy concerns." Id. (emphasis added). Even assuming that the jury was unanimous as to which of the two alleged acts formed the basis for Mundon's culpable

[9](...continued)
protections of the double jeopardy clause. Nevertheless, the dissent suggests that remand is impermissible because "it is [] entirely possible that the jury had in effect found [Kalaola] not guilty on the act[] supported by substantial evidence." Dissenting opinion at 68. With all due respect, the dissent's extension of the implied acquittal doctrine to the circumstances of the instant case -- in which there is no basis for assuming that the jury "in effect" acquitted Kalaola of the charged offense -- is without support in our case law.

conduct, "there [was] no way to know which specific act . . . served as the basis for Mundon's acquittal[.]" Id. (emphasis in original). Accordingly, if this court had remanded one of the counts for retrial, there would be "a distinct possibility that Mundon could be retried for an offense involving the same conduct for which he was acquitted." Id. Since it is well-settled that double jeopardy bars retrial for the same offense after an express acquittal, this court reversed Mundon's conviction. Id.

In contrast, in the instant case, Kalaola was never acquitted by a jury for either of the two alleged acts of failure to disperse. Thus, unlike Mundon, the retrial of Kalaola does not present a distinct possibility that Kalaola could be retried for an offense for which he was previously acquitted. Moreover, whereas the holding in Mundon relies on the well-established proposition that double jeopardy bars retrial following an express jury verdict of acquittal, nothing in Mundon purports to resolve the distinct factual situation presented here, where the jury expressly found the defendant guilty of the charged offense.

3. There was sufficient evidence to support Kalaola's conviction for failure to disperse

The reversal of a conviction for insufficiency of the evidence constitutes a determination by the appellate court that the defendant should have been acquitted in the trial court in the first instance because, "as a matter of law [] the jury could not properly have returned a verdict of guilty." See State v. Bannister, 60 Haw. 658, 660, 594 P.2d 133, 135 (1979). When

reviewing the sufficiency of evidence presented at trial, this court has explained that:

> evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

Jones, 96 Hawai i at 181, 29 P.3d at 371 (emphasis added) (quoting Quitog, 85 Hawai i at 145, 938 P.2d at 576).

In the instant case, the evidence presented at trial was insufficient to support a conclusion that Kalaola failed to disperse from the second floor of ATM when ordered to do so by Officer Alapa. However, this evidentiary insufficiency does not bar retrial of Kalaola on his alleged failure to disperse from the first floor, for which there was clearly sufficient evidence. Because there was substantial evidence to support the conclusion of the trier of fact, i.e., that Kalaola was guilty of the charged offense of failure to disperse, double jeopardy does not bar retrial with regard to the events on the first floor. See id.

In Burks v. United States, 437 U.S. 1, 5 (1978), the United States Supreme Court considered whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the evidence was insufficient to sustain the verdict of the jury. The Court analogized an appellate court s determination that the evidence was insufficient to support a

conviction to a verdict of acquittal, noting:

> It is unquestionably true that the Court of Appeals decision represente[d] a resolution, correct or not, of some or all of the factual elements of the offense charged. By deciding that the Government had failed to come forward with sufficient proof of petitioner's capacity to be responsible for criminal acts, that court was clearly saying that Burks criminal culpability had not been established. If the District Court had so held in the first instance, as the reviewing court said it should have done, a judgment of acquittal would have been entered and, of course, petitioner could not be retried for the same offense. Consequently, as Mr. Justice Douglas correctly perceived in Sapir [v. United States, 348 U.S. 373 (1955)], it should make no difference that the reviewing court, rather than the trial court, determined the evidence to be insufficient. The appellate decision unmistakably meant that the District Court had erred in failing to grant a judgment of acquittal. To hold otherwise would create a purely arbitrary distinction between those in petitioner s position and others who would enjoy the benefit of a correct decision by the District Court.

Id. at 10-11 (internal citations and footnote omitted; some brackets in original and some added; first emphasis in original, second emphasis added).

The Court further explained that [t]he [d]ouble [j]eopardy [c]lause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. Id. at 11. The Court also distinguished reversal for evidentiary insufficiency from that for trial error:

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring

> that the guilty are punished.

Id. at 15 (emphasis added).

The court identified, inter alia, the failure to dismiss a faulty indictment[,] improper instruction, absence of the accused during a portion of the trial, improper hearsay testimony received, and failure to record jury instructions, as trial errors. Id. at 14 & n.8.

Relying on Burks, this court has determined that [t]he prohibition against double jeopardy applies where the reversal is based on insufficiency of evidence[.] Bannister, 60 Haw. at 660, 594 P.2d at 135. In Bannister, this court reversed the defendant s conviction for first degree theft due to a lack of admissible evidence that he had committed theft of property or services the value of which exceeds $200[,] and remanded for entry of a judgment of acquittal. Id. at 659-60, 594 P.2d at 134-35 (quotation marks omitted). This court explained that:

> Since we necessarily afford absolute finality to a jury s verdict of acquittal no matter how erroneous its decision it is difficult to conceive how society has any greater interest in retrying the defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.
>
> [Burks, 437 U.S. at] 16[]. However, the prohibition does not apply where judgment is reversed for a trial error because the effect of the decision does not constitute a failure of the government to prove its case. Id. at 10[].
>
> The prohibition against double jeopardy where reversal is based on insufficiency of evidence is absolute. The appellate court cannot remand the case even where a new trial appears equitable. Id. at 11 n.6[]. Furthermore, this prohibition applies only where the insufficiency of evidence is such that the appellate court finds that the government failed to prove its case beyond a reasonable doubt. Id. at 16 n.10[].

Id. at 660, 594 P.2d at 135 (emphasis added); see also State v. Hamala, 73 Haw. 289, 293, 834 P.2d 275, 277 (1992), overruled on other grounds by State v. Rogan, 91 Hawai i 405, 984 P.2d 1231 (1999).

In the instant case, there was substantial evidence that Kalaola failed to disperse on the first floor. Thus, the determination that there was not substantial evidence that Kalaola failed to disperse on the second floor does not constitute a failure of the government to prove its case. See Bannister, 60 Haw. at 660, 594 P.2d at 135. To the contrary, our conclusion demonstrates that there was substantial evidence to support the conclusion of the trier of fact[,] i.e., that Kalaola was guilty of the charged offense of failure to disperse. See Jones, 96 Hawai i at 181, 29 P.3d at 371. Moreover, our determination that there was insufficient evidence that Kalaola failed to disperse on the second floor does not constitute a determination that Kalaola should have been acquitted in the trial court, since the jury could properly have returned a verdict of guilty on the charged offense based on the events that took place on the first floor. Our determination therefore

> implies nothing with respect to the guilt or innocence of [Kalaola] with regard to the charged offense of failure to disperse. See Burks, 437 U.S. at 15.

This analysis is consistent with our holding in Jones, 96 Hawai i at 183-84, 29 P.3d at 373-74. The defendant in Jones

was charged with multiple counts of sexual assault relating to the 14 year old complaining witness (CW). 96 Hawai i at 163-64, 29 P.3d at 353-54. Each count related to a specific act of sexual penetration or sexual contact; in other words, the State did not rely on multiple acts of sexual conduct to support a single count, and thus Jones was not a multiple acts case. Id. at 172, 29 P.3d at 362. However, the State did rely on alternative means of proving the consent element of each offense, i.e., it argued both that the CW did not consent, and that if she did, her consent was invalid for various reasons. Id. at 164, 174, 29 P.3d at 354, 364. The circuit court instructed the jury both on lack of consent, and on four different grounds by which it could find that any consent by the CW was invalid, pursuant to HRS § 702-235. Id. at 164-65, 29 P.3d at 354-55. Although the prosecution presented considerable argument and some evidence regarding two of the four grounds, this court found that there was insufficient evidence supporting any of the four grounds. Id. at 183, 29 P.3d at 373. There was, however, sufficient evidence to establish lack of consent by the CW. Id. at 182, 29 P.3d at 372.

We then phrased the issue as follows: in an alternative means case where it is impossible to tell which alternative the jury s verdict is based upon, does due process require that each of the alternative means presented to the jury be supported by legally sufficient evidence? Id. at 178, 29

P.3d at 368. We considered, but rejected, the approach taken by the United States Supreme Court in Griffin v. United States, 502 U.S. 46 (1991), where the Court held that due process did not require that each alternative presented to the jury be supported by sufficient evidence, since it could be assumed that the jury had rejected any alternative that was not so supported. Id. at 178-81, 29 P.3d at 368-71. We concluded that unanimity is not required where alternative means of establishing an element of an offense are submitted to the jury, provided that there is no reasonable possibility that the jury s verdict was based on an alternative unsupported by sufficient evidence. Id.at 181, 29 P.3d at 371 (emphasis in original).

We emphasized that the trial court had instructed the jury that it could find that the consent element was satisfied if any one of four alternative theories of ineffective consent was established by the State, and observed that based on that instruction being given, the jurors understandably might believe that there must be some evidence to support that theory. Id. at 183, 29 P.3d at 373 (quoting Commonwealth v. Plunkett, 664 N.E.2d 833, 837 (Mass. 1996)). We also noted that there was some evidence and argument to the jury supporting some of the grounds of ineffective consent[,] Jones, 96 Hawai i at 167, 178, 29 P.3d at 357, 368 (emphasis in original), but that the evidence adduced in support of those grounds was legally insufficient[,] id. at 178, 29 P.3d at 368. Thus, we concluded that the

instruction as to ineffective consent prejudicially affected Defendant s right to due process[,] and added that the erroneous jury instruction regarding ineffective consent was not harmless because there was a reasonable possibility that the verdict was based on an alternative that was unsupported by legally sufficient evidence. Id.

In sum, this court determined that:

> (1) the jury was instructed that it could convict Defendant based on the absence of consent or any of the four grounds of ineffective consent, (2) there was a reasonable possibility that the verdict was based upon at least one of the four grounds of ineffective consent, and (3) there was legally insufficient evidence to support any of the four grounds of ineffective consent presented to the jury.

Id. (first emphasis in original, second emphasis added).

Accordingly, we determined that the defendant s conviction could not stand. Id. However, despite determining that there was a possibility that the verdict was based on an alternative means of establishing guilt not supported by legally sufficient evidence, this court concluded that the double jeopardy clause does not bar retrial on the means of establishing guilt for which there was sufficient evidence presented at trial because the error in this case was trial error. Id. at 184 n.30, 29 P.3d at 374 n.30.

It is well-settled that, even where this court finds trial error, challenges to the sufficiency of the evidence must always be decided on appeal. This is because the [d]ouble [j]eopardy [c]lause bars retrial of a defendant once a reviewing court has found the evidence at trial to be legally insufficient

to support a conviction. State v. Malufau, 80 Hawai i 126, 132, 906 P.2d 612, 618 (1995), vacated in part on other grounds on reconsideration, 80 Hawai i 126, 134-38, 906 P.2d 612, 620-24 (1995). Although this court determined that there was trial error in Jones, double jeopardy would have barred retrial had this court found that the evidence at trial [was] legally insufficient to support a conviction. Jones, 96 Hawai i at 184 n.30, 29 P.3d at 374 n.30. Thus, Jones is not distinguishable on the ground that the outcome was based on trial error.[10]

A careful reading of this court s discussion of double jeopardy in Jones is instructive:

> The double jeopardy clause bars retrial of a defendant once a reviewing court has found the evidence at trial to be legally insufficient to support a conviction. However, retrial is not barred when the reviewing court reverses a case due to trial error, such as erroneous jury instructions. Although our holding in this case is based, in part, on our conclusion that the jury instruction regarding ineffective consent raised the possibility that the verdict was based on an alternative means of establishing guilt not supported by legally sufficient evidence, it is undisputed that there was legally sufficient evidence of the other alternative of establishing guilt and, thus, the error in this case is trial error.

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[10] The dissent maintains that the instant case hinges on the prosecution s failure to adduce sufficient evidence, and not on the court s failure to properly instruct the jury. Dissenting opinion at 49 (emphasis added). The dissent further asserts that because the basis for reversal [in Jones] was trial error and not insufficiency of the evidence, double jeopardy was not implicated[.] Dissenting opinion at 49.

However, the instant case does not hinge on insufficiency of the evidence to any greater extent than Jones. It is undisputed that trial error occurred in the instant case, insofar as the circuit court failed to properly instruct the jury. Although the dissent attempts to discount the presence of trial error in this case by apparently contending that the disposition in Jones is proper only where insufficiency of the evidence occurs as a direct result of trial error, dissenting opinion at 53-54, nothing in this court s analysis in Jones requires such a result. Moreover, the dissent does not explain why requiring a nexus between trial error and insufficiency of the evidence is necessary in light of the principle that, so long as there was sufficient evidence presented to support a conviction, double jeopardy bars retrial only when there was an acquittal, whether express or implied.

> Accordingly, the double jeopardy clause does not bar retrial on the means of establishing guilt for which there was sufficient evidence presented at trial.

Id. at 184 n.30, 29 P.3d at 374 n.30 (citations omitted) (emphasis added).

This court s reasoning indicates that because there was sufficient evidence of one of the alternative means of establishing guilt but insufficient evidence of the other, the error in Jones was properly analyzed under the double jeopardy principles applicable to trial error. Put another way, the double jeopardy clause was not implicated because there was sufficient evidence to support a conviction.[11] Id.; see also Arceo, 84 Hawai i at 33 n.40, 928 P.2d at 875 n.40. Similarly here, the double jeopardy clause is not implicated with regard to Kalaola s failure to disperse from the first floor of ATM since there was sufficient evidence to support a conviction based on those acts.

Arceo is not to the contrary. Arceo was charged with

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[11] We respectfully disagree with the dissent s attempt to distinguish Jones on the ground that, in Jones, the prosecution charged each act or incident in a separate count, and the jury s decision as to each act was readily discernable. Dissenting opinion at 51. Although there was no basis by which to confirm the jury s verdict as to each alternative means in Jones, we nevertheless remanded the defendant s case for retrial on the alternative means that was supported by sufficient evidence. 96 Hawai i at 184, 29 P.3d 374. Thus, for double jeopardy purposes, confirmation as to the basis for the jury s verdict is not required where there is substantial evidence to support a conviction. See id at 184 n.30, 29 P.3d at 374 n.30 (noting that, when reviewing a conviction for sufficiency of the evidence, we consider whether the evidence was legally insufficient to support a conviction); see also Arceo, 84 Hawai i at 33 n.40, 928 P.2d at 875 n.40. The dissent provides no explanation for its contrary assertion that double jeopardy bars remand in the instant case, but did not present any risks to the double jeopardy rights of the defendant in Jones[,] dissenting opinion at 52 (emphasis added), despite the fact that there was a genuine possibility that the jury may have acquitted the defendant in Jones of the alternative means that were remanded.

one count of sexual assault in the third degree (Count I), and one count of sexual assault in the first degree (Count II). 84 Hawai i at 2-3, 928 P.2d at 844-45. Count I involved multiple acts of sexual contact between Arceo and his six-year-old son (the minor). Id. at 3-4, 928 P.2d at 845-46. Count II involved multiple acts of sexual penetration with the minor. Id.

At trial, the minor testified inconsistently concerning the number of sexual assaults he was subjected to. Id. at 24 n.25, 928 P.2d at 867 n.25 (the [m]inor purported to recall seven separate, distinct, and specific sexual assaults); id. at 10, 928 P.2d at 852 (the minor acknowledged telling a detective that his father had touched him approximately twelve times). With regard to Count I, the minor testified at trial that [Arceo] put his penis on mine I think once. Id. at 8, 928 P.2d at 850. The minor clarified, [m]aybe it s more or maybe it s once. The minor further testified that Arceo put his penis on the minor s back. Id. at 9, 928 P.2d at 851. With regard to Count II, the minor testified that [Arceo p]ut his finger in my butt [t]wice I think[,] and that [Arceo] put his penis in my butt[.] Id. The minor further testified that Arceo touched the minor s penis with his mouth [t]wice, I think. Id. at 9, 928 P.2d at 851. On cross-examination, the minor acknowledged telling a detective that his father had touched him approximately twelve times, but that, at trial, he could only guess as to the number of separate instances because he could not

presently remember. Id. at 10, 928 P.2d at 852 (emphasis added).

This court held, inter alia:

> that when separate and distinct culpable acts are subsumed within a single count charging a sexual assault-any one of which could support a conviction thereunder-and the defendant is ultimately convicted by a jury of the charged offense, the defendant s constitutional right to a unanimous verdict is violated unless one or both of the following occurs: (1) at or before the close of its case-in-chief, the prosecution is required to elect the specific act upon which it is relying to establish the conduct element of the charged offense; or (2) the trial court gives the jury a specific unanimity instruction, i.e., an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt.

Id. at 32-33, 928 P.2d at 874-75 (footnote omitted).

Accordingly, this court concluded that the trial court erred in failing to give the jury a specific unanimity instruction, and that the error was not harmless beyond a reasonable doubt. Id. at 33, 928 P.2d at 875. We therefore

> vacate[d] Arceo s judgment of conviction and remand[ed] the matter for a new trial[.] Id. We further concluded that,
>
> [b]ecause our disposition of the present appeal is grounded in trial error and the evidence adduced at trial was clearly sufficient to support Arceo s convictions, double jeopardy concerns are not implicated by a new trial. Id. at 33 n.40, 928 P.2d at 875 n.40 (emphasis added).

Our opinion in Arceo clearly states that we found the evidence presented at trial sufficient to support Arceo s convictions[,] 84 Hawaii at 33 n.40, 928 P.2d at 875 n.40

(emphasis added), and did not address whether there was sufficient evidence to support each and every act presented to the jury.[12] There is no indication that this court concluded, based on the minor s equivocal testimony, that there was substantial evidence to support, for example, the twelve acts of sexual contact the minor reported to the detective, id. at 10, 928 P.2d at 852, more than one incident of Arceo putting his penis on the minor s penis, id.at 8, 928 P.2d at 850, more than one incident of Arceo putting his finger in the minor s butt, id. at 9, 928 P.2d at 851, or more than one incident of fellatio, id. at 9, 928 P.2d at 851.[13]

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[12] We therefore respectfully disagree with the dissent s contention that this passage in Arceo indicates that this court had determined that each of the underlying acts it had discussed as supporting the convictions rested on substantial evidence. Dissenting opinion at 47 (emphasis added). In support of this assertion, the dissent contends that this court discussed each individual act as it related to the elements of the two charged offenses[,] thereby leav[ing] no question that there was substantial evidence . . . as to each underlying act[.] Dissenting opinion at 40 (emphasis in original). However, the dissent s assertion is incorrect, insofar as this court merely discussed five types of prohibited conduct, as opposed to the seven acts argued by the dissent. Arceo, 84 Hawai i at 14-15, 928 P.2d at 856-57. The dissent also cites to a stipulation by the prosecution that the indictment against Arceo covered all alleged sexual assaults of [the minor witness] by [the defendant] during the specified period[.] Dissenting opinion at 38 (brackets in original) (some quotation marks omitted) (quoting Arceo, 84 Hawai i at 24, 928 P.2d at 866). However, the stipulation concerning the indictment was made to avoid double jeopardy[,] Arceo, 84 Hawai i at 6, 928 P.2d at 848, since defense counsel was concerned that the minor made at least nine separate allegations of sexual abuse during his grand jury testimony, id. at 5, 928 P.2d at 847, and testified on two different occasions that there were 12 separate instances of sexual assault, id. at 7, 928 P.2d at 849. Thus, the parties stipulation in Arceo does not suggest that this court found that each of the seven acts the minor testified to at trial were supported by substantial evidence.

[13] The dissent correctly notes that the law regarding testimony on dates, times, and places, is a separate area of law and does not go to the sufficiency of the evidence. Dissenting opinion at 46 & n.10. However, the minor s testimony in Arceo went beyond the mere inability to recall those details, and instead extended to an inability to recall whether distinct culpable acts had even occurred on more than one occasion. 84 Hawai i at 8-10, 928 P.2d at 850-52.

In the instant case, the evidence presented at trial concerning Kalaola s conduct on the first floor of ATM was clearly sufficient to support a conviction for failure to disperse. Accordingly, the double jeopardy clause is not implicated with regard to Kalaola s failure to disperse from the first floor of ATM, since there was sufficient evidence to support a conviction based on that act.[14]

However, double jeopardy precludes the State from again seeking a conviction of Kalaola based on his failure to disperse from the second floor of ATM. In order to obtain a conviction on retrial based on that act, the prosecution would necessarily be required to introduce additional evidence beyond that presented in the first trial. In the circumstances of this case, where the prosecution specifically argued that Kalaola s conduct on the second floor could independently support conviction, allowing the prosecution an opportunity to present necessary evidence that it failed to muster in the first proceeding would implicate double jeopardy. See Quitog, 85 Hawai i at 140, 938 P.2d at 571 ([t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence

[14] The dissent asserts that the prosecution is in a position, and has been since before Arceo was decided, to avoid this problem by either 1) presenting each act as a separate charge or 2) electing the specific act upon which it is seeking a conviction. Dissenting opinion at 71. However, as we noted in Arceo, requiring either a unanimity instruction or an election is not intended . . . to encourage the bringing of multiple charges when, in the prosecutor s judgment, they are not warranted. The criteria used to determine that only a single charge should be brought[] may indicate that the election of one particular act for conviction is impractical. 84 Hawaii at 31, 928 P.2d at 873 (quoting State v. Petrich, 683 P.2d 173, 178 (Wash. 1984), overruled on other grounds by State v. Kitchen, 756 P.2d 105, 107 (Wash. 1988)).

which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials.) (quoting Green, 355 U.S. at 187); cf. Jones, 96 Hawai i at 184 n.30, 29 P.3d at 374 n.30 (the double jeopardy clause does not bar retrial on the means of establishing guilt for which there was sufficient evidence presented at trial).

IV. Conclusion

It is undisputed that trial error occurred in the instant case, insofar as the circuit court failed to properly instruct the jury concerning (1) the statutory definition of disorderly conduct and (2) the applicability of the knowingly state of mind to each element of the offense of failure to disperse. State v. Kalaola, No. 29163, 2009 WL 1507291, at *2 (App. May 29, 2009). The two remaining questions are whether the evidence was sufficient to support Kalaola s conviction, and whether retrial is permissible under the double jeopardy clause of the Hawai i Constitution. We hold that sufficient evidence was presented at trial to establish that Kalaola failed to disperse from the first floor of ATM, but not from the second. Because we hold there was sufficient evidence to support Kalaola s conviction with regard to his conduct on the first floor of ATM, there was sufficient evidence to support the conclusion of the trier of fact that Kalaola had committed the charged offense. See Jones, 96 Hawai i at 181, 29 P.3d at 371. Thus, the double jeopardy clause does not bar retrial with regard

to that conduct.

Accordingly, we affirm the judgment of the ICA, and remand the case for further proceedings consistent with this opinion.

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