IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

PAUL C.K. KAEO, Petitioner/Defendant-Appellant.

SCWC-12-0000007

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-12-0000007; CR. NO. 09-1-0719)

FEBRUARY 28, 2014

DISSENTING OPINION BY RECKTENWALD, C.J.

I respectfully dissent. The majority determines that there was a rational basis in the evidence for the jury to acquit Paul Kaeo of murder in the second degree and to convict him of assault in the first degree, and therefore a jury instruction on assault in the first degree was warranted. However, in my view, the relevant question is whether there was a rational basis in the evidence for a jury to acquit Kaeo of reckless manslaughter

and convict him of assault in the first degree. Because I believe there was no such rational basis in the evidence, I would hold that the trial court properly refused to instruct the jury on the lesser included offense of first degree assault.

Under HRS § 701-109(5) (1993), "[t]he court is not obligated to charge[1] the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense." In other words, the statute requires a two step analysis: the court must find that the jury could acquit of the "offense charged" and that it could convict the defendant of the included offense. In my view, "charged offense" in this context must be read to include any included offenses that satisfy the HRS § 701-109(5) test. Otherwise, the trial court will necessarily be required to instruct on every possible included offense, as long as the jury could acquit of the offense that was specified in the indictment, information, or complaint. In the instant case, for example, the trial court would have been required to instruct on third degree assault,[2] which would be absurd since no rational jury could

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[1] "Charge" here refers to the trial court instructing the jury on the relevant laws to guide its deliberations. See Black's Law Dictionary 265 (9th ed. 2009) (defining "charge" as "[t]o instruct a jury on matters of law <the judge charged the jury on self-defense>").

[2] HRS § 707-712 (1993) provides that:
(1) A person commits the offense of assault in the

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acquit Kaeo of first or second degree assault given the facts of this case.

The circuit court here instructed the jury with regard to second degree murder, as well as the lesser included offenses of reckless manslaughter and extreme mental or emotional distress manslaughter. That was appropriate, since a jury could have found that Kaeo did not intend to kill Kahumoku but that he recklessly caused Kahumoku's death.

However, with regard to whether to instruct on first degree assault, the relevant inquiry should be whether a jury could acquit on reckless manslaughter, but convict on first degree assault. The majority skips that step of the analysis, and instead relies solely on the fact that a jury could have acquitted Kaeo of second degree murder. See majority opinion at 38, 42-43. Although the majority states in a footnote that it has determined that "there was a rational basis in the evidence for the jury to acquit [Kaeo] of manslaughter and convict him of assault in the first degree," majority opinion at 46 n.21 (emphasis added), the majority's analysis nevertheless would

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[2](...continued)

third degree if the person:

(a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or

(b) Negligently causes bodily injury to another person with a dangerous instrument.

(2) Assault in the third degree is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

appear to require an instruction on assault if there was a rational basis in the evidence for acquitting Kaeo of second degree murder and convicting him of first degree assault. Majority opinion at 38-43. Respectfully, in my view, this analysis is incorrect for the following reasons.

Notably, neither party here advocated for the approach taken by the majority. Although Kaeo clearly argued that first degree assault is a lesser included offense of second degree murder, see majority opinion at 39 n.18, both Kaeo and the State recognized that, in determining whether the circuit court should have instructed the jury with regard to first degree assault, the relevant inquiry was whether Kaeo could have been acquitted of reckless manslaughter. For instance, in Kaeo's reply brief in the ICA, he argued that "there existed a rational basis in the evidence for the jury to acquit [Kaeo] of murder in the second degree and reckless manslaughter and to convict him of either assault in the first degree or assault in the second degree." (Emphasis added). Additionally, the State argued in its answering brief to the ICA that "there [was] no rational basis to support the contention that the jury could have rationally acquitted Defendant of Reckless Manslaughter and convicted him of Assault in the First Degree or Assault in the Second Degree." Thus, both Kaeo and the State acknowledged that the trial court would only be obligated to give a first degree assault

instruction if the evidence would enable the jury to acquit him of reckless manslaughter and convict him of first degree assault.

Given the facts of the case, there was no rational basis[3] to acquit Kaeo of reckless manslaughter while convicting him of first degree assault. "A person commits the offense of manslaughter if ... [h]e recklessly causes the death of another person." HRS § 707-702(1)(a) (Supp. 2009). "A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result." HRS § 702-206(3)(c)

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[3] For there to be a "rational basis" in the evidence to acquit the defendant of the offense charged and convict the defendant of the included offense, the evidence must allow the jury to simultaneously acquit of one offense and convict of another in a way that is consistent. Stated differently, if the jury must credit particular evidence to convict a defendant of the lesser offense, it cannot be said that it might have discredited that same evidence to acquit the defendant of the greater offense.

For example, in State v. Powell, 154 P.3d 788 (Utah 2007), the Utah Supreme Court applied a nearly identical statutory provision to HRS § 701-109(5), see Utah Code Ann. § 76-1-402 (West 2013), which states that "[t]he court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense[,]" to hold that the defendant was not entitled to instructions on aggravated assault or assault as lesser included offenses of attempted murder because the "evidence did not provide a rational basis for acquitting of attempted murder while simultaneously convicting of assault or aggravated assault." Id. at 797. In reaching its decision, the court rejected the defendant's argument that the jury could have potentially disbelieved the witnesses' testimony for the purposes of acquitting him of attempted murder but believed the same portion of testimony to convict him of assault. Thus, the court stated that

> [t]here is no basis in the record upon which the jury could have simultaneously credited the testimony necessary to establish the lesser offense and rejected the very same testimony insofar as it established the greater offense. In other words, there was no rational basis in the evidence for the jury to accept the witnesses' testimony as establishing assault or aggravated assault while rejecting that same testimony as establishing attempted murder.

Id. at 798 (internal quotation marks, footnote, and ellipses omitted).

(1993). In contrast, "[a] person commits the offense of assault in the first degree if the person intentionally or knowingly causes serious bodily injury to another person." HRS § 707-710 (1993). "Serious bodily injury" is defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." HRS § 707-700 (1993).

I agree with the majority that the jury could have found that Kaeo intentionally or knowingly caused serious bodily injury to Kahumoku when he beat Kahumoku with the rebar pipe, but did not intend to cause Kahumoku's death. However, under the facts of the case, I believe the same evidence that would have provided a rational basis for the jury to convict Kaeo of first degree assault also would have provided a rational basis to convict him of reckless manslaughter, given that his knowing and intentional assault of Kahumoku led to Kahumoku's death. Stated differently, the jury could have found that Kaeo intentionally or knowingly caused serious bodily injury to Kahumoku when he beat Kahumoku with the rebar pipe, but did not intend to cause Kahumoku's death. However, the jury could not have done so without also finding that Kaeo consciously disregarded a substantial and unjustifiable risk that his conduct would cause Kahumoku's death.

The uncontroverted evidence showed that Kaeo forcefully beat Kahumoku, and that Kaeo's beating caused Kahumoku's death. The evidence showed that Kahumoku had several "circular injuries" from "blunt type force" on his forehead, his nose, and the left side of his jaw. Kahumoku also suffered multiple injuries to his chest and neck, and "elongated abrasions" on his forearm consistent with being struck. When the medical examiner who performed the autopsy on Kahumoku's body, Dr. Gayle Suzuki, was asked if one of the elongated injuries could have been caused by the tip of the pipe dragging along the skin, she testified that such a dragging motion would have caused a scraping rather than the seven-inch contusion. Thus, Dr. Suzuki testified that the elongated injury was consistent with Kahumoku being hit by the length of the pipe rather than jabbed with it.

In addition, Kahumoku had internal injuries, including bruises underneath his scalp, a bruise on the left side of his forehead, and bleeding or hemorrhaging to the back whole left side of his brain. Referring to her autopsy report, Dr. Suzuki thus concluded to a reasonable medical degree of certainty that the cause of Kahumoku's death was the head injuries Kahumoku suffered as a result of Kaeo's attack.[4] Kaeo did not dispute the

[4] Dr. Suzuki also ruled out the possibility that Kahumoku could have died from natural disease or alcohol concussion syndrome. She explained that alcohol concussion syndrome did not apply to Kahumoku's death because the case studies on the syndrome all involved cases in which elevated alcohol combined with "evidence of head trauma but no injury of the brain." (Emphasis added).
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injuries that he inflicted on Kahumoku, and that these injuries resulted in Kahumoku's death.[5]

It is the province of the jury to weigh the evidence, and the jury may accept or reject any of the evidence presented to it. See State v. Chen, 77 Hawaiʻi 329, 338, 884 P.2d 392, 401 (App. 1994). Nevertheless, the jury must act within the confines of the law, and may not consider a lesser included offense unless the instruction is provided because there is a rational basis in the evidence for acquitting the defendant of a greater offense and convicting of a lesser. HRS § 701-109(5).

Here, in rejecting the charge of murder in the second degree, the jury necessarily concluded that Kaeo did not intentionally or knowingly cause Kahumoku's death. See HRS

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[4](...continued)
In contrast to such cases of alcohol concussion syndrome, Kahumoku's death did involve brain injury. Thus, Dr. Suzuki testified that, regardless of whether or not alcohol played a contributing factor, Kahumoku's death was caused by the brain injuries he suffered as a result of Kaeo's attack, not alcohol concussion syndrome.

Notably, in closing arguments, Kaeo's attorney argued that the testimony on alcohol concussion syndrome did not go to causation but instead went to whether Kaeo intended to kill Kahumoku. Kaeo's attorney stated that alcohol concussion syndrome:

> was a contributing factor. So it matters. Why is this important? Is it important because, well, it changes the end result? No, absolutely not. But it affects the intent. Remember, this case is about intent, right? So if you think, eh, you know what, [Kaeo], he put a beating on [Kahumoku] and then he died so, you know, that's intentionally or knowingly. No, no, no, no. [Kaeo] intended, yeah, I going put a beating on this guy but I had no intent to kill him.

(Emphasis added).

[5] Kaeo twice admitted that he killed Charles Kahumoku Jr. When asked at trial, "You killed him, correct," Kaeo answered, "Correct." Later during his testimony, Kaeo again acknowledged that his beating of Kahumoku was the cause of Kahumoku's death.

§ 707-701.5. It is beyond dispute that the evidence, and in particular Kaeo's testimony, provided a rational basis for the jury to so conclude. However, in my view, there was no such rational basis for the jury to conclude that Kaeo intentionally or knowingly caused serious bodily injury to Kahumoku (i.e., assault in the first degree), but did not consciously disregard a substantial and unjustifiable risk that his conduct would cause Kahumoku's death (i.e., reckless manslaughter). Thus, the evidence does not meet the criteria set forth in HRS § 701-109(5) for requiring the trial court to instruct on a lesser included offense. I therefore respectfully disagree with the majority's assertion that this issue involves one of credibility that should be reserved for the finder of fact. See majority opinion at 43-46.

Finally, the majority relies on several factors that provide a rational basis for acquitting Kaeo of second degree murder and convicting him of first degree assault. However, these same factors provide a rational basis for convicting Kaeo of manslaughter. The majority points to the following evidence, each of which provides a rational basis for a manslaughter verdict: Kaeo's testimony that he "was trying to hurt [Kahumoku, but] did not intend to kill him"; that Kaeo committed the offense with a bar for keeping the gate closed, "which provides some evidentiary support that [Kaeo] did not plan to intentionally or

knowingly cause [Kahumoku's] death"; and that "the testimony was conflicting as to whether [Kaeo] said he would kill [Kahumoku]." See majority opinion at 39-41. Finally, to show that the jury could acquit Kaeo of second degree murder, the majority highlights the fact that the "jury convicted [Kaeo] of the included offense of reckless manslaughter, which rejects the conclusion that [Kaeo] intentionally or knowingly caused [Kahumoku's] death." Majority opinion at 42. However, none of these factors provide a rational basis for acquitting Kaeo of reckless manslaughter and convicting him of first degree assault.

In conclusion, in this particular case, there was no rational basis for a jury to render a verdict acquitting Kaeo of reckless manslaughter but convicting him of assault in the first degree. Accordingly, HRS § 701-109(5) did not obligate the trial court to charge the jury with respect to first degree assault.[6]

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[6] Moreover, although the majority concludes that the trial court made its decision not to instruct based on its analysis of the law and not upon the facts adduced at trial, see majority opinion at 42, the record indicates that the circuit court did consider the evidence. In explaining its decision not to instruct on assault, the trial court noted two circumstances in which an assault instruction may be warranted in a homicide case: (1) when there are several co-defendants and it is unclear who inflicted what kind of injury; and (2) where there is a dispute as to causation. The trial court noted that "those two exceptions don't apply here."

Although the commentary to Model Penal Code § 1.07(4)(c), upon which HRS § 701-109(4) is based, states that the section "allows conviction of an offense consisting of an intentional infliction of bodily harm where the charge is intentional homicide," the rest of the passage reveals that an assault instruction is normally permitted when the question of causation of the homicide is in doubt, which was not the case here:

> Paragraph (c) allows conviction of an offense consisting of an intentional infliction of bodily harm where the charge is intentional homicide, a problem that has caused courts considerable difficulty because an element that is required to establish the lesser

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Because the trial court did not err in refusing to instruct the jury on first degree assault, I would affirm the judgment of the Intermediate Court of Appeals.

/s/ Mark E. Recktenwald

[6](...continued)

> offense may not be necessary to establish the greater. It arises most frequently where a person is charged with criminal homicide and there is a doubt as to whether his blow was the cause of death. Under those circumstances the state or the defendant may request an instruction on assault and battery. Some courts have refused to allow such an instruction to be given, while others have held such an instruction to be proper. Since a basic premise of the Code is that it is desirable, whenever possible, to adjudicate the entire criminal liability of the defendant in a single trial, it seems sensible, for example, to allow a conviction for assault and battery where the question of causation in a homicide case is in doubt.

Model Penal Code § 1.07 cmt. (1985) (footnotes omitted).