SCAP-13-0000029

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI,
Plaintiff-Appellee,

vs.

FAALAGA TOMA,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-13-0000029; CR. NO. 11-1-0452)

DISSENT TO PART II
(By: Nakayama, J., with whom Circuit Judge Nacino, joins)

The majority holds that the jury instruction regarding accomplice liability was erroneous and vacates the circuit court's judgment of conviction. However, although Toma objected to the circuit court's decision to give an accomplice liability instruction, Toma did not object to the specific language of the instruction at trial and did not raise the issue on appeal. Therefore, the majority reviews the issue sua sponte for plain error and has "depart[ed] from the position usually presupposed by the adversary system that a party must look to his counsel to

protect him and that he must bear the cost of the mistakes of his counsel." State v. Fox, 70 Haw. 46, 55, 760 P.2d 670, 675 (1988) (internal quotation marks and citation omitted). The majority departs from the adversary system twice: first by recognizing an error that Toma's counsel failed to preserve at the circuit court,[1] and second by recognizing an error that Toma's counsel failed to raise on appeal.

I dissent. Because "[t]he appellate court must seek power to notice plain error sua sponte from both HRAP Rule 28(b)(4) and HRPP Rule 52(b)[,] [t]he power to deal with plain error sua sponte, therefore, should be exercised even more 'sparingly' than the 'power to deal with plain error.'" State v. Miller, 122 Hawaiʻi 92, 139, 223 P.3d 157, 204 (2010) (Nakayama, J., dissenting). Furthermore, this court's jurisprudence suggests that it is improper for the court to notice plain error sua sponte where the purported error is an erroneous jury instruction because the appellant must first overcome a presumption that the unobjected-to instruction was correct.

In State v. Nichols, this court clarified the plain error standard of review for cases involving erroneous jury

[1] The majority states that "[t]he error in this case arose from the circuit court's erroneous modification to the State's proposed instruction over the objection of the defense[,]" making it appear as if the defense properly preserved the issue at the circuit court. However, the majority admits in a footnote that Toma objected to the instruction on the grounds that the accomplice liability instruction should not have been given at all, not on the grounds that the instruction was flawed. Therefore, the purportedly erroneous jury instruction must be reviewed for plain error.

instructions. 111 Hawaiʻi 327, 337, 141 P.3d 974, 984 (2006). The defendant was charged with Terroristic Threatening in the First Degree of an off-duty police officer, and the defendant did not object when the circuit court failed to instruct the jury that the relevant attributes of the defendant and the complainant could be taken into consideration when assessing whether the defendant's remarks were a true threat. Id. at 332-33, 141 P.3d at 979-80. Even though the defendant did not preserve the issue at the circuit court, he raised the issue on appeal to the ICA and this court. Id. at 338, 141 P.3d at 985. This court held that

> although as a general matter forfeited assignments of error are to be reviewed under the HRPP Rule 52(b) plain error standard of review, in the case of erroneous jury instructions, that standard of review is effectively merged with the HRPP Rule 52(a) harmless error standard of review because it is the duty of the trial court to properly instruct the jury. As a result, once instructional error is demonstrated, we will vacate, without regard to whether timely objection was made, if there is a reasonable possibility that the error contributed to the defendant's conviction, i.e., that the erroneous jury instruction was not harmless beyond a reasonable doubt.

Id. at 337, 141 P.3d at 984. The court then held that there was a reasonable possibility that the jury might have weighed the evidence differently had it been properly instructed and then vacated the circuit court's final judgment. Id. at 340, 342, 141 P.3d at 987, 989.

I wrote a concurring and dissenting opinion in Nichols,

arguing that the majority had "taken its first step towards eviscerating the discretion from our inherently discretionary plain error analysis[,]" and that "the majority's new standard effectively reads: 'the appellate courts shall seek out erroneous jury instructions within the record, either when called upon by the parties or sua sponte, and shall reverse the trial court unless it can be proven that the instructional error was harmless beyond a reasonable doubt.'" Id. at 344, 141 P.3d at 992 (Nakayama, J., concurring and dissenting). The majority responded with the following:

> The fear that appellate discretion has been eviscerated is unfounded; we emphasize that the phrase "once instructional error is demonstrated" in our holding is not to be taken lightly. As already noted above, this point was made clear in [State v. Eberly]: "Where instructions were not objected to at trial, if the appellant overcomes the presumption that the instructions were correctly stated, the rule is that such 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." 107 Hawaiʻi at 250, 112 P.3d at 736 (internal citations and quotation marks omitted) (emphasis added). In other words, there was and remains a presumption that unobjected-to jury instructions are correct; hence, the appellate court is under no duty to scour the record for error sua sponte.

Id. at 337 n.6, 141 P.3d at 984 n.6. Thus, the Nichols majority maintained appellate discretion in instructional error cases by confirming that the presumption remained that instructions not objected to at trial were correctly stated and that the appellant must first overcome this presumption before the plain error

standard of review is applied. Here, the appellant has not even raised it.

Most recently, in State v. DeLeon, this court reaffirmed the burden-shifting process under Nichols, holding that "the appellant must first demonstrate instructional error by rebutting the 'presumption that ubobjected-to jury instructions are correct[,]' . . . [and i]f the appellant is able to rebut this presumption, the burden shifts to the State to prove that the error was harmless beyond a reasonable doubt . . . ." 131 Hawaiʻi 463, 479, 319 P.3d 382, 398 (2014) (Recktenwald, C.J.).

By sua sponte reviewing the unobjected-to jury instructions for plain error without requiring Toma to carry his burden of showing that the instructions were erroneous, the majority has now effectively overruled the burden-shifting process of Nichols and its progeny and taken the final steps in eviscerating appellate discretion in our instructional error jurisprudence. The appellate courts must now carry the appellant's burden and seek out any errors in jury instructions whether or not they were objected to at trial and whether or not they were raised on appeal. And even though the court may not require the benefit of briefing when passing judgment on issues of instructional error, the parties are nonetheless deprived of the opportunity to be heard on the matter.

It is certainly true that

> [t]he idea of the appellate courts taking an active role in reversing convictions based upon erroneous jury instructions that were not harmless beyond a reasonable doubt has a certain visceral appeal in the abstract . . . a criminal defendant has a constitutional right to a fair trial, and if the jury is improperly instructed as to how to conduct its deliberations, that right has been violated if there is a reasonable possibility to the defendant's conviction.

Nichols, 111 Hawaiʻi at 345, 141 P.3d at 992 (Nakayama, J., concurring and dissenting). However, the majority's holding in this case "does not exist in a vacuum. It must co-exist with precedent, this court's rules of procedure, judicial economy, and our adversarial system of justice, and it does violence to all of these." Id. Therefore, I would decline to review this case sua sponte for plain error.[2]

DATED: Honolulu, Hawaiʻi, December 21, 2015.

/s/ Paula A. Nakayama

/s/ Edwin C. Nacino

[2] It should also be noted that nothing would preclude the appellant from challenging the purportedly erroneous instructions through an appropriate vehicle such as a HRPP Rule 40 petition for relief due to ineffective assistance of counsel.