IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

MELCHOR B. ADVIENTO, Petitioner/Defendant-Appellant.

SCWC-30171

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 30171; CR. NO. 07-1-2068)

February 10, 2014

CONCURRING OPINION BY ACOBA, J.

I agree with the holding and core rationale of the majority opinion in this case, that the circuit court of the first circuit (the court) had the duty and obligation to instruct the jury on the mitigating defense of Extreme Mental and Emotional Distress (EMED) manslaughter to a charge of murder, because our cases and the public interest mandate accurate and true verdicts based on the law and the evidence. Such verdicts

cannot be attained insofar as trial strategies based on a "win-lose", or an "all or nothing" approach are allowed to govern. State v. Haanio, 94 Hawaiʻi 405, 415, 16 P.3d 246, 256 (2001) ("Acceding to an 'all or nothing' strategy . . . forecloses the determination of criminal liability where it may in fact exist."). That approach would pose a substantial risk of a jury returning a verdict that is not reflective of the facts and of the relevant law. See State v. Flores, 131 Hawaiʻi 43, ---, 314 P.3d 120, 134 (2013) (explaining that holding the lack of a lesser included offense instruction to be harmless error "perpetuates the risk that the jury in any given case did not actually reach the result that best conforms with the facts[.]").

However, I write to concur because there are several propositions described in the majority opinion herein that I have said must be or should be augmented. First, in State v. Cabagbag, 127 Hawaiʻi 302, 277 P.3d 1027 (2012), the majority there, in requiring a defendant to request an eyewitness identification instruction before it may be given, distinguished Haanio on the grounds that the identification instruction is not a defense and did not constitute an "all or nothing" approach. Cabagbag, 127 Hawaiʻi at 315 n.23, 277 P.3d at 1040 n.23. However, if it were not "a type of defense," there seems little reason for the Cabagbag majority to condition the giving of the instruction on the defendant's request. See id.

The fact is that for all intents and purposes the identification instruction is intended to protect defendants because "'[t]he empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country.'" Cabagbag, 127 Hawaiʻi at 320, 277 P.3d at 1045 (quoting Perry v. New Hampshire, 132 S.Ct. 716, 732 (2011) (Sotomayor, J., dissenting)). The Cabagbag majority's position rested "on the ground that defendants may wish to forgo the instruction as a matter of strategy[.]" Cabagbag, 127 Hawaiʻi at 320, 277 P.3d at 1045 (Acoba, J., dissenting). Respectfully, this is the same strategy-bound analysis that in principle was rejected in Haanio -- that is that "the public interest in ensuring fair outcomes outweighs the interest of any particular defendant in obtaining a tactical advantage at trial." Id. "[A]ny party's desire to deflect the jury's attention from identification issues is far outweighed by the need to ensure that juries are properly instructed on eyewitness identification testimony." Id. at 320 n.29, 277 P.3d at 1045 n.29.

Second, while EMED manslaughter may be raised as a mitigating defense to murder, this case does not present a situation where there is a dispute as to whether a theory of defense, here EMED manslaughter, was apparent and one on which the court could have instructed. On the other hand, any defense, no matter how weak, inconclusive or unsatisfactory the court may

believe the evidence is, should be brought to the attention of the jury because it is the jury that finds the facts. State v. Stenger, 122 Hawaiʻi 271, 226 P.3d 441 (2010).

"[T]he principle underlying Stenger, and [State v. Locquiao, 100 Hawaiʻi 195, 58 P.3d 1242 (2002),] is that it would be wrong to uphold a defendant's conviction when no instruction was given to the jury on an apparent defense that existed in the evidence, and there is a reasonable possibility that the failure to instruct the jury on that defense contributed to the conviction." State v. Taylor, 130 Hawaiʻi 196, 214, 307 P.3d 1142, 1159 (2013) (Acoba, J., concurring and dissenting) (citing Loquiao, 100 Hawaiʻi at 206, 58, P.3d at 1253). For, "the trial court, trained and experienced in the law and viewing the evidence at trial" should be credited with the competence to "recognize an applicable defense adduced in the evidence[.]" Taylor, 130 Hawaiʻi at 217 n.15, 307 P.3d at 1163 n.15 (Acoba, J., concurring and dissenting).

In any event, because it is a fundamental proposition that the jury must be informed of the legal theories presented by the evidence, the determination of whether the court should have given an instruction regarding a defense does not rest on the failure of any particular judge to recognize that defense in the evidence. The ultimate safeguard for insuring the public

interest in fully informed jurors rests in appellate review, as in every case where error may have been committed at trial.

Finally, I believe the mitigating defense of EMED manslaughter to a charge of murder should not be circumscribed by a singular focus on loss of self control. Since the EMED manslaughter defense is a mitigating defense to murder, it necessarily concedes that the defendant intentionally or knowingly caused the death of another, but under extreme mental and emotional distress. See HRS § 707-701.5. Thus, commission of the acts constituting murder cannot be the basis for defeating the mitigating defense of EMED manslaughter. See State v. Haili, 103 Hawaiʻi 89, 109, 79 P.3d 1263, 1283 (2003) (Acoba, J., concurring and dissenting) (explaining that "'[s]elf-control' is not an element of the defense of emotional disturbance manslaughter[,]" and that otherwise, "[t]he defense becomes logically meaningless because the question of self-control is obviated by the legal prerequisite finding of intentional or knowing conduct resulting in murder that the fact-finder must make[.]").

/s/ Simeon R. Acoba, Jr.