

NO. CAAP-13-0000379

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
SATSON SATANO, Defendant-Appellant, and
AMOI ELIAS, Defendant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 11-1-0738)

SUMMARY DISPOSITION ORDER

(By: Fujise, Presiding Judge, Reifurth and Ginoza, JJ.)

Defendant-Appellant Satson Satano (Satano) appeals from the March 4, 2013 "Judgment of Conviction and Probation Sentence" for the crime of Theft in the Second Degree, a violation of Hawaii Revised Statutes (HRS) § 708-831(1)(a) (2014) entered by the Circuit Court of the First Circuit (Circuit Court).¹

On appeal, Satano argues that the Circuit Court erred when it instructed the jury on Theft in the Second Degree because Theft in the Second Degree pursuant to HRS § 708-831(1)(a) is not a lesser included offense of Robbery in the Second Degree pursuant to HRS § 708-841(1)(a).

After a careful review of the point of error raised, the arguments made by the parties, the record on appeal and the applicable legal authority, we resolve Satano's point on appeal as follows and affirm.

¹ The Honorable Karen S.S. Ahn presided.

Robbery in the Second Degree (Robbery 2),² as charged here, required the prosecution prove that "[Satano], while in the course of committing theft, did use force against the person of Roy Roman, a person who was present, with the intent to overcome Roy Roman's physical resistance or physical power of resistance[.]"

Theft in the Second Degree (Theft 2),³ as instructed by the Circuit Court, required the prosecution to prove that "Satano[] obtained or exerted unauthorized control over the property of Roy Roman; and . . . did so from the person of Roy Roman; and . . . did so with the intent to deprive Roy Roman of the property."

Satano argues that Theft 2 is not a lesser included offense of Robbery 2 under HRS § 701-109(4)(a) or (c) (2014).⁴

² "Robbery 2" refers to Robbery in the Second Degree pursuant to HRS § 708-841(1)(a) (2014) which provides,

(1) A person commits the offense of robbery in the second degree if, in the course of committing theft or non-consensual taking of a motor vehicle:

- (a) The person uses force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance[.]

³ "Theft 2" refers to Theft in the Second Degree pursuant to HRS § 708-831(1)(a), which provides,

(1) A person commits the offense of theft in the second degree if the person commits theft:

- (a) Of property from the person of another[.]

⁴ **§ 701-109. Method of prosecution when conduct establishes an element of more than one offense.**

. . . .

(4) A defendant may be convicted of an offense included in an offense charged in the indictment or the information. An offense is so included when:

- (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
- (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
- (c) It differs from the offense charged only in the

(continued...)

We conclude that Theft 2 is a lesser included offense of Robbery 2 under HRS §701-109(4)(c).

Under "[s]ubsection (c) . . . there may be some dissimilarity in the facts necessary to prove the lesser offense, but the end result is the same." State v. Matautia, 81 Hawai'i 76, 83, 912 P.2d 573, 580 (App. 1996) (quoting State v. Alston, 75 Haw. 517, 536, 865 P.2d 157, 167 (1994)). The factors to consider include "(1) the degree of culpability; (2) the degree or risk of injury; and (3) the end result." Alston, 75 Haw. at 536, 865 P.2d at 167.

a. The degree of culpability. As Satano acknowledges, the state of mind for both offenses is "intentionally." Under the Hawaii Penal Code, the term "culpability" equates to the state of mind required by each offense. See Commentary on HRS § 702-204 (2014) (State of Mind Required) ("Clear analysis requires that the various distinct ingredients of an offense be separately recognized and that culpability be required as to each."). Therefore, the first factor does not disqualify Theft 2 as a lesser included offense.

b. The degree or risk of injury. According to the Commentary on § 701-109(4),⁵

paragraph (c) is concerned with cases in which the included offense involves a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability. Paragraph (c) differs from paragraph (a) in that, although the included offense must produce the same result as the inclusive offense, there may be some dissimilarity in the facts necessary to prove the offense. Therefore (a) would not strictly apply and (c) is needed to fill the gap.

Both offenses under consideration here are included in Chapter 708, "Offenses Against Property Rights," making protection of property the main focus of each offense. Both offenses are designed to prevent the risk of bodily injury.

⁴(...continued)

respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

⁵ The Penal Code Commentary may be used as an aid in understanding the code's provisions. HRS § 701-105 (2014).

In the case of the offense of Robbery 2, this is implicit in the use of force element. Concern over the potential for harm to the person is also implicit in the requirement, in Theft 2, that the taking be from "the person." The Commentary on HRS §§ 708-830 to 708-833 (2014) (footnote omitted) observes,

Degrees of theft. The Code is in accord with the Model Penal Code and other recent revisions in grading the theft offenses according to the mode of the theft, the object involved, and the value of the property or services stolen. The gradation is based on the theory that theft from the person, or of a firearm, or of property or services of relatively high value presents greater social harm and that the actor in such cases may require greater rehabilitation efforts.

The commentary to the Model Penal Code further notes that a theft from the person would be subject to higher penalties, despite lower value of the property taken, because it involves "special potentialities for physical violence or alarm associated with the taking[.]" Model Penal Code and Commentaries, Part II Commentaries, vol. 2, § 223.1(2) at 148 (1980).

In short, while the elements that distinguish both offenses from an ordinary theft are related to the risk of personal injury, because Robbery 2 requires actual force, whereas Theft 2 requires only that the property be taken from the person, the latter makes the level of risk involved less than that involved in Robbery 2. Accord Commonwealth v. Monroe, 678 A.2d 1208, 1213 (Pa. Super. Ct. 1996) (citing Model Penal Code and Commentaries, Part II Commentaries, vol. 2, § 223.1(2) at 148 (1980)); see also Commonwealth v. Williams, 567 A.2d 709, 713 (Pa. Super. Ct. 1989).

While the use of force to take an object not attached to the person of the victim could constitute Robbery 2 without constituting Theft 2, under the facts of the instant case, the attendant circumstances required by Theft 2 are included in Robbery 2. Roman testified that the bag he was carrying was grabbed by Satano after Satano and Elias pounded him down. Therefore the facts alleged supported (1) the charge of Robbery 2 because force was used to overcome Roman's resistance to his bag being taken from his person; and (2) the included offense of Theft 2 because the bag was taken from Roman's person. This is

precisely the sort of "need[] to fill the gap" anticipated by the Commentary on subsection (4)(c). Commentary on § 701-109.

c. End result. In both offenses, the result of the prohibited conduct is the taking of property. Contrary to Satano's characterization of Robbery 2, that offense is not primarily concerned with violence. For robbery, use of force is a method, not the end result. As the title to HRS Chapter 708 indicates, the end result of both robbery and theft is an offense against property rights.

Therefore, based on the foregoing, we affirm the March 4, 2013 "Judgment of Conviction and Probation Sentence" entered by the Circuit Court of the First Circuit.

DATED: Honolulu, Hawai'i, May 20, 2016.

On the briefs:

Taryn R. Tomasa,
Deputy Public Defender,
for Defendant-Appellant.

Presiding Judge

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge