NO. CAAP-14-0000892

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,
v.
BROK CARLTON, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 13-1-0254(2))

MEMORANDUM OPINION
(By: Leonard, Presiding Judge, Reifurth and Ginoza, JJ.)

Defendant-Appellant Brok Carlton (Carlton) appeals from a Judgment Conviction and Sentence (Judgment), filed on June 6, 2014, in the Circuit Court of the Second Circuit (circuit court).[1] Judgment was entered against Carlton after a jury found him guilty of Kidnapping (Count I), in violation of Hawaii Revised Statutes (HRS) § 707-720(1)(d) (2014);[2] Robbery in the

[1] The Honorable Rhonda I.L. Loo presided.

[2] HRS § 707-720 provides in pertinent part:

> **§707-720 Kidnapping.** (1) A person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to:
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> . . . .
>
> (d) Inflict bodily injury upon that person or subject that person to a sexual offense[.]
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> . . . .

(continued...)

First Degree (Count II), in violation of HRS § 708-840(1)(a) (2014);[3] Assault in the Second Degree (Count III), in violation of HRS § 707-711(1)(d) (2014);[4] and Unauthorized Control of a Propelled Vehicle (UCPV) (Count IV), in violation of HRS § 708-836 (2014).[5]

On appeal, Carlton contends that the circuit court

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[2](...continued)
(2) Except as provided in subsection (3), kidnapping is a class A felony.

[3] HRS § 708-840(1)(a) and (3) provide:

§708-840 Robbery in the first degree. (1) A person commits the offense of robbery in the first degree if, in the course of committing theft or non-consensual taking of a motor vehicle:

(a) The person attempts to kill another or intentionally or knowingly inflicts or attempts to inflict serious bodily injury upon another[.]

. . . .

(3) Robbery in the first degree is a class A felony.

[4] HRS § 707-711 provides in pertinent part:

§707-711 Assault in the second degree. (1) A person commits the offense of assault in the second degree if:

. . . .

(d) The person intentionally or knowingly causes bodily injury to another with a dangerous instrument[.]

. . . .

(2) Assault in the second degree is a class C felony.

[5] HRS § 708-836 provides in pertinent part:

§708-836 Unauthorized control of propelled vehicle. (1) A person commits the offense of unauthorized control of a propelled vehicle if the person intentionally or knowingly exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent or by changing the identity of the vehicle without the owner's consent.

(2) "Propelled vehicle" means an automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle.

. . . .

(5) Unauthorized control of a propelled vehicle is a class C felony.

erred by (1) failing to instruct the jury regarding the potential merger of Count I (Kidnapping), Count II (Robbery in the First Degree), and Count III (Assault in the Second Degree) pursuant to HRS § 701-109(1)(e) (2014); and (2) denying his motion for judgment of acquittal on Count II (Robbery in the First Degree). Carlton raises no challenge on appeal that affects his conviction on Count IV (UCPV).

For the reasons stated below, we vacate the Judgment with respect to the counts for Kidnapping, Robbery in the First Degree and Assault in the Second Degree and remand to the circuit court for proceedings consistent with this opinion.

I. Background

On April 9, 2013, Plaintiff-Appellee State of Hawai'i (State) charged Carlton via complaint with Kidnapping, Robbery in the First Degree, Assault in the Second Degree, and UCPV stemming from an altercation between Carlton and the complaining witness (CW) on March 21, 2013.

Up to shortly before the March 21, 2013 incident, the CW worked for and lived with Carlton. During this time, Carlton loaned the CW money to buy a BMW automobile. On March 15, 2013, Carlton called police to report that $90,000 had been stolen from a safe located in his home. Carlton informed the responding officer that he suspected that the CW and the CW's girlfriend had stolen the money. The CW moved out shortly after the money allegedly went missing due to "tension" between the parties, taking the BMW with him.

Regarding the March 21, 2013 altercation, the CW testified to the following facts.[6] At around 9:30 p.m., the CW left his second-floor apartment to go pick up his friend from work. As he reached the stairs, Carlton was coming up. There

[6] At trial, Carlton contended that he did not commit any of the acts alleged, but was set up by the CW, who lured Carlton to the location of the altercation, attacked Carlton, and staged the rest of the fight, including having a guy emerge from his apartment holding a baseball bat and driving the BMW away from the apartment complex himself to make it appear as if Carlton had taken it. Carlton testified that he only went to meet the CW in order to take possession of the BMW.

was another individual behind Carlton, Noah Thomas-Francis (Thomas-Francis). Carlton attempted to grab the CW's keys and cell phone from out of his hand. The CW punched Carlton in the face and grabbed him in a choke hold. As the two quarreled, two people came up behind the CW and hit him with baseball bats, knocking the CW and Carlton to the ground. While the CW had Carlton in a choke hold, the other three individuals hit and kicked the CW, causing the CW to release Carlton. While the CW was being hit and kicked so that he could not get up, Carlton got up, the group grabbed the CW's feet and dragged him, and Carlton and Thomas-Francis tried to put zip ties around the CW's feet. Thomas-Francis poured gasoline on the CW, and said "Light this mother fucker on fire." As Thomas-Francis tried to light a match, the CW fought and kicked, but could not get up due to the physical attack. Thomas-Francis did not successfully ignite the gasoline.

The CW testified that he heard witnesses yelling for the group to stop hitting him. Once police sirens could be heard, Carlton and Thomas-Francis kicked the CW in the head, picked up some of their supplies, grabbed the CW's phone and keys, and ran off down the stairs. As Thomas-Francis was leaving, he threatened the CW, saying that if the CW did not get the money, "this is what's going to keep happening . . . ."

Carlton and/or Thomas-Francis got into the BMW, and drove off. The BMW was found the next morning parked outside a beach access gate and was returned to the CW.

After the State rested, Carlton orally moved for a judgment of acquittal on all four counts, but only made argument regarding Count II (Robbery in the First Degree). The circuit court denied Carlton's motion. After the defense rested, Carlton renewed the motion for judgment of acquittal on all four counts, resting on previous argument. The court again denied the motion.

On February 13, 2014, the circuit court read the jury instructions to the jury. The circuit court refused Defendant's Special Instruction No. 7, Defendant's Special Instruction No. 10, and Defendant's Special Instruction No. 11, which together

covered potential merger of Count I (Kidnapping), Count II (Robbery in the First Degree) and Count III (Assault in the Second Degree) pursuant to HRS § 701-109(1)(e). The jury found Carlton guilty as charged on all counts.

II. Discussion

A. Jury Instructions on Merger

Carlton contends that the circuit court erred by not instructing the jury regarding the possible merger, pursuant to HRS § 701-109(1)(e), of: Count I (Kidnapping) and Count II (Robbery in the First Degree); Count II (Robbery in the First Degree) and Count III (Assault in the Second Degree); and Count I (Kidnapping) and Count III (Assault in the Second Degree). The circuit court did not instruct the jury in any way regarding the potential merger of the charges.

> When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading. 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. However, error is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction. If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.

State v. Frisbee, 114 Hawai'i 76, 79-80, 156 P.3d 1182, 1185-86 (2007) (quoting State v. Nichols, 111 Hawai'i 327, 334-35, 141 P.3d 974, 981-82 (2006))(block format and brackets omitted).

HRS § 701-109(1)(e) provides:

> **§701-109 Method of prosecution when conduct established an element of more than one offense.** (1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:
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> . . . .
>
> (e) The offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of conduct constitute separate offenses.

As the Hawai'i Supreme Court has expressed on several occasions:

> HRS § 701-109(1)(e) . . . interposes a constraint on multiple convictions arising from the same criminal conduct. The statute "reflects a policy to limit the possibility of multiple convictions and extended sentences when the defendant has basically engaged in only one course of criminal conduct directed at one criminal goal[.]" See Commentary on HRS § 701-109.
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> > Whether a course of conduct gives rise to more than one crime [within the meaning of HRS § 701-109(1)(e)] depends in part on the intent and objective of the defendant. The test to determine whether the defendant intended to commit more than one offense is whether the evidence discloses one general intent or discloses separate and distinct intents. Where there is one intention, one general impulse, and one plan, there is but one offense. *All factual issues involved in this determination must be decided by the trier of fact.*
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> ... Hoey, 77 Hawai'i [at] 27 n.[ ]9, 881 P.2d [at] 514 n.[ ]9 ... (quoting ... Alston, 75 Haw. [at] 531, 865 P.2d [at] 165 ...). HRS § 701-109(1)(e), however, does not apply where a defendant's actions constitute separate offenses under the law. See State v. Hoopii, 68 Haw. 246, 251, 710 P.2d 1193, 1197 (1985).

Frisbee, 114 Hawai'i at 80-81, 156 P.3d at 1186-87 (quoting State v. Matias, 102 Hawai'i 300, 305, 75 P.3d 1191, 1196 (2003)).

If there is a reasonable possibility of merger under HRS § 701-109(1), "the factual question of merger is one for the trier of fact." Id. at 84, 156 P.3d at 1190 (internal quotation marks omitted). The Hawai'i Supreme Court has held that it is plain error not to give a merger instruction where there is a reasonable possibility that merger applies. Id. Further, if a party's requested merger instruction is "inaccurately, unfairly, or prejudicially worded, . . . the trial court [is] nevertheless obligated to ensure that a correct merger instruction [is] submitted to the jury for its guidance." State v. Hoey, 77 Hawai'i 17, 38, 881 P.2d 504, 525 (1994).

Where the trial court fails to properly instruct the jury on merger, this court has held that "HRS § 701-109(1)(e) only prohibits *conviction* for two offenses if the offenses merge; it specifically permits *prosecution* on both offenses." State v. Padilla, 114 Hawai'i 507, 517, 164 P.3d 765, 775 (App. 2007). Even if two counts might merge under HRS § 701-109(1)(e),

conviction on one of the two charges does not violate the statute. Id. Thus, this court held that there were alternative remedies, stating:

> We fail to see any reason why the State should not be permitted to dismiss one of the two charges and maintain the judgment of conviction and sentence on the other. Accordingly, on remand, we afford the State the option of: 1) dismissing either [of the two subject counts] and retaining the judgment of conviction and sentence on the non-dismissed count; or 2) retrying [the defendant] on both [of the subject counts] with an appropriate merger instruction.

Id.

1. Defendant's Special Instruction No. 7: Merger of Count I (Kidnapping) and Count II (Robbery in the First Degree)

Carlton contends that the record shows that Count I (Kidnapping) and Count II (Robbery in the First Degree) could have arisen from a continuing course of conduct, therefore, the circuit court should have given Defendant's Special Instruction No. 7. Defendant's Special Instruction No. 7 stated in pertinent part:

> If and only if you find the Defendant BROK CARLTON, as a principal and/or accomplice, guilty of Robbery in the First Degree, as charged in Count Number Two of the Complaint and guilty of Kidnapping as charged in Count number One of the Complaint, then you must answer the following question.
>
> Is the conduct upon which you based your verdict in Count number Two of the Complaint, the same conduct upon which you based your verdict for Count number One of the Complaint?

The Hawai'i Supreme court has indicated that:

> It is possible for kidnapping and robbery charges against a defendant to merge, pursuant to HRS § 701-109(1)(e), under circumstances in which (1) there is but one intention, one general impulse, and one plan, (2) the two offense are part and parcel of a continuing and uninterrupted course of conduct, and (3) the law does not provide that specific periods of conduct constitutes separate offenses.

Hoey, 77 Hawai'i at 38, 881 P.2d at 525(footnote omitted).

Robbery in the First Degree under HRS § 708-840(1)(a) (Count II) is committed when, "in the course of committing theft . . . [t]he person attempts to kill another or intentionally or knowingly inflicts or attempts to inflict serious bodily injury upon another[.]" (Emphasis added.)

Depending on the record, Robbery in the First Degree under HRS § 708-840(1)(a) may or may not encompass the form of Kidnapping proscribed in HRS § 707-720(1)(d) (Count I), which in pertinent part prohibits intentionally or knowingly restraining a person with intent to inflict bodily injury upon him or her. The "restraint" is the conduct element of a Kidnapping charge. See Frisbee, 114 Hawai'i at 81, 156 P.3d at 1187.

The State contends that Count I (Kidnapping) and Count II (Robbery in the First Degree) do not merge because it can be assumed that the jury found Carlton guilty of each count based on different conduct. On appeal, the State contends that Count II (Robbery in the First Degree) was based on the group stomping and kicking the CW to facilitate the attempted taking of $90,000. As to Count I (Kidnapping), the State contends on appeal that the restraint occurred when Carlton and his cohorts dragged the CW by the feet, and attempted to inflict bodily injury by trying to light the CW on fire. The State argues that both separate courses of conduct are separate offenses under the law.[7]

Contrary to the State's contention on appeal, there is no clear delineation between the acts constituting Kidnapping and Robbery in the First Degree as separate and independent offenses. See Hoopii, 68 Haw. at 251, 710 P.2d at 1197. This is evidenced by the fact that the State's theory of the case *at trial* in terms of what conduct constituted Kidnapping and Robbery in the First Degree was the inverse of its argument on appeal. During closing arguments, the State contended that the "restraint" related to

[7] The State cites to this court's holding in State v. Correa, 5 Haw. App. 644, 706 P.2d 1321 (1985). In Correa, this court held that "a kidnapping that was not necessarily and incidentally committed during a robbery may be charged as a separate offense in addition to the robbery charge." Id. at 649, 706 P.2d at 1325. First, we note that the plain language of HRS § 701-109(1) only prohibits *convictions* for two offenses if the offenses merge, not the *prosecution* for both offenses. Padilla, 114 Hawai'i at 517, 164 P.3d at 775. There is no question in this case that the State could charge Carlton with both Count I and Count II. Second, Correa was decided before Hoey. In Hoey, the supreme court cited Correa. Hoey, 77 Hawai'i at 38, 881 P.2d at 525. However, the Hoey court still held that where the record indicates that the course of conduct constituting the robbery may or may not encompass the form of kidnapping charged, the issue of merger is a question of fact that should be submitted to the jury. Id.

the Kidnapping charge was the CW's inability to stand up due to the physical attack and that the resulting bruises were evidence of an intent to inflict bodily injury. The State further contended that Robbery in the First Degree was committed because the attackers poured gasoline on the CW and attempted to light him on fire, therefore, taking a substantial step in a attempt to cause serious bodily injury in the course of committing a theft. The State's vacillating theories demonstrate that the record indicates that the course of conduct constituting the robbery may or may not encompass the form of Kidnapping charged. See Hoey, 77 Hawai'i at 38, 881 P.2d at 525. In short, there is a reasonable possibility that the jury could have convicted Carlton on Kidnapping and Robbery in the First Degree based on the same conduct and general intent, and that merger cannot be ruled out as a matter of law.

Based on the record in this case, the jury, as fact finder, should have been instructed on the question of whether the charges of Kidnapping and Robbery in the First Degree merged. As the case law indicates, the fact finder must determine whether the evidence disclosed "one general intent or disclose[d] separate and distinct intents[,]" because "[w]here there is one intention, one general impulse, and one plan, there is but one offense." Frisbee, 114 Hawai'i at 81, 156 P.3d at 1187; Hoey, 77 Hawai'i at 27 n.9, 881 P.2d at 514 n.9.

2. Defendant's Special Instruction No. 10: Merger of Count II (Robbery in the First Degree) and Count III (Assault in the Second Degree)

Carlton contends that the circuit court erred in refusing to give Defendant's Special Instruction No. 10 because there is a factual issue whether the conduct constituting Assault in the Second Degree (Count III) and Robbery in the First Degree (Count II) was a continuing course of conduct. Defendant's Special Instruction No. 10 provided in pertinent part:

> If and only if you find the Defendant BROK CARLTON guilty of Assault in the Second Degree, as charged in Count number Three of the Complaint and guilty of Robbery in the First Degree, as charged in Count Number Two of the

> Complaint, then you must answer the following question.
> Is the conduct upon which you based your verdict in Count Number Three of the Complaint, the same conduct upon which you based your verdict for Count Number Two of the Complaint?

Carlton contends that the jury could have found that Carlton attempted to inflict serious bodily injury on the CW by using a deadly instrument, the baseball bat.

Robbery in the First Degree pursuant to HRS § 708-840(1)(a) (Count II) is committed when, "in the course of committing theft or non-consensual taking of a motor vehicle . . . [t]he person attempts to kill another or intentionally or knowingly inflicts or attempts to inflict serious bodily injury upon another[.]" (Emphasis added.) Depending on the record, Robbery in the First Degree (Count II) under HRS § 708-840(1)(a) may or may not encompass the form of Assault in the Second Degree (Count III) proscribed in HRS § 707-711(1)(d). One violates section 707-711(1)(d) by intentionally or knowingly causing bodily injury to another with a dangerous instrument. The complaint and the jury instructions provided that Count III charged Carlton with intentionally or knowingly causing bodily injury to the CW with a dangerous instrument, "to wit, a baseball bat[.]"

Based on the record in this case, it is reasonably possible that the jury rendered convictions for Robbery in the First Degree (Count II) and Assault in the Second Degree (Count III) based on the same conduct. On appeal, the State argues that the underlying conduct of Count II and Count III constitute two separate actions because Carlton committed the offense of Robbery in the First Degree when he, in the course of committing a theft, "did inflict serious bodily injury by kicking and stomping on [the CW,]" however, the assault was committed through "beating him with a metal bat."[8] Yet, the evidence suggests that the CW

[8] At trial, the State argued Robbery in the First Degree, in part, because the attackers poured gasoline on the CW and attempted to light him on fire, therefore, taking a substantial step in an attempt to cause serious bodily injury. The State even called an expert witness, Dr. Lindsey Harle, (continued...)

was struck with the baseball bat as part of a broader physical attack, particularly while laying prone on the ground. The jury could reasonably have viewed the physical attack, including the use of a baseball bat, as an attempt to inflict serious bodily injury. It is not clear based on the record that any acts constituting the alleged robbery were separate and independent offenses from the assault with a dangerous instrument, such that there was not "one intention, one general impulse, and one plan." Hoey, 77 Hawai'i at 27 n.9, 38, 881 P.2d at 514 n.9, 525.

Because it is reasonably possible that the jury convicted Carlton of Robbery in the First Degree and Assault in the Second Degree based, in part, on the CW being struck repeatedly with a baseball bat, the question of merging Count II and Count III pursuant to HRS § 701-109(1)(e) should have been presented to the trier of fact.

3. Defendant's Special Instruction No. 11: Merger of Count I (Kidnapping) and Count III (Assault in the Second Degree)

Carlton contends that the circuit court erred by refusing Defendant's Special Instruction No. 11 because there is a question of fact whether the assault was part of a single intent or general plan that merges into the Kidnapping offense. Defendant's Special Instruction No. 11 covered Count I (Kidnapping) and Count III (Assault in the Second Degree) and provided in pertinent part:[9]

> If and only if you find the Defendant BROK CARLTON guilty of Assault in the Second Degree, as charged in Count number Three of the Complaint and guilty of Robbery in the First Degree, as charged in Count Number One of the Complaint, then you must answer the following question.

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[8](...continued)
who testified to the severity of the hypothetical injury that could result from lighting gasoline that had been poured on a person.

[9] Defendant's Special Instruction No. 11 appears to contain a typographical error in stating "Robbery in the First Degree, as charged in Count Number One of the Complaint[.]" Count I was the Kidnapping charge; Robbery in the First Degree is Count II. Given that Defendant's Special Instruction No. 10 covered merging Count III (Assault in the Second Degree) with Count II (Robbery in the First Degree), the only logical reading of Special Instruction No. 11 is that Carlton meant to propose instructing the jury regarding merging Count III with the Kidnapping charge, Count I.

> Is the conduct upon which you based your verdict in Count Number Three of the Complaint, the same conduct upon which you based your verdict for Count Number One of the Complaint?

Carlton was convicted of Assault in the Second Degree in violation of HRS § 707-711(1)(d) (Count III). One violates section 707-711(1)(d) by intentionally or knowingly causing bodily injury to another with a dangerous instrument. Count III specifically charged Carlton with Assault in the Second Degree "as a principal and/or accomplice" for intentionally or knowingly causing bodily injury to the CW with a dangerous instrument, "to wit, a baseball bat[.]" In certain circumstances, like if the CW had only been knocked to the ground by a singular blow from the baseball bat, the conduct prohibited by HRS § 707-711(1)(d) is not a course of conduct crime because the offense is committed without any further action. See Hoopii, 68 Haw. at 251, 710 P.2d at 1197.

In this vein, the State contends that Count I and Count III cannot merge because the use of the baseball bat occurred before any act constituting a Kidnapping occurred. However, Count I of the Complaint alleged that Carlton, "as a principal and/or accomplice," intentionally or knowingly restrained the CW with intent to inflict bodily injury, in violation of HRS § 707-720(1)(d). The "restraint" is the conduct element of a Kidnapping charge. See Frisbee, 114 Hawai'i at 81, 156 P.3d at 1187. The State's theory of the case at trial was that the restraint constituting the basis of the Kidnapping charge was the CW's inability to stand up due to the physical attack and that the resulting bruises were evidence of an intent to inflict bodily injury. The evidence suggests that the CW, besides being knocked to the ground by a blow delivered with a baseball bat, was repeatedly struck with the baseball bat while on the ground. Therefore, it is not clear that the acts constituting the Kidnapping were separate and independent offenses from the assault with a dangerous instrument. See Hoopii, 68 Haw. at 251, 710 P.2d at 1197.

It is reasonably possible that the jury convicted Carlton of Kidnapping and Assault in the Second Degree based, in part, on the CW being struck with a baseball bat while laying on the ground, and that there was one general intent. Based on this record, the question of merging Count I and Count III pursuant to HRS § 701-109(1)(e) should have been presented to the trier of fact.

4. Result

The jury instructions as a whole did not include any instructions regarding potential merger of any of the counts. Instead, the circuit court gave Instruction No. 16 which encouraged the jury to consider separately "[e]ach count and the evidence that applies to that count . . . ." Therefore, the jury instructions as a whole appear to contravene HRS § 701-109(1)(e), which "reflects a policy to limit the possibility of multiple convictions and extended sentences when the defendant has basically engaged in only one course of criminal conduct directed at one criminal goal." Matias, 102 Hawai'i at 305, 75 P.3d at 1196 (citation and brackets omitted).[10]

"[G]iven the reasonable possibility that the jury's verdict led to [multiple] convictions for 'the same conduct,' . . . the circuit court's failure to charge the jury with respect to merger contravened HRS § 701-109(1)(e) and was not harmless beyond a reasonable doubt." Frisbee, 114 Hawai'i at 84, 156 P.3d at 1190. Therefore, the Judgment must be vacated in part. Upon remand on Count I, Count II, and Count III, the State has the following options: (1) it may retry the case with an appropriate merger instruction, or (2) dismiss two of the three potentially merging counts (Counts I, II and III) and reinstate the conviction and sentence on the one non-dismissed count. Padilla, 114 Hawai'i at 518, 164 P.3d at 776.

[10] Carlton's proposed jury instructions on merger were not given. We do not address the propriety of those proposed instructions.

B. Motion for Judgment of Acquittal on Count II (Robbery in the First Degree)

Carlton contends that the circuit court erred in denying his motion for judgment of acquittal on Count II (Robbery in the First Degree).[11] Carlton contends that there is no evidence that he had the intent to deprive the CW of the BMW, therefore he did not commit the required underlying theft. The State counters that evidence showing an intent to deprive the CW of the BMW is irrelevant because the subject of the robbery charge was Carlton's attempted taking of $90,000.

> The standard to be applied by the trial court in ruling upon a motion for a judgment of acquittal is whether, upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. An appellate court employs the same standard of review.

State v. Hicks, 113 Hawai'i 60, 69, 148 P.3d 493, 502 (2006) (quoting State v. Maldonado, 108 Hawai'i 436, 442, 121 P.3d 901, 907 (2005))(block format omitted).

We reject Carlton's effort to focus exclusively on the taking of the BMW. Carlton was charged with violating HRS § 708-840(1)(a), which provides that "[a] person commits the offense of robbery in the first degree if, in the course of committing theft or non-consensual taking of a motor vehicle . . . [t]he person attempts to kill another or intentionally or knowingly inflicts or attempts to inflict serious bodily injury upon another[.]" (Emphasis added.) However, the specific charge against Carlton states in pertinent part that he was "a principal and/or accomplice, in the course of committing theft[.]" Count II does not contain any language referencing the "non-consensual taking of a motor vehicle[.]" This is perhaps because, as the State contends, the non-consensual taking of the BMW was the subject of Count IV, UCPV.

[11] Carlton does not challenge the circuit court's denial of his motion for judgment of acquittal as to the other three charged counts.

HRS § 708-842 (2014) provides that "[a]n act shall be deemed 'in the course of committing a theft . . . ' if it occurs in an attempt to commit theft . . . , in the commission of theft . . . , or in the flight after the attempt or commission." Theft requires an "intent to deprive the other of" property. HRS § 708-830 (2014). "Deprive" means, in pertinent part, "[t]o withhold property or cause it to be withheld from a person permanently . . . ." HRS § 708-800 (2014). Therefore, Carlton need only have been a principal or accomplice in an attempt to permanently withhold property from the CW with the intent to do so.

In this case, Carlton presented evidence after the circuit court denied his first motion for judgment of acquittal at the close of the State's case-in-chief. This court has previously noted that

> [i]t is well established that when a defendant presents evidence after the denial of his or her motion for judgment of acquittal at the close of the government's case-in-chief, the defendant thereby waives any error in the trial court's denial of [that] motion. . . . When the defendant presents evidence, the court on appeal determines the sufficiency of the evidence based on all the evidence presented.

State v. Souza, 119 Hawai'i 60, 73, 193 P.3d 1260, 1273 (App. 2008) (citations omitted). Upon viewing the evidence in the light most favorable to the prosecution, a reasonable mind might fairly conclude guilt beyond a reasonable doubt on Count II. See Hicks, 113 Hawai'i at 69, 148 P.3d at 502.

During cross-examination, Carlton agreed that he "had never been so upset" as he was after discovering $90,000 was missing from his safe, and that he suspected the CW and his girlfriend took the money. The CW testified that, as Carlton and Thomas-Francis were departing after the attack, they grabbed the CW's phone and keys, and ran off down the stairs. The CW also testified that Thomas-Francis threatened that if the CW did not get the money, "this is what's going to keep happening . . . ." An eye witness testified that while Carlton and Thomas-Francis were heading toward the BMW, one of them said "Watch out for [the CW]. He's a thief." "It is well settled in this jurisdiction

that guilt may be proved beyond a reasonable doubt on the basis of reasonable inferences drawn from circumstantial evidence." State v. Simpson, 64 Haw. 363, 373 n.7, 641 P.2d 320, 327 n.7 (1982). This evidence, and the record, when viewed in a light most favorable to the prosecution, is sufficient to enable a reasonable mind to conclude that Carlton, as a principal or accomplice, did attempt to kill or intentionally or knowingly inflict or attempt to inflict serious bodily injury upon the CW in the course of committing a theft, *i.e.*, an attempt to commit theft.

III. Conclusion

The Judgment Conviction and Sentence, filed on June 6, 2014, in the Circuit Court of the Second Circuit is affirmed as to Count IV (UCPV), but vacated as to Count I (Kidnapping), Count II (Robbery in the First Degree), and Count III (Assault in the Second Degree). Upon remand, the State may either: (1) retry Count I, Count II, and Count III with appropriate merger instructions, or (2) dismiss two of the three counts and reinstate the conviction and sentence on the one non-dismissed count.

DATED: Honolulu, Hawai'i, May 27, 2016.

On the briefs:

Benjamin E. Lowenthal,
for Defendant-Appellant.

Richard K. Minatoya,
Deputy Prosecuting Attorney,
for Plaintiff-Appellee.

Presiding Judge

Associate Judge

Associate Judge