OPINION BY HIRAOKA, J.
CONCURRING IN PART AND DISSENTING IN PART

I concur that the evidence was sufficient to support the jury's finding that Forbes did not voluntarily release CW. But I would not find plain instructional error. Even if State v. Sheffield, 146 Hawaiʻi 49, 456 P.3d 122 (2020) applies to a prosecution for kidnapping under HRS § 707-720(1)(e) (intent to terrorize), in my view the trial court's failure to give a Sheffield-type instruction was harmless beyond a reasonable doubt.

In State v. Malave, 146 Hawaiʻi 341, 463 P.3d 998 (2020), a family court jury found Malave guilty of sexually assaulting his pre-teen stepdaughter over a two-year period. On appeal, Malave argued the family court did not have subject matter jurisdiction. HRS § 571-14(a) gave the family court exclusive jurisdiction "[t]o try any offense committed against a child by . . . any other person having the child's legal or physical custody." Id. at 349, 463 P.3d at 1006. The family court did not instruct the jury that it must find Malave had legal or physical custody of the complaining witness in order to find him guilty.

The supreme court found instructional error: "[W]hen a jury trial is conducted in family court in a case subject to HRS § 571-14(a), the jury should be instructed by way of a special interrogatory to find whether the defendant had physical or legal custody of the complaining witness." Malave, 146 Hawaiʻi at 349-50, 463 P.3d at 1006-07. However, the supreme court held that the error was harmless beyond a reasonable doubt:

> Where uncontradicted and undisputed evidence of jurisdiction is contained in the record, the trial court's failure to instruct the jury is harmless beyond a reasonable doubt. . . .
>
> "'Physical custody' means the physical care and supervision of a child." HRS § 583A-102. The evidence in the record . . . shows that Malave did have physical custody of [the complaining witness] for the reasons the ICA noted: [the complaining witness] lived with her mother, Malave, and [her] two half-siblings; Malave watched and cared for [the complaining witness] while her mother was at work; Malave

> cooked meals, did laundry, disciplined [the complaining witness], and sometimes helped her with homework; and [the complaining witness] was expected to follow Malave's rules and obey him. Failure to instruct the jury on jurisdiction was thus harmless beyond a reasonable doubt.

Id. at 350, 463 P.3d at 1007 (cleaned up).

Similarly, based on the undisputed trial evidence — Forbes's own testimony as well as corroborating testimonial and photographic evidence — I do not believe any reasonable jury could conclude that Forbes did not restrain CW "more than any restraint incidental to the intended terroristic threatening of the complaining witness." See Majority Opinion at 2.

At trial Forbes admitted to conduct — brandishing a "simulated firearm" (a cigarette lighter that resembled a hand-gun) — to threaten CW with bodily injury. That evidence would have been sufficient to support a conviction for terroristic threatening in the first degree. Here, Forbes admitted scaring CW ***to restrain him in the taxi*** so that CW would drive Forbes where CW did not want to go. But Forbes admitted doing ***more*** to restrain CW than just scaring him with a simulated firearm. When CW attempted to escape the first time, Forbes admitted grabbing CW's shirt to ***physically*** restrain him. That physical restraint was more than incidental to terroristic threatening in the first degree. Forbes admitted, "I tried to pull [CW] back in so he could continue my drive." CW testified, "when I tried to run away from the car [Forbes] used his gun and then the grip side, holding side, and hit my neck side, neck[.]" Photographs depicting CW's injuries were admitted into evidence without objection. In light of this evidence, I believe that no reasonable jury could find that Forbes did not restrain CW more than was incidental to his terroristically threatening CW with a simulated firearm.

For these reasons, I would find the trial court's alleged plain instructional error harmless beyond a reasonable doubt, and affirm the August 8, 2019 Judgment.

/s/ Keith K. Hiraoka
Associate Judge