IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee/Cross-Appellant,

vs.

LORRIN Y. ISHIMINE,
Petitioner/Defendant-Appellant/Cross-Appellee.

SCWC-18-0000691

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-18-0000691; CASE NO. 2PC161000679)

AUGUST 4, 2022

DISSENTING OPINION BY NAKAYAMA, J.,
WITH WHOM RECKTENWALD, C.J., JOINS

Today's majority invokes this court's plain error jurisdiction to vacate Lorrin Y. Ishimine's (Ishimine) conviction for kidnapping because of an unchallenged deficiency in the circuit court's jury instructions. In so doing, the majority erodes the jurisdictional guardrails that protect our adversarial system. Furthermore, the majority silently

dismisses our precedent identifying three tests for determining whether the jury instruction was necessary and, in turn, whether the defect was harmless beyond a reasonable doubt. The proper application of these tests reveals that Ishimine could not have been harmed by the missing jury instruction.

Under these circumstances, the majority's invocation of plain error jurisdiction constitutes judicial overreach. Accordingly, I respectfully dissent.

I. DISCUSSION

A. Today's majority's invocation of this court's plain error jurisdiction substantially undermines our adversarial system.

Hawaii's appellate courts have long maintained "the power, sua sponte, to notice plain errors or defects in the record affecting substantial rights not properly brought to the attention of the trial judge or raised on appeal." State v. Iaukea, 56 Haw. 343, 355, 537 P.2d 724, 733 (1975) (citations omitted). However, "[t]his court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system—that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes." State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993) (citing State v. Fox, 70 Haw. 46, 55-56, 760 P.2d 670, 675-76 (1988)). Moreover, a key "premise of our

adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983); see also United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").

Today's majority throws caution to the wind to override our adversarial system and address an issue Ishimine never raised. On appeal and on application for writ of certiorari, Ishimine sought review of (1) the circuit court's denial of a motion to suppress, (2) the circuit court's decision to admit certain testimony, and (3) whether substantial evidence supported Ishimine's conviction for kidnapping. At no point did Ishimine independently contend that his conviction should be vacated because of a deficiency in the circuit court's jury instructions.

Instead of requiring Ishimine to "look to his counsel to protect him," the court acted as a "self-directed board[] of legal inquiry and research" and identified for Ishimine a mistake committed by his counsel. Kelekolio, 74 Haw. at 515,

849 P.2d at 74-75; Carducci, 714 F.2d at 177; see also State v. Sheffield, 146 Hawai'i 49, 59, 456 P.3d 122, 133 (2020). Today's majority now dismisses Ishimine's failure to challenge the sufficiency of the jury instructions on his own volition "because the notice of appeal predated State v. Sheffield[.]"

But when Ishimine filed his notice of appeal has no bearing on his ability to challenge the sufficiency of the jury instructions.[1]

[1] Under Hawai'i Rules of Appellate Procedure (HRAP) Rule 3(c) (2018), which specifies the contents of a notice of appeal,

> (1) The notice of appeal shall identify the party or parties taking the appeal either in the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "plaintiffs A, B, et al.," or "all defendants except X." In a class action, whether or not the class has been certified, it is sufficient for the notice of appeal to name one person qualified to bring the appeal as representative of the class. In cases where fictitious titles are authorized by law, the first and last initials of the party or parties shall be used. In the event that a case involves parties bearing the same initials, middle initials shall be added.
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> (2) The notice of appeal shall designate the judgment, order, or part thereof and the court or agency appealed from. A copy of the judgment or order shall be attached as an exhibit. Forms 1, 2, and 3 in the Appendix of Forms are suggested forms of notices of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

Neither HRAP Rule 3(c) nor the referenced forms require an appellant to articulate points of error in their notice of appeal. Contra HRAP Rule 28(b)(4) (2016) ("[T]he appellant shall file an opening brief[] containing . . . [a] concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency[.]").

In any event, Ishimine has had numerous opportunities to raise a jury-instruction claim since he filed his notice of appeal. This court published Sheffield on January 2, 2020. 146 Hawaiʻi 49, 456 P.3d 122. The Intermediate Court of Appeals (ICA) did not file its summary disposition order in the underlying appeal until February 27, 2020. Pursuant to HRAP Rule 28(j),[2] Ishimine could have "br[ought] to the appellate court's attention pertinent and significant authorities published after [the parties'] brief[s] ha[d] been filed, but before a decision." Ishimine did not.

Nearly four months later, on June 9, 2020, Ishimine filed his application for writ of certiorari. Ishimine could have used his application to ask this court to address whether the circuit court erred by not instructing the jury that the restraint at issue had to be in excess of restraint incidental to an accompanying crime. He did not.

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[2] HRPP Rule 28(j) (2016) provides in whole:

> Citation of supplemental authorities. Parties may, by letter to the appellate clerk, bring to the appellate court's attention pertinent and significant authorities published after a party's brief has been filed, but before a decision. A copy of the letter, setting forth the citations, shall be served at or before the time of filing as provided by Rule 25(b) of these Rules. The letter shall provide references to either the page(s) of the brief or a point argued orally to which the citations pertain. The letter shall, without argument, state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Under these circumstances, the adversarial system would require Ishimine to bear the cost of his appellate counsel's repeated mistake.[3] Kelekolio, 74 Haw. at 515, 849 P.2d at 74-75. Instead, today's majority upends the adversarial system and takes up an inquisitorial role. See Burke, 504 U.S. at 246 (Scalia, J., concurring). As detailed below, Ishimine has not suffered a substantial injury which merits "a departure from [the] presupposition of the adversary system." Kelekolio,

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[3] Ishimine has been represented by the same attorney at all stages of the appellate proceedings.

In holding the missing jury instruction impacted Ishimine's substantial rights, today's majority questionably condones Ishimine's appellate counsel's provision of what the majority renders ineffective assistance.

> When the denial of the right to effective assistance of counsel is raised . . . [t]he defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a meritorious defense.

State v. Aplaca, 74 Haw. 54, 66-67, 837 P.2d 1298, 1305 (1992) (quoting State v. Smith, 68 Haw. 304, 309, 712 P.2d 496, 500 (1986)). Here, Ishimine's appellate counsel did not raise a jury instruction claim for nearly two years after this court published Sheffield. Absent this court's intervention, this failure would have substantially impaired what today's majority deems a meritorious defense.

Moreover, had appellate counsel's failure to raise a jury instruction challenge impacted Ishimine's substantial rights, but see infra, Ishimine would not have been left without recourse. In such a scenario, Ishimine could file a petition pursuant to Hawaiʻi Rules of Penal Procedure (HRPP) Rule 40 (2006) asserting ineffective assistance of counsel. See State v. Fields, 115 Hawaiʻi 503, 529 & n.17, 168 P.3d 955, 981 & n.17 (2007). The majority dismisses this avenue because Ishimine "may never have become aware of the issue." But this is a feature of our adversarial system, not a bug. See Kelekolio, 74 Haw. at 515, 849 P.2d at 74-75. The majority further justifies circumventing our system of appellate review because "there would be a substantial delay before the issue ever reached this court." By such logic, this court should no longer sit as an appellate court, but should intervene and weigh in upon every legal issue raised while cases are pending before the trial courts. This would subvert the very concept of appellate review.

74 Haw. at 515, 849 P.2d at 74-75. This case is therefore not one which merits departure from the adversarial system. See id.

B. Today's majority's exercise of plain error jurisdiction is unwarranted because the alleged instructional error was harmless beyond a reasonable doubt.

In addition to the restraint imposed by the presuppositions of our adversarial system, this court's plain error jurisdiction has long been limited to "[p]lain errors or defects affecting substantial rights." HRPP Rule 52(b);[4] see also, e.g., State v. Onishi, 59 Haw. 384, 385, 581 P.2d 763, 765 (1978) ("An alleged error in an instruction to which no objection was made before the trial court will not be considered on appeal, unless it is shown that the substantial rights of the defendant have been affected." (citations omitted)). In contrast, "we will deem harmless beyond a reasonable doubt, and therefore disregard, 'any error, defect, irregularity[,] or variance' that 'does not affect [the] substantial rights of a defendant.'" State v. Aplaca, 96 Hawaiʻi 17, 22, 25 P.3d 792, 797 (2001) (quoting HRPP Rule 52(a)).

[4] HRPP Rule 52 (2000) provides:

> (a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
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> (b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

A close inspection of the record reveals that the jury-instructions defect was harmless beyond a reasonable doubt.

Ishimine was not harmed because, as a matter of law, Ishimine's restraint of the Complainant was not incidental. This court held in Sheffield that "the restraint necessary to support a kidnapping conviction under [Hawai'i Revised Statutes (HRS)] § 707-720(1)(d)[5] must be restraint that is in excess of any restraint incidental to the infliction or intended infliction of bodily injury or subjection or intended subjection of a person to a sexual offense." 146 Hawai'i at 59, 456 P.3d at 132. In reaching this holding, we recognized "three tests for incidental movement or restraint":

> (1) whether the confinement, movement, or detention was merely incidental to the accompanying crime or whether it was significant enough, in and of itself, to warrant independent prosecution.
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> (2) whether the detention or movement substantially increased the risk of harm over and above that necessarily present in the accompanying crime.
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> (3) when the restraint or movement was done to facilitate the commission of another crime, the restraint or movement must not be slight, inconsequential, and merely incidental to the other crime, or be the kind of restraint or movement inherent in the nature of the other crime. Under this test, the restraint or movement must have some significance independent of the other crime, in that it makes the other crime substantially easier to commit or substantially lessens the risk of detection.

[5] HRS § 707-720(1)(d) (2014) provides "(1) A person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to: . . . (d) Inflict bodily injury upon that person or subject that person to a sexual offense."

Id. (quoting State v. Trujillo, 289 P.3d 238, 248 (N.M. Ct. App. 2012)).

The application of each[6] of these tests reveals that Ishimine's restraint of Complainant was not merely incidental to an accompanying crime. First, neither Ishimine nor the majority disputes that Ishimine's confinement, movement, and detention of Complainant was significant enough, in and of itself, to warrant independent prosecution.

Second, Ishimine's detention and movement of Complainant substantially increased the risk of harm over and above that necessarily present in the accompanying crimes with which the State of Hawaiʻi (the State) charged Ishimine. Pursuant to HRS § 709-906(1),[7] a person commits the offense of

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[6] Neither the Trujillo court nor this court selected a single test to apply when evaluating whether restraint or movement is incidental. Id. (citing Trujillo, 289 P.3d at 250).

[7] HRS § 709-906 (2014 & Supp. 2016) provides in relevant part:

> Abuse of family or household members; penalty.
> (1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member or to refuse compliance with the lawful order of a police officer under subsection (4). . . .
> For the purposes of this section:
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> . . .
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> "Family or household member":
> (a) Means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons in a dating relationship as defined under section 586-1, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit[.]

abuse of a family or household member if they "physically abuse a family or household member." Although the statute does not define "physical abuse," this court has recognized that the suffering of physical harm is sufficient to constitute physical abuse. State v. Kameenui, 69 Haw. 620, 622, 753 P.2d 1250, 1252 (1988). Additionally, HRS § 709-906(8) makes the "intentional[] or knowing[] impeding [of] normal breathing or circulation of the blood of [a] family or household member by applying pressure on the throat or neck" unlawful. The threshold of injury required to commit either of the alleged accompanying crimes is therefore low. In contrast, Ishimine's act of dragging Complainant up a flight of stairs — while Complainant was kicking and screaming — presented a substantial risk of injury to Complainant. A single misstep could have proven fatal.

Third, it is indisputable that Ishimine's act of moving Complainant into the apartment and restraining her within made any other crime easier to commit or substantially lessened the risk of detection. The only reason Ishimine was arrested and charged in the first place was because an off-duty officer

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. . . .

(8) Where the physical abuse consists of intentionally or knowingly impeding the normal breathing or circulation of the blood of the family or household member by applying pressure on the throat or the neck, abuse of a family or household member is a class C felony.

observed Ishimine's actions outside of the apartment. As Ishimine insists, his confinement of Complainant indoors provided "ample time" during which he could have injured Complainant.

The tests this court identified in Sheffield therefore lead to the conclusion that, as a matter of law, Ishimine's restraint of Complainant was "in excess of any restraint incidental to the infliction or intended infliction of bodily injury or subjection or intended subjection of a person to a sexual offense." See 146 Hawaiʻi at 59, 456 P.3d at 132. In turn, Ishimine could not have been harmed by the deficiency in the circuit court's jury instructions.

However, today's majority makes no attempt to apply any of Sheffield's tests to evaluate whether Ishimine's substantial rights were impacted.[8] The majority instead silently

[8] Although Sheffield did not explicitly apply the three tests to evaluate whether the restraint at issue in that case was more than incidental, the Sheffield court recognized that a scenario where "a person might grab another person's arm and pull the other person a few feet to land a punch" is "clearly incidental." 146 Hawaiʻi at 58, 456 P.3d at 131. The degree of restraint present in such a scenario is nearly identical to the degree of restraint upon which defendant David M. Sheffield was convicted: "grabb[ing] [the complaining witness's] backpack and pull[ing] her 5-10 steps backward" in order to assault her. Id. at 54, 456 P.3d at 127.

Furthermore, the application of the three tests reveals that such restraint could be merely incidental because (1) it would not be significant enough to warrant independent prosecution for kidnapping; (2) it did not substantially increase the risk of harm over and above that present in an assault; and (3) it did not make an assault substantially easier to commit or reduce the risk of detection. See id. at 59, 456 P.3d at 132.

To the contrary, the facts here more closely resemble the example of restraint that Sheffield held would be "much more than incidental," where a hypothetical defendant might "lead another by knifepoint through an alley and

dismisses the Sheffield tests because of Sheffield's allusion to the possibility that the prosecutorial decision to dismiss accompanying charges "could be characterized as 'abusive' and an 'end run around the special doctrinal protections designed for uncompleted crimes.'" (Quoting Sheffield, 146 Hawaiʻi at 58 n.11, 456 P.3d at 131 n.11.) (Emphasis added.) But the majority's concern with abusive prosecution here is completely unfounded.

First, as the Sheffield court noted,

> the [Model Penal Code (MPC)] Commentators characterized prosecution solely for kidnapping as "abusive": "Where the underlying crime is not completed, prosecution for kidnapping instead of attempt may amount to an end run around the special doctrinal protections designed for uncompleted crimes."

146 Hawaiʻi at 58 n.11, 456 P.3d at 131 n.11 (quoting MPC § 212.1 cmt. at 221). Thus, the MPC Commentators' concern over abusive prosecution arises when "the underlying crime is not completed." See id. In this case, there is no evidence that the intended physical injury with which the majority is concerned was inchoate and not completed. Second, in any event, the Sheffield court indicated that the MPC Commentator's concerns were inapposite because "Hawaiʻi law, however, allows prosecution for kidnapping without a completed offense." Id. (emphasis added).

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into a deserted warehouse, for the purpose of committing a sexual offense, but eventually fail." Id. at 58, 456 P.3d at 131.

Third, there is no evidence in the record that the State dismissed the accompanying charges as an abusive prosecution tactic. Under these circumstances, the majority's concern does not merit silently overriding Sheffield's recognition of three tests for incidental movement or restraint.

The majority further undermines the Sheffield tests by proclaiming that "[t]he three tests assist the jury in understanding whether the restraint used by the defendant could support a kidnapping conviction because the restraint is more than just incidental to the commission of some other crime," and thus are not used to determine whether the jury instruction was necessary. To the contrary, the Sheffield tests were developed "to determine whether [the] confinements or movements involved, where an offense separate from kidnapping has occurred, are such that kidnapping may also be charged and prosecuted." Laura Hunter Dietz, 1 Am. Jur. 2d Abduction & Kidnapping § 10 (2012) (cited by Trujillo, 289 P.3d at 248). Both Sheffield and today's majority acknowledge as much. 146 Hawaiʻi at 59, 456 P.3d at 132 (citing Trujillo, 289 P.3d at 248). In turn, the application of these tests necessarily determines whether a more-than-incidental-restraint instruction is required: if the restraint can be considered incidental, the court must provide the instruction; if the restraint cannot be considered incidental, the court need not provide the instruction. Id.

The jury-instructions defect was also harmless beyond a reasonable doubt because the jury could not have convicted Ishimine of any of the accompanying charges. It is well-established that in order for a jury to convict a defendant, "[t]he jury must unanimously find that each material element of the offense has been proven—the conduct, the attendant circumstances, and the result of conduct—as well as the mental state requisite to each element." State v. Jones, 96 Hawaiʻi 161, 169, 29 P.3d 351, 359 (2001) (citations omitted). One of the material elements of an abuse of a family or household member charge is that the complainant qualifies as a "family or household member." See HRS § 709-906(1) ("'[F]amily or household member': (a) Means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons in a dating relationship as defined under section 586-1, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit."). However, neither party introduced any evidence that Complainant qualified as a "family or household member." Absent such evidence, the State could not have met its burden of proof to establish every material element of the accompanying abuse of a family or household member charges. See State v. Lima, 64 Haw. 470, 474, 643 P.2d 536, 539 (1982). The majority therefore errs in

concluding that the jury could not have convicted Ishimine under HRS § 709-906 only because those offenses "were dismissed and untried."

In turn, the majority improperly vacates Ishimine's conviction based upon an error that did not affect his substantial rights. Aplaca, 96 Hawaiʻi at 22, 25 P.3d at 797.

II. CONCLUSION

For the foregoing reasons, today's majority improperly invokes this court's plain error jurisdiction to vacate Ishimine's conviction. Because the majority does not address any of the points of error raised by Ishimine, I would dismiss the application for writ of certiorari as improvidently granted. I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama