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NO. CAAP-25-0000133

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
MICHAEL AKAU, also known as
MICHAEL JACOB AKAU, Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CASE NO. 1CPC-22-0001558)

SUMMARY DISPOSITION ORDER

(By: Nakasone, Chief Judge, Leonard and Gluck, JJ.)

Defendant-Appellant Michael Akau, also known as Michael Jacob Akau (**Akau**), appeals from the Circuit Court of the First Circuit's (**Circuit Court**)¹ December 12, 2023 "Judgment of Conviction and Sentence" (**Judgment**), in which Akau was found guilty of Robbery in the Second Degree following a jury trial.²

On appeal, Akau challenges the Circuit Court's jury instructions, alleges prosecutorial misconduct, and contends

¹ The Honorable James S. Kawashima presided.

² The Circuit Court entered a "Free Standing Order of Restitution" on January 21, 2025, and Akau filed a timely notice of appeal thereafter.

that the Circuit Court erred by waiving his presence at a restitution hearing.

Upon careful review of the record on appeal and the briefs submitted, and having given due consideration to the arguments advanced and the issues raised, we vacate and remand due to erroneous jury instructions.

The relevant background facts are these. A jury trial was held on August 24-25, 2023. Steven Andrews (**Andrews**) testified that on November 23, 2022, he was sitting outside of 7-Eleven with a blue Walmart bag that contained a library book, cigarettes, and some change, when Akau walked by, bent over, and "grabbed [his] things." Andrews "grabbed the bag back," Akau gripped the bag tighter, and the two struggled for around 30 seconds. Andrews attempted to hit Akau to make him let go of the bag, at which point the two began fighting. Andrews testified that he then punched Akau in the face, after which Akau punched Andrews twice and kneed him in the back. Andrews left the scene to return to his residence at Weinberg Hale, and observed Akau with the bag in his (Akau's) hand. Andrews later received his belongings back from responding officers, but testified that "a little bit of money [was] missing" and he could not recall if he got the cigarettes back.

Honolulu Police Department (**HPD**) Officer Daniel Wolf (**Officer Wolf**) testified that on November 23, 2022, he was dispatched to an "assault or a robbery type case" at Weinberg

Hale. Andrews reported to Officer Wolf that his property was taken at 7-Eleven down the road. Officer Wolf found Andrews's Walmart bag "tucked away into a corner" at the 7-Eleven. Officer Wolf reviewed the surveillance footage from 7-Eleven, but testified that he could not determine whether Akau took Andrews's belongings.³

Akau testified that on November 23, 2022, he was "panhandling" at 7-Eleven. Akau saw Andrews, whom he seen previously at Weinberg Hale and 7-Eleven, and he asked Andrews for a cigarette. Akau testified that Andrews then punched him in the mouth, and they began fighting. When the fighting stopped, Andrews left, and Akau sat in the corner where Andrews was initially sitting. Akau observed a blue tote bag "off in the corner[,] " but denied grabbing the bag from Andrews at any point while fighting and denied taking any items from the bag. Akau testified that his friend then came over and gave him a cigarette.

The Circuit Court instructed the jury on Robbery in the Second Degree, use of force, as follows:

Robbery in the Second Degree, use of force. As to the first alternative, a person commits the offense of Robbery in the Second Degree, use of force, if in the course of committing theft he uses force against the person of anyone present with the -- with intent to overcome the person's physical resistance, or physical power of resistance.

There are two material elements to the offense of Robbery in the Second Degree, use of force, each of which

³ Although the surveillance video is listed in the record on appeal, the video itself was not available for this court to review.

the prosecution must prove beyond a reasonable doubt. The two elements are:

1. That on or about November 23rd, 2022, in the City and County of Honolulu, state -- the defendant, Michael Akau, was in the course of committing theft; and

2. That while doing so the defendant, Michael Akau, used force against the person of Steven Kermit Andrews, a person who was present, with intent to overcome Steven Kermit Andrews's physical resistance or physical power of resistance.

(Emphases added.) The Circuit Court did not provide the jury with the statutory definition of "theft" (from Hawai'i Revised Statutes (**HRS**) § 708-830) when instructing the jury on Robbery in the Second Degree.⁴

⁴ The Circuit Court did, however, define the following terms:

Control over the property means exercise of the -- the exercise of dominion over the property, and includes but is not limited to taking, carrying away, or possessing the property, or selling, conveying, or transferring title to or an interest in the property.

Deprive means A, to withhold property or cause it to be withheld from a person permanently, or for so extended a period, or under such circumstance, that a significant portion of its economic value or the use -- or the use and benefit thereof is lost to him; or

B, to dispose of the property, so as to make it unlikely the owner will recover it; or

C, to retain the property with the intent to restore it to the owner only if the owner purchases or leases it back, or pays a reward or other compensation for its return; or

D, to sell, give, pledge or otherwise transfer any interest in the property; or

E, to subject the property to a claim of a person other than the owner.

Obtain means, when used in relation to property, to bring about a transfer of possession or other interest, whether to the obtainer or to another.

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Unauthorized control over property means control over property of another which is not authorized by the owner.

Thereafter, the Circuit Court instructed the jury that if it found Akau not guilty of Robbery in the Second Degree, it would determine whether Akau was guilty of Theft in the Fourth Degree, as follows:

A person commits the offense of Theft in the Fourth Degree if he obtains or exerts unauthorized control over the property of another, the value of which does not exceed 250 dollars, with intent to deprive the person of the property.

There are four material elements of the offense of Theft in the Fourth Degree, each of which the prosecution must prove beyond a reasonable doubt.

These four elements are:

1. That on or about November 23rd, 2022, in the City and County of Honolulu, the State of Hawai'i, the defendant, Michael Akau, obtained or exerted unauthorized control over the property of Steven Kermit Andrews; and
2. That the defendant, Michael Akau, did so with the intent to deprive Steven Kermit Andrews of the property; and
3. That the defendant, Michael Akau, was aware or believed the property had value; and
4. The property had value.

In closing argument, the State reiterated the "depriving" definition, as follows:

You've learned about what depriving is. Depriving is to withhold the property, permanently or for so extended a period that a significant portion of it, or its value, is lost. You've also learned that deprived can mean to dispose of it, to make it unlikely that the person, Mr. Andrews, could recover it.

You've learned that it means to retain the property, with the intent to restore it only if the owner purchases it or leases it back. Depriving also means to sell or otherwise transfer the interest of the property to someone else. It's not yours. To subject the property to the claim of a person other than the owner, in this case Mr. Andrews.

The State argued that Akau approached Andrews with the goal "to take whatever it was that Mr. Andrews had[,]" and that Akau then

punched and kneed Andrews in the back causing Andrews to flee the 7-Eleven parking lot and leave his belongings behind. The State argued that Andrews observed Akau with the "blue tote in his hand" while fleeing. After Andrews left, the State contended, the surveillance video showed Akau smoking a cigarette, which was from Andrews's bag.

In its rebuttal argument to the jury, the State argued that "[i]t didn't have to be the defendant who took anything from the wallet, or took any cigarettes from the bag, under the law." The State contended that because of Akau's actions, "Andrews was forced to abandon his belongings," and it did not matter "if the defendant took the cigarettes, or the book, . . . or the cash[.]" Defense counsel objected for "misstate[ment of] the law." The Circuit Court overruled the objection.

The jury found Akau guilty as charged of Robbery in the Second Degree, use of force. Akau was sentenced to ten years of imprisonment. Akau timely appealed.

Standard of review.

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. Nichols, 111 Hawai'i 327, 334, 141 P.3d 974, 981 (2006) (quoting State v. Gonsalves, 108 Hawai'i 289, 292-93, 119 P.3d 597, 600-01 (2005)) (brackets omitted). "Jury instructions to which no objection was made at trial will be reviewed for plain error." State v. Brown, 157 Hawai'i 354, 367, 577 P.3d 1045, 1058 (2025).

Akau argues that the Circuit Court erred by "failing to define theft under HRS § 708-830(1)" as including the "mens rea for element 1 of Robbery." Akau contends that "[w]ithout being informed that element 1 requires an intent to deprive another of property, a mens rea, the jury could have believed that the State was not required to prove a mens rea at all for that first element." The State, on the other hand, argues that because the Circuit Court "gave an instruction on Theft in the Fourth Degree as a lesser included offense of Robbery in the Second Degree[,]" "the jury was in fact provided with a definition of 'theft' and the mental state associated with 'theft.'"

HRS § 701-114 (2014), entitled "Proof beyond a reasonable doubt," provides:

(1) Except as otherwise provided in section 701-115, no person may be convicted of an offense unless the following are proved beyond a reasonable doubt:

(a) Each element of the offense;

(b) The state of mind required to establish each element of the offense;

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(2) In the absence of the proof required by subsection (1), the innocence of the defendant is presumed.

(Emphasis added.) HRS § 702-204 (2014), entitled "State of mind required," provides: "Except as provided in section 702-212, a person is not guilty of an offense unless the person acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense."

(Emphasis added.)

Akau was found guilty of HRS § 708-841(1)(a) (2014), which provides that a person commits Robbery in the Second Degree if:

in the course of committing theft . . . :

(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;

(Emphasis added.) HRS § 708-830 (2014) provides, inter alia, that a person commits theft if the person "obtains or exerts unauthorized control over the property of another with intent to deprive the other of the property." (Emphasis added.) Thus, to find Akau guilty of Robbery in the Second Degree, the jury was required to find that, in addition to force, Akau acted "with intent" to "deprive" Andrews of his property. See id.; HRS §§ 701-114 and 702-204; see also State v. Cordeiro, 99 Hawai'i 390, 407, 56 P.3d 692, 709 (2002) (noting that the Circuit Court instructed the jury on the "statutory definition[]" of "theft" in a Robbery in the First Degree case).

Here, the Circuit Court instructed the jury as to Robbery in the Second Degree without providing the definition of "theft." The Circuit Court then provided the definitions of "Control over the property," "Deprive," "Obtain," and "Unauthorized control over property," all terms derived from the statutory definition of "theft." As Akau argues, without the "theft" definition, the jury could have been misled "that if Akau somehow caused the property to be withheld from the owner without any intent to do so, . . . then he could still be guilty of robbery." Without the proper instruction of "theft," a jury could have found that Akau's fight with Andrews caused Andrews to abandon his property. Therefore, it is unclear whether the jury understood that Akau had to have the "intent to deprive" Andrews of his property during the fight. HRS § 708-830. Thus, the Circuit Court's jury instructions were erroneous. See Nichols, 111 Hawai'i at 334, 141 P.3d at 981.

The Circuit Court's erroneous jury instructions were presumptively harmful. Id. Based on the record, there is a reasonable possibility that the erroneous instruction contributed to Akau's conviction, and this error was not harmless beyond a reasonable doubt. Accordingly, we vacate and remand, and we need not address Akau's remaining arguments.

For the foregoing reasons, we vacate the Circuit Court of the First Circuit's December 12, 2023 "Judgment of Conviction

and Sentence," and remand for proceedings consistent with this Summary Disposition Order.

DATED: Honolulu, Hawai'i, August 28, 2026.

On the briefs:

Audrey Stanley,
for Defendant-Appellant.

/s/ Karen T. Nakasone
Chief Judge

Robert T. Nakatsuji,
Deputy Prosecuting Attorney,
City and County of Honolulu
for Plaintiff-Appellee.

/s/ Katherine G. Leonard
Associate Judge

/s/ Daniel M. Gluck
Associate Judge