CHAPTER 707
OFFENSES AGAINST THE PERSON

Case Notes

In the context of offenses against persons set forth in this chapter, the defendant's proscribed conduct must be committed at a time when the victim is within the class contemplated by the legislature because the specified class is an attendant circumstance. 109 H. 115, 123 P.3d 1210 (2005).

"PART I. GENERAL PROVISIONS RELATING TO OFFENSES AGAINST THE PERSON

§707-700 Definitions of terms in this chapter. In this chapter, unless a different meaning plainly is required:

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

"Compulsion" means absence of consent, or a threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss.

"Dangerous instrument" means any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

"Deviate sexual intercourse" means any act of sexual gratification between a person and an animal or a corpse, involving the sex organs of one and the mouth, anus, or sex organs of the other.

"Emergency worker" means any:

(1) Law enforcement officer, including any police officer, public safety officer, parole or probation officer, or any other officer of any county, state, federal, or military agency authorized to exercise law enforcement or police powers;

(2) Firefighter, emergency medical services personnel, emergency medical technician, ambulance crewmember, or any other emergency response personnel;

(3) Member of the Hawaii National Guard on any duty or service done under or in pursuance of an order or call of the governor or the President of the United States or any proper authority;

(4) Member of the United States Army, Air Force, Navy, Marine Corps, or Coast Guard on any duty or service performed under or in pursuance of an order or call of the President of the United States or any proper authority;

(5) Member of the National Guard from any other state ordered into service by any proper authority; or

(6) Person engaged in emergency management functions as authorized by the director of Hawaii emergency management or the administrator or director of the county emergency management agency or as otherwise authorized under chapter 127A.

"Labor" means work of economic or financial value.

"Married" includes persons legally married, and a male and female living together as husband and wife regardless of their legal status, but does not include spouses living apart.

"Mentally defective" means a person suffering from a disease, disorder, or defect which renders the person incapable of appraising the nature of the person's conduct.

"Mentally incapacitated" means a person rendered temporarily incapable of appraising or controlling the person's conduct as a result of the influence of a substance administered to the person without the person's consent.

"Person" means a human being who has been born and is alive.

"Physically helpless" means a person who is unconscious or for any other reason physically unable to communicate unwillingness to an act.

"Public highway" shall have the same meaning as in section 264-1.

"Relative" means parent, ancestor, brother, sister, uncle, aunt, or legal guardian.

"Restrain" means to restrict a person's movement in such a manner as to interfere substantially with the person's liberty:

(1) By means of force, threat, or deception; or

(2) If the person is under the age of eighteen or incompetent, without the consent of the relative, person, or institution having lawful custody of the person.

"Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

"Services" means a relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor. Prostitution-related and obscenity-related activities as set forth in chapter 712 are forms of "services" under this section. Nothing in this chapter shall be construed to legitimize or legalize prostitution.

"Sexual contact" means any touching, other than acts of "sexual penetration", of the sexual or other intimate parts of

another, or of the sexual or other intimate parts of the actor by another, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.

"Sexual penetration" means:

(1) Vaginal intercourse, anal intercourse, fellatio, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight, but emission is not required. As used in this definition, "genital opening" includes the anterior surface of the vulva or labia majora; or

(2) Cunnilingus or anilingus, whether or not actual penetration has occurred.

For purposes of this chapter, each act of sexual penetration shall constitute a separate offense.

"Street" shall have the same meaning as in section 291C-1.

"Strong compulsion" means the use of or attempt to use one or more of the following to overcome a person:

(1) A threat, express or implied, that places a person in fear of bodily injury to the individual or another person, or in fear that the person or another person will be kidnapped;

(2) A dangerous instrument; or

(3) Physical force.

"Substantial bodily injury" means bodily injury which causes:

(1) A major avulsion, laceration, or penetration of the skin;

(2) A burn of at least second degree severity;

(3) A bone fracture;

(4) A serious concussion; or

(5) A tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs.

"Vehicle" has the same meaning as in section 291E-1.

"Vulnerable user" means:

(1) A pedestrian legally within a street or public highway;

(2) A roadway worker actually engaged in work upon a street or public highway or in work upon utility facilities along a street or public highway, or engaged in the provision of emergency services within a street or public highway, including but not limited to:

(a) Construction and maintenance workers; and

(b) Police, fire, and other emergency responders; or

(3) A person legally operating any of the following within the street or public highway:
(a) A bicycle;
(b) A moped;
(c) An electric personal assistive mobility device; or
(d) A wheelchair conveyance or other personal mobility device. [L 1972, c 9, pt of §1; am L 1973, c 136, §6; am L 1980, c 223, §1; am L 1981, c 213, §1; am L 1986, c 314, §48; am L 1987, c 181, §7; gen ch 1993; am L 2001, c 30, §1; am L 2004, c 61, §3; am L 2006, c 116, §4 and c 230, §26; am L 2008, c 147, §1; am L 2012, c 21, §1 and c 316, §1; am L 2014, c 111, §15; am L 2015, c 35, §23; am L 2016, c 231, §32]

COMMENTARY ON §707-700

This section is definitional only and, of course, specifies no offense. A discussion of the definitions in this section, when needed or appropriate, is found in the commentary to the substantive offenses employing the terms defined.

SUPPLEMENTAL COMMENTARY ON §707-700

With respect to Item (11), relating to the definition of "married", the Proposed Draft had recommended that "married" should also include "a male and female living together as man and wife regardless of their legal status." The Code as originally adopted in 1972 did not contain that recommended clause. However, by Act 136, Session Laws 1973, the clause was restored. The legislature declared, "the definition of 'married' is amended to conform to the language of the proposed Draft of the Hawaii Penal Code as submitted by the Judicial Council of Hawaii and recognizes the prevalence of many male and female couples living together although not legally married." House Standing Committee Report No. 726.

Act 223, Session Laws 1980, amended the definitions of "sexual intercourse" and "forcible compulsion" to make their meanings less restrictive so as to bring more conduct within the scope of sexual offenses. It also deleted the definition of "female." This term was applicable only to the offense of rape, and it became superfluous when the offense was "de-sexed" in 1979.

Act 213, Session Laws 1981, sought to clarify the definition of "forcible compulsion." One of the primary changes was to delete the requirement that physical force be such as to "overcome resistance."

Act 314, Session Laws 1986, added the definition of "substantial bodily injury" to account for injuries far more serious than bodily injury--which includes any physical pain, illness, or impairment--but do not approximate the risk of death, permanent loss or disfigurement that constitute "serious bodily injury."

Act 314 also added the definition of "sexual penetration." That definition was enacted to express the legislature's intent that even though rape and sodomy are renamed as sexual assault offenses, prosecutors may still charge a defendant with multiple counts for each act of penetration. Conference Committee Report No. 51-86.

Act 181, Session Laws 1987, broadened the definitions of "sexual contact" by including touching of the sexual or other intimate parts through the clothing or other material intended to cover the sexual or intimate parts. Senate Standing Committee Report No. 1130.

Act 30, Session Laws 2001, amended the definition of "substantial bodily injury" by deleting the requirement that qualifying second degree burns be caused by chemical, electrical, friction, or scalding means. The legislature found that the definitions of many crimes include a requirement of "substantial bodily injury" and that defining that term too restrictively excludes from successful prosecution many otherwise criminal actions. The legislature supported the categorization of every second degree burn, regardless of origin, as a "substantial bodily injury." The legislature found that burns that are substantial bodily injuries are determined by the severity and degree, not by the nature or cause of the injuries. Senate Standing Committee Report No. 829, House Standing Committee Report No. 1220.

Act 61, Session Laws 2004, amended the definitions of "sexual contact" and "sexual penetration." The legislature found that clarification of the definition of "sexual penetration" was necessary because of a recent Hawaii supreme court decision, in which the court held that the definition of "sexual penetration" required proof of actual penetration for the acts of cunnilingus or anilingus. A previous decision held that the act of cunnilingus is an act of "sexual penetration" under the statutory definition of "sexual penetration," irrespective of whether there was proof of actual penetration. The legislature found that it is usually difficult for many sexual assault victims to know whether penetration, however slight, occurred during the act of cunnilingus. Also, the failure to provide such a clarification would reduce many sexual assaults involving acts of cunnilingus or anilingus on children under the age of consent, from a class A felony to a class C felony. The

legislature believed that the definition of sexual penetration should include the acts of cunnilingus or anilingus, regardless of whether there was actual penetration. Senate Standing Committee Report No. 3121.

Act 116, Session Laws 2006, defined "emergency worker." Act 116 penalized the commission of certain crimes during a time of a civil defense emergency proclaimed by the governor or during a period of disaster relief. The legislature found that Hurricanes Katrina and Rita created situations that highlighted the prevalence of opportunistic crimes that can occur during these times. When resources are needed to restore law and order, emergency response aid to victims may be hampered or delayed, leaving victims at an increased risk of bodily injury or death. Stronger measures to control law and order may deter looting and other crimes. Senate Standing Committee Report No. 3302, House Standing Committee Report No. 757-06, Conference Committee Report No. 64-06.

Act 230, Session Laws 2006, defined the term "genital opening" as used in the definition of "sexual penetration." House Standing Committee Report No. 665-06.

Act 230, Session Laws 2006, made a technical nonsubstantive amendment to the definition of "mentally incapacitated."

Act 147, Session Laws 2008, amended this section by defining "labor" and "services." Act 147 made it a crime of kidnapping to intentionally or knowingly restrain another person with the intent to unlawfully obtain the labor or services of the person, regardless of whether a debt collection is involved. Conference Committee Report No. 38-08.

Act 21, Session Laws 2012, amended this section by adding the definition of "vehicle" for the purpose of modifying the scope of offenses relating to negligent injury to broaden the offenses' application to include injuries caused by more types of vehicles to increase public safety. The legislature found that a person was guilty of a negligent injury offense if that person caused serious or substantial bodily injury to another person while operating a motor vehicle. Act 21 would allow this negligent injury offense to also include the negligent operation of a moped or vessel. Adding a broader definition for vehicles under the Hawaii penal code would hold vehicle operators more accountable for their actions, especially when their actions involve the safety of others. Senate Standing Committee Report No. 2449, House Standing Committee Report No. 1101-12.

Act 316, Session Laws 2012, amended this section by adding definitions for "public highway," "street," and "vulnerable user."

Act 111, Session Laws 2014, amended the definition of "emergency worker." Act 111 updated and recodified Hawaii's

emergency management laws to conform with nationwide emergency management practices by, among other things, establishing a Hawaii emergency management agency in the state department of defense with the functions and authority currently held by the state civil defense agency; establishing the power and authority of the director of Hawaii emergency management, who will be the adjutant general, and providing the director with the functions and authority currently held by the director of civil defense; establishing county emergency management agencies, each to be under the respective county mayor's direction, with the functions and authority currently held by the local organizations for civil defense; and repealing the chapters on disaster relief [chapter 127] and the civil defense [and] emergency act [chapter 128], which were determined to be obsolete with the creation of the Hawaii emergency management agency. Conference Committee Report No. 129-14.

Act 35, Session Laws 2015, made technical nonsubstantive amendments to the definition of "vulnerable user."

Act 231, Session Laws 2016, amended the definition of "sexual contact" to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Case Notes

Forcible compulsion construed with respect to 18-month-old victim. 56 H. 664, 548 P.2d 271 (1976).

"Sexual intercourse" means coitus or bodily intrusions or penetrations which are malum in se. 66 H. 281, 660 P.2d 522 (1983).

"Serious bodily injury": "serious" modifies only "permanent disfigurement", not "protracted loss" phrase. 75 H. 419, 864 P.2d 583 (1993).

Definition of "sexual contact" not unconstitutionally overbroad as it does not interfere with the constitutionally protected activity of nude dancing; section permits dancing in the nude and allows customers to look at performers dancing in the nude; the conduct prohibited is the touching of sexual or intimate parts. 88 H. 19, 960 P.2d 1227 (1998).

Definition of "sexual contact" not unconstitutionally vague as it establishes a bright line rule "you can look but you can't touch", gives a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited, constitutes an explicit standard that avoids arbitrary and discriminatory enforcement and is not subjective. 88 H. 19, 960 P.2d 1227 (1998).

Under the plain meaning of §712-1200 and this section, touching the sexual or other intimate parts of another person, for a fee, constitutes prostitution, even if the touching occurs through clothing. 88 H. 19, 960 P.2d 1227 (1998).

A specific unanimity jury instruction was not required for offense of second degree unlawful imprisonment under §707-722 where defendant's conduct, as proved by the prosecution, constituted a continuing course of conduct "set on foot by a single impulse and operated by an unintermittent force", with "one general intent ... and one continuous plan". 95 H. 440, 24 P.3d 32 (2001).

As a precondition to convicting a person of first degree sexual assault, in violation of §707-730(1)(b), the prosecution must prove beyond a reasonable doubt that the person committed an act of "any penetration, however slight", as mandated by the plain language of the definition of "sexual penetration" contained in this section. 102 H. 391, 76 P.3d 943 (2003).

Based on the plain language and legislative history of this section and construing the definition of "sexual contact" with reference to other definitions relating to sexual relations in this section and §712-1210, contact with the interior of the mouth constitutes "touching of intimate parts" under the definition of "sexual contact" in this section. 108 H. 279, 118 P.3d 1222 (2005).

According to the plain language of the Hawaii penal code, a fetus is not included within the definition of the term "person". 109 H. 115, 123 P.3d 1210 (2005).

Where the definition of "sexual conduct" under §712-1210 includes "physical contact with a person's clothed or unclothed ... buttocks ... for the purposes of sexual stimulation, gratification, or perversion", an in pari materia reading of §712-1210 as well as the legislative history of this section supports the conclusion that the legislature intended the buttocks to be an "intimate part" for purposes of "sexual contact" as that phrase is defined in this section. 125 H. 1, 249 P.3d 1141 (2011).

There was overwhelming and compelling evidence tending to show defendant guilty beyond a reasonable doubt of kidnapping, where defendant restrained victim intentionally or knowingly, with intent to inflict bodily injury upon victim or subject victim to a sexual offense or terrorize victim, by, inter alia, striking victim in the face and back of the head several times specifically in response to victim's request to let victim go and victim's attempts to escape. 126 H. 267, 270 P.3d 997 (2011).

There was overwhelming and compelling evidence tending to show defendant guilty beyond a reasonable doubt of two counts of

sexual assault in the third degree, where defendant subjected victim to sexual contact by placing defendant's hand and mouth on victim's breast, respectively, by strong compulsion, and did so knowingly as to each element of the offense. 126 H. 267, 270 P.3d 997 (2011).

There was overwhelming evidence tending to show defendant guilty beyond a reasonable doubt of two counts of sexual assault in the first degree, where defendant subjected victim to acts of sexual penetration by inserting defendant's penis into victim's mouth and genital openings, respectively, by strong compulsion, and did so knowingly as to each element of the offense. 126 H. 267, 270 P.3d 997 (2011).

"Bodily injury". 2 H. App. 19, 624 P.2d 1374 (1981).

"Mentally incapacitated"; consent vitiated by deception; based on the record, victim was "physically helpless". 5 H. App. 404, 696 P.2d 846 (1985).

"Mentally defective". 5 H. App. 659, 706 P.2d 1333 (1985).

When jury can infer handgun is dangerous. 5 H. App. 674, 706 P.2d 453 (1985).

Evidence of injuries sustained by victim struck in face with golf club, including broken facial and jaw bones, was sufficient to prove serious bodily injury. 8 H. App. 595, 817 P.2d 123 (1991).

In the terroristic threatening context, an instrument is a dangerous instrument, as defined in this section, when it is known to be capable of producing death or serious bodily injury when used in the manner it is threatened to be used. 10 H. App. 584, 880 P.2d 213 (1994).

Witness' testimony that witness was "sore" after being struck by appellant was sufficient to establish "physical pain" and thus, the element of "bodily injury" in assault charge. 79 H. 265 (App.), 900 P.2d 1332 (1995).

Section imposes requirement that laceration must be "major" in order to fall within definition of "substantial bodily injury". 82 H. 373 (App.), 922 P.2d 986 (1996).

There was substantial evidence that minor caused serious bodily injury to complainant as defined in this section where minor inflicted bodily injury which caused protracted loss or impairment of the function of any bodily member or organ--namely, the eye injury that caused the blurred and diplopic vision that was still bothering complainant at the time of trial. 106 H. 530 (App.), 107 P.3d 1203 (2005).

Where defendant punched and kicked another so ferociously in the face that the lip was split clean through, four teeth were bashed in, the eye was hemorrhaged and pushed inward, and the orbital floor was fractured causing blurred and diplopic vision lasting almost eleven months, there was substantial evidence

that the defendant was, at the very least, aware that it was practically certain that defendant's conduct would cause the result required, "serious bodily injury", for conviction of first degree assault. 106 H. 530 (App.), 107 P.3d 1203 (2005).

Where there was substantial evidence that the manner in which the "little black stick" was used was capable of producing serious bodily injury as defined under this section, minor was properly convicted as an accomplice to robbery in the first degree under §708-840. 107 H. 439 (App.), 114 P.3d 945 (2005).

Although the evidence was insufficient to show that defendant committed the offense of first degree assault, there was ample evidence to show that the victim's injury satisfied the definition of "substantial bodily injury" under this section and that defendant thus committed the lesser included offense of second degree assault in violation of §707-711(1)(a); thus the jury, having returned a guilty verdict against defendant for first degree assault, must also have found sufficient evidence to prove the lesser included offense of second degree assault. 116 H. 445 (App.), 173 P.3d 592 (2007).

A stabbing injury that is caused by a knife blade that penetrates close to vital internal organs and vessels but misses without harming them, so that the injury quickly resolves itself without the need for significant treatment, does not create a substantial risk of death within the meaning of this section. 116 H. 445 (App.), 173 P.3d 592 (2007).

"PART II. CRIMINAL HOMICIDE

§707-701 Murder in the first degree. (1) A person commits the offense of murder in the first degree if the person intentionally or knowingly causes the death of:

(a) More than one person in the same or separate incident;

(b) A law enforcement officer, judge, or prosecutor arising out of the performance of official duties;

(c) A person known by the defendant to be a witness in a criminal prosecution and the killing is related to the person's status as a witness;

(d) A person by a hired killer, in which event both the person hired and the person responsible for hiring the killer shall be punished under this section;

(e) A person while the defendant was imprisoned;

(f) A person from whom the defendant has been restrained, by order of any court, including an ex parte order, from contacting, threatening, or physically abusing pursuant to chapter 586;

(g) A person who is being protected by a police officer ordering the defendant to leave the premises of that

protected person pursuant to section 709-906(4), during the effective period of that order;

(h) A person known by the defendant to be a witness in a family court proceeding and the killing is related to the person's status as a witness; or

(i) A person whom the defendant restrained with intent to:

(i) Hold the person for ransom or reward; or

(ii) Use the person as a shield or hostage.

(2) Murder in the first degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656. [L 1972, c 9, pt of §1; am L 1986, c 314, §49; am L 2001, c 91, §4; am L 2006, c 230, §27; am L 2011, c 63, §2; am L 2016, c 214, §1]

Cross References

Acting intentionally and acting knowingly with respect to the result of conduct, see §702-206.

COMMENTARY ON §707-701

General analysis. The aggravated nature and severe sanctions traditionally associated with the crime of murder are hardly subjects of debate today. The actor in such a crime has disregarded the most highly held social values, and has proved oneself an extreme danger to society. The Code recognizes the highly aggravated nature of this crime in imposing its most severe sanction.

Several states, and some recent efforts at penal law revision, recognize two degrees of murder.[1] One of the primary reasons for this distinction is to limit the scope of first degree murder in jurisdictions which make it a capital offense.[2] In states, like Hawaii, where the death penalty has been abolished, the above reason for the distinction is no longer applicable and the continuation of the distinction would be a carryover from the older death penalty legislation.

Under previous Hawaii law, first degree murder required proof of "deliberate premeditated malice aforethought."[3] For a conviction of murder in the second degree, the Hawaii law required only "malice aforethought."[4] The Code is in accord with the Model Penal Code in making murder a unified offense which requires that the actor act intentionally or knowingly with respect to the homicidal result.[5] If a person has the conscious object of causing the death of another, or if the person is "practically certain" that the person will cause the death, the person has the requisite culpability for conviction.

Murder has usually been defined to provide that it can be committed by extreme recklessness. In recent codes which do recognize two degrees of murder, a homicide caused with this lesser degree of mental culpability has been made murder in the second degree.[6] The net effect is to change manslaughter to murder when aggravated circumstances are present. Typically, these formulations hold an individual guilty of murder in the second degree if

> [h]e recklessly causes the death of another person under circumstances which manifest a cruel, wicked, and depraved indifference to human life.[7]

Analytically, however, it is both simpler and more appropriate to leave provisions for more severe sentences in aggravated circumstances to those sections which are specifically designed to deal with such cases. An actor whose indifference to human life amounts to "practical certainty" of causing death will be held to have caused death knowingly under the Code's formulation of murder; but where the actor's conduct is characterized by a "cruel, wicked, and depraved indifference," without more, these character traits ought to be taken into account at the time of disposition. Sections 706-661 and 706-662 provide for extended sentences in such aggravated circumstances. An individual who would, under a statute such as that quoted above, be convicted of second degree murder would, under the Code's system, be convicted of manslaughter and given an extended sentence. The resultant sentence may be the same in both cases;[8] however, where the other formulation requires the determination of the actor's character to be made by the finder of fact, the Code assigns this task to a psychiatrist, who is eminently better suited to make such determinations. More specifically, the psychiatrist must report that the actor's conduct is characterized by "compulsive, aggressive behavior with heedless indifference to consequences, and that such condition makes him a serious danger to others."[9] It is easily seen that the psychiatrist is looking for precisely those traits which the trier of fact is asked to find in the other form of the statute. And, beyond the psychiatrist's greater expertise in making such determinations, the abnormality presented by such character traits falls more appropriately under special circumstances requiring prolonged treatment, via an extended sentence, than under greater moral culpability requiring conviction for a more serious offense.

Felony-murder rule. The felony-murder rule[10] "has an extensive history of thoughtful condemnation."[11] The genesis of the rule may have been due to an erroneous interpretation by Coke of a passage from Bracton and, at least since 1834, when His Majesty's Commissioners on Criminal Law found the rule to be

"totally incongruous with the general principles of our jurisprudence,"[12] the rule has been condemned by writers and scholars.

The felony-murder rule has been used to support murder convictions of defendants where one victim of a robbery accidentally shoots another victim,[13] where one of the defendant's co-robbers kills another co-robber during a robbery for the latter's refusal to obey orders and not as part of the robbery transaction,[14] and where the defendant (a dope addict) commits robbery of the defendant's homicide victim as an afterthought following the killing.[15] The application of the felony-murder rule dispenses with the need to prove that culpability with respect to the homicidal result that is otherwise required to support a conviction for murder and therefore leads to anomalous results. The rule has been called a "legal Hydra."[16] "Like the multiheaded beast of Greek mythology, the felony-murder rule has several 'heads' of its own, each willing to consume one of the accused's defenses by presuming a needed element in the proof of felony murder."[17]

Because "principled argument in its [the felony-murder rule's] defense is hard to find,"[18] the Model Penal Code,[19] certain recent penal revisions,[20] and some recent cases[21] have limited the scope of the rule. The attempts to preserve the rule by limiting its application have taken a number of forms. Some recent revisions require that the death be recklessly caused in furtherance of a felony or attempted felony,[22] others require that the death be caused simply in furtherance of the felony and allow the defendant an affirmative defense if the defendant can show, in effect, that the defendant reasonably did not foresee the possibility of the killing.[23] That the killing may result from acts done negligently or recklessly (states of mind otherwise insufficient to establish murder) is not changed. California has limited the application of the rule by a re-interpretation of existing statutory language.[24] The court limited the rule in terms of persons: it held that a killing by a victim of the attempted felony of defendant's co-felon was not "to perpetrate" the felony and that the felony-murder rule was not applicable to the surviving defendant. In view of the statutory language making the rule applicable to killings in the perpetration of an enumerated felony, the language and logic of the court are somewhat strained.[25] However, the court's attempt to limit the rule and thereby avoid the questionable results brought about by the rule's broad application has been characterized as a "heightened awareness of the doctrine's underlying illogic."[26] The Model Penal Code has taken a different approach: it has abandoned the felony-murder rule as a rule of substantive law and has reformulated it

as a rule of evidence. Extreme recklessness, which under the M.P.C. is sufficient to establish murder, may be presumed from the commission of certain enumerated felonies.[27]

The wiser course, it seems, would be to follow the lead of England[28] and India[29] and abolish the felony-murder rule in its entirety. The rule certainly is not an indispensable ingredient in a system of criminal injustice; "[t]he rule is unknown as such in continental Europe."[30]

Even in its limited formulation the felony-murder rule is still objectionable. It is not sound principle to convert an accidental, negligent, or reckless homicide into a murder simply because, without more, the killing was in furtherance of a criminal objective of some defined class. Engaging in certain penally-prohibited behavior may, of course, evidence a recklessness sufficient to establish manslaughter, or a practical certainty or intent, with respect to causing death, sufficient to establish murder, but such a finding is an independent determination which must rest on the facts of each case. Limited empirical data discloses that the ratio of homicides in the course of specific felonies[31] to the total number of those felonies does not justify a presumption of culpability with respect to the homicide result sufficient to establish murder.[32] There appears to be no logical base for the felony-murder rule which presumes, either conclusively or subject to rebuttal, culpability sufficient to establish murder.[33]

Nor does the felony-murder rule serve a legitimate deterrent function. The actor has already disregarded the presumably sufficient penalties imposed for the underlying felony. If the murder penalty is to be used to reinforce the deterrent effect of penalties imposed for certain felonies (by converting an accidental, negligent, or reckless killing into a murder), it would be more effective, and hardly more fortuitous, to select a certain ratio of convicted felons for the murder penalty by lot.[34]

In recognition of the trend toward, and the substantial body of criticism supporting, the abolition of the felony-murder rule, and because of the extremely questionable results which the rule has worked in other jurisdictions, the Code has eliminated from our law the felony-murder rule.

General effect of Code. The homicide sections of the Code substantially simplify and clarify the law of Hawaii, although the results reached by the court or jury in most cases will probably be similar. As explained above, the felony-murder rule has been eliminated.

Previous Hawaii law provided that a person convicted of murder in the first degree shall be imprisoned at hard labor for life

not subject to parole.[35] A person convicted of murder in the second degree, under previous law, would be sentenced to "imprisonment at hard labor for any number of years but for a term not less than twenty years."[36] Under the Code, a convicted defendant will be sentenced to imprisonment for an indeterminate term, the maximum length of which will be life imprisonment without parole in four instances set forth in §706-606(a) or life or twenty years as determined by the court.[37] The possibility of eventual parole is made available by the general revision of sentencing in chapter 706.

The need for clarification of the law has been implied rather strongly by the Supreme Court of Hawaii. For instance, the court has stated plainly, on a number of occasions, that it is reversible error, in some murder trials, to instruct the jury in the language of the previous statutory presumption on "malice aforethought."[38] Moreover, although the court said that "malice aforethought" was the same as "malice,"[39] it was not the same "malice" as that which was defined in the prior penal code,[40] and it was apparently reversible error in any homicide prosecution to instruct the jury in the language of the statutory definition.[41] Furthermore, the antiquity and ambiguity of, and the difficulty in dealing with, the requirement of "malice aforethought" is evident from a cursory glance at court opinions.[42] This Code eliminates such problems of interpretation, while achieving greater simplicity and consistency.

SUPPLEMENTAL COMMENTARY ON §707-701

The legislature, in adopting the Code in 1972, added the provision for mandatory life imprisonment without parole (but subject to commutation) as contained in §706-606(a). The legislature stated that these instances "are so threatening to the security of our society that the severest deterrent penalty should be required." Conference Committee Report No. 2 (1972). The reader is referred to the discussion in the Supplemental Commentary on §706-606.

Act 230, Session Laws 2006, amended subsection (1) to clarify that the killing of a person known by the defendant to be a witness in a criminal prosecution is murder in the first degree [if the killing is related to the person's status as a witness]. House Standing Committee Report No. 665-06.

Act 63, Session Laws 2011, amended this section by establishing first degree murder for a person who causes death to a person: (1) from whom the defendant has been restrained, by order of any court, from contacting, threatening, or physically abusing pursuant to domestic abuse protective orders;

(2) who is being protected by a police officer ordering the defendant to leave the premises of the protected person, during the effective period of the order; or (3) who is known by the defendant to be a witness in a family court proceeding and the killing is related to the person's status as a witness. The legislature found that domestic violence victims need added protection under Hawaii law. Restraining orders or orders from police officers to abusers to leave the premises are intended to remove abusers from the vicinity of domestic violence victims and provide safety. The legislature believed that domestic violence victims are particularly vulnerable when they attempt to disengage from their abusers and at that time, violence and the threat of violence are at the most extreme levels. Increasing the penalties against abusers in those situations may deter violent retaliation and may help break victims from the cycle of violence. House Standing Committee Report No. 930, Conference Committee Report No. 74, Senate Standing Committee Report No. 1255.

Act 214, Session Laws 2016, amended this section to broaden the offense of murder in the first degree to include cases in which the victim was restrained as a shield, hostage, or for ransom or reward. The legislature found that the offense of murder in the first degree was a narrowly defined offense that was limited to cases in which there were multiple victims, the victim was killed by a hired killer, or the victim was under the specific protection of or had a particular role with the courts or law enforcement system. Defendants convicted of murder in the first degree are automatically sentenced to life imprisonment without the possibility of parole. All other forms of murder are covered under the offense of murder in the second degree, and defendants convicted of murder in the second degree are generally sentenced to life imprisonment with the possibility of parole. However, it is possible for a defendant convicted of murder in the second degree to be sentenced to life imprisonment without the possibility of parole if enhanced sentencing under §706-657 or an extended term of imprisonment under §706-661 is applied. The legislature found that the different sentencing requirements between these two offenses can have a tremendous impact on the surviving members of the victims' families. Senate Standing Committee Report No. 3451, Conference Committee Report No. 65-16.

Case Notes

See also notes to §706-606.

Attempted murder is treated as ordinary class A felony and is subject to imprisonment for 20 years. 57 H. 418, 558 P.2d 1012 (1976).

In murder prosecutions where instructions on self-defense are given, the court shall instruct on manslaughter, subject to one exception. 58 H. 492, 573 P.2d 959 (1977).

Indictment for murder properly included allegation that defendant knew the victim was a witness in a prior murder prosecution. 59 H. 625, 586 P.2d 250 (1978).

In prosecution for murder, evidence of mental disease did not raise the question whether offense was murder or manslaughter. 61 H. 193, 600 P.2d 1139 (1979).

Reckless endangering in the second degree is a lesser included offense of attempted murder. 62 H. 637, 618 P.2d 306 (1980).

Sufficiency of evidence on motion for acquittal. 63 H. 51, 621 P.2d 343 (1980).

Trial court erred by not including jury instructions on mitigating defense. 70 H. 509, 778 P.2d 704 (1989).

Where petitioner's convictions on counts I (attempted first degree murder), II (second degree murder), and III (attempted second degree murder) violated §701-109(1)(c)'s clear prohibition against inconsistent factual findings, the failure to raise this issue, both at trial and on appeal, resulted in withdrawal of not only a potentially meritorious defense, but a defense that would have altered the outcome. 74 H. 442, 848 P.2d 966 (1993).

State of mind required to establish attendant circumstance of "arising out of the performance of official duties" is "intentionally or knowingly"; although instruction merely tracked statutory language of subsection (1)(b) by requiring proof beyond reasonable doubt that police officer's death arose out of performance of officer's official duties, the deficiency in instruction did not affect defendant's substantial rights. 75 H. 282, 859 P.2d 1369 (1993).

Court's instruction that, in order to convict defendant of attempted first degree murder, the jury must find "conduct intended or known to cause the death of [two individuals] in the same incident" did not omit a material element of the offense and was not otherwise defective. 86 H. 1, 946 P.2d 955 (1997).

Section 707-702(2) precludes multiple manslaughter convictions based on a single count charging first degree murder under subsection (1)(a). 99 H. 542, 57 P.3d 467 (2002).

Where negativing of defendant's mitigating extreme mental or emotional distress defense by prosecution was a material element of the offense of first degree murder such that jury unanimity was a prerequisite to returning any verdict, and trial court's special instruction expressly directed the jury to convict

defendant of manslaughter if a single juror believed that the prosecution had failed to negative the mitigating defense, constitutional right to unanimous jury verdict violated. 99 H. 542, 57 P.3d 467 (2002).

With the January 1, 1987 repeal of the language in this section (pre-1986 amendment), murder is no longer classified as a class A felony. 102 H. 282, 75 P.3d 1173 (2003).

One cannot be convicted of both attempted murder and of violation of §291C-12, failure to render assistance. 1 H. App. 625, 623 P.2d 1271 (1981).

Murder is not lesser included offense of murder for hire. 3 H. App. 107, 643 P.2d 807 (1982).

Crime of attempted manslaughter is an included offense of attempted murder. 7 H. App. 291, 757 P.2d 1175 (1987).

Mentioned: 74 H. 141, 838 P.2d 1374 (1992).

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§707-701 Commentary:

1. E.g., H.R.S. §748-1; Prop. Del. Cr. Code §§412, 413; Prop. Mich. Rev. Cr. Code §§2005, 2006.

2. See Comment, 65 Colum. L. Rev. 1496 (1965).

3. H.R.S. §748-1; see also note 12, infra.

4. H.R.S. §748-2.

5. M.P.C. §210.2; see also Prop. Pa. Cr. Code §903. These codes, however, also provide that murder can be committed by extreme recklessness.

6. Prop. Del. Cr. Code §412; Prop. Mich. Rev. Cr. Code §2006.

7. Prop. Del. Cr. Code §412(1).

8. See Prop. Mich. Rev. Cr. Code §2006.

9. §706-662(3).

10. This rule holds that a person who, either by the person's own conduct or the conduct of another for whom the person is responsible, commits or attempts to commit a felony (or, in some codifications, one of a certain class of felonies) is liable for murder (sometimes in the first degree) if a killing occurs during or in the perpetration of the felony or the attempt--notwithstanding the fact that the killing was not intentional or

the fact that the defendant did not have the mental culpability, i.e., the state of mind, otherwise required for a conviction of murder (or of murder in the first degree). See H.R.S. §748-1: "Murder in the first degree is the killing of any human being without authority, justification or extenuation by law done... (3) In the commission of or attempt to commit or the flight from the commission of or attempt to commit arson, rape, robbery, burglary or kidnapping."

11. Note, Criminal Law: Felony-Murder Rule-Felon's Responsibility For Death of Accomplice, 65 Colum. L. Rev. 1496 (1955).

12. See id. at 1496, citing, with respect to the genesis of the rule, 65 L.T. (London) 292 (1878), and, with respect to His Majesty's Commissioners, First Report of His Majesty's Commissioners on Criminal Law 29 (1834). The note also points out Sir James Stephens found the rule "a monstrous doctrine" [3 Stephens, History of the Criminal Law of England 75 (1883)].

13. People v. Harrison, 203 Cal. 587, 265 P. 230 (1928).

14. People v. Cabaltero, 31 Cal. App. 2d 52, 87 P.2d 364 (1939).

15. People v. Arnold, 108 Cal. App. 2d 719, 239 P.2d 449 (1952).

16. Note, California Rewrites Felony Murder Rule, 18 Stan. L. Rev. 690 (1966).

17. Id. at 690 note 1.

18. M.P.C., Tentative Draft No. 9, comments at 37 (1959).

19. M.P.C. §210.2(1)(b).

20. E.g., Prop. Del. Cr. Code §412(2) (murder in the second degree); Wisconsin Statutes Annotated §940.03 (West 1958); Prop. Mich. Rev. Cr. Code §2005(1)(b); N.Y.R.P.L. §125.25(3).

21. E.g., People v. Washington, 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130 (1965).

22. See, e.g., Prop. Del. Cr. Code §412(2).

23. See, e.g., Prop. Mich. Rev. Cr. Code §2005(1)(b); N.Y.R.P.L. §125.25(3).

24. People v. Washington, supra.

25. "California Penal Code Section 189 on felony-murder requires that the felon or his accomplice commit the killing, for if he does not, the killing is not committed *to* perpetrate the felony." People v. Washington, supra at 780, 44 Cal. Rptr. at 445, 402 P.2d at 133. (Emphasis added.) As the dissenting opinion was quick to note: "Section 189 carries not the least suggestion of a requirement that the killing must take place *to* perpetrate the felony. If that requirement now be read into the section by the majority, then what becomes of the rule--which they purport to recognize that an accidental and unintentional killing falls within the section? How can it be said that such a killing takes place to perpetrate a robbery." Id. at 787, 44 Cal. Rptr. at 449, 402 P.2d at 137 (dissenting opinion). (Emphasis by Burke, J.)

26. 65 Colum. L. Rev. at 1500, see note 13, supra.

27. See note 19, supra.

28. English Homicide Act. 1 (1957), 5 and 6 Eliz. 2, c.11.

29. Indian Penal Code §§299, 300 and comments (Ranchhoddas 1951).

30. M.P.C., Tentative Draft No. 9, comments at 36 (1959); which also discusses the Codes cited in the previous two footnotes.

31. It should be remembered that homicides in furtherance of the specified felonies would be even fewer in number.

32. For the statistics of one study, see M.P.C., Tentative Draft No. 9, comments at 38-39 (1959).

33. Compare M.P.C. §210.2 with Prop. Del. Code §412(2).

34. Holmes, The Common Law 58 (1881) ("the law would do better to hang one thief out of every thousand by lot").

35. H.R.S. §748-4.

36. Id.

37. §§706-606 and 707-701(2).

38. See H.R.S. §748-3, Territory v. Cutad, 37 Haw. 182, 188 (1945), and State v. Foster, 44 Haw. 403, 429, 354 P.2d 960, 974, and concurring opinion at 434-440, 354 P.2d at 974-980 (1960).

39. State v. Moeller, 50 Haw. 110, 118, 433 P.2d 136, 142 (1967).

40. See id. at 119, 433 P.2d at 142.

41. Id.

42. Id.

" **[§707-701.5] Murder in the second degree.** (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.

(2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656. [L 1986, c 314, §50]

Case Notes

Jury's "not guilty" verdicts on attempted second degree murder counts created a double jeopardy bar to petitioner's impending retrial on attempted second degree murder charges, where jury returned a "guilty" verdict on attempted first degree murder charge and "not guilty" verdicts on attempted second degree murder counts, based on the same incidents, and Hawaii supreme court reversed jury's judgment of conviction of attempted first degree murder and held that the "not guilty" verdicts did not, in substance, constitute acquittals and therefore the State could retry petitioner for attempted second degree murder without subjecting petitioner to double jeopardy. 389 F.3d 880 (2004).

Directs the factfinder to first consider the elements of first degree murder. 71 H. 86, 784 P.2d 860 (1989).

Trial was reversed due to prosecutorial misconduct. 71 H. 347, 791 P.2d 392 (1990).

Combination of acts of physical abuse and omissions to discharge parental duties and responsibilities, when coupled with requisite mental state, may rise to level of murder. 73 H. 236, 831 P.2d 924 (1992).

Where petitioner's convictions on counts I (attempted first degree murder), II (second degree murder), and III (attempted second degree murder) violated §701-109(1)(c)'s clear prohibition against inconsistent factual findings, the failure to raise this issue, both at trial and on appeal, resulted in withdrawal of not only a potentially meritorious defense, but a defense that would have altered the outcome. 74 H. 442, 848 P.2d 966 (1993).

Defendant charged with attempted murder, in violation of §705-500 and this section, may be convicted of attempted manslaughter, in violation of §§705-500 and 707-702(2). 80 H. 27, 904 P.2d 912 (1995).

The offense of use of a firearm in the commission of second degree murder in violation of §134-6(a) is not an included offense of second degree murder in violation of this section. 87 H. 1, 950 P.2d 1201 (1998).

As conviction for manslaughter due to an extreme mental or emotional disturbance under §707-702(2) is deemed an acquittal of murder, double jeopardy barred defendant's reprosecution for second degree murder under this section. 88 H. 356, 966 P.2d 1082 (1998).

Defendant's drug-induced mental illness was not a defense to second degree murder under subsection (1) as adoption of such a rule would be contrary to the statutory scheme and legislative intent of §§702-230 and 704-400. 93 H. 224, 999 P.2d 230 (2000).

Where evidence that child was a victim of battered child syndrome was relevant to show that child's death was not an accident, but the result of an intentional, knowing or reckless criminal act, giving rise to a duty on defendant's part to obtain medical care for child pursuant to §663-1.6, trial court did not err in admitting expert testimony that child was a victim of battered child syndrome. 101 H. 332, 68 P.3d 606 (2003).

The trial court did not violate the double jeopardy clause of the Hawaii constitution by convicting defendant of attempted murder in the second degree under this section, and place to keep, and use of a firearm under §134-6, as each of the offenses contains elements which the others do not. 107 H. 469, 115 P.3d 648 (2005).

Trial court reversibly erred when it gave flawed jury instruction on elements of murder in second degree, which led to improper closing argument by prosecutor, where defendants were charged with committing murder in second degree by voluntarily omitting to perform a duty imposed by law, more specifically, by omitting to perform their parental duty to provide timely medical care to son. 10 H. App. 43, 861 P.2d 24 (1993).

Under §701-109(4)(a) and (c), reckless endangering in the first degree under §707-713 is an included offense of attempted murder in the second degree under this section. 94 H. 513 (App.), 17 P.3d 862 (2001).

Where expert's testimony on the battered child syndrome was relevant to prove that the injuries to child were not accidental and that someone must have intended to harm child, trial court did not abuse discretion in admitting testimony. 101 H. 256 (App.), 66 P.3d 785 (2003).

The head injuries inflicted on victim, the use of the kiawe branch, and the fact that victim was left in a dark, undeveloped area where victim would not be discovered until morning was substantial evidence of sufficient quality and probative value that defendant had the specific intent to kill victim. 103 H. 490 (App.), 83 P.3d 753 (2003).

The recovery of a dead body is not a necessary condition for establishing murder. 122 H. 2 (App.), 222 P.3d 409 (2010).

Taken as a whole, there were legitimate and reasonable inferences drawn from the evidence to support the jury's unanimous verdict convicting defendant of second degree murder where, inter alia, there were multiple witnesses who testified that decedent left the club with a person generally matching defendant's description in a vehicle that was of the same make and model as defendant's, and DNA evidence showed that defendant had sex with decedent within a short time frame that surrounded decedent's death. 126 H. 40 (App.), 266 P.3d 448 (2011).

Assault in the first degree is a lesser included offense of murder in the second degree. The circuit court erred in failing to instruct the jury on the included offense of assault in the first degree. 132 H. 451, 323 P.3d 95 (2014).

Mentioned: 74 H. 197, 840 P.2d 374 (1992).

" **§707-702 Manslaughter.** (1) A person commits the offense of manslaughter if:

(a) The person recklessly causes the death of another person; or

(b) The person intentionally causes another person to commit suicide.

(2) In a prosecution for murder or attempted murder in the first and second degrees it is an affirmative defense, which reduces the offense to manslaughter or attempted manslaughter, that the defendant was, at the time the defendant caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a reasonable person in the circumstances as the defendant believed them to be.

(3) Manslaughter is a class A felony. [L 1972, c 9, pt of §1; am L 1987, c 181, §8; am L 1996, c 197, §2; am L 2003, c 64, §1; am L 2006, c 230, §28]

Cross References

Recklessness with respect to result of conduct, see §702-206.

COMMENTARY ON §707-702

Manslaughter is traditionally considered as an offense less heinous than murder, principally because the actor's state of mind is less culpable. The Code has followed the lead of other recent criminal law revisions in making recklessness the standard of culpability for this offense.[1] The Code is also in accord with other revisions with regard to the sentence.[2]

The reduction of murder to manslaughter, when mitigating mental or emotional disturbances are present, appears in the Model Penal Code and most recent state revisions.[3] This reduction is a clarification of the common law on the subject.[4] The Code adopts this approach in subsection (2).

In the case of an intentional or knowing killing, where mitigating circumstances are present, the prosecutor may, but need not, bring a prosecution for murder. The prosecutor may, if the prosecutor chooses, bring a prosecution for manslaughter. Since recklessness will be satisfied by proof that the defendant acted intentionally or knowingly,[5] a charge of manslaughter could be employed where a prosecutor, in the prosecutor's discretion, did not wish to push for a murder conviction.

Intentionally causing another to commit suicide is designated manslaughter. While other codes have treated this as a separate offense,[6] the Code incorporates conduct causing this result into the definition of manslaughter. The harm sought to be prevented is largely the same, and, although the conduct is intentional, rather than reckless, the dependence of the result on the will of another justifies requiring a higher standard of culpability than that which is required in cases of "direct" causation.

Previous Hawaii law defined manslaughter as any killing "without malice aforethought, and without authority, justification, or extenuation."[7] The Code clarifies substantially the statutory requirements for a conviction of manslaughter.

The case law of Hawaii contains the typical common-law provision for the reduction of murder in the first or second degree to manslaughter when mitigating mental or emotional disturbances are present. Reduction of the offense for killing

in the "heat of passion" has been recognized[8] and something approximating the Code's more general approach to mental and emotional extenuation had been accepted as early as 1853:

> Whoever kills another... under the sudden impulse of passion... of a nature tending to disturb the judgment and mental faculties, and weaken the possession of self-control of the killing party, is not guilty of murder, but manslaughter.[9]

The criterion of a general weakening of self-control was quite an advanced and liberal approach for 1853. However, there were the additional requirements that the killing be without malice and that the passion be provoked or caused by the victim.[10] Such additional requirements tended to subvert the otherwise liberal approach.

SUPPLEMENTAL COMMENTARY ON §707-702

Act 181, Session Laws 1987, added language to this section to reflect the recently created statutory murder crimes. These crimes are murder in the first and second degree. Senate Standing Committee Report No. 1130.

Act 197, Session Laws 1996, amended this section by raising the crime of manslaughter from a class B to a class A felony. The legislature found that homicides, particularly homicides involving domestic violence situations, have increased in the State. A person convicted of manslaughter as a class B felony may be sentenced to imprisonment for a maximum of ten years. The legislature believed that a maximum sentence of ten years imprisonment was inadequate for the taking of a life. Conference Committee Report No. 71.

Act 64, Session Laws 2003, amended this section by establishing extreme mental or emotional disturbance as an affirmative defense to murder or attempted murder. Under existing law, a defendant charged with murder or attempted murder need not raise extreme mental or emotional disturbance as a defense, and may not legitimately have extreme mental or emotional disturbance, but the prosecution must still disprove that the defendant suffers from extreme mental or emotional disturbance. Establishing extreme mental or emotional disturbance as an affirmative defense requires the defense to prove by a preponderance of the evidence that the defendant suffers from extreme mental or emotional disturbance. Conference Committee Report No. 56.

Act 230, Session Laws 2006, amended subsection (1) by making technical nonsubstantive amendments.

Law Journals and Reviews

Extreme Emotion. 12 UH L. Rev. 39 (1990).

The Nature of the Offense: An Ignored Factor in Determining the Application of the Cultural Defense. 18 UH L. Rev. 765 (1996).

Should The Right To Die Be Protected? Physician Assisted Suicide And Its Potential Effect On Hawai‘i. 19 UH L. Rev. 783 (1997).

Extreme Mental or Emotional Disturbance (EMED). 23 UH L. Rev. 431 (2001).

Case Notes

In prosecution for murder, evidence of mental disease did not raise the question whether offense was murder or manslaughter. 61 H. 193, 600 P.2d 1139 (1979).

In prosecution for murder, no evidence to support reduced charge of manslaughter. 69 H. 72, 734 P.2d 156 (1987).

Reversible error where jury instruction required extreme unusual and overwhelming stress for reduction from homicide to manslaughter. 70 H. 173, 766 P.2d 128 (1988).

Expert testimony about defendant being under influence of extreme mental or emotional disturbance for which there is a reasonable explanation is allowable since that disturbance can reduce murder to manslaughter. 73 H. 109, 831 P.2d 512 (1992).

No abuse of discretion where expert opinion testimony was admitted on killer's degree of self-control to rebut manslaughter mitigation defense. 74 H. 197, 840 P.2d 374 (1992).

Circuit court's failure to provide burden of proof instructions with regard to mitigating defense of extreme emotional disturbance manslaughter constituted plain error. 79 H. 219, 900 P.2d 1286 (1995).

Defendant charged with attempted murder, in violation of §§705-500 and 707-701.5, may be convicted of attempted manslaughter, in violation of §705-500 and subsection (2). 80 H. 27, 904 P.2d 912 (1995).

Subsection (1)(a) combined with §705-500 does not give rise to the offense of attempted manslaughter. 80 H. 27, 904 P.2d 912 (1995).

No error for failure to instruct jury on attempted extreme mental or emotional distress manslaughter where there was absolutely no evidentiary support for this mitigating defense. 82 H. 202, 921 P.2d 122 (1996).

Trial court determines whether record reflects any evidence of a subjective nature that defendant acted under a loss of self-control resulting from extreme mental or emotional disturbance;

if record does not reflect any such evidence, then trial court shall refuse to instruct the jury on extreme mental or emotional disturbance manslaughter; if record does reflect any evidence, then issue must be submitted to jury and court should instruct jury on extreme mental or emotional disturbance manslaughter. 88 H. 325, 966 P.2d 637 (1998).

As conviction for manslaughter due to an extreme mental or emotional disturbance under subsection (2) is deemed an acquittal of murder, double jeopardy barred defendant's reprosecution for second degree murder under §707-701.5. 88 H. 356, 966 P.2d 1082 (1998).

Prosecution not barred from reprosecuting defendant for offense of reckless manslaughter under subsection (1)(a) as reckless manslaughter is a lesser included offense of murder and remanding a case for retrial on lesser included offenses not barred by double jeopardy. 88 H. 356, 966 P.2d 1082 (1998).

Trial court did not err in giving jury instruction that the presence or absence of self-control was a significant factor in determining whether a defendant was under the influence of extreme mental or emotional disturbance in such a manner as to reduce attempted murder to attempted extreme mental or emotional disturbance manslaughter. 90 H. 65, 976 P.2d 379 (1999).

When considered in conjunction with the testimony of expert witnesses, where there was substantial evidence adduced at trial that defendant was not experiencing a loss of control during defendant's attack on victim and was not acting under extreme mental or emotional distress, trial court did not err in refusing to convict defendant of the included offense of manslaughter. 93 H. 224, 999 P.2d 230 (2000).

Trial court did not err in declining to provide extreme mental or emotional disturbance defense instruction to jury where generalized testimony that baby victim could cry a lot and that defendant sometimes lost defendant's temper in stressful situations, without more, was not probative that during the incident in question, defendant acted, even from a subjective standpoint, under a loss of self-control resulting from extreme mental or emotional disturbance. 97 H. 299, 36 P.3d 1269 (2001).

Subsection (2) precludes multiple manslaughter convictions based on a single count charging first degree murder under §707-701(1)(a). 99 H. 542, 57 P.3d 467 (2002).

Where negativing of defendant's mitigating extreme mental or emotional distress defense by prosecution was a material element of the offense of first degree murder such that jury unanimity was a prerequisite to returning any verdict, and trial court's special instruction expressly directed the jury to convict defendant of manslaughter if a single juror believed that the

prosecution had failed to negative the mitigating defense, constitutional right to unanimous jury verdict violated. 99 H. 542, 57 P.3d 467 (2002).

Where evidence that child was a victim of battered child syndrome was relevant to show that child's death was not an accident, but the result of an intentional, knowing or reckless criminal act, giving rise to a duty on defendant's part to obtain medical care for child pursuant to §663-1.6, trial court did not err in admitting expert testimony that child was a victim of battered child syndrome. 101 H. 332, 68 P.3d 606 (2003).

A mother's prosecution for her own prenatal conduct, which causes the death of the baby subsequently born alive, is not within the plain meaning of subsection (1)(a), in conjunction with the general provisions of penal liability found in the Hawaii Penal Code. 109 H. 115, 123 P.3d 1210 (2005).

Evidence presented to grand jury was sufficient to support indictment for manslaughter. 1 H. App. 396, 620 P.2d 740 (1980).

Evidence that defendant supplied a knife to another knowing that the other was about to engage in a fight with decedent who was killed with the knife held sufficient. 2 H. App. 277, 630 P.2d 650 (1981).

"Extreme mental or emotional disturbance" and "reasonable explanation" construed; evidence of extreme mental or emotional disturbance. 6 H. App. 173, 715 P.2d 822 (1986).

Defendant not entitled to burden-of-proof instruction regarding manslaughter, where no evidence supported manslaughter defense. 6 H. App. 409, 723 P.2d 186 (1986).

Crime of attempted manslaughter is an included offense of attempted murder; includes both voluntary and involuntary manslaughter. 7 H. App. 291, 757 P.2d 1175 (1987).

Trial court did not err in refusing to give jury instruction on manslaughter due to extreme mental or emotional disturbance (EMED) where evidence must show that that defendant was under the influence of an EMED at the time defendant committed the crime; EMED defense was not supported by evidence that when defendant returned to accomplice's apartment after allegedly committing the murder, defendant was not oneself and in "kind of a panic". 119 H. 74 (App.), 193 P.3d 1274 (2008).

Where the evidence sufficiently raised the issue of extreme mental or emotional disturbance, the circuit court was required to instruct the jury on the defense of extreme mental or emotional disturbance notwithstanding that a "waiver" of the instruction was elicited from the defendant. 132 H. 123, 319 P.3d 1131 (2014).

Cited: 132 H. 451, 323 P.3d 95 (2014).

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§707-702 Commentary:

1. M.P.C. §210.3; N.Y.R.P.L. §125.15; Prop. Del. Cr. Code §411; Prop. Mich. Rev. Cr. Code §2010; Prop. Pa. Cr. Code §904.

2. Id.

3. M.P.C. §210.3(1)(b); N.Y.R.P.L. §125.25(1)(a); Prop. Del. Cr. Code §414; Prop. Mich. Rev. Cr. Code §§2010(d), 2005(2); Prop. Pa. Cr. Code §904(a)(2).

4. See The King v. Greenwell, 1 Haw. 85 [146] (1853), and The King v. Sherman, 1 Haw. 88 [150] (1853).

5. Cf. §702-208.

6. E.g., Prop. Mich. Rev. Cr. Code §2120; N.Y.R.P.L. §120.30.

7. H.R.S. §748-6.

8. The King v. Greenwell, supra, and The King v. Sherman, supra.

9. The King v. Greenwell, supra at 87 [149].

10. Id. at 87 [149].

" **§707-702.5 Negligent homicide in the first degree.** (1) A person commits the offense of negligent homicide in the first degree if that person causes the death of:

(a) Another person by the operation of a vehicle in a negligent manner while under the influence of drugs or alcohol; or

(b) A vulnerable user by the operation of a vehicle in a negligent manner.

(2) Negligent homicide in the first degree is a class B felony. [L 1988, c 292, pt of §1; am L 2012, c 316, §2]

COMMENTARY ON §707-702.5

Act 292, Session Laws 1988, added this section to redefine negligent homicide in the first degree. The legislature felt that stronger measures were needed to protect the public and to deter those who negligently operate a motor vehicle while under the influence of alcohol or drugs, which results in bodily

injury or death to others. Senate Conference Committee Report No. 278, House Conference Committee Report No. 105-88.

Act 316, Session Laws 2012, amended this section to include a provision for incidents involving a vulnerable highway user. Hawaii's roadways have often been called dangerous for pedestrians, cyclists, and others who legally use the public right of way without being in a motor vehicle. Unfortunately, when collisions occur between motor vehicles and these individuals, the outcome is often catastrophic. Amending the offense of negligent homicide in the first degree to include a provision for incidents in which vulnerable highway users are involved may, at the very least, increase driver awareness of these individuals. Conference Committee Report No. 33-12.

" **§707-703 Negligent homicide in the second degree.** (1) A person commits the offense of negligent homicide in the second degree if that person causes the death of:

(a) Another person by the operation of a vehicle in a negligent manner; or

(b) A vulnerable user by the operation of a vehicle in a manner that constitutes simple negligence as defined in section 707-704(2).

(2) Negligent homicide in the second degree is a class C felony. [L 1972, c 9, pt of §1; am L 1988, c 292, §2; am L 2012, c 316, §3]

Case Notes

Section does not preclude charging defendant on one count for each victim injured fatally. 62 H. 389, 615 P.2d 748 (1980).

" **§707-704 Negligent homicide in the third degree.** (1) A person is guilty of the offense of negligent homicide in the third degree if that person causes the death of another person by the operation of a vehicle in a manner which is simple negligence.

(2) "Simple negligence" as used in this section:

(a) A person acts with simple negligence with respect to the person's conduct when the person should be aware of a risk that the person engages in that conduct.

(b) A person acts with simple negligence with respect to attendant circumstances when the person should be aware of a risk that those circumstances exist.

(c) A person acts with simple negligence with respect to a result of the person's conduct when the person should be aware of a risk that the person's conduct will cause that result.

(d) A risk is within the meaning of this subsection if the person's failure to perceive it, considering the nature and purpose of the person's conduct and the circumstances known to the person, involves a deviation from the standard of care that a law-abiding person would observe in the same situation.

(3) Negligent homicide in the third degree is a misdemeanor. [L 1972, c 9, pt of §1; am L 1988, c 292, §3]

Cross References

Negligence with respect to result of conduct, see §702-206.

Case Notes

Court has discretion to grant deferred acceptance of guilty or deferred acceptance of no contest pleas for second degree negligent homicide. 69 H. 438, 746 P.2d 568 (1987).

As nonconformity with relevant statutory standards may be admissible as evidence of negligence in civil cases, and simple negligence is defined by subsection (2)(d) to be violation of "the standard of care that a law-abiding person would observe in the same situation", a jury may, consistent with the requirements of due process and other rules peculiar to the criminal process, be allowed to also consider relevant statutes or ordinances in criminal negligent homicide cases. 88 H. 296, 966 P.2d 608 (1998).

Not inconsistent that jury found defendant not guilty of negligent homicide in the third degree, but guilty of intentionally, knowingly, or recklessly failing to stop at accident scene. 77 H. 329 (App.), 884 P.2d 392 (1994).

COMMENTARY ON §§707-703 AND 707-704

In adopting the Code in 1972, the legislature basically retained much of the prior Hawaii law relating to negligent homicide. Like the previous Hawaii law, negligent homicide under the Code is divided into two degrees. As in prior law, the Code restricts the offense to cases involving the operation of a "vehicle." However, under prior law negligent homicide in the first degree was committed where a person by the operation of any vehicle in a "grossly negligent" manner caused the death of another. HRS §748-9. Under the Code, §707-703(1), a person is guilty of negligent homicide in the first degree if the person causes the death of another person by the operation of a vehicle in a "negligent" manner. The statutorily defined standard of "negligence" upon which this offense is based is set

forth in §702-206(4). The actor should be aware of a "substantial and unjustifiable risk" with respect to the actor's conduct, the attendant circumstances, and the result of the actor's conduct. The actor's failure to perceive the risk must constitute a "gross deviation" from the standard of care that a law-abiding person would observe in the same situation. (See §702-206(4).) The offense is a class C felony.

The prior law made it negligent homicide in the second degree in the case where a person, by the operation of a vehicle in a "negligent" manner, caused the death of another. HRS §749-9(b). Section 707-704(1) of the Code provides that a person is guilty of negligent homicide in the second degree if the person causes the death of another person by the operation of a vehicle "in a manner which is simple negligence." Negligent homicide in the second degree is a misdemeanor. Under §707-704(2), a person acts with "simple negligence" when the person should be aware of a "risk" (not "substantial and unjustifiable risk", as stated in §702-206(4)) with respect to the person's conduct, the attendant circumstances, and the result of the person's conduct. The person's failure to perceive the risk must constitute a "deviation" (not "gross deviation", as stated in §702-206(4)) from the standard of care that a law-abiding person would observe in the same situation.

The Code as adopted differs in several respects from the recommendation of the Proposed Draft with respect to negligent homicide. The Proposed Draft provided that a person is guilty of negligent homicide if "he negligently causes the death of another person." It constituted the crime as a misdemeanor. Under the Proposed Draft, the offense had only one degree and it was not restricted to the operation of a vehicle. Also, the draft did not recognize as a basis for culpability the standard of "simple negligence" set forth in the Code's second degree negligent homicide.

In Conference Committee Report No. 2 (1972), it is stated:

> Your Committee has agreed to the creation of two degrees of negligent homicide in order to preserve the present law distinction between gross negligence and simple negligence. Your Committee finds that expansion of the offense of negligent homicide beyond the scope of the operation of a motor vehicle is not necessary at the present time.

SUPPLEMENTAL COMMENTARY ON §§707-703 AND 707-704

Act 292, Session Laws 1988, amended these sections by making negligent homicide in the second degree a class C felony and negligent homicide in the third degree a misdemeanor. The legislature felt that stronger measures were needed to protect

the public and to deter those who negligently operate a motor vehicle, which results in bodily injury or death to others. Senate Conference Committee Report No. 278, House Conference Committee Report No. 105-88.

Act 316, Session Laws 2012, amended §707-703 to include a provision for incidents involving a vulnerable highway user. Hawaii's roadways have often been called dangerous for pedestrians, cyclists, and others who legally use the public right of way without being in a motor vehicle. Unfortunately, when collisions occur between motor vehicles and these individuals, the outcome is often catastrophic. Amending the offense of negligent homicide in the second degree to include a provision for incidents in which vulnerable highway users are involved may, at the very least, increase driver awareness of these individuals. Conference Committee Report No. 33-12.

" **§707-705 Negligent injury in the first degree.** (1) A person commits the offense of negligent injury in the first degree if that person causes:

(a) Serious bodily injury to another person by the operation of a vehicle in a negligent manner; or

(b) Substantial bodily injury to a vulnerable user by the operation of a [vehicle] in a negligent manner.

(2) Negligent injury in the first degree is a class C felony. [L 1988, c 292, pt of §1; am L 2012, c 21, §2 and c 316, §4]

COMMENTARY ON §707-705

Act 292, Session Laws 1988, added this section which defines negligent injury in the first degree. The legislature felt that stronger measures were needed to protect the public and to deter those who negligently operate a motor vehicle, which results in bodily injury or death to others. Senate Conference Committee Report No. 278, House Conference Committee Report No. 105-88.

Act 21, Session Laws 2012, amended this section by modifying the scope of offenses relating to negligent injury to broaden the offenses' application to include injuries caused by more types of vehicles to increase public safety. The legislature found that a person was guilty of a negligent injury offense if that person caused serious or substantial bodily injury to another person while operating a motor vehicle. Act 21 would allow this negligent injury offense to also include the negligent operation of a moped or vessel and made operators of more types of vehicles more accountable for their actions when those actions involve the safety of others. Senate Standing

Committee Report No. 2449, House Standing Committee Report No. 1101-12.

Act 316, Session Laws 2012, amended this section to include a provision for incidents involving a vulnerable highway user. Hawaii's roadways have often been called dangerous for pedestrians, cyclists, and others who legally use the public right of way without being in a vehicle. Unfortunately, when collisions occur between vehicles and these individuals, the outcome is often catastrophic. Amending the offense of negligent injury in the first degree to include a provision for incidents in which vulnerable highway users are involved may, at the very least, increase driver awareness of these individuals. Conference Committee Report No. 33-12.

" **§707-706 Negligent injury in the second degree.** (1) A person is guilty of the offense of negligent injury in the second degree if that person causes substantial bodily injury to another person by the operation of a vehicle in a negligent manner.

(2) Negligent injury in the second degree is a misdemeanor. [L 1988, c 292, pt of §1; am L 2012, c 21, §3]

COMMENTARY ON §707-706

Act 292, Session Laws 1988, added this section which defines negligent injury in the second degree. The legislature felt that stronger measures were needed to protect the public and to deter those who negligently operate a motor vehicle, which results in bodily injury or death to others. Senate Conference Committee Report No. 278, House Conference Committee Report No. 105-88.

Act 21, Session Laws 2012, amended this section by modifying the scope of offenses relating to negligent injury to broaden the offenses' application to include injuries caused by more types of vehicles to increase public safety. The legislature found that a person was guilty of a negligent injury offense if that person caused serious or substantial bodily injury to another person while operating a motor vehicle. Act 21 would allow this negligent injury offense to also include the negligent operation of a moped or vessel and made operators of more types of vehicles more accountable for their actions when those actions involve the safety of others. Senate Standing Committee Report No. 2449, House Standing Committee Report No. 1101-12.

"PART III. CRIMINAL ASSAULTS AND RELATED OFFENSES

§707-710 Assault in the first degree. (1) A person commits the offense of assault in the first degree if the person intentionally or knowingly causes serious bodily injury to another person.

(2) Assault in the first degree is a class B felony. [L 1972, c 9, pt of §1; ree L 1986, c 314, §51; gen ch 1993]

Case Notes

Attempted assault. 56 H. 664, 548 P.2d 271 (1976).

Expert medical testimony that "permanent, serious disfigurement" would have resulted absent medical attention irrelevant and improperly admitted where that result was an element of the offense charged under this section. 80 H. 126, 906 P.2d 612 (1995).

Insufficient evidence to convict defendant under this section where evidence in record describing victim's scar only established that it was located on forehead, was two inches in length, and was visible from a "normal social" distance. 80 H. 126, 906 P.2d 612 (1995).

Under §701-109(1)(c), petitioner could not be convicted of both robbery in the second degree and assault in the first degree; the jury inconsistently found that petitioner intentionally or knowingly and recklessly inflicted serious bodily injury on complainant. 131 H. 353, 319 P.3d 272 (2013).

Where petitioner, convicted of robbery in the second degree (§708-841) and assault in the first degree, could not be convicted of both offenses, the assault conviction was reversed; among other things, there was sufficient evidence to convict petitioner as to robbery in the second degree and because the penalties for the robbery and assault convictions are the same, it could not be said that petitioner would be prejudiced by dismissal of the assault charge. 131 H. 353, 319 P.3d 272 (2013).

There was substantial evidence that minor caused serious bodily injury to complainant as defined in §707-700 where minor inflicted bodily injury which caused protracted loss or impairment of the function of any bodily member or organ--namely, the eye injury that caused the blurred and diplopic vision that was still bothering complainant at the time of trial. 106 H. 530 (App.), 107 P.3d 1203 (2005).

Where defendant punched and kicked another so ferociously in the face that the lip was split clean through, four teeth were bashed in, the eye was hemorrhaged and pushed inward, and the orbital floor was fractured causing blurred and diplopic vision lasting almost eleven months, there was substantial evidence that the defendant was, at the very least, aware that it was

practically certain that defendant's conduct would cause the result required, "serious bodily injury", for conviction of first degree assault. 106 H. 530 (App.), 107 P.3d 1203 (2005).

There was substantial and convincing evidence that complainant suffered "serious bodily injury" where evidence showed that complainant suffered eight fractured ribs which resulted in protracted impairment of the function of complainant's lungs and impaired complainant's ability to breathe for a prolonged and extended period of time; thus, trial court properly denied defendant's motion for judgment of acquittal. 112 H. 278 (App.), 145 P.3d 821 (2006).

Where defendant argued that the evidence was insufficient to prove defendant was an accomplice to an assault in any degree, and evidence was adduced that defendant pushed a person who was involved in a motor vehicle accident, causing the person to fall to the ground, and defendant held the person on the ground before the driver of a car involved in the accident jumped onto the person, substantial evidence supported the jury's conclusion. 132 H. 97, 319 P.3d 1105 (2014).

Where the prosecutor orally modified the court's accomplice jury instruction by defining the words "promote" and "facilitate", and the prosecutor did not make a curative statement specifically directed at correcting the improper definitions and the court did not give a curative instruction, the misstatement of the law for which no curative instruction was given was not harmless beyond a reasonable doubt, and defendant's conviction was vacated. 132 H. 97, 319 P.3d 1105 (2014).

Assault in the first degree is a lesser included offense of murder in the second degree. The circuit court erred in failing to instruct the jury on the included offense of assault in the first degree. 132 H. 451, 323 P.3d 95 (2014).

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

(a) The person intentionally, knowingly, or recklessly causes substantial bodily injury to another;

(b) The person recklessly causes serious bodily injury to another;

(c) The person intentionally or knowingly causes bodily injury to a correctional worker, as defined in section 710-1031(2), who is engaged in the performance of duty or who is within a correctional facility;

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

(e) The person intentionally or knowingly causes bodily injury to an educational worker who is engaged in the

performance of duty or who is within an educational facility. For the purposes of this paragraph, "educational worker" means any administrator, specialist, counselor, teacher, or employee of the department of education or an employee of a charter school; a person who is a volunteer, as defined in section 90-1, in a school program, activity, or function that is established, sanctioned, or approved by the department of education; or a person hired by the department of education on a contractual basis and engaged in carrying out an educational function;

(f) The person intentionally or knowingly causes bodily injury to any emergency medical services provider who is engaged in the performance of duty. For the purposes of this paragraph, "emergency medical services provider" means emergency medical services personnel, as defined in section 321-222, and physicians, physician's assistants, nurses, nurse practitioners, certified registered nurse anesthetists, respiratory therapists, laboratory technicians, radiology technicians, and social workers, providing services in the emergency room of a hospital;

(g) The person intentionally or knowingly causes bodily injury to a person employed at a state-operated or -contracted mental health facility. For the purposes of this paragraph, "a person employed at a state-operated or -contracted mental health facility" includes health care professionals as defined in section 451D-2, administrators, orderlies, security personnel, volunteers, and any other person who is engaged in the performance of a duty at a state-operated or -contracted mental health facility;

(h) The person intentionally or knowingly causes bodily injury to a person who:

(i) The defendant has been restrained from, by order of any court, including an ex parte order, contacting, threatening, or physically abusing pursuant to chapter 586; or

(ii) Is being protected by a police officer ordering the defendant to leave the premises of that protected person pursuant to section 709-906(4), during the effective period of that order; or

(i) The person intentionally or knowingly causes bodily injury to any firefighter or water safety officer who is engaged in the performance of duty. For the purposes of this paragraph, "firefighter" has the same

meaning as in section 710-1012 and "water safety officer" means any public servant employed by the United States, the State, or any county as a lifeguard or person authorized to conduct water rescue or ocean safety functions.

(2) Assault in the second degree is a class C felony. [L 1972, c 9, pt of §1; am L 1979, c 84, §1; am L 1986, c 314, §52; am L 1987, c 257, §1; am L 1988, c 279, §1; am L 2006, c 230, §29 and c 298, §16; am L 2007, c 9, §19 and c 79, §1; am L 2008, c 100, §7; am L 2010, c 146, §1; am L 2011, c 63, §3 and c 187, §1; am L 2016, c 2031, §33]

SUPPLEMENTAL COMMENTARY ON §§707-710 TO 707-712

Act 231, Session Laws 2016, amended §707-711(1) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Law Journals and Reviews

Cruelty to Animals: Recognizing Violence Against Nonhuman Victims. 23 UH L. Rev. 307 (2000).

Case Notes

Assault in the third degree is not a lesser included offense. 68 H. 276, 711 P.2d 1289 (1985).

Circuit court was obligated, even absent a request by either party, to instruct the jury regarding the included offense of assault in the third degree where appellant was charged with committing offense of assault in the second degree; court's failure to do so constituted plain error. 76 H. 387, 879 P.2d 492 (1994).

Conviction of defendant of offense of carrying, using or threatening to use a firearm in the commission of a separate felony under §134-6(a) and (e), the separate felony being second degree assault under subsection (1)(a), vacated where there was no substantial evidence that defendant caused substantial bodily injury to victim as required under subsection (1)(a). 94 H. 241, 11 P.3d 466 (2000).

The plain and unambiguous language of §853-4(2) does not prohibit the grant of a deferred acceptance of no contest plea for assault in the second degree under this section causing "substantial bodily injury", as statutory prohibition expressly applies only to felony and misdemeanor assaults inflicting "bodily injury" or "serious bodily injury". 101 H. 409, 70 P.3d 635 (2003).

Court's failure to personally engage defendant in on-the-record colloquy to determine whether defendant understood consequences of foregoing right to have jury instructed on third degree assault, the lesser-included offense of second degree assault, constituted plain error. 85 H. 44 (App.), 936 P.2d 1292 (1997).

Trial court's omission of the "strongly corroborative" paragraph in the attempted assault in the second degree instructions was presumptively prejudicial and omission was not harmless beyond a reasonable doubt. 104 H. 517 (App.), 92 P.3d 1027 (2004).

Although the evidence was insufficient to show that defendant committed the offense of first degree assault, there was ample evidence to show that the victim's injury satisfied the definition of "substantial bodily injury" under §707-700 and that defendant thus committed the lesser included offense of second degree assault in violation of subsection (1)(a); thus the jury, having returned a guilty verdict against defendant for first degree assault, must also have found sufficient evidence to prove the lesser included offense of second degree assault. 116 H. 445 (App.), 173 P.3d 592 (2007).

Cited: 55 H. 531, 534, 523 P.2d 299 (1974).

" **§707-712 Assault in the third degree.** (1) A person commits the offense of assault in the third degree if the person:

(a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or

(b) Negligently causes bodily injury to another person with a dangerous instrument.

(2) Assault in the third degree is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

Cross References

Definitions of states of mind, see §702-206.

Case Notes

Defendant's motion to dismiss federal indictment granted, where the government relied on defendant's no contest plea to assault in the third degree as the predicate misdemeanor conviction of domestic violence; force is not a required element for an assault in the third degree conviction and the record did

not demonstrate that defendant pled to conduct that involved the use of physical force. 301 F. Supp. 2d 1142 (2004).

Harassment, in violation of §711-1106, is not a lesser included offense of assault in the third degree. 63 H. 1, 620 P.2d 250 (1980).

Not a lesser included offense of assault in the second degree. 68 H. 276, 711 P.2d 1289 (1985).

Circuit court was obligated, even absent a request by either party, to instruct the jury regarding the included offense of assault in the third degree where appellant was charged with committing offense of assault in the second degree; court's failure to do so constituted plain error. 76 H. 387, 879 P.2d 492 (1994).

Thirteen-year-old appellant's waiver of right to counsel was not knowing and voluntary because the family court failed to set forth nature of assault charge against appellant. 77 H. 46, 881 P.2d 533 (1994).

Where assault against police officer count of oral charge was fatally defective, oral charge alleged all of essential elements of assault in the third degree, and circuit court found that all of those elements had been proven beyond a reasonable doubt, therefore, case remanded for entry of judgment of conviction of assault in the third degree and for resentencing in accordance therewith. 77 H. 309, 884 P.2d 372 (1994).

Under either §701-109(4)(a) or (4)(c), a petty misdemeanor assault under subsection (2) is not a lesser included offense of family abuse under §709-906. 93 H. 63, 996 P.2d 268 (2000).

As indicated in the Hawaii jury instructions criminal 9.21, where there is any evidence in the record that an injury was inflicted during the course of a fight or scuffle entered into by mutual consent, the trial court must submit a mutual affray instruction to the jury. 125 H. 78, 253 P.3d 639 (2011).

Where the misdemeanor offense charged against defendant of assault in the third degree under this section was not amended to a petty misdemeanor, and defendant had demanded defendant's right to a jury trial pursuant to §806-60 prior to leaving the courtroom, the district court lacked jurisdiction to proceed to trial; defendant's conviction for third degree assault in the course of a mutual affray thus vacated and remanded for a new trial. 128 H. 479, 291 P.3d 377 (2013).

Evidence was not sufficient to support finding of bodily injury. 2 H. App. 19, 624 P.2d 1374 (1981).

Court's finding that witness suffered pain and sustained injuries not clearly erroneous. 79 H. 265 (App.), 900 P.2d 1332 (1995).

Court's failure to personally engage defendant in on-the-record colloquy to determine whether defendant understood

consequences of foregoing right to have jury instructed on third degree assault, the lesser-included offense of second degree assault, constituted plain error. 85 H. 44 (App.), 936 P.2d 1292 (1997).

Mentioned: 74 H. 54, 837 P.2d 1298 (1992).

COMMENTARY ON §§707-710 TO 707-712

These sections of the Code consolidate offenses previously classified as "assault", "battery", and "affray".[1] Nonfatal bodily offenses against the person are termed assaults, and are graded according to the gravity of the harm or danger they represent.[2]

Assault in the first degree, as defined in §707-710, is the most serious, combining the requirements of the most culpable states of mind with the most serious bodily injury, short of homicide. Accordingly, assault in the first degree is made a class B felony, one class below murder.

Assault in the second degree, as defined in §707-711, embodies two types of behavior-and-result. (1) When a person acts intentionally or knowingly, with a dangerous instrument, the definition of the offense does not require the bodily injury inflicted to be serious, as in the first degree. However, the offense is still a felony, albeit one class lower. Assault offenses are intended to penalize injurious conduct to the bodily integrity of the person. The danger represented by the use of a dangerous instrument is largely inchoate in nature, and, although constituting an aggravating circumstance, the danger is not of the same order as the actual infliction of serious bodily injury. Hence, the offense is a class C felony. (2) When a person acts recklessly the person's state of mind is far less culpable than the intentional or knowing actor; however, the employment of a dangerous instrument and the infliction of serious harm present dangers which, in total, require treatment as a class C felony.

Assault in the third degree, as defined in §707-712, is treated as a misdemeanor. In subsection (1)(a), where a person acts intentionally, knowingly, or recklessly, the less serious nature of the injury, together with the absence of aggravating circumstances, warrant the less severe penalty. In subsection (1)(b), negligent culpability will suffice where the aggravating circumstance of a dangerous instrument is present. Assault in the third degree is reduced to a petty misdemeanor if the harm is inflicted in a fight or scuffle entered into by mutual consent.

The Code's gradation of assaults follows generally the Model Penal Code.[3] Previous Hawaii law defined assault in terms of

attempt to injure another.[4] Also included was the placing of another in apprehension of being injured.[5] The Code handles this latter case in the sections on Reckless Endangering (§§707-713 and 714) and Terroristic Threatening (§707-715). After the definition of the basic offense of assault, the Hawaii Revised Statutes listed three classes of aggravating circumstances, calling for either felony or misdemeanor sanctions, depending upon the severity of the aggravation.[6] The unaggravated offense was slightly more severe than, but roughly equivalent to, a petty misdemeanor.[7] Consensual scuffles were included in the unaggravated offense.[8] Hence the Code is similar in both structure and penalty to prior Hawaii law, but achieves greater economy and clarity of statement.

SUPPLEMENTAL COMMENTARY ON §§707-710 TO 707-712

Act 84, Session Laws 1979, added subsection (c) to §707-711 as a means of deterring a rising number of assaults committed against correctional officers. The legislature found that due to the very nature of a corrections facility, a high probability existed that correctional workers who were not on duty might be assaulted within the facility. Conference Committee Report No. 14.

Act 257, Session Laws 1987, amended §707-711 to give educational workers added protection by making it a crime to assault them. Senate Conference Committee Report No. 24, House Conference Committee Report No. 20.

Act 279, Session Laws 1988, amended §707-711 to clarify that second degree assault does not include persons injuring themselves. House Standing Committee Report No. 1598-88.

Act 230, Session Laws 2006, amended §707-711(1) by adding, as an element of the offense of assault in the second degree, the reckless causing of substantial bodily injury to another person.

Act 298, Session Laws 2006, amended §707-711 by including an employee of a charter school in the definition of "educational worker."

Act 9, Session Laws 2007, amended §707-711(1)(e) by deleting the brackets around the word "or" to ratify the revisor's insertion of "or," which was done to blend the amendments by Acts 230 and 298, Session Laws 2006, to the definition of "educational worker." House Standing Committee Report No. 807.

Act 79, Session Laws 2007, amended §707-711(1) by establishing a criminal offense of assault in the second degree if a person intentionally [or] knowingly causes bodily injury to any emergency medical services personnel who is engaged in the performance of duty. The legislature found that emergency medical services personnel are at a heightened risk of personal

injury or death from patients and others with whom they are in contact in the course of their work. By the very nature of the job, emergency medical services personnel respond to people in distressful situations, which include incidences of criminal violence, family disputes, and drunken brawls. Although the legislature acknowledged that much of the violence promulgated from explosive situations involving agitated people who lack momentary self-control, the legislature believed that emergency medical [services] personnel should be afforded the same protection as correctional workers and educational workers. Senate Standing Committee Report No. 1244.

Act 100, Session Laws 2008, amended §707-711(1) by making an assault on a person employed at a state-operated or -contracted mental health facility assault in the second degree, a class C felony. The legislature found that mental health professionals need to be protected from criminal behavior that, at times, occurs during the course of performing their job duties. Act 100 imposed the same penalty on a defendant that knowingly [or intentionally] assaults a staff member at the Hawaii state hospital as that imposed for assaults that occur in a school or correctional facility. Senate Standing Committee Report No. 2331, Conference Committee Report No. 37-08.

Act 146, Session Laws 2010, amended §707-711(1) by expanding the class of emergency services providers protected against assault to include, among others, physicians, physician's assistants, nurses, and nurse practitioners providing medical services in a hospital emergency room. The legislature found that emergency medical workers serve an indispensable public need but face a high level of risk in the line of duty. Nationally, studies show that between thirty-five per cent and eighty per cent of hospital staff have been physically assaulted at least once and that nurses are at an increased risk for violence while on duty. The legislature found that extending the offense of assault in the second degree to include actions against emergency services providers in emergency rooms is a logical extension of the existing provisions covering emergency response personnel. Senate Standing Committee Report Nos. 2989 and 2765, House Standing Committee Report No. 466-10, Conference Committee Report No. 33-10.

Act 63, Session Laws 2011, amended §707-711(1) by establishing second degree assault for a person who causes bodily injury to a person: (1) from whom the defendant has been restrained, by order of any court, from contacting, threatening, or physically abusing pursuant to domestic abuse protective orders; or (2) who is being protected by a police officer ordering the defendant to leave the premises of the protected person, during the effective period of the order. The legislature found that domestic

violence victims need added protection under Hawaii law. Restraining orders or orders from police officers to abusers to leave the premises are intended to remove abusers from the vicinity of domestic violence victims and provide safety. The legislature believed that domestic violence victims are particularly vulnerable when they attempt to disengage from their abusers and at that time, violence and the threat of violence are at the most extreme levels. Increasing the penalties against abusers in those situations may deter violent retaliation and may help break victims from the cycle of violence. House Standing Committee Report No. 930, Conference Committee Report No. 74, Senate Standing Committee Report No. 1255.

Act 187, Session Laws 2011, amended §707-711(1) by adding to the offense of assault in the second degree intentionally or knowingly causing bodily injury to a firefighter or water safety officer who is engaged in the performance of duty. Firefighters and water safety officers, like correctional workers, educational workers, and emergency medical services providers, may find themselves in hostile and volatile situations, stemming from drug use by or domestic violence between members of the public. The volatile situations can erupt and place a firefighter or water safety officer in danger trying to perform public safety functions. Conference Committee Report No. 32.

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§§707-710 To 707-712 Commentary:

1. H.R.S., chapter 724.

2. See chart analysis of criminal assaults at end of comment.

3. M.P.C. §211.1.

4. H.R.S. §724-1.

5. Id.

6. Id. §§724-3, 724-4, 724-5, and 724-6.

7. Id. §724-7.

8. Id. §724-8.

" **§707-712.5 Assault against a law enforcement officer in the first degree.** (1) A person commits the offense of assault

against a law enforcement officer in the first degree if the person:

(a) Intentionally or knowingly causes bodily injury to a law enforcement officer who is engaged in the performance of duty; or

(b) Recklessly or negligently causes, with a dangerous instrument, bodily injury to a law enforcement officer who is engaged in the performance of duty.

(2) Assault of a law enforcement officer in the first degree is a class C felony. The court shall, at a minimum, sentence the person who has been convicted of this offense to:

(a) An indeterminate term of imprisonment of five years, pursuant to section 706-660; or

(b) Five years probation, with conditions to include a term of imprisonment of not less than thirty days without possibility of suspension of sentence. [L 1990, c 192, §1; am L 2003, c 66, §2]

Cross References

Definition of law enforcement officer, see §701-118.

COMMENTARY ON §707-712.5

Act 192, Session Laws 1990, added this section in an attempt to afford a police officer some additional measure of protection. The legislature noted that this measure may not have any deterrent effect because assaults on police officers usually happen in the heat of the moment. House Standing Committee Report No. 1203-90.

Act 66, Session Laws 2003, amended this section to upgrade assault against a police officer to a class C felony and expand its scope to cover other law enforcement officers. Under current law, threatening a police officer is a felony, although actual assault of a police officer is a misdemeanor. It is a class C felony to assault correctional workers or educational workers who are engaged in the performance of their duties. The legislative intent was to deter the rising number of assaults committed against correctional officers each year, and to give educational workers added protection. The legislature believed that law enforcement officers deserved the same protection and deterrent methods as these other workers. The legislature expressed the intent that the term "law enforcement officer" includes, but is not limited to, police officers, sheriffs, sheriff deputies, department of land and natural resources enforcement officers, and investigators with the department of the attorney general. Senate Standing Committee Report No. 979.

Case Notes

Statutory references in oral charge did not cure the omission of essential elements in resisting arrest and assault against a police officer counts of the charge; supreme court unable to reasonably construe oral charge as charging assault against a police officer. 77 H. 309, 884 P.2d 372 (1994).

As this section does not specifically state that the convicted "shall serve" the minimum sentence of thirty days imprisonment, nor explicitly limit the court's ability to suspend part of the minimum sentence, trial court did not err in suspending twenty-five days of the minimum sentence, placing defendant on probation and ordering community service. 99 H. 118, 53 P.3d 257 (2002).

" **[§707-712.6] Assault against a law enforcement officer in the second degree.** (1) A person commits the offense of assault against a law enforcement officer in the second degree if the person recklessly causes bodily injury to a law enforcement officer who is engaged in the performance of duty.

(2) Assault of a law enforcement officer in the second degree is a misdemeanor. The court shall sentence the person who has been convicted of this offense to a definite term of imprisonment, pursuant to section 706-663, of not less than thirty days without possibility of probation or suspension of sentence. [L 2003, c 66, §1]

Cross References

Definition of law enforcement officer, see §701-118.

COMMENTARY ON §707-712.6

Act 66, Session Laws 2003, added this section, creating the misdemeanor offense of assault against a law enforcement officer in the second degree. The legislature expressed the intent that the term "law enforcement officer" includes, but is not limited to, police officers, sheriffs, sheriff deputies, department of land and natural resources enforcement officers, and investigators with the department of the attorney general. Senate Standing Committee Report No. 979.

" **§707-712.7 Assault against an emergency worker.** (1) A person commits the offense of assault against an emergency worker if the person, during an emergency period proclaimed by

the governor or mayor pursuant to chapter 127A, within the area covered by the emergency or disaster:

(a) Intentionally, knowingly, or recklessly causes serious or substantial bodily injury to an emergency worker; or

(b) Intentionally, knowingly, or recklessly causes bodily injury to an emergency worker with a dangerous instrument.

(2) Assault against an emergency worker is a class B felony. [L 2006, c 116, §2; am L 2014, c 111, §16]

COMMENTARY ON §707-712.7

Act 116, Session Laws 2006, added this section, which classifies assault on an emergency worker, causing substantial bodily injury or with a dangerous weapon, as a class B felony. Act 116 penalized the commission of certain crimes during a time of a civil defense emergency proclaimed by the governor or during a period of disaster relief. The legislature found that Hurricanes Katrina and Rita created situations that highlighted the prevalence of opportunistic crimes that can occur during these times. When resources are needed to restore law and order, emergency response aid to victims may be hampered or delayed, leaving victims at an increased risk of bodily injury or death. Stronger measures to control law and order may deter looting and other crimes. House Standing Committee Report No. 757-06, Senate Standing Committee Report No. 3302, Conference Committee Report No. 64-06.

Act 111, Session Laws 2014, which amended this section, updated and recodified Hawaii's emergency management laws to conform with nationwide emergency management practices by, among other things, establishing a Hawaii emergency management agency in the state department of defense with the functions and authority currently held by the state civil defense agency; establishing the power and authority of the director of Hawaii emergency management, who will be the adjutant general, and providing the director with the functions and authority currently held by the director of civil defense; establishing county emergency management agencies, each to be under the respective county mayor's direction, with the functions and authority currently held by the local organizations for civil defense; and repealing the chapters on disaster relief [chapter 127] and the civil defense [and] emergency act [chapter 128], which were determined to be obsolete with the creation of the Hawaii emergency management agency. Conference Committee Report No. 129-14.

" **§707-713 Reckless endangering in the first degree.** (1) A person commits the offense of reckless endangering in the first degree if the person employs widely dangerous means in a manner which recklessly places another person in danger of death or serious bodily injury or intentionally fires a firearm in a manner which recklessly places another person in danger of death or serious bodily injury.

(2) Reckless endangering in the first degree is a class C felony. [L 1972, c 9, pt of §1; am L 1978, c 215, §1; am L 1988, c 285, §1; gen ch 1992]

Case Notes

Under §701-109(4)(a) and (c), reckless endangering in the first degree under this section is an included offense of attempted murder in the second degree under §707-701.5. 94 H. 513 (App.), 17 P.3d 862 (2001).

Cited: 55 H. 531, 534, 523 P.2d 299 (1974).

" **§707-714 Reckless endangering in the second degree.** (1) A person commits the offense of reckless endangering in the second degree if the person:

(a) Engages in conduct that recklessly places another person in danger of death or serious bodily injury; or

(b) Intentionally discharges a firearm in a populated area, in a residential area, or within the boundaries or in the direction of any road, street, or highway; provided that the provisions of this paragraph shall not apply to any person who discharges a firearm upon a target range for the purpose of the target shooting done in compliance with all laws and regulations applicable thereto.

(2) Reckless endangering in the second degree is a misdemeanor. [L 1972, c 9, pt of §1; am L 1990, c 62, §1; gen ch 1992; am L 2006, c 230, §30]

Cross References

Definition of recklessly, see §702-206.

Definition of "widely dangerous means", see §708-800.

Case Notes

Statute essentially the equivalent of federal statute on "assault with dangerous weapon with intent to do bodily harm" set out in 18 U.S.C. §113(c). 376 F. Supp. 1024 (1974).

This offense is a lesser included offense of attempted murder under §701-109(4). 62 H. 637, 618 P.2d 306 (1980).

Based on testimony of a vendor and dirt biker, there was substantial evidence upon which a jury could have found that defendant discharged a firearm in a populated area, supporting defendant's conviction under this section. 106 H. 62 (App.), 101 P.3d 671 (2004).

Cited: 55 H. 531, 534, 523 P.2d 299 (1974).

COMMENTARY ON §§707-713 AND 707-714

The Code follows the lead of the Model Penal Code in providing two general sections for conduct which recklessly endangers human life.[1] Previous Hawaii law covered, as does the law of most jurisdictions,[2] such cases of reckless endangering on an ad hoc basis.[3] A quick perusal of such statutes reveals that they all have in common the reckless endangering of human life. The Code obviates the need for special legislation on each dangerous instrument or act. Rather, all conduct so endangering human life or limb is made a misdemeanor.

The aggravated offense of reckless endangering in the first degree, §707-713, is reserved for cases where the actor employs "widely dangerous means." Widely dangerous means, as defined in §708-800, are those means which are known to be capable of causing widespread damage or destruction to both life and property. It is thought that where the potential for destruction is this great, the actor's dangerousness to society is increased so substantially, over the case where only a single or a few people are threatened, that the felony sanction is justified.

SUPPLEMENTAL COMMENTARY ON §§707-713 AND 707-714

Act 215, Session Laws 1978, added to §707-713(1) the words "or intentionally fires a firearm in a manner which places another person in danger of death or serious bodily injury." The legislature felt that the grave dangers posed by the use of a firearm justified a felony sanction. Senate Standing Committee Report No. 675-78, House Standing Committee Report No. 116.

Act 285, Session Laws 1988, amended §707-713 for the purpose of limiting the offense, in regard to firearms, to a person who intentionally fires a firearm in a manner which recklessly places another person in danger of death or serious bodily injury. House Standing Committee Report No. 1604-88, Senate Standing Committee Report No. 2141.

Act 62, Session Laws 1990, amended §707-714 to subject to misdemeanor liability, a person who creates an obvious risk to

the public by intentionally discharging a firearm in areas likely to be traveled or inhabited. Senate Standing Committee Report No. 3060.

Act 230, Session Laws 2006, amended §707-714 by making technical nonsubstantive amendments.

§§707-713 And 707-714 Commentary:

1. M.P.C. §220.2(2) and 211.2.

2. Cf. M.P.C., Tentative Draft No. 9, comments at 86 (1959).

3. E.g., H.R.S. §§727-1 (spreading of dangerous disease, storing of explosives in populated areas, blasting with excessive charge, releasing dangerous animals), 753-13 (scattering poisonous substances).

" **[§707-714.5] Criminally negligent storage of a firearm.** (1) A person commits the offense of criminally negligent storage of a firearm if the person violates section 134-10.5 and a minor obtains the firearm. For purposes of this section, "minor" means any person under the age of sixteen years.

(2) This section shall not apply if the minor obtains the firearm as a result of an unlawful entry to any premises by any person.

(3) Criminally negligent storage of a firearm is a misdemeanor. [L 1992, c 288, §2]

COMMENTARY ON §707-714.5

Act 288, Session Laws 1992, added this section to establish that a person can be found criminally negligent for storage of a firearm if a person keeps a firearm on the premises and the person knows or reasonably should know that a minor can gain access to the firearm without the permission of the parent or guardian and that the minor does obtain the firearm. Conference Committee Report No. 119.

" **§707-715 Terroristic threatening, defined.** A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage or harm to property, including the pets or livestock, of another or to commit a felony:

(1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person; or

(2) With intent to cause, or in reckless disregard of the risk of causing evacuation of a building, place of assembly, or facility of public transportation. [L 1972, c 9, pt of §1; am L 1979, c 184, §1(1); gen ch 1993; am L 2012, c 214, §1]

Cross References

Definitions of states of mind, see §702-206.

COMMENTARY ON §707-715

[The following commentary is based on the original proposal which differed from the Code as enacted, as indicated in the Supplemental Commentary below.]

This section is addressed to conduct causing serious alarm for personal safety, or the disruption of public services or activities. In the first instance, it is an offense against the individual of substantial magnitude and danger, even allowing for the lack of any actual harm. This danger is recognized for two reasons. (1) It is easily seen that people who are attempting to avoid what they believe to be a serious harm may often take action so precipitous as to harm themselves. Where the actual harm occurs, the threatener may be guilty of a more serious offense. But where the harm does not occur, this section permits conviction for the inchoate threat. (2) The civil law has come to recognize the validity of psychological trauma; recovery may now be had for the intentional infliction of such injury even though the conduct of the offender had no physical connection with the victim. If such conduct constitutes a recognized substantial danger, it follows that a penal sanction may appropriately be imposed for conduct which intentionally or recklessly creates the danger.

In the second instance, the magnitude of the inconvenience and attendant dangers involved in the disruption of public services and activities warrant the imposition of the penal sanction.[1]

In both cases, because threats represent far less of a danger than does consummation of the criminal objective, the offense is only graded as a misdemeanor. The sanction is more commensurate with the inconvenience of personal apprehension of danger, or of public disruption, than with the possibility of the threatened evil being accomplished. In the latter case, of the accomplished evil, the various attempt and substantive sections will deal more severely with the conduct and results involved.

Previous Hawaii law contained no prohibition of the conduct proscribed by this section.

SUPPLEMENTAL COMMENTARY ON §707-715

When the legislature adopted the Code in 1972, it departed from §715 of the Proposed Code by deleting the phrase "serious public inconvenience" as a basis of criminal liability and by deleting the word "public" preceding the word "building."

As stated in Conference Committee Report No. 2 (1972):

> Your Committee has agreed to delete the phrase "serious public inconvenience" as a basis of criminal liability for terroristic threatening because of its possible unconstitutional vagueness. Your Committee has also agreed to have this statute apply to private as well as public buildings by deletion of the word "public."

Act 184, Session Laws 1979, broadened this section to include threats to commit a felony.

Act 214, Session Laws 2012, amended this section by including pets and livestock as property that, if threatened to be damaged or harmed, may constitute the offense of terroristic threatening. The legislature found that Act 214 clarified that threatening to cause serious damage to the property of another person includes threatening to damage or harm the pets and livestock of that person under the terroristic threatening offense. Senate Standing Committee Report No. 2451, Conference Committee Report No. 22-12.

Case Notes

Defendant's constitutional right to unanimous verdict not violated as section defines a single criminal offense; paragraphs (1) and (2) constitute alternative means of establishing the mens rea of the offense of terroristic threatening--either one giving rise to the same criminal culpability. 92 H. 577, 994 P.2d 509 (2000).

A specific unanimity jury instruction was not required where defendant's conduct, as alleged and proved by the prosecution, constituted a continuing course of conduct "set on foot by a single impulse and operated by an unintermittent force", with "one general intent ... and one continuous plan". 95 H. 440, 24 P.3d 32 (2001).

Defendant's first degree terroristic threatening conviction remanded for new trial where instructions did not sufficiently inform jury that, to constitute a "true threat", defendant's threatening utterance was objectively susceptible to inducing fear of bodily injury in a reasonable person at whom the threat was directed and who was familiar with the circumstances under which the threat was uttered. 95 H. 465, 24 P.3d 661 (2001).

Defendant's first degree terroristic threatening conviction remanded for new trial where trial court failed to instruct jury that it could consider relevant attributes of both defendant and the subject of the allegedly threatening utterance in determining whether the subject's fear of bodily injury, as allegedly induced by defendant's threatening utterance, was objectively reasonable under the circumstances in which the threat was uttered. 95 H. 465, 24 P.3d 661 (2001).

Neither the free speech clause of the U.S. Constitution nor that of the Hawaii constitution impose a temporal "immediacy" requirement that must be met before words become subject to criminal prosecution as "true threats". 95 H. 465, 24 P.3d 661 (2001).

Defendant's claim of justification, in defense against prosecution for terroristic threatening, was established regardless of whether or not defendant used deadly force. 1 H. App. 167, 616 P.2d 229 (1980).

One may be charged with a violation of §707-716(1)(d) when a dangerous instrument is employed in connection with a threat to property as proscribed by this section. 88 H. 477 (App.), 967 P.2d 674 (1998).

§707-715 Commentary:

1. M.P.C., Tentative Draft No. 11, comments at 8, et seq. (1960).

" **§707-716 Terroristic threatening in the first degree.** (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:

(a) By threatening another person on more than one occasion for the same or a similar purpose;

(b) By threats made in a common scheme against different persons;

(c) Against a public servant arising out of the performance of the public servant's official duties. For the purposes of this paragraph, "public servant" includes but is not limited to an educational worker. "Educational worker" has the same meaning as defined in section 707-711;

(d) Against any emergency medical services provider who is engaged in the performance of duty. For purposes of this paragraph, "emergency medical services provider" means emergency medical services personnel, as defined in section 321-222, and physicians, physician's assistants, nurses, nurse practitioners, certified

registered nurse anesthetists, respiratory therapists, laboratory technicians, radiology technicians, and social workers, providing services in the emergency room of a hospital;

(e) With the use of a dangerous instrument or a simulated firearm. For purposes of this section, "simulated firearm" means any object that:

(i) Substantially resembles a firearm;

(ii) Can reasonably be perceived to be a firearm; or

(iii) Is used or brandished as a firearm; or

(f) By threatening a person who:

(i) The defendant has been restrained from, by order of any court, including an ex parte order, contacting, threatening, or physically abusing pursuant to chapter 586; or

(ii) Is being protected by a police officer ordering the defendant to leave the premises of that protected person pursuant to section 709-906(4), during the effective period of that order.

(2) Terroristic threatening in the first degree is a class C felony. [L 1979, c 184, pt of §1(2); am L 1989, c 131, §1; gen ch 1992; am L 2006, c 230, §31; am L 2007, c 79, §2; am L 2010, c 146, §2; am L 2011, c 63, §4; am L 2013, c 255, §1]

Case Notes

A U.S. military police officer is not a "public servant" for purposes of this section. 552 F. Supp. 2d 1108 (2008).

For purposes of establishing subject matter jurisdiction, defendant who placed threatening telephone call from California to Hawaii engaged in conduct occurring within Hawaii. 72 H. 591, 825 P.2d 1062 (1992).

Court erred in concluding section requires threat to be communicated directly or indirectly to person and that communication of threat to third party was insufficient. 75 H. 398, 862 P.2d 1063 (1993).

Section not unconstitutional where threats sufficiently unequivocal, unconditional, immediate, and specific as to convey a gravity of purpose and imminent prospect of execution. 75 H. 398, 862 P.2d 1063 (1993).

Double jeopardy clause of Hawaii constitution did not bar terroristic threatening prosecution of defendant who had been found guilty of abuse under §709-906. 75 H. 446, 865 P.2d 150 (1994).

Terroristic threatening not a lesser included offense of intimidating a witness within the meaning of §701-109(4)(a); multiple conviction of terroristic threatening and intimidating

a witness not barred by §701-109(4)(c). 75 H. 517, 865 P.2d 157 (1994).

Where no evidence was presented that any "dangerous instrument" other than a firearm was involved, which established an element of the underlying felony under this section, §134-6(a) did not apply. 83 H. 229, 925 P.2d 797 (1996).

Defendant's first degree terroristic threatening conviction remanded for new trial where instructions did not sufficiently inform jury that, to constitute a "true threat", defendant's threatening utterance was objectively susceptible to inducing fear of bodily injury in a reasonable person at whom the threat was directed and who was familiar with the circumstances under which the threat was uttered. 95 H. 465, 24 P.3d 661 (2001).

Defendant's first degree terroristic threatening conviction remanded for new trial where trial court failed to instruct jury that it could consider relevant attributes of both the defendant and the subject of the allegedly threatening utterance in determining whether the subject's fear of bodily injury, as allegedly induced by defendant's threatening utterance, was objectively reasonable under the circumstances in which the threat was uttered. 95 H. 465, 24 P.3d 661 (2001).

Neither the free speech clause of the U.S. Constitution nor that of the Hawaii constitution impose a temporal "immediacy" requirement that must be met before words become subject to criminal prosecution as "true threats". 95 H. 465, 24 P.3d 661 (2001).

The offense of terroristic threatening in the first degree does not require a nexus between the alleged threat and the threatened person's status as a public servant where the threatened person is a government officer or employee; thus, trial court did not err in failing to give a nexus instruction. 111 H. 327, 141 P.3d 974 (2006).

Trial court's failure to instruct the jury that it could consider the relevant attributes of both the defendant and the subject of the allegedly threatening utterance in determining whether the subject's fear of bodily injury, as allegedly induced by the defendant's threatening utterance, was objectively reasonable under the circumstances in which the threat was uttered, was not harmless beyond a reasonable doubt because there was a reasonable possibility that the error contributed to defendant's conviction. 111 H. 327, 141 P.3d 974 (2006).

Where jury was not given a specific unanimity instruction with respect to the first degree terroristic threatening offense under this section, was never informed which act committed by defendant coincided with the two terroristic threatening counts, and convicted defendant of one count and acquitted defendant of

the other, there was a genuine possibility that different jurors concluded that defendant committed different acts; thus, to correct any potential confusion in the case, a specific unanimity jury instruction should have been given to insure that the jury understood its duty to unanimously agree to a particular set of facts. 121 H. 339, 219 P.3d 1126 (2009).

Terroristic threatening in second degree can be an offense included in terroristic threatening in first degree; trial court's failure to instruct jury on the lesser included offense was not plain error, where defendant contended there was a rational basis in the record for jury to decide that, although defendant made a terroristic threat, defendant did not do so with a dangerous instrument as defined in §707-700. 10 H. App. 584, 880 P.2d 213 (1994).

Terroristic threatening charge under subsection (1)(d) remanded for prosecutorial misconduct and where evidence of defendant's violation of furlough was not a fact of consequence to any material issue under this section. 82 H. 517 (App.), 923 P.2d 934 (1996).

One may be charged with a violation of subsection (1)(d) when a dangerous instrument is employed in connection with a threat to property as proscribed by §707-715. 88 H. 477 (App.), 967 P.2d 674 (1998).

Subsection (1)(c) was not unconstitutionally vague when applied to defendant's conduct of threatening to kill public servants because of their performance of official duties; this section gave defendant fair notice that defendant's conduct was prohibited and afforded defendant the opportunity to choose between lawful and unlawful conduct. 105 H. 261 (App.), 96 P.3d 590 (2004).

Where there were no jury instructions requiring unanimity as to the person or persons threatened, thus allowing each juror seven choices as to the persons threatened and not requiring all jurors to agree on no less than one person, trial court violated the rule requiring a unanimous jury regarding the person or persons threatened, which was necessary to prove the offense charged. 114 H. 135 (App.), 157 P.3d 574 (2007).

" **[§707-717] Terroristic threatening in the second degree.** (1) A person commits the offense of terroristic threatening in the second degree if the person commits terroristic threatening other than as provided in section 707-716.

(2) Terroristic threatening in the second degree is a misdemeanor. [L 1979, c 184, pt of §1(2); gen ch 1993]

Case Notes

Not a lesser included offense of attempted extortion in the second degree. 70 H. 456, 776 P.2d 392 (1989).

The requirement of a "true threat" jury instruction is not limited to terroristic threatening prosecutions that are based solely upon verbal conduct, but rather applies in all such prosecutions, whether the threat is proved by evidence of verbal expression, motor behavior, or a combination thereof. 106 H. 136, 102 P.3d 1034 (2005).

Terroristic threatening in second degree can be an offense included in terroristic threatening in first degree; trial court's failure to instruct jury on the lesser included offense was not plain error, where defendant contended there was a rational basis in the record for jury to decide that, although defendant made a terroristic threat, defendant did not do so with a dangerous instrument as defined in §707-700. 10 H. App. 584, 880 P.2d 213 (1994).

Defendant's words, yelling at dirt bikers to get off defendant's land, combined with defendant's conduct of repeatedly discharging defendant's shotgun, were sufficient evidence to sustain defendant's conviction under this section. 106 H. 62 (App.), 101 P.3d 671 (2004).

COMMENTARY ON §§707-716 AND 707-717

Act 184, Session Laws 1979, upgraded the offense of terroristic threatening from a misdemeanor to a class C felony in four aggravated situations. The legislature felt that raising the penalty would provide an incentive for vigorous prosecution and act as a deterrent against such offenses. House Standing Committee Report No. 673. For discussion of a "common scheme" under §707-716, see Senate Standing Committee Report No. 902.

Act 131, Session Laws 1989, amended §707-716 to establish the offense of terroristic threatening of an educational worker to make our school environments safer and to better enable prosecuting attorneys to obtain convictions. Senate Standing Committee Report No. 998.

Act 230, Session Laws 2006, amended §707-716(1) to limit the charge of terroristic threatening in the first degree against a public servant to actions arising out of the performance of the public servant's official duties. House Standing Committee Report No. 665-06.

Act 79, Session Laws 2007, amended §707-716(1) by establishing a criminal offense of terroristic threatening in the first degree if a person commits terroristic threatening against any emergency medical services personnel [engaged in the performance of duty]. The legislature found that emergency medical services

personnel are at a heightened risk of personal injury or death from patients and others with whom they are in contact in the course of their work. By the very nature of the job, emergency medical services personnel respond to people in distressful situations, which include incidences of criminal violence, family disputes, and drunken brawls. Although the legislature acknowledged that much of the violence promulgated from explosive situations involving agitated people who lack momentary self-control, the legislature believed that emergency medical [services] personnel should be afforded the same protection as correctional workers and educational workers. Senate Standing Committee Report No. 1244.

Act 146, Session Laws 2010, amended §707-716(1) by expanding the class of emergency services providers protected against terroristic threatening to include, among others, physicians, physician's assistants, nurses, and nurse practitioners providing medical services in a hospital emergency room. The legislature found that emergency medical workers serve an indispensable public need but face a high level of risk in the line of duty. Nationally, studies show that between thirty-five per cent and eighty per cent of hospital staff have been physically assaulted at least once and that nurses are at an increased risk for violence while on duty. The legislature found that extending the offense of assault in the second degree to include actions against emergency services providers in emergency rooms is a logical extension of the existing provisions covering emergency response personnel. Senate Standing Committee Report Nos. 2989 and 2765, House Standing Committee Report No. 466-10, Conference Committee Report No. 33-10.

Act 63, Session Laws 2011, amended §707-716(1) by establishing first degree terroristic threatening for a person who threatens a person: (1) from whom the defendant has been restrained, by order of any court, from contacting, threatening, or physically abusing pursuant to domestic abuse protective orders; or (2) who is being protected by a police officer ordering the defendant to leave the premises of the protected person, during the effective period of the order. The legislature found that domestic violence victims need added protection under Hawaii law. Restraining orders or orders from police officers to abusers to leave the premises are intended to remove abusers from the vicinity of domestic violence victims and provide safety. The legislature believed that domestic violence victims are particularly vulnerable when they attempt to disengage from their abusers and at that time, violence and the threat of violence are at the most extreme levels. Increasing the penalties against abusers in those situations may deter violent

retaliation and may help break victims from the cycle of violence. House Standing Committee Report No. 930, Conference Committee Report No. 74, Senate Standing Committee Report No. 1255.

Act 255, Session Laws 2013, amended §707-716(1) to include the use of a simulated firearm in the offense of terroristic threatening in the first degree. The legislature found that simulated firearms are becoming increasingly difficult to discern from real firearms and as a result, simulated firearms are being used to commit serious criminal offenses. The victims in these crimes believe that the weapons are real and are terrorized when threatened with one. Under existing law, if the weapon is not a real firearm, the suspect cannot be charged with the higher offense of terroristic threatening in the first degree and the charge is reduced to a misdemeanor. Senate Standing Committee Report No. 488, House Standing Committee Report No. 1231.

"PART IV. KIDNAPPING AND RELATED OFFENSES; CRIMINAL COERCION

§707-720 Kidnapping. (1) A person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to:

(a) Hold that person for ransom or reward;

(b) Use that person as a shield or hostage;

(c) Facilitate the commission of a felony or flight thereafter;

(d) Inflict bodily injury upon that person or subject that person to a sexual offense;

(e) Terrorize that person or a third person;

(f) Interfere with the performance of any governmental or political function; or

(g) Unlawfully obtain the labor or services of that person, regardless of whether related to the collection of a debt.

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

(3) In a prosecution for kidnapping, it is a defense which reduces the offense to a class B felony that the defendant voluntarily released the victim, alive and not suffering from serious or substantial bodily injury, in a safe place prior to trial. [L 1972, c 9, pt of §1; am L 1986, c 314, §53; gen ch 1992; am L 2008, c 147, §2]

Case Notes

Evidence held sufficient to show defendant restrained victim to subject victim to sexual offense. 61 H. 475, 605 P.2d 75 (1980).

Trial judge erred in refusing to instruct jury regarding the possible merger of the robbery and kidnapping counts against defendant. 77 H. 17, 881 P.2d 504 (1994).

Prosecution adduced substantial evidence from which a person of reasonable caution could conclude that defendant intentionally or knowingly restrained officer and intended to inflict bodily injury upon officer in violation of subsection (1)(d) where officer testified that defendant had pinned officer's arm against car's steering wheel and dragged officer thirty yards down the street while officer was hanging outside the vehicle. 95 H. 465, 24 P.3d 661 (2001).

Where handgun constituted a significant piece of evidence pertaining to the state of mind requisite to the charged offense of kidnapping-with-the-intent-to-terrorize, trial court's admission of testimony regarding the handgun was not erroneous because the testimony's probative value outweighed any potential prejudice. 118 H. 493, 193 P.3d 409 (2008).

Where jurors could have found that defendant's culpable acts of either the morning or afternoon of April 10, 2004 established the conduct element of the kidnapping count, and trial court did not issue a specific unanimity instruction to the jury regarding defendant's kidnapping charge, appellate court erred in affirming trial court's kidnapping conviction under this section. 118 H. 493, 193 P.3d 409 (2008).

A specific unanimity (jury) instruction is not required where (1) the offense is not defined in such a manner as to preclude it from being proved as a continuous offense and (2) the prosecution alleges, adduces evidence of, and argues that the defendant's action constituted a continuous course of conduct; thus, a specific unanimity instruction was not required where prosecution alleged a continuous course of conduct with respect to defendant's kidnapping charge under this section, but was required for defendant's attempted first degree sexual assault charge under §707-730. 121 H. 339, 219 P.3d 1126 (2009).

There was overwhelming and compelling evidence tending to show defendant guilty beyond a reasonable doubt of kidnapping, where defendant restrained victim intentionally or knowingly, with intent to inflict bodily injury upon victim or subject victim to a sexual offense or terrorize victim, by, inter alia, striking victim in the face and back of the head several times specifically in response to victim's request to let victim go and victim's attempts to escape. 126 H. 267, 270 P.3d 997 (2011).

There was a rational basis for the jury to find defendant guilty of unlawful imprisonment in the first degree, had the jury been given the appropriate instruction. The failure to instruct the jury on a lesser included offense for which the evidence provided a rational basis warranted vacating defendant's conviction for kidnapping. 131 H. 43, 314 P.3d 120 (2013).

Under §701-109(4)(c), unlawful imprisonment in the first degree is a lesser-included offense of kidnapping because unlawful imprisonment in the first degree involves a less culpable mental state than kidnapping. 131 H. 43, 314 P.3d 120 (2013).

The purpose of allowing a mitigating defense would be undermined by only requiring the State to demonstrate that the victim was suffering from a substantial bodily injury at the time of the victim's release; instead, evidence must have been adduced that demonstrates that the substantial bodily injury was caused during the course of the kidnapping by defendant or by the co-defendant as defendant's accomplice, or both. 131 H. 365, 319 P.3d 284 (2013).

The State was only required to disprove one of the elements of the class B mitigating defense beyond a reasonable doubt to establish that the defendant "failed to fulfill" one element and therefore was not entitled to the defense. Defendant was not entitled to the class B mitigating defense where the jury's responses to the special interrogatories established that the State proved beyond a reasonable doubt facts negativing the first and third elements of the defense. 131 H. 365, 319 P.3d 284 (2013).

No evidence that defendant voluntarily released the victim in a safe place. 6 H. App. 77, 711 P.2d 1303 (1985).

Trial court's jury instruction that "terrorize means the risk of causing another person serious alarm for his or her personal safety" had no basis in Hawaii's criminal statutes, derogated the culpable state of mind required for conviction under subsection (1)(e), and was not harmless error. 98 H. 208 (App.), 46 P.3d 1092 (2002).

A defense under subsection (3) imposed upon the State the burden of proving beyond a reasonable doubt that defendant (a) did not release the victim alive, (b) prior to trial, (c) voluntarily, (d) the victim was not suffering from serious or substantial bodily injury, or (e) did not release the victim in a safe place; if and when the State satisfied its burden of disproving one or more of these five elements, it disproved the defense; failure of the jury instructions to connect "release" and "prior to trial" was harmless beyond a reasonable doubt. 102 H. 346 (App.), 76 P.3d 589 (2003).

Circuit court did not err in convicting defendant of a class A felony under this section where the jury found that when defendant released victim, victim was suffering from serious or substantial bodily harm; a doctor testified that victim's concussion coupled with victim's loss of consciousness of unknown duration created a substantial risk of death. 123 H. 456 (App.), 235 P.3d 1168 (2010).

Other evidence and victim's testimony that defendant drove victim's van from urban Honolulu to Kaneohe provided sufficient evidence to convict defendant of kidnapping under this section. 123 H. 456 (App.), 235 P.3d 1168 (2010).

" **§707-721 Unlawful imprisonment in the first degree.** (1) A person commits the offense of unlawful imprisonment in the first degree if the person knowingly restrains another person under circumstances which expose the person to the risk of serious bodily injury.

(2) Unlawful imprisonment in the first degree is a class C felony. [L 1972, c 9, pt of §1; ree L 1986, c 314, §54; gen ch 1993; am L 2008, c 147, §3]

Case Notes

Double jeopardy clause of Hawaii constitution barred unlawful imprisonment prosecution of defendant who had been found guilty of abuse under §709-906. 75 H. 446, 865 P.2d 150 (1994).

There was a rational basis for the jury to find defendant guilty of unlawful imprisonment in the first degree, had the jury been given the appropriate instruction. The failure to instruct the jury on a lesser included offense for which the evidence provided a rational basis warranted vacating defendant's conviction for kidnapping. 131 H. 43, 314 P.3d 120 (2013).

Under §701-109(4)(c), unlawful imprisonment in the first degree is a lesser-included offense of kidnapping because unlawful imprisonment in the first degree involves a less culpable mental state than kidnapping. 131 H. 43, 314 P.3d 120 (2013).

" **§707-722 Unlawful imprisonment in the second degree.** (1) A person commits the offense of unlawful imprisonment in the second degree if the person knowingly restrains another person.

(2) In any prosecution under this section, it is an affirmative defense that:

(a) The person restrained was less than eighteen years old;

(b) The defendant was a relative of the victim; and

(c) The defendant's sole purpose was to assume custody over the victim.

In that case, the liability of the defendant, if any, is governed by section 707-727, and the defendant may be convicted under section 707-727, although charged under this section.

(3) In any prosecution under this section, it is an affirmative defense that:

(a) The person restrained was:

(i) On or in the immediate vicinity of the premises of a retail mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise;

(ii) Restrained in a reasonable manner and for not more than a reasonable time; and

(iii) Restrained to permit the investigation or questioning by a police officer or by the owner of the retail mercantile establishment, the owner's authorized employee, or the owner's agent; and

(b) The police officer, owner, employee, or agent had reasonable grounds to believe that the person detained was committing or attempting to commit theft of merchandise on the premises.

(4) Unlawful imprisonment in the second degree is a misdemeanor. [L 1972, c 9, pt of §1; am L 1981, c 171, §2; gen ch 1993; am L 2015, c 35, §24]

Case Notes

A specific unanimity jury instruction was not required for offense of second degree unlawful imprisonment under this section where defendant's conduct, as proved by the prosecution, constituted a continuing course of conduct "set on foot by a single impulse and operated by an unintermittent force", with "one general intent ... and one continuous plan". 95 H. 440, 24 P.3d 32 (2001).

COMMENTARY ON §§707-720 TO 707-722

These three offenses are gradations based upon the underlying conduct of interference with a person's liberty. The gradations are based upon the seriousness of the circumstances or purpose attending this interference. The interference with liberty is dealt with under the general definition of "restrain."[1]

Where the restraint is for the purpose of personal gain, or for certain purposes which are themselves unlawful, the offense is termed "kidnapping," and the most severe sanctions apply.[2]

The statutory provision for mitigation, in cases where the victim is released unharmed, is intended (1) to differentiate according to the severity of the actual harm involved, and (2) to encourage the actor to proceed less dangerously once the criminal course of conduct has begun.[3]

Previous Hawaii law defined kidnapping as the forceful, fraudulent, or deceitful imprisonment, seizing, detention, or inveiglement of any person.[4] The difficulty in dealing with such words is immediately apparent. Moreover, the mandatory term of life imprisonment is thought somewhat too harsh to be imposed as a rule. Instances of kidnapping which are so heinous as to call for a sanction commensurate with that for murder will almost necessarily fall under the provisions for extended sentences, whereby the normal sentence for a class A felony may be extended to life imprisonment.[5] The Code's sentence is commensurate with that of the Model Penal Code and with most recent state revisions.[6]

Where the restraint poses a danger of serious injury, or where it involves involuntary servitude, the offense, defined in §707-721, is "unlawful imprisonment in the first degree." This offense is a class C felony, commensurate with 18 U.S.C. §§1581 et seq., which, enacted pursuant to the Thirteenth Amendment, makes it a felony to hold or return a person "to a condition of peonage," or to kidnap, carry away, or hold a person to be "sold into involuntary servitude, or held as a slave."

Unlawful imprisonment in the second degree consists of any knowing restraint of another person. The offense is graded as a misdemeanor, and is commensurate with the common-law offense of false imprisonment: it is also the substantial equivalent of "unlawful imprisonment" under previous Hawaii law.[7] The lawful exercise of custodial powers over a minor is, of course, excluded from the operation of this section.

It must be noted that, in all the above offenses involving interference with personal liberty, the duration of restraint necessary for conviction depends upon the intent and attendant circumstances. In this regard, something like a reasonable standard applies. Hence, a short restraint in an area where the victim might suffocate or come to other bodily harm would constitute a substantial interference with liberty under these sections. However, a short restraint in a store, based on a reasonable suspicion of shoplifting, would not amount to a substantial interference with liberty for the purposes of these offenses.[8]

SUPPLEMENTAL COMMENTARY ON §§707-720 TO 707-722

When the legislature adopted the Code in 1972, it added the affirmative defense now set forth in §707-722(3). It is an attempt to assure that reasonable restraint is allowed for the purpose of apprehending persons suspected of "shoplifting."

The Conference Committee Report of the legislature stated:

> It is the intent of your Committee that "reasonable grounds" includes, but is not limited to, knowledge that a person has concealed possession of unpurchased merchandise of the retail mercantile establishment; that "reasonable time" means the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees, and records of the mercantile establishment relative to the ownership of the merchandise; and that "retail mercantile establishment" means a place where goods, wares, or merchandise are offered to the public for sale. Conference Committee Report No. 2 (1972).

Act 147, Session Laws 2008, amended §707-720(1) by making it a crime of kidnapping to intentionally or knowingly restrain another person with the intent to unlawfully obtain the labor or services of the person, regardless of whether a debt collection is involved. The legislature strengthened the laws on prostitution and related offenses to deter and punish sexual exploitation of minors, including obscenity-related activities. Conference Committee Report No. 38-08.

Act 147, Session Laws 2008, amended §707-721(1) by deleting a reference to involuntary servitude. Conference Committee Report No. 38-08.

Act 35, Session Laws 2015, amended §707-722(2) and (3) by making technical nonsubstantive amendments.

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§§707-720 to 707-722 Commentary:

1. §707-700(5).

2. §707-720.

3. §707-720(3).

4. H.R.S. §749-1.

5. Cf. §§706-661, 662.

6. M.P.C. §212.1; see N.Y.R.P.L. §135.35; Prop. Del. Cr. Code §452; Prop. Mich. Rev. Cr. Code §2210; and Prop. Pa. Cr. Code §1101.

7. H.R.S. §749-2.

8. Cf. §707-700(5).

" **§707-723 REPEALED.** L 1981, c 171, §3.

" **§§707-724 and 707-725 REPEALED.** L 1979, c 106, §§1, 2.

" **§707-726 Custodial interference in the first degree.** (1) A person commits the offense of custodial interference in the first degree if:

(a) The person:

(i) Intentionally or knowingly violates a court order issued pursuant to chapter 586, or intentionally or knowingly takes, entices, conceals, or detains the minor from any other person who has a right to custody pursuant to a court order, judgment, or decree; and

(ii) Removes the minor from the State;

(b) The person intentionally or knowingly takes, entices, conceals, or detains a minor less than eleven years old from that minor's lawful custodian, knowing that the person had no right to do so; or

(c) The person, in the absence of a court order determining custody or visitation rights, intentionally or knowingly takes, detains, conceals, or entices away a minor with the intent to deprive another person or a public agency of their right to custody, and removes the minor from the State.

(2) It is an affirmative defense to a prosecution under this section that the person had "good cause" for the violation of a court order issued pursuant to chapter 586, for the taking, detaining, concealing, or enticing away of the minor, or for removing the minor from the State; provided that the person asserting the affirmative defense filed a report with the clerk of the family court detailing the whereabouts of the minor, the person who took, enticed, detained, concealed, or removed the minor or child, and the circumstances of the event as soon as the filing of the report was practicable; and provided further that the person asserting the affirmative defense also filed a request for a custody order as soon as the filing of the request was practicable.

As used in this section, "good cause" means a good faith and reasonable belief that the taking, detaining, concealing, enticing away, or removing of the minor is necessary to protect the minor from immediate bodily injury.

(3) The identity and address of the person reporting under subsection (2) shall remain confidential unless the information is released pursuant to a court order.

(4) Custodial interference in the first degree is a class C felony. [L 1981, c 171, pt of §1; am L 1982, c 48, §2; am L 1984, c 138, §1; am L 1986, c 314, §55; am L 1994, c 245, §1; am L 1996, c 146, §1]

" **§707-727 Custodial interference in the second degree.** (1) A person commits the offense of custodial interference in the second degree if:

(a) The person intentionally or knowingly takes, entices, conceals, or detains a minor knowing that the person has no right to do so; or

(b) The person intentionally or knowingly takes, entices, conceals, or detains from lawful custody any incompetent person, or other person entrusted by authority of law to the custody of another person or an institution.

(2) Custodial interference in the second degree is a misdemeanor, if the minor or incompetent person is taken, enticed, concealed, or detained within the State. If the minor or incompetent person is taken, enticed, concealed, or detained outside of the State under this section, custodial interference in the second degree is a class C felony. [L 1981, c 171, pt of §1; am L 1994, c 245, §2]

Case Notes

Defendant's assistance to ward of State who had run away from foster home was de minimis infraction under section 702-236. 73 H. 75, 828 P.2d 269 (1992).

COMMENTARY ON §§707-726 AND 707-727

Act 171, Session Laws 1981, repealed §707-723, relating to custodial interference, a misdemeanor, and enacted §§707-726 and 707-727 to recognize two degrees of custodial interference--in the first degree and in the second degree--and to make first degree custodial interference a felony. A primary reason for creating the felony offense was to enable the State to utilize its power of extradition and to seek federal assistance under the Parental Kidnapping Prevention Act of 1980 (P.L. 96-611). Senate Standing Committee Report No. 792, House Standing Committee Report No. 613. Section 707-727 retains most of the language of repealed §707-723 and reclassifies the offense as custodial interference in the second degree.

Act 48, Session Laws 1982, amended §707-726 by making the violation of an ex parte temporary restraining order, formerly treated as a misdemeanor, a class C felony. This amendment will provide for punishment commensurate with the violation and allow for the utilization of interstate and federal law enforcement agencies to assist in the return of the absent person.

Act 314, Session Laws 1986, amended §707-726 by creating a new class C felony for any person who knowingly takes or entices another person less than eleven years old from that person's lawful custodian, if that taking was with the knowledge that the actor had no right to do so. Conference Committee Report No. 51-86.

Act 245, Session Laws 1994, amended §707-726 to make it an offense to intentionally or knowingly violate a court order or take, entice, conceal, or detain a minor or child. Act 245 amended §707-727 to make it an offense to intentionally or knowingly take, entice, conceal, or detain a minor or incompetent person, and created a class C felony for custodial interference in the second degree if the minor or incompetent person is taken, enticed, concealed, or detained outside of the State. The amendments to the sections were made to include penalties and language necessary to trigger the assistance of federal authorities. Conference Committee Report No. 26.

Act 146, Session Laws 1996, amended §707-726 by broadening the offense of custodial interference in the first degree to include the abduction and removal of a child from the State by any person in violation of a court order or before a court order is issued. Under current law, if there is no court order determining custody, a parent who interferes with another parent's right to custody does not commit custodial interference. When a parent takes a child out-of-state, law enforcement is unable to commence an investigation until after a court order determining the child's custody has been made. Current law thus delays the search for the child taken out-of-state. Act 146 also expanded the definition of the person acting. The legislature found that parents and relatives who want to gain physical custody of a child through self-help will seek the assistance of any willing person. The Act also defined "good cause" and made "good cause" an affirmative defense to a prosecution for custodial interference in the first degree. Senate Standing Committee Report No. 2029, House Standing Committee Report No. 1239-96, Conference Committee Report No. 74.

"PART V. SEXUAL OFFENSES

Law Journals and Reviews

Rape and Child Sexual Assault: Dispelling the Myths. 14 UH L. Rev. 157 (1992).

§§707-730 to 707-738 [OLD] REPEALED. L 1986, c 314, §56.

§707-730 Sexual assault in the first degree. (1) A person commits the offense of sexual assault in the first degree if:

(a) The person knowingly subjects another person to an act of sexual penetration by strong compulsion;

(b) The person knowingly engages in sexual penetration with another person who is less than fourteen years old;

(c) The person knowingly engages in sexual penetration with a person who is at least fourteen years old but less than sixteen years old; provided that:

(i) The person is not less than five years older than the minor; and

(ii) The person is not legally married to the minor;

(d) The person knowingly subjects to sexual penetration another person who is mentally defective; or

(e) The person knowingly subjects to sexual penetration another person who is mentally incapacitated or physically helpless as a result of the influence of a substance that the actor knowingly caused to be administered to the other person without the other person's consent.

Paragraphs (b) and (c) shall not be construed to prohibit practitioners licensed under chapter 453 or 455 from performing any act within their respective practices.

(2) Sexual assault in the first degree is a class A felony. [L 1986, c 314, pt of §57; am L 1987, c 181, §9; am L Sp 2001 2d, c 1, §§1, 7; am L 2002, c 36, §3; am L 2003, c 62, §1; am L 2004, c 10, §15; am L 2006, c 230, §32; am L 2009, c 11, §72]

Cross References

Testing of charged or convicted person for human immunodeficiency virus status, see §325-16.5.

Case Notes

Defendant's right to a fair trial was violated where counselor of victim-witness was allowed to place hands upon victim's

shoulders while victim was testifying. 70 H. 472, 777 P.2d 240 (1989).

Trial court did not commit plain error when it gave a single instruction encompassing two counts of sexual assault in first degree; a consent instruction may be given separately and need not be included as an element of sexual assault. 75 H. 152, 857 P.2d 579 (1993).

Sexual assault in the first degree, in violation of subsection (1)(b), is not, and cannot be, a "continuing offense"; each distinct act in violation of this statute constitutes a separate offense under the Hawaii Penal Code. 84 H. 1, 928 P.2d 843 (1996).

As a precondition to convicting a person of first degree sexual assault, in violation of subsection (1)(b), the prosecution must prove beyond a reasonable doubt that the person committed an act of "any penetration, however slight", as mandated by the plain language of the definition of "sexual penetration" contained in §707-700. 102 H. 391, 76 P.3d 943 (2003).

A specific unanimity (jury) instruction is not required where (1) the offense is not defined in such a manner as to preclude it from being proved as a continuous offense and (2) the prosecution alleges, adduces evidence of, and argues that the defendant's action constituted a continuous course of conduct; thus, a specific unanimity instruction was not required where prosecution alleged a continuous course of conduct with respect to defendant's kidnapping charge under §707-720, but was required for defendant's attempted first degree sexual assault charge under this section. 121 H. 339, 219 P.3d 1126 (2009).

Circuit court did not err in instructing the jury on the lesser included offense of sexual assault in the third degree where, although testimony indicated that there were incidents of sexual penetration between complainant and defendant, which would support a conviction for sexual assault in the first degree, a rational juror could have inferred that there was "sexual contact" prior to the penetration, i.e., that there was "touching" of "the sexual or other intimate parts" of complainant, such as complainant's genitalia, buttocks, or other intimate parts, or that complainant touched defendant's "sexual or other intimate parts". 124 H. 90, 237 P.3d 1156 (2010).

There was overwhelming evidence tending to show defendant guilty beyond a reasonable doubt of two counts of sexual assault in the first degree, where defendant subjected victim to acts of sexual penetration by inserting defendant's penis into victim's mouth and genital openings, respectively, by strong compulsion, and did so knowingly as to each element of the offense. 126 H. 267, 270 P.3d 997 (2011).

Where victim testified that defendant sexually assaulted victim in each of the four ways alleged, which was supported by testimony of victim's brother and uncle, evidence was sufficient to prove that defendant intentionally engaged in conduct under the circumstances that defendant believed them to be, the conduct constituted a substantial step in the course of conduct, and defendant intended that the course of conduct culminate in sexual penetration with victim, thus supporting defendant's convictions. 126 H. 383, 271 P.3d 1142 (2012).

Trial court must instruct jury as to what specific facts jury must find before it decides whether defendant is guilty of attempted sexual assault in first degree. 77 H. 177 (App.), 880 P.2d 1224 (1994).

Placement of the elemental attendant circumstances after the state of mind in the enumerated elements instruction was not error; when read and considered as a whole, the instructions adequately informed the jury of the prosecution's burden to prove that complainant did not consent to the acts alleged and was not married to defendant at the time, and that defendant was aware of both circumstances when defendant acted. 97 H. 140 (App.), 34 P.3d 1039 (2000).

Where there was no evidence, independent of defendant's extrajudicial confession, of the corpus delicti of attempted sexual assault of victim by defendant, defendant's conviction reversed. 103 H. 490 (App.), 83 P.3d 753 (2003).

Although criminal sanctions are clearly directed only at adult conduct under subsection (1)(b) and §707-732(1)(b), there is no legislative history that supports a conclusion that only adults were intended to be prohibited from the proscribed sexual conduct; when the legislature amended subsection (1) and §707-732(1) in 2001, and could have, but did not include language allowing consensual sexual conduct between, for example, two thirteen year olds, the legislative intent was to maintain the existing prohibitions against such conduct. 121 H. 92 (App.), 214 P.3d 1082 (2009).

Section 707-732(1)(b) and subsection (1)(b), as applied to private consensual acts between two persons, including minors, did not violate minor's right to privacy as the State has at least a significant interest in regulating the sexual activities of children under the age of fourteen; in addition, there is no fundamental personal privacy right for minors under the age of fourteen to engage in sexual activities with other children under the age of fourteen; this applies to young boys, as well as to young girls, and is not strictly dependent on an age differential between the children. 121 H. 92 (App.), 214 P.3d 1082 (2009).

State's exercise of prosecutorial discretion in the case was not constitutionally infirm where defendant failed to meet the burden of demonstrating that defendant was prosecuted based on an arbitrary classification; defendant was prosecuted under §707-732 and this section based on allegations that defendant was significantly older than child #1, had initiated the prohibited sexual activities with child #1 and child #2, and had engaged in multiple instances of prohibited sexual contact with more than one child. 121 H. 92 (App.), 214 P.3d 1082 (2009).

" **§707-731 Sexual assault in the second degree.** (1) A person commits the offense of sexual assault in the second degree if:

(a) The person knowingly subjects another person to an act of sexual penetration by compulsion;

(b) The person knowingly subjects to sexual penetration another person who is mentally incapacitated or physically helpless;

(c) The person, while employed:

(i) In a state correctional facility;

(ii) By a private company providing services at a correctional facility;

(iii) By a private company providing community-based residential services to persons committed to the director of public safety and having received notice of this statute;

(iv) By a private correctional facility operating in the State of Hawaii; or

(v) As a law enforcement officer as defined in section 710-1000,

knowingly subjects to sexual penetration an imprisoned person, a person confined to a detention facility, a person committed to the director of public safety, a person residing in a private correctional facility operating in the State of Hawaii, or a person in custody; provided that paragraph (b) and this paragraph shall not be construed to prohibit practitioners licensed under chapter 453 or 455 from performing any act within their respective practices; and further provided that this paragraph shall not be construed to prohibit a law enforcement officer from performing a lawful search pursuant to a warrant or exception to the warrant clause; or

(d) The person knowingly subjects to sexual penetration a minor who is at least sixteen years old and the person is contemporaneously acting in a professional capacity

to instruct, advise, or supervise the minor; provided that:

(i) The person is not less than five years older than the minor; and

(ii) The person is not legally married to the minor.

(2) Sexual assault in the second degree is a class B felony. [L 1986, c 314, pt of §57; am L 1987, c 181, §10; am L 1997, c 366, §1; am L 2002, c 36, §1; am L 2004, c 61, §4; am L 2006, c 230, §33; am L 2009, c 11, §73; am L 2016, c 153, §1]

Case Notes

Because sexual assault in the fourth degree in violation of §707-733(1)(a) and attempted sexual assault in the fourth degree in violation of §§705-500 and 707-733(1)(a) are included offenses of charged offense of attempted sexual assault in the second degree in violation of §§705-500 and 707-731(1)(a), circuit court erred in refusing, over appellant's objection, to instruct jury with respect to them. 79 H. 46, 897 P.2d 973 (1995).

Evidence sufficient to establish absence of consent and thus sufficient to establish element of "compulsion". 81 H. 39, 912 P.2d 71 (1996).

State must prove beyond a reasonable doubt that complainant was mentally defective, mentally incapacitated, or physically helpless and defendant was aware that complainant was such a person. 81 H. 447 (App.), 918 P.2d 254 (1996).

An imprisoned person's consent to "sexual penetration" by an employee of a state correctional facility is ineffective and thus is not a defense to a charge brought under subsection (1)(c). 86 H. 426 (App.), 949 P.2d 1047 (1997).

Subsection (1)(c) not unconstitutionally vague. 86 H. 426 (App.), 949 P.2d 1047 (1997).

" **§707-732 Sexual assault in the third degree.** (1) A person commits the offense of sexual assault in the third degree if:

(a) The person recklessly subjects another person to an act of sexual penetration by compulsion;

(b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person;

(c) The person knowingly engages in sexual contact with a person who is at least fourteen years old but less than sixteen years old or causes the minor to have sexual contact with the person; provided that:

(i) The person is not less than five years older than the minor; and

(ii) The person is not legally married to the minor;

(d) The person knowingly subjects to sexual contact another person who is mentally defective, mentally incapacitated, or physically helpless, or causes such a person to have sexual contact with the actor;

(e) The person, while employed:

(i) In a state correctional facility;

(ii) By a private company providing services at a correctional facility;

(iii) By a private company providing community-based residential services to persons committed to the director of public safety and having received notice of this statute;

(iv) By a private correctional facility operating in the State of Hawaii; or

(v) As a law enforcement officer as defined in section [710-1000],

knowingly subjects to sexual contact an imprisoned person, a person confined to a detention facility, a person committed to the director of public safety, a person residing in a private correctional facility operating in the State of Hawaii, or a person in custody, or causes the person to have sexual contact with the actor; or

(f) The person knowingly, by strong compulsion, has sexual contact with another person or causes another person to have sexual contact with the actor.

Paragraphs (b), (c), (d), and (e) shall not be construed to prohibit practitioners licensed under chapter 453 or 455 from performing any act within their respective practices; provided further that paragraph (e)(v) shall not be construed to prohibit a law enforcement officer from performing a lawful search pursuant to a warrant or an exception to the warrant clause.

(2) Sexual assault in the third degree is a class C felony. [L 1986, c 314, pt of §57; am L 1987, c 181, §11; am L Sp 2001 2d, c 1, §§2, 7; am L 2002, c 36, §§2, 3; am L 2003, c 62, §1; am L 2004, c 10, §15 and c 61, §5; am L 2009, c 11, §74]

Case Notes

Sexual assault in the fourth degree under §707-733(1)(a) not an included offense of sexual assault in the third degree under subsection (1)(b) as defined by §701-109(4). 83 H. 308, 926 P.2d 599 (1996).

Where age of victim is element of sexual offense, the specified state of mind is not intended to apply to that element; defendant thus strictly liable with respect to attendant circumstance of victim's age in a sexual assault. 83 H. 308, 926 P.2d 599 (1996).

Sexual assault in the third degree, in violation of subsection (1)(b), is not, and cannot be, a "continuing offense"; each distinct act in violation of this statute constitutes a separate offense under the Hawaii Penal Code. 84 H. 1, 928 P.2d 843 (1996).

Circuit court did not err in instructing the jury on the lesser included offense of sexual assault in the third degree where, although testimony indicated that there were incidents of sexual penetration between complainant and defendant, which would support a conviction for sexual assault in the first degree, a rational juror could have inferred that there was "sexual contact" prior to the penetration, i.e., that there was "touching" of "the sexual or other intimate parts" of complainant, such as complainant's genitalia, buttocks, or other intimate parts, or that complainant touched defendant's "sexual or other intimate parts". 124 H. 90, 237 P.3d 1156 (2010).

Insufficient evidence existed in the record to support defendant's conviction of sexual assault in the third degree under subsection (1)(b) where defendant's conduct of tossing minor back and forth between defendant and minor's father in the pool occurred "a day or two before" the massage and the subsequent massage did not turn defendant's conduct in the pool into a criminal offense. 125 H. 1, 249 P.3d 1141 (2011).

Substantial evidence existed in the record to support defendant's conviction of sexual assault in the third degree under subsection (1)(b) where minor's testimony that defendant touched minor's buttocks during the late night massage constituted the touching of an "intimate part" of minor's body and was credible evidence of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion that defendant knowingly subjected minor, who was eleven years old at the time, to sexual contact. 125 H. 1, 249 P.3d 1141 (2011).

There was overwhelming and compelling evidence tending to show defendant guilty beyond a reasonable doubt of two counts of sexual assault in the third degree, where defendant subjected victim to sexual contact by placing defendant's hand and mouth on victim's breast, respectively, by strong compulsion, and did so knowingly as to each element of the offense. 126 H. 267, 270 P.3d 997 (2011).

"Mentally defective". 5 H. App. 659, 706 P.2d 1333 (1985).

Based on §701-109(4)(a), fourth degree sexual assault under §707-733(1)(a) is a lesser included offense of third degree sexual assault under subsection (1)(e). 85 H. 92 (App.), 937 P.2d 933 (1997).

Third degree sexual assault committed in violation of subsection (1)(e) not a continuous offense; defendant's convictions of five counts of that offense, each based on a separate sexual contact thus did not violate §701-109(1)(e). 85 H. 92 (App.), 937 P.2d 933 (1997).

Placement of the elemental attendant circumstances after the state of mind in the enumerated elements instruction was not error; when read and considered as a whole, the instructions adequately informed the jury of the prosecution's burden to prove that complainant did not consent to the acts alleged and was not married to defendant at the time, and that defendant was aware of both circumstances when defendant acted. 97 H. 140 (App.), 34 P.3d 1039 (2000).

Although criminal sanctions are clearly directed only at adult conduct under subsection (1)(b) and §707-730(1)(b), there is no legislative history that supports a conclusion that only adults were intended to be prohibited from the proscribed sexual conduct; when the legislature amended subsection (1) and §707-730(1) in 2001, and could have, but did not include language allowing consensual sexual conduct between, for example, two thirteen year olds, the legislative intent was to maintain the existing prohibitions against such conduct. 121 H. 92 (App.), 214 P.3d 1082 (2009).

Section 707-730(1)(b) and subsection (1)(b), as applied to private consensual acts between two persons, including minors, did not violate minor's right to privacy as the State has at least a significant interest in regulating the sexual activities of children under the age of fourteen; in addition, there is no fundamental personal privacy right for minors under the age of fourteen to engage in sexual activities with other children under the age of fourteen; this applies to young boys, as well as to young girls, and is not strictly dependent on an age differential between the children. 121 H. 92 (App.), 214 P.3d 1082 (2009).

State's exercise of prosecutorial discretion in the case was not constitutionally infirm where defendant failed to meet the burden of demonstrating that defendant was prosecuted based on an arbitrary classification; defendant was prosecuted under §707-730 and this section based on allegations that defendant was significantly older than child #1, had initiated the prohibited sexual activities with child #1 and child #2, and had engaged in multiple instances of prohibited sexual contact with more than one child. 121 H. 92 (App.), 214 P.3d 1082 (2009).

" **§707-733 Sexual assault in the fourth degree.** (1) A person commits the offense of sexual assault in the fourth degree if:

(a) The person knowingly subjects another person, not married to the actor, to sexual contact by compulsion or causes another person, not married to the actor, to have sexual contact with the actor by compulsion;

(b) The person knowingly exposes the person's genitals to another person under circumstances in which the actor's conduct is likely to alarm the other person or put the other person in fear of bodily injury;

(c) The person knowingly trespasses on property for the purpose of subjecting another person to surreptitious surveillance for the sexual gratification of the actor; or

(d) The person knowingly engages in or causes sexual contact with a minor who is at least sixteen years old and the person is contemporaneously acting in a professional capacity to instruct, advise, or supervise the minor; provided that:

(i) The person is not less than five years older than the minor; and

(ii) The person is not legally married to the minor.

(2) Sexual assault in the fourth degree is a misdemeanor.

(3) Whenever a court sentences a defendant for an offense under this section, the court may order the defendant to submit to a pre-sentence mental and medical examination pursuant to section 706-603. [L 1986, c 314, pt of §57; am L 1991, c 214, §1; am L 2016, c 153, §2 and c 231, §34]

COMMENTARY ON §§707-730 TO 707-734

Act 153, Session Laws 2016, amended §707-731 to include within the offense of sexual assault in the second degree a person who knowingly subjects to sexual penetration a minor at least sixteen years of age if the person is contemporaneously acting in a professional capacity to instruct, advise, or supervise the minor, with certain exceptions. The legislature found that sexual relations between a person who is younger than sixteen years, the age of consent, and a person who is not less than five years older was a crime even if the younger person consents. However, once a minor attains sixteen years of age, consensual sexual activity was not a crime and the minor was not protected from adults who abuse the power of their position to obtain consent. House Standing Committee Report No. 280-16, Senate Standing Committee Report No. 3309.

Act 153, Session Laws 2016, amended §707-733 to include within the offense of sexual assault in the fourth degree a person who knowingly engages in or causes sexual contact with a minor who is at least sixteen years old but less than eighteen years old if the person is contemporaneously acting in a professional capacity to instruct, advise, or supervise the minor, with certain exceptions. The legislature found that sexual relations between a person who is younger than sixteen years, the age of consent, and a person who is not less than five years older was a crime even if the younger person consents. However, once a minor attains sixteen years of age, consensual sexual activity was not a crime and the minor was not protected from adults who abuse the power of their position to obtain consent. House Standing Committee Report No. 280-16, Senate Standing Committee Report No. 3309.

Act 231, Session Laws 2016, amended §707-733(1) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Case Notes

Defendant's right to a fair trial was violated where counselor of victim-witness was allowed to place hands upon victim's shoulders while victim was testifying. 70 H. 472, 777 P.2d 240 (1989).

Sexual assault in the fourth degree and attempted sexual assault in the fourth degree are included offenses of attempted sexual assault in the second degree, within the meaning of §701-109(4)(c). 79 H. 46, 897 P.2d 973 (1995).

Evidence sufficient to establish absence of consent and thus sufficient to establish element of "compulsion". 81 H. 39, 912 P.2d 71 (1996).

Sexual assault in the fourth degree under subsection (1)(a) not an included offense of sexual assault in the third degree under §707-732(1)(b) as defined by §701-109(4). 83 H. 308, 926 P.2d 599 (1996).

Based on §701-109(4)(a), fourth degree sexual assault under subsection (1)(a) is a lesser included offense of third degree sexual assault under §707-732(1)(e). 85 H. 92 (App.), 937 P.2d 933 (1997).

" **§707-733.5 REPEALED.** L 2006, c 60, §6.

" **[§707-733.6] Continuous sexual assault of a minor under the age of fourteen years.** (1) A person commits the offense of continuous sexual assault of a minor under the age of fourteen years if the person:

(a) Either resides in the same home with a minor under the age of fourteen years or has recurring access to the minor; and

(b) Engages in three or more acts of sexual penetration or sexual contact with the minor over a period of time, while the minor is under the age of fourteen years.

(2) To convict under this section, the trier of fact, if a jury, need unanimously agree only that the requisite number of acts have occurred; the jury need not agree on which acts constitute the requisite number.

(3) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section, unless the other charged offense occurred outside the period of the offense charged under this section, or the other offense is charged in the alternative. A defendant may be charged with only one count under this section, unless more than one victim is involved, in which case a separate count may be charged for each victim.

(4) Continuous sexual assault of a minor under the age of fourteen years is a class A felony. [L 2006, c 60, §1]

" **§707-734 Indecent exposure.** (1) A person commits the offense of indecent exposure if, the person intentionally exposes the person's genitals to a person to whom the person is not married under circumstances in which the actor's conduct is likely to cause affront.

(2) Indecent exposure is a petty misdemeanor. [L 1986, c 314, pt of §57; am L 1991, c 214, §2]

Case Notes

Defendant did not act intentionally under circumstances likely to cause affront by exposing defendant's genitals to a fellow sunbather where, since other sunbather was also nude, there was no logical or rational basis for concluding that defendant intended to cause affront to other sunbather. 94 H. 60, 8 P.3d 1224 (2000).

Indecent exposure, in violation of this section, does not constitute an offense that entails "criminal sexual conduct" and, consequently, persons convicted of indecent exposure are not "sex offenders" for purposes of chapter 846E; thus, defendant was not required to register as a "sex offender" pursuant to chapter 846E. 102 H. 383, 76 P.3d 935 (2003).

No double jeopardy for convictions under this section and §712-1217. 8 H. App. 535, 813 P.2d 335 (1991).

COMMENTARY ON §§707-730 TO 707-734

Act 314, Session Laws 1986, incorporated all of the sexual offenses into five degrees of sexual assault. These new crimes comprise a graduated series of offenses from a class A felony to a petty misdemeanor, providing punishment reflecting the seriousness of the offense committed. As a result of the changes the "voluntary social companion" distinction no longer exists between what was first and second degree rape and sodomy. Conference Committee Report No. 51-86.

Act 214, Session Laws 1991, amended §707-733 by providing that a person commits fourth degree sexual assault if that person knowingly trespasses on property for the purpose of surreptitious surveillance. This will avoid prosecuting innocent passersby and distinguishes this offense from simple trespass. Conference Committee Report No. 44.

Act 214, Session Laws 1991, renamed §707-734 from sexual assault in the fifth degree to indecent exposure which is intended to deal with behavior such as nude sunbathing or streaking, which is likely to be an affront to a substantial part of the community. Senate Committee Report No. 1000.

Act 366, Session Laws 1997, amended §707-731 to extend the existing prohibition of sexual penetration of a prisoner by a corrections officer to a general prohibition of sexual penetration of any arrested or detained person by a law enforcement officer. The legislature found that under current law, adult corrections officers are held to a higher standard of conduct in relation to their prisoners than police officers. The legislature further found that existing law recognized that a person in custody was in no position to consent to an act of sexual penetration by those incarcerating them. Thus, the legislature believed that the policy of preventing coercion by correctional officers for sexual favors from inmates and to prevent inmates from using sex to extort favors from correctional officers should be extended to all law enforcement officers. Senate Standing Committee Report No. 767, House Standing Committee Report No. 1217.

Act 379, Session Laws 1997, added §707-733.5, creating a new class A felony offense known as continuous sexual assault of a minor under the age of fourteen years, which provides specific circumstances under which sexual assault of a minor under the age of fourteen years is deemed a continuing offense. The legislature found that public safety demanded immediate action against sex offenders who prey on children by taking advantage of their relationship of trust with respect to the minor. According to statistics, sexual assault against minors is an offense in which an overwhelming majority of minor victims knew their perpetrator. The legislature further found that these

types of cases are often difficult to prosecute given that molesters who reside in the same household with children sexually abuse their victim over an extended period of time. The child often has difficulty remembering or identifying the specific dates on which the child was molested and may even repress the memory of events. Senate Standing Committee Report No. 1594, Conference Committee Report No. 28. [Act 60, Session Laws 2006, repealed §707-733.5 and added §707-733.6, which reenacted the provisions defining the crime of continuous sexual assault of a minor under the age of fourteen years, to reverse the effect of State v. Rabago, 103 Haw. 236 (2003). In State v. Rabago, the Hawaii supreme court stated that it was the province of the supreme court, and not the legislature, to ascertain whether, for purposes of §707-733.5, multiple acts of sexual penetration or sexual contact may be deemed a "continuing offense." Act 60, Session Laws 2006, took effect upon the ratification of a constitutional amendment authorizing the legislature to define what behavior constitutes a continuing course of conduct in sexual assault crimes committed against minors under the age of fourteen (SB 2246 (2006); codified at article I, §25 of the state constitution). See also Commentary for Act 60, Session Laws 2006, enacting §707-733.6.]

Act 1, Second Special Session Laws 2001, amended §§707-730 and 707-732 to require, for the offenses of sexual assault in the first degree and sexual assault in the third degree, that the minor be at least fourteen years old but less than sixteen years old, and the defendant be at least five years older than the minor and not married to the minor. The legislature found that, in many cases, minors lacked the capacity to understand the responsibilities and ramifications of engaging in a sexual relationship with adults. Current law allowed adults to enter into consensual sexual relationships with minors as young as fourteen years old without penalty. The legislature believed that these minors were unfairly burdened with the presumption of knowing the consequences of engaging in sexual relations with an adult, and that the Act would protect Hawaii's children from harmful sexual relationships with adults. Conference Committee Report No. 66, Senate Standing Committee Report No. 1394.

Act 36, Session Laws 2002, amended §§707-731 and 707-732 to prohibit private company employees at correctional facilities or in other residential services under the director of public safety from knowingly subjecting imprisoned persons to sexual contact or sexual penetration. The legislature found inmates particularly vulnerable to sexual assaults from employees at correctional facilities. Private employees associated with the prison system were in the same position of authority as state employees over the inmates they supervised.

The legislature found that although current state law prohibited sexual assaults against inmates in Hawaii correctional facilities, no reference was made to correctional facilities operated by private companies. The legislature further found that the law could be construed to exclude acts by employees of private companies working in state correctional facilities. Act 36 addressed this "loophole" in the law by ensuring that sexual offenses committed by any correctional facility employee against inmates were prohibited, regardless of the employer's status as a public or private facility. House Standing Committee Report No. 696-02, Senate Standing Committee Report No. 3162.

Act 62, Session Laws 2003, amended §§707-730 and 707-732 by removing the sunset provision of Act 1, Second Special Session Laws 2001, which raised the age at which a person can consent to sexual contact from fourteen to sixteen years of age in most cases. Act 62 made permanent the provisions that raised the age of consent to sixteen in most cases. House Standing Committee Report No. 568.

Act 10, Session Laws 2004, amended §§707-730 and 707-732 by amending Act 62, Session Laws 2003, to include the amendment to §707-732 by Act 36, Session Laws 2002. Sections 707-730 and 707-732 were amended by Act 1, Second Special Session Laws 2001, subject to repeal and reenactment on June 30, 2003. Act 36, Session Laws 2002, amended the repeal and reenactment provisions of Act 1, Second Special Session Laws 2001, to exempt Act 36's amendment of §707-732 from the repeal and reenactment. Act 62, Session Laws 2003, deleted the repeal and reenactment provision by amending Act 1, Second Special Session Laws 2001, but not Act 36, Session Laws 2002. House Standing Committee Report No. 1015-4.

Act 61, Session Laws 2004, amended §§707-731 and 707-732 by including as a victim of sexual assault in the second degree, a person committed to the director of public safety and knowingly subjected to sexual penetration, and by amending the offense of sexual assault in the third degree to include law enforcement officers who knowingly subject to sexual contact a person confined to a detention facility or in custody. The Act created uniformity between the offenses of sexual assault in the second degree and in the third degree.

Act 61 also corrected an error in §707-732. The purpose of the 2002 amendment to §§707-731 and 707-732 was to include employees of private companies in correctional facilities in sexual offense statutes that prohibit sexual contact and penetration with imprisoned persons or persons confined in a detention facility. However, the 2002 amendment inadvertently excluded state-employed law enforcement officers and only

prohibited private company employees from committing the acts. Act 61 corrected the mistake by including state-employed law enforcement officers and clarified language regarding what does and does not constitute an offense. Conference Committee Report No. 35-04, Senate Standing Committee Report No. 3121.

Act 60, Session Laws 2006, added §707-733.6, reenacting provisions that define the behavior that constitutes the crime of continuous sexual assault of a minor under the age of fourteen years and the unanimity required to convict a person of the crime. Act 60, along with the proposed constitutional amendment in Senate Bill 2246, was intended to reverse the effect of State v. Rabago, 103 Haw. 236 (2003). Under the current law, it is difficult to prosecute persons who repeatedly sexually assault young children because of the difficulty the children have in remembering the individual dates on which they were sexually assaulted. Act 60 permitted the conviction of a person of the continuous sexual assault of a child, if each member of the jury was convinced beyond a reasonable doubt that the defendant had sexually assaulted the child the required minimum number of times, even without unanimity as to the individual assaults, thus making it easier to prosecute those who repeatedly sexually assault children. Senate Standing Committee Report No. 3010, House Standing Committee Report No. 150-06.

Act 230, Session Laws 2006, amended §707-730(1) by adding [the offense of knowingly subjecting to sexual penetration another person who is mentally defective and] the offense of date rape as sexual assault in the first degree. House Standing Committee Report No. 665-06.

Act 230, Session Laws 2006, amended §707-731(1) by deleting the offense of knowingly subjecting to sexual penetration another person who is mentally defective as sexual assault in the second degree to conform to the amendment made in §707-730(1) by the Act.

Act 11, Session Laws 2009, amended §§707-730(1), 707-731(1), and 707-732(1), by deleting references to chapter 460, relating to osteopathy, which was repealed by Act 5, Session Laws 2008. Senate Standing Committee Report No. 49.

" **§707-739 REPEALED.** L 1975, c 163, §5.

" **§707-740 REPEALED.** L 1981, c 213, §8.

" **§707-741 Incest.** (1) A person commits the offense of incest if the person commits an act of sexual penetration with another who is within the degrees of consanguinity or affinity within which marriage is prohibited.

(2) Incest is a class C felony. [L 1972, c 9, pt of §1; am L 1987, c 176, §1; gen ch 1992]

Cross References

Degrees of consanguinity or affinity within which marriage is prohibited, see §572-1(1).

COMMENTARY ON §707-741

The Proposed Draft had recommended the deletion of incest as a crime. The legislature, however, decided to retain the offense and found "that sexual intercourse with another who is within the degrees of consanguinity or affinity within which marriage is prohibited by HRS §572-1 should be prohibited for the reason such marriages are prohibited." Conference Committee Report No. 2 (1972).

ADDITIONAL COMMENT

The Proposed Draft had suggested a provision (§741 of the Proposed Draft) that no person shall be convicted of a felony upon the uncorroborated testimony of the alleged victim. The legislature rejected this concept, however, since it felt that there is little probability of corroborating evidence in the cases listed in part V. The legislature felt that the corroborating evidence requirement would prevent effective enforcement of the acts prohibited under this part. Conference Committee Report No. 2 (1972).

Case Notes

Incest is a general intent crime. 66 H. 281, 660 P.2d 522 (1983).

" **§707-742 REPEALED.** L 1980, c 164, §13.

Cross References

For similar provisions, see §626-1, rule 412.

" **§707-743 REPEALED.** L 1997, c 316, §4.

Cross References

For present provisions, see chapter 846E.

"[PART VI. CHILD ABUSE]

Cross References

Internet crimes against children, see chapter 846F.

§707-750 Promoting child abuse in the first degree. (1) A person commits the offense of promoting child abuse in the first degree if, knowing or having reason to know its character and content, the person:

(a) Produces or participates in the preparation of child pornography;

(b) Produces or participates in the preparation of pornographic material that employs, uses, or otherwise contains a minor engaging in or assisting others to engage in sexual conduct; or

(c) Engages in a pornographic performance that employs, uses, or otherwise contains a minor engaging in or assisting others to engage in sexual conduct.

(2) As used in this section:

"Child pornography" means any pornographic visual representation, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexual conduct, if:

(a) The pornographic production of such visual representation involves the use of a minor engaging in sexual conduct; or

(b) The pornographic visual representation has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct.

"Community standards" means the standards of the State.

"Computer" shall have the same meaning as in section 708-890.

"Lascivious" means tending to incite lust, to deprave the morals in respect to sexual relations, or to produce voluptuous or lewd emotions in the average person, applying contemporary community standards.

"Material" means any printed matter, visual representation, or sound recording and includes, but is not limited to, books, magazines, motion picture films, pamphlets, newspapers, pictures, photographs, and tape or wire recordings.

"Minor" means any person less than eighteen years old.

"Performance" means any play, motion picture film, dance, or other exhibition performed before any audience.

"Pornographic" shall have the same meaning as in section 712-1210.

"Produces" means to produce, direct, manufacture, issue, publish, or advertise.

"Sadomasochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

"Sexual conduct" means actual or simulated sexual intercourse, including genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact, whether between persons of the same or opposite sex, masturbation, bestiality, sexual penetration, deviate sexual intercourse, sadomasochistic abuse, or lascivious exhibition of the genital or pubic area of a minor.

"Visual representation" refers to, but is not limited to, undeveloped film and videotape and data stored on computer disk or by electronic means that are capable of conversion into a visual image.

(3) The fact that a person engaged in the conduct specified by this section is prima facie evidence that the person engaged in that conduct with knowledge of the character and content of the material or the performance produced, directed, or participated in. The fact that the person who was employed, used, or otherwise contained in the pornographic material or performance, was at that time, a minor, is prima facie evidence that the defendant knew the person to be a minor.

(4) Promoting child abuse in the first degree is a class A felony. [L 1978, c 214, §1; am L 1982, c 218, §1; am L 1986, c 314, §58; am L 1988, c 91, §1; am L 1997, c 363, §1; am L 2002, c 200, §2; am L 2016, c 16, §1]

" **§707-751 Promoting child abuse in the second degree.** (1) A person commits the offense of promoting child abuse in the second degree if, knowing or having reason to know its character and content, the person:

(a) Disseminates child pornography;

(b) Reproduces child pornography with intent to disseminate;

(c) Disseminates any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography;

(d) Disseminates any pornographic material which employs, uses, or otherwise contains a minor engaging in or assisting others to engage in sexual conduct; or

(e) Possesses thirty or more images of any form of child pornography, and the content of at least one image contains one or more of the following:

(i) A minor who is younger than the age of twelve;

(ii) Sadomasochistic abuse of a minor; or

(iii) Bestiality involving a minor.

(2) As used in this section:

"Child pornography" means any pornographic visual representation, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexual conduct, if:

(a) The pornographic production of such visual representation involves the use of a minor engaging in sexual conduct; or

(b) The pornographic visual representation has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct.

"Community standards" means the standards of the State.

"Computer" shall have the same meaning as in section 708-890.

"Disseminate" means to publish, sell, distribute, transmit, exhibit, present material, mail, ship, or transport by any means, including by computer, or to offer or agree to do the same.

"Lascivious" means tending to incite lust, to deprave the morals in respect to sexual relations, or to produce voluptuous or lewd emotions in the average person, applying contemporary community standards.

"Material" means any printed matter, visual representation, or sound recording and includes, but is not limited to, books, magazines, motion picture films, pamphlets, newspapers, pictures, photographs, and tape or wire recordings.

"Minor" means any person less than eighteen years old.

"Pornographic" shall have the same meaning as in section 712-1210.

"Sadomasochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

"Sexual conduct" means actual or simulated sexual intercourse, including genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact, whether between persons of the same or opposite sex, masturbation, bestiality, sexual penetration, deviate sexual intercourse, sadomasochistic abuse, or lascivious exhibition of the genital or pubic area of a minor.

"Visual representation" refers to, but is not limited to, undeveloped film and videotape, and data stored on computer disk or by electronic means that are capable of conversion into a visual image.

(3) The fact that a person engaged in the conduct specified by this section is prima facie evidence that the person engaged in that conduct with knowledge of the character and content of the material. The fact that the person who was

employed, used, or otherwise contained in the pornographic material was at that time, a minor, is prima facie evidence that the defendant knew the person to be a minor.

(4) Promoting child abuse in the second degree is a class B felony. [L 1978, c 214, §2; am L 1982, c 218, §2; am L 1986, c 314, §59; am L 1997, c 363, §2; am L 2002, c 200, §3; am L 2012, c 212, §1; am L 2016, c 16, §2]

Cross References

Reporting on child abuse, see chapter 350.
Promoting pornography, see §712-1214.

Law Journals and Reviews

State v. Kam: The Constitutional Status of Obscenity in Hawaii. 11 UH L. Rev. 253 (1989).
The Jurisdictional Limits of Federal Criminal Child Pornography Law. 21 UH L. Rev. 73 (1999).

Case Notes

Statute not unconstitutionally overbroad. 65 H. 116, 648 P.2d 190 (1982).

COMMENTARY ON §§707-750 AND 707-751

Act 214, Session Laws 1978, added these sections to prevent the sexual exploitation of children. Dealing with activities involving the participation of children without attempting to define the conduct in terms of pornography, these sections classify the offenses as offenses against the person rather than pornography. It is an offense for anyone to engage in the proscribed activities whether the material or performance involving a minor is pornographic or not. Senate Conference Committee Report No. 27-78, House Conference Committee Report No. 21.

Act 218, Session Laws 1982, amended these sections to clarify that the offense of promoting child abuse applies to the use of minors in pornographic material. Section 707-751 was found to be unconstitutional because "the statute prohibited speech protected by the First and Fourteenth Amendment of the United States Constitution ... and because the statute did not incorporate the three-part test defining obscenity as enunciated by the U.S. Supreme Court in the case of Miller v. California, the statute prohibited non-obscene as well as obscene materials." The constitutionality of the section is on appeal

but the legislature found "that any question as to what is being prohibited should be clarified." House Conference Committee Report No. 4, Senate Conference Committee Report No. 3.

Act 91, Session Laws 1988, amended §707-750 by reclassifying the offense of promoting child abuse in the first degree from a class B felony to a class A felony. The legislature found that victims of child abuse are the least able to defend themselves, and the resulting emotional scars of these victims increase the likelihood of further contact with the criminal justice system; therefore, a more severe punishment for this offense is warranted. The legislature also found that reclassifying this offense will make the classification consistent with the current penalty for sexual abuse in the first degree involving a minor. House Standing Committee Report No. 481-88, Senate Standing Committee Report No. 2545.

Act 363, Session Laws 1997, amended §§707-750 and 707-751 to include persons producing or making pornographic material involving minors under the offense of child abuse. The legislature found that under existing child abuse laws, in order for a person to be charged with child abuse, the pornographic materials must show a minor engaged in or assisting others to engage in a sexual act. This loophole in the law allowed persons producing those materials to exploit children by using them in sexually explicit poses without technically violating the law. The legislature believed that it was important to extend the scope of the offense of child abuse to include producing material in which children are exploited through sexually explicit conduct.

The Act also, inter alia, amended the definition of "sexual conduct" to include lascivious exhibition of the genital or pubic area of a minor, and added the definitions of "lascivious" and "community standards," in both §§707-750 and 707-751. Section 707-751 was also amended to include possession of pornographic material involving children as an offense. Senate Standing Committee Report No. 757, House Standing Committee Report No. 1214.

Act 200, Session Laws 2002, amended §§707-750 and 707-751 by, among other things, defining "child pornography" to encompass computer-generated representations of minors. The legislature found that Act 200 addressed the problem of utilizing computer technology in committing crimes against children. House Standing Committee Report No. 417-02, Conference Committee Report No. 36-02.

Act 212, Session Laws 2012, amended §707-751 to provide greater protection for children by addressing instances of possession of particularly violent or egregious child pornography. Specifically, Act 212 amended the offense of

promoting child abuse in the second degree to include possession of thirty or more images of child pornography where the content of at least one image contains a minor younger than the age of twelve, sadomasochistic abuse of a minor, or bestiality involving a minor. The legislature found that child pornography was a permanent record of the actual sexual abuse, exploitation, and assault of innocent and helpless children. The legislature further found that Hawaii's child pornography laws should be strengthened and should distinguish between the various forms of child pornography. Prior to Act 212, possession of any form of child pornography was covered under the offense of promoting child abuse in the third degree, but a violation was only a class C felony. Act 212 amended the offense of promoting child abuse in the second degree, a class B felony, to include particularly violent or egregious child pornography. Conference Committee Report No. 24-12.

Act 16, Session Laws 2016, amended §§707-750 and 707-751 by amending the definition of the term "sexual conduct" as that term is used in the Penal Code for the offenses of promoting child abuse in the first and second degrees. The amendments made by Act 16 aligned the term, as used in state law, more closely with the terminology used in federal law by expanding the definition of "sexual conduct" to include specific types of conduct. Act 16 also removed unnecessary and archaic language regarding sexual orientation. House Standing Committee Report No. 1124-16.

" **[§707-752] Promoting child abuse in the third degree.** (1) A person commits the offense of promoting child abuse in the third degree if, knowing or having reason to know its character and content, the person possesses:

(a) Child pornography;

(b) Any book, magazine, periodical, film, videotape, computer disk, electronically stored data, or any other material that contains an image of child pornography; or

(c) Any pornographic material that employs, uses, or otherwise contains a minor engaging in or assisting others to engage in sexual conduct.

(2) As used in this section:

"Child pornography" means any pornographic visual representation, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexual conduct, if:

(a) The pornographic production of the visual representation involves the use of a minor engaging in sexual conduct; or

(b) The pornographic visual representation has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct.

"Community standards" means the standards of the State.

"Computer" shall have the same meaning as in section 708-890.

"Lascivious" means tending to incite lust, to deprave the morals with respect to sexual relations, or to produce voluptuous or lewd emotions in the average person, applying contemporary community standards.

"Material" means any printed matter, visual representation, or sound recording and includes, but is not limited to, books, magazines, motion picture films, pamphlets, newspapers, pictures, photographs, and tape or wire recordings.

"Minor" means any person less than eighteen years old.

"Pornographic" shall have the same meaning as in section 712-1210.

"Sadomasochistic abuse" means flagellation or torture by or upon

"Sexual conduct" means actual or simulated sexual intercourse, including genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact, whether between persons of the same or opposite sex, masturbation, bestiality, sexual penetration, deviate sexual intercourse, sadomasochistic abuse, or lascivious exhibition of the genital or pubic area of a minor.

"Visual representation" includes but is not limited to undeveloped film and videotape and data stored on computer disk or by electronic means that are capable of conversion into a visual image.

(3) The fact that a person engaged in the conduct specified by this section is prima facie evidence that the person engaged in that conduct with knowledge of the character and content of the material. The fact that the person who was employed, used, or otherwise contained in the pornographic material was, at that time, a minor is prima facie evidence that the defendant knew the person to be a minor.

(4) Promoting child abuse in the third degree is a class C felony. [L 2002, c 200, pt of §1; am L 2016, c 16, §3]

COMMENTARY ON §§707-752 AND 707-753

Act 16, Session Laws 2016, amended §707-752 by amending the definition of the term "sexual conduct" as that term is used in

the Penal Code for the offense of promoting child abuse in the third degree. The amendments made by Act 16 aligned the term, as used in state law, more closely with the terminology used in federal law by expanding the definition of "sexual conduct" to include specific types of conduct. Act 16 also removed unnecessary and archaic language regarding sexual orientation. House Standing Committee Report No. 1124-16.

Case Notes

Based on all of the relevant circumstances--that TSA screeners saw photographs of nude and semi-nude children, at least one, if not two photos they saw contained child pornography, and there were additional photos that they were aware of--HCPD officers had an objectively reasonable belief that defendant had committed a violation of this section; in effect, probable cause to arrest defendant existed. 835 F. Supp. 2d 938 (2011).

" **[§707-753] Affirmative defense to promoting child abuse.** It shall be an affirmative defense to a charge of promoting child abuse in the third degree that the defendant:

(a) Possessed less than three images of child pornography; and

(b) Promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof:

(i) Took reasonable steps to destroy each such image; or

(ii) Reported the matter to a law enforcement agency and afforded that agency access to each such image. [L 2002, c 200, pt of §1]

COMMENTARY ON §§707-752 AND 707-753

Act 200, Session Laws 2002, added these sections to add the offense of third degree promoting child abuse that prohibits the knowing possession of child pornography and to provide an affirmative defense to [promoting] child abuse that includes cooperation with law enforcement or destruction of the child pornography. House Standing Committee Report No. 417-02.

" **§707-756 Electronic enticement of a child in the first degree.** (1) Any person who, using a computer or any other electronic device:

(a) Intentionally or knowingly communicates:

(i) With a minor known by the person to be under the age of eighteen years;

(ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or

(iii) With another person who represents that person to be under the age of eighteen years;

(b) With the intent to promote or facilitate the commission of a felony:

(i) That is a murder in the first or second degree;

(ii) That is a class A felony; or

(iii) That is another covered offense as defined in section 846E-1,

agrees to meet with the minor, or with another person who represents that person to be a minor under the age of eighteen years; and

(c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time,

is guilty of electronic enticement of a child in the first degree.

(2) Electronic enticement of a child in the first degree is a class B felony. Notwithstanding any law to the contrary, a person convicted of electronic enticement of a child in the first degree shall be sentenced to an indeterminate term of imprisonment as provided by law. [L 2002, c 200, pt of §1; am L 2006, c 80, §2; am L 2008, c 80, §3]

Case Notes

Requiring the use of a computer or other electronic device to travel to the agreed-upon meeting place at the agreed-upon time would render the statute absurd in meaning; and requiring the use of a computer or other electronic device to agree to meet with the minor would render the statute structurally incoherent as a whole. With respect to the computer-use requirement, the State was required to prove that defendant used a computer or electronic device only to communicate with "Chyla". 131 H. 379, 319 P.3d 298 (2013).

This section does not concern interstate commerce, and therefore, scrutiny under the commerce clause was not appropriate. Assuming, arguendo, that this section warranted commerce clause scrutiny, this section does not violate the dormant commerce clause. 131 H. 312 (App.), 318 P.3d 602 (2013).

This section was not unconstitutionally overbroad and/or vague as applied to defendant, and the circuit court did not err in denying defendant's motion to dismiss the indictment on that basis where, among other things, when the statute was read as a

whole, it was clear that only criminal conduct was proscribed and the statute plainly criminalized conduct that is coupled with the intent to promote or facilitate the commission of a felony. 131 H. 312 (App.), 318 P.3d 602 (2013).

Trial court did not err in rejecting defendant's proffered reason for requesting the withdrawal of defendant's second guilty plea on the ground that defendant had not been aware of a potentially meritorious defense that the State was unable to prove that defendant had traveled to the agreed upon meeting place as required under subsection (1)(c), where transcripts of the internet chat room conversations defendant had with minor provided compelling evidence that the meeting place was the Burger King, not a particular area within the Burger King. 120 H. 480 (App.), 210 P.3d 3 (2009).

Where it was not necessary for defendant to actually commit one of the felony offenses defined in §846E-1 in order to violate the prohibition against the electronic enticement of a child under subsection (1) but only necessary under subsection (1)(b)(iii) that defendant act with the intent to promote or facilitate the commission of a felony offense defined in §846E-1, the State was not required to specify in the indictment which §846E-1 felony offense defendant intended to promote or facilitate. 120 H. 480 (App.), 210 P.3d 3 (2009).

Where State presented evidence to the grand jury that the person communicating with defendant represented to defendant that the person was a 14-year old girl, the State was not required to prove under subsection (1)(a)(iii) that defendant engaged in communication with an actual child, and the record showed that the agreed upon meeting place was the Burger King and not a specific table within the Burger King, evidence before the grand jury that defendant arrived at the Burger King and was arrested was sufficient to establish probable cause regarding the meeting place element. 120 H. 480 (App.), 210 P.3d 3 (2009).

Circuit court did not abuse its discretion under HRE rule 403 in admitting video showing defendant masturbating for "child" where video: (1) was extremely probative of defendant's intent to promote or facilitate the commission of one of the predicate felonies necessary to prove first degree electronic enticement of a child under this section; (2) provided clear evidence of defendant's motives and desires regarding the "child" and the extreme actions defendant was willing to undertake in order to entice the "child"; and (3) was the strongest evidence of defendant's intention to engage in sexual activity with the "child". 128 H. 328 (App.), 289 P.3d 964 (2012).

This section does not require proof that a defendant used a computer or other electronic device to travel to the agreed upon

meeting place and the legislature did not intend the statute to require that the agreement to meet be accomplished through the use of a computer or other electronic device; requiring proof that the defendant used a computer to travel to the agreed upon meeting place at the agreed upon meeting time would lead to absurd results; thus, the circuit court did not erroneously instruct the jury on the elements for the charged offense of first degree electronic enticement of a child. 128 H. 328 (App.), 289 P.3d 964 (2012).

" **§707-757 Electronic enticement of a child in the second degree.** (1) Any person who, using a computer or any other electronic device:

(a) Intentionally or knowingly communicates:

(i) With a minor known by the person to be under the age of eighteen years;

(ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or

(iii) With another person who represents that person to be under the age of eighteen years;

(b) With the intent to promote or facilitate the commission of a felony, agrees to meet with the minor, or with another person who represents that person to be a minor under the age of eighteen years; and

(c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time;

is guilty of electronic enticement of a child in the second degree.

(2) Electronic enticement of a child in the second degree is a class C felony. Notwithstanding any law to the contrary, if a person sentenced under this section is sentenced to probation rather than an indeterminate term of imprisonment, the terms and conditions of probation shall include, but not be limited to, a term of imprisonment of one year. [L 2002, c 200, pt of §1; am L 2006, c 80, §3]

Revision Note

In subsection (1)(a)(iii), "and" deleted pursuant to §23G-15.

COMMENTARY ON §§707-756 AND 707-757

Act 200, Session Laws 2002, added these sections to create criminal offenses relating to electronic enticement of a child. The legislature found that Act 200 addressed the problem of

utilizing computer technology in committing crimes against children. Conference Committee Report No. 36-02.

Act 80, Session Laws 2006, amended §§707-756 and 707-757 to mandate at least one year of incarceration for defendants convicted of electronic enticement of a child. Act 80 provided a means to ensure the safety of Hawaii's children, enhance enforcement efforts, and impose significant penalties against those who prey on the most vulnerable members of the community. Conference Committee Report No. 10-06.

Act 80, Session Laws 2008, amended §707-756 to clarify the element of electronic enticement of a child in the first degree pertaining to the intent to promote or facilitate the commission of another crime. Conference Committee Report No. 82-08.

" **§707-758 REPEALED.** L 2002, c 240, §11.

" **[§707-759] Indecent electronic display to a child.** (1) Any person who intentionally masturbates or intentionally exposes the genitals in a lewd or lascivious manner live over a computer online service, internet service, or local bulletin board service and who knows or should know or has reason to believe that the transmission is viewed on a computer or other electronic device by:

(a) A minor known by the person to be under the age of eighteen years;

(b) Another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or

(c) Another person who represents that person to be under the age of eighteen years,

is guilty of indecent electronic display to a child.

(2) Indecent electronic display to a child is a misdemeanor. [L 2008, c 80, §1]

COMMENTARY ON §707-759

Act 80, Session Laws 2008, added this section, establishing a new offense to address a specific form of grooming conduct by child predators involving masturbation or the lewd or lascivious exposure of the predator's genitals over the computer for view by a minor. The legislature found that with the widespread use and acceptance of the Internet and computers as tools for social networking and the anonymity they appeared to provide, children and teens are at a greater risk for victimization by persons who seek out minors for sexual purposes. Online predators abuse modern day technology to covertly invade what is considered to

be the most secure of places, the home. Conference Committee Report No. 82-08, Senate Standing Committee Report No. 3407.

"[PART VII.] EXTORTION

§707-760 Definitions. For the purposes of this part:

"An extortionate means" is any means which involves the use, or an express or implicit threat of the use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

"Creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

"Debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

"Repayment of any extension of credit" includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

"To collect an extension of credit" means to induce in any way any person to make repayment thereof.

"To extend credit" means to make or renew any loan or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred. [L 1979, c 106, pt of §1; am L 1980, c 232, §38]

Revision Note

Numeric designations deleted pursuant to §23G-15.

" **§707-761 Extortionate extension of credit; prima facie evidence.** (1) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(2) In any prosecution under this part, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie

evidence that the extension of credit was extortionate, but this section is nonexclusive and in no way limits the effect or applicability of subsection (1):

(a) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor:

(i) In the jurisdiction within which the debtor, if a natural person, resided; or

(ii) In every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business at the time the extension of credit was made;

(b) The extension of credit was made at a rate of interest in excess of a yearly rate of forty-five per cent calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which payment is applied first to the accumulated interest and the balance applied to the unpaid principal;

(c) At the time the extension of credit was made, the debtor reasonably believed that either:

(i) One or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(ii) The creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof;

(d) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(3) In any prosecution under this part, if evidence has been introduced tending to show the existence of any of the circumstances described in subparagraph (2)(a) or (2)(b) of this section, and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension. [L 1979, c 106, pt of §1; am L 1980, c 232, §38]

" **[§707-762] Financing extortionate extensions of credit.** "Financing extortionate extensions of credit" includes wilfully advancing money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit. [L 1979, c 106, pt of §1]

" **§707-763 Collection of extensions of credit by extortionate means.** (1) "Collection of extensions of credit by extortionate means" includes knowingly participating in any way, or conspiring to do so, in the use of any extortionate means:

(a) To collect or attempt to collect any extension of credit; or

(b) To punish any person for the nonrepayment thereof.

(2) In any prosecution under this part, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(3) In any prosecution under this part, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in subsection (2)(a) or subsection (2)(b) of section 707-761 and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of collection or attempt at collection. [L 1979, c 106, pt of §1; am L 1980, c 232, §39]

COMMENTARY ON §§707-760 TO 707-763

Act 106, Session Laws 1979, established these sections to extend Hawaii's extortion laws to prohibit extortionate credit transactions.

" **§707-764 Extortion.** A person commits extortion if the person does any of the following:

(1) Obtains, or exerts control over, the property, labor, or services of another with intent to deprive another of property, labor, or services by threatening by word or conduct to:

(a) Cause bodily injury in the future to the person threatened or to any other person;

(b) Cause damage to property or cause damage, as defined in section 708-890, to a computer, computer system, or computer network;

(c) Subject the person threatened or any other person to physical confinement or restraint;

(d) Commit a penal offense;

(e) Accuse some person of any offense or cause a penal charge to be instituted against some person;

(f) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt, or ridicule, or to impair the threatened person's credit or business repute;

(g) Reveal any information sought to be concealed by the person threatened or any other person;

(h) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense;

(i) Take or withhold action as a public servant, or cause a public servant to take or withhold such action;

(j) Bring about or continue a strike, boycott, or other similar collective action, to obtain property that is not demanded or received for the benefit of the group that the defendant purports to represent;

(k) Destroy, conceal, remove, confiscate, or possess any actual or purported passport, or any other actual or purported government identification document, or other immigration document, of another person; or

(l) Do any other act that would not in itself substantially benefit the defendant but that is calculated to harm substantially some person with respect to the threatened person's health, safety, business, calling, career, financial condition, reputation, or personal relationships;

(2) Intentionally compels or induces another person to engage in conduct from which another has a legal right to abstain or to abstain from conduct in which another has a legal right to engage by threatening by word or conduct to do any of the actions set forth in paragraph (1)(a) through (l); or

(3) Makes or finances any extortionate extension of credit, or collects any extension of credit by extortionate means. [L 1979, c 106, pt of §1; am L 2001, c 33, §3; am L 2008, c 147, §4]

Case Notes

In RICO action, plaintiff did not satisfy essential element of extortion and failed to establish attempted extortion regarding defendant's letter to plaintiff. 855 F. Supp. 1156 (1994).

"Legal right to abstain" as an essential component of the offense under subsection (2). 63 H. 105, 621 P.2d 381 (1980).

Substantial direct and circumstantial evidence existed from which jury could have convicted defendant of theft in the first degree by extortion. 64 H. 65, 637 P.2d 407 (1981).

Elements of crime established even though victim did not drop criminal charges against the defendant. 70 H. 245, 768 P.2d 239 (1989).

" **§707-765 Extortion in the first degree.** (1) A person commits the offense of extortion in the first degree if the person commits extortion:

(a) Of property, labor, or services the value of which exceeds $200 in total during any twelve-month period; or

(b) By making or financing any extortionate extension of credit, or by collecting any extension of credit by extortionate means.

(2) Extortion in the first degree is a class B felony. [L 1979, c 106, pt of §1; gen ch 1993; am L 2008, c 147, §5]

Case Notes

Evidence sufficient to convict defendant under this section; evidence showed that victim borrowed $1,100 from brother and gave it to defendant; when victim borrowed the money, it became victim's money. 103 H. 68 (App.), 79 P.3d 686 (2003).

" **§707-766 Extortion in the second degree.** (1) A person commits the offense of extortion in the second degree if the person commits extortion:

(a) Of property, labor, or services the value of which exceeds $50 during any twelve-month period; or

(b) As set forth in section 707-764(2).

(2) Extortion in the second degree is a class C felony. [L 1979, c 106, pt of §1; am L 1993, c 28, §1; am L 2008, c 147, §6]

Case Notes

Terroristic threatening in the second degree is not a lesser included offense of attempted extortion in the second degree. 70 H. 456, 776 P.2d 392 (1989).

" **§707-767 Extortion in the third degree.** (1) A person commits the offense of extortion in the third degree if the person commits extortion of property, labor, or services.

(2) Extortion in the third degree is a misdemeanor. [L 1979, c 106, pt of §1; gen ch 1993; am L 2008, c 147, §7]

" **[§707-768] Firearms, explosives, and dangerous weapons.** Extortion in any degree is a class A felony when a firearm, explosive, or any dangerous weapon is immediately available and is physically used as part of the threat. [L 1979, c 106, pt of §1]

Cross References

Firearms; dangerous weapons, see §§134-1 and 134-51.

" **§707-769 Defenses to extortion.** (1) It is a defense to a prosecution for extortion as defined by paragraph (1) of section 707-764 that the defendant:

(a) Was unaware that the property or service was that of another; or

(b) Believed that the defendant was entitled to the property or services under a claim of right or that the defendant was authorized, by the owner or by law, to obtain or exert control as the defendant did.

(2) If the owner of the property is the defendant's spouse or reciprocal beneficiary, it is a defense to a prosecution for extortion under paragraph (1) of section 707-764 that:

(a) The property which is obtained or over which unauthorized control is exerted constitutes household belongings; and

(b) The defendant and the defendant's spouse or reciprocal beneficiary were living together at the time of the conduct.

(3) "Household belongings" means furniture, personal effects, vehicles, or money or its equivalent in amounts customarily used for household purposes, and other property usually found in and about the common dwelling and accessible to its occupants.

(4) It is an affirmative defense to a prosecution for extortion as defined in paragraphs (1) and (2) of section 707-764 and as further defined by subparagraphs (e), (f), (g), and (i), that the defendant believed the threatened accusation, penal charge, or exposure to be true, or the proposed action of a public servant was justified, and that the defendant's sole intention was to compel or induce the victim to give property or services to the defendant due the defendant as restitution or indemnification for harm done, or as compensation for property obtained or lawful services performed, or to induce the victim to take reasonable action to prevent or to remedy the wrong which was the subject of the threatened accusation, charge, exposure, or action of a public servant in circumstances to which the threat relates.

(5) In a prosecution for extortion as defined in paragraph (1) of section 707-764, it is not a defense that the defendant has an interest in the property if the owner has an interest in the property to which the defendant is not entitled. [L 1979, c 106, pt of §1; gen ch 1993; am L 1997, c 383, §68; am L 2015, c 35, §25]

Case Notes

Defendant's attempt to obtain plaintiff's property was made under claim of [sic] right. 855 F. Supp. 1156 (1994).

COMMENTARY ON §§707-764 TO 707-769

Act 106, Session Laws 1979, established these sections as part of a consolidation of laws pertaining to extortion wherein the legislature sought to make those laws simpler and more comprehensive. The legislature rejected a provision making acts which caused the victim "great mental anguish" extortion in the first degree on the grounds that such a standard is too subjective, and would differ from one individual to the next. Conference Committee Report No. 43.

Act 28, Session Laws 1993, amended §707-766 by stating the elements of the offense of extortion in the second degree in the disjunctive, consistent with the intent of the 1979 legislature in enacting that section, and by making the language of that section gender neutral. House Standing Committee Report No. 190, Senate Standing Committee Report No. 1121.

Act 383, Session Laws 1997, amended §707-769 to provide a defense to prosecution for extortion to reciprocal beneficiaries. In establishing the status of reciprocal beneficiaries, the Act provides certain rights and benefits, and represents a commitment to provide substantially similar government rights to those couples who are barred by law from marriage. Conference Committee Report No. 2.

Act 33, Session Laws 2001, strengthened the State's computer crime laws by, among other things, amending §707-764 to clarify the offense of extortion to include threatening by word or conduct to cause damage to a computer, computer system, or computer network. The legislature found that society was adopting at a rapid pace, computer technology to conduct activities of daily living. Computer technology was being utilized not only for purposes of business and recreation, but also for criminal activity. Thus, computer-related criminal activity was on the rise as society's dependence on computers increased. Senate Standing Committee Report No. 1508.

Act 147, Session Laws 2008, amended §707-764 by adding a reference to unlawfully obtaining "labor" [in paragraph (1)], and by adding as an element of the offense of extortion, to destroy, conceal, remove, confiscate, or possess a passport or other government identification or immigration document of another person. The legislature strengthened the laws on prostitution and related offenses to deter and punish sexual exploitation of minors, including obscenity-related activities. Conference Committee Report No. 38-08.

Act 147, Session Laws 2008, amended §§707-765(1), 707-666(1), and 707-767(1) by adding a reference to "labor" as an element of the offenses of extortion in the first, second, and third degrees. Conference Committee Report No. 38-08.

Act 35, Session Laws 2015, amended §707-769(1) by changing the phrase "claim or right" to "claim of right."

"[PART VIII.] LABOR TRAFFICKING

[§707-780] Definitions. As used in this part:

"Deadly force" has the same meaning as in section 703-300.

"Force" has the same meaning as in section 703-300.

"Labor" means work of economic or financial value. Prostitution-related and obscenity-related activities as set forth in chapter 712 are not forms of "labor" under this part.

"Services" means a relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor or a third party. Prostitution-related and obscenity-related activities as set

forth in chapter 712 are not forms of "services" under this part.

"Unlawful force" has the same meaning as in section 703-300.

"Venture" means a business relationship between two or more parties to undertake economic activity together.

"Victim" means the person against whom an offense specified in section 707-781 or 707-782 has been committed. [L 2011, c 146, pt of §1]

" **[§707-781] Labor trafficking in the first degree.** (1) A person commits the offense of labor trafficking in the first degree if the person intentionally or knowingly provides or obtains, or attempts to provide or obtain, another person for labor or services by any of the following means committed against the other person:

(a) Any of the acts constituting extortion as described in section 707-764, except that for purposes of this paragraph "labor" and "services" shall be as defined in section 707-780;

(b) The acts constituting kidnapping as described in section 707-720(1)(a) through (g), except that for purposes of this paragraph "labor" and "services" shall be as defined in section 707-780;

(c) The acts described in section 707-721(1) or 707-722, relating to unlawful imprisonment;

(d) The acts described in section 707-730, 707-731, or 707-732, relating to sexual assault in the first, second, or third degree;

(e) Force, deadly force, or unlawful force;

(f) The acts described in the definition of deception pursuant to section 708-800, or fraud, which means making material false statements, misstatements, or omissions to induce or maintain the person to engage or continue to engage in the labor or services;

(g) Requiring that labor or services be performed to retire, repay, or service a real or purported debt, if performing the labor or services is the exclusive method allowed to retire, repay, or service the debt and the indebted person is required to repay the debt with direct labor in place of currency; provided that this shall not include labor or services performed by a child for the child's parent or guardian;

(h) The acts described in either section 707-710, 707-711, or 707-712, relating to assault;

(i) Withholding any of the person's government-issued identification documents with the intent to impede the movement of the person;

(j) Using any scheme, plan, or pattern intended to cause the person to believe that if the person did not perform the labor or services, then the person or a friend or a member of the person's family would suffer serious harm, serious financial loss, or physical restraint; or

(k) Using or threatening to use any form of domination, restraint, or control over the person which, given the totality of the circumstances, would have the reasonably foreseeable effect of causing the person to engage in or to remain engaged in the labor or services.

(2) Labor trafficking in the first degree is a class A felony. [L 2011, c 146, pt of §1]

" **[§707-782] Labor trafficking in the second degree.** (1) A person commits the offense of labor trafficking in the second degree if the person knowingly:

(a) Acts as an individual or uses a licensed business or business enterprise to aid another in a venture knowing that the other person in that venture is committing the offense of labor trafficking in the first degree; or

(b) Benefits, financially or by receiving something of value, from participation in a venture knowing or in reckless disregard of the fact that another person has engaged in any act described in paragraph (a) in the course of that venture or that another person in that venture is committing the offense of labor trafficking in the first degree.

(2) Labor trafficking in the second degree is a class B felony; provided that if a violation of subsection (1) involves kidnapping or an attempt to kidnap, sexual assault in the first, second, or third degree, or the attempt to commit sexual assault in the first, second, or third degree, or an attempt to cause the death of a person, or if a death results, the offense shall be a class A felony.

(3) Upon conviction of a defendant for an offense under subsection (1), the court shall also order that any and all business licenses issued by the State be revoked for the business or enterprise that the defendant used to aid in the offense of labor trafficking in the second degree; provided that the court, in its discretion, may reinstate a business license upon petition to the court by any remaining owner or partner of

the business or enterprise who was not convicted of an offense under this section or section 707-781. [L 2011, c 146, pt of §1]

" **[§707-783] Additional sentencing considerations; victims held in servitude.** In addition to the factors set forth in sections 706-606 and 706-621, when determining the particular sentence to be imposed on a defendant convicted under section 707-781 or 707-782, the court shall consider:

(a) The time for which the victim was held in servitude; and

(b) The number of victims involved in the offense for which the defendant is convicted. [L 2011, c 146, pt of §1]

" **[§707-784] Extended terms of imprisonment; labor trafficking offenses.** If a person is found guilty of a violation under section 707-781 or 707-782 and the victim of the offense suffered bodily injury, the person may be sentenced to an extended indeterminate term of imprisonment as described in this section. Subject to the procedures set forth in section 706-664, the court may impose, in addition to the indeterminate term of imprisonment provided for the grade of offense, an additional indeterminate term of imprisonment as follows:

(a) Bodily injury – an additional two years of imprisonment;

(b) Substantial bodily injury – an additional five years of imprisonment;

(c) Serious bodily injury – an additional fifteen years of imprisonment; or

(d) If death results, the defendant shall be sentenced in accordance with the homicide statute relevant for the level of criminal intent.

When ordering an extended term sentence, the court shall impose the maximum length of imprisonment. The minimum length of imprisonment for an extended term sentence under paragraph (a), (b), (c), or (d) shall be determined by the Hawaii paroling authority in accordance with section 706-669. [L 2011, c 146, pt of §1]

" **[§707-785] Restitution for victims of labor trafficking.** (1) In addition to any other penalty, and notwithstanding a victim's failure to request restitution under section 706-646(2), the court shall order restitution to be paid to the victim, consisting of an amount that is the greater of:

(a) The total gross income or value to the defendant of the victim's labor or services; or

(b) The value of the victim's labor or services, as guaranteed under the minimum wage provisions of chapter 387 or the Fair Labor Standards Act of 1938, Public Law 75-718, title 29 United States Code sections 201 through 219, inclusive, whichever is greater.

(2) The return of the victim to the victim's home country or other absence of the victim from the jurisdiction shall not relieve the defendant of the defendant's restitution obligation. [L 2011, c 146, pt of §1]

" **[§707-786] Nonpayment of wages.** (1) A person commits the offense of nonpayment of wages if the person, in the capacity as an employer of an employee, intentionally or knowingly or with intent to defraud fails or refuses to pay wages to the employee, except where required by federal or state statute or by court process. In addition to any other penalty, a person convicted of nonpayment of wages shall be fined not less than $2,000 nor more than $10,000 for each offense.

(2) Nonpayment of wages is:

(a) A class C felony, if the amount owed to the employee is equal to or greater than $2,000 or if the defendant convicted of nonpayment of wages falsely denies the amount or validity of the wages owed; or

(b) A misdemeanor, if the amount owed to the employee is less than $2,000.

(3) A person commits a separate offense under this section for each pay period during which the employee earned wages that the person failed or refused to pay the employee. If no set pay periods were agreed upon between the person and the employee at the time the employee commenced the work, then each "pay period" shall be deemed to be bi-weekly.

(4) In addition to any other penalty, the court shall order restitution to be paid to the employee, consisting of an amount that is the greater of:

(a) The wages earned by the employee that were unpaid by the person convicted of nonpayment of wages; or

(b) The value of the employee's labor or services, as guaranteed under the minimum wage provisions of chapter 387 or the Fair Labor Standards Act of 1938, Public Law 75-718, title 29 United States Code sections 201 through 219, inclusive, whichever is greater.

(5) An employee who is the victim of nonpayment of wages may bring a civil action to recover all wages owed by the defendant convicted of nonpayment of wages.

(6) For purposes of this section:

"Employee" means any person working for another for hire, including an individual employed in domestic service or at a family's or person's home, any individual employed by the individual's spouse, or by an independent contractor.

"Person" includes any individual, partnership, association, joint-stock company, trust, corporation, the personal representative of the estate of a deceased individual, or the receiver, trustee, or successor of any of the same, employing any persons, but shall not include the United States.

"Wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission, or other basis of calculation. [L 2011, c 146, pt of §1]

" **[§707-787] Unlawful conduct with respect to documents.** (1) A person commits unlawful conduct with respect to documents if the person knowingly:

(a) Destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person:

(i) In the course of a violation or attempt to commit an offense under section 707-781 or 707-782; or

(ii) To prevent or restrict, or in an attempt to prevent or restrict, without lawful authority, the ability of the other person to move or travel in order to maintain the labor or services of the other person, when the person is or has been the victim of an offense under section 707-781 or 707-782; or

(b) Destroys, conceals, removes, or confiscates any actual or purported government identification document of an employee.

(2) Unlawful conduct with respect to documents is a class C felony. [L 2011, c 146, pt of §1]

COMMENTARY ON §§707-780 TO 707-787

Act 146, Session Laws 2011, established, among other things, a class A and class B felony offense for labor trafficking, an offense for nonpayment of wages, and an offense for unlawful conduct with respect to documents. The legislature found that Hawaii is one of only five states without a specific labor trafficking statute, yet labor trafficking has occurred at an unprecedented level in the State. Act 146 sent an unmistakable warning to individuals and entities engaged in labor trafficking and provided a clearer and more structured means for law enforcement agencies to protect and aid trafficking victims.

Also, Act 146 would be a catalyst for law enforcement agencies, service providers, and other state agencies and community organizations to engage in needed training and education on labor trafficking. Conference Committee Report No. 77.