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NO. CAAP-16-0000797

**IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI‘I**

STATE OF HAWAI‘I,	) Criminal No. 15-1-1959
)
Plaintiff-Appellant,	) APPEAL FROM THE FINDINGS OF FACT
	) AND CONCLUSIONS OF LAW AND
vs.	) ORDER GRANTING DEFENDANT’S
	) MOTION TO SUPPRESS EVIDENCE AND
JOSHUA LEE,	) STATEMENTS filed on October 13, 2016
)
Defendant-Appellee.	) FIRST CIRCUIT COURT
)
	) HONORABLE ROM A. TRADER
	) JUDGE
)

OPENING BRIEF OF THE STATE OF HAWAI‘I

APPENDIX “A”

and

CERTIFICATE OF SERVICE

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OPENING BRIEF OF THE STATE OF HAWAI‘I

I.

STATEMENT OF THE CASE

A. The Charge.

On October 15, 2015, Plaintiff-Appellant STATE OF HAWAI‘I (“the State”) charged Defendant-Appellee JOSHUA LEE (“Defendant”) via Indictment in Count 1 with Terroristic Threatening in the First Degree in violation of Hawai‘i Revised Statutes (“HRS”) Section 707-716(1)(e) (2014 Repl.), in Count 2 with Assault Against a Law Enforcement Officer in the First Degree in violation of HRS Section 707-712.5(1)(a) (2014 Repl.), and in Count 3 with Resisting Arrest in violation of HRS Section 710-1026(1)(a) (2014 Repl.). See, JEFS docket entry number (“JEFS Dkt. #”) 16, PDF pages (“PDF”) at 15-16¹.

B. Hearing on the Motion to Suppress Evidence.

On April 25, 2016, Defendant filed a Motion to Suppress Evidence and Statements. JEFS Dkt. #16, PDF at 75-97. On May 27, 2016, the State filed a Memorandum in Opposition to Defendant’s Motion to Suppress Evidence and Statements. JEFS Dkt. #16, PDF at 104-116.

The circuit court held a hearing on Defendant’s Motion to Suppress Evidence and Statements on July 5, 2016, August 23, 2016, and September 1, 2016. See generally, Transcript of Proceedings held on July 5, 2016 (“7/5/16 TR/JEFS Dkt. #34”), Transcript of Proceedings held on August 23, 2016 (“8/23/16 TR/JEFS Dkt. #14”), and Transcript of Proceedings held on September 1, 2016 (“9/1/16 TR/JEFS Dkt. #22”). At the outset, the circuit court took “judicial notice of the records and files to include the instant motion as well as the timely filed opposition memo.” 7/5/16 TR/JEFS Dkt. #34, PDF at 5. The circuit court also received into evidence State’s Exhibits 1 through 5, as well as, 8 through 12, without objection from the defense. *Id.*

1. The State’s Witnesses.

a. HPD Officer Summer Kahao.

At the hearing, the State called Honolulu Police Department (“HPD”) Officer Summer Kahao (“Officer Kahao”) as its first witness. 7/5/16 TR/JEFS Dkt. #34, PDF at 7. On October 16, 2015, at around 1:30 p.m., Officer Kahao was called via dispatch to an incident at 98-569

¹ Since documents, including the Record on Appeal, are filed with JEFS, the State shall cite to the JEFS docket entry number and the PDF page(s) in citing to documents, including transcripts.

Aloalii Street “[r]egarding a suicidal male . . . locked in a bedroom with samurai swords.” 7/5/16 TR/JEFS Dkt. #34, PDF at 9. When she arrived on the scene, Officer Kahao was met by a male. 7/5/16 TR/JEFS Dkt. #34, PDF at 9-10. She told the male that she was called to the residence. 7/5/16 TR/JEFS Dkt. #34, PDF at 10. The male then led her inside the house, where she was met by “Officer Takahashi” and Defendant’s mother. 7/5/16 TR/JEFS Dkt. #34, PDF at 9-12. Officer Kahao asked Defendant’s mother, where “this male was that was suicidal.” 7/5/16 TR/JEFS Dkt. #34, PDF at 11. Officer Kahao was directed to the bedroom near the kitchen. *Id.*

Officer Kahao identified “[her]self through the door and tried to communicate with [Defendant] . . . , asking him to open the door, unlock the door.” *Id.* She verified that the door was locked. 7/5/16 TR/JEFS Dkt. #34, PDF at 11-12. “Officer Takahashi” was at the door with her. 7/5/16 TR/JEFS Dkt. #34, PDF at 12. Defendant’s mother was “behind [them] in the kitchen or dining room area” about 10 or 15 feet away. *Id.* Officer Kahao called out, “Joshua, this is Officer Kahao. Could you please open the door.” *Id.* Defendant said, “[N]o, go away [I do]n’t want to talk to anyone.” *Id.* Officer Kahao testified she did not leave because she “was called there regarding a suicidal male, and [she] needed to make sure that he was safe.” 7/5/16 TR/JEFS Dkt. #34, PDF at 13. She further testified, “I needed to visibly see that he was not hurt, he did not hurt himself, also to speak with him and get more information from him as far as whether or not he was suicidal.” *Id.* She indicated that police officers “go through a portion of suicide training while [they]’re in the police academy. [And they] also have training yearly.” *Id.* She confirmed that as part of their training, when the police respond to a suicidal call, they have to see the individual to make sure that the individual is all right. *Id.* Officer Kahao “continued to talk to [Defendant] through the doorway to try to build a rapport with him and try to get him to open the door,” but Defendant did not open the door for her. 7/5/16 TR/JEFS Dkt. #34, PDF at 14.

Officer Kahao’s supervisor, HPD Sergeant Michael Cobb (“Sgt. Cobb”), arrived on the scene “and kind of took over as far as talking to [Defendant] through the door.” 7/5/16 TR/JEFS Dkt. #34, PDF at 14, 41-42. She stood about three feet away from Sgt. Cobb, as he spoke to Defendant through the door. *Id.* Sgt. Cobb “was a little more demanding, a little bit louder.” *Id.* Defendant “seemed a little more agitated.” *Id.* The police officers “tried to see if there was a way that [they] could unlock the door,” but they were unsuccessful in doing so. 7/5/16 TR/JEFS Dkt. #34, PDF at 15. Sgt. Cobb “pounded on the door[, and] spoke with [Defendant] through the

doorway for . . . a few minutes or so, at which time . . . [D]efendant had unlocked the door and the door was cracked open.” 7/5/16 TR/JEFS Dkt. #34, PDF at 14-15. Sgt. Cobb was the closest person to the door. 7/5/16 TR/JEFS Dkt. #34, PDF at 15. When Officer Kahao “came into view of the door being cracked open, [she] saw a male behind the door with something in his hand.” *Id.* She “believed it could have been a sword, so [she] went to draw [her] duty weapon. As [she] got into better view, [she] realized it wasn’t a real samurai sword, it was a wooden sword, so [she] then holstered [her] weapon and told [the male] to drop the weapon.” 7/5/16 TR/JEFS Dkt. #34, PDF at 16. After a few verbal warnings, Defendant lowered the wooden sword. *Id.*

Sgt. Cobb then “pushed his way through the doorway to try to get to [D]efendant.” *Id.* As “[Sgt.] Cobb pushed his way through the doorway, [Officer Kahao] entered the doorway behind him. [She] didn’t quite see [D]efendant. [She] saw [Sgt.] Cobb just kind of go head over heels, and he was flipped onto the floor.” *Id.* Officer Kahao saw “[D]efendant was bent over over [Sgt.] Cobb, so [she] only had a view of [Defendant’s] back, at which time [she] came up from behind . . . [and] tried to grab [Defendant]’s arms as he was hunched over [Sgt.] Cobb laying on the floor.” 7/5/16 TR/JEFS Dkt. #34, PDF at 17. Defendant “pulled his arms away from [Officer Kahao], at which time [she] tried to attempt a vascular neck restraint[,]” but she was unsuccessful in doing so. *Id.* Defendant somehow tossed her “over onto the couch.” 7/5/16 TR/JEFS Dkt. #34, PDF at 17-18. She “then pulled out [her] pepper spray, OC pepper spray, and sprayed it.” 7/5/16 TR/JEFS Dkt. #34, PDF at 18. “Officer Takahashi” was also in the room with them, but Officer Kahao was not aware if Defendant’s mother was in the bedroom. *Id.* While the police were in the bedroom, however, Officer Kahao heard Defendant’s mother “telling [them] to leave her son alone and leave.” *Id.* Officer Kahao testified the police did not leave because “[a]fter [they] gained entry into the bedroom, [they] were unable to just leave without making sure that [Defendant] was okay. When [they] went in and [they] ended up into this physical confrontation with him, [they] were no longer able to just leave him.” 7/5/16 TR/JEFS Dkt. #34, PDF at 18-19. Officer Kahao further testified she “believe[d] there was a concern” when she entered Defendant’s bedroom. 7/5/16 TR/JEFS Dkt. #34, PDF at 19. She “believed that suicide was probable at that time” and she took the suicide call seriously. *Id.*

On cross-examination, Officer Kahao testified she received “policies and handouts” at her police academy training on how to handle suicide calls. 7/5/16 TR/JEFS Dkt. #34, PDF at 22. She clarified that she received the dispatch call regarding a suicidal male, locked in a

bedroom with samurai swords at about 1:20 p.m., and that she arrived on the scene about 10 minutes later, at 1:30 p.m. 7/5/16 TR/JEFS Dkt. #34, PDF at 23-24. She also clarified that “Officer Takahashi” was communicating through the door with Defendant when she arrived. 7/5/16 TR/JEFS Dkt. #34, PDF at 24. Officer Kahao confirmed that “Officer Takahashi” appeared to be calm and trying to build a rapport with Defendant. *Id.* Before she started talking to Defendant, she did not hear any responses from him to “Officer Takahashi.” 7/5/16 TR/JEFS Dkt. #34, PDF at 25.

Officer Kahao testified she did not believe Defendant’s bedroom door was “a solid wood door,” but rather “probably a hollow core door.” *Id.* She opined that she, or, at least, she and “Officer Takahashi” could have “[p]ossibly” broken through Defendant’s bedroom door if she needed to or thought that Defendant was harming himself or committing suicide. 7/5/16 TR/JEFS Dkt. #34, PDF at 25-26. Officer Kahao testified she did not hear “any sounds, voices of distress” coming from within Defendant’s bedroom and Defendant’s voice did not sound like he was in any kind of pain or like he was injured. 7/5/16 TR/JEFS Dkt. #34, PDF at 26. According to her, based on her training and experience, it was not protocol for a police officer to arrive on the scene and be demanding and louder. 7/5/16 TR/JEFS Dkt. #34, PDF at 27-28. She claimed, “Normally, we just try to talk to them to try to gain their cooperation,” and build a rapport with them. 7/5/16 TR/JEFS Dkt. #34, PDF at 28.

Officer Kahao testified that she, Sgt. Cobb, and “Officer Takahashi” were not in a single-file line outside of Defendant’s bedroom, but rather they were “staggered.” *Id.* She testified that she was not able to see Defendant at first when the door opened, but she was able to see him before any of them entered the room. *Id.* She denied that she was able to see Defendant from head to toe. 7/5/16 TR/JEFS Dkt. #34, PDF at 28-29. She testified, “There was . . . a desk or something near the doorway, so I could probably see from waist up.” 7/5/16 TR/JEFS Dkt. #34, PDF at 29. She opined that Defendant did not appear to be injured from what she could see. *Id.*

Officer Kahao testified she believed that she recognized the sword in Defendant’s hand as a wooden sword before any of the police officers entered Defendant’s bedroom. 7/5/16 TR/JEFS Dkt. #34, PDF at 29-30. She confirmed it would be pretty hard to kill yourself with the wooden sword and it was not illegal to possess the wooden sword. 7/5/16 TR/JEFS Dkt. #34, PDF at 30. She told Defendant to drop the sword because Defendant “was holding the sword in a manner as where he would have used it to strike, say, anyone who entered the bedroom.” *Id.*

She testified that “[i]t was a fairly long sword, so as [Sgt.] Cobb stepped into the bedroom” he was in striking distance. 7/5/16 TR/JEFS Dkt. #34, PDF at 30-31.

Officer Kahao confirmed that when Defendant was “[m]aybe 3 feet or so” inside of his bedroom, he had the sword raised in his right fist around chest height and the length of the sword extending up beyond his head. 7/5/16 TR/JEFS Dkt. #34, PDF at 31. She denied Defendant made any forward motions towards the police officers “at the time.” *Id.* She clarified that she “did not see [Defendant] lower the sword” and that she was not sure at what point Defendant lowered the sword. 7/5/16 TR/JEFS Dkt. #34, PDF at 31-32. She testified, “As [Sgt.] Cobb entered and I entered before [Sgt.] Cobb[,] . . . my view was a bit obstructed, and like I said, that’s when I just saw [Sgt.] Cobb flip over, so at that point I’m not sure what happened to the sword or whether or not he lowered it, dropped it.” 7/5/16 TR/JEFS Dkt. #34, PDF at 32. She testified that she did not see Defendant swing the sword. *Id.*

On redirect examination, Officer Kahao testified she was not able to get Defendant’s cooperation to open the door when she was attempting to build a rapport with him. 7/5/16 TR/JEFS Dkt. #34, PDF at 33. When Sgt. Cobb arrived on the scene, she told him that they had “been there for some time trying to talk to [D]efendant, asking him to open the door and he had not yet opened the door.” 7/5/16 TR/JEFS Dkt. #34, PDF at 33-34. She opined that based on her training and experience, if Defendant opened the door when she asked him to, she would have been able to gain access to the bedroom. 7/5/16 TR/JEFS Dkt. #34, PDF at 34. She testified that she would not have necessarily left the premises if she had gained access to the bedroom and saw Defendant for herself. *Id.* She explained, “We still needed to talk to him, make sure that he was of sound mind, ask him some questions to see what state of mind he was in, whether or not he was suicidal.” *Id.*

On recross-examination, Officer Kahao confirmed that when Sgt. Cobb arrived, Defendant had not indicated in any way he was harmed. 7/5/16 TR/JEFS Dkt. #34, PDF at 35.

On further redirect examination, Officer Kahao testified she “believed that there were samurai swords in the room.” 7/5/16 TR/JEFS Dkt. #34, PDF at 35-36.

On further recross-examination, Officer Kahao confirmed that after she pepper-sprayed Defendant, all of the police vacated the room and left Defendant sitting on the couch with all of the samurai swords. 7/5/16 TR/JEFS Dkt. #34, PDF at 36-37. With regard to whether she would have removed the swords before exiting if she thought Defendant was going to harm himself, she

testified, “After spraying the pepper spray, all of us became incapacitated, so yes, we did exit the room. I did keep a visual contact -- visual contact with [D]efendant to make sure that he did not grab any of those weapons.” 7/5/16 TR/JEFS Dkt. #34, PDF at 37. She confirmed that the couch was “some distance from the door” and that she was outside the door in the hallway. *Id.*

On further redirect examination, Officer Kahao clarified that she, Sgt. Cobb, “Officer Takahashi,” as well as Defendant were incapacitated due to the pepper spray. *Id.* After he had been pepper-sprayed, Defendant “sat on the couch with his head down in his hands.” 7/5/16 TR/JEFS Dkt. #34, PDF at 38. She opined, based on her training and experience, Defendant did not appear to be in a position to threaten himself or anyone else at that point. *Id.*

On further recross-examination, Officer Kahao testified Sgt. Cobb’s pepper spray does not immobilize a person’s nervous system. *Id.* She confirmed that the pepper spray makes it very uncomfortable to breathe and see, but it does not affect an individual’s muscles. *Id.* She confirmed Defendant could have grabbed the sword and just killed himself. 7/5/16 TR/JEFS Dkt. #34, PDF at 38-39.

During examination by the circuit court, Officer Kahao testified, “I’m not sure how [Sgt. Cobb] had gotten the door opened, if [D]efendant unlocked it and who had cracked it open, whether it was [D]efendant or [Sgt.] Cobb.” 7/5/16 TR/JEFS Dkt. #34, PDF at 39. She further testified, “As [Sgt.] Cobb was conversing with [D]efendant, that’s when I saw a stick in his hand. From that point, [Sgt.] Cobb pushed his way into the doorway . . . and we went into the bedroom.” 7/5/16 TR/JEFS Dkt. #34, PDF at 40.

b. HPD Sergeant Michael Cobb.

On October 16, 2015, at around 1:30 p.m., Sgt. Cobb responded to a call regarding “a male attempting suicide” at 98-569 Aloalii Street in the Aiea area. 7/5/16 TR/JEFS Dkt. #34, PDF at 41-43. He was informed by dispatch that “the male [locked himself in a room and] is going to commit suicide and was using samurai swords as his weapon.” 7/5/16 TR/JEFS Dkt. #34, PDF at 42. When he arrived on the scene, he observed “Officer Takahashi [] standing by [Officer Kahao] and [Defendant’s] mother and what appeared to be [Defendant’s] brother [] standing in the dining room area.” 7/5/16 TR/JEFS Dkt. #34, PDF at 43. He also observed “Officer Kahao [] at the doorway to the bedroom talking to somebody behind a closed door.” *Id.*

Sgt. Cobb asked Defendant’s mother, “[W]hy does he want to do this[?]” 7/5/16 TR/JEFS Dkt. #34, PDF at 43-44. Defendant’s mother told him that Defendant “fought with

[his] brother, and now he wants to commit suicide.” 7/5/16 TR/JEFS Dkt. #34, PDF at 44.

Defendant’s mother also told him that she was “worried because he’s done this before and he’s actually cut himself[.]” *Id.* He confirmed that based on his conversation with Defendant’s mother, he had reason to believe that Defendant had attempted suicide in the past. *Id.*

Defendant’s mother “seemed to be in a little bit of [a] frantic mood[.] . . . She was kind of anxious about what was going on behind the closed door.” 7/5/16 TR/JEFS Dkt. #34, PDF at 45.

Officer Kahao continued to “try to have the person inside the room open the door. When she was getting nowhere with him, then [Sgt. Cobb] took over trying to get the person to open the door.” *Id.* Sgt. Cobb spoke to Defendant through the door “calm[ly] . . . [but, m]aybe a little bit louder[.]” 7/5/16 TR/JEFS Dkt. #34, PDF at 45-46. Defendant “kept telling [them] . . . he’s fine and for [them] to leave.” 7/5/16 TR/JEFS Dkt. #34, PDF at 46. He did not leave “because of the type of call [they] had, [they] couldn’t just leave without checking, verifying that [Defendant wa]s okay inside that room.” *Id.* With regard to training on responding to suicide calls, he testified that he “had basic training when [he] first [became a police officer], and then yearly . . . recall training specifically on that matter.” *Id.* He confirmed that he asked Defendant to open the door. *Id.* He testified that it was important to open the door to “[c]heck on his well-being, making sure that he didn’t actually hurt himself, possibly bleeding out on the other side of the door, telling [them] to leave while he bleeds to death on the other side.” 7/5/16 TR/JEFS Dkt. #34, PDF at 49. He testified that Defendant’s voice sounded “[k]ind of agitated like he wanted [them] to just leave.” *Id.*

Sgt. Cobb “noticed that the door lock was the type of door lock which, if you stuck a pin or some type of small item into it, you can unlock it from outside, so [he] asked [Defendant’s] mother if she had something that [he] could use to open the door.” 7/5/16 TR/JEFS Dkt. #34, PDF at 47. He explained that the bedroom “door [wa]s right next to the kitchen and [] there’s a dining room right next to the kitchen[.]” 7/5/16 TR/JEFS Dkt. #34, PDF at 48. Defendant’s mother was in the dining room area “[m]aybe about 10, 15 feet” away from where Sgt. Cobb was standing. *Id.* Defendant’s mother left and returned with a paper clip which Sgt. Cobb used to try to unlock the door. 7/5/16 TR/JEFS Dkt. #34, PDF at 47-48. He “got it to the point where [he] could turn the doorknob” but “something was blocking [the door] from the other side, not letting [him] open the door.” 7/5/16 TR/JEFS Dkt. #34, PDF at 48-49.

Sgt. Cobb testified Defendant “eventually cracked the door open [about maybe 4 to 6 inches,] and now [they] have him where [Sgt. Cobb] could see him in person.” 7/5/16 TR/JEFS Dkt. #34, PDF at 49. He testified that he was able to see “[j]ust a part of [Defendant]” through the crack in the door. 7/5/16 TR/JEFS Dkt. #34, PDF at 50. He could see Defendant standing and “holding an object in his right hand, and he was trying to hide it behind the [] jamb of the doorway, [as he was] talking to [Sgt. Cobb] through that crack.” *Id.* He testified that the object in Defendant’s hand “appeared to be a handle of possibly a sword.” *Id.* He could see “only the part that [Defendant] was holding in his hand, and he was hiding the other part behind the door jamb.” *Id.*

Sgt. Cobb testified, “For our safety, and fearing that he might actually have a samurai sword in his hand, I kind of pushed the door open, shoved him back away from us, and then made entry into the bedroom.” 7/5/16 TR/JEFS Dkt. #34, PDF at 50-51. He also testified, “[D]efendant lifted the object he was holding and took a swing at [him], what actually turned out to be a wooden sword.” 7/5/16 TR/JEFS Dkt. #34, PDF at 51. Defendant “just missed [Sgt. Cobb].” *Id.* Sgt. Cobb then testified, “At this point -- because when I went into the room, I had my hand on my gun. He took the swing, and then he -- I guess he knows that I had my hand on my gun. He [said], ‘Shoot me. Shoot me. That’s what I want.’” *Id.* Defendant sounded “[r]eal agitated, kind of yelled it at [Sgt. Cobb] . . . for [the police] to shoot him.” *Id.* Sgt. Cobb “tried to keep talking to [Defendant] trying to get him to calm down.” *Id.* He told Defendant that they were not there to arrest someone and that they just wanted to make sure that he was okay, but Defendant would not listen. 7/5/16 TR/JEFS Dkt. #34, PDF at 51-52.

Defendant “kept holding the stick like he was going to keep swinging the sword, so [Sgt. Cobb] kind of approached closer to him so if [Defendant did] swing, he wouldn’t be able to get a full swing on it with [Sgt. Cobb] close to him.” 7/5/16 TR/JEFS Dkt. #34, PDF at 52. Sgt. Cobb “kept trying to talk with [Defendant.]” *Id.* Defendant “then slowly [] started to reach to his left towards the couch[.]” *Id.* Sgt. Cobb noticed for the first time that “there w[ere] real samurai swords on the couch and [Defendant] was reaching for the real swords.” *Id.* Sgt. Cobb grabbed Defendant’s left hand with his “right hand to keep him away from the swords.” *Id.*

Defendant “raised up the wooden sword, and . . . was going to . . . strike [Sgt. Cobb] with the wooden sword, [so Sgt. Cobb] kind of pushed him away from the real swords [and] back towards . . . his bed in the room[.]” 7/5/16 TR/JEFS Dkt. #34, PDF at 53. While Sgt. Cobb “was

trying to push [Defendant] back, [Defendant] ducked down, [and Sgt. Cobb] started to go over him, then [Defendant] flipped [Sgt. Cobb] over over the top of him.” *Id.* Sgt. Cobb “landed on top of the bed” which was “actually just a mattress on the ground . . . not on a frame or box springs[,] . . . just right on the ground.” *Id.* While Sgt. Cobb “was on the ground, [Defendant] kneeed [him] twice in the top of [his] head.” *Id.* Officer Kahao and “Officer Takahashi” both “tried to subdue [D]efendant[,]” but he “fought them off [so they could not take him into custody either], and so they had to resort to using their pepper spray, OC pepper spray.” 7/5/16 TR/JEFS Dkt. #34, PDF at 54. Sgt. Cobb testified, “[Defendant] kept telling [them] to leave the whole time [they] w[ere] there, . . . that he’s okay, just leave, just leave. Even when [they] got into the room, he just told [them] just leave.” *Id.* Defendant’s mother “never did tell [them] to leave.” *Id.* With regard to whether there was any reason for him to believe that Defendant was not suicidal, Sgt. Cobb testified, “No, . . . the whole period of time is the period that he would be suicidal if we left.” 7/5/16 TR/JEFS Dkt. #34, PDF at 56.

Sgt. Cobb identified State’s Exhibit 1 as a photograph depicting the bedroom door. 7/5/16 TR/JEFS Dkt. #34, PDF at 54. He also identified State’s Exhibit 2 as a photograph depicting the bed. 7/5/16 TR/JEFS Dkt. #34, PDF at 55. He testified that he “must have been half on the bed and half on the ground because [he knew he] was on the ground when [Defendant] was kneeing [him].” *Id.* He further identified State’s Exhibit 3 as a photograph depicting the bedroom. *Id.* He also identified State’s Exhibit 4 as a photograph depicting “the wooden sword that [Defendant] swung at [him].” *Id.*; see also, JEFS Dkt. #40, PDF at 6, 8. He further identified State’s Exhibit 5 as a photograph depicting “the samurai swords that [Defendant] was reaching for with his left hand.” 7/5/16 TR/JEFS Dkt. #34, PDF at 55-56.

On cross-examination, Sgt. Cobb clarified that when he arrived at the residence, he “knocked and [Defendant’s brother] came and opened the door.” 9/1/16 TR/JEFS Dkt. #22, PDF at 4. He did not have a warrant to enter the home or Defendant’s room. 9/1/16 TR/JEFS Dkt. #22, PDF at 4-5. Based on the information Sgt. Cobb had at the time, Defendant had locked himself in his room. 9/1/16 TR/JEFS Dkt. #22, PDF at 5. Sgt. Cobb confirmed it was his understanding that Defendant’s mother had called the police. *Id.* He also confirmed it was not illegal to commit suicide or attempt to do so. 9/1/16 TR/JEFS Dkt. #22, PDF at 6. He confirmed that as far as he knew, Defendant was in the room by himself. *Id.* Sgt. Cobb testified he did not go to the residence “to investigate any type of crime or criminal activity[.]” *Id.*

Sgt. Cobb confirmed he said things like “stop being a baby,” “be a man,” and “grow up” to Defendant. 9/1/16 TR/JEFS Dkt. #22, PDF at 7. He testified that he knocked on the door and told Defendant to open it. *Id.* He denied that he ever said, “If you don’t open the door, we’re going to break the door down,” or called Defendant a fag. *Id.* He testified that Defendant “was already agitated” before he started talking with him and did not become more agitated. 9/1/16 TR/JEFS Dkt. #22, PDF at 7-8. He also testified Defendant just said, “Leave me alone. Go away,” and did not say “I’m not hurt” or “I’m fine.” 9/1/16 TR/JEFS Dkt. #22, PDF at 8.

Sgt. Cobb confirmed he was trained to deal with suicide calls at the HPD academy and the Annual Recall Training. *Id.* He testified that there were PowerPoint presentations at the training. 9/1/16 TR/JEFS Dkt. #22, PDF at 8-9. He did not receive a handout copy of the PowerPoint presentation, but he did receive something in writing. 9/1/16 TR/JEFS Dkt. #22, PDF at 9. He did not know if somebody within HPD wrote the material or “if [one of the police psychiatrists, who present at the training,] use[d] somebody else’s material.” *Id.* He confirmed that, as part of the instructions for responding to suicide calls, telling someone they are being “a baby” and to “be a man” could be used. 9/1/16 TR/JEFS Dkt. #22, PDF at 9-10. He testified that he thought it was a good idea to use such terms in order “[t]o get [the individual] to open the door.” 9/1/16 TR/JEFS Dkt. #22, PDF at 10.

Sgt. Cobb confirmed that he could not hear, see, or detect that Defendant was injured and that Defendant was responding to his statements. *Id.* He agreed that the locked door indicated that the person inside the room did not want him to enter. 9/1/16 TR/JEFS Dkt. #22, PDF at 11. He did not ever tell Defendant that he was going to use the paperclip to open his door and did not get Defendant’s consent to unlock the door. 9/1/16 TR/JEFS Dkt. #22, PDF at 13. As he was turning the door knob and unable to open the door, Defendant was still telling him to leave him alone. *Id.* He confirmed that it was pretty obvious by the tone of Defendant’s voice that he did not want Sgt. Cobb to be there. *Id.* He testified that Defendant “wanted [the police] to leave the house” and “just kept telling [them] to leave.” 9/1/16 TR/JEFS Dkt. #22, PDF at 14. He also testified that while there was nothing to indicate that Defendant was “bleeding out on the other side of the door,” there was also “[n]othing to indicate that it wasn’t happening, either.” *Id.* He confirmed he did not hear any signs or sounds of distress. *Id.*

Sgt. Cobb estimated he was talking with Defendant through the door for “[p]robably almost five minutes” before the door opened. *Id.* Sgt. Cobb could not “recall the exact time”

that he arrived on the scene, but knew that Officer Kahau and “Officer Takahashi” were on the scene “for quite a while before [he] got to the scene.” 9/1/16 TR/JEFS Dkt. #22, PDF at 15. He also estimated that Officer Kahau and “Officer Takahashi” were communicating with Defendant through the door for “[p]robably about maybe five minutes, also[,]” before “[he] took over.” *Id.* He testified, “If we would have known positively that [Defendant] had hurt himself, . . . we would have broke the door down.” 9/1/16 TR/JEFS Dkt. #22, PDF at 15-16. He explained, “[I]f we knew something had happened to him, we would have broken the door down. Being that he’s still talking with us, then we know we still had time to try to get him to cooperate and open the door.” 9/1/16 TR/JEFS Dkt. #22, PDF at 16. He confirmed that the police “didn’t break the door down.” *Id.* He confirmed that the part of Defendant which he “could see through the crack of the door” did not appear to be injured and he did not see any blood. 9/1/16 TR/JEFS Dkt. #22, PDF at 17. He testified he could see a part of Defendant’s face, and he did not seem to be in pain. *Id.* He confirmed it was not illegal to hold a sword. *Id.* He clarified that “after [Defendant] swung [the sword] at him, and it came back to him[, then he] realized it was a wooden sword.” 9/1/16 TR/JEFS Dkt. #22, PDF at 18. With regard to whether he wanted to see if Defendant was okay, he testified, “It was more than just physically okay. There’s also the mental part of it.” *Id.* He explained, “So if they tell us that based on his statement to me, ‘shoot me, shoot me, that’s what I want,’ that’s suicidal. He wants to be shot by a cop because he can’t do it himself, so he’ll use us to get him to commit the suicide for him.” *Id.*

Sgt. Cobb testified that “[a]s [he] was entering [the room], [Defendant] was swinging at [him.]” 9/1/16 TR/JEFS Dkt. #22, PDF at 19. He estimated the size of the room to be “[p]robably about 12 [feet] by maybe 16 [feet] or something, or 12 [feet] by 14 [feet].” *Id.* With regard to how he dodged the sword, he testified, “He was far enough away from me that, when he swung, he didn’t connect with me.” *Id.* He confirmed when he was able to see Defendant’s whole body, he observed Defendant was “not physically” injured and was not bleeding. *Id.* He confirmed that until he went into the room, Defendant had not committed any criminal activity. 9/1/16 TR/JEFS Dkt. #22, PDF at 19-20. He testified “it would be difficult, but [Defendant] could” have killed himself with the wooden sword. 9/1/16 TR/JEFS Dkt. #22, PDF at 20. He confirmed that it would take a long time for Defendant to do so. *Id.* He confirmed he did not see any illegal items or paraphernalia when he went into Defendant’s room. *Id.*

On redirect examination, Sgt. Cobb confirmed he intended to make sure that Defendant was not in danger with respect to the samurai swords in his room. 9/1/16 TR/JEFS Dkt. #22, PDF at 21-22. With regard to how much time elapsed from the moment that he entered the room until Defendant flipped him, he testified, “Just seconds -- a few seconds because I had just enough time to try to tell him we’re not here to arrest him or anything, we just came to check on him, and that’s when everything started.” 9/1/16 TR/JEFS Dkt. #22, PDF at 22.

On recross-examination, Sgt. Cobb testified, “After I pushed the door open, I pushed him back, and that’s when he swung at me. So now it changed the situation now.” 9/1/16 TR/JEFS Dkt. #22, PDF at 23.

On further redirect examination, Sgt. Cobb testified he became concerned for his own safety because “[a]s soon as [he went] in, [Defendant] swung a dangerous weapon at him.” 9/1/16 TR/JEFS Dkt. #22, PDF at 24. He also testified, “When he started reaching for the real ones, that really heightened my fear of him, and that’s when I shoved him to the bed.” *Id.*

During examination by the circuit court, Sgt. Cobb opined that after the door opened, Defendant’s engaging with him was a criminal offense. 9/1/16 TR/JEFS Dkt. #22, PDF at 25. He testified that prior to his opening the door, he did “[n]ot criminally” have probable cause, but as far as Defendant’s well-being he had a reason to open the door. 9/1/16 TR/JEFS Dkt. #22, PDF at 25-26. He confirmed that he had a significant concern that Defendant might harm himself, based on what Defendant’s mother told him, on what he may have had in his room, and everything else that was going on. 9/1/16 TR/JEFS Dkt. #22, PDF at 26.

c. HPD Corporal Takahashi.

On October 16, 2015, at around 1:30 p.m., HPD Corporal Craig Takahashi (“Cpl. Takahashi”), who was employed by HPD for 25 years, was called to an incident located at 98-569 Aloalii Street in the Aiea area. 8/23/16 TR/JEFS Dkt. #14, PDF at 5-6. He was informed by dispatch that the incident was “[f]irst [] called in argument, which turned into a male locked himself in a room that threatened to commit suicide and he had samurai swords in his room.” 8/23/16 TR/JEFS Dkt. #14, PDF at 6.

When he arrived at the residence, Cpl. Takahashi met with the caller, Defendant’s mother -- “Mrs. Matsuo” -- and “her other son” who were “going to take [him] up . . . to [Defendant’s] bedroom but at that time [he] told them hold on, [and let him] wait for [his] beat partner to come [be]cause [he] didn’t know what to expect.” 8/23/16 TR/JEFS Dkt. #14, PDF at 6-7. He

confirmed that he was the first police officer to arrive on the scene. 8/23/16 TR/JEFS Dkt. #14, PDF at 7. Defendant's mother told him that Defendant "had depression, that he tried to commit suicide before, hurt himself before," and "had several samurai swords." 8/23/16 TR/JEFS Dkt. #14, PDF at 7-8.

Once Officer Kahao arrived on the scene, Defendant's mother and "her other son" took Cpl. Takahashi and Officer Kahao upstairs "to where [Defendant's] bedroom was" located. 8/23/16 TR/JEFS Dkt. #14, PDF at 8. When they reached Defendant's bedroom, Cpl. Takahashi "tried turning . . . the doorknob," but "the door was locked." 8/23/16 TR/JEFS Dkt. #14, PDF at 9. He and Officer Kahao knocked on Defendant's bedroom door and "told him Honolulu police officer[s,] . . . We just want to talk . . . to find out what's going on." *Id.* Defendant's mother was "in the back by the kitchen area, but the kitchen area was right next to [Defendant's] bedroom so she was, like, kind of behind" Cpl. Takahashi and Officer Kahao. 8/23/16 TR/JEFS Dkt. #14, PDF at 10. Defendant's mother was within 10 feet of the police officers, as her other son was upstairs by her. *Id.*

Defendant stated, through the door, "I'm fine, leave me alone, go away." *Id.* With regard to whether he had any reason to think that Defendant was not threatening suicide, Cpl. Takahashi testified,

That I couldn't tell. I didn't see him. I wanted to see him visibly, make sure he wasn't hurt, so that's why I wanted him to open the door. And I kept -- I kept explaining to him, just open the door, your mom wants to make sure you're all right. That's all -- that's all we wanted him to do was just open the door.

8/23/16 TR/JEFS Dkt. #14, PDF at 10-11. He confirmed that he believed that suicide was potentially an issue. 8/23/16 TR/JEFS Dkt. #14, PDF at 11.

After a while, Sgt. Cobb arrived on the scene and "tried to talk to [D]efendant through the door, [and] have him open up the door so [the police] could talk to him." *Id.* Officer Kahao was next to Sgt. Cobb, while Cpl. Takahashi was "a couple [of] feet behind him." *Id.* Sgt. Cobb asked Defendant's mother "if she had a paper clip so he could try to open up [D]efendant's door [be]cause [D]efendant's doorknob . . . wasn't a key lock, it was like a pinhole doorknob, so . . . he wanted to see if he could stick . . . the paper clip in and she may unlock the door." *Id.* Defendant's mother gave Sgt. Cobb a paper clip, but he was unsuccessful in his attempt to use the paper clip to gain access to the door. 8/23/16 TR/JEFS Dkt. #14, PDF at 11-12.

While the police officer's continued to talk with him, Defendant "finally opened the door." 8/23/16 TR/JEFS Dkt. #14, PDF at 12. Cpl. Takahashi "saw . . . Officer Kahao unholster her gun. . . . [Cpl. Takahashi] moved up more and then [he saw] her reholster her weapon again." *Id.* When he moved closer, he was able to see that Defendant had a wooden stick in his hand. *Id.* Defendant was holding the stick "up at a 90-degree" angle with his right arm. 8/23/16 TR/JEFS Dkt. #14, PDF at 13.

Sgt. Cobb entered Defendant's bedroom and approached Defendant to have him put down the stick. *Id.* Sgt. Cobb tried to grab Defendant's hand which was holding the stick. *Id.* Defendant then flipped Sgt. Cobb onto the ground. 8/23/16 TR/JEFS Dkt. #14, PDF at 13-14. Officer Kahao and Cpl. Takahashi tried to pull Defendant off Sgt. Cobb, but were unable to since Defendant "as kind of strong." 8/23/16 TR/JEFS Dkt. #14, PDF at 14. Cpl. Takahashi took out his pepper spray and sprayed Defendant. *Id.* Officer Kahao also took out her pepper spray and spray him. *Id.* After a while, Defendant "kind of gave up the fight." *Id.* The police officers backed out of the bedroom, while keeping a "visual of [Defendant] in the room[.]" *Id.*

Officer Kahao called for "more units." 8/23/16 TR/JEFS Dkt. #14, PDF at 15. When "Officer de la Forrest" arrived on the scene, she "took out . . . her taser and pointed it at [D]efendant and had him come out, . . . [and] put his hand behind his back." *Id.* The police officers then "handcuffed him and [] got him out of . . . the room." *Id.*

Cpl. Takahashi did not lose visual contact of Defendant from the time that the police officers pepper sprayed him until he was handcuffed. *Id.* He did not ever hear Defendant's mother tell him to leave the bedroom or stop what he was doing. *Id.*

With regard to his police training in responding to calls with suicide as an issue, Cpl. Takahashi testified,

Every year we . . . have a recall training and . . . our police psychologist comes down and he talks to us about . . . suicides, how to deal with them, what to look for. . . . [I've] been doing this [for] 25 years so I kind of see it all the time so I kind of know . . . what to do pretty much already. If . . . they say they want to hurt themselves, or they're a danger to others, we'll call our psychologist, and we explain to them what we got and he will determine if we should take him to the hospital to get mental health treatment.

8/23/16 TR/JEFS Dkt. #14, PDF at 15-16. With respect to the suicidal individual, Cpl. Takahashi testified,

I want to . . . make sure that they get the help they need. . . . I don't want him to go to jail. I just want him to get help. . . . [W]e w[ere] there . . . to get him help, make sure that . . . he was all right. That all the mom wanted us to do, make sure he was all right.

8/23/16 TR/JEFS Dkt. #14, PDF at 16. Based on his training and experience, he testified that in this situation, even if Defendant's mother asked him to leave, he would not have left "[b]ecause if [he] did leave and [Defendant] did hurt himself, it's going to come right back to [him be]cause she's going to say, I called the police, they didn't do nothing. And [Cpl. Takahashi] couldn't do that." 8/23/16 TR/JEFS Dkt. #14, PDF at 16-17.

Cpl. Takahashi identified State's Exhibit 1 as "the bedroom where [D]efendant was." 8/23/16 TR/JEFS Dkt. #14, PDF at 17. He clarified that Defendant's bedroom door "swings inward[.]" *Id.* He also identified State's Exhibit 2 as "[D]efendant's bed," where Sgt. Cobb "got flipped over right by . . . where the bed was." 8/23/16 TR/JEFS Dkt. #14, PDF at 17-18. He further identified State's Exhibit 3 as "the couch where they had the samurai sword on." 8/23/16 TR/JEFS Dkt. #14, PDF at 18-19. He testified that he saw the samurai swords on the couch when he entered Defendant's bedroom. 8/23/16 TR/JEFS Dkt. #14, PDF at 19. He testified he did not see Defendant reach for the samurai sword. *Id.*

Cpl. Takahashi also identified State's Exhibit 4 as "the stick [Defendant] had in his hand." 8/23/16 TR/JEFS Dkt. #14, PDF at 19-20. He clarified that the stick was "a wooden sword" which Defendant raised over his head towards Sgt. Cobb. 8/23/16 TR/JEFS Dkt. #14, PDF at 20. He further identified State's Exhibit 5 as "the sword that was on the couch." *Id.* He also identified State's Exhibit 8 as "[t]hrowing knives" which he "saw . . . in the room later on." *Id.* He further identified State's Exhibit 9 as other "throwing stars[.]" 8/23/16 TR/JEFS Dkt. #14, PDF at 20-21. He also identified State's Exhibit 10 as "a replica airsoft, the AR15" which he saw in Defendant's closet. 8/23/16 TR/JEFS Dkt. #14, PDF at 21. He further identified State's Exhibit 11 as a "similar airsoft gun that was in [Defendant's] room." *Id.*

On cross-examination, Cpl. Takahashi clarified that Officer Kahao arrived on the scene around two or three minutes after him. 8/23/16 TR/JEFS Dkt. #14, PDF at 22. He confirmed that he would have waited for Officer Kahao to arrive even if he thought that there was an imminent threat of suicide because Defendant's mother informed him that Defendant had samurai swords and he did not know what to expect when he went up to Defendant's bedroom. 8/23/16 TR/JEFS Dkt. #14, PDF at 23.

Cpl. Takahashi testified that Defendant's mother told him that Defendant had locked himself in his room. *Id.* When he and Officer Kahao spoke to Defendant through the door, they were not being aggressive, but instead, tried to be friendly and build a rapport with him. 8/23/16 TR/JEFS Dkt. #14, PDF at 23-24. They told Defendant they "couldn't leave because [they] wanted to see him physically." 8/23/16 TR/JEFS Dkt. #14, PDF at 25.

Cpl. Takahashi clarified that Sgt. Cobb arrived on the scene around "10 minutes, maybe a little longer than that" after he and Officer Kahao. *Id.* He testified that Sgt. Cobb was "not like boisterous" in speaking with Defendant. 8/23/16 TR/JEFS Dkt. #14, PDF at 25-26. He confirmed Sgt. Cobb said something like "don't be a baby, be a man[.]" 8/23/16 TR/JEFS Dkt. #14, PDF at 26.

Cpl. Takahashi testified he previously "never had a situation where a person locked himself in a room and threatened suicide. Most of the calls [he] deal[t] with [wa]s . . . persons face to face." 8/23/16 TR/JEFS Dkt. #14, PDF at 27. He confirmed that Defendant did not himself tell him that he was going to kill himself or give him any indication that he was going to hurt himself. 8/23/16 TR/JEFS Dkt. #14, PDF at 28. With regard to whether there was anything he observed or heard that would indicate that Defendant was in danger in his room, he testified, "No, but I wasn't taking a chance." *Id.*

Cpl. Takahashi clarified that Defendant opened the bedroom door about a couple of minutes after Sgt. Cobb tried to open the door with a paper clip. 8/23/16 TR/JEFS Dkt. #14, PDF at 28-29. He confirmed that he did not see Defendant swing the wooden sword at Sgt. Cobb. 8/23/16 TR/JEFS Dkt. #14, PDF at 32. He also confirmed that he did not see any illegal activity or Defendant committing any crimes in Defendant's room, when Defendant opened the door. 8/23/16 TR/JEFS Dkt. #14, PDF at 32-33.

Cpl. Takahashi confirmed it was not illegal to own or possess a wooden samurai sword or any of the items depicted in the State's Exhibits. 8/23/16 TR/JEFS Dkt. #14, PDF at 30. He testified Defendant's mother "asked [him] where were the [samurai] swords[, and he] said [they were] on the couch and she was . . . kind of shocked. So [he] asked her, why, where w[ere] the swords supposed to be? She said [they were] supposed to have been on top of a shelf." 8/23/16 TR/JEFS Dkt. #14, PDF at 31.

Cpl. Takahashi confirmed he told Defendant he wanted to open the door, see that he was okay, and they would leave. 8/23/16 TR/JEFS Dkt. #14, PDF at 33-34. He testified that Sgt.

Cobb did not leave, but instead went inside Defendant's bedroom because Defendant "had the stick up, he was raising the stick." 8/23/16 TR/JEFS Dkt. #14, PDF at 34.

Cpl. Takahashi clarified that after they pepper sprayed Defendant, the spray kind of permeated the whole house. *Id.* Defendant was "kind of coughing, hacking from all the [pepper spray]." *Id.* He confirmed that the police officers could have broken down Defendant's bedroom door if they needed to do so. 8/23/16 TR/JEFS Dkt. #14, PDF at 35. He also confirmed Defendant was talking with them the whole time the door was closed. 8/23/16 TR/JEFS Dkt. #14, PDF at 35-36.

2. The Defense's Witness.

a. Gavin Lee.

At the time of the hearing, Gavin Lee ("Gavin"), Defendant's younger brother, was 21 years old. 9/1/16 TR/JEFS Dkt. #22, PDF at 28-29. He, Defendant, and their mother lived in a four-room residence located at 98-569 Aloalii Street where each person had their own bedroom. 9/1/16 TR/JEFS Dkt. #22, PDF at 29. He denied that he or his mother went into Defendant's room, as Defendant "said that he doesn't want anyone in his room." 9/1/16 TR/JEFS Dkt. #22, PDF at 29-30. He confirmed that they have respected Defendant's wish that they do not go into his room. 9/1/16 TR/JEFS Dkt. #22, PDF at 30. Gavin claimed Defendant's bedroom door was closed whether he was in his room or not home. *Id.*

On October 16, 2015, Gavin waited in the driveway for police officers to arrive, while his mother "was still upstairs." 9/1/16 TR/JEFS Dkt. #22, PDF at 31. Two police officers -- one male police officer and one female police officer -- arrived separately, about a few minutes apart. *Id.* He brought them into the front door and upstairs "to [Defendant]'s room[, where they] tried to talk to [Defendant] through the door" and "get him to open the door." 9/1/16 TR/JEFS Dkt. #22, PDF at 30-32. The police officers "were calm and saying that the family's worried about him. They just wanted to see if he's okay . . . and then they'll leave." 9/1/16 TR/JEFS Dkt. #22, PDF at 32. He claimed that the female police officer was primarily doing most of the talking for about ten minutes. *Id.* Defendant responded to the police officer "saying that he's okay. He just wants to be left alone, and to please leave." *Id.* He claimed that Defendant did not sound agitated, hurt, or injured. *Id.* He and his mother were sitting down "by the dining room table maybe 10ish feet away" from Defendant's bedroom. 9/1/16 TR/JEFS Dkt. #22, PDF at 33.

The two police officers “said that the third [police] officer has arrived, so [Gavin went] downstairs, [] open[ed] the door, heard the third male [police] officer, [who went] upstairs” with Gavin. 9/1/16 TR/JEFS Dkt. #22, PDF at 33-34. Sgt. Cobb talked to Defendant through the bedroom door. 9/1/16 TR/JEFS Dkt. #22, PDF at 34. According to Gavin, Sgt. Cobb “seemed more aggressive. He was banging on the door, demanding [Defendant] to open the door; told him that he was 26, ‘stop acting like a baby.’” *Id.* He claimed that Defendant asked, “Do you have a warrant?” *Id.* He further that claimed Sgt. Cobb said, “We don’t need a warrant, dumb ass.” *Id.* He denied that Sgt. Cobb said it in a calm manner. *Id.* He confirmed that he heard the words “be a man” and something to the effect of “grow up.” 9/1/16 TR/JEFS Dkt. #22, PDF at 34-35. He did not recall hearing Sgt. Cobb call Defendant “a fag.” 9/1/16 TR/JEFS Dkt. #22, PDF at 35. He claimed that he recalled Sgt. Cobb saying something to the effect of “open the door, or we’re going to break the door[.]” *Id.* According to Gavin, Defendant “seemed more agitated than before” and was telling Sgt. Cobb to leave and that “he’s fine, he’s okay.” *Id.* He claimed that Sgt. Cobb spoke with Defendant for “another 10ish minutes.” *Id.*

Gavin saw Sgt. Cobb “look around the room for something, and then he [went] back to the door, and that’s when the door open[ed].” *Id.* When the police officers went into Defendant’s room, Gavin “got up and [] followed the [police] officers, and [] st[ood] right before the doorway to [Defendant]’s room.” 9/1/16 TR/JEFS Dkt. #22, PDF at 36. He saw Defendant standing by his desk and that he okay. *Id.* He testified that “[t]he edge of the desk is pretty close to the doorway[.]” about “[a] few feet . . . at most.” 9/1/16 TR/JEFS Dkt. #22, PDF at 36-37. Defendant was a “little more than arm’s distance away” from the police officers. 9/1/16 TR/JEFS Dkt. #22, PDF at 37. He claimed that Defendant had “a wooden sword in his right hand, down into his side” with the tip of the sword facing down. *Id.* He denied seeing Defendant swing the sword at anyone. *Id.*

According to Gavin, Defendant was standing in the room with the police officers for a “few minutes.” 9/1/16 TR/JEFS Dkt. #22, PDF at 38. The police officers “were telling [Defendant] to drop the stick.” *Id.* He claimed that he said to the police officers, “We see [Defendant] is okay. That was our goal. Can you guys please leave?” *Id.* He further claimed that the first male police officer responded, “You guys were the ones who called us,” and turned his back to Gavin. *Id.*

Gavin “saw [Sgt.] Cobb get closer to [Defendant]. That’s when he grabbed [Defendant]’s left arm, and he reached for [Defendant]’s neck, and at the same time [Defendant] dropped . . . the wooden sword in his hand.” 9/1/16 TR/JEFS Dkt. #22, PDF at 39. With regard to why he told the police officers to leave, he testified, “We just wanted to see that [Defendant] is okay. We saw that he was okay. I didn’t know what was going to happen. Since the [police] officers were inside of the room, the tension seemed kind of high.” *Id.* He claimed that Sgt. Cobb “was being aggressive through the door[, and] still seemed aggressive while he was in the room facing [Defendant].” *Id.* He further claimed, “It made me worried that I didn’t know what was going to happen.” *Id.*

On cross-examination, Gavin testified that aside from Defendant, he had “one more older brother,” named “Bryce.” 9/1/16 TR/JEFS Dkt. #22, PDF at 40-41. He testified that his mother told him that the police were called because Defendant and “Bryce” had a fight and that Defendant was not opening the bedroom door. 9/1/16 TR/JEFS Dkt. #22, PDF at 41. Defendant’s mother “was worried he might hurt himself.” *Id.* He was not aware if Defendant had threatened to commit suicide that day and neither his mother nor “Bryce” told him anything about Defendant threatening to commit suicide. 9/1/16 TR/JEFS Dkt. #22, PDF at 41-42. “Bryce” was not at home when the police arrived. 9/1/16 TR/JEFS Dkt. #22, PDF at 42.

Gavin denied Defendant ever opened the door while the female police officer was talking to Defendant. *Id.* He claimed that the lock on Defendant’s door could not be locked from the outside if no one was in the bedroom. *Id.* With regard to Sgt. Cobb asking his mother for a paper clip, he testified, “I don’t recall him asking physically for a paperclip, but I know he seemed to be searching for some kind of object.” *Id.* With regard to whether Sgt. Cobb ever found an object, he testified, “I didn’t see any objects that I’m -- I’m guessing he did since he went back to the door.” 9/1/16 TR/JEFS Dkt. #22, PDF at 42-43. He did not recall seeing his mother give anything to Sgt. Cobb to try to gain entrance to Defendant’s room. 9/1/16 TR/JEFS Dkt. #22, PDF at 43.

Gavin testified that when the three police officers went into Defendant’s bedroom, he stood “[m]aybe like one step before the doorway” to the bedroom. *Id.* He claimed that he did not see the samurai swords on Defendant’s couch and did not see Defendant reach with his left hand toward the couch. 9/1/16 TR/JEFS Dkt. #22, PDF at 44. He clarified that initially he could not see the couch, stating, “[U]ntil after [Defendant] had thrown the first cop, the other two

[police] officers moved into different positions, so [then] . . . I could see the couch.” *Id.* He did not recall seeing swords on the couch. *Id.* Gavin denied he ever heard Defendant threaten to commit suicide. *Id.* He admitted that he cleaned his own room. 9/1/16 TR/JEFS Dkt. #22, PDF at 45. He was not aware of whether Defendant cleaned his own room. *Id.*

On redirect examination, Gavin reiterated that he did not know if Defendant cleaned his own room. *Id.* He testified that their mother “[s]ometimes” cleaned Defendant’s room and that they “do have maids who come, who also help clean the rooms.” *Id.* He confirmed that the maids cleaned Defendant’s room with his consent. *Id.* He claimed that when he walked over to Defendant’s bedroom doorway, the police officers were still standing by the door inside of the bedroom, but “none of the physicality had occurred yet[.]” 9/1/16 TR/JEFS Dkt. #22, PDF at 46. He denied “any physicality had occurred” when he said, “we see that he’s okay, we want you to leave[.]” *Id.*

On recross-examination, Gavin identified State’s Exhibit 1 as Defendant’s doorway. 9/1/16 TR/JEFS Dkt. #22, PDF at 46-47. He claimed that he was standing at the entryway to Defendant’s room when the physical incident occurred. 9/1/16 TR/JEFS Dkt. #22, PDF at 47. He testified that he did not enter the room at any point during the physical altercation. 9/1/16 TR/JEFS Dkt. #22, PDF at 47-48. He testified that the altercation occurred a “[l]ittle to the left and in front of [him.]” 9/1/16 TR/JEFS Dkt. #22, PDF at 48.

On redirect examination, Gavin denied there was anything that was blocking his view of what was occurring in Defendant’s room. *Id.*

On October 13, 2016, the circuit court filed its Findings of Fact and Conclusions of Law and Order Granting Defendant’s Motion to Suppress Evidence and Statements. JEFS Dkt. #16, PDF at 141-152, attached hereto as Appendix “A.”

Notice of Appeal was filed herein on November 10, 2016. JEFS Dkt. #1, PDF at 1-20.

II.

STATEMENT OF THE POINTS OF ERROR

1. In the instant appeal, the State challenges as wrong the circuit court’s Findings of Fact and Conclusions of Law and Order Granting Defendant’s Motion to Suppress Evidence and Statements filed on October 13, 2016, to wit, the circuit court’s order that “all statements, evidence, observations and actions that were observed or obtained after the unlawful entrance

into Defendant's bedroom, and all the fruits thereof [be] suppressed and precluded from use at trial." JEFS Dkt. #16, PDF at 141-152, attached hereto as Appendix "A."

On April 25, 2016, Defendant filed a Motion to Suppress Evidence and Statements. JEFS Dkt. #16, PDF at 75-97. On May 27, 2016, the State filed a Memorandum in Opposition to Defendant's Motion to Suppress Evidence and Statements. JEFS Dkt. #16, PDF at 104-116. On August 23, 2016, the circuit court held a hearing on Defendant's Motion to Suppress Evidence and Statements. See generally, 8/23/16 TR/JEFS Dkt. #14, and 9/1/16 TR/JEFS Dkt. #22. The State challenges as wrong, *inter alia*, the circuit court's conclusions with regard to granting Defendant's motion to dismiss, as follows:

In this case, the defense has sought to suppress the evidence based on an unlawful search of [D]efendant's room as it was accomplished without a search warrant and in violation of [D]efendant's Fourth Amendment rights. And that, beyond that, that all evidence seized and any statements made were essentially the fruit of the poisonous tree and should be suppressed. The Court is in agreement with the defense and I will be granting the motion in its entirety.

9/1/16 TR/JEFS Dkt. #22, PDF at 60. The State also challenges as wrong the circuit court's conclusions with regard to granting Defendant's motion to dismiss, as follows:

Even if the Court were to view the act of opening the door and by all accounts had to have been [D]efendant that opened the door, under that set of circumstances it's very clear -- and the Court does find the testimony of the brother to be credible on the point that, by all accounts, officer -- Sergeant Cobb sort of took a different tact in dealing with this type of situation. The first two officers tried to do what they could to persuade [D]efendant, cajole him, do whatever was necessary they thought to get him to essentially open the door. Officer Cobb or Sergeant Cobb took an entirely different tact; was much more assertive, I think that's fair to say.

And I do agree or in other words find credible the testimony of the brother where he indicated that various statements were made. And perhaps one could question whether or not they were necessarily proper or not. I wasn't there and I don't fault the Sergeant for thinking that perhaps that was the appropriate tact to take. But at that point in time when he essentially told [D]efendant that he had better open the door or the officers will essentially break the door down, I can't think of any other statement or statement that might be similarly made in that set of circumstances that would not rise to a level of some level of coercion. And that to the extent that [D]efendant may have then viewed and consented to the opening of the door that it is deemed by this court to be ineffective consent as it was not freely given, in my view, and was a product or a likely course of conduct on behalf of the police.

Beyond that, to the extent that the door was open and then the officers had an opportunity to view [D]efendant -- had a partial view of [D]efendant, and that included [D]efendant standing behind the door apparently armed with some sort of object, and even if we get past that and say that perhaps they were -- they made those observations and that there were some sort of conduct that would have justified the officers immediately entering the room, the Court does not find that under the circumstances as I've stated previously that the vantage point from which they would have made those observations exceeded essentially what was permissible because in order for them to avail themselves of the plain view exception, they would need to be in a place where they will lawfully locate and then inadvertently make those observations. The Court does not find that to be the case.

Lastly, to the extent that the State has relied on the exigency exception for the warrant requirement, [*Seibert v. Florida*, 923 So.2d 460 (Fla. 2006)] is fairly clear that in a circumstance not that dissimilar -- and I think the State has every right to rely on that particular case where there are some circumstances where even though the police may be deemed to have otherwise acted perhaps unlawfully and entered the residence without a warrant to follow-up on a suicide call just to check on the welfare and well-being of the individual involved, and in that set of circumstances they felt that the observations, after performing an inspection or at least a viewing of the interior of the apartment which was not beyond the scope of what their entry would have required to check on the individual, that those observations and the evidence recovered as a result thereof were proper. Here, this court cannot adopt -- that particular case as binding precedent on this court. And the primary reason is what [defense counsel] alluded to at the outset. We're always mindful of the fact that here in Hawaii that our courts have for quite some time, as is reflected in our constitution, have every right to afford individuals to greater protections, and one of those is the right to privacy. And here, when I look at the overall set of circumstances, even if I were to conclude -- and I'm not so sure that I can -- that true exigency existed in this situation. But even if I did reach that, the exception to the warrant requirement requires probable cause coupled with exigency. And lacking probable cause for this particular exception, everything else that flows from that has to be deemed to be unlawful.

9/1/16 TR/JEFS Dkt. #22, PDF at 63-66. Finally, the State challenges as wrong the circuit court's stating,

Here, in this case, I think in many ways you may disagree, but I think in many ways the police have to make these choices sometimes knowing -- and here they weren't entering your room. And, I think, to give the State credit for pointing this out in the *Seibert* decision is that it's the -- it's the mindset of the officers dealing with it. I have no doubt that they entered that room with every good intention to ensure that you were okay notwithstanding everything that you were doing to get them to get the heck out of your house and leave you alone. And it was only when they entered the room, and as I've stated, unlawfully that

the circumstances led to the ultimate charges in this case. But they were put in a difficult set of circumstances. They did the best they could. But here, I think sometimes that's what they need to do because what's the alternative? The alternative is that they leave somebody who is clearly demonstrating or presenting themselves in a way that's causing those around them grave concern for their well-being. And that sometimes their actions, while understandable, may be even entirely appropriate, are not going to necessarily survive a challenge. And that's simply what's happened in this case.

9/1/16 TR/JEFS Dkt. #22, PDF at 66-68.

The State challenges as wrong the circuit court's Findings of Fact ("FOF") no. 23, which reads, in pertinent part, "There was no information known to the officers before entering Defendant's bedroom that criminal activity was occurring within the bedroom." See, JEFS Dkt. #16, PDF at 146, attached hereto as Appendix "A." To the contrary, the police officers observed Defendant holding a wooden samurai sword over his head towards Sgt. Cobb. Specifically, FOF no. 21 correctly points out that "[t]he officers observed Defendant was holding a wooden sword . . . *before* they entered Defendant's bedroom." See, JEFS Dkt. #16, PDF at 146, attached hereto as Appendix "A" (emphasis added). Such conduct was a threat to cause bodily injury to Sgt. Cobb with a dangerous instrument. Indeed, such conduct was the basis for Count 1, the offense of Terroristic Threatening in the First Degree in violation of HRS Section 707-716(1)(e), of the indictment against Defendant. See, Indictment, JEFS Dkt. #16, PDF at 15-16. Accordingly, the circuit court's FOF no. 23 is clearly erroneous.

The State further challenges as wrong the circuit court's Conclusions of Law ("COL") nos. 9 through 14, 21, and 23 through 25. See, JEFS Dkt. #16, PDF at 148-151, attached hereto as Appendix "A." The State submits the applicable and controlling law does not support the circuit court's conclusions and thus they are wrong as a matter of law. Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994).

III.

STATEMENT OF THE STANDARD OF REVIEW

A. Ruling on Motion to Suppress Evidence: The circuit court's ruling on a motion to suppress evidence is reviewed *de novo* to determine whether, as a matter of law, the ruling was "right" or "wrong." State v. Edwards, 96 Hawai'i 224, 231, 30 P.3d 238, 245 (2001) (citing, State v. Jenkins, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000)). The proponent of the motion to suppress had the burden of establishing, by a preponderance of the evidence, that the statements

or items sought to be excluded were unlawfully secured and that his or her right to be free from unreasonable searches or seizures was violated under the fourth amendment to the United States Constitution and article I, section 7 of the Hawai‘i Constitution. State v. Wilson, 92 Hawai‘i 45, 48, 987 P.2d 268, 271 (1999) (citations omitted).

The trial court’s findings of fact are reviewed under the “clearly erroneous” standard, while its conclusions of law are reviewed under the “right/wrong” standard. Dan v. State, 76 Hawai‘i 423, 428, 879 P.2d 528, 533 (1994). “A conclusion of law that is supported by the trial court’s findings of fact and that reflects an application of the correct rule of law will not be overturned.” *Id.* (citation omitted). “A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made.” State v. Okumura, 78 Hawai‘i 383, 392, 894 P.2d 80, 89 (1995); see, State v. Lloyd, 61 Haw. 505, 512, 606 P.2d 913, 918 (1980) (“[T]he question of exigency is addressed to the factfinding function of the trial court, and its findings in that regard will not be set aside unless determined to be clearly erroneous.”). However, where a conclusion of law “presents mixed questions of fact and law,” that conclusion of law “is reviewed under the clearly erroneous standard because the court’s conclusions are dependent upon the facts and circumstances of each case.” State v. Crouser, 81 Hawai‘i 5, 10, 911 P.2d 725, 730 (1996). Inasmuch as the question of whether an exigent circumstance exists is dependent on the totality of the circumstances of each case, the clearly erroneous standard of review should also apply to those conclusions of law relating to an exigent circumstance and present mixed questions of fact and law. See, *id.*; *accord*, Lloyd, 61 Haw. at 512, 606 P.2d at 918.

IV.

ARGUMENT

A. THE CIRCUIT COURT ERRED IN SUPPRESSING EVIDENCE STEMMING FROM THE POLICE ENTRY INTO DEFENDANT’S BEDROOM WITHOUT A WARRANT WHERE EXIGENCY EXISTED UNDER THE CIRCUMSTANCES OF THIS CASE.

Both the Fourth Amendment to the United States Constitution and Article 1, section 7 of the Hawai‘i Constitution protects the right of the people to be secure in, among other things, their “houses” against unreasonable searches and seizures. See, U.S. Const. amend. IV; Haw. Const. art. I, § 7. “[T]he primary purpose of both the Fourth Amendment and article I, section 7 ‘is to

safeguard the privacy and security of individuals against arbitrary invasions by government officials.” State v. Lopez, 78 Hawai‘i 433, 441, 896 P.2d 889, 897 (1995). “Because of the special privacy interest in the home, ‘[i]t is now settled that any warrantless entrance of a private dwelling by the police can only be justified under the ‘exigent circumstances’ exception[] to the warrant requirement of the Fourth Amendment[.]’” State v. Line, 121 Hawai‘i 74, 85, 214 P.3d 613, 624 (2009) (citation and internal quotation marks omitted). As currently explained in this jurisdiction, the exigent circumstances exception

exists when the demands of the occasion reasonably call for an immediate police response. More specifically, it includes situations presenting an immediate danger to life or serious injury or an immediate threatened removal or destruction of evidence. However, the burden, of course, is upon the government to prove the justification . . . , and whether the requisite conditions exist is to be measured from the totality of the circumstances. And in seeking to meet this burden, the police must be able to point to specific and articulable facts from which it may be determined that the action they took was necessitated by the exigencies of the situation.

State v. Jenkins, 93 Hawai‘i 87, 102, 997 P.2d 13, 28 (2000) (citation omitted, emphases added); see, State v. Clark, 65 Haw. 488, 494, 654 P.2d 355, 360 (1982).

1. Exigent circumstances include providing emergency aid.

Indeed, a police officer’s search of a person’s home to determine whether any of the home’s occupants require emergency aid is dissimilar from the situation where a police officer searches a home to investigate or prevent criminal activity. See, United States v. Najjar, 451 F.3d 710, 714-715 (10th Cir.), *cert. denied*, 549 U.S. 1013 (2006) (explaining that “the emergency aid exigency” is “informed by the practical recognition of critical police functions quite apart from or only tangential to a criminal investigation”); see also, Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963) (“The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.”). The exigent circumstances exception to the warrant requirement “permit[s] a] warrantless entry in an ‘emergency’ requiring preventative action, even though no crime has been committed.” Duquette v. Godbout, 471 A.2d 1359, 1362 (R.I. 1984); *accord*, Jenkins, 93 Hawai‘i at 102, 997 P.2d at 28 (explaining that an exigent circumstance generally “exists when the demands of the occasion reasonably call for an immediate police response”).

The Hawai‘i Supreme Court has recognized that exigent circumstances include situations where a police officer is “faced with any sort of ‘emergency.’” State v. Bonnell, 75 Haw. 124,

138, 856 P.2d 1265, 1273 (1993); see also, United States v. Torres, 751 F.2d 875, 880 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985) (“A search without a warrant certainly is permissible in an emergency[.]”). In this regard, “[t]he role of a peace officer includes” not only “*preventing violence and restoring order*,” but also “rendering first aid to casualties.” Brigham City v. Stuart, 547 U.S. 398, 406 (2006) (emphasis added). Further:

[B]y design or default, the police are also expected to reduce the opportunities for the commission of some crimes through preventative patrol and other measures, *aid individuals who are in danger of physical harm, assist those who cannot care for themselves, resolve conflict, create and maintain a feeling of security in the community*, and provide other services on an emergency basis.

United States v. Snipe, 515 F.3d 947, 953 n.6 (9th Cir. 2008) (quoting, 3 W. LaFare, *Search & Seizure: A Treatise on the Fourth Amendment* § 6.6 (4th ed. 2004) (emphasis added); see, State v. Elderts, 62 Haw. 495, 499-500, 617 P.2d 89, 92-93 (1980) (recognizing that, where the circumstances show that “the need to act quickly [is] essential,” “the constitution does not require . . . police officers to break off their pursuit to seek a warrant and chance violence or escape by the suspects” because “[t]o do otherwise would [be] poor police work”).

Recognizing the multiple roles of a police officer, the United States Supreme Court (“U.S. Supreme Court”) has held that where the totality of the circumstances indicate that it is objectively reasonable for officers to enter a home to search for occupants that may require emergency aid, a police officer is not required to obtain a warrant to search a home in order to provide emergency aid to any person therein. See, Brigham City, 547 U.S. at 403 (“One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury.”); see also, Torres, 751 F.2d at 780; Patrick v. State, 227 A.2d 486, 489 (Del. 1967) (“The preservation of human life is paramount to the right of privacy protected by search and seizure laws and constitutional guaranties; it is an overriding justification of what otherwise may be an illegal entry.”).

2. The objectively reasonable standard.

The reasonableness standard “is an objective one,” and “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight” – “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments [] in circumstances that are tense, uncertain, and rapidly evolving.” Graham v. Conner, 490 U.S. 386, 396-97 (1989); see, Wayne, 318 F.2d at

212 (“[T]he business of policemen and firemen is to act, not to speculate or meditate on whether [a] report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process.”).

A court that reviews a situation confronted by a police officer does so “far removed from the scene and with the opportunity to dissect the elements of the situation.” Ryburn v. Huff, 132 S. Ct. 987, 991-992 (2012) (per curiam). As such, the U.S. Supreme Court has admonished against assessing the situation in a manner that “second-guess[es that] officer’s assessment, made on the scene, of the danger presented by a particular situation[.]” because a court’s assessment of the situation is ultimately made “with the benefit of hindsight and calm deliberation[.]” Ryburn, 132 S. Ct. at 992. Instead, “the proper perspective” is that “of a reasonable officer forced to make a split-second decision in response to a rapidly unfolding chain of events” *Id.*

Several of the U.S. Supreme Court’s cases demonstrate this “proper perspective.” See, e.g. Mincey v. Arizona, 437 U.S. 385, 392 (1978) (the U.S. Supreme Court recognized that “[t]he need to protect and preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.”); Brigham City, 547 U.S. at 403 (the U.S. Supreme Court explained that police officers “may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.”); and Michigan v. Fisher, 130 S. Ct. 546, 549 (2009) (per curiam) (the U.S. Supreme Court framed the issue as “whether there was ‘an objectively reasonable basis for believing’ that medical assistance was needed, or persons were in danger[.]” The Fisher Court explained that police officers “do not need ironclad proof of ‘a likely serious, life-threatening’ injury to invoke the emergency aid exception[.]” and “[i]t was error for the [state court of appeals] to replace th[e] objective inquiry into appearances with its hindsight determination that there was in fact no emergency.”); see also, State v. Pires, 201 N.W.2d 153, 157 (Wis. 1972) (“The fact that, in reality, no one was in the dwelling, does not alter the justification for the initial entry.”).

3. It was objectively reasonable for the police officers to open the bedroom door of a suicidal individual in order to determine whether he required emergency aid, including immediate mental health treatment.

It has been observed that “[a] 911 call is one of the most common – and universally recognized – means through which police and other emergency personnel learn that there is someone in a dangerous situation who urgently needs help.” United States v. Richardson, 208

F.3d 626, 630 (7th Cir.), *cert. denied*, 531 U.S. 910 (2000). “The whole point of the 911 system is to provide people in need of emergency assistance an expeditious way to request it.” Johnson v. City of Memphis, 617 F.3d 864, 870 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 1478 (2011); *Id.* (“[A] 911 call is by its nature an appeal for help in an emergency[.]”). “Many 911 calls are inspired by true emergencies that require an immediate response.” Richardson, 208 F.3d at 629.

“The efficient and effective use of the emergency response networks requires that the police (and other rescue agents) be able to respond to such calls quickly and without unnecessary second-guessing.” See, Richardson, 208 F.3d at 630; see also, Wayne, 318 F.2d at 212. In this light, “[a] myriad of circumstances could fall within the terms ‘exigent circumstances[.]’” – for example, “smoke coming out a window or under a door, the sound of gunfire in a house, threats from the inside to shoot through the door at police, [or] reasonable grounds to believe an injured or seriously ill person is being held within.” Wayne, 318 F.2d at 212; see, Fisher, 130 S. Ct. at 549 (“Officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception.”); United States v. Brown, 64 F.3d 1083, 1086 (7th Cir. 1995) (“We do not think that the police must stand outside an apartment, despite legitimate concerns about the welfare of the occupant, unless they can hear screams. *Doubtless outcries would justify entry, . . . but they are not essential.*” (emphasis added.)). The totality of the circumstances of this case clearly reveals that Officer Kahao, Sgt. Cobb, and Cpl. Takahashi had “‘an objectively reasonable basis for believing’ that medical assistance was needed, or persons were in danger[.]” Fisher, 130 S. Ct. at 549 (citation omitted). Furthermore, their objectively reasonable basis is based on specific and articulable facts. See, Jenkins, 93 Hawai‘i at 102, 997 P.2d at 28.

In the instant case, the police officers were sent to the scene on a 911 call regarding a suicidal male, Defendant, who had locked himself in a room. Moreover, the police officers were informed that Defendant had samurai swords in the room. Furthermore, when they arrived on the scene, Defendant’s mother reported she was scared because Defendant was suicidal and had attempted suicide in the past by cutting himself. Given the totality of the circumstances, the police officers had objectively reasonable grounds to believe that Defendant was in danger and to be concerned that he may be in need of emergency aid physically, was likely in need of aid mentally, and to believe that immediate action was required. Indeed, it would have been poor police work, if the police had left the scene without investigating into Defendant’s well-being, both physically and mentally.

That Defendant was discovered *physically* uninjured does not change the fact that he may have needed immediate mental health treatment; thus, the police officers had “reasonable grounds to believe that someone inside the [bedroom] may have been in need of emergency aid and immediate action was required[.]” Najar, 451 F.3d at 712. The inquiry remains the same – there must be an objectively reasonable basis that is “judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” See, Fisher, 130 S. Ct. at 549; Graham, 490 U.S. at 396-397; cf. Bonnell, 75 Haw. at 137, 856 P.2d at 1273 (“[A] search is not . . . made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success.” (Internal quotation marks and citation omitted.)); Pires, 201 N.W.2d at 157 (“The fact that, in reality, no one was in the dwelling, does not alter the justification for the initial entry.”). Here, the totality of the facts and circumstances indicates it was objectively reasonable for the officers to enter the bedroom to extinguish any uncertainty regarding whether Defendant required emergency aid with regard to his physical and mental well-being. See, Fisher, 130 S. Ct. at 548-549; Mincey, 437 U.S. at 392-393; Johnson, 617 F.3d at 870; Najar, 451 F.3d at 719; People v. Brooks, 289 N.E.2d 207, 210 (Ill. App. Ct. 1972) (“The very uncertainty created by the totality of all the[] circumstances created a justification, and actually a need, for the police to take immediate action.”). Of significance, even if Defendant was physically uninjured, given that Defendant’s mother informed the police that Defendant wanted to commit suicide, had locked himself in his room, and had attempted suicide before by cutting himself, it was objectively reasonable for the police to be concerned for Defendant’s mental well-being and to seek immediate mental health treatment for him.

Furthermore, the manner of the police search in this case was reasonable because it was brief and strictly circumscribed by the exigencies which justified its initiation. See, Mincey, 437 U.S. at 393. In other words, the police officers “did not attempt to search any place beyond the locations where a victim might likely be found.” See, Najar, 451 F.3d at 720. Prior to entering the bedroom, the police officers attempted to have Defendant come outside so that they could see that he was physically unharmed and so that they could talk with him. Without seeing Defendant’s physical appearance, the police officers had no indication that Defendant had not physically harmed himself. Moreover, as previously mentioned, even if Defendant was physically uninjured, certainly, it was objectively reasonable for the police to be concerned for Defendant’s mental health and to seek mental health treatment for him. As such, it was

necessary for the police to have access to Defendant in order to seek mental health treatment for him. Under these circumstances, it cannot be said that Sgt. Cobb's opening of Defendant's bedroom door was unreasonable, as it was "strictly circumscribed by the exigencies which justif[ied] its initiation[.]" *Mincey, supra*. Accordingly, Defendant's claim is without merit.

B. THE EXCLUSIONARY RULE DOES NOT APPLY AS DEFENDANT DID NOT HAVE A LEGITIMATE, REASONABLE EXPECTATION OF PRIVACY WITH RESPECT TO COMMITTING THE CRIMINAL OFFENSES OF TERRORISTIC THREATENING IN THE FIRST DEGREE, ASSAULT AGAINST A LAW ENFORCEMENT OFFICER, AND RESISTING ARREST.

Even assuming *arguendo* the police conduct in the instant case amounted to an unlawful search and seizure, the exclusionary rule does not prohibit testimony describing a defendant's own illegal actions following an unlawful search and seizure. See, *Brown v. City of Danville*, 44 Va.App. 586, 606 S.E.2d 523 (Va. Ct. App. 2004). In cases where a person subjected to an illegal search reacts by committing a criminal offense, such as endangering the safety of the officers conducting the search, courts have uniformly held that the evidence of this new crime is admissible. See, 5 W. LaFave, *Search and Seizure* § 11.4(j) at 339-341 (3d ed. 1996).

In *United States v. Waupekenay*, 973 F.2d 1533 (10th Cir. 1992), the United States Court of Appeals, Tenth Circuit, held that evidence of an assault initiated against police officers after an illegal entry was admissible because the defendant did not have a subjective expectation of privacy at the time he initiated the assault. *Waupekenay*, 973 F.2d at 1537-1538. In *Waupekenay*, the police officers entered the defendant's trailer home, without consent, to investigate a domestic violence complaint and partially saw the defendant in the back of the trailer. *Waupekenay*, 973 F.2d at 1536. The defendant then stepped fully into view and aimed a semi-automatic rifle at the police officers. *Waupekenay*, 973 F.2d at 1535. The police officers eventually arrested the defendant and seized evidence. *Id.* The defendant was charged with assault with a dangerous weapon. *Id.* The defendant moved to suppress evidence obtained as a result of the officers' entry. *Id.* The trial court found the entry was illegal and granted the motion. *Id.* The Tenth Circuit agreed that the officers unlawfully entered the home. *Waupekenay*, 973 F.2d at 1536. In determining whether the evidence was the fruit of the unlawful entry, the court asked two questions. *Waupekenay*, 973 F.2d at 1536-1538. First, did the defendant exhibit a subjective expectation of privacy when he assaulted the officers? *Id.*

Second, if he did, was that expectation reasonable? *Id.* The Waupekenay Court did not reach the second question because it found that once the defendant was aware that the officers were inside his home, he could not have had a legitimate, reasonable expectation of privacy with respect to any actions initiated in their presence. *Id.* In other words, the Tenth Circuit found the evidence was not fruit of the poisonous tree and not tainted by the illegal search because the defendant commenced the independent crime of assault after the police entered his home and fully cognizant of the police presence as well as their ability to see his actions. Waupekenay, 973 F.2d at 1536-1537.

Indeed, the overwhelming weight of authority on this issue from federal and state courts are consistent with the Waupekenay Court's holding "uniformly reject[ing] motions to suppress arising from skirmishes comparable to the one at issue in the instant case." Waupekenay, 973 F.2d at 1537-1538. See, United States v. Sprinkle, 106 F.3d 613, 619 (4th Cir. 1997); United States v. Udey, 748 F.2d 1231, 1240 (8th Cir. 1984), *cert. denied*, 472 U.S. 1017, 105 S.Ct. 3477, 3478, 87 L.Ed.2d 613 (1985); United States v. King, 724 F.2d 253, 256 (1st Cir. 1984) (holding that the defendant's act of firing a gun in response to an unlawful police search constituted "an independent intervening act which purged the taint of the prior illegality"); Napageak v. State, 729 P.2d 893, 895 n. 2 (Alaska Ct. App. 1986) ("The better basis of distinction [between this situation and a proper application of the "fruit of the poisonous tree" extension of the Exclusionary Rule] is that no exploitation of the prior illegality is involved and that the rationale of the exclusionary rule does not justify its extension to this extreme. Application of the exclusionary rule in such a fashion . . . would in effect give the victims of illegal searches a license to assault and murder the officers involved – a result manifestly unacceptable.' " (quoting, 3 W. LaFave, *Search and Seizure* § 11.4(j), at 680 (1978) (alteration in original) (internal quotes omitted))); State v. Brocuglio, 264 Conn. 778, 826 A.2d 145, 152 (2003) (adopting the "new crime" exception to the exclusionary rule, reasoning that "the limited objective of the exclusionary rule is to deter unlawful police conduct – not to provide citizens with a shield so as to afford an unfettered right to threaten or harm police officers in response to the illegality"); United States v. Nooks, 446 F.2d 1283, 1288 (5th Cir.), *cert. denied*, 404 U.S. 945, 92 S.Ct. 299, 30 L.Ed.2d 261 (1971); People v. Pearson, 150 Cal.App.2d 811, 815-819, 311 P.2d 142, 145-146 (1957); People v. Klimek, 101 Ill.App.3d 1, 6, 56 Ill.Dec. 403, 408, 427 N.E.2d 598, 603 (1981) (holding that evidence describing the unlawful conduct of the defendant

following unconstitutional police conduct was admissible); State v. Boilard, 488 A.2d 1380, 1386-1387 (Me. 1985) (“[I]t is beyond question that the exclusionary rule does not extend to suppress evidence of independent crimes taking place as a reaction to an unlawful arrest or search.”); State v. Brown, 784 S.W.2d 903, 905 (Mo.Ct.App. 1990) (holding that the exclusionary rule did not apply to evidence of an assault committed by defendant in response to an illegal search); State v. Ottwell, 239 Mont. 150, 779 P.2d 500, 502-503 (1989) (refusing “to extend the exclusionary rule to suppress evidence of a person’s assaultive conduct towards a state employee who committed a Fourth Amendment violation,” reasoning that “[s]uch evidence does not constitute the ‘fruit of the poisonous tree’ ”); State v. Chamberlain, 109 N.M. 173, 783 P.2d 483, 485 (App. 1989) (admitting evidence that the defendant shot at police officers following an illegal entry into his home); Commonwealth v. Saia, 372 Mass. 53, 360 N.E.2d 329, 332 (1977); State v. Bale, 267 N.W.2d 730, 732-733 (Minn. 1978); State v. Miller, 282 N.C. 633, 194 S.E.2d 353, 357-358 (1973) (ruling that evidence of a police officer’s murder after the officer illegally entered the defendant’s premises was admissible); State v. Saavedra, 396 N.W.2d 304, 305 (N.D. 1986); State v. Indvik, 382 N.W.2d 623, 627-628 (N.D. 1986); State v. Townes, 41 N.Y.2d 97, 100-103, 390 N.Y.S.2d 893, 896-898, 359 N.E.2d 402, 405-406 (1976) (holding that the defendant’s “action in pulling and attempting to fire the gun” after an unconstitutional seizure “serve[d] to render any connection between the lawless conduct of the police and the discovery of the challenged evidence . . . so attenuated as to dissipate the taint” of illegality (omission in original) (internal quotations omitted)); State v. Burger, 55 Or.App. 712, 639 P.2d 706, 707-708 (1982) (holding that an illegal warrantless entry cannot immunize subsequent criminal activity); State v. Mitchell, 848 S.W.2d 894, 896 (Tex. App. 1993) (“[I]t is beyond question that the exclusionary rule does not extend to suppress evidence of independent crimes against police officers taking place in reaction to an unlawful entry.”); Commonwealth v. Hill, 264 Va. 541, 548, 570 S.E.2d 805, 809 (2002) (affirming conviction for assault where defendant attempted to resist an illegal detention, noting that “ ‘[c]lose questions as to whether an officer possesses articulable suspicion must be resolved in the courtroom and not fought out on the streets’ ” (quoting, State v. Wiegmann, 350 Md. 585, 714 A.2d 841, 849-850 (1998))); Woodson v. Commonwealth, 245 Va. 401, 406, 429 S.E.2d 27, 30 (1993); State v. Gaffney, 36 Or.App. 105, 583 P.2d 582, 584 (1978); State v. Miskimins, 435 N.W.2d 217, 221-222 (S.D. 1989); State v. Aydelotte, 35 Wash.App. 125, 665 P.2d 443, 447 (1983) (“All courts which have

considered this issue . . . agree that evidence of post-entry assaults on police officers are outside the scope of the exclusionary rule.”).

The Waupekenay Court noted these numerous courts “have considered situations in which a defendant seeks to suppress evidence relating to his or her violence or threatened violence toward police officers subsequent to an unlawful search and seizure or a warrantless entry.” Waupekenay, 973 F.2d at 1537-1538. Of importance, the Tenth Circuit noted, as follows:

We note that, whereas our decision stems from the fact that Mr. Waupekenay lacked a legitimate expectation of privacy at the time he assaulted the officers, many of the above courts based their decisions upon somewhat different reasoning. Some courts have found the intervening act of the defendant to be so separate and distinct from the illegal entry or arrest as to break the causal chain.

Other courts have stressed the limited objective of the exclusionary rule- *i.e.*, deterring unlawful police conduct by excluding evidence obtained as a result of such conduct-and the strong public interest in preventing and punishing force or threats of force directed against police officers.

The rationale that is most applicable depends upon the underlying facts of the encounter. Here, we have chosen to rely on the defendant’s lack of a reasonable expectation of privacy; in other situations, a different rationale may be more appropriate. However, whatever rationale is used, the result is the same: Evidence of a separate, independent crime initiated against police officers in their presence after an illegal entry or arrest will not be suppressed under the Fourth Amendment.

Waupekenay, 973 F.2d at 1538 (citations omitted).

In United States v. Bailey, 691 F.2d 1009 (11th Cir. 1982) the United States Court of Appeals, Eleventh Circuit, held that “the police may legally arrest a defendant for a new, distinct crime, even if the new crime is in response to police misconduct and causally connected thereto.” Bailey, 691 F.2d at 1017-1018. The Bailey Court explained:

. . . Unlike the situation where in response to the unlawful police action the defendant merely reveals a crime that *already* has been or is being committed, extending the fruits doctrine to immunize a defendant from arrest for *new* crimes gives a defendant an intolerable *carte blanche* to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct. This result is too far reaching and too high a price for society to pay in order to deter police misconduct.

Bailey, 691 F.2d at 1017 (emphases added). The South Dakota Supreme Court agreed with this reasoning and noted that a contrary holding “would have allowed [the] defendant to summarily

execute [the two officers involved] with no legal accountability[.]” Miskimins, 435 N.W.2d at 221; See also, Bale, 267 N.W.2d at 733 (holding that the assault committed by defendant was “an intervening act of defendant’s free will which dissipated any taint” caused by unlawful police behavior); and, Burger, 55 Or.App. at 716 (“We decline to hold that after an unlawful entry evidence of subsequent crimes committed against police officers must be suppressed. Such a rule would produce intolerable results. For example, a person who correctly believed that his home had been unlawfully entered into by police could respond with unlimited force and, under the exclusionary rule, could be effectively immunized from criminal responsibility for any action taken after that entry. . . . We do not believe either the state or federal constitution compels such a result.”). No matter what rationale is used, the result is the same: Evidence of a separate, independent crime initiated against police officers in their presence after an illegal entry will not be suppressed under the Fourth Amendment.

In the instant case, Defendant held a wooden samurai sword in his right hand raised over his head towards Sgt. Cobb. 8/23/16 TR/JEFS Dkt. #14, PDF at 20. Sgt. Cobb entered Defendant’s bedroom and approached Defendant to have him put down the sword. 8/23/16 TR/JEFS Dkt. #14, PDF at 13. Sgt. Cobb tried to grab Defendant’s hand which was holding the stick. *Id.* Defendant then flipped Sgt. Cobb onto the ground. 8/23/16 TR/JEFS Dkt. #14, PDF at 13-14. Defendant’s separate, independent crimes initiated against the police officers in their presence after an illegal entry should not have been suppressed under the Fourth Amendment. To conclude otherwise, “would produce intolerable results.” Burger, *supra*.

The State acknowledges that “article I, section 7 of the Hawai‘i Constitution provides broader protection than the fourth amendment to the United States Constitution because it also protects against *unreasonable* invasions of privacy.” State v. Dixon, 83 Hawai‘i 13, 23, 924 P.2d 181, 191 (1996) (emphasis added). Nevertheless, in this case, there was no “unreasonable invasion[] of privacy,” as the police officers unlocked Defendant’s bedroom door to investigate into his physical and mental well-being, given that his mother reported concern that Defendant was suicidal (Defendant told her he wanted to kill himself), that Defendant was inside his bedroom with samurai swords, and that he had previously attempted suicide by cutting himself. Under these circumstances, it was reasonable for the police to unlock Defendant’s door in the interest of protecting or preserving Defendant’s life. To suggest that the police should have entered the room earlier (by breaking down the door) if there was an immediate danger to life or

injury, or not entered at all, is the type of second-guessing that the U.S. Supreme Court has admonished against assessing the situation. Ryburn, *supra*. In the instant case, when Defendant “eventually cracked open the door” and Sgt. Cobb saw an object in Defendant’s hand that “appeared to be a handle of possibly a sword,” the State submits “a reasonable officer forced to make a split-second decision in response to [the] rapidly unfolding chain of events,” Ryburn, *supra*, would do what Sgt. Cobb did, to wit, “[f]or [the police officers’] safety, and fearing that [Defendant] might actually have a samurai sword in his hand, [Sgt. Cobb] kind of pushed the door open, shoved [Defendant] back away from [the police], and then made entry into the bedroom.” 7/5/16 TR/JEFS Dkt. #34, PDF at 50-51. In other words, the police conduct in this case was reasonable. Accordingly, the circuit court erred in granting Defendant’s Motion to Suppress Evidence and Statements.

V.

CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests that this Court vacate the circuit court’s October 13, 2016 Findings of Fact and Conclusions of Law and Order Granting Defendant’s Motion to Suppress Evidence and Statements, and remand the case with instructions to deny Defendant’s Motion to Suppress Evidence and Statements.

Dated at Honolulu, Hawai‘i: April 19, 2017.

Respectfully submitted,

STATE OF HAWAI‘I
Plaintiff-Appellant

By KEITH M. KANESHIRO
Prosecuting Attorney

By /s/ STEPHEN K. TSUSHIMA
Deputy Prosecuting Attorney
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FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII,

Plaintiff,

vs.

JOSHUA LEE,

Defendant.

CR NO.: 15-1-1959

COUNT I:
TERRORISTIC THREATENING IN THE
FIRST DEGREE (HRS § 707-716(1)(c))
HPD NO. 15427198

COUNT II:
ASSAULT AGAINST A LAW
ENFORCEMENT OFFICER IN THE FIRST
DEGREE (HRS § 707-712.5)
HPD NO. 15427199

COUNT III:
RESISTING ARREST (HRS § 710-
1026(1)(a))
HPD NO. 15427200

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND ORDER GRANTING
DEFENDANT'S MOTION SUPPRESS
EVIDENCE AND STATEMENTS

HONORABLE ROM A. TRADER, JUDGE

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER GRANTING
DEFENDANT'S MOTION SUPPRESS EVIDENCE AND STATEMENTS

Appendix "A"

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FIRST CIRCUIT COURT
STATE OF HAWAII
17TH DIVISION

Defendant's Motion to Suppress Evidence and Statements filed on April 25, 2016, was heard on July 5, 2016, August 23, 2016 and September 1, 2016, before the Honorable ROM A. TRADER. Present were Deputy Prosecuting Attorney LAWRENCE SOUSIE, representing the State of Hawai'i, and ALEN M. KANESHIRO, representing Defendant, who was present. Based on the Defendant's Motion to Suppress Evidence and Statements, the State's Memorandum in Opposition to Defendant's Motion to Suppress Evidence and Statements, the testimony of witnesses, the evidence adduced at the hearing and arguments of counsel, Defendant's Motion to Suppress Statements is hereby GRANTED, in its entirety.

When a Finding of Fact can be construed as a Conclusion of Law, it is so intended. When a Conclusion of Law can be construed as a Finding of Fact, it is so intended.

FINDINGS OF FACT

1. The offense in the instant case allegedly occurred on October 26, 2015.
2. On April 25, 2016, Defendant filed a Motion to Suppress Evidence and Statements. Defendant requested that "the above mentioned statements, evidence, observations and actions, and all fruits thereof be precluded from use at trial."
3. The first hearing on Defendant's Motion to Suppress Evidence and Statements was held on July 5, 2016. Honolulu Police Department Officer Summer Kahao (hereinafter "Officer Kahao") testified. Honolulu Police Department Sergeant Michael Cobb (hereinafter "Sergeant Cobb") gave his direct testimony but was not cross-examined by defense counsel due to time constraints.
4. The second hearing on Defendant's Motion to Suppress Evidence and Statements was held on August 23, 2016. Honolulu Police Department Corporal Kurt Takahashi (hereinafter "Corporal Takahashi") testified. Defense counsel could not resume his cross-examination

of Sergeant Cobb because he was on injured leave.

5. The final hearing on Defendant's Motion to Suppress Evidence and Statements was held on September 1, 2016. Sergeant Cobb resumed his testimony and Defendant's brother Gavan Lee testified.
6. This Court makes the following Findings of Fact:
7. Officer Kahao and Corporal Takahashi responded to Defendant's residence located at 98-569 Aloalii Street on a "suicidal male call."
8. It was related through HPD dispatch that a male had locked himself in his bedroom, was threatening suicide and had samurai swords in the room.
9. Corporal Takahashi arrived at 98-569 Aloalii Street approximately 1:30 p.m. and Officer Kahao arrived a few minutes later. Corporal Takahashi waited for Officer Kahao to arrive before entering the residence. When Corporal Takahashi and Officer Kahao arrived, they were greeted by a male who they believed to be Defendant's brother. The male led Corporal Takahashi and Officer Kahao into the residence. Corporal Takahashi and Officer Kahao had consent to enter the residence of 98-569 Aloalii Street.
10. Once entering the residence, both Officer Kahao and Corporal Takahashi met with Defendant's mother, "Linda," who explained the circumstances to the officers. Linda was in the upstairs kitchen, approximately 10 to 15 feet away from Defendant's bedroom door. Officer Kahao began communicating with Defendant through the bedroom door and called out to him, "Joshua, this is Officer Kahao. Could you please open the door?" Defendant told the officers to go away, and that he did not want to talk to anyone. Defendant did not want to engage with the officers.
11. Officer Kahao spoke to Defendant through his bedroom door for approximately 10 minutes.

Officer Kahao spoke to Defendant in a calm voice, trying to establish a rapport with him. Defendant repeatedly told Officer Kahao, "I'm okay. I just don't want to talk to you," "I'm not hurt, just leave."

12. Officer Kahao did not hear any signs of distress coming from inside the room. It did not sound like Defendant was in pain or injured.
13. Officer Kahao and Corporal Takahashi's goal was to visibly see that Defendant was okay. Officer Kahao also wanted to speak to Defendant to see whether or not he was suicidal. While Officer Kahao was speaking to Defendant, Corporal Takahashi also spoke to Defendant through the door and explained, "We just want to see you."
14. After Officer Kahao had been attempting to speak to Defendant through his bedroom door for approximately 10 minutes Sergeant Cobb arrived at the residence. Defendant's brother, Gavan Lee ("Gavan"), met Sergeant Cobb at the front door and led him up to Defendant's bedroom door. Sergeant Cobb had consent to enter 98-569 Aloalii Street.
15. When Sergeant Cobb arrived, he spoke to Defendant's mother ("Linda") who related that Defendant had tried to commit suicide before. Linda did not indicate when the prior suicide attempt may have occurred.
16. When Sergeant Cobb arrived, he took over speaking to Defendant through the bedroom door. Sergeant Cobb was more demanding, and a little bit louder than Officer Kahao. Sergeant Cobb told Defendant that he needed to open the door, that "he needed to grow up," and that "he needed to be a man." Sergeant Cobb told Defendant that if he did not open the door, they would break the door down. Defendant asked Sergeant Cobb, "Do you have a warrant?" Sergeant Cobb responded, "We don't need a warrant, dumbass."
17. None of the HPD personnel heard signs of injury, distress or any other indication that

Defendant was hurt or harming himself. All of the officers confirmed that if there was any indication that Defendant was harming himself, they would have broken the bedroom door down.

18. After Sergeant Cobb had been talking to Defendant for approximately 10 minutes he noticed that Defendant's bedroom door could be unlocked from the outside by sticking a "pin or some type of small item into it." Sergeant Cobb asked Linda for something he could use to open the door. Linda gave Sergeant Cobb a paperclip.
19. Sergeant Cobb was successful at unlocking the door from the outside by using the paperclip, however, someone or something on the inside of Defendant's room was preventing Sergeant Cobb from opening the door.
20. Eventually, Defendant opened his bedroom door approximately four to six inches. All three officers could see parts of Defendant's person/body, but they could not see his entire body. From what the officers could see, Defendant did not appear to be injured. The officers also observed what appeared to be the handle to a samurai sword in Defendant's right hand. When Officer Kahao observed the handle, she put her hand on her firearm but did not draw it. When the door opened wider, the officers could see Defendant's full body. The officers could see that Defendant was not injured, in pain or hurt. Officer Kahao and Corporal Takahashi also observed that Defendant was holding a wooden sword in his right hand. When Officer Kahao observed that the sword Defendant was holding was a wooden sword, she took her hand off her firearm.
21. The officers observed that Defendant was holding a wooden sword, not a real samurai sword, before they entered Defendant's bedroom.
22. It is not a crime to possess wooden or real samurai swords in a bedroom.

23. The officers did not observe any illegal items or paraphernalia in Defendant's bedroom prior to entering. There was no information known to the officers before entering Defendant's bedroom that criminal activity was occurring within the bedroom.
24. Defendant's home at 98-569 Aloalii Street has four bedrooms: one bedroom was converted into a sewing room; one bedroom belonged to Gavan; one bedroom belonged to Linda; and the third bedroom belonged to Defendant.
25. Defendant was locked in his bedroom.
26. Gavan was not allowed in his bedroom. Linda was not allowed in Defendant's bedroom without his consent.
27. There were times when Linda or a house cleaner would enter Defendant's bedroom however, it was with Defendant's consent.
28. None of the officers had obtained a warrant for 98-569 Aloalii Street or Defendant's bedroom prior to entering Defendant's bedroom.

CONCLUSIONS OF LAW

1. "The Fourth Amendment, applicable through the Fourteenth Amendment to the States, provides: 'The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause ... particularly describing the place to be searched, and the persons or things to be seized.'" Bailey v. U.S., 133 S.Ct. 1031, 1037, 185 L.Ed.2d 19, 28 (2013).
2. Article I, section 7 of the Hawai'i State Constitution provides that, "[T]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated." These constitutional provisions mandate that government agents obtain warrants based on probable cause before they effect

a search and seizure of persons or places. In the Interest of Jane Doe, 77 Hawai`i 435, 887 P.2d 645 (1994); State v. Dias, 62 Haw. 52, 609 P.2d 637 (1980); State v. Barrett, 67 Haw. 650, 701 P.2d 1277 (1985).

3. The Hawai`i Supreme Court has held that the Hawai`i Constitution provides greater protection of individual's right against unreasonable searches and seizures than is provided under the federal constitution. See e.g. State v. Won, 137 Hawai`i 330, 356, 372 P.3d 1065, 1091 (2015) ("We have a rightfully proud tradition under our constitution of providing greater protections to our citizens than those afforded under the United States Constitution.")
4. Unlike its federal counterpart, article I, section 7, of the Hawai`i Constitution specifically protects against invasions of privacy. The "exclusionary rule" applies to violations of a citizen's privacy rights. State v. Endo, 83 Hawai`i 87, 93, 924 P.2d 581, 583 (1996).
5. In the instant case, Defendant had an actual, subjective expectation of privacy in his bedroom. That expectation is one that society would recognize as objectively reasonable. Defendant's privacy interest met the criteria set forth in State v. Hauge, 103 Hawai`i 38, 50-51, 79 P.3d 131, 143-44 (2003).
6. "It is well settled that an area in which an individual has a reasonable expectation of privacy is protected by the Fourth Amendment of the United States Constitution and by article 1, § 7 of the Hawai`i Constitution and cannot be searched without a warrant." State v. Biggar, 68 Haw. 404, 407, 716 P.2d 493, 495 (1986) (citing Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); State v. Wong, 68 Haw. 221, 223, 708 P.2d 825, 828 (1985); State v. Stachler, 58 Haw. 412, 415, 570 P.2d 1323, 1326 (1977)).

7. Because Defendant had a reasonable expectation of privacy in his bedroom, the police were required to obtain a warrant prior to entering Defendant's bedroom unless there was an exception to the warrant requirement.
8. Governmental intrusions into the personal privacy of citizens of the State of Hawai'i must be "no greater in intensity than absolutely necessary." State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58-59 (1974). Thus, "each proffered justification for a warrantless search must meet the test of necessity inherent in the concept of reasonableness." State v. Fields, 67 Haw. 268, 282-83, 686 P.2d 1379, 1390 (1984).

EXIGENT CIRCUMSTANCES

9. The State's assertion that there were exigent circumstances and that police could enter Defendant's bedroom without a warrant is without merit because the exigent circumstances exception to the warrant requirement mandates that the police must have probable cause that a crime was or is being committed. State v. Kapoi, 64 Haw. 130, 141, 637 P.2d 1105, 1114 (1981) (citing Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971)).
10. While police responding to a suicide call could be considered exigent circumstances, in the instant case Defendant was communicating with officers through his bedroom door for at least 20 minutes. He was in his room for at least 10 minutes prior to Corporal Takahashi and Officer Kahao's arrival. Defendant did not sound hurt, injured or in distress. Defendant repeatedly told the officers that he was okay and he did not want to talk to them. In response to Officer Kahao's statement, that "she just wanted to see that he was okay," Defendant told Officer Kahao he was not hurt and he wanted them to leave. All of the officers testified that if they believed that Defendant was actually harming himself in his bedroom, they would have broken down the bedroom door.

11. Whether or not there was an exigency is independent from the requirement that the police must also have probable cause that a crime was or is being committed. In the instant case, the police did not have probable cause that a crime was being committed. Sergeant Cobb testified that committing suicide and attempting to commit suicide are not criminal offenses. All of the officers testified that there was no indication that criminal activity was occurring inside of Defendant's bedroom. When the bedroom door opened, the officers did not observe any illegal activity occurring inside the bedroom prior to entering.
12. There was no probable cause Defendant was engaging in criminal conduct in the bedroom. Thus, exigent circumstances did not exist.

CONSENT

13. The State's argument that Defendant or his family consented to the entry into Defendant's bedroom is without merit because Defendant's mother, Linda, and brother, Gavan, did not have authority to consent to the police entering Defendant's bedroom and Defendant's consent was not freely and voluntarily given.
14. Defendant had an actual, subjective expectation of privacy in his bedroom. That expectation is one that society would recognize as objectively reasonable. Thus, even though Linda and Gavan may have consented to entry into the residence at 98-569 Aloalii Street, neither Linda, nor Gavan could have consented to the police entering Defendant's bedroom. It is clear that Defendant did not want the officers to enter his bedroom. Defendant did not open his door for at least 30 minutes. He repeatedly told the officers to leave. Defendant asked the police if they had a warrant and once Sergeant Cobb unlocked the bedroom door from the outside, Defendant blocked the door to prevent Sergeant Cobb from entering his bedroom.

15. The Hawai'i Supreme Court has repeatedly recognized that an individual has a constitutional right to refuse consent to a search. State v. Kearns, 75 Haw. 558, 570, 867 P.2d 903, 909 (1994).
16. The Hawai'i Supreme Court held that, "Consent in the constitutional sense means more than the absence of an objection on the part of the person to be searched; it must be shown that such consent was voluntarily given." State v. Bonnell, 75 Haw. 124, 147-48, 856 P.2d 1265, 1277 (1993). The Court has defined voluntariness as a "free and unconstrained choice," State v. Shon, 47 Haw. 158, 166, 385 P.2d 830, 836 (1963) and has held that "for consent to be in fact, freely and voluntarily given, the consent must be uncoerced." Nakamoto, 64 Haw. at 21, 635 P.2d at 951.
17. In State v. Price, 55 Haw. 442, 443, 521 P.2d 376, 377 (1974), the supreme court stated, "consent may not be gained by explicit or implicit coercion, implied threat, or covert force."
18. A "totality of the circumstances" test is employed to determine whether consent was freely and voluntarily given. Kearns, 75 Haw. at 571, 867 P.2d at 909.
19. If a person submits to a search under the belief that the search will occur regardless of an objection to the search or the person reasonably believed that there was no other alternative to prevent forfeiture of a right, that consent is coerced. Won, 137 Hawai'i 342, 372 P.3d at 1077. In the instant case, Sergeant Cobb's threats to break the door down and his actions in unlocking Defendant's bedroom door from the outside without Defendant's consent amounted to coercion.
20. Based on the totality of the circumstances, Defendant did not freely and voluntarily consent to the police entering his bedroom.

PLAIN VIEW

21. The State's argument that the "plain view" doctrine is applicable in this case is without merit because there was no prior lawful justification for the intrusion into Defendant's bedroom and there was no probable cause to believe that there was evidence of a crime or contraband in Defendant's bedroom.
22. In State v. Meyer, 78 Hawai'i 308, 314, 893 P.2d 159, 165 (1995), the Hawai'i Supreme Court recognized the ruling by the United States Supreme Court in Coolidge, where they held that three factors are required to merit a legitimate plain view observation: (1) prior justification for the intrusion; (2) inadvertent discovery; and (3) probable cause to believe the item is evidence of a crime or contraband.
23. There was no justification for the intrusion into Defendant's bedroom. There were no exigent circumstances to justify the intrusion and Defendant did not freely and voluntarily consent to the intrusion. See COL 12 and 19. "Without prior justification for their presence, police officers may not enter constitutionally protected premises in order to seize evidence in plain view." Meyer, 78 Hawai'i at 317, 893 P.2d at 168.
24. There was no probable cause to believe that there was evidence of a crime or contraband in Defendant's bedroom. It was not unlawful for Defendant to possess real or wooden samurai swords in his bedroom. None of the items observed in Defendant's bedroom before or after the unlawful intrusion were contraband.
25. Once officers unlawfully stepped into Defendant's bedroom, any subsequent criminal activity that officers may have observed cannot fall into the plain view exception to the warrant requirement because they did not observe the activity and/or evidence from a position they were lawfully permitted to be in.

ORDER

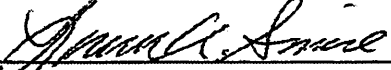
IT IS HEREBY ORDERED that the Defendant's Motion to Suppress Evidence and Statements is GRANTED in its entirety, and all statements, evidence, observations and actions that were observed or obtained after the unlawful entrance into Defendant's bedroom, and all the fruits thereof is hereby suppressed and precluded from use at trial.

DATED: Honolulu, Hawai'i, OCT 13 2016



HONORABLE ROM A. TRADER
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:



LAWRENCE SOUSIE
DEPUTY PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

VI.

STATEMENT OF RELATED CASES

The State is unaware of any related cases pending before the Hawai‘i courts or agencies.

NO. CAAP-16-0000797

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I,	)	Criminal No. 15-1-1959
)	
Plaintiff-Appellant,	)	APPEAL FROM THE FINDINGS OF FACT
	)	AND CONCLUSIONS OF LAW AND
vs.	)	ORDER GRANTING DEFENDANT'S
	)	MOTION TO SUPPRESS EVIDENCE AND
JOSHUA LEE,	)	STATEMENTS filed on October 13, 2016
)	
Defendant-Appellee.	)	FIRST CIRCUIT COURT
)	
	)	HONORABLE ROM A. TRADER
	)	JUDGE
)	

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2017, a copy of the **Opening Brief of the State of Hawai'i**, was served by electronic notification through JEFS to:

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Attorney for Defendant-Appellee

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City and County of Honolulu