NO. CAAP-20-0000175

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

STATE OF HAWAI'I,	)	CRIMINAL NO. 1PC161001176
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE JUDGMENT OF
	)	CONVICTION AND SENTENCE; NOTICE
vs.	)	OF ENTRY filed on February 20, 2020
	)	
BRANDON FETU LAFOGA,	)	FIRST CIRCUIT COURT
	)	
Defendant-Appellant,	)	HONORABLE PAUL B. K. WONG
	)	JUDGE
and	)	
	)	
RANIER INES, also known as Schizo,	)	
	)	
Defendant.	)	

ANSWERING BRIEF OF THE STATE OF HAWAI'I

APPENDIX "A"

and

CERTIFICATE OF SERVICE

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ANSWERING BRIEF OF THE STATE OF HAWAI‘I

I.

COUNTERSTATEMENT OF THE CASE

A. The Charge.

On July 20, 2016, Plaintiff-Appellee STATE OF HAWAI‘I ("the State") charged Defendant-Appellant BRANDON FETU LAFOGA ("Lafoga"), via Indictment[1] in Criminal No. 1PC161001176 with in Count 2, Attempted Murder in the Second Degree in violation of Hawai‘i Revised Statutes ("HRS") § 702-221(2)(c) (2014 Repl.), HRS § 702-222(1)(b) (2014 Repl.), HRS § 705-500 (2014 Repl.), HRS § 707-701.5 (2014 Repl.), and HRS § 706-656 (2014 Repl.), in Count 3, Criminal Conspiracy to Commit Murder in the Second Degree in violation of HRS § 705-520 (2014 Repl.) and HRS § 707-701.5 (2014 Repl.), in Count 4, Carrying or Use of Firearm in the Commission of a Separate Felony in violation of HRS § 134-21 (2011 Repl.), in Count 6, Kidnapping in violation of HRS § 707-720(1)(e) (2014 Repl.), and, in Count 8, Ownership or Possession Prohibited of Any Firearm or Ammunition by a Person Convicted of Certain Crimes in violation of HRS § 134-7(b) (2011 Repl.). See, 1PC161001176, Docket #1, 07/20/2016 "Indictment."

B. The Trial.

1. Christopher Miranda.

Christopher Miranda ("Miranda") was a registered nurse at the emergency room ("ER") with the Waianae Coast Comprehensive Health Center ("WCC") for 19 years. Transcript of Proceedings held on November 22, 2019 ("JEFS Dkt. #70"), PDF page ("PDF") at 50-51[2]. On September 16, 2015, at about 7:22 p.m., Miranda received "a call saying that somebody had parked in front of the old emergency room, and [] told security that he'd been shot and needed

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[1] The Indictment also charged Defendant RANIER INES, also known as Schizo ("Ines") with in Count 1, Accomplice to Attempted Murder in the Second Degree in violation of HRS § 702-221(2)(c), HRS § 702-222(1)(b), HRS § 705-500, HRS § 707-701.5, and HRS § 706-656, in Count 3, Criminal Conspiracy to Commit Murder in the Second Degree in violation of HRS § 705-520 and HRS § 707-701.5, in Count 5, Kidnapping in violation of HRS § 707-720(1)(e) (2014 Repl.), and, in Count 7, Robbery in the First Degree in violation of HRS § 708-840(1)(b)(i) (2014 Repl.) and/or HRS § 708-840(1)(b)(ii) (2014 Repl.). See, 1PC161001176, Docket #1, 07/20/2016 "Indictment." Ines is not a party to this appeal.

[2] Since the transcripts of proceedings are filed with JEFS, the State shall cite to the JEFS docket entry number and the PDF page(s) in citing to the transcripts.

help." JEFS Dkt. #70, PDF at 53. Miranda and another nurse proceeded to the old ER, located about 400 feet away. *Id*. Miranda observed Kele Stout ("Stout") in the driver's seat of a white Ford van with his head and arms hanging out the window. JEFS Dkt. #70, PDF at 52, 54-55. Miranda further observed "a blood clot . . . dripping [from Stout's] wound in the back of his head, and . . . the front part of his face[.]" JEFS Dkt. #70, PDF at 55. Stout told Miranda that "he'd been shot, someone tried to kill him[.]" JEFS Dkt. #70, PDF at 56.

Miranda asked Stout if he could "move over a little bit" so that Miranda could drive the van to the new ER to which Stout complied. *Id*. Once Miranda drove Stout to the new ER, Stout "actually got out on his own . . . [and] onto the gurney[.]" JEFS Dkt. #70, PDF at 57. Stout was then taken into the ER where Miranda observed multiple gunshot wounds or "bullet holes" on Stout. JEFS Dkt. #70, PDF at 57-59, 61. Miranda asked another nurse to cut shoelaces off Stout's wrists which had caused "ligature marks" to them. JEFS Dkt. #70, PDF at 59-60, 69. Stout was intubated and sedated. JEFS Dkt. #70, PDF at 61. He was then transported to Queen's Medical Center ("Queen's"). JEFS Dkt. #70, PDF at 61,69.

2. HPD Corporal Dustin Hao.

On September 16, 2015, at about 7:37 p.m., Honolulu Police Department ("HPD") Corporal Dustin Hao was dispatched to the WCC to assist in an investigation of a shooting. JEFS Dkt. #70, PDF at 76-78. When he arrived at the WCC at about 7:50 p.m., he was directed to a white van with Hawai'i license plate number 320 TTZ ("white van") that he "check[ed] for occupants" or "any suspects and weapons." JEFS Dkt. #70, PDF at 78-79. He was assigned to secure the white van and its keys pending investigation. JEFS Dkt. #70, PDF at 80. He did not remove anything from the white van and insured that only one authorized individual, HPD Evidence Specialist Leslie Murakami ("Murakami"), entered it. JEFS Dkt. #70, PDF at 79-80.

3. HPD Evidence Specialist Richard Perron.

On September 17, 2015, at about 10:30 a.m., HPD Evidence Specialist Richard Perron proceeded to Queen's where he took photographs of Stout's injuries which were received into evidence without objection from the defense. JEFS Dkt. #70, PDF at 87-89.

4. Eric Campos.

Eric Campos was a security guard at Bishop Place Building ("Bishop Place"). JEFS Dkt. #70, PDF at 93-94. He was trained to operate the Bishop Place video surveillance system which consisted of "more or less 30 cameras." JEFS Dkt. #70, PDF at 97-98.

5. Kele Stout.

In September of 2015, Stout worked as the lead countertop installer at Aloha State Sales ("Aloha"), a custom countertop company. JEFS Dkt. #70, PDF at 117-119. Ines worked as Stout's helper on jobs at Aloha for "just a few months." JEFS Dkt. #70, PDF at 122-125. In the last month, Stout would "always find" Ines "outside by the work van smoking a cigarette or on the phone" during jobs. JEFS Dkt. #70, PDF at 128-129. Stout told Ines "that [Ines] needs to be present while [Stout was] doing everything, not taking these random breaks[.]" JEFS Dkt. #70, PDF at 130-131. Ines "was a little defensive" and asked Stout to give him more responsibilities. 11/22/19 TR/JEFS Dkt. #70, PDF at 131.

On September 16, 2015, Stout and Ines had a job to install counters at Net Enterprises located at Bishop Place. JEFS Dkt. #70, PDF at 132-134. As Stout was seaming together a bar top, Ines "got mad because [Stout] wouldn't teach him how to seam, and . . . he wanted to learn how to seam, but that's not his responsibility." JEFS Dkt. #70, PDF at 134. Ines started yelling at Stout. JEFS Dkt. #70, PDF at 135. Stout told Ines "to just take all the tools down to the work van, [since they would] be heading back to the shop." *Id*. Ines "started grabbing the tools, slamming them in the buckets that [they] use to carry them." *Id*. When they finished the job, they proceeded to the work van in the parking garage. JEFS Dkt. #70, PDF at 135-136. When Stout noticed that Ines still had his visitor badge from the building, he told Ines that he needed to return it. JEFS Dkt. #70, PDF at 136. Ines then left to return the badge. *Id*. Once Stout "put everything into the back of the van, [he] then changed out of [his] work shoes[.]" *Id*. Stout's slippers were under Ines' backpack, so Stout "put [Ines'] bag on his seat, [then] changed [from his] shoes" to his slippers. JEFS Dkt. #70, PDF at 137. When Ines "came back, [he] noticed his bag had been moved, and [he] accused [Stout] of going into it." *Id.* As they jumped into the van and Stout began to drive them out of the parking lot, Ines "was questioning [Stout]." JEFS Dkt. #70, PDF at 138.

Once Stout drove onto the street, Ines "grab[bed Stout's] right wrist from the steering wheel[,] pull[ed] out a gun from his backpack and pistol whip[ped Stout in his eyebrow area], all in one motion." JEFS Dkt. #70, PDF at 138-139. As blood started gushing, Ines "ordered [Stout] to drive out to Waianae." JEFS Dkt. #70, PDF at 139. Ines started ranting that Stout had disrespected him. JEFS Dkt. #70, PDF at 139-140. Throughout the drive towards Waianae via "Nimitz Road . . . and the freeway[,]" Ines said multiple times that "if you try to do anything, I'll

shoot you." JEFS Dkt. #70, PDF at 140, 143. Ines held onto Stout's right wrist during the entire drive, while aiming the gun at Stout's face. *Id.* As Ines "made a bunch of phone calls[,] . . . he'd always be controlling [Stout] by holding [his] wrist, and he'd have the gun just in his lap." JEFS Dkt. #70, PDF at 141. During one of the phone calls, Ines said that "he has the rent money." *Id.* Ines searched Stout's wallet which was on the dashboard, took Stout's debit card, and asked Stout for the PIN number to which Stout complied. JEFS Dkt. #70, PDF at 142-143. Ines also grabbed Stout's phone, which was also on the dashboard, and "smashed it right on the dashboard, broke it." JEFS Dkt. #70, PDF at 143.

As they "reached the beginning of Maili," Ines ordered "directions [to Stout] like turn left, turn right[, until they] ended up right off of Farrington . . . into Sea Country area[.]" JEFS Dkt. #70, PDF at 143-144. Ines ordered Stout "to pull into the driveway" of a house, where "a Polynesian man [was] standing . . . right under the [open] garage door with a bat in his hand." JEFS Dkt. #70, PDF at 144-145. The Polynesian male, who had tattoos on his face, "escorted [Stout] from the driver's seat into the garage." JEFS Dkt. #70, PDF at 145.

Ines and the Polynesian male took Stout into the garage and closed the garage door. *Id.* The Polynesian male asked Stout what he did to make Ines so mad. JEFS Dkt. #70, PDF at 145-146. He then tied Stout's wrists behind his back. JEFS Dkt. #70, PDF at 146. As Stout was seated in the middle of the garage, Ines and the Polynesian male then "started beating on [him, Ines] with his fists and the other guy with the baseball bat." *Id.* At some point, Stout was "hit in the back of [his] head [] and blood just gushe[d] everywhere." JEFS Dkt. #70, PDF at 147. One of the males "grabbed a towel, put it over [Stout's] head, and they continued beating [him.]" *Id.* Stout testified that "[i]t seemed like they just went until they ran out of energy." JEFS Dkt. #70, PDF at 148.

Ines and the Polynesian male then "went through the door in the garage into the house, where [Stout] could barely hear their conversation[. Ines], the Polynesian male, and . . . a third male voice . . . discuss[ed] what to do next." JEFS Dkt. #70, PDF at 149. Stout also heard Ines "order[] somebody to take care of the body." *Id.*

Stout's "wrists were sore from being bound so tight that [he began] fidgeting [his] wrists behind [his] back to make it a little more comfortable[. Ines] came through the doorway to the garage and [] saw [Stout] just wiggling a little and yelled out . . . that [he was] trying to escape, . . . so they both [ran] in and started beating on [him] again." JEFS Dkt. #70, PDF at 150. Stout

was then "grabbed . . . under [his] arms[,] guided [] towards . . . the van and . . . throw[n]" into the back of the work van. JEFS Dkt. #70, PDF at 151. Stout saw Ines "slam[] the [van] door shut." JEFS Dkt. #70, PDF at 151-152. The Polynesian male proceeded "into the driver's seat and . . . [drove] off without [Ines]" in the van. JEFS Dkt. #70, PDF at 152, 194.

As the Polynesian male drove, Stout sat "by the back doors, but with [his] back against the side wall, the passenger side." JEFS Dkt. #70, PDF at 154. At some point, the Polynesian male stopped the van and started talking to some person, "bragging about what they've done to [Stout], mentions that it was him and [Ines], and then . . . tells the person to go look through the back window." *Id.* Stout saw "a figure [go to the back window of the van], but [he] didn't get a good look at [the person]." *Id.*

While the Polynesian male continued to drive, he "says that [Stout will] be the first person that he is going to kill, meaning that he knows he's going to regret it." JEFS Dkt. #70, PDF at 155. Stout told him, "[J]ust let me go, I'll catch the first flight out of here, like no one's gotta know." *Id.* The Polynesian male replied, "[N]o, I can't do that." *Id.* At some point, the Polynesian male pulled to the side of the road and a car drove past, so he proceeded back onto the road until he found "a quiet spot where there's no one around." *Id.* The Polynesian male then "parked the work van, [and] climb[ed] in between the seats to come into the back." JEFS Dkt. #70, PDF at 156. The Polynesian male "kinda hesitated over [Stout] for a little bit, [as Stout] could hear him breathing, and then he . . . shot [Stout] right in the face." JEFS Dkt. #70, PDF at 157. Stout testified that "it felt like [his] face was caving in. The blood just felt like lava. It was very painful." *Id.*

At some point, Stout "realized [he] wasn't dead yet[.]" *Id.* He "was kinda inhaling and swallowing all the blood[.]" *Id.* He "somehow broke out of the restraints and rolled onto [his] stomach[.]" *Id.* He "was trying to cough everything out and find a way to breathe[, as i]t was very, very hard to breathe." *Id.* The Polynesian male "had already started driving [again.]" JEFS Dkt. #70, PDF at 158. While he was driving, "he turn[ed] back and shoots, and [Stout got] hit again." *Id.* Stout realized that the Polynesian male was "going to be shooting [him] the more [he] ma[d]e noise, he realized [Stout was] not dead, so [Stout] tried to muffle the sound of [his] breathing and coughing." *Id.* Stout testified that "[a]fter being shot in the face, [he] felt [one shot] in [his] torso and then one in [his] butt cheek, and so [he] only recall[e]d three." JEFS Dkt. #70, PDF at 159. Stout heard the Polynesian male "making phone calls, trying to find someone

to give him a ride." JEFS Dkt. #70, PDF at 160. Stout also heard the Polynesian male explain "how he was trying to burn the van with [Stout's] body still in it[.]" *Id.*

When the Polynesian male stopped the van and exited it, Stout "could hear the engine still running[.]" *Id.* Stout was "listening closely to the footsteps, and as soon as [he] couldn't hear any footsteps, that's when [he] rolled over and tried to get up and get into the driver's seat." *Id*. Stout "jumped into the driver's seat, locked the door, put it into drive, and took off." JEFS Dkt. #70, PDF at 161. Stout knew that the WCC "was directly to the left if [he] had followed the road[.]" *Id*. Stout "also knew that if the driver were to see [him] take off, he'd know exactly where [he] was going, so he could call [Ines] and maybe they'd intercept [him], so [he] ended up turning right and going the long way around to the [WCC]." JEFS Dkt. #70, PDF at 162.

When Stout arrived at the WCC, "instead of trying to find somebody, [he] just leaned on the steering wheel and started honking the horn until the security guard eventually came around on the golf cart." JEFS Dkt. #70, PDF at 163. Stout told the security guard that he had been shot. *Id*. Stout recalls being "rolled into [the WCC]" and spelling out his name for someone, but then "blacked out from there." *Id.* Stout woke up a week later in the ICU at Queen's. JEFS Dkt. #70, PDF at 164.

On October 2, 2015, when Stout met with an HPD detective, he was shown a photographic lineup with six different individuals which might include the Polynesian male. 11/22/19 TR/JEFS Dkt. #70, PDF at 170. Stout testified that one photograph stood out because the individual in that photograph had "very similar traits and everything, [except] . . . when [the Polynesian male] was standing in the garage[,] . . . [Stout] remember[ed] him being really dark like he'd been at the beach for a few days or something, . . . and in the photograph his skin was just too light." *Id*. Stout testified "[t]hat was the only difference." JEFS Dkt. #70, PDF at 171-172. Stout identified State's Exhibit 303 as the photograph depicting the individual that looked like the Polynesian male, except with lighter skin. JEFS Dkt. #70, PDF at 176-177. Stout testified that "[t]he tattoos on the [cheek sideburn area]" of the individual and "the shape of [the face]" of the individual in State's Exhibit 303 was similar to the Polynesian male shooter. Transcript of Proceedings held on November 25, 2019 ("JEFS Dkt. #71"), PDF at 71-72.

6. HPD Evidence Specialist Leslie Murakami.

On September 16, 2015, at around 9:30 p.m., Murakami, an evidence specialist with the HPD, proceeded to the WCC, where she took photographs of the white van which were received

into evidence without objection from the defense. JEFS Dkt. #71, PDF at 76, 83. Murakami also dusted the white van for latent fingerprints, recovering four prints from the driver's door and the passenger door, and swabbed interior parts of the van for potential biological evidence. JEFS Dkt. #71, PDF at 81, 90-92. Murakami also recovered jean shorts, a men's brief, a pair of socks, and 72 cents in coins from HPD Officer Solomon Woodward. JEFS Dkt. #71, PDF at 93-94. Murakami also recovered a t-shirt from the scene and a bath towel from the white van. JEFS Dkt. #71, PDF at 94-96. On June 20, 2016, Murakami processed a FedEx package with a DNA reference sample from the Alaska Department of Public Safety. JEFS Dkt. #71, PDF at 96-98.

7. HPD Detective Damien Desa.

On September 17, 2015, HPD Detective Damien Desa and HPD Detective Kevin Fujioka met with Ines at Aloha to interview him as a potential witness as the police did not have any suspects in the case at the time since Stout was hospitalized and was not able to provide a statement. JEFS Dkt. #71, PDF at 114-117. The circuit court received State's Exhibit 390, Ines' statement to the police, into evidence without objection from the defense. JEFS Dkt. #71, PDF at 117-119.

8. Kristin Ka'anoi.

In September of 2015, Kristin Ka'anoi ("Ka'anoi") was "VP of operations" for Aloha. Transcript of Proceedings held on November 26, 2019 ("JEFS Dkt. #72"), PDF at 12-13. Ka'anoi testified that Stout was a lead installer at Aloha and that he had permission to drive an Aloha work van on September 16, 2015. JEFS Dkt. #72, PDF at 13-14. Ka'anoi testified that Ines was a helper at Aloha, assigned to help Stout in September of 2015. JEFS Dkt. #72, PDF at 16-17. With respect to their work relationship, Ka'anoi told Stout that she wanted him to "work it out with [Ines] . . . prior to [her] getting involved." JEFS Dkt. #72, PDF at 18. On September 16, 2015, Stout and Ines were assigned to "do some repairs" together on a job at Net Enterprises at Bishop Place. JEFS Dkt. #72, PDF at 18-19. Ka'anoi "missed a call from [Stout] about 2:45-ish or so." JEFS Dkt. #72, PDF at 19. Neither Stout nor Ines returned to the Aloha office that day. *Id*. On September 17, 2015, Stout did not report to work, but Ines did. JEFS Dkt. #72, PDF at 20. Ka'anoi asked Ines if he had seen Stout to which he replied, "No." *Id.*

9. HPD Evidence Specialist Toy Stech.

On September 24, 2015, at about 2:22 p.m., HPD Evidence Specialist Toy Stech ("Stech") processed the white van which was located at the Kapolei Police Station. JEFS Dkt.

#72, PDF at 26, 30-31. Stech took photographs of the white van which were received into evidence without objection from the defense. JEFS Dkt. #72, PDF at 31-33, 38-39. Stech recovered a pistol which was wrapped inside of an "off-white size 2XL, soiled, Dooley brand t-shirt," a second cartridge, a cartridge case, and a bullet from the white van. JEFS Dkt. #72, PDF at 38-47. Stech dusted "the gun . . . two cartridges, a magazine, one cartridge case, a bullet, and a cell phone" for latent fingerprints, recovering one print from the magazine of the gun and one print from the cell phone. JEFS Dkt. #72, PDF at 48. Stech also swabbed the pistol, its magazine, its cartridge, the second cartridge, and the cartridge case for potential biological evidence. JEFS Dkt. #72, PDF at 49-51.

On September 25, 2015, Stech recovered a saliva sample from Stout at Queen's. JEFS Dkt. #72, PDF at 53. On November 17, 2015, Stech processed the white van located at a secure warehouse. JEFS Dkt. #72, PDF at 54. Stech took photographs of the white van which were received into evidence without objection from the defense. JEFS Dkt. #72, PDF at 55-56. Stech recovered a wallet and "three possible teeth" from the white van. JEFS Dkt. #72, PDF at 57-58. Stech dusted items inside the wallet, "one Hawaii National Bank withdrawal slip ("National Bank slip"), two Bank of Hawaii ATM withdrawal slips ("BOH slips"), and one business card," for latent fingerprints, recovering "some potential fingerprints on the back" of the National Bank slip, "some fingerprints on the back of the business card, and then possible fingerprints on the front of the two [BOH slips]." JEFS Dkt. #72, PDF at 59. Stech also swabbed areas of the interior of the white van for potential biological evidence. JEFS Dkt. #72, PDF at 60-61.

10. Doctor Susan Steinemann.

Doctor Susan Steinemann ("Dr. Steinemann") was "allowed to provide . . . opinion testimony in the area of general surgery with a specialty in trauma and critical care." JEFS Dkt. #72, PDF at 68, 74. On September 17, 2015, Dr. Steinemann treated Stout at Queen's for injuries related to "at least four" gunshot wounds. JEFS Dkt. #72, PDF at 76-77. She noted that Stout had gunshot wounds to his scalp, jaw, torso, pelvis/rectum area, right femur/hip bone, and left thigh. JEFS Dkt. #72, PDF at 78-84. Dr. Steinemann performed surgery on Stout to repair "an injury to his rectum, [] the lower part of the large intestine[,] . . . which if left unrepaired would . . . kill him." JEFS Dkt. #72, PDF at 77-78, 85. Dr. Steinemann testified that Stout's injury to "his jaw with the bullet still lodged in . . . the left side of his head" would be fatal if not operated on. JEFS Dkt. #72, PDF at 85. On December 3, 2015, Dr. Steinemann also performed

surgery on Stout to remove a "bullet in his neck that was uncomfortable for him." JEFS Dkt. #72, PDF at 78.

11. Kathryn Gasilos.

On December 3, 2015, Kathryn Gasilos, a pathology assistant at Queen's, retrieved a bullet that was recovered from Stout in the operating room and submitted it into the pathology department safe. JEFS Dkt. #72, PDF at 92-95.

12. HPD Evidence Specialist Garrick Baligad.

On December 4, 2015, HPD Evidence Specialist Garrick Baligad retrieved a bullet from the Queen's pathology department and submitted it into the HPD evidence room on December 7, 2015. JEFS Dkt. #72, PDF at 98-99.

13. HPD Criminalist Curtis Kubo.

HPD Criminalist Curtis Kubo ("Kubo") was "certified in the area of firearms evidence examination and identification from the Association of Firearm and Tool Mark Examiners" and was "allowed to provide [] opinion testimony in the field of firearms and tool marks examination and identification." JEFS Dkt. #72, PDF at 101-104. On September 25, 2015, Kubo examined cartridges, test fired the "Kimber model Custom Target II, caliber .45 auto, single action semiautomatic pistol" under HPD Report No. 15-370046, and found them to be functional and in operating condition. JEFS Dkt. #72, PDF at 108-112. Kubo testified that the cartridges qualified as ammunition. JEFS Dkt. #72, PDF at 111-114. Kubo further testified that one of the cartridge cases and a bullet had been fired from the Kimber pistol. JEFS Dkt. #72, PDF at 114. On December 20, 2015, Kubo examined another bullet and found that it also had been fired from the Kimber pistol. JEFS Dkt. #72, PDF at 115-117.

Following Kubo's testimony, the deputy prosecuting attorney articulated two stipulations by the parties: (1) the only latent fingerprints that were of sufficient quality to be analyzed were partial fingerprints that Stech recovered from inside of Stout's wallet which did not match Ines, Lafoga, or Anthony Riley, and (2) prior to September 16, 2015, Lafoga was convicted of a felony when he was an adult and he knew that he had been convicted of a felony. JEFS Dkt. #72, PDF at 133-134. On the following day of trial, prior to the presentation of further witnesses, the deputy prosecuting attorney read additional stipulations by the parties. Transcript of Proceedings held on November 27, 2019 ("JEFS Dkt. #73"), PDF at 15-18.

14. Ricol Arakaki.

Ricol Arakaki ("Arakaki") was the same age as Lafoga and knew him from the time she "was little" because "[h]is grandma and [her] grandpa [we]re brother and sister." JEFS Dkt. #73, PDF at 18-20. Arakaki identified State's Exhibit 303 as a photograph depicting Lafoga. JEFS Dkt. #73, PDF at 20. In May of 2015, Arakaki formed a close relationship with Lafoga following her grandmother's "last viewing." JEFS Dkt. #73, PDF at 21. Arakaki met Ines once through Lafoga and knew him as Lafoga's friend based on that meeting. JEFS Dkt. #73, PDF at 24-25. In late September of 2015, Lafoga called Arakaki and told her that he was moving to Alaska "[f]or a new start," which surprised her since he had never previously mentioned it. JEFS Dkt. #73, PDF at 27-28. In October of 2015, Arakaki saw a Crime Stoppers news release with a composite sketch of a suspect in a shooting which she thought looked like Lafoga. JEFS Dkt. #73, PDF at 28. Sometime after Lafoga had moved to Alaska, during a telephone conversation, Arakaki asked Lafoga about the shooting. JEFS Dkt. #73, PDF at 29. Lafoga told her that he pulled a man out of a vehicle, opened the garage, and beat him up. JEFS Dkt. #73, PDF at 30. Lafoga also told her that he drove to Waianae, heard Stout talking, and that Stout had asked to let him go. *Id*. Lafoga further told Arakaki that he shot Stout in the vehicle and was going to burn it. JEFS Dkt. #73, PDF at 30-31. Lafoga never mentioned anybody else shooting Stout or being in the vehicle other than him and Stout. JEFS Dkt. #73, PDF at 31.

15. Sergeant Michael Henry.

Sergeant Michael Henry ("Sgt. Henry") was a state trooper with the Alaska State Troopers. Transcript of Proceedings held on December 3, 2019 ("JEFS Dkt. #54"), PDF at 4-5. On June 16, 2016, Sgt. Henry received a request for an agency assist and a copy of a search warrant from the HPD. JEFS Dkt. #54, PDF at 8. Pursuant to the search warrant, Sgt. Henry retrieved a biological sample from Lafoga on June 17, 2016, and shipped it to the HPD. JEFS Dkt. #54, PDF at 8-9, 12-13.

16. Randi DeCosta.

Randi DeCosta ("DeCosta") was Lafoga's girlfriend in 2015. JEFS Dkt. #54, PDF at 14-15. DeCosta identified State's Exhibit 303 as a photograph depicting Lafoga. JEFS Dkt. #54, PDF at 15-16. DeCosta knew Anthony Riley, an African-American, whose nickname was "Tonez." JEFS Dkt. #54, PDF at 17. On September 16, 2015, at around 3:00 p.m., DeCosta received a telephone call from Lafoga where he told her that "he had to handle stuff." JEFS Dkt.

#54, PDF at 19-20. A couple of hours later, DeCosta received another telephone call from Lafoga where he told her, *inter alia*, that: (1) he beat up a man with a baseball bat at his mother's garage, (2) there was "big blood" all over the garage, (3) there was a male in the back of the van that he shot, choking on his blood, (4) he told the male to shut up, turned around, and shot him, (5) the male was dead, and (6) he was going to burn the van. JEFS Dkt. #54, PDF at 20-22. A short time after hanging up on DeCosta, Lafoga called her back and told her that the van was gone. JEFS Dkt. #54, PDF at 22-23. DeCosta confirmed that it sounded like Lafoga was talking to Tonez and telling him that he was supposed to stay by the van and watch it. JEFS Dkt. #54, PDF at 23. Lafoga also told DeCosta that he went to a store to "get stuff to burn the van." JEFS Dkt. #54, PDF at 23-24. He further told DeCosta that the gun was in the van. JEFS Dkt. #54, PDF at 24.

Shortly after the shooting, Lafoga left to Alaska. *Id*. When DeCosta spoke with Lafoga over the telephone, he said that the Crime Stoppers news release with a composite sketch of a suspect and shooter "looked like him. He knew that was him." JEFS Dkt. #54, PDF at 25. He told DeCosta not to worry because he was in Alaska. JEFS Dkt. #54, PDF at 26. He claimed to DeCosta that Tonez had also shot the man. 12/3/19 TR/JEFS Dkt. #54, PDF at 27. DeCosta identified a t-shirt that was recovered from the white van as belonging to Lafoga. JEFS Dkt. #54, PDF at 28.

17. HPD Criminalist Gavin Yuasa.

HPD Criminalist Gavin Yuasa ("Yuasa") was allowed "to provide expert testimony [] in the field of serology and forensic DNA testing." JEFS Dkt. #54, PDF at 81-85. On October 7, 2015, Yuasa retrieved five swab sample sets under HPD Report No. 15-370046 to be tested for the presence of DNA. JEFS Dkt. #54, PDF at 108-109. One of the reference swab sets was taken from Stout and utilized by Yuasa to develop a "known DNA profile" for Stout. JEFS Dkt. #54, PDF at 109. Another swab sample set was taken from a substance on the grip and trigger of a gun, which Yuasa "found that there was a mixture of two individuals and that a major DNA profile that [he] obtained matched the DNA profile of [] Stout." JEFS Dkt. #54, PDF at 109-110. A third swab set was taken from substance on the body of a gun, which Yuasa concluded that "human blood was indicated on that sample" and "found that [it] was a mixture of two individuals, and the major DNA profile matched the profile of [] Stout." JEFS Dkt. #54, PDF at 110. A fourth swab set was taken from a magazine, which Yuasa "found that there was a

mixture of three or more individuals and that due to the levels in the DNA profile, [he could not] make any conclusions regarding [] Stout as a possible contributor to that DNA mixture." JEFS Dkt. #54, PDF at 110-111. A fifth swab set was taken from a substance on a bullet, which Yuasa "found that the DNA profile from that sample matched the DNA profile of [] Stout." JEFS Dkt. #54, PDF at 110-112.

On November 19, 2015, Yuasa retrieved four other sealed items under HPD Report No. 15-370046, including a t-shirt, to be tested for the presence of DNA. JEFS Dkt. #54, PDF at 112. With respect to the t-shirt, Yuasa testified that "human blood was indicated" and he "found that the DNA profile that came from that sample was consistent with a mixture of two individuals and that the major DNA profile from that sample matched the DNA profile of [] Stout." JEFS Dkt. #54, PDF at 114-118. Yuasa performed DNA testing on a swab set taken from the driver's side overhead grab handle to which "no DNA profile was obtained from [the] sample." JEFS Dkt. #54, PDF at 119. Yuasa also performed DNA testing on a swab set taken from the steering wheel to which he "found that the DNA profile obtained from that sample matched the DNA profile of [] Stout." *Id.* Yuasa further performed DNA testing on a swab set taken from radio knobs and buttons to which he "found that the DNA profile obtained from that sample was consistent with a mixture of two individuals and that the major DNA profile obtained matched the DNA profile of [] Stout." JEFS Dkt. #54, PDF at 120.

On June 20, 2015, Yuasa retrieved another swab set under HPD Report No. 15-370046 taken from Lafoga and utilized by Yuasa to develop a "known DNA profile" for Lafoga. JEFS Dkt. #54, PDF at 121. With respect to the swab sample sets taken from a substance on the grip and trigger of a gun, as well as from the magazine, Yuasa concluded that due to the low levels of DNA, "no conclusions could be made regarding [] Lafoga as a possible contributor to that DNA mixture." JEFS Dkt. #54, PDF at 122-123. With respect to the swab sample taken from the body of the gun, Yuasa "concluded that [] Lafoga was excluded as a possible contributor to that DNA mixture." JEFS Dkt. #54, PDF at 122. With respect to the swab sample taken from the bullet, Yuasa "concluded that [] Lafoga was excluded as the source of the DNA obtained from that sample." JEFS Dkt. #54, PDF at 123.

With respect to the collar area of a t-shirt, Yuasa "concluded that Lafoga cannot be excluded as a possible contributor to the major DNA profile obtained from that sample." *Id*. Yuasa explained that "approximately 74.68 trillion unrelated individuals would have to be

evaluated before expecting to find an individual that would have a DNA profile that cannot be excluded as a possible contributor to the major DNA profile from that T-shirt collar area." JEFS Dkt. #54, PDF at 124. With respect to DNA samples from the other areas of the t-shirt, Yuasa concluded either that "due to the low levels of DNA in the minor profile, no conclusions could be made regarding [] Lafoga as a possible contributor to that DNA mixture" or that Lafoga "was excluded as the source of the DNA obtained from that sample." JEFS Dkt. #54, PDF at 124-126.

Following Yuasa's testimony, the State rested. JEFS Dkt. #54, PDF at 135. The defense for both Lafoga and Ines orally moved for a judgment of acquittal which the circuit court denied. JEFS Dkt. #54, PDF at 135-137. The defense for both Lafoga and Ines rested without presenting any further evidence. JEFS Dkt. #54, PDF at 137, 144. The defense for both Lafoga and Ines renewed their oral motions for a judgment of acquittal which the circuit court denied. JEFS Dkt. #54, PDF at 146.

C. Verdict and Sentencing.

The jury found[3] Lafoga guilty as charged with in Count 2, Attempted Murder in the Second Degree, in Count 4, Carrying or Use of Firearm in the Commission of a Separate Felony, in Count 6, Kidnapping, and in Count 8, Ownership or Possession Prohibited of Any Firearm or Ammunition by a Person Convicted of Certain Crimes. See, 1PC161001176, Docket #308, 12/04/2019 "Verdict." With respect to the special interrogatory for Counts 2 and 6, the jury answered "No" to the question of whether the prosecution proved beyond a reasonable doubt that Lafoga did not commit the Attempted Murder in the Second Degree and Kidnapping as part of a continuing and uninterrupted course of conduct. *Id*. With respect to the special interrogatory for Counts 2 and 6, the jury answered "No" to the question of whether the prosecution proved beyond a reasonable doubt that Lafoga committed the Attempted Murder in the Second Degree and Kidnapping with separate and distinct intents, rather than acting with one intention, one general impulse, and one plan to commit both offenses. *Id*.

Following the further trial with respect to extended terms of imprisonment, the jury answered "Yes" to the questions of whether the prosecution proved beyond a reasonable doubt that Lafoga was a persistent and multiple offender and that that it was necessary for the

[3] The jury also found Ines guilty as charged with in Count 1, Accomplice to Attempted Murder in the Second Degree, in Count 5, Kidnapping, and in Count 7, Robbery in the First Degree. 1PC161001176, Docket #308, 12/04/2019 "Verdict."

protection of the public to extend the sentences in Counts 2, 4, 6, and 8. See, 1PC161001176, Docket #338, 12/06/2019 "Verdict."

On February 20, 2020, the circuit court sentenced Lafoga to, in pertinent part, serve the following extended terms of imprisonment: in Count 2, a life term of imprisonment without the possibility of parole, in Count 4, a life term of imprisonment with the possibility of parole, and in Count 8, an indeterminate term of imprisonment of 20 years, with all terms to run consecutively to each other and any other terms being served. See, 1PC161001176, Docket #352, 12/06/2019 "Judgment of Conviction."

Notice of Appeal was filed herein on March 20, 2020. JEFS Dkt #1.

II.

COUNTERSTATEMENT OF THE STANDARDS OF REVIEW

A. Plain Error Review: Where Lafoga contends for the first time on appeal that the trial court's procedures during the impaneling of the jury was erroneous, the matter will be reviewed for plain error. Hawai'i Rules of Penal Procedure ("HRPP") Rule 52(b) (2019). "This Court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999) (citations omitted).

B. Ineffective Assistance of Trial Counsel: "In any claim of ineffective assistance of trial counsel, the burden is upon the defendant to demonstrate that, in light of all the circumstances, counsel's performance was not objectively reasonable--i.e.,'within the range of competence demanded of attorneys in criminal cases.'" Briones v. State, 74 Haw. 442, 462, 848 P.2d 966, 976 (1993) (citations omitted).

C. Jury Instructions:

> When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading[.] . . .
>
> [E]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.
>
> [E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the

> effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that the error may have contributed to conviction. If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.

State v. Valentine, 93 Hawai‘i 199, 204, 998 P.2d 479, 484 (2000) (citations and internal quotation signals omitted) (brackets in original).

D. HRPP Rule 48: Upon review of a trial court's HRPP Rule 48 decision, the court's findings of fact are reviewable under the clearly erroneous standard of review, and whether those facts constitute excludable periods are questions of law which are freely reviewable under the right/wrong standard. State v. Ahlo, 79 Hawai‘i 385, 392-393, 903 P.2d 690, 697-698 (App. 1995) (citations omitted).

E. Sentencing:

> A sentencing judge generally has broad discretion in imposing a sentence. The applicable standard of review for sentencing or resentencing matters is whether the court committed plain and manifest abuse of discretion in its decision. Factors that indicate a plain and manifest abuse of discretion are arbitrary or capricious actions by the judge and a rigid refusal to consider the defendant's contentions. In general, to constitute an abuse it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Savitz, 97 Hawai‘i 440, 443, 39 P.3d 567, 570 (2002) (citations, internal quotation marks, and brackets omitted).

III.

ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE LAFOGA'S FUNDAMENTAL RIGHT TO A FAIR TRIAL WHERE IT REDACTED JURORS' TELEPHONE NUMBERS AND STREET ADDRESSES FROM THE JUROR SUMMONS CARDS AND EXPLAINED TO THE JURORS THAT THEY WOULD BE REFERRED TO BY NUMBER AND NOT BY NAME.

Lafoga claims that "the trial court erred when it impaneled a partially anonymous jury without adequately determining that the jury needed the protection of anonymity and without taking sufficient precautions to minimize any prejudicial effects of jury anonymity on the presumption of innocence." Opening Brief of Defendant-Appellant ("OB") at 18-22. However, the record and applicable law do not support his claim.

1. Lafoga did not object to the trial court's procedures, and thus, this issue should be deemed waived.

At the outset, the State points out that Lafoga did not object to the trial court's procedures of which he now complains on appeal, and therefore, the issue should be deemed waived. See, State v. Fagaragan, 115 Hawai'i 364, 367-368, 167 P.3d 739, 742-743 (2007) ("Normally, an issue not preserved at trial is deemed to be waived."). An appellate court will generally not consider questions which were not raised in the trial courts. State v. Kahalewai 56 Haw. 481, 541 P.2d 1020 (1975). As such, the State submits that the question of whether the trail court's procedure of redacting jurors' telephone numbers and street addresses from the juror summons cards and explaining to the jurors that they would be referred to by number and not by name is not properly before this court. Accordingly, the matter should be foreclosed on appeal. The appellate court will only deviate from this rule to serve the ends of justice or to prevent the denial of fundamental rights. State v. Bunn, 50 Haw. 351, 440 P.2d 528 (1968).

2. Plain error review.

"[The appellate court] may recognize plain error when the error committed affects the substantial rights of the defendant." State v. Aplaca, 96 Hawai'i 17, 22, 25 P.3d 792, 797 (2001). However, "[e]rror is not to be viewed in isolation [or] considered purely in the abstract." Aplaca, 96 Hawai'i at 25, 25 P.3d at 800 (quoting, State v. Gano, 92 Hawai'i 161, 176, 988 P.2d 1153, 1168 (1999)). Therefore, error "must be examined in light of the entire proceedings and given the effect to which the whole record shows it is entitled. In that context, the real question becomes whether there is a reasonable doubt that the error might have contributed to conviction." Gano, 92 Hawai'i at 176, 988 P.2d at 1168. Should this reviewing court decide to entertain this issue, for the reasons discussed below, the State submits the trial court's procedure of redacting jurors' telephone numbers and street addresses from the juror summons cards and explaining to the jurors that they would be referred to by number and not by name did not constitute plain error as Lafoga was not deprived of his fundamental right to a fair trial.

a. The trial court's redaction of jurors' telephone numbers and street addresses from the juror summons cards.

With respect to the trial court's redacting the jurors' telephone numbers and street addresses from the juror summons cards, the State points out that Lafoga mischaracterizes such procedure as "impaneling a partially anonymous jury." An "anonymous jury" refers to the

impaneling of a jury where the prospective jurors' identifying information -- such as names, occupations, addresses, exact places of employment, and other such facts -- is not shared with the parties. See, *e.g.*, United States v. Morales, 655 F.3d 608, 620 (7th Cir. 2011). In this case, the jurors' identification -- to wit their full name -- was provided to the parties. Indeed, it is undisputed that the only information redacted from the juror summons cards was juror telephone numbers and street addresses. In this case, Lafoga fails to demonstrate how withholding the jurors' telephone numbers and street addresses affected his right to a fair trial.

Lafoga relies upon State v. Samonte, 83 Hawai'i 507, 928 P.2d 1 (1996) in claiming that the trial court erred when it impaneled a "partially anonymous jury." However, Samonte is distinguishable from the instant case. In Samonte, the Hawai'i Supreme Court viewed the redaction of the first names, social security numbers, street addresses and phone numbers of prospective jurors and their spouses, and the name and phones numbers of their employers from juror qualifications forms to have created a "partially anonymous jury." Samonte, 83 Hawai'i at 518-519, 928 P.2d at 12-13. With the first names and spouse names of the prospective jurors withheld from the parties, the jurors were, in fact, "partially anonymous." Conversely, as noted above, in the instant case, the full names of the jurors were shared with the parties. Thus, the jurors were not even "partially anonymous," but rather completely identified to the parties by their full names.

To be certain, the trial court's redaction of telephone numbers and street addresses in the instant case is more akin to the procedure followed in State v. Villeza, 85 Hawai'i 258, 942 P.2d 522 (1997) where the Hawai'i Supreme Court held that the trial court did not err in redacting jurors' home street addresses and home/work telephone numbers from the juror qualification forms. The Hawai'i Supreme Court did not regard the partial redaction of jurors' home street addresses and home/work telephone numbers as creating an "anonymous jury" situation. Villeza, 85 Hawai'i at 266, 942 P.2d at 530. The Villeza Court, therefore, concluded that the Samonte analysis was not directly applicable. See, Villeza, 85 Hawai'i at 266, fn. 9, 942 P.2d at 530, fn.9. The Hawai'i Supreme Court held that "no danger to Villeza's right to a presumption of innocence and an impartial jury was created by the redaction of only the street addresses and telephone numbers of potential jurors." *Id.* The Villeza Court concluded that

> . . . [t]his redaction did not "raise the specter" that Villeza was a dangerous person so as to endanger his presumption of innocence. Further, because all other vital information regarding the potential jurors was provided to Villeza, the risk of

> selecting an impartial jury was kept to a minimum. Thus, even under a *Samonte* analysis, the trial court's redaction would be upheld.

Id. Similarly, this reviewing court should conclude that the trial court's redaction of the jurors' telephone numbers and street addresses from the juror summons card did not create an "anonymous jury" situation. Like in Villeza, the Samonte analysis is not directly applicable here. Of significance, however, Lafoga is unable to show how redacting the jurors' telephone numbers and street addresses from the juror summons cards affected his right to a fair trial.

b. The trial court's referring to jurors by number and not by name.

Likewise, the trial court's referring to the jurors by number and not by name did not create an "anonymous jury" situation because the trial court did not leave the jury with the impression that they were anonymous to the parties where the trial court informed the jury that their actual names are known to the Court and to the attorneys. Nevertheless, Lafoga claims the trial court failed to take sufficient precautions to minimize any prejudicial effects on his presumption of innocence, based on the jurors being referred to by number instead of by name. OB at 20-21. In support of his claim, Lafoga points to a few excerpts from the proceedings during voir dire and the proceedings preceding opening statements in which the trial court explained its procedure of referring to the jurors by number and not by name. See, OB at 8-10. However, this reviewing court should conclude that the trial court's explaining to the jurors that they would be referred to by number and not by name did not "raise the specter" that Lafoga was a dangerous person so as to endanger his presumption of innocence. Villeza, *supra*.

To be certain, in this case, the trial court informed the jurors that their actual names are known to the Court and to the attorneys, but their names and contact information would not be available to *the public*. Such procedure merely implied a respect of the jurors' privacy from the public, not anonymity as the jurors were informed that their names were known by the attorneys and the Court. Although the jurors names were, in fact, withheld from Lafoga, himself, the manner in which the trial court explained the procedure, the jurors would not have gleaned that such procedure was utilized for any particular reason other than a respect of the jurors' privacy from the general *public*. The trial court also explained that if it appeared that the parties had some information about them, it was because they had copies of their juror summons cards with their telephone numbers and street addresses redacted. Again, such procedure did not imply anonymity from the parties as clearly the parties were provided with the jurors' identities as well

as personal information about them. The trial court further explained that *the rest of the public* would not have access about the jurors. Indeed, the trial court informed the jurors that *the public* would not have access to their names and contact information, and that such were not made part of the *public record of the case*. The trial court indicated that while *the media* was permitted to cover the proceedings, *they were not allowed* to have any likeness or depiction of theirs, or take any pictures or videos of them. Therefore, to the extent that the trial court's explanations to the jury implied anonymity, it did so only with respect *to the general public*. Under these circumstances, there was no reason for the jurors to infer that the trial court's procedure was anything other than a policy that respected the jurors' privacy from the outside public that had nothing to do with Lafoga or dangerousness or possible guilt. Therefore, this reviewing court should hold that no danger to Lafoga's right to a presumption of innocence and an impartial jury was created by the trial court's referring to the jurors by number and not by name. Accordingly, under the circumstances of this case, Lafoga cannot demonstrate how referring to the jurors by number and not by name affected his right to a fair trial.

B. LAFOGA HAS FAILED TO SUPPORT HIS CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

In Lafoga's second point of error, he claims that he was denied effective assistance of counsel because his trial counsel failed to object to the trial court's procedure of redacting jurors' telephone numbers and street addresses from the juror summons cards and explaining to the jurors that they would be referred to by number and not by name. OB at 22-23. Lafoga argues said failures by his trial counsel constituted "specific errors or omissions that reflected a lack of skill, judgment, or diligence" which "resulted in the substantial impairment of [his] defense." OB at 23. However, as discussed below, the State submits Lafoga has failed to support his claim of ineffective assistance of trial counsel.

In order to determine whether a defendant has met his burden of proof in a claim of ineffective assistance of trial counsel, the Hawai‘i Supreme Court has set forth a two-part test in State v. Antone, 62 Haw. 346, 348-349, 615 P.2d 101, 104 (1980), requiring a defendant to show "specific errors or omissions . . . reflecting counsel's lack of skill, judgment, or diligence[,]" and that "these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense."

At the outset, the State points out that the Hawai‘i Supreme Court has held that "[t]he failure of counsel to assert every novel, albeit plausible, legal theory in the defense of an accused does not in itself reflect his ignorance of law." State v. McNulty, 60 Haw. 259, 269, 588 P.2d 438, 446 (1978). Furthermore, the Hawai‘i Supreme Court has noted that "[i]f the record is unclear or void as to the basis for counsel's actions, counsel should be given the opportunity to explain his or her actions in an appropriate proceeding." Briones, 74 Haw. at 464, 848 P.2d at 977. Customarily, a Hawai‘i Rules of Penal Procedure Rule 40 (2019) hearing is the proper method to address ineffective assistance of counsel claims. State v. Brantley, 84 Hawai‘i 112, 122, 929 P.2d 1362, 1372 (App. 1996). Here, Lafoga has failed to give his trial counsel the opportunity to explain his actions in an appropriate proceeding. Consequently, the record is void as to the basis for trial counsel's actions.

In any event, in the instant case, it is reasonable to infer that Lafoga's counsel did not object to the trial court's procedures because counsel may have interpreted the trial court's procedures to be substantially fair. See, Argument Section A. Accordingly, the failure of Lafoga's counsel to object to the trial court's procedures was not an error or omission "reflecting counsel's lack of skill, judgment, or diligence." Antone, *supra*.

Even assuming *arguendo* the failure of Lafoga's trial counsel to object to the trial court's procedures constitutes an error or omission, Lafoga, nevertheless, fails the second prong of the Antone test. Significantly, Lafoga is unable to make a showing that had his trial counsel objected to the trial court's procedures that the trial court would have done anything differently. Thus, Lafoga is unable to demonstrate that his trial counsel's failure to object to the trial court's procedures "resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Antone, *supra*; see, Argument Section A. Accordingly, Lafoga's claim of ineffective assistance of counsel fails on this basis.

C. THERE WAS NO RATIONAL BASIS TO INSTRUCT THE JURY WITH RESPECT TO THE OFFENSES OF ASSAULT IN THE FIRST DEGREE AND ASSAULT IN THE SECOND DEGREE.

In his third point of error on appeal, with regard to the trial court's instructions to the jury, Lafoga claims that "[t]here was a rational basis for the jury to acquit [him] of Attempted Murder in the Second Degree and convict him of assault." OB at 23-29. However, as discussed below, the record does not support his claim.

In State v. Flores, 131 Hawai‘i 43, 51, 314 P.3d 120, 128 (2013), the Hawai‘i Supreme Court reiterated "it is axiomatic that 'providing instructions on all lesser-included offenses with a rational basis in the evidence is essential to the performance of the jury's function.'" State v. Stenger, 122 Hawai‘i 271, 296, 226 P.3d 441, 466 (2010) (citing, State v. Haanio, 94 Hawai‘i 405, 415, 16 P.3d 246, 256 (2001). Pursuant to the Hawai‘i Supreme Court's precedent, "[j]ury instructions on lesser-included offenses *must* be given where there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense." State v. Kaeo, 132 Hawai‘i 451, 465, 323 P.3d 95, 109 (2014) (emphasis in original) (quoting, Flores, 131 Hawai‘i at 51, 314 P.3d at 128). In State v. Kinnane, 79 Hawai‘i 46, 897 P.2d 973 (1995), the Hawai‘i Supreme Court further declared, "Indeed, in the absence of such a rational basis in the evidence, the trial court *should not* instruct the jury as to included offenses." Kinnane, 79 Hawai‘i at 49, 897 P.2d at 976 (citation omitted) (emphasis added). Thus, the trial court's obligation to instruct the jury on the offenses of Assault in the First Degree and Assault in the Second Degree depends on whether the jury could have rationally acquitted Lafoga of Attempted Murder in the First Degree and convicted him of either Assault in the First Degree or Assault in the Second Degree. See, Flores, *supra*; Kaeo, *supra*.

In this case, the circuit court refused instructing the jury on the included assault offenses, stating, in pertinent part,

> And the facts in this case that we're dealing with -- the shooting is very similar to that in *Moore*. Multiple shots to the body as well as the failure to render aid. What is distinguishable, however, is according to the testimony provided, is of Mr. Lafoga's stated intention to cause the complaining witness's death.
>
> The Court is also mindful of *State v. Kaeo*, 132 Hawai‘i 451 (2014), where Assault 1 can be an included offense to Attempted Murder.
>
> * * * *
>
> In this case, the Court finds that the reasoning in *Kaeo* is not applicable because there is no evidence for the jury to find that Lafoga's intent was to only hurt the complaining witness. As stated, even if there was such testimony, the Court would nevertheless decline an instructing on included offenses. The evidence in this case includes the stated intent to kill, the initial shot to the face, and three more shots to the body where whenever the complaining witness showed any signs of life. And these facts prohibit[] a rational basis to find an alternate mens rea. Simply put, to conclude a state of mind other than the conscious object to cause the death of Kele Stout in this case would beggar belief.

12/3/19 TR/JEFS Dkt. #54, PDF at 153-155.

Here, the trial court's reasoning to refuse to instruct the jury on the included assault offenses is supported by the record, to wit, the evidence adduced at trial:

Stout testified that Ines and the Polynesian male beat him up, Ines "with his fists and the other guy with the baseball bat." 11/22/19 TR/JEFS Dkt. #70, PDF at 144-146. At some point after the beating, Stout heard Ines "order[] somebody to take care of the body." 11/22/19 TR/JEFS Dkt. #70, PDF at 149. When Ines heard Stout moving around in the garage, Ines and the Polynesian male again started beating on Stout. 11/22/19 TR/JEFS Dkt. #70, PDF at 150. They then threw Stout into the back of the work van. 11/22/19 TR/JEFS Dkt. #70, PDF at 151. The Polynesian male proceeded "into the driver's seat and . . . [drove] off without [Ines]" in the van. 11/22/19 TR/JEFS Dkt. #70, PDF at 152, 194.

While the Polynesian male continued to drive, he "says that [Stout will] be the first person that he is going to kill, meaning that he knows he's going to regret it." 11/22/19 TR/JEFS Dkt. #70, PDF at 155. Stout told him, "[J]ust let me go, I'll catch the first flight out of here, like no one's gotta know." *Id*. The Polynesian male replied, "[N]o, I can't do that." *Id.* At some point, the Polynesian male pulled to the side of the road and a car drove past, so he proceeded back onto the road until he found "a quiet spot where there's no one around." *Id*.

The Polynesian male then "parked the work van, [and] climb[ed] in between the seats to come into the back." 11/22/19 TR/JEFS Dkt. #70, PDF at 156. The Polynesian male "kinda hesitated over [Stout] for a little bit, [as Stout] could hear him breathing, and then he . . . shot [Stout] right in the face." 11/22/19 TR/JEFS Dkt. #70, PDF at 157. At some point, Stout "realized [he] wasn't dead yet[.]" *Id*. He "was trying to cough everything out and find a way to breathe[, as i]t was very, very hard to breathe." *Id*. While the Polynesian male was driving, "he turn[ed] back and shoots, and [Stout got] hit again." 11/22/19 TR/JEFS Dkt. #70, PDF at 158. Stout realized that the Polynesian male was "going to be shooting [him] the more [he] ma[d]e noise, he realized [Stout was] not dead, so [Stout] tried to muffle the sound of [his] breathing and coughing." *Id*. Stout testified that "[a]fter being shot in the face, [he] felt [one shot] in [his] torso and then one in [his] butt cheek, and so [he] only recall[e]d three." 11/22/19 TR/JEFS Dkt. #70, PDF at 159.

Stout heard the Polynesian male talking on the phone to someone about "how he was trying to burn the van with [Stout's] body still in it[.]" 11/22/19 TR/JEFS Dkt. #70, PDF at 160.

Stout identified State's Exhibit 303 as the photograph depicting the individual that looked like the Polynesian male, except with lighter skin. 11/22/19 TR/JEFS Dkt. #70, PDF at 176-177. Arakaki and DeCosta identified State's Exhibit 303 as a photograph depicting Lafoga. 11/27/19 TR/JEFS Dkt. #73, PDF at 20; 12/3/19 TR/JEFS Dkt. #54, PDF at 15-16.

Based on the above evidence adduced at trial, there was no rational basis in the evidence for a verdict acquitting Lafoga of the offense of attempted murder in the second degree and convicting him of assault in the first degree or assault in the second degree. Nevertheless, Lafoga claims that "a theory that [he] did not fire all of the gunshots at Stout would have undercut the trial court's assessment of the evidence and its refusal to instruct the jury on assault[.]" OB at 28. In support of his claim, Lafoga points to excerpts of testimony that he suggests lends itself to a juror concluding that "an undetected passenger could have fired the second, third, and fourth shots." *Id.* However, such claim ignores or overlooks Stout's definitive testimony that the Polynesian male shot him each time and that there was not a third person in the van. See, 11/22/19 TR/JEFS Dkt. #70, PDF at 156-159; see also, 11/25/19 TR/JEFS Dkt. #71, PDF at 61. To be certain, a claim that it was possible that a second shooter was hidden in the van and shot Stout is so lacking of support in the evidence or credibility that, significantly, Lafoga's trial counsel never argued or even suggested such at any point during his closing argument. See, Transcript of Proceedings held on December 4, 2019/JEFS Dkt. #55, PDF at 85-96.

Moreover, of significance, the State submits that Lafoga's act of walking to the back of the van to shoot Stout in the face, along with the surrounding circumstances of the act, clearly evinces an attempt to murder Stout. Indeed, Lafoga's only claim on appeal that such act does not evince an attempt to murder is that Lafoga hesitated before doing so and that such hesitation could be seen as intending to only hurt Stout. OB at 28-29. The State disagrees and submits that a hesitation before committing an act of shooting an individual in the face does not evince any intent to commit less injury. Consequently, in this case, there was no rational basis in the evidence for a verdict acquitting Lafoga of the offense of attempted murder in the second degree and convicting him of assault in the first degree or assault in the second degree. Accordingly, Lafoga's third point of error on appeal is without merit.

D. LAFOGA'S HRPP RULE 48 CLAIM IS WITHOUT MERIT.

Lafoga claims that the trial court erred when it denied his HRPP Rule 48 motion to dismiss. OB at 35-37. However, the record and controlling law do not support his claim.

Lafoga filed his Motion to Dismiss for Violation of HRPP Rule 48 on November 12, 2019. 1PC161001176, Docket #264, 11/12/2019 "Motion to Dismiss." On November 14, 2019, the State filed State's Memorandum in Opposition to Defendant Ines' Motion to Dismiss Indictment for Violation of Haw. R. Penal P. Rule 48 and Defendant Lafoga's Motion to Dismiss for Violation of HRPP Rule 48. 1PC161001176, Docket #266, 11/14/2019 "Memorandum in Opposition." On January 15, 2020, the trial court filed its Findings of Fact, Conclusions of Law, and Order Denying Defendant Ines' Motion to Dismiss Indictment for Violation of Haw. R. Penal Rule 48 and Defendant Lafoga's Motion to Dismiss for Violation of HRPP Rule 48. 1PC161001176, Docket #342, 01/15/2020 "Order Denied."

HRPP Rule 48(b)(1) (2019) requires the trial court to dismiss a charge, with or without prejudice, if trial is not commenced within six months from the date of the arrest or the filing of the charge, whichever is sooner. On appeal, the parties agree that the period of time between Lafoga's arrest on July 15, 2016, and the filing of Lafoga's Motion to Dismiss for Violation of HRPP Rule 48 on November 12, 2019, was 1215 days. OB at 30.

However, for the reasons stated below, there was no HRPP Rule 48 violation pursuant to HRPP Rule 48(b)(3) (2019) and/or the excludable periods in calculating the time for commencement of trial under HRPP Rule 48(c) (2019) and applied to Lafoga, pursuant to HRPP Rule 48(c)(7) (2019).

1. The HRPP Rule 48 clock was properly reset to May 20, 2019, pursuant to HRPP Rule 48(b)(3), upon the trial court's granting of Lafoga's motion for withdrawal of plea.

In this case, the trial court found, in pertinent part, that when Lafoga withdrew his guilty pleas on May 20, 2019, his case was reset for trial which reset the starting date for the calculation of his HRPP Rule 48 clock to May 20, 2019, pursuant to HRPP Rule 48(b)(3). See, 1PC161001176, Docket #342, 01/15/2020 "Order Denied," PDF at 8. The trial court further found that the time period between July 1, 2019 and September 30, 2019, a total of 92 days, was excludable under HRPP Rule 48(c)(3) (2019). Therefore, for purposes of HRPP Rule 48, only 88 days had passed for Lafoga. On appeal, Lafoga concedes that the period of time from July 1,

2019, to September 30, 2019, is excludable. OB at 30. Consequently, for purposes of reviewing the trial court's HRPP Rule 48 calculation, the only question which remains is whether the trial court was correct in resetting the starting date for the HRPP Rule 48 clock to May 20, 2019.

On appeal, Lafoga claims that "the trial court erred when it concluded that Lafoga's withdrawal of his guilty plea reset the starting date of his Rule 48 calculation to May 20, 2019." OB at 12. Lafoga cites to HRPP Rule 48(b)(1) and argues that "[u]nder Rule 48(b), a defendant's guilty plea and subsequent withdrawal of such plea does not re-set the Rule 48 starting date; on the other hand, a re-filing of the charge or an order granting a new trial does." OB at 29. In so arguing, Lafoga overlooks or ignores that an order allowing the withdrawal of a guilty plea and resetting of trial is analogous to an order granting a new trial.

In this case, the trial court was correct when it reset the starting date for the calculation of Lafoga's HRPP Rule 48 clock to May 20, 2019, pursuant to HRPP Rule 48(b)(3). HRPP Rule 48(b)(3) provides, in pertinent part:

> (b) By Court. Except in the case of traffic offenses that are not punishable by imprisonment, the court shall, on motion of the defendant, dismiss the charge, with or without prejudice in its discretion, if trial is not commenced within six months:
>
> * * * *
>
> (3) from the date of . . . order granting a new trial[.]

Although the Hawai'i appellate courts have yet to directly opine[4] on this issue, a review of cases from jurisdictions which have dealt with this claim on appeal concur with the trial court in this case that the speedy trial clock resets when a defendant pleads guilty and subsequently withdraws such plea. See, State v. Belieu, 314 N.W.2d 382 (1982) (court concluded that defendant's speedy trial rights were not denied; that defendant's speedy trial rights were derivatively waived upon pleading guilty; time for speedy trial began upon granting of withdrawal of guilty plea and resetting of trial); and, Commonwealth v. Jensch, 322 Pa.Super.

[4] However, in State v. Palic, 129 Hawai'i 450, 303 P.3d 1227 (Haw. App. 2013) (unpublished memorandum opinion), attached hereto as Appendix "A" pursuant to Hawai'i Rules of Appellate Procedure Rule 35(c)(2) (2019), where defendant Palic was allowed to withdraw his guilty plea and subsequently, on appeal, an HRPP Rule 48 issue was raised, the ICA's HRPP Rule 48 calculation did not include the period of time prior to the withdrawal of guilty plea, presumably because the Hawai'i appellate court considered the speedy trial clock to be reset upon the granting of the withdrawal of guilty plea.

304, 312, 469 A.2d 632, 636 (1983) ("It is well established that the withdrawal of a guilty plea, like the grant of a new trial, begins a new 120-day period in which the [prosecution] must bring a defendant to trial."). Such cases recognize that upon pleading guilty, a defendant waives his/her right to trial and derivatively his/her speedy trial right as well. Thus, the time for calculating speedy trial begins upon the date of an order granting a withdrawal of guilty plea. To be certain, while other jurisdictions' speedy trial rules, like ours, "addresses the issue by analogy only," their courts have concluded that "the time for a trial begins to run anew after an order is entered allowing the withdrawal of a guilty plea." See, Kennedy v. State, 297 Ark. 488, 489-490, 763 S.W.2d 648, 649 (1989) (holding that an order allowing the withdrawal of a guilty plea is analogous to an order granting a new trial). This interpretation of the speedy trial rule is consistent with the federal court speedy trial rule, 18 U.S.C. § 3161(i)[5], which explicitly states that if trial did not commence within the time limitation specified in the section because the defendant had entered a plea of guilty and subsequently withdrew his/her plea, he/she shall be deemed indicted on the date of the order permitting withdrawal of the plea.

The purpose of HRPP Rule 48 is to ensure speedy trials for criminal defendants and to relieve congestion in the trial court by promptly processing all cases reaching the courts so as to advance the efficiency of the criminal justice process. State v. Coyaso, 73 Haw. 352, 355-356, 833 P.2d 66, 68 (1992). The rule was not intended to provide a defendant with a weapon to trap state officials and terminate prosecutions. When waiver of the right to speedy trial is withdrawn, the State and defense must have an adequate opportunity to prepare for trial -- including preparing and subpoenaing witnesses, preparing exhibits, etc. As such, interpreting the granting of a motion to withdraw guilty plea as equating to a granting of a new trial is fair. Under Lafoga's interpretation, however, a defendant could plead guilty one hundred seventy-nine days into his speedy trial clock, then subsequently withdraw his plea, and the State would be required to go to trial the day following the granting of the motion to withdraw plea or be subject to a speedy trial violation. A result based on such interpretation of the rule would be patently unfair.

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[5] 18 U.S.C. § 3161(i) provides:

If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

In sum, when Lafoga pled guilty, he waived his right to a trial and likewise his right to a speedy trial. Belieu, *supra*. In granting Lafoga's motion to withdraw guilty plea and resetting his case, the trial court effectively granted Lafoga a new trial on May 20, 2019. Jensch, *supra*; Kennedy, *supra*. Consequently, Lafoga's HRPP Rule 48 clock started anew on May 20, 2019. As previously stated, Lafoga concedes on appeal that the period of time from July 1, 2019, to September 30, 2019, is excludable. OB at 30. As such, the trial court was correct in concluding that, for purposes of HRPP Rule 48, only 88 days had passed for Lafoga. Accordingly, Lafoga's HRPP Rule 48 claim is without merit.

2. Assuming *arguendo* the trial court's granting of Lafoga's motion to withdraw guilty plea did not reset his HRPP Rule 48 clock, nevertheless, there was no HRPP Rule 48 violation where excludable periods of delay attributable to Ines, pursuant to HRPP Rule 48(c)(3), were properly applied to Lafoga, pursuant to HRPP Rule 48(c)(7), as Ines' co-defendant.

Assuming *arguendo* that the trial court's granting of Lafoga's motion to withdraw guilty plea did not reset his HRPP Rule 48 clock, nevertheless, the State submits that there was no HRPP Rule 48 violation where the periods of delay attributable to Ines, pursuant to HRPP Rule 48(c)(3), were properly applied to Lafoga, pursuant to HRPP Rule 48(c)(7), as Ines' co-defendant. Lafoga, on the other hand, claims that "[d]ue to [his] objections to multiple continuances of trial, the trial court should have granted his HRPP Rule 48 motion to dismiss." OB at 29. However, the record and controlling law in this jurisdiction do not support his claim.

HRPP Rule 48(c) designates excludable periods of time in calculating the time for commencement of trial. Specifically, HRPP Rule 48(c)(3) and HRPP Rule 48(c)(7) provides for exclusion of periods of delay, stating, in pertinent part, as follows:

> (c) Excluded Periods. The following periods shall be excluded in computing the time for trial commencement:
>
> * * * *
>
> (3) periods that delay the commencement of trial and are caused by a continuance granted at the request or with the consent of the defendant or defendant's counsel;
>
> * * * *
>
> (7) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance[.]

In State v. Faalafua, 67 Haw. 335, 349, 686 P.2d 816, 829 (1984), the Hawai‘i Supreme Court analyzed HRPP Rule 48(c)(7) and held that "where the exclusion of time as to one defendant is permitted under other paragraphs of Rule 48(c), the same exclusion may be applied to co-defendants unless severance is granted or the interest of justice militates against it." Here, in calculating the time for commencement of trial, the trial court applied the same excludable periods of time to Lafoga as was permitted under HRPP Rule 48(c)(3) with respect to Ines, that is, "periods that delay the commencement of trial and are caused by a continuance granted at the request or with the consent of the defendant or defendant's counsel[.]" HRPP Rule 48(c)(3).

In this case, Lafoga concedes that there were six periods of delay which he consented to a continuance or where his guilty plea and withdrawal of such plea delayed trial and that such periods of delay "total 505 excludable days, leaving 710 days":

(1) September 26, 2016, to January 9, 2017,
(2) January 9, 2017, to June 13, 2017,
(3) May 21, 2018, to August 27, 2018,
(4) July 1, 2019, to August 19, 2019,
(5) August 19, 2019, to September 30, 2019, and
(6) May 6, 2019, to July 1, 2019
[Total = 505 days]

See, OB at 30. Consequently, Lafoga only challenges the trial court's HRPP Rule 48 ruling with respect to "six periods of time where continuances were granted at the request of Ines but objected to by Lafoga[,]" to wit, the following periods of delay:

(1) June 13, 2017, to September 18, 2017,
(2) September 18, 2017, to November 13, 2017,
(3) November 13, 2017, to January 1, 2018,
(4) January 1, 2018, to May 21, 2018,
[(1) through (4) = 343 days)
(5) August 27, 2018, to January 21, 2019 [148 days], and
(6) January 21, 2019, to May 6, 2019 [106 days]
[Total = 597 days]

OB at 30. A review of the record reveals that two of the periods of delay -- the second and fourth above -- were due to withdrawal and substitutions of Ines' counsel. See, 1PC1001176, Dkt. #126, 09/13/2017 "Mtn for Withdrawal/Sub of Cnsl;" and, 1PC1001176, Dkt. #144, 01/30/2018 "Withdrawal & Sub of Counsel." The remaining four periods of delay appear to be due to continuances requested by Ines' counsel for trial preparation purposes. See, 1PC161001176, 05/24/2017 Minutes, 1PC161001176, 10/18/2017 Minutes, 1PC161001176,

12/13/2017 Minutes, 1PC161001176, 07/16/2018 Minutes, and 1PC161001176, 12/17/2018 Minutes. Under these circumstances, the trial court did not err in finding the above periods of delay excludable for Ines under HRPP Rule 48(c)(3), and excludable for Lafoga under HRPP Rule 48(c)(7) "where there was no good cause for severance and [] Ines moved to continue their joint trial." 1PC161001176, Docket #342, 01/15/2020 "Order Denied," PDF at 4-6.

The State acknowledges that in at least two of the instances, as noted by Lafoga in his OB at 31, the specific circumstances compelling the continuance by Ines' counsel is not apparent from the record. See, 1PC161001176, 07/16/2018 Minutes, and 1PC161001176, 12/17/2018 Minutes. The State submits that to the extent this record is unclear or insufficiently developed for this reviewing court to make accurate conclusions with regard to the application of *any* excludable periods to Lafoga, this case should be remanded to the trial court with instructions to make appropriate findings of fact with regard to HRPP Rule 48, creating a proper record for this reviewing court. To hold otherwise would allow the parties to take advantage of the lack of a developed record below. As the Hawai'i Supreme Court has stated, it "will not countenance the subversion of the purposes of [HRPP] Rule 48, nor permit its utilization to create a 'mockery of justice . . . by technical evasion . . . ' of the rule by either the state *or defendant*." Faalafua, 67 Haw. at 339, 686 P.2d at 829 (emphasis added) (citations omitted).

In State v. Hutch, 75 Haw. 307, 861 P.2d 11 (1993), the Hawai'i Supreme Court stated that "pursuant to HRPP [Rule] 48(c)(3), the court must find *whether any period of delay resulting from a continuance was granted* at the request or *with the consent of the defendant or his or her counsel*. If the court so finds, it may then enter an appropriate HRPP [Rule] 48(c) conclusion of law." Hutch, 75 Haw. at 331, 861 P.2d at 23 (emphases added). The Hutch Court explained that an HRPP Rule 48 motion to dismiss, by its very nature, involved factual issues. *Id*. The Hutch Court further stated that

> [b]ecause findings of fact are imperative for an adequate judicial review of a lower court's conclusions of law, we have held that *cases will be remanded when the factual basis of the lower court's ruling cannot be determined from the record*.

Hutch, 75 Haw. at 331, 861 p.2d at 23 (internal quotation marks, ellipsis, and brackets omitted) (emphasis added).

In this case, however, although in a couple of the instances, the specific reasons for Ines' counsel requesting a continuance is not apparent from the record, the record is clear that the

continuances were, indeed, caused by a continuance at the request of Ines' counsel. Consequently, the State submits that the record is sufficient for this reviewing court to conclude that the trial court did not err in finding the above periods of delay excludable for Ines under HRPP Rule 48(c)(3), and excludable for Lafoga under HRPP Rule 48(c)(7) "where there was no good cause for severance and [] Ines moved to continue their joint trial." 1PC161001176, Docket #342, 01/15/2020 "Order Denied," PDF at 4-6. Significantly, Lafoga has failed to demonstrate that the trial court erred in concluding that "all of the excludable time outlined by the Court amounts to 1,063 days for Defendant Lafoga. For purposes of HRPP Rule 48, 153 days passed for Defendant Lafoga." 1PC161001176, Docket #342, 01/15/2020 "Order Denied," PDF at 8. Accordingly, Lafoga's HRPP Rule 48 claim is without merit.

E. THE TRIAL COURT'S EXTENDED SENTENCING JURY INSTRUCTION, WHICH WAS MODELED AFTER HAWJIC 19.3.1A AND HAWJIC 19.3.4A, WAS NOT PREJUDICIALLY INSUFFICIENT, ERRONEOUS, INCONSISTENT, OR MISLEADING.

In his fifth point of error on appeal, Lafoga claims that "the trial court erred in giving the jury an instruction that characterized the non-extended sentence for attempted murder in the second degree as a "possible life term of imprisonment." OB at 31-32. Lafoga claims that "[t]his instruction was misleading and confusing and prejudiced [him]." OB at 31. However, the record and applicable law do not support his claim.

> When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading[.] . . .
>
> [E]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.

Valentine, 93 Hawai'i at 204, 998 P.2d at 484 (citations and internal quotation signals omitted) (brackets in original).

In the instant case, at the hearing on extended sentencing, the trial court's jury instruction in question, provided, in pertinent part:

> 3. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the sentences for Defendant Brandon Fetu Lafoga in Count 2 from a possible life term of imprisonment to a definite life term of imprisonment, in Counts 4 and 6 from a possible twenty-year

term of imprisonment to a possible life term of imprisonment, and in Counts 8 from a possible ten-year term of imprisonment to a possible twenty-year term of imprisonment?

Transcript of Proceedings held on December 6, 2019 ("12/6/19 TR/JEFS Dkt. #56"), PDF at 83. The trial court appears to have modeled its jury instruction relating to extended sentencing after the Hawai'i Pattern Jury Instructions – Criminal ("HAWJIC") 19.3.1A (2019) with regard to Persistent Offender and HAWJIC 19.3.4A (2019) with regard to Multiple Offender. See, HAWJIC 19.3.1A[6] and HAWJIC 19.3.4A[7]; see also, 12/6/19 TR/JEFS Dkt. #56, PDF at 17 (where the trial court explained, "And the way the interrogatory is drafted tries to boil down the options in its most basic and understandable terms to a layperson. I believe that's the intent when the HAWJIC committee drafted the language for these enhanced sentencings.").

The State acknowledges that while the HAWJIC "have been approved for publication, the Hawai'i Supreme Court has not approved the substance of any of the pattern instructions[,]" HAWJIC Introduction, and the appellate courts are not bound by them. State v. Nupeiset, 90 Hawai'i 175, 181 n. 9, 977 P.2d 183, 189, n. 9 (App. 1999). However, the pattern instructions are instructive, in that they contain general language a court may consider when crafting jury instructions. State v. Hattori, 92 Hawai'i 217, 221 n. 5, 990 P.2d 115, 119 n.5 (App. 1999). In State v. Toro, 77 Hawai'i 340, 884 P.2d 403 (App. 1994), the ICA noted that the HAWJIC were "a product of the cooperative effort of judges and attorneys to encompass and to standardize rules of law in jury instructions, [which are] widely used by the circuit courts. However, as a general proposition, the circuit courts are not required to give such instructions." Toro, 77

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[6] HAWJIC 19.3.1A reads, in pertinent part:

2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant's sentence from a [possible five year term of imprisonment] [possible ten year term of imprisonment] [possible twenty year term of imprisonment] [possible life term of imprisonment] to a [possible ten year term of imprisonment] [possible twenty year term of imprisonment] [possible life term of imprisonment] [definite life term of imprisonment]?

[7] HAWJIC 19.3.4A reads, in pertinent part:

2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant's sentence from a [possible five year term of imprisonment] [possible ten year term of imprisonment] [possible twenty year term of imprisonment] [possible life term of imprisonment] to a [possible ten year term of imprisonment] [possible twenty year term of imprisonment] [possible life term of imprisonment] [definite life term of imprisonment]?

Hawai‘i at 348, 884 P.2d at 411. Accordingly, although the appellate courts are not bound by the pattern jury instructions, they are instructive. Nupeiset, *supra*; Hattori, *supra*.

Here, the trial court's instruction regarding extended sentencing (as well as HAWJIC 19.3.1A and HAWJIC 19.3.4A) correctly informed the jury in basic and understandable terms the effect an extended sentence has on the various terms of imprisonment. Thus, the trial court provided an "understandable instruction that aid[ed] the jury in applying the law to the facts of the case." State v. Sawyer, 88 Hawai‘i 325, 330, 966 P.2d 637, 642 (1998).

Lafoga, nevertheless, claims that "the trial court's characterization to the jury of the non-extended sentence for attempted murder in the second degree as a 'possible life term of imprisonment' drew inordinate attention to the minimum term of imprisonment that Lafoga may have received from the Hawaii Paroling Authority, in the event that he was sentenced to a non-extended sentence of life imprisonment with the possibility of parole." OB at 32. First, the State points out that Lafoga does not cite to any authority in support of his claim. The State acknowledges that by referring to the non-extended life term of imprisonment as a "possible life term imprisonment," the trial court's instruction seemingly accounts for the possibility of parole. Here, Lafoga fails to demonstrate how such reference is erroneous or misleading.

To be certain, the only authority Lafoga relies upon to support his claim that the instruction was erroneous or misleading is a 1918 case that purportedly supports his view that "[t]he possibility of parole does not make a life sentence any less of a life sentence." OB at 32. However, such view overlooks and ignores the practical effect that parole has on the amount of *imprisonment* a defendant, in fact, serves. Indeed, inasmuch as the trial court's extended sentencing jury instruction specifically references the possible amount of *imprisonment* that the defendant may serve, Lafoga fails to explain how doing so is erroneous. Additionally, Lafoga fails to suggest what he claims is the proper instruction that the trial court should have provided in lieu of the instruction in question. Of importance, Lafoga fails to demonstrate how such language was erroneous or misleading to a layperson, particularly with respect to the possible term of imprisonment. In failing to do so, Lafoga has failed to demonstrate he was prejudiced[8].

[8] For the same reason, Lafoga fails to demonstrate why the extended sentences in Counts 4 and 8 should be vacated. As such, his claim that "[s]ince the jury findings that extended sentences in Counts 4 and 8 were necessary for the protection of the public may have been unduly influenced by its consideration of an extended sentence in Count 2" is also without merit.

In this case, the trial court's extended sentence jury instruction, which utilizes the language "possible life term of imprisonment to a definite life term of imprisonment," properly explains in basic and understandable terms the effect an extended sentence has on a life term of imprisonment. More importantly, the explanation does not draw "inordinate attention" to it as Lafoga boldly claims. Significantly, there is nothing about the trial court's instruction that is "prejudicially insufficient, erroneous, inconsistent, or misleading." Valentine, *supra*. Accordingly, Lafoga's fifth point of error on appeal is without merit.

F. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING LAFOGA TO THE EXTENDED SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE FOR THE OFFENSE OF ATTEMPTED MURDER IN THE SECOND DEGREE.

In his final point of error on appeal, Lafoga claims that "[t]he trial court exceeded its lawful authority when it imposed the extended sentence of life imprisonment without the possibility of parole in Count 2." OB at 33. In support of his claim, Lafoga argues that "H.R.S. [§] 706-661(1) [(2014 Repl.)] unambiguously provides for a possible extended sentence of life imprisonment without the possibility of parole for murder in the second degree but not for attempted murder in the second degree." OB at 32-33. However, the controlling law in this jurisdiction does not support his claim.

"The authority of a trial court to select and determine the severity of a penalty is normally undisturbed on review in the absence of an apparent abuse of discretion or unless applicable statutory or constitutional commands have not been observed." State v. Davia, 87 Hawai'i 249, 253-254, 953 P.2d 1347, 1351-1352 (1998) (citations and internal quotation marks omitted). "Generally, to constitute an abuse it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Keawe v. State, 79 Hawai'i 281, 284, 901 P.2d 481, 484 (1995) (citations and internal quotation marks omitted).

In the instant case, Lafoga was convicted of, *inter alia*, in Count 2, Attempted Murder in the Second Degree. See, 1PC161001176, Docket #308, 12/04/2019 "Verdict." Following the further trial with respect to extended terms of imprisonment, the jury answered "Yes" to the questions of whether the prosecution proved beyond a reasonable doubt that Lafoga was a persistent and multiple offender and that that it was necessary for the protection of the public to

extend the sentence in, *inter alia*, Count 2. See, 1PC161001176, Docket #338, 12/06/2019 "Verdict." On February 20, 2020, the circuit court sentenced Lafoga to, in pertinent part, serve the following extended terms of imprisonment: in Count 2, a life term of imprisonment without the possibility of parole, in Count 4, a life term of imprisonment with the possibility of parole, and in Count 8, an indeterminate term of imprisonment of 20 years, with all terms to run consecutively to each other and any other terms being served. See, 1PC161001176, Docket #352, 12/06/2019 "Judgment of Conviction."

HRS § 706-662 (2014 Repl.) lays out the criteria for extended terms of imprisonment, stating, in pertinent part:

> A defendant who has been convicted of a felony may be subject to an extended term of imprisonment under 706-661 [(2014 Repl.)] if it is proven beyond a reasonable doubt that an extended term of imprisonment is necessary for the protection of the public and that the convicted defendant satisfies one or more of the following criteria:
>
> (1) The defendant is a persistent offender in that the defendant has previously been convicted of two or more felonies committed at different times when the defendant was eighteen years of age or older;
>
> * * * *
>
> (4) The defendant is a multiple offender in that:
>
> (a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for any felony; or
>
> (b) The maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively, would equal or exceed in length the maximum of the extended term imposed or would equal or exceed forty years if the extended term imposed is for a class A felony[.]

HRS § 706-661 provides, in pertinent part:

> The court may sentence a person who satisfies the criteria for any of the categories set forth in § 706-662 to an extended term of imprisonment, which shall have a maximum length as follows:
>
> (1) For murder in the second degree--life without the possibility of parole;
> (2) For a class A felony--indeterminate life of imprisonment;
> (3) For a class B felony--indeterminate twenty-year term of imprisonment; and
> (4) For a class C felony--indeterminate ten-year term of imprisonment.

A review of HRS § 706-661 reveals that the extended term of imprisonment statute lays out the various extended sentences of imprisonment available to the sentencing court based on the class and grade of the offense, as shown above. In this case, Lafoga claims that HRS § 706-

661(1) only "applies to murder in the second degree and not to attempted murder in the second degree." OB at 33. However, in so claiming, Lafoga conspicuously overlooks or ignores HRS § 705-502 (2014 Repl.), "Grading of criminal attempt," which states that "[a]n attempt to commit a crime is an offense of the same class and grade as the . . . offense which is attempted." HRS § 705-502. Therefore, based on the plain language of HRS § 705-502, because the offense of Attempted Murder in the Second Degree is the same class and grade as the offense of Murder in the Second Degree, the extended sentence of "life without the possibility of parole" would apply to it. Attempted Murder in the Second Degree clearly does not fall under any of the other classes of felonies. Consequently, Lafoga's claim is without merit. Relatedly, Lafoga's claim that "since the jury findings that extended sentences in Counts 4 and 8 were necessary for the protection of the public may have been unduly influenced by its consideration of an extended sentence in Count 2, the extended sentences in Counts 4 and 8 should be vacated too" is also without merit.

IV.

CONCLUSION

Based upon the foregoing argument and authority, the State respectfully requests this Honorable Court affirm the judgment of the circuit court.

Dated at Honolulu, Hawai'i: December 18, 2020.

Respectfully submitted,

STATE OF HAWAI'I
Plaintiff-Appellee

By DWIGHT K. NADAMOTO
Acting Prosecuting Attorney

By **/s/ STEPHEN K. TSUSHIMA**
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129 Hawai'i 450
Unpublished Disposition
Unpublished disposition. See HI R RAP Rule 35 before citing.
Intermediate Court of Appeals of Hawai'i.

STATE of Hawai'i, Plaintiff–Appellee,
v.
Rinson PALIC, also known as Johnny Nena and Johnny Neha, Defendant–Appellant.

No. CAAP–11–0000609.
|
June 6, 2013.
|
As Corrected Sept. 13, 2013.

Appeal from the Circuit Court of the First Circuit (CR. NO. 02–1–2327).

Attorneys and Law Firms

Harrison L. Kiehm, on the briefs, for Defendant–Appellant.

Stephen K. Tsushima, Deputy Prosecuting Attorney, City and County of Honolulu, on the briefs, for Plaintiff–Appellee.

NAKAMURA, C.J., and FOLEY, JJ., with REIFURTH, JJ., dissenting separately.

MEMORANDUM OPINION

***1** Plaintiff–Appellee State of Hawai'i (State) charged Defendant–Appellant Rinson Palic (Palic), also known as Johnny Nena and Johnny Neha, by complaint with second-degree robbery (Count 1); promoting a dangerous drug in the third degree (Count 2); and unlawful use of drug paraphernalia (Count 3). The alleged victim and complaining witness for the robbery charged in Count 1 was Thaddeus Pisarek (Pisarek).[1] Pisarek cooperated with the State in the initiation of the robbery prosecution against Palic.

The charges against Palic were originally resolved through a plea agreement in which Palic agreed to plead guilty to the reduced charge of second-degree theft in Count 1 and guilty as charged to Counts 2 and 3. The Circuit Court of the First Circuit (Circuit Court) accepted Palic's guilty pleas and sentenced him to probation. However, Palic subsequently violated the terms of his probation, which resulted in the revocation of his probation and his being resentenced to five years of imprisonment. While incarcerated, Palic filed a post-conviction petition to withdraw his guilty pleas. In support of the petition, Palic asserted, among other things, that he had not been adequately apprised of the immigration consequences of his pleas.

More than five years after Palic had originally pleaded guilty, the Circuit Court granted Palic's motion to withdraw his pleas, vacated his convictions, and set his case for trial. The State moved to continue the trial to secure the presence of Pisarek, who by this time was no longer residing in Hawai'i and who was an essential witness on the second-degree robbery charged in Count 1. The Circuit Court granted the motion, continued the trial, and later excluded a 92–day period of this trial continuance from the speedy-trial computation under Hawai'i Rules of Penal Procedure (HRPP) Rule 48 (2000). Additional continuances largely attributable to Palic further delayed the trial for an extensive period of time.

Appendix "A"

Immediately prior to the jury being sworn, the State moved to *nolle prosequi* Count 1, which the Circuit Court granted. The jury found Palic guilty as charged of Counts 2 and 3. The Circuit Court sentenced Palic to concurrent five-year terms of imprisonment on Counts 2 and 3, with credit for time served. The Circuit Court[2] filed its Judgment of Conviction and Sentence on July 15, 2011 (July 15, 2011, Judgment).

On appeal, Palic argues that: (1) the Circuit Court erred in excluding under HRPP Rule 48(c)(4)(i)[3] a 92–day period that the trial was continued to permit the State to secure its material witness Pisarek; and (2) there was insufficient evidence to convict Palic of Counts 2 and 3. As explained below, we affirm the Circuit Court's July 15, 2011, Judgment.

BACKGROUND

I.

Palic was arrested on October 15, 2002, for second-degree robbery, promoting a dangerous drug in the third degree, and unlawful use of drug paraphernalia. That same day, the arresting officer, Honolulu Police Department Officer Alvin Kahawaii signed an "Affidavit in Support of Warrantless Arrest," which described Officer Kahawaii's basis for believing there was probable cause for each of Palic's[4] arrests and to support the extended restraint of his liberty. Officer Kahawaii stated that he observed Pisarek chasing Palic at the intersection of Pauahi and Bethel Streets; that Pisarek shouted out to Officer Kahawaii that Pisarek had just been robbed; and that Officer Kahawaii and Officer Jack Long gave chase and apprehended Palic. In his affidavit, Officer Kahawaii relied upon information Pisarek provided to Officer Kahawaii during his investigation, including that: Palic had grabbed Pisarek's ten dollar bill that was in front of Pisarek on the bar at Paradise Lost Lounge; that Pisarek followed Palic and attempted to retrieve the money, but Palic punched Pisarek in the mouth with his right fist and fled on foot; and that Pisarek chased Palic and flagged the officers when Pisarek saw them. Officer Kahawaii also stated that during Palic's arrest, a glass pipe with white residue was recovered from Palic's pants pocket, which Officer Kahawaii recognized as a pipe used to smoke crack cocaine that appeared to contain crack cocaine residue. Officer Kahawaii also recovered a ten dollar bill from Palic, which Palic acknowledged belonged to Pisarek.

***2** On October 16, 2002, a judge of the District Court of the First Circuit (District Court) signed a "Judicial Determination of Probable Cause for the Extended Restraint of Liberty of Warrantless Arrestee" regarding each of Palic's arrests.

On October 21, 2002, the District Court held a preliminary hearing on the charges against Palic. Pisarek appeared and testified as a witness for the State. Pisarek testified that while at an establishment called Paradise Lost, he paid for drinks and received change that included a ten dollar bill that was in front of him on the bar; that Palic grabbed Pisarek's ten dollar bill and ran out of Paradise Lost and into a video store; that Pisarek gave chase, caught up to Palic, and demanded that Palic return the money; that Palic punched Pisarek in the mouth with a closed fist and ran away; that Pisarek followed Palic and asked two police officers for assistance; and that the officers stopped Palic and recovered the ten dollars Palic had stolen. Pisarek made an in-court identification of Palic as the person who had taken his money. The State also presented evidence on the drug-related charges. The District Court found that the State had established probable cause and committed the case to Circuit Court.

The State filed its complaint against Palic in Circuit Court on October 23, 2002. On January 27, 2003, pursuant to a plea agreement, Palic pleaded guilty to the reduced charge of second-degree theft as to Count 1 and guilty as charged on Counts 2 and 3. The Circuit Court entered judgment against Palic on April 29, 2003, sentencing him to concurrent five-year terms of probation on each count. Palic subsequently violated the terms of his probation. The Circuit Court revoked Palic's probation and resentenced him on December 13, 2005, to concurrent five-year terms of imprisonment on Counts 1, 2, and 3.

II.

While incarcerated, Palic learned that federal authorities had placed an immigration detainer on him. On February 10, 2009, Palic filed a petition for post-conviction relief, seeking to withdraw his guilty pleas that were entered on January 27, 2003. Palic claimed that when he entered his guilty pleas, he had not been properly advised of the

likelihood that deportation proceedings would be brought against him and that he had valid defenses to the charges which should have been raised. A hearing on Palic's petition set for April 27, 2009, was continued at Palic's request to permit Palic to obtain a transcript of the change of plea hearing and to obtain information from immigration authorities. On June 22, 2009, the Circuit Court held a hearing on Palic's petition, granted the petition, and set trial for the week of August 10, 2009. On July 8, 2009, the Circuit Court issued its written order withdrawing Palic's guilty pleas, vacating his judgment, and setting trial for the week of August 10, 2009.

On August 5, 2009, the State filed a Motion for Continuance of Trial to permit it to secure the presence of Pisarek, an essential witness on Count 1, at trial. In support of the motion, the State submitted the declaration of the Deputy Prosecuting Attorney then handling the case (DPA Young). DPA Young's declaration asserted that the State was utilizing an investigator, Kai Dodson ("Investigator Dodson"), from the Honolulu Prosecutor's Office to attempt to locate Pisarek and serve him with a trial subpoena. Investigator Dodson's efforts eventually led him to contact Mr. Bugarin, a Fireman's Union Port Agent in Wilmington, California ("Agent Bugarin"), from whom Investigator Dodson learned that Pisarek was on a ship at sea and would not return to port for "several weeks." Agent Bugarin was unable to be more specific about the exact date of Pisarek's return. Investigator Dodson asked Agent Bugarin, and Agent Bugarin agreed, to deliver a message to Pisarek to call the Honolulu Prosecutor's Office when Pisarek returned to port.

***3** On August 10, 2009, the Circuit Court held a hearing on the State's motion for continuance. Based on a plea offer extended to Palic by the State, a tentative change of plea hearing had also been scheduled for that date, but Palic advised the Circuit Court that he was rejecting the State's plea offer.[5] The Circuit Court granted the State's motion for continuance and set the trial for November 16, 2009. As a result of numerous additional continuances largely attributable to Palic, including continuances required to determine Palic's competency to proceed and necessitated by two withdrawals and substitutions of Palic's appointed counsel, trial did not begin until July 7, 2011.

In the intervening period, on December 16, 2010, Palic filed a motion to dismiss the complaint with prejudice for violating the time limits set forth in HRPP Rule 48 (Motion to Dismiss). The State filed a memorandum in opposition to the Motion to Dismiss. The State asserted that the period from August 10, 2009, to November 10, 2009, of its requested continuance to secure the presence of Pisarek should be exculuded from the HRPP Rule 48 speedy-trial computation

> as it was determined that the victim in Count I, Thaddeus Pisarek now resides on the mainland (California) and was not available to return to Hawaii for trial as scheduled due to his work as a merchant marine. Pursuant to HRPP Rule 48(c)(4)(i), Mr. Pisarek is a material and necessary witness in the prosecution of Count I, and the State through it'[s] diligence was able to track him down, and even make contact with him while he was at sea. At that point, it appeared that Mr. Pisarek may be willing to participate in the prosecution of this matter, and the State moved the Court for a continuance of the trial in order to try and secure Mr. Pisarek's presence at a future proceeding.

On June 27, 2011, the Circuit Court held a hearing on Palic's Motion to Dismiss. DPA Young, who had been assigned to Palic's case in August 2009 when the State moved for the trial continuance, testified that on June 22, 2009, the Circuit Court allowed Palic to withdraw his guilty pleas and reset the case for trial during the week of August 10, 2009. DPA Young explained that the State, through its investigator, attempted to locate Pisarek at his original 2002 Honolulu address, but determined that Pisarek was a merchant seaman and had moved to California. Attempts to locate Pisarek in California revealed that he would be out at sea during the period of the scheduled trial. Therefore, the State moved to continue the trial as it "hoped to make the evidence or testimony from [Pisarek] available at some future date," because he was a necessary witness for the robbery charge.

At the same hearing, the deputy prosecuting attorney who had assumed responsibility for the case (DPA Clark) advised the Circuit Court that the State was "still having a very difficult time reaching [Pisarek]" and may not be able to secure his presence at trial. DPA Clark stated that the State's investigator "is having a hard time trying to nail down Mr. Pisa[r]ek as to whether he's on shore or off." Because the State did not have a direct connection to Pisarek, it was working through the merchant marine union to contact him. DPA Clark asserted that "[p]reviously we were able to get in touch with [Pisarek] on the ship ... through [the merchant marine union], so I'm hoping that this means will yield that contact again."

***4** On July 26, 2011, the Circuit Court issued its order denying Palic's Motion to Dismiss, which contained the following relevant findings of fact and conclusion of law:

Findings of Fact

....

11. On August 5, 2009, the State filed a Motion for Continuance of Trial based upon its efforts to locate and subpoena witnesses in the case and determination that the complaining witness for the Robbery in the Second Degree charge was working aboard a ship at sea as of August 3, 2009; would not return to port for "several weeks;" and the Fireman's Union Port Agent Robert Bugarin, located in Wilmington, California, did not know specifically when the complaining witness would return to port.

12. Hearing on the State's Motion for Continuance of Trial was had on August 10, 2009, when a tentative Change of Plea was scheduled based on a plea offer extended by the State but which the Defendant rejected at that hearing. The court granted the State's Motion for Continuance of Trial and, at the State's request, set trial for November 16, 2009....

....

CONCLUSIONS OF LAW

....

4. From August 10, 2009, to November 10, 2009, 92 days elapsed, but the State's continuance was necessitated by an unavailable material witness—the complaining witness in Count [1]—as to whose location the State had exercised due diligence, who had been located but who was working on a ship at sea, and as to whom there were reasonable grounds to believe that the witness would become available to testify. Thus, the 92 days are excluded under [HRPP] Rule 48(c)(4)(i).

III.

Palic's trial commenced on July 7, 2011. The State was unable to obtain Pisarek's presence and moved to *nolle prosequi* Count 1 just prior to the jury being sworn. The Circuit Court granted the motion. With respect to Counts 2 and 3, the State presented evidence that police officers involved in Palic's arrest recovered a pipe with cocaine residue from Palic's pocket. Officer Kahawaii testified that during a search incident to arrest, Palic disclosed that he was in possession of a crack pipe, stating, "eh, I get crack pipe." Officer Spencer Andersen read portions of his police report into evidence, as past recollection recorded, which showed that Officer Anderson had recovered a glass pipe containing a black and white powdery substance, along with a lighter from Palic. The State presented evidence regarding the chain of custody for the pipe and the results of a chemical analysis, which revealed that the residue found inside the pipe contained cocaine.

Palic did not testify or call any witnesses. His main theory of defense was that because of the age of the case, the witnesses did not have a present recollection of their actions and therefore there was insufficient evidence and a reasonable doubt regarding his guilt. Palic also argued that the absence of the glass pipe due to its destruction prior to trial created a reasonable doubt. The jury found Palic guilty as charged on Counts 2 and 3.

DISCUSSION

I.

***5** Palic argues that the Circuit Court erred in excluding the 92–day period from August 10, 2009, to November 10, 2009, during which the trial was continued to permit the State to secure the presence of Pisarek. Palic contends that contrary to the Circuit Court's ruling, this period was not properly excludable under HRPP Rule 48(c)(4)(i) and, if included in the speedy-trial computation, resulted in the State violating the HRPP Rule 48 time limits. We review the trial court's factual findings in ruling on a motion to dismiss under HRPP Rule 48 for clear error and its determination of whether those facts fall within HRPP Rule 48's exclusionary provisions *de novo*. *State v. Samonte,*

83 Hawai'i 507, 514, 928 P.2d 1, 8 (1996).

HRPP Rule 48(c)(4)(i) excludes from speedy-trial computation the period of a continuance that is "granted because of the unavailability of evidence material to the prosecution's case, when the prosecutor has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at a later date[.]" Palic argues that the Circuit Court erred in excluding the 92–day period under HRPP Rule 48(c)(4)(i) because "[t]here was no evidence based on reasonable grounds that [Pisarek] was ever personally contacted and may become 'available at a later date.' " We conclude that the Circuit Court did not err in excluding the 92–day period.

It is not clear from Palic's argument whether he is claiming that the State failed to exercise due diligence to obtain Pisarek's presence at trial prior to the requested continuance. If Palic is making such a claim, it is without merit. The record reveals that Palic had originally pleaded guilty and was sentenced in 2003. Thus, the State had no reason to keep in contact with Pisarek. However, on June 22, 2009, the Circuit Court orally ruled that it was granting Palic's petition to withdraw his guilty pleas and setting the case for trial during the week of August 10, 2009, and it filed a written order memorializing its ruling on July 8, 2009. The State assigned an investigator with the Honolulu Prosecutor's Office to locate Pisarek. The investigator attempted to locate Pisarek at his last known 2002 Honolulu address, learned that Pisarek was a merchant seaman and had moved to California, located him through a union agent as being aboard a ship at sea, determined that Pisarek was not expected to return to port until after the scheduled trial, and arranged through the agent to have Pisarek contact the Honolulu Prosecutor's Office once he returned. Palic does not indicate, under the circumstances, what more the State could have or should have done. We conclude that the State exercised due diligence to locate Pisarek and secure his presence prior to requesting the trial continuance.

We also conclude that there were "reasonable grounds to believe" that Pisarek and his testimony would be available at a later date within the meaning of HRPP Rule 48(c)(4)(i). We must evaluate whether this requirement of HRPP Rule 48(c)(4)(i) was satisfied based on the information reasonably available to the Circuit Court and the State at the time the Circuit Court granted the State's motion for continuance on August 10, 2009. Prior to the Circuit Court's ruling on the State's continuance motion, the record shows that Pisarek had cooperated with the State in the prosecution of Palic. Pisarek requested the assistance of the police in apprehending Palic. Pisarek then provided information to the police in its investigation of Palic, and Pisarek testified for the State as a witness at the preliminary hearing held on the charges against Palic. At the time the Circuit Court ruled on the State's motion for continuance, there is nothing in the record to suggest that Pisarek would not continue to cooperate with the State in its prosecution of Palic.

***6** As noted, the Circuit Court orally granted Palic's petition to withdraw his guilty pleas on June 22, 2009, and set the case for trial during the week of August 10, 2009. Prior to filing its motion for a continuance on August 5, 2009, the State had been able to locate Pisarek through a union agent, determine that he was at sea but would return to port at a later date, and obtain assurances that the union agent would deliver a message to Pisarek to call the Honolulu Prosecutor's Office when Pisarek returned to port. Because Pisarek was at sea, the State was limited in its ability to directly communicate with Pisarek and obtain definitive information regarding his availability prior to filing its continuance motion on August 5, 2009, and the Circuit Court's ruling on the motion on August 10, 2009.[6] Under these circumstances, we hold that the Circuit Court did not err in concluding that there were reasonable grounds to believe that Pisarek would become available to testify at a later date.

II.

Palic contends that there was insufficient evidence to support his convictions on Counts 2 and 3. Palic does not contest the "competency" of the evidence presented at trial, but argues that it was insufficient because no physical evidence of the pipe (which had been destroyed) was presented; testimony concerning the recovery of the pipe was inconsistent; and due to the passage of time, the witnesses had difficulty specifically recalling the actions they had taken.

In evaluating the sufficiency of the evidence on appeal, we must consider the evidence in the light most favorable to the State. *State v. Richie*, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998). "The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact." *Id.* (block quote format and citation omitted). Applying the appropriate standard of review, we reject

Palic's claim that the evidence was insufficient.

CONCLUSION

We affirm the July 11, 2011, Judgment of the Circuit Court.

Dissenting Opinion by REIFURTH, J.

***6** While I agree that there was substantial evidence to support Palic's conviction, I would not reach this question because, contrary to the majority's conclusion, I believe his conviction should be vacated on speedy trial grounds. The majority's conclusion—that there were reasonable grounds to believe that Pisarek would later be present at trial—is simply unsupported by the underlying facts. I, therefore, respectfully dissent.

The majority relies upon Pisarek's original cooperation with the police to establish "reasonable grounds to believe" that Pisarek and his testimony would be available at a later date within the meaning of HRPP Rule 48(c)(4)(i). Mem. Op. at 10–11. Pisarek's original, and only, assistance with this case, however, came in 2002, within days of Palic's alleged offense. It was not for another seven years that the question of whether Pisarek's presence could be secured at trial arose. In light of such temporal separation, I find Pisarek's original assistance to be irrelevant to the question of whether he would be so amenable seven years later.

***7** Moreover, at the time of the continuance, Pisarek was no longer local. As best the prosecution could determine, as ascertained through an intermediary, Agent Bugarin, Pisarek was out at sea and not expected to return for several weeks time. Furthermore, he was not returning to Hawai'i, but to somewhere in California, an ocean away.

In the State's efforts to locate Pisarek, the only certainty is that the State left a message with Agent Bugarin; all else, however, is at best vague or speculative. Agent Bugarin could only say that Pisarek was expected to return in "several weeks" time.[1] The record is vague as to whether Agent Bugarin ever even spoke to Pisarek, but even if he did, the content of any such communication was never established.[2] Further, there is no evidence of precisely where Pisarek would return ashore, and it is entirely speculative whether he would remain ashore for any meaningful length of time.

In the end, the State's—and the majority's—argument is tied not to any legitimate expectation but, rather, to several speculative contingencies. Would Pisarek receive the message left for him with Agent Bugarin? Would he be inclined to respond after so long?[3] Most dubiously, would Pisarek be both available and willing to take time to travel overseas to help prosecute a ten-dollar robbery that occurred seven years earlier?

Whatever "reasonable grounds to believe" means, it must mean something more definite than an attenuated hopefulness. For example, a witness's demonstrated and contemporaneous willingness to testify, *see State v. Ferraro*, 8 Haw.App. 284, 298–99, 800 P.2d 623, 631–32 (1990), the predictability of a witness's return from a temporary absence, *see State v. Ahlo*, 79 Hawai'i 385, 393–94, 903 P.2d 690, 698–99 (App.1995), or the reliability of a witness's whereabouts for purposes of service, *see State v. Filoteo*, No. 29921, 2011 WL 2126149, at *2 (Haw.Ct.App. May 25, 2011), may suffice.

But I find it wholly inadequate to predicate any likelihood of securing the presence of an overseas witness, whose current employment involves some degree of extended travel, and whose interest in assisting the prosecution is utterly unknown and unpredictable, at trial in Hawai'i upon no more than a phone message left with a third party who promises to pass along the message seven years after the offense.

Therefore, I respectfully dissent.

All Citations
129 Hawai'i 450, 303 P.3d 1227 (Table), 2013 WL 2450841

Footnotes

[1] It appears that Pisarek's name was misspelt as "Pisanek" in the complaint and in certain other parts of the record. To avoid

confusion, we will use "Pisarek" when referring to the complaining witness for the charged robbery.

[2] The Honorable Karen S.S. Ahn presided over the proceedings relevant to this appeal.

[3] HRPP Rule 48(c)(4)(i) provides:

> **(c) Excluded Periods.** The following periods shall be excluded in computing the time for trial commencement:
> ...
> (4) periods that delay the commencement of trial and are caused by a continuance granted at the request of the prosecutor if:
> (i) the continuance is granted because of the unavailability of evidence material to the prosecution's case, when the prosecutor has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at a later date[.]

[4] Palic was identified in Officer Kahawaii's affidavit by the alias "Johnny Nena."

[5] According to the Circuit Court's minutes, the State advised the Circuit Court that the plea offer would remain open until "the complainant is flown in for trial."

[6] We note that Hawaii Revised Statutes § 836–3 (1993) establishes procedures by which witnesses from another state may be summoned to testify in Hawai'i in a criminal prosecution.

[1] What formed the basis for Agent Bugarin's expectation is not made clear, although while discussing Pisarek's unavailability for the 2011 trial, the State clarified that Agent Bugarin's role was to "log[ ] the different merchant marines' trips out because they handle the insurance matters and things like that."

[2] In its January 26, 2011 memorandum in opposition to Palic's Motion to Dismiss, the State represented that it had been "able to track [Pisarek] down, and even make contact with him while he was at sea." Later, in 2011, when the State was discussing Pisarek's unavailability for the continued trial, the State asserted: "[p]reviously we were able to get in touch with him on the ship, and that was through [Agent Bugarin], so [we're] hoping that this means will yield that contact again." If there were more specific facts regarding the nature or substance of Agent Bugarin's contact with Pisarek, it is reasonable to expect that the State would have presented them below.

[3] Indeed, there is no indication that Pisarek ever received the State's message or contacted the State in response. Ultimately, the State had to *nolle prosequi* the robbery charge.

V.

STATEMENT OF RELATED CASES

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

NO. CAAP-20-0000175

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

STATE OF HAWAI‘I, Plaintiff-Appellee, vs. BRANDON FETU LAFOGA, Defendant-Appellant, and RANIER INES, also known as Schizo, Defendant.	)	CRIMINAL NO. 1PC161001176 APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE; NOTICE OF ENTRY filed on February 20, 2020 FIRST CIRCUIT COURT HONORABLE PAUL B. K. WONG JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2020, one (1) copy of the **Answering Brief of the State of Hawai‘i** was served by Electronic notification through JEFS to the following:

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