

\*\*\* NOT FOR PUBLICATION \*\*\*

NO. 22340

IN THE SUPREME COURT OF THE STATE OF HAWAII

---

STATE OF HAWAII, Plaintiff-Appellee

vs.

THOMAS S. SCHILLACI, Defendant-Appellant

---

APPEAL FROM THE SECOND CIRCUIT COURT  
(CR. NO. 96-0316)

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, and Nakayama, JJ.,  
Circuit Judge Chang, in place of Acoba, J., recused, and  
Circuit Judge Sakamoto, assigned by reason of vacancy)

Defendant-appellant Thomas S. Schillaci (Schillaci), also known as Steven Collura, appeals from the January 22, 1999 judgment of the circuit court of the second circuit, the Honorable Boyd P. Mossman presiding, convicting Schillaci of (1) manslaughter based on extreme mental or emotional disturbance, in violation of Hawai'i Revised Statutes (HRS) § 707-702 (1993)<sup>1</sup> [hereinafter, "Count I" or "EMED manslaughter"], (2) carrying or use of a firearm in the commission of a separate felony, in

---

<sup>1</sup> HRS § 707-702 provides:

- (1) A person commits the offense of manslaughter if:
  - (a) He recklessly causes the death of another person; or
  - (b) He intentionally causes another person to commit suicide.

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

- (3) Manslaughter is a class B felony.

\*\*\* NOT FOR PUBLICATION \*\*\*

violation of HRS § 134-6(a) (Supp. 1996)<sup>2</sup> (Count II), (3) felon in possession of any firearm, in violation of HRS § 134-7(b) (Supp. 1996)<sup>3</sup> (Count III), and (4) unauthorized control of a

---

<sup>2</sup> HRS § 134-6 provides in relevant part:

(a) It shall be unlawful for a person to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not; provided that a person shall not be prosecuted under this subsection where the separate felony is:

- (1) A felony offense otherwise defined by this chapter;
- (2) The felony offense of reckless endangering in the first degree under section 707-713;
- (3) The felony offense of terroristic threatening in the first degree under section 707-716(1)(a), 707-716(1)(b), and 707-716(1)(d); or
- (4) The felony offenses of criminal property damage in the first degree under section 708-820 and criminal property damage in the second degree under section 708-821 and the firearm is the instrument or means by which the property damage is caused.

. . . . .

(e) Any person violating subsection (a) or (b) shall be guilty of a class A felony. . . .

<sup>3</sup> HRS § 134-7 provides in relevant part:

(b) No person who is under indictment for, or has waived indictment for, or has been bound over to the circuit court for, or has been convicted in this State or elsewhere of having committed a felony, or any crime of violence, or an illegal sale of any drug shall own, possess, or control any firearm or ammunition therefor.

. . . . .

(h) Any person violating subsection (a) or (b) shall be guilty of a class C felony; provided that any felon violating subsection (b) shall be guilty of a class B felony.

\*\*\* NOT FOR PUBLICATION \*\*\*

propelled vehicle, in violation of HRS § 708-836 (1993)<sup>4</sup> (Count V).<sup>5</sup>

On appeal, Schillaci argues that: (1) the instructions in the verdict and interrogatory forms resulted in inconsistent jury verdicts for EMED manslaughter and murder in the second degree; (2) he was illegally convicted of both Counts I and II pursuant to State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998); (3) the circuit court erred by sentencing him under both HRS § 134-6(a) and HRS § 706-660.1 based on the same underlying felony offense; (4) the circuit court erred by imposing consecutive mandatory minimum sentences for Counts I and III; (5) the circuit court erred by admitting evidence of firearms and drug paraphernalia due to its irrelevant and prejudicial nature; (6) the circuit court erred by denying his motion for mistrial based on prosecutorial misconduct; (7) the circuit court failed to instruct the jury that the choice of evils defense was applicable to the charges for felon in possession; (8) the circuit court erred by striking Schillaci's motion for a new trial based on defense counsel's absence from the hearing; and (9) the circuit court erred by denying his motion for judgment of acquittal where

---

<sup>4</sup> HRS § 708-836 provides in relevant part:

(1) A person commits the offense of unauthorized control of a propelled vehicle if the person intentionally exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent or by changing the identity of the vehicle without the owner's consent.

<sup>5</sup> Schillaci was also convicted of the offense of felon in possession of firearm ammunition, in violation of HRS § 134-7(b) (Count IV), but the circuit court dismissed this conviction at the sentencing hearing because, pursuant to State v. Auwae, 89 Hawai'i 59, 70, 968 P.2d 1070, 1081 (App. 1998), it was improper to convict Schillaci of both Counts III and IV. For clarity's sake, this memorandum adheres to the labels of Count IV, felon in possession of firearm ammunition, and Count V, unauthorized control of a propelled vehicle.

**\*\*\* NOT FOR PUBLICATION \*\*\***

"there was a lack of evidence as to the manner in which Simpson was shot."

We hold that although the jury verdict, which reflected a guilty verdict as to EMED manslaughter and a not guilty verdict as to murder in the second degree, was not inconsistent, cf. Whiting v. State, 88 Hawai'i 356, 360, 966 P.2d 1082, 1086 (1998) (noting that a conviction of EMED manslaughter ultimately requires an acquittal of murder in the second degree), the special interrogatory form was plainly erroneous, inasmuch as it did not require jury unanimity for a conviction as to EMED manslaughter, see State v. Yamada, 99 Hawai'i 542, 550-52, 57 P.3d 467, 475-77 (2002) (noticing the plainly erroneous verdict form that permitted the jury to return a guilty verdict for EMED manslaughter without jury unanimity). This plain error requires that Counts I and II be vacated and remanded for a new trial. We further hold that the absence of a specific finding by the jury, as evidenced by a special verdict interrogatory form, that a semiautomatic firearm was used requires that this court vacate the mandatory minimum sentence imposed for Count III and remand for resentencing. In all other respects, Schillaci's arguments were either without merit, waived, or moot. Nonetheless, we address certain points of error as guidance to the circuit court on remand.

**I. BACKGROUND**

**A. Statement of Facts**

On March 27, 1996, Michael Waltze (Mr. Waltze) and Danette Waltze (Mrs. Waltze) [collectively, "the Waltzes"] entered into an agreement to rent a residence and cottage at 552-

**\*\*\* NOT FOR PUBLICATION \*\*\***

C Piiholo Road to Schillaci and Carmencita Lista for \$2,000/month. In May 1996, Schillaci and Lista failed to pay the rent. Due to the nonpayment of rent and problems contacting Schillaci and Lista, the Waltzes hired a rental agent, and eventually sent an employee, William Simpson, to inspect the property. The Waltzes gave Simpson permission to use their car.

On June 3, 1996, Simpson went to the 552-C Piiholo Road property. According to Lista, Simpson came onto the property swearing and said, "What's the matter with you folks? Never pay rent?" Lista gave Simpson \$2,000 and had Simpson sign a handwritten note indicating that he received the \$2,000. Simpson then told Lista that he would have Mr. Waltze contact them.

That same day, Mr. Waltze received a call from Simpson, who expressed suspicion of drug activity at the property and relayed that he told Schillaci that his uncle was with the Drug Enforcement Agency (DEA). Mr. Waltze asked Simpson to return to inspect the property. After this conversation, Mr. Waltze received a call from Schillaci. Mr. Waltze told Schillaci that Simpson would be returning to inspect the property.

According to Lista, Simpson returned to the property swearing and said, "You're a f-ing liar. I'm not leaving here until I have June's rent." Simpson then allegedly grabbed Lista's neck and held a knife to her back. A shot was fired, and Lista heard Simpson say, "Oh shit." Simpson then released Lista, and Lista heard a second shot. Lista and Schillaci then left the property, Lista driving away in a truck and Schillaci in the car Simpson borrowed from the Waltzes. Schillaci abandoned the car

**\*\*\* NOT FOR PUBLICATION \*\*\***

down the road and jumped into the truck Lista was driving.<sup>6</sup>

Based on a 911 call made by a neighbor,<sup>7</sup> Maui Police Department (MPD) Police Officer Scott Alo (Officer Alo) and MPD Police Detective Derek Lee (Detective Lee) were dispatched to 552-C Piiholo Road. Both officers noticed Simpson lying on the ground in a pool of blood with a severe head wound. While Officer Alo was attending to Simpson, Simpson reached out and asked for help saying, on several occasions, "Her husband shot me." Both officers noticed two shell casings on the ground near Simpson that appeared to belong to a high caliber semiautomatic firearm.

After an ambulance arrived, Detective Lee, along with several other arriving officers, donning bullet proof vests and with their guns drawn throughout, proceeded to check the crime scene to make sure there were no other victims and no one who may have been armed with a gun. Upon entering the house, the officers noticed, in plain view, several firearms and items of drug paraphernalia. The officers later recovered these items pursuant to a search warrant. The officers did not find the firearm used to shoot Simpson. Simpson was airlifted to Queen's

---

<sup>6</sup> Officers recovered the car that Simpson was using, belonging to the Waltzes, that same day, still running, parked down the road.

<sup>7</sup> While this incident was taking place, Sherrel Pike, Schillaci's and Lista's neighbor, heard arguing coming from the 552-C Piiholo Road property. Pike, a former police officer, heard a man yell, "Don't fuck with me. I'm tired of you fucking with me. Quick [sic] fucking me around." She then heard another man yell, "Get the fuck off my property. Get the fuck outta here. Leave us alone." Pike then heard a female voice "yelling stop it and get outta here," and Pike dialed 911. A scuffle ensued and Pike heard one of the men say, "Let go of me." According to Pike, that same man then became scared and, in a begging manner, said, "Okay. I'll go. I'll leave. Just let me go. I'll leave." The female then yelled, "No," and Pike heard a gunshot. The female screamed, and Pike heard a second gunshot. Pike then heard two automobiles leave the property. Throughout most of this incident, Pike was connected to a 911 dispatcher, explaining the situation.

Medical Center where he was pronounced dead.

Meanwhile, a high speed chase ensued between several marked police cars and the truck that Lista and Schillaci were in. Officers, who had set up a barricade, finally stopped the truck and apprehended Lista. Schillaci, who had "bail[ed] out" of the truck, was apprehended three days later at a friend's residence.

**B. Procedural History**

On June 7, 1996, Schillaci was charged with Counts I-V. Schillaci filed a motion to suppress "all evidence and fruit of the evidence recovered as a result of the searches of 552-C Piiholo Road[,]" including evidence of firearms and drug paraphernalia. The circuit court denied Schillaci's motion to suppress.

Trial commenced in 1998. During trial, Schillaci objected to the conduct of the State of Hawai'i [hereinafter, "the prosecution"] including that the prosecution (1) did not prevent some of its witnesses from referring to Simpson as "the victim," and (2) prejudicially spread out evidence of firearms and ammunition recovered from the 552-C Piiholo Road property in front of the jury on a 20-foot mantle. The circuit court gave the jury curative instructions regarding the reference to Simpson as "the victim" and overruled Schillaci's objection regarding the spread of firearm and ammunition evidence, directing the prosecution to "pack up."

After the presentation of evidence, the court gave the following instruction, in relevant part, regarding Count I:

A person commits the offense of Murder in the Second Degree if he intentionally or knowingly causes the death of another person.

\*\*\* NOT FOR PUBLICATION \*\*\*

. . . .  
If and only if you find, beyond a reasonable doubt, that the defendant intentionally and knowingly caused the death of William R. Simpson and that he was not justified in using deadly force, you must then determine whether, at that time, the defendant was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a person in the defendant's situation under the circumstances of which the defendant was aware or as the defendant believed them to be.

As to Count II, the circuit court instructed the jury that the underlying felony offense for the HRS § 134-6(a) charge was murder in the second degree. The court also gave the jury instructions on self-defense, defense of others, defense of property, and choice of evils.

The jury returned the following verdict form, finding Schillaci guilty of the offenses charged in Counts I-V:

As to Count One, MURDER IN THE SECOND DEGREE:

Not Guilty	<u>Yes</u> ; or
Guilty as Charged	_____ ; or

(If you find Defendant knowingly or intentionally caused the the [sic] death of William Simpson, please go to Special Interrogatory #1 before proceeding further).

Guilty of the included offense of Manslaughter based upon extreme mental or emotional disturbance	<u>Yes</u> ; or
--	-----------------

Guilty of the included offense of Manslaughter based upon reckless Conduct	_____.
--	--------

As to Count Two, CARRYING OR USE OF FIREARM IN THE COMMISSION OF A SEPARATE FELONY:

Not Guilty	_____ ; or
Guilty as Charged	<u>Yes</u> .

As to Count Three, FELON IN POSSESSION OF A FIREARM:

Not Guilty	_____ ; or
Guilty as Charged	<u>Yes</u> .

As to Count Four, FELON IN POSSESSION OF FIREARM AMMUNITION:



\*\*\* NOT FOR PUBLICATION \*\*\*

Not Guilty \_\_\_\_\_; or

Guilty as Charged Yes .

As to Count Five, UNAUTHORIZED CONTROL OF A PROPELLED VEHICLE:

Not Guilty \_\_\_\_\_; or

Guilty as Charged Yes .

Special Interrogatory #1 provided as follows:

1. Did the prosecution prove beyond a reasonable doubt that Defendant was not, at the time that he committed the offense of Murder in the Second Degree, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation.

A "yes" answer to this question must be unanimous. Otherwise, you must answer "no."

Yes \_\_\_\_\_; or

If you answer "yes," go back to Page One and enter verdict of Guilty as Charged for Murder in the Second Degree.

No No .

If you answer "no," go to Page One and enter a verdict of Guilty of Manslaughter due to extreme mental or emotional disturbance for which there is a reasonable explanation.

Schillaci filed a motion for a new trial, or in the alternative a mistrial. The prosecution filed a motion to strike this motion. A hearing was scheduled for January 5, 1999, but defense counsel failed to appear. The circuit court granted the prosecution's motion to strike, noting defense counsel's absence. Schillaci himself had been present at this hearing.

At the sentencing hearing, the circuit court dismissed Count IV, felon in possession of firearm ammunition, based on State v. Auwae, 89 Hawai'i 59, 968 P.2d 1070 (App. 1998), overruled in part on other grounds, State v. Jenkins, 93 Hawai'i 87, 997 P.2d 13 (2000), and did not dismiss Count I on the basis that it should be considered on appeal. The circuit court sentenced Schillaci to ten years' imprisonment with a ten-year

**\*\*\* NOT FOR PUBLICATION \*\*\***

mandatory minimum each for Counts I and III, twenty years' imprisonment for Count II, and five years' imprisonment for Count V, all terms to run consecutively. Schillaci timely appealed.

**II. STANDARD OF REVIEW**

**A. Inconsistent Verdicts**

With regard to inconsistent verdicts, this court has stated that

[a] conflict in the jury's answers to questions in a special verdict will warrant a new trial only if those answers are irreconcilably inconsistent, and the verdict will not be disturbed if the answers can be reconciled under any theory. . . . When faced with a claim that the verdicts are inconsistent, the court must search for a reasonable way to read the verdicts as expressing a coherent view of the case, and must exhaust this effort before it is free to dismiss the jury's verdict and remand the case for a new trial.

Shanghai Inv. Co., Inc. v. Alteka Co. Ltd., 92 Hawai'i 482, 496-97, 993 P.2d 516, 530-31 (2000) (citation omitted).

**B. Jury Instructions**

We review the circuit court's jury instructions to determine whether, "when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent or misleading." State v. Valentine, 93 Hawai'i 199, 203, 998 P.2d 479, 483 (2000) (citations and internal quotations signals omitted).

[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 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.

Id. (citations and internal quotation marks omitted).

State v. Hironaka, 99 Hawai'i 198, 204, 53 P.3d 806, 812

**\*\*\* NOT FOR PUBLICATION \*\*\***

(2002) (brackets in original). Moreover,

Inasmuch as "the ultimate responsibility properly to instruct the jury lies with the [trial] court, "if trial or appellate counsel fail to raise an objection to an erroneous jury instruction as to which there is a reasonable possibility of contribution to the defendant's conviction and which, consequently, cannot be harmless beyond a reasonable doubt, then the instruction, by its very nature, has affected the defendant's substantial rights -- to wit, his or her constitutional rights to a trial by an impartial jury and to due process of law -- and, therefore, may be recognized as plain error. Id. at 205, 998 P.2d at 485 (citations omitted); see State v. Jenkins, 93 Hawai'i 87, 101, 997 P.2d 13-27 (2000) ("We may recognize plain error when the error committed affects substantial rights of the defendant.") (Quoting State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997)); Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) (1993) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); see also State v. Haanio, 94 Hawai'i 405, 414-16, 16 P.3d 246, 255-57 (2001) (distinguishing plain from harmless error in the context of jury instructions regarding included offenses).

State v. Rapoza, 95 Hawai'i 321, 326, 22 P.3d 968, 973 (2001) (brackets in original). More specifically,

With respect to jury instructions, "[i]t is a grave error to submit a [criminal] case to a jury without accurately defining the offense charged and its elements. Accordingly, the jury may not be instructed in a manner that would relieve the prosecution of its burden of proving every element of the offense charged." State v. Jenkins, 93 Hawai'i 87, 108, 997 P.2d 13, 34 (2000) (citations and footnote omitted). Further, "where . . . the jury has been given instructions on a defense other than an affirmative defense,[] but has not been instructed that the prosecution bears the burden of proof beyond a reasonable doubt with respect to negating that defense, substantial rights of the defendant may be affected and plain error may be noticed." Raines v. State, 79 Hawai'i 219, 225, 900 P.2d 1286, 1292 (1995); see also HRS § 701-115 (1993).

State v. Jones, 96 Hawai'i 161, 168, 29 P.3d 351, 258 (2001) (brackets and ellipsis points in original).

State v. Yamada, 99 Hawai'i 542, 549, 57 P.3d 467, 474 (2002).

### **C. Illegal Sentences**

The trial court may correct an illegal sentence at any

time. See Hawai'i Rules of Penal Procedure (HRPP) Rule 35.

**D. Sentencing**

"Sentencing matters are typically reviewed for an abuse of discretion." State v. Young, 93 Hawai'i 224, 231, 999 P.2d 230, 237 (2000) (citations omitted).

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. An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or has disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Vanstory, 91 Hawai'i 33, 43, 979 P.2d 1059, 1069 (1999), superceded by statute on other grounds by HRS § 134-6(e) (Supp. 2002), (citations and internal quotations omitted).

**E. Evidentiary Rulings**

[D]ifferent standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard.

Where the evidentiary ruling at issue concerns admissibility based upon relevance, under [Hawai'i Rules of Evidence (HRE)] Rules 401 and 402, the proper standard of appellate review is the right/wrong standard.

Evidentiary decisions based on HRE Rule 403, which require a "judgment call" on the part of the trial court, are reviewed for an abuse of discretion. The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Staley, 91 Hawai'i 275, 281, 982 P.2d 904, 910 (1999) (citations, internal quotations, and formatting omitted). "HRE 404 represents a particularized application of the principle of HRE 403 (see Commentary to HRE 404), and we will employ the same abuse of discretion standard of review." State v. Cabrera, 90 Hawai'i 359, 366, 978 P.2d 797, 804 (1999) (citations omitted).

**F. Prosecutorial Misconduct**

Allegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of whether there is a reasonable possibility that the error complained of might have contributed to the conviction. Factors to consider are: (1) the nature of the conduct; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant.

State v. Klinge, 92 Hawai'i 577, 584, 994 P.2d 509, 516 (2000) (citations and internal quotations omitted).

**G. Motion for Mistrial**

The denial of a motion for mistrial is within the sound discretion of the trial court and will not be upset absent a clear abuse of discretion. The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.

Id. at 584, 994 P.2d at 516 (citations omitted).

**H. Motion for New Trial**

As a general matter, the granting or denial of a motion for new trial is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. The same principle is applied in the context of a motion for new trial premised on juror misconduct. The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Furutani, 76 Hawai'i 172, 178-79, 873 P.2d 51, 57-58 (1994) (citations and formatting omitted).

**III. DISCUSSION**

**A. Although the jury verdicts for EMED manslaughter and murder in the second degree were not inconsistent, the special interrogatory form was plainly erroneous, in that it did not require jury unanimity with respect to EMED manslaughter.**

Schillaci argues that the jury verdict was inconsistent, inasmuch as he was found guilty of EMED manslaughter and not guilty of murder in the second degree. Although the jury verdicts for EMED manslaughter and murder in

\*\*\* NOT FOR PUBLICATION \*\*\*

the second degree were not inconsistent, the special interrogatory form was plainly erroneous, in that it did not require jury unanimity with respect to EMED manslaughter. This plain error requires that Counts I and II be vacated and the case remanded for a new trial on the originally charged offenses of murder in the second degree and the mitigating defense of EMED manslaughter, should the evidence adduced at the new trial so warrant, and carrying or use of a firearm in the commission of a separate felony.

1. The verdicts of guilty as to EMED manslaughter and not guilty as to murder in the second degree are not irreconcilably inconsistent.

"Inconsistent verdicts are not per se grounds for reversal." State v. Liuafi, 1 Haw. App. 625, 643, 623 P.2d 1271, 1282 (1981) (citing Dunn v. United States, 284 U.S. 390 (1932), and United States v. Magnus, 365 F.2d 1007 (2d Cir. 1966)).

A conflict in the jury's answers to questions in a special verdict will warrant a new trial only if those answers are irreconcilably inconsistent, and the verdict will not be disturbed if the answers can be reconciled under any theory. . . . When faced with a claim that the verdicts are inconsistent, the court must search for a reasonable way to read the verdicts as expressing a coherent view of the case, and must exhaust this effort before it is free to dismiss the jury's verdict and remand the case for a new trial.

Shanghai Inv. Co., Inc., 92 Hawai'i at 496-97, 993 P.2d at 530-31 (citation omitted).

In this case, the jury's verdict form reflected a finding of guilt as to EMED manslaughter and a finding of not guilty as to murder in the second degree. As a mitigating defense to murder in the second degree, a conviction for EMED manslaughter presupposes that the prosecution has initially proved the elements of murder in the second degree. See HRS §

\*\*\* NOT FOR PUBLICATION \*\*\*

707-702(2) (providing that EMED manslaughter is a defense to murder in the second degree). EMED manslaughter, however, adds a material element to the murder offense, requiring that the prosecution additionally prove that, at the time he caused the death of another person, the defendant was not under the influence of extreme mental or emotional disturbance for which there was a reasonable explanation. See Yamada, 99 Hawai'i at 551, 57 P.3d at 476 ("[I]n order to convict Yamada of the offense of first degree murder, the prosecution bore the burden of proving beyond a reasonable doubt, inter alia, that Yamada was not under the influence of EMED for which there was a reasonable explanation[.]") (Citations omitted.); Whiting, 88 Hawai'i at 360, 966 P.2d at 1086 (noting that a conviction for EMED manslaughter establishes that the jury concluded that the defendant intentionally or knowingly caused a person's death, that the prosecution failed to negative the EMED defense, and that the prosecution failed to prove all of the material elements of the murder offense). If the prosecution fails to disprove EMED manslaughter, a defendant is "absolved from penal liability for murder," id., but may be found guilty of EMED manslaughter upon a unanimous jury verdict. As such, a guilty verdict for EMED manslaughter and a not guilty verdict for murder in the second degree are not irreconcilably inconsistent verdicts.

2. The special interrogatory form was plainly erroneous.

Notwithstanding, the special interrogatory form was plainly erroneous, in that it did not require jury unanimity with respect to a conviction for EMED manslaughter. Article I, sections 5 and 14 of the Hawai'i Constitution provide a defendant with the right to a unanimous verdict in a criminal prosecution.

\*\*\* NOT FOR PUBLICATION \*\*\*

Yamada, 99 Hawai'i at 551, 57 P.3d at 476. This right, which is "an essential part and parcel of the jury's formulation of its guilty verdict[,]" includes the right to unanimity "as to each material element of the criminal offense[.]" Id. (citations omitted).

In applying the unanimity requirement to EMED manslaughter, the rules get sticky. EMED manslaughter is not a chargeable offense, but rather, is a defense to murder in the first and second degrees. See HRS § 707-702(2). As previously discussed, where EMED manslaughter is asserted as a defense to murder in the first and second degrees, an additional material element arises that the prosecution must prove. See Yamada, 99 Hawai'i at 551, 57 P.3d at 476. As noted above, in addition to proving the elements of the murder offense, the prosecution must prove that, at the time he caused the death of another person, the defendant was not under the influence of extreme mental or emotional disturbance for which there was a reasonable explanation. Id. The addition of this material element means that "jury unanimity [i]s a prerequisite to returning any verdict in connection with [the charged offense of murder in the first and/or second degrees]." Id. (emphasis in original). Thus, the jury must be instructed that, in order to return a guilty verdict as to EMED manslaughter, it must reach such a decision unanimously.<sup>8</sup>

---

<sup>8</sup> Instruction 9.08 of the Hawai'i Pattern Jury Instructions, regarding HRS § 707-702(2) provides, in relevant part:

If and only if you unanimously find that all the elements of (specify murder charge) have been proven by the prosecution beyond a reasonable doubt [and you unanimously find that the defendant was not justified in using deadly force], then you must consider

(continued...)



\*\*\* NOT FOR PUBLICATION \*\*\*

In this case, the jury was not instructed that it was required to reach a unanimous guilty verdict as to EMED manslaughter. The jury was instructed that, once it found that the elements of murder in the second degree were proved, it was to consider EMED manslaughter. The instructions then advised,

The prosecution must prove beyond a reasonable doubt that the defendant was not, at the time that he caused the death of William R. Simpson, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. If the prosecution has done so, then you must return a verdict of guilty of Murder in the Second Degree. If the prosecution has not done so, then you must return a verdict of guilty of Manslaughter based upon extreme mental or emotional disturbance.

Thus, the instructions did not expressly require that the jury reach a unanimous verdict as to EMED manslaughter.

To further compound the incorrect jury instructions, Special Interrogatory #1 literally directed the jury to reach a guilty verdict as to EMED manslaughter without jury unanimity. The interrogatory form provided as follows:

1. Did the prosecution prove beyond a reasonable doubt that Defendant was not, at the time that he committed the offense of Murder in the Second Degree, under the influence of extreme

---

<sup>8</sup>(...continued)

whether, at the time defendant caused the death, he/she was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. . . .

The prosecution must prove beyond a reasonable doubt that the defendant was not, at the time that he/she caused the death of (decedent), under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. If you unanimously find that the prosecution has done so, then you must return a verdict of guilty of (specify murder charge). If you unanimously find that the prosecution has not done so, then you must return a verdict of guilty of Manslaughter based upon extreme mental or emotional disturbance.

If you are unable to reach a unanimous agreement as to whether the prosecution has proved, or failed to prove, that the defendant was not under the influence of extreme mental or emotional disturbance, then your decision is not unanimous and a verdict may not be returned on this offense.

(Some emphases added and some in original.)

**\*\*\* NOT FOR PUBLICATION \*\*\***

mental or emotional disturbance for which there is a reasonable explanation.

A "yes" answer to this question must be unanimous.  
Otherwise, you must answer "no."

Yes \_\_\_\_\_; or

If you answer "yes," go back to Page One and enter verdict of Guilty as Charged for Murder in the Second Degree.

No \_\_\_\_\_.

If you answer "no," go to Page One and enter a verdict of Guilty of Manslaughter due to extreme mental or emotional disturbance for which there is a reasonable explanation.

(Emphasis added.) This form mandated that the jury find Schillaci guilty of EMED manslaughter if it did not answer "yes." It did not mandate that the jury unanimously answer "no" in order to return a guilty verdict for EMED manslaughter.

Following these instructions on the special interrogatory form, the jury marked "no" and found Schillaci guilty of EMED manslaughter. The incorrect instructions on the special interrogatory form make it impossible to determine whether the jury unanimously reached this verdict. As there is a reasonable possibility that the incorrect instructions contributed to Schillaci's conviction, his substantial rights were adversely affected. The special interrogatory form was thus plainly erroneous. Because of this plain error, the judgment in Count I must be vacated and the matter remanded for a new trial. Additionally, Count II, carrying or use of a firearm in the commission of a separate felony, which arose out of conduct underlying the charge in Count I, must also be vacated and remanded for a new trial.

\*\*\* NOT FOR PUBLICATION \*\*\*

**B. The jury should be instructed that EMED manslaughter may serve as the underlying felony for the HRS § 134-6(a) charge.**

In order to give guidance to the trial court on remand, this court addresses whether the jury should be instructed that EMED manslaughter can be the underlying felony upon which a conviction under HRS § 134-6(a) can be based.

Pursuant to HRS § 134-6(a), it is unlawful for a person "to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony[.]" HRS § 134-6(a). "[B]ecause HRS § 134-6(a) requires the actual commission of an underlying felony,' the prosecution 'is required to prove all of the conduct, attendant circumstances, and results of conduct that comprise the underlying crime' in order to convict a defendant of violating HRS § 134-6(a)." State v. Jumila, 87 Hawai'i 1, 3, 950 P.2d 1201, 1203 (1998) (citation omitted), overruled on separate but related grounds, State v. Brantley, 99 Hawai'i 463, 56 P.3d 1252 (2002).

Instruction 15.01 of the Hawai'i Pattern Jury Instructions, regarding HRS § 134-6(a), provides, in relevant part:

There are three material elements of the offense of [Carrying] [Immediate Control of] [Use of] [Threatening to Use] a Firearm While Engaged in the Commission of a Separate Felony, each of which the prosecution must prove beyond a reasonable doubt.

These three elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant [carried on his/her person] [had within his/her immediate control] [used] [threatened to use] a firearm, whether the firearm was loaded or not, and whether operable or not; and
2. That the Defendant did so while engaged in the commission of (specify applicable felony(s));

\*\*\* NOT FOR PUBLICATION \*\*\*

and  
3. That the Defendant did so [knowingly] [intentionally].  
[A person commits the offense of (specify felony offense) if  
he/she . . .  
There are (number) material elements of the (specify felony  
offense), each of which the prosecution must prove beyond a  
reasonable doubt.  
These (number) elements are: (List elements numerically).]

Notes to this standard jury instruction state that “[t]he court must instruct the jury on the elements of any applicable separate felony, whether charged or not, and included felonies. These felonies should also be named in element two of the instruction.” (Emphasis added.) Based on the foregoing, when evidence is adduced warranting a jury instruction regarding the applicability of EMED manslaughter, the jury should be instructed that EMED manslaughter is a felony and may serve as a predicate for an HRS § 134-6(a) charge.

**C. Pursuant to State v. Brantley, a defendant may be convicted of both HRS § 134-6(a) and its underlying felony offense.**

In order to give guidance to the trial court on remand, this court addresses Schillaci’s argument that, pursuant to State v. Jumila, 87 Hawai’i 1, 950 P.2d 1201 (1998), he was illegally convicted of both Counts I and II. In State v. Brantley, 99 Hawai’i 463, 464, 56 P.3d 1252, 1253 (2002), this court overruled the holding in Jumila to which Schillaci cites. Accordingly, a defendant may be convicted of both HRS § 134-6(a) and its underlying felony offense.

**D. Sentencing under both HRS § 134-6(a) and HRS § 706-660.1 for the same underlying felony offense is prohibited.**

In order to give guidance to the trial court on remand, we address Schillaci’s argument that he cannot be sentenced under both HRS § 134-6(a) and 706-660.1 for the same underlying felony

\*\*\* NOT FOR PUBLICATION \*\*\*

offense.

In Jumila, 87 Hawai'i at 13, 950 P.2d at 1213 (Ramil, J., with whom Nakayama, J., joins, dissenting), a two-member dissent addressed the issue of "whether double jeopardy prohibits punishment under both HRS § 134-6(a) (carrying or use of a firearm) and HRS § 706-660.1 (mandatory minimum terms) when the application of both statutes is based on the same underlying felony[]." The dissent noted that nothing in the language or legislative history of HRS § 134-6(a) "provide[d] clear indication that the legislature intended cumulative punishments." Id. (emphasis in original). Based, inter alia, on the absence of clear legislative intent, the dissent concluded that "double jeopardy principles prevent[ed] imposition of cumulative punishments under both HRS § 134-6(a) and HRS § 706-660.1 when the application of both statutes is based on the same underlying felony." Id. at 13-14, 950 P.2d at 1213-14.

In 1999, the legislature amended HRS § 134-6(a), adding the following language:

A conviction and sentence under subsection (a) or (b) shall be in addition to and not in lieu of any conviction and sentence for the separate felony; provided that the sentence imposed under subsection (a) or (b) may run concurrently or consecutively with the sentence for the separate felony.

HRS § 134-6(e) (Supp. 2002); see also 1999 Haw. Sess. L. Act 12, § 1 at 12. The legislature indicated that this amendment was meant "to clarify that any conviction or sentence for carrying or use of a firearm in the commission of a separate felony shall be in addition to and not in lieu of any conviction and sentence for the separate felony" and that "the sentence imposed may run concurrently or consecutively with the sentence for the separate felony." Sen. Stand. Comm. Rep. No. 843, in 1999 Senate Journal,

at 1296 (emphasis added).

In addition to the amendment, the legislature addressed a "shortcoming in the law," stating,

At the same time, your Committee recognizes and seeks to address another shortcoming in the law, as pointed out by the Jumila dissent. The dissent noted that there was insufficient legislative intent to permit cumulative sentencing under section 134-6(a) and section 706-660.1 (sentence of imprisonment for use of a firearm in a felony). Your Committee believes that when the application of both statutes is based upon the same underlying felony, cumulative punishment is permissible.

Sen. Stand. Comm. Rep. No. 843, in 1999 Senate Journal, at 1296. Furthermore, the legislature limited the scope of the 1999 amendment, stating that it did "not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date [of April 13, 1999]." 1999 Haw. Sess. L. Act 12, § 1 at 12.

In light of the foregoing, even if the legislature may have initially intended to permit cumulative sentences, the lack of clear legislative intent in the previous version of HRS § 134-6(a) and the legislature's indication in 1999 that it was addressing a "shortcoming in the [previous] law" requires that this court hold that Schillaci, whose proceedings had begun prior to April 13, 1999, cannot be sentenced under both HRS § 134-6(a) and HRS § 706-660.1 based on the same underlying felony offense.

**E. A mandatory minimum sentence may not be imposed pursuant to HRS § 706-660.1(3) without a specific finding by the jury that a semiautomatic firearm or automatic firearm was used.**

Schillaci argues that the court may not impose a mandatory minimum sentence pursuant to HRS § 706-660.1(3) in the absence of an express finding by the jury that a semiautomatic firearm was used. Schillaci is correct. Thus, the mandatory

\*\*\* NOT FOR PUBLICATION \*\*\*

minimum sentence imposed in Count III must be vacated and remanded for resentencing. With regards to Count I, on remand the sentencing court is cautioned that it may not impose a mandatory minimum sentence unless there is a specific finding by the jury, as evidenced in a special verdict interrogatory form, that a semiautomatic firearm or automatic firearm was used.

A mandatory minimum sentence may be imposed under the circumstances outlined in HRS § 706-660.1(3). As applicable to enhanced and mandatory minimum sentencing, this court has held that

when a fact susceptible to jury determination is a predicate to the imposition of an enhanced sentence, the Hawai'i Constitution requires that such factual determinations be made by the trier of fact. The legislature may not dilute the historical province of the jury by relegating facts necessary to the imposition of a certain penalty for criminal behavior to the sentencing court. The jury is the body responsible for determination of intrinsic facts necessary for the imposition of punishment for an offense criminalized by the legislature.

State v. Tafoya, 91 Hawai'i 261, 271, 982 P.2d 890, 900 (1999); cf. Apprendi v. New Jersey, 530 U.S. 466, 489 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). This court defined an intrinsic fact as one "contemporaneous with, and enmeshed in, the statutory elements of the proscribed offense." Tafoya, 91 Hawai'i at 271, 982 P.2d at 900.

Specifically regarding HRS § 706-660.1(3), this court has established that "the use of a semiautomatic firearm is an aggravating circumstance intrinsic to the commission of the offense charged and must be found by the trier of fact for purposes of enhanced sentencing." Vanstory, 91 Hawai'i at 50,

\*\*\* NOT FOR PUBLICATION \*\*\*

979 P.2d at 1076 (citations omitted). There are two non-exclusive ways that the court can ensure that the jury has found, beyond a reasonable doubt, that the aggravating circumstance, i.e., the use of a semiautomatic firearm, was present: (1) by using a special verdict interrogatory form; or (2) the presence of "a guilty verdict on the very same aggravating circumstance." Id. (citations omitted).

In this case, a guilty verdict on the same aggravating circumstance would not constitute a finding by the jury that a semiautomatic firearm was used. None of the other offenses that Schillaci was charged with require, as an essential element, that the prosecution prove, beyond a reasonable doubt, the use of a semiautomatic firearm or an automatic firearm. See HRS § 707-701.5 (1993) (prescribing, as an element of murder in the second degree, that the defendant cause the death of another person, but not necessarily with a semiautomatic firearm or automatic firearm); HRS § 707-702(2) (prescribing, as an element of EMED manslaughter, that the defendant cause the death of another person, though not necessarily with the use of a semiautomatic firearm or automatic firearm); HRS § 134-6(a) (prescribing, as an element of the offense, that the defendant use or possess "a firearm" but not necessarily a "semiautomatic firearm" or an "automatic firearm"); HRS § 708-736 (relating to the unauthorized control of a propelled vehicle). Thus, in this case, the proper finding could only be set forth by the jury in a special verdict interrogatory form.

It is undisputed that the jury did not set forth the required finding regarding the use of a semiautomatic firearm in a special verdict interrogatory form. Therefore, this court is



**\*\*\* NOT FOR PUBLICATION \*\*\***

required to vacate the mandatory minimum sentence imposed in Count III and remand for resentencing. Furthermore, with regards to Count I, the circuit court is cautioned that the imposition of a mandatory minimum sentence pursuant to HRS § 706-660.1(3) is prohibited unless the jury returns a special verdict interrogatory form, reflecting that it found, beyond a reasonable doubt, that a semiautomatic firearm or automatic firearm was used.

**F. The circuit court did not abuse its discretion, pursuant to HRE Rule 403, by admitting evidence of firearms and drug paraphernalia.**

Schillaci argues that the circuit court abused its discretion by admitting the firearms and items of drug paraphernalia because this evidence was irrelevant and any relevance was outweighed by its prejudicial effect. Schillaci's arguments are without merit, inasmuch as (1) the firearms were relevant to the charged offenses and the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice, and (2) the items of drug paraphernalia were admissible as evidence of motive and the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice.

The general rule is that "[a]ll relevant evidence is admissible[.]" HRE Rule 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." HRE Rule 401. Evidence that is directly probative of an element of the charged offenses is relevant. See Staley, 91 Hawai'i at 283, 982

\*\*\* NOT FOR PUBLICATION \*\*\*

P.2d at 912 (holding that the trial court abused its discretion by excluding evidence that was directly relevant to the defendant's intent); State v. Arceo, 84 Hawai'i 1, 24, 928 P.2d 843, 866 (1996) (noting that HRE Rule 404(b) had "no application to the use of evidence that is directly probative of an element of the charged offense or offenses"). In addition, although "evidence of other crimes, wrongs, or acts are not admissible to prove the character of a person in order to show that he acted in conformity therewith[,]" such evidence may be admissible "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident." HRE Rule 404(b).

Notwithstanding, relevant evidence or evidence admissible pursuant to HRE Rule 404(b) "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" HRE Rule 403. "Probative value comprises not only relevancy but also need for the evidence." Staley, 91 Hawai'i at 283, 982 P.2d at 912 (citations omitted). Need assessment includes relative importance, the disputability of the evidence, and the availability of other evidence to prove the same fact. Id. Unfair prejudice means "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." HRE Rule 403 commentary.

1. Evidence of Firearms

In this case, the evidence admitted of firearms was directly probative of elements of the offenses charged. Schillaci was charged with Count II, carrying or use of a firearm in the commission of a separate felony, and Count III, felon in possession of any firearm or ammunition therefor. To prove these

\*\*\* NOT FOR PUBLICATION \*\*\*

offenses, the prosecution focused upon, inter alia, Schillaci's alleged use, ownership, possession, or control of a .45 caliber semiautomatic firearm. Notwithstanding the focus on the .45 caliber semiautomatic firearm, the additional firearms exhibited were directly relevant to the felon in possession charge, which prohibits the possession of "any" firearm. See HRS § 134-7(b) (prohibiting felons from possessing "any firearm or ammunition therefor") (emphasis added).

Furthermore, the probative value of the firearms evidence was not substantially outweighed by the danger of unfair prejudice. Although the sheer number of firearms presented could potentially be prejudicial in nature, the probative value of this evidence was extremely significant because the .45 caliber semiautomatic firearm used to shoot Simpson was never recovered and several of the items recovered from the 552-C Piiholo Road property included accessories for a .45 caliber semiautomatic firearm. The probative value thus outweighed any possible prejudice. Accordingly, the circuit court did not err in admitting the evidence of firearms.

2. Evidence of Drug Paraphernalia

The evidence of drug paraphernalia was also relevant as evidence of motive. The prosecution adduced evidence that, upon arriving at the 552-C Piiholo Road property, Simpson told Schillaci that his uncle was with the DEA. The prosecution also adduced evidence that Schillaci believed that Simpson was in some way associated with the DEA. Based on the foregoing, the evidence of drug paraphernalia was relevant to disprove Schillaci's claim of self-defense and to illustrate a possible motive for the shooting (i.e., that Schillaci did not want

**\*\*\* NOT FOR PUBLICATION \*\*\***

Simpson to inspect the property, which contained drug paraphernalia, if Simpson was somehow connected to the DEA).

In addition, the probative value of the evidence of drug paraphernalia was not substantially outweighed by the danger of unfair prejudice. Schillaci asserts that the prejudicial effect of the evidence of drug paraphernalia is "quite apparent" in that the prosecution used it to "paint the defendant as a 'sniper-rifle-buying, ammunition-hoarding, crystal-methamphetamine-pipe-smoking kind of guy.'" The nature of drug paraphernalia evidence in general lends itself to the danger of unfair prejudice. Nonetheless, the need to introduce such evidence in this case was significant in light of the self-defense claim and the prosecution's intent to use it to prove motive. It is further of significant probative value because of the absence of other evidence to prove the same facts. Accordingly, the circuit court did not abuse its discretion in admitting the evidence of drug paraphernalia.

**G. The prosecution's conduct did not amount to prosecutorial misconduct.**

Schillaci argues that several instances of prosecutorial misconduct required that the circuit court declare a mistrial and that the circuit court erred by failing to do so.<sup>9</sup> Specifically, Schillaci points to the prosecution's (1) spreading the evidence of firearms out on a 20-foot mantle in front of the jury, (2) permitting many of its witnesses to continue, after

---

<sup>9</sup> Schillaci argues that he is entitled to a new trial and does not argue that double jeopardy precludes his reprosecution because "the prosecutorial misconduct is so egregious that, from an objective standpoint, it clearly denied a defendant his or her right to a fair trial." State v. Rogan, 91 Hawai'i 405, 423, 984 P.2d 1231, 1249 (1999).

\*\*\* NOT FOR PUBLICATION \*\*\*

being advised to refrain from, referring to Simpson as "the victim," and (3) stating twice during closing arguments that Schillaci was a "sniper-rifle buying, ammunition-hoarding, crystal-methamphetamine-pipe-smoking kind of guy." The prosecution's conduct in this case did not amount to prosecutorial misconduct.

It is a well-settled principle in this jurisdiction that allegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard. Klinge, 92 Hawai'i at 590, 994 P.2d at 522. Under this standard, this court must look to the record as a whole and determine whether prosecutorial misconduct occurred. Id. This entails a balancing test, taking into consideration the following factors: (1) the nature of the conduct; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant. Id.

1. The Spread of Firearm Evidence

The prosecution's spreading the firearms and ammunition on a 20-foot mantle in front of the jury involves action by the prosecution, as opposed to remarks made by the prosecution. Prosecutorial conduct, as addressed in this jurisdiction, has revolved mostly around the latter and not the former. See State v. Pacheco, 96 Hawai'i 83, 95-101, 26 P.3d 572, 584-90 (2001) (regarding references to the defendant as an "asshole" and remarks about his prior convictions); Klinge, 92 Hawai'i at 590-96, 994 P.2d at 522-28 (regarding remarks about applicable law and jury instructions); State v. Rogan, 91 Hawai'i 405, 412, 984 P.2d 1231, 1238 (1999) (regarding remarks about the defendant's race). Nonetheless, general considerations relating to the

\*\*\* NOT FOR PUBLICATION \*\*\*

prosecution's duties are informative.

In general, conduct by the prosecution must not be unduly prejudicial and must not divert the jury from its duty to decide the case on the evidence. See Klinge, 92 Hawai'i at 592, 994 P.2d at 524. This is because the prosecution's duty is not merely to seek convictions but "to seek justice, to exercise the highest good faith in the interest of the public and to avoid even the appearance of an unfair advantage over the accused." Rogan, 91 Hawai'i at 412, 984 P.2d at 1238 (citations omitted). Nonetheless, it is undisputed that the prosecution may present evidence to the jury that is relevant and not unduly prejudicial. See HRE Rule 402 and 403.

In this case, the firearms evidence was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice, entitling the prosecution to present such evidence. Nonetheless, when the prosecution spread the evidence in front of the jury, the court gave a prompt instruction to the prosecution to "pack up." Furthermore, there is no indication that the jury was diverted from its duty to decide the case on the evidence. Evidence overwhelmingly supported Schillaci's responsibility for the death of Simpson and culpability as to the remaining counts. Based on the evidence, there was no reasonable possibility that the prosecution's isolated and single incident of placing the firearms and ammunition on a mantle in front of the jury contributed to the jury verdict. Accordingly, the circuit court did not abuse its discretion by denying Schillaci's motion for mistrial.

2. The Reference to Simpson as "the Victim"

In State v. Nomura, 79 Hawai'i 413, 417, 903 P.2d 718,

\*\*\* NOT FOR PUBLICATION \*\*\*

722 (App. 1995), the Intermediate Court of Appeals (ICA) held that

the reference to a complaining witness as "the victim" in criminal jury instructions is inaccurate and misleading where the jury must yet determine from the evidence whether the complaining witness was the object of the offense and whether the complaining witness was acted upon in the manner required under the statute to prove the offense charged.

(Emphasis added.) This holding was based on HRE Rule 1102, which provides in relevant part that "[t]he court . . . shall not comment upon the evidence. . . ." HRE Rule 1102; see also Nomura, 79 Hawai'i at 417, 903 P.2d at 722. The ICA noted that the rationale behind HRE Rule 1102 was "that judicial comment upon evidence risks placing the court in the role of an advocate[.]" Id. (citation omitted).

In this case, the reference to Simpson as "the victim" was not contained in any jury instructions. Nor did the circuit court or the prosecution ever refer to Simpson as "the victim." The references to Simpson as "the victim" were made by prosecution witnesses, MPD police officers in particular. The record reveals that after the first reference, witnesses were instructed not to refer to Simpson as "the victim." The circuit court, however, noted for the record that future references were inevitable and bound to happen in a case of this length and nature. In addition, the circuit court, promptly and after every time a reference was made and objected to, gave the jury a curative instruction. Under these circumstances, it cannot be said that the circuit court abused its discretion by denying Schillaci's motion for mistrial.

3. The Prosecution's Closing Argument

Schillaci argues that the prosecution's statements

**\*\*\* NOT FOR PUBLICATION \*\*\***

during closing argument required that the circuit court declare a mistrial. Schillaci, however, did not object to these statements during the proceedings. While Schillaci orally moved for a mistrial and filed a written motion for mistrial or new trial based in part on prosecutorial misconduct, Schillaci did not preserve for appeal the issue of the prosecution's statements during closing argument. Accordingly, we decline to address this issue.

**H. Schillaci waived his argument that the choice of evils defense applied to the felon in possession charge.**

Schillaci argues that the choice of evils defense may apply to excuse a defendant from HRS § 134-7(b), felon in possession of any firearm or ammunition therefor. Schillaci, however, waived this argument by failing to comply with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7), which requires that an appellant set forth "[t]he argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."

The choice of evils defense, pursuant to HRS § 703-302 (1993), provides in relevant part:

- (1) Conduct which the actor believes to be necessary to avoid an imminent harm or evil to the actor or to another is justifiable provided that:
  - (a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
  - (b) Neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
  - (c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

HRS § 703-302. To be entitled to the choice of evils defense, a



**\*\*\* NOT FOR PUBLICATION \*\*\***

defendant must set forth at least some evidence, "no matter how weak, inconclusive, or unsatisfactory the evidence may be[,] " that the defendant believed his/her conduct to be necessary to avoid an imminent harm or evil, as defined by HRS § 703-302(1). See State v. Locquiao, 100 Hawai'i 195, 205, 58 P.3d 1242, 1252 (2002) (citations omitted) (noting the standard to be applied for defense instructions); State v. Yamamoto, 98 Hawai'i 208, 220, 46 P.3d 1092, 1104 (App. 2002) (applying the standard in the case of HRS § 703-302(1)).

In this case, Schillaci's sole argument is that HRS § 703-302 "is a general defense. There is nothing to suggest that it is unavailable for charges of felon in possession of firearms or ammunition." Schillaci fails to set forth at least some evidence, no matter how weak, inconclusive, or unsatisfactory, that he believed that his conduct was necessary to avoid an imminent harm or evil. In fact, Schillaci does not identify the imminent harm or evil that required his possession of firearms. An analysis of this issue would thus rest on speculation, in which this court will not engage. Accordingly, Schillaci waived this argument by failing to comply with HRAP Rule 28(b)(7).

**I. The circuit court did not abuse its discretion by striking Schillaci's motion for a new trial.**

Schillaci argues that the circuit court erred by summarily striking his motion for a new trial based on defense counsel's absence from the hearing, without considering the merits of the motion. Schillaci's arguments consist of the following:

In this case, the court's only reason for granting the State's motion to strike was that defense counsel was not present. The court was well aware that defense counsel's

**\*\*\* NOT FOR PUBLICATION \*\*\***

office was in Honolulu. However, there is nothing in the record to indicate how long, if at all, the court waited before calling the case. The record does not reflect if the bailiff even made three calls to see if defense counsel was in the courthouse.

The defendant was present. The court never asked if the defendant wished to proceed pro se in opposing the motion.

. . . .  
The Motion for New Trial raised substantial issues concerning juror and prosecutorial misconduct. . . .

This worked substantial prejudice to the defendant. Even though the court stated that defense counsel could re-file the motion, that fact was not even reflected in the court's order. . .  
.

Schillaci's arguments are without merit.

As an initial matter, it should be noted that Schillaci's argument regarding the court's knowledge of his trial counsel's whereabouts and failure to wait for his counsel or ask Schillaci if he wanted to proceed pro se is entirely without merit. It is the duty of counsel to be present at scheduled hearings that counsel has been give notice of and not the duty of the court to wait until counsel arrives. See Rules of the Circuit Courts of the State of Hawai'i (RCCH) Rule 15(b) ("An attorney who, without just cause, fails to appear when his case is before the court . . . may be subject to such discipline as the court deems appropriate."). Furthermore, it is absurd to suggest that the court was obligated to ask Schillaci if he wanted to proceed pro se where there was no indication that defense counsel had withdrawn or that Schillaci was not otherwise represented.

Schillaci's other argument, though less absurd, is additionally without merit. Unlike Schillaci's claim, the court did not base its decision solely on defense counsel's absence from the hearing. Although a review of the transcripts reveals that the court did take into consideration defense counsel's

**\*\*\* NOT FOR PUBLICATION \*\*\***

absence, the court's order reflects that it also based its decision on the prosecution's motion to strike Schillaci's motion for a new trial, defense counsel's failure to file any opposition to the prosecution's motion, and the court's being "fully advised in the premises[.]" The court's granting of the prosecution's motion to strike, based on these considerations, was thus not an abuse of discretion.

**IV. CONCLUSION**

Based on the foregoing, (1) Counts I and II are vacated and remanded for a new trial on the original counts of murder in the second degree, the mitigating defense of EMED manslaughter, if evidence is adduced to support the instruction, and carrying or use of a firearm in the commission of a separate felony, (2) the conviction as to Count III is affirmed but the mandatory minimum sentence is vacated and the matter remanded for resentencing, and (3) Count V is affirmed.

DATED: Honolulu, Hawai'i, August 13, 2003.

On the briefs:

Donald L. Wilkerson  
for defendant-appellant

Simone C. Polak, Deputy  
Prosecuting Attorney,  
for plaintiff-appellee