

CONCURRING OPINION OF ACOBA, J.

Inasmuch as the majority agrees with and has adopted my position that the court's Special Instruction No. 1 was erroneous, I set out my position in detail. The judgment entered herein should be vacated and remanded for a new trial because the instructions given by the the third circuit court (the court) as to (1) the offenses charged of first degree murder of Carla Russell and Rachel DeCambra in the same incident in Count I of the complaint¹ or, alternatively, second degree murder as separately charged as to each of the aforesaid decedents in Counts II and III,² and (2) the affirmative defense of physical or mental disease, disorder, or defect excluding penal responsibility (hereinafter insanity)³ and the mitigating defense

¹ Hawai'i Revised Statutes (HRS) § 707-701 (1993), in relevant part, provides:

(1) A person commits the offense of murder in the first degree if the person intentionally or knowingly causes the death of:

(a) More than one person in the same or separate incident[.]

(Emphasis added.)

² HRS § 707-701.5(1) (1993) states:

Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.

(Emphasis added.)

³ HRS § 704-400 (1993) provides:

(1) A person is not responsible, under this Code, for
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of manslaughter⁴ (hereinafter manslaughter) were erroneous. While Defendant-Appellant Tetsuya Yamada (Defendant) challenges the instructions as erroneous, insufficient, and misleading, there are other fundamental defects in them that we may notice. See State v. Culkin, 97 Hawai'i 206, 214, 35 P.3d 233, 241 (2001) ("Where an erroneous instruction affected the substantial rights of a defendant, . . . we may notice the error as 'plain error' and remand for corrective action." (Internal quotation marks and citation omitted.)).

³(...continued)

conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of law.

(2) As used in this chapter, the terms "physical or mental disease, disorder, or defect" do not include an abnormality manifested only by repeated penal or otherwise anti-social conduct.

(Emphasis added.)

⁴ HRS § 707-702(2) (1993) provides:

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.

(Emphasis added.)

"The mitigating defense has been characterized as 'voluntary manslaughter' because it involves the intentional or knowing killing of another while under the influence of a reasonably induced extreme mental or emotional disturbance . . . causing a temporary loss or normal self control." State v. Kaiama, 81 Hawai'i 15, 25 n.25, 911 P.2d 735, 745 n.25 (1996) (quoting State v. Pinero, 70 Haw. 509, 523-24, 778 P.2d 704, 714 (1989) (citation omitted)) (brackets omitted).

I.

We review jury instructions by asking “whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading.” State v. Aganon, 97 Hawai‘i 299, 302, 36 P.3d 1269, 1272 (2001) (quoting State v. Balanza, 93 Hawai‘i 279, 283, 1 P.3d 281, 285 (2000)). “[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.” Id. (quoting State v. Sua, 92 Hawai‘i 61, 69, 987 P.2d 959, 967 (1999)). We must consider the claimed error “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.” Id. (quoting Sua, 92 Hawai‘i at 69, 987 P.2d at 967).

II.

In instructing the jury in a criminal case, certain fundamental principles must be followed. In State v. Miyashiro, 90 Hawai‘i 489, 979 P.2d 85 (App. 1999), the Intermediate Court of Appeals (ICA) ruled that guilt is an ultimate determination, not an intermediate one, to be made. Therefore, in considering affirmative defenses, jurors must first decide whether the elements of the charged offense have been proved beyond a reasonable doubt before considering evidence regarding an

affirmative defense and, if appropriate, the final question of guilt:

In our view, . . . a defendant's guilt is the ultimate finding that a jury must make after determining whether the defendant has committed all the elements of the offense charged and considering any affirmative defenses raised. In other words, each juror must individually determine whether all the elements of the offense have been established beyond a reasonable doubt and, if so, whether the defendant has established, by a preponderance of the evidence, the existence of the affirmative defense before determining the ultimate issue of the defendant's guilt.

Id. at 499, 979 P.2d at 95 (emphasis added). Second, the ICA explained that, in order for any proper verdict to be rendered, complete unanimity is necessary. See id. Finally, Miyashiro indicated that the instructions should be given in a sequence consistent with the logical progression of determining acquittal or guilt:

The circuit court should have instructed the jury, in relevant part, that its deliberative process should include the following steps:

(1) For each count, decide whether all the elements of the charged offense have been established beyond a reasonable doubt.

(2) If the jury unanimously agrees that all the elements of the charged offense have not been established beyond a reasonable doubt, the jury must acquit [the d]efendant of the charged offense and consideration of the affirmative defense . . . is not required.

(3) If the jury unanimously agrees that all the elements of the charged offense have been established beyond a reasonable doubt, then the jury must consider the affirmative defense In such event,

(a) If the jury unanimously agrees that [the d]efendant has proved, by a preponderance of the evidence, [the affirmative defense] for a charged offense, the jury must acquit [the d]efendant of that offense; and

(b) If the jury unanimously agrees that [the d]efendant has not proved, by a preponderance of the evidence, [the affirmative defense], the jury must find Defendant guilty of the charged offense.

Id. at 500 n.13, 979 P.2d at 96 n.13. These principles were not adhered to in this case.

III.

The court's Special Instruction No. 1⁵ set forth the

⁵ For reading convenience, the instruction is set forth in its entirety herein. As originally given, the instruction at issue, "Court's Special Instruction No. 1," except for the last paragraph, reads as follows:

In Count I of the Complaint, Defendant Tetsuya Yamada is charged with the offense of Murder in the First Degree.

A person commits the offense of Murder in the First Degree if he intentionally or knowingly causes the death of more than one person in the same incident.

There are three material elements of the offense of Murder in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These three elements are:

1. On or about September 29, 1996, in the County and State of Hawaii;
2. Defendant Tetsuya Yamada intentionally or knowingly caused the deaths of Carla Russell and Rachel DeCambra; and
3. Defendant Tetsuya Yamada's state of mind in intentionally or knowingly causing the deaths of Carla Russell and Rachel DeCambra was to cause the deaths of both Carla Russell and Rachel DeCambra in the same incident.

If you unanimously find that the prosecution has not proven beyond a reasonable doubt all of the material elements of the offense of Murder in the First Degree, then you are to enter a verdict of not guilty of the offense of Murder in the First Degree. Again, your verdict must be unanimous.

If you unanimously find that Defendant Tetsuya Yamada has proven by a preponderance of the evidence the affirmative defense of physical or mental disease, disorder or defect excluding criminal responsibility in regard to the offense of Murder in the First Degree, then you are to enter a verdict of not guilty because of a physical or mental disease, disorder or defect excluding criminal responsibility. Again, your verdict must be unanimous.

If and only if you unanimously find beyond a reasonable doubt that the prosecution has proven all of the elements of the offense of Murder in the First Degree and you also unanimously find that Defendant Tetsuya Yamada has not proven by a preponderance of the evidence the affirmative defense of a physical or mental disease, disorder or defect excluding criminal responsibility, you must then determine whether, at the time he caused the deaths of Carla Russell and Rachel DeCambra, Defendant was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation.

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⁵(...continued)

The reasonableness of the explanation shall be determined from the viewpoint of a reasonable person in Defendant's situation under the circumstances which Defendant was aware of or as Defendant believed them to be.

The prosecution must prove beyond a reasonable doubt that Defendant Tetsuya Yamada was not, at the time he caused the deaths of Carla Russell and Rachel DeCambra, 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 Murder in the First Degree unless one or more jurors has or have determined that Defendant has proven by a preponderance of the evidence the affirmative defense of a physical or mental disease, disorder or defect excluding criminal responsibility.

Remember, that in order to return a verdict of Murder in the First Degree,:

1. You must unanimously find that the prosecution has proven all of the elements of Murder in the First Degree;
2. You must unanimously find that the prosecution has proven beyond a reasonable doubt that Defendant Tetsuya Yamada was not, at the time he caused the deaths of Carla Russell and Rachel DeCambra, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation; and
3. No juror has determined that Defendant has proven by a preponderance of the evidence the affirmative defense of a physical or mental disease, disorder or defect excluding criminal responsibility.

If one or more jurors believes or believe that the prosecution has not proven beyond a reasonable doubt that the Defendant Tetsuya Yamada was not, at the time he caused the death of Carla Russell, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation, then you must return a verdict of guilty of Manslaughter based upon extreme mental or emotional disturbance as to the death of Carla Russell unless one or more jurors has or have determined that Defendant has proven by a preponderance of the evidence the affirmative defense of a physical or mental disease, disorder or defect excluding criminal responsibility. Remember[,] you may not find Defendant guilty of Manslaughter as to the death of Carla Russell if one or more jurors has or have determined that Defendant has proven by a preponderance of the evidence the affirmative defense of a physical or mental disease, disorder or defect excluding criminal responsibility.

If one or more jurors believes or believe that the prosecution has not proven beyond a reasonable doubt that Defendant Tetsuya Yamada was not, at the time he caused the death of Rachel DeCambra, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation, then you must return a verdict of guilty of Manslaughter based upon extreme mental or emotional disturbance as to the death of Rachel DeCambra

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elements of first degree murder of two or more persons, that is, for causing the deaths of Carla Russell and Rachel DeCambra, the defenses of insanity and manslaughter as previously mentioned, the order in which the jury was to consider the offense(s) and the defenses, and the possible verdicts the jury might render. It was prejudicial insofar as it: (1) failed to clearly inform the jurors that they were to consider the affirmative defense of insanity only if they first decided the prosecution had proved all the elements of murder in the first degree; (2) suggested that the jurors were to consider the insanity defense after addressing the manslaughter question; and (3) incorrectly advised the jurors that they could return a verdict of manslaughter

⁵(...continued)

unless one or more jurors has or have determined that Defendant has proven by a preponderance of the evidence the affirmative defense of a physical or mental disease, disorder or defect excluding criminal responsibility.

At some point after the court read all the instructions to the jury, and the jurors had initiated their deliberations, the prosecution contended that the last paragraph of Court's Special Instruction No. 1, not reproduced here, was confusing. The court proposed two paragraphs, which were acceptable to both the prosecution and the defense, that were read to the jurors. These two paragraphs, given in addition to the paragraphs reproduced supra, were as follows:

If: (1) you have determined that Defendant Tetsuya Yamada is guilty of an offense under Count I of the Complaint¹ [sic]; or (2) you have determined that Defendant is not guilty of an offense under Count I of the Complaint because he has proven the affirmative defense of physical or mental disease, disorder or defect excluding criminal responsibility, then you are not to consider Counts II and III of the Complaint.

If: (1) you have determined that Defendant Tetsuya Yamada is not guilty of the offense of Murder in the First Degree under Count I of the Complaint; or (2) you cannot reach a unanimous verdict as to Murder in the First Degree under Count I of the Complaint, then you are to consider Counts II and III of the Complaint.

(Emphasis added.)

without a unanimous verdict as to that defense. The court also incorrectly instructed the jury with regard to when it was to consider Counts II (second degree murder for causing the death of Carla Russell) and III (second degree murder for causing the death of Rachel DeCambra) of the complaint. Insofar as Counts II and III incorporate similar phrasing and the order of directions that are contained in Count I, they would be similarly defective.

IV.

A.

Court's Special Instruction No. 1 was inconsistent and misleading. The court failed to advise the jurors that they were to consider the affirmative defense of insanity only if they first unanimously found the prosecution had proved all the elements of first degree murder. The court's instructions in this regard stated:

If you unanimously find that the prosecution has not proven beyond a reasonable doubt all of the material elements of the offense of Murder in the First Degree, then you are to enter a verdict of not guilty of the offense of Murder in the First Degree. Again, your verdict must be unanimous.

If you unanimously find that Defendant Tetsuya Yamada has proven by a preponderance of the evidence the affirmative defense of physical or mental disease, disorder or defect excluding criminal responsibility in regard to the offense of Murder in the First Degree, then you are to enter a verdict of not guilty because of a physical or mental disease, disorder or defect excluding criminal responsibility. Again, your verdict must be unanimous.

Contrary to Miyashiro, nowhere in the instructions did the court expressly inform the jurors that they were to consider insanity only after having unanimously concluded that the prosecution had

proven all the elements of murder in the first degree. Cf. State v. Williams, 595 A.2d 895, 898 (Conn. App. Ct.) (upholding use of jury instruction that advised the jury that it is to consider a defense only after it first found that prosecution proved all the elements of murder beyond a reasonable doubt), cert. denied, 597 A.2d 339 (Conn. 1991).

B.

Early in its instructions, the court indicated that the jurors were to consider the manslaughter defense after unanimously deciding there was proof of the first degree murder elements and not a preponderance of evidence as to the insanity defense:

If and only if you unanimously find beyond a reasonable doubt that the prosecution has proven all the elements of the offense of Murder in the First Degree and you also unanimously find that Defendant Tetsuya Yamada has not proven by a preponderance of the evidence the affirmative defense of a physical or mental disease, disorder or defect excluding criminal responsibility, you must then determine whether, at the time he caused the deaths of Carla Russell and Rachel DeCambra, Defendant was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation.

. . . .

However, the instruction later implied that the jurors should consider the insanity issue after the manslaughter defense:

Remember, that in order to return a verdict of Murder in the First Degree,:

1. You must unanimously find that the prosecution has proven all of the elements of Murder in the First Degree;
2. You must unanimously find that the prosecution has proven beyond a reasonable doubt that Defendant Tetsuya Yamada was not, at the time he caused the deaths of Carla Russell and Rachel DeCambra, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation; and

3. No juror has determined that Defendant has proven by a preponderance of the evidence the affirmative defense of a physical or mental disease, disorder or defect excluding criminal responsibility.

(Emphasis added.) Again, later in the instructions, the court repeated this suggestion:

If one or more jurors believes or believe that the prosecution has not proven beyond a reasonable doubt that the Defendant Tetsuya Yamada was not, at the time he caused the death of Carla Russell, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation, then you must return a verdict of guilty of Manslaughter based upon extreme mental or emotional disturbance as to the death of Carla Russell unless one or more jurors has or have determined that Defendant has proven by a preponderance of the evidence the affirmative defense of a physical or mental disease, disorder or defect excluding criminal responsibility. . . .

If one or more jurors believes or believe that the prosecution has not proven beyond a reasonable doubt that Defendant Tetsuya Yamada was not, at the time he caused the death of Rachel DeCambra, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation, then you must return a verdict of guilty of Manslaughter based upon extreme mental or emotional disturbance as to the death of Rachel DeCambra unless one or more jurors has or have determined that Defendant has proven by a preponderance of the evidence the affirmative defense of a physical or mental disease, disorder or defect excluding criminal responsibility.

(Emphases added.) The court's instruction thus indicated that the jury was to consider the insanity defense after addressing the manslaughter question.

Of course, the jury was required to decide the insanity defense, which would exclude responsibility for first degree murder, before proceeding to consider the mitigating defense of manslaughter, inasmuch as the manslaughter defense is premised on the subsistence of the murder charge and, at least, some criminal responsibility for the actions for which the defendant was charged. Court's Special Instruction No. 1 was therefore internally misleading. In light of the instruction, the jury

could have considered the manslaughter defense before addressing the insanity question. Cf. People v. Johns, 504 N.Y.S.2d 485, 486 (N.Y. App. Div. 1986) (inasmuch as the trial court's instructions suggested that the jury not consider the insanity defense if it determined that defendant had proved the manslaughter defense, "[t]he charge . . . created the misleading impression that the insanity defense did not apply if the jury found that defendant satisfied his burden of proving that he was acting while under the influence of an extreme emotional disturbance" and that such instruction "impermissibly curtailed the jury's consideration of the insanity defense").

V.

A.

Most egregious, however, is that Court's Special Instruction No. 1 erroneously advised the jurors that they could return a verdict on manslaughter without unanimously agreeing to such a verdict.⁶ To properly instruct the jury that it could render such a verdict, the court was required to inform the jury that it must unanimously agree the prosecution had failed to disprove the manslaughter defense beyond a reasonable doubt. The court never so instructed the jury. Rather, the court informed the jury as follows:

⁶ This error was also made with regard to the court's instructions on the manslaughter defense as applied to Counts II and III.

If one or more jurors believes or believe that the prosecution has not proven beyond a reasonable doubt that the Defendant Tetsuya Yamada was not, at the time he caused the death of Carla Russell, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation, then you must return a verdict of guilty of Manslaughter based upon extreme mental or emotional disturbance as to the death of Carla Russell unless one or more jurors has or have determined that Defendant has proven by a preponderance of the evidence the affirmative defense of a physical or mental disease, disorder, or defect excluding criminal responsibility. . . .

If one or more jurors believes or believe that the prosecution has not proven beyond a reasonable doubt that the Defendant Tetsuya Yamada was not, at the time he caused the death of Rachel DeCambra, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation, then you must return a verdict of guilty of Manslaughter based upon extreme mental or emotional disturbance as to the death of Rachel DeCambra unless one or more jurors has or have determined that Defendant has proven by a preponderance of the evidence the affirmative defense of a physical or mental disease, disorder or defect excluding criminal responsibility.

(Emphases added.) The circumstance the court described in instructing the jury to return a verdict of manslaughter was one in which the jury could have convicted Defendant of manslaughter without a unanimous decision. In such a case, the jury should have been hung, entitling Defendant to a mistrial.⁷ The Hawai'i Pattern Jury Instructions - Criminal (HAWJIC) correctly applies the unanimity principles to the manslaughter defense as follows:

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

⁷ At best, the specific statement that the jury was to return a verdict of manslaughter, if one or more jurors believed the prosecution failed to disprove that defense, created a misleading and inconsistent directive in light of the court's giving of a general unanimity instruction, broadly instructing the jury that "[its] verdict must be unanimous."

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.

HAWJIC 9.08 (Underscoring in original.) (Italicized emphasis added.)

B.

Criminal defendants are entitled to a unanimous verdict under the Hawai'i Constitution and pursuant to court rule. See State v. Arceo, 84 Hawai'i 1, 30, 928 P.2d 843, 872 (1996) ("[W]e . . . hold that the right of an accused to a unanimous verdict in a criminal prosecution, tried before a jury in a court of this state, is guaranteed by article I, sections 5 and 14 of the Hawai'i Constitution."⁸ (Citation omitted.)); State v. Jones, 97 Hawai'i 23, 29, 32 P.3d 1097, 1103 (App. 1998) ("Defendant may only be convicted by a unanimous verdict[.]"); Hawai'i Rules of Penal Procedure Rule 31(a) ("The verdict shall be unanimous, unless otherwise stipulated to by the parties."). By instructing the jury that they could return a manslaughter verdict without a unanimous vote, the court violated Defendant's constitutional right to a unanimous verdict. Accordingly, there is a reasonable possibility that the wording of the court's Special Instruction No. 1 may have contributed to Defendant's conviction.

⁸ Article I, section 5 of the state constitution reads, in part, "No person shall be deprived of life, liberty, or property without due process of law[.]" Meanwhile, article I, section 7 states in part that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury Juries, where the crime charged is serious, shall consist of twelve persons."

VI.

The court also erroneously instructed as to the circumstances necessary to proceed to Counts II and III. Guilt is an ultimate determination to be made by the jury. See Miyashiro, 90 Hawai'i at 499, 979 P.2d at 95 ("[A] defendant's guilt is the ultimate finding that a jury must make after determining whether the defendant has committed all the elements of the offense charged and considering any affirmative defenses raised.") The final two paragraphs of the court's Special Instruction No. 1 employ "guilty" and "not guilty" in an imprecise way, thus generating directions for the jury that are inconsistent and misleading:

If: (1) you have determined that Defendant Tetsuya Yamada is guilty of an offense under Count I of the Complaint1 [sic]; or (2) you have determined that Defendant is not guilty of an offense under Count I of the Complaint because he has proven the affirmative defense of physical or mental disease, disorder or defect excluding criminal responsibility, then you are not to consider Counts II and III of the Complaint.

If: (1) you have determined that Defendant Tetsuya Yamada is not guilty of the offense of Murder in the First Degree under Count I of the Complaint; or (2) you cannot reach a unanimous verdict as to Murder in the First Degree under Count I of the Complaint, then you are to consider Counts II and III of the Complaint.

(Emphases added.)

On the one hand, in the first paragraph above, the instruction advises the jury not to consider Counts II and III if it determines Defendant is not guilty of Count I due to insanity. ("If . . . you have determined that Defendant is not guilty of . . . Count I . . . because he has proven [insanity], then you are not to consider Counts II and III of the Complaint."). On

the other hand, in the second paragraph above, the instruction informs the jury it is to consider Counts II and III if it determines that Defendant is not guilty of first degree murder. ("If . . . you have determined that Defendant . . . is not guilty of the offense of Murder in the First Degree[,] . . . then you are to consider Counts II and III.").

With regard to the latter instruction, the court does not clarify, as it apparently means, that "not guilty" in that instance means not guilty due to the prosecution's failure to prove the elements of murder in the first degree, and not because Defendant was found insane, thus excluding penal responsibility. Inasmuch as the instruction advises that the jurors are not to consider Counts II and III if they find Defendant not guilty by reason of insanity, but also suggests that they are to consider Counts II and III if they find Defendant not guilty generally (which would include a finding of not guilty by reason of insanity), the instruction is inconsistent and misleading.

Also, in informing the jury that if it "cannot reach a unanimous verdict as to Murder in the First Degree[,] it "[is] to consider Counts II and III of the Complaint[,] (emphasis added) the court incorrectly permitted the jury to consider Counts II and III, even in the event the jury found the murder first degree elements established beyond a reasonable doubt but could not reach a unanimous verdict on whether Defendant proved insanity or on whether the prosecution disproved manslaughter. In such circumstances, the jury should not be allowed to consider

Counts II and III. Moreover, a jury that is hung on either insanity or manslaughter with regard to Count I would, in all likelihood, be similarly hung on either defense with regard to Counts II and III, rendering consideration of those counts inconsequential.

VII.

I believe that the court should have instructed the jury in a manner consistent with principles announced in Miyashiro. Instructions should have been given in the instant case in the following order. The court should have advised the jury that it was to first consider whether the prosecution proved each of the elements of murder in the first degree. If the jurors unanimously found that the prosecution did not prove the elements of first degree murder, they were to return a verdict of not guilty as to Count I, and were then to consider Counts II and III. If they were not unanimous as to whether the prosecution proved the elements beyond a reasonable doubt, then they were to consider Counts II and III. If they unanimously agreed that the prosecution proved murder in the first degree, the jurors were then to address Defendant's insanity claim.

The court should have then instructed the jurors as to the burdens with regard to the insanity defense and explained that, if the jury was unanimous in deciding that Defendant proved insanity, it should return a verdict of not guilty on the ground of physical or mental disease, disorder, or defect excluding

responsibility. See HRS § 704-402(3) (1993). If the jury unanimously agreed that Defendant failed to prove insanity, the court should then direct the jury to consider the defense of manslaughter.⁹

With regard to the manslaughter defense, the jury should have been advised of the burdens with regard to that mitigating defense. If it unanimously agreed that the prosecution disproved the defense, the court should then advise the jury it was to return a verdict of guilty of first degree murder. If the jurors unanimously agreed that the prosecution did not disprove the defense, they were to return an appropriate manslaughter disposition.¹⁰

In the event they reached Counts II and III, the jurors should have been instructed in the same manner with respect to Count I as to the consideration of defenses, burdens of proof, and proper verdicts under each of Counts II and III.

VIII.

For the foregoing reasons, the case must be vacated and remanded for a new trial, with instructions to the court to

⁹ If the jury could not reach a decision on the question of insanity, it would so inform the court and the court should then declare the jury hung.

¹⁰ Again, if the jurors could not reach an appropriate manslaughter disposition, they would so inform the court. In such a situation, the court should then declare the jury hung.

properly instruct the jury in accordance with the foregoing precepts.