DISSENTING OPINION BY RAMIL, J.

I dissent from the majority's conclusion that Yamada was denied his constitutional right to a unanimous jury verdict because any error by the court in its special jury instruction number 1 was harmless. I also dissent from the majority's reasoning that mitigation of murder in the first degree, a crime that involves "intentionally or knowingly" causing the death of "[m]ore than one person in the same or separate incident," HRS § 707-701(1)(a), results in a single conviction of manslaughter due to extreme mental or emotional disturbance ("EMED").

A. Harmless Error Regarding the Court's Special Jury Instruction Number 1

I begin by explaining that the issue whether unanimity is required to convict of manslaughter due to EMED was not an issue brought on appeal. In Yamada's opening brief, he asserts the following five points of error: (1) the trial court's special instruction number 1 was patently defective, prejudicially flawed, and erroneous; (2) the trial court's response to the jury regarding whether unanimity was required on the insanity defense was insufficient and misleading; (3) the trial court erred by submitting two verdict forms on manslaughter; (4) the trial court erred by sentencing Yamada to two manslaughter convictions; and (5) the trial court abused its discretion when it allowed the defense to play the videotaped reenactment of the incident for the jury, but disallowed the jury to hear the sound. In his first contention that the jury

instructions were prejudicially insufficient, erroneous, inconsistent, and misleading, Yamada argued the following: (a) that the trial court erroneously instructed the jury to proceed to counts II and III (charging second degree murder) if they were unable to reach a unanimous verdict on count I (first degree murder);[1] (b) that the trial court failed to instruct the jurors that they must find that the prosecution proved all of the elements of first degree murder before considering the insanity defense;[2] (c) that the trial court's "special jury instruction no. 1" was "exceedingly lengthy, cumbersome, and requires numerous readings;"[3] and (d) that the trial court's response to a jury communication was reversible error.[4] None of Yamada's

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[1] The jurors reached a verdict under count I of the complaint and did not proceed to counts II and III. Accordingly, Yamada's argument is moot and can have no effect upon his conviction. State v. Haanio, 94 Hawai'i 405, 415-16, 16 P.3d 246, 256-57 (2001); State v. Holbron, 80 Hawai'i 27, 47, 904 P.2d 912, 932 (1995).

[2] Yamada does not explain how this was error or how it might have impacted the jury's unanimous conclusion that he did not establish the affirmative defense of penal irresponsibility. In any event, when read as a whole, the instructions plainly advise that the jury must determine whether the prosecution has proved all of the elements of first degree murder before considering whether Yamada established the affirmative defense of penal irresponsibility.

[3] Inasmuch as it encompassed first degree murder, EMED manslaughter, and the affirmative defense of penal irresponsibility, a somewhat lengthy instruction was necessary to fully inform the jurors regarding the law applicable to the facts. See Roxas v. Marcos, 89 Hawai'i 91, 140 n.32, 969 P.2d 1209, 1259 n.32 (1998) (citation omitted). Hawai'i case law emphasizes the trial court's duty to ensure that cases go to the jurors in a "clear and intelligent manner, so that they may have a clear and correct understanding of what it is that they are to decide[.]" Id. Much of the length of the jury instruction derived from the trial court's efforts to clarify the law for jurors through repetition and emphasis. As such, contrary to Yamada's assertion, length clarifies rather than obfuscates this instruction.

[4] I first note that this argument is the same as Yamada's second point of error, described above. The jury inquired:

> One, do we have to be unanimous in finding defendant not

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allegations of error direct the court to consider whether unanimity is required to properly convict of manslaughter due to EMED. Furthermore, I note that Yamada was clearly aware that unanimity could be an issue brought on appeal. In Yamada's second point of error, and in what I have labeled as point of error (1)(d), he argued that the trial court's response to the jury regarding whether unanimity was required on the insanity defense was insufficient and misleading. I decline to speculate why Yamada elected not to put forth a similar argument pertaining to the EMED instruction -- suffice it to say that he did not, and that the majority therefore examined the issue sua sponte.

Because the majority decided to address the issue of unanimity for a conviction of manslaughter due to EMED sua sponte, it must apply a "plain error" standard of review. However, the majority paradoxically finds plain error when the record reveals that the error was harmless. The majority itself recognizes that:

> [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.

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[4](...continued)

> guilty. Two, do we have to be unanimous in finding defendant not guilty as a result of physical, mental disease, disorder or defect excluding criminal responsibility.

The jury instructions quite plainly advised the jury that it did, in fact, have to be unanimous in finding Yamada not guilty, either because the prosecution failed to prove beyond a reasonable doubt the material elements of first degree murder, or because Yamada proved by a preponderance of evidence the affirmative defense of penal irresponsibility. As such, the trial court's response, directing the jurors to follow the jury instructions, was not erroneous.

> [E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that the error may have contributed to conviction.

Majority at 9 (citation omitted).

In the present case, the jury verdict form states in relevant part:

> Please answer SPECIAL INTERROGATORY No. 1
> With respect to Count I of the Complaint, did the prosecution prove beyond a reasonable doubt that the Defendant Testuya Yamada used a firearm while engaged in the commission of the offense of MANSLAUGHTER in regard to the death of RACHEL DeCAMBRA?
>
> (A "Yes" answer must be unanimous. If you are not unanimous in your answer, then your answer must be "No".)
>
> Yes _____ No_____

There is an identical jury verdict form in regard to the death of Carla Russell. On both forms, the jury placed a checkmark on the "Yes" line. The verdict forms facially indicated that unanimity was required. Although the jury instructions did not mandate unanimity, the jury nonetheless was unanimous, as demonstrated by its answer to special interrogatory number 1. Accordingly, any error in the jury instructions was necessarily harmless and could not amount to plain error. See State v. Correa, 5 Haw. App. 644, 647, 706 P.2d 1321, 1324 (1985) (holding that "[t]he verdict forms cured the deficiency in the court's instruction with respect to counts II and III"); see also State v. Lord, 117 Wash. 2d 829, 879-80, 822 P.2d 177, 206 (1992) (holding that the special verdict form, when read with the "to convict" instruction for the alternative of first degree murder, cured any problem

with the jury instructions because the verdict form properly informed the jury that unanimity was required for each underlying crime in order to convict of felony murder).

B. Two Convictions of Manslaughter Due to EMED

Yamada's primary contention on appeal relates to the fact that he was charged with one count of first degree murder,[5] yet convicted of two counts of manslaughter due to EMED. He points out, correctly, that because the jury found him guilty under count I of the complaint, they concluded that he had a single intent to kill more than one person. See Briones v. State, 74 Haw. 442, 454-56, 848 P.2d 966, 973-74 (1993). Yamada argues that, because he only committed one criminal offense, the trial court erred by convicting him of two counts of manslaughter due to EMED.

EMED, however, is not a criminal offense, but rather a mitigating defense to the offense of first and second degree murder that reduces the offense to manslaughter. Whiting v. State, 88 Hawai'i 356, 360, 966 P.2d 1082, 1087 (1998); State v. Holbron, 80 Hawai'i 27, 42, 904 P.2d 912, 927 (1995) (citing State v. Pinero, 70 Haw. 509, 523-24, 778 P.2d 704, 713-14 (1989)). This court has described EMED as "a special defense idiosyncratic to a charge of murder that mitigates a defendant's culpability for murder by diminishing his penal liability for the

[5] A person commits the offense of murder in the first degree, in violation of HRS § 707-701(1)(a), if the person "intentionally or knowingly" causes the death of "[m]ore than one person in the same or separate incident[.]"

offense." Whiting, 88 Hawai'i at 361, 966 P.2d at 1087. The jury verdict in this case established: (1) that the jury concluded beyond a reasonable doubt that Yamada intentionally or knowingly caused the death of two people in the same incident; and (2) that the prosecution failed to negative Yamada's EMED defense. See HRS § 702-205(3)(b) (1993). Yamada was thus absolved from penal liability for murder but, by operation of law, found to be criminally responsible for manslaughter. See Whiting, 88 Hawai'i at 360, 966 P.2d at 1086. The question is whether, under HRS § 707-702(2), a defendant charged with murder in the first degree, in violation of HRS § 707-701(1)(a), who in fact caused the death of multiple persons, is culpable for only one offense of manslaughter due to EMED, as Yamada argues, or whether culpability may be measured by the number of lives taken.[6]

This issue is ultimately one of statutory interpretation. When construing a statute, "our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." State v. Cullen, 86 Hawai'i 1, 9, 946 P.2d 955, 963 (1997) (citing Gray, 84 Hawai'i at 148, 931 P.2d at 590). This court reads statutory language "in

[6] The prosecution established beyond a reasonable doubt that Yamada intentionally or knowingly killed Carla Russell and Rachel DeCambra. The prosecution failed to prove only that Yamada was not under the influence of an extreme mental or emotional disturbance when he pulled the trigger.

the context of the entire statute and construe[s] it in a manner consistent with its purpose." Id.

First, I note that the language of Hawaii's EMED manslaughter statute provides little assistance in this regard:

> In a prosecution for murder in the first or 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.

HRS § 707-702(2).[7] Reading the statute in pari materia, taking into account the definitions of first and second degree murder, the statute is ambiguous. "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another." HRS § 1-16 (1993); see also State v. Kupihea, 98 Hawai'i 196, 202, 46 P.3d 498, 504 (2002). While HRS § 707-702(2) operates to "reduce[] the offense to manslaughter," the statute does not address the manner in which such reduction is executed. It is also apparent that the statute does not preclude multiple convictions of manslaughter due to EMED where a defendant has been charged with one offense encompassing several deaths. As the majority states, "[w]hen there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity

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[7] In 1987, the legislature amended HRS § 707-702(2) to reflect revisions to the penal code by adding the words "in the first and second degrees" after the word "murder." See 1987 Haw. Sess. L. Act 181, at 407; Sen. Stand. Comm. Rep. No. 1130, 1987 Senate Journal, at 1393 (noting that the amendment simply "substitutes new murder crimes for murder where the defense of extreme mental or emotional distress reduces the offense to manslaughter").

exists," the meaning of which may be sought be examining the context of the statute and legislative intent. Majority at 9.

Second, I look to the statutory scheme to ascertain legislative intent. It is clear from the language of HRS § 707-702(2) that the EMED defense applies to murder in the first degree. The legislature created the offense of "murder in the first degree," HRS § 707-701(1)(a), to impose a more severe sentence upon those who kill multiple persons in the same or separate incidents.[8] Interpreting HRS § 707-702(2) to preclude more than one conviction of manslaughter due to EMED where a defendant has in fact killed more than one person, would be to construe HRS § 707-702(2) in a manner inconsistent with clear legislative intent to impose a more severe punishment for those found guilty of first degree murder.[9] It is inconceivable that

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[8] HRS § 707-701(1) carries a mandatory sentence of life imprisonment without the possibility of parole. See HRS § 706-656(1); Sen. Stand. Com. Rep. No. 820-86, in 1986 Senate Journal, at 1169 ("Your Committee intends that persons convicted of multiple killings which occur in the same incident or separate incidents be subject to life imprisonment without the benefit of parole."); Sen. Conf. Comm. Rep. No. 51-86, in 1986 Senate Journal, at 747 ("Your Committee intends that persons convicted of serial killings be subject to life imprisonment without parole.").

[9] I do not disagree with Yamada that count I of the complaint, murder in the first degree in violation of HRS § 707-701(1)(a), charged him with a single offense. This offense, however, contemplated two deaths. The prosecution could have foregone the first degree murder charge and instead pursued two charges of second degree murder, in which case there is no dispute that Yamada could have been convicted of two counts of manslaughter due to EMED. Likewise, if Yamada were prosecuted for killing Carla Russell and Rachel DeCambra in 1986, prior to the legislature's creation of the "murder in the first degree" offense, he would likely have been charged with two counts of murder, in violation of HRS § 707-701(1) (1985). If the prosecution failed to disprove that Yamada was under the influence of extreme mental or emotional distress at the times he pulled the trigger, Yamada would have been entitled to acquittals of the murder charges, but would have been criminally culpable for two counts of manslaughter due to EMED. HRS § 707-702(2) (1985); HRS § 702-205(3)(b) (1985).

Additionally, I do not disagree with the majority that HRS § 707-701(1)(a) "does not predicate the severity of the resulting punishment upon

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successful prosecution of all the elements for murder in the first degree (save negating an EMED defense), would result in only one conviction for manslaughter when successful prosecution of all the elements for two counts of murder in the second degree (save negating an EMED defense) would result in two convictions for manslaughter. Thus, a conclusion that a defendant who has in fact killed two people is criminally culpable for only one death, solely because the prosecutor charged one count of first degree

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the particular number of persons whom the jury determines the defendant has killed." Majority at 20. Put simply, the statute could not predicate the severity of the punishment on the number of persons killed because short of imposing the death penalty, life imprisonment without the possibility of parole leaves nothing that can be added in terms of punishment. Thus, the majority is certainly correct that "[b]e it two people or twenty, the punishment flowing from a violation of HRS § 707-701(1)(a) does not vary as a function of the number of victims." Id. at 21. In writing HRS § 707-701(1), the legislature has already imposed its most severe punishment.

Finally, the majority fails to understand that the legislature intended that the distinguishing factor between murder in the first degree and murder in the second degree is not the length of the term (they are both life sentences), but the fact that those convicted of murder in the first degree do not have the benefit of parole. Compare HRS § 706-656(1) (1993) (describing sentencing for murder in the first degree and attempted murder in the first degree) with HRS § 706-656(2) (1993 & Supp. 2000) (describing sentencing for murder in the second degree and attempted murder in the second degree) (I note that if the circumstances for enhanced sentencing under § 706-657 are met, the court may sentence a person convicted of murder in the second degree to life imprisonment without the possibility of parole). The majority cites as "one of several [anomalies] embedded in HRS ch. 707, pt. II," majority at 22, the following:

> For example, pursuant to HRS § 706-656(1) (1993), had Yamada been convicted of first degree murder as charged in Count I, he would have been subject to one mandatory sentence of life imprisonment without the possibility of parole. However, had the jury acquitted Yamada of first degree murder but convicted him of the two counts of second degree murder charged in Counts II and III, he would have been subject, pursuant to HRS § 706-656(2) (Supp. 2001), to two mandatory sentences of life imprisonment with the possibility of parole, which, pursuant to HRS § 706-668.5 (1993), the sentencing court could impose concurrently or consecutively in its discretion.

Majority at 22. Contrary to its belief, the majority has not identified an anomaly in the legislature's statutory scheme for criminal homicides. Short of commutation, a person convicted of murder in the first degree is sentenced to life imprisonment without the benefit of parole. See HRS § 706-656(1). Thus, the fact that there are multiple life sentences, or consecutive rather than concurrent sentences, has no effect on a person who does not have the benefit of parole.

murder rather than two counts of second degree murder would be, in our view, absurd.[10] See HRS § 1-15(3) (1993) ("Every construction which leads to an absurdity shall be rejected."); State v. Arceo, 84 Hawai'i 1, 19, 928 P.2d 843, 861 (1996) (stating that the legislature is presumed not to intend an absurd result) (citation omitted).

Accordingly, I would hold that a defendant who knowingly or intentionally causes the death of one or more persons in the same or separate incidents may be convicted and sentenced for one count of manslaughter due to EMED for each person killed, without respect for whether the defendant is charged with murder in the first degree, in violation of HRS § 707-701(1)(a), or two counts of murder in the second degree, in violation of HRS § 707-701.5. The trial court did not err by convicting Yamada of two counts of manslaughter in violation of HRS § 707-702(2).

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[10] In response to this argument, the majority argues that they cannot agree with the bifurcation of a single charge of first degree murder into multiple convictions of EMED manslaughter. Majority at 19-20. The majority narrowly focuses its analysis on the word "offense," without considering the context in which it is used and repeatedly emphasizes the fact that the word is used in its singular form. See Majority at 17, 19. By doing this, the majority fails to abide by well-established rules of statutory interpretation. See Kupihea, 98 Hawai'i at 202, 46 P.3d at 504 (stating that laws in pari materia should be construed together); State v. Pacheco, 96 Hawai'i 83, 94, 26 P.3d 572, 583 (2001) (stating that statutory language should be read in the context of the entire statute and construed in a manner consistent with its purpose). Allowing a defendant's first degree murder charge, for the murder of more than one individual, to be mitigated to only one count of EMED manslaughter, while subjecting a defendant charged of two counts of second degree murder for the same crime to two counts of EMED manslaughter upon a showing of mitigation, is tantamount to giving the first degree murder defendant a "get out of jail free" card for every additional murder. I submit, based on the doctrine of in pari materia and the purpose of the EMED manslaughter statute, that the legislature did not intend to afford such inconsistent leniency under the EMED statute and could not have intended such an absurd result.

For the foregoing reasons, I would affirm Yamada's conviction of and sentence for two counts of manslaughter due to EMED.