CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.

I agree with the holding of the majority that at least a part of the body must intrude in a vehicle in order to constitute an "entry" as used in the Unauthorized Entry of Motor Vehicle (UEMV) statute. I also agree that the particular offense intended to be committed need not be alleged in the complaint charging a UEMV. I write separately to note my disagreement with the majority's holding in Part III(A) that the circuit court's failure to provide jury instructions regarding the definition of the term "entry" should be recognized as plain error. I do not believe that this failure rises to the level of plain error because (1) defendant-appellant Gary Faria (Faria) did not object to the general instruction regarding the UEMV offense and did not request a specific instruction regarding the definition of "entry," and (2) there is no evidence that this failure affected the jury's application of the facts and law and thus the fundamentally fair trial that Faria received. For these reasons, I dissent.

"As a general rule, jury instructions to which no objection has been made at trial will be reviewed only for plain error." State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998) (citation omitted). It is undisputed that Faria did not object to the general UEMV instruction given to the jury and did not request a specific instruction regarding the definition of "entry." Thus, the circuit court's failure to give such an instruction can only be reviewed for plain error.

This court may recognize plain error "in exceptional circumstances" if there is evidence of highly prejudicial error adversely affecting substantial rights. See State v. Arceo, 84

Hawai‘i 1, 34, 928 P.2d 843, 876 (1996) (citing United States v. Ancheta, 38 F.3d 1114, 1116 (9th Cir. 1994)) (Nakayama, J., dissenting) ("Plain error is a highly prejudicial error affecting substantial rights, and is found only in exceptional circumstances."); State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 675-76 (1988) (citing United States v. Atkinson, 297 U.S. 157, 160 (1936)) ("In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.").

This discretion to recognize plain error must be mindful of the fact that the doctrine of plain error is a departure from the general rules of waiver that govern appellate review. See Montalvo v. Lapez, 77 Hawai‘i 282, 304, 884 P.2d 345, 367 (1994) (citations omitted) (Nakayama, J., dissenting) ("The plain error doctrine represents a departure from the normal rules of waiver that govern appellate review, i.e., that a party who invites error in the trial court waives the right to have the error considered on appeal."); Fox, 70 Haw. at 55, 760 P.2d at 675 (citation omitted) ("The plain error rule is a departure from the position usually presupposed by the adversary system that a party must look to his counsel to protect him and that he must bear the cost of the mistakes of his counsel."). Thus, this court has stated that the "power to deal with plain error is one to be exercised sparingly and with caution . . . ," State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 75 (1993) (citation omitted); Fox, 70 Haw. at 57, 760 P.2d at 676 (citation omitted),

and that "the decision to take notice of plain error must turn on the facts of the particular case . . . ," Id. at 56, 760 P.2d at 676.

I do not believe that the facts of this case exhibit "exceptional circumstances," such that an invocation of the plain error doctrine is warranted, inasmuch as the jury's communication to the court does not necessarily evidence that the jury convicted Faria of UEMV based on the entry of the mace into the vehicle. The circuit court instructed the jury regarding the UEMV offense as follows:

> In the indictment, Defendant is charged with the offense of Unauthorized Entry into a Motor Vehicle.
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> A person commits the offense of Unauthorized Entry into a Motor Vehicle if he intentionally or knowingly enters unlawfully a motor vehicle, with intent to commit therein a crime against a person.
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> There are two material elements to this offense, each of which the prosecution must prove beyond a reasonable doubt.
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> These two elements are:
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> 1. On or about February 17, 2000, in the City and County of Honolulu, State of Hawaii, the Defendant intentionally or knowingly entered unlawfully a motor vehicle; and
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> 2. When the Defendant unlawfully entered the motor vehicle, the Defendant, at that time, had the intent to commit therein a crime against a person.

In response to this instruction, the jury asked the following question: "Does the mace entering the car constitute entry by the person spraying the mace?" The circuit court's answer was "[y]ou are referred to the court's instructions previously given to you." In asking this question, the majority assumes that the jury may have been confused regarding what constituted "entry" for purposes of UEMV and thus may have misapplied the facts and law.

A more practicable assumption exists and is supported by the jury's subsequent question. At trial, both the State of

Hawai‘i and Faria, in questioning every witness to the incident, focused on whether any part of Faria's body, but specifically Faria's arm, entered the car. Thus, unless the jurors were completely ignoring the evidence presented throughout the three day trial, it was clear that the issue was whether Faria's arm physically entered the vehicle when he sprayed the mace. One witness testified that Faria's arm "was about elbow length inside the vehicle . . . ." Another witness testified that she did not know whether Faria's arm entered the car because she "ducked" as soon as Faria sprayed the mace. Yet another witness testified that at least some part of Faria's arm entered the vehicle. Faria himself testified that he never reached into the car and that he sprayed the mace from a distance of about "three or more feet away from the vehicle . . . ."

Amidst the range of testimony regarding whether Faria's arm physically entered the vehicle, one piece of evidence was certain and undisputed -- Faria sprayed mace into the vehicle, contacting at least two of the occupants in the vehicle. From this, the more probable assumption to make is that the jury concluded that if the mace entering the car constituted "entry," the testimony concerning physical entry of Faria's arm need not be weighed. Thus, the jury submitted the question to the court: "Does the mace entering the car constitute entry by the person spraying the mace?" This question does not necessarily evidence a confusion with the definition of "entry," nor a misapplication of the facts or law rising to the level of plain error.

The jury's second question supports the conclusion that it did not misapply the facts and law rising to a level of plain error. Approximately fifteen minutes after submitting the first

question to the circuit court, the jury submitted a second question, asking the following: "What is the range (distance) that this mace can spray in evidence?" This question does not assume, nor is it based on the belief, that the entry of mace into the vehicle constituted an "entry." In fact, this question assumes that the entry of mace is not an "entry" for purposes of UEMV, inasmuch as the distance of the spray would either be consistent with or contradict Faria's testimony that his arm did not physically enter the vehicle, as he testified that he was standing three or more feet from the vehicle when he sprayed the mace that contacted both the passenger and the driver of the vehicle. As such, there is no evidence to suggest that the jury misunderstood or misapplied the law, and the failure to give an instruction does not rise to the level of plain error.

When applying the plain error doctrine, it must be kept in mind that, in the absence of an objection to the alleged error below, the question is not whether the trial court should have done something differently (i.e., in this case, whether the trial court should have provided an instruction). The question is whether the trial court's alleged error rises to the level of adversely affecting the fairness, integrity, and reputation of judicial proceedings such that this court is justified in ignoring the general rules of waiver under our adversary system. Otherwise, the rules of waiver under our adversary system are not purposeful and are eroded. It is for the foregoing reasons that I respectfully dissent.