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IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII, Plaintiff-Appellee

vs.

EDWIN KIM, also known as Edwin Alexander Kim,
Defendant-Appellant

NO. 24216

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-2388)

DECEMBER 30, 2003

MOON, C.J., LEVINSON, AND NAKAYAMA, JJ.,
CIRCUIT JUDGE McKENNA, ASSIGNED BY REASON OF VACANCY,
AND ACOBA, J. DISSENTING

OPINION OF THE COURT BY NAKAYAMA, J.

Defendant-appellant Edwin Kim appeals from the judgment of the circuit court of the first circuit, the Honorable Sandra A. Simms presiding, convicting Kim of and sentencing him for (1) murder in the second degree, in violation of Hawai'i Revised Statutes (HRS) § 707-701.5 (1993)¹ (Count I), (2) place to keep a pistol or revolver, in violation of HRS § 134-6(c) and (e) (1993)² (Count II), and (3) ownership or possession

¹ HRS § 707-701.5 provides in relevant part that, "[e]xcept 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."

² HRS § 134-6(c) and (e) provides in relevant part:

(c) Except as provided in sections 134-5 and 134-9, all firearms and ammunition shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms or ammunition or both in an enclosed container from the

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prohibited of any firearm or ammunition by a person convicted of certain crimes, in violation of HRS § 134-7(b) and (h) (1993)³ (Count III). On appeal, Kim argues that the circuit court erred by denying his motion for judgment of acquittal and/or new trial. As discussed infra, in section III, the circuit court did not abuse its discretion by denying Kim's motion for judgment of acquittal and/or new trial. Accordingly, we affirm the circuit court's March 19, 2001 judgment.

I. BACKGROUND

Following an alleged gang shooting that killed Gercel

place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following: a place of repair; a target range; a licensed dealer's place of business; an organized, scheduled firearms show or exhibit; a place of formal hunter or firearm use training or instruction; or a police station. "Enclosed container" means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.

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(e) Any person violating subsection (a) or (b) shall be guilty of a class A felony. Any person violating this section by carrying or possessing a loaded firearm or by carrying or possessing a loaded or unloaded pistol or revolver without a license issued as provided in section 134-9 shall be guilty of a class B felony. Any person violating this section by carrying or possessing an unloaded firearm, other than a pistol or revolver, shall be guilty of a class C felony.

³ HRS § 134-7(b) and (h) 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.

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(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. . . .

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Ong, Kim was arrested and charged with Counts I, II, and III. During Kim's trial, Curtis Kubo (Kubo), a criminalist with the Honolulu Police Department, testified regarding the bullet recovered from the scene:

[Prosecutor:] Mr. Kubo, I'm going to show you State's exhibit 28 and ask you if you recognize that.

[Kubo:] Yes, I do.

[Prosecutor:] What is it?

[Kubo:] It's a bullet that I examined under Police Report No. 99-406926.

[Prosecutor:] Was that recovered by John Wadahara^[4] on November 20th, 1999, from a Toyota Tercel.

[Kubo:] Yes.

[Prosecutor:] Did you analyse [sic] that, I guess, under a microscope? Is that what you did?

[Kubo:] Yes, I did.

[Prosecutor:] And what are you looking for when you do that?

[Kubo:] Well, I was just trying to identify the bullet as far as caliber, barrel impressions and other characteristics of the bullet.

[Prosecutor:] Okay. And could you tell what type of gun that bullet came from?

[Kubo:] Well, what I found was that bullet was consistent with being in a caliber .38 class, which includes the .38 Special and the .357 Magnum.

[Prosecutor:] I'm sorry. Let me just stop you there, first, and ask you what's the difference between a .38 Special -- or a .38 and a .357 Magnum?

[Kubo:] Well, this -- a class is called a .38 -- caliber .38 which consists of different calibers, specific calibers. And that include [sic] the .38 Special and a .357 Magnum. Both of those calibers use the same bullet; they just have a different case length.

[Prosecutor:] And what does that mean?

[Kubo:] Well, the bullets can interchange between the two calibers.

[Prosecutor:] Okay. And so if you have a .357 Magnum, you can fire either type of bullets? Is that what you're saying?

[Kubo:] In a .357, you can fire a .357 Magnum or .38 Special, but you can't go the other way. You can't fire a .357 Magnum in a .38 Special firearm.

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[Prosecutor:] Okay. Does that differ between a .38 and a .357?

[Kubo:] Like I said, in the .357 Magnum, the case would be longer than a .38 Special.

[Prosecutor:] And what does a longer casing do for

⁴ John Wadahara was an evidence specialist for the Honolulu Police Department.

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the bullet?

[Kubo:] You would have more space for gunpowder which results in more velocity.

[Prosecutor:] More velocity?

[Kubo:] Yes.

[Prosecutor:] And power?

[Kubo:] Yes.

[Prosecutor:] So you couldn't tell whether it was a .38 or .357 from just the bullet itself, basically; right?

[Kubo:] Yes.

. . . .

[Prosecutor:] What else -- what type of bullet was that besides what type of gun it came from? Are there different types of bullets?

[Kubo:] Yes.

[Prosecutor:] What type was this from?

[Kubo:] This one could be either a jacketed hollow point or jacketed soft point bullet hollow.

[Prosecutor:] What does it mean, and what's the significance of that type of bullet?

[Kubo:] This type of bullet would be designed to expand when it hits something soft, like tissue. That hollow point or the soft point would expand or mushroom out so that you would have ended up with a larger caliber projectile.

[Prosecutor:] And I guess in plain English, does that mean it would do more damage, when it mushrooms out --

[Kubo:] Yes.

[Prosecutor:] -- as it passes through the tissue?

[Kubo:] Potentially, yes.

[Prosecutor:] Now, from looking at that bullet in this case, can you tell if it came from a revolver or not?

[Kubo:] There's indications where what's called slippage or skid marks, and that occurs mainly in revolvers. In revolvers, the bullet has to pass through a space from the chamber into the barrel before it engages the rifling. And because it has this little space, it kind of slips, initially, before it engages the rifling. And that's what I saw in the bullet.

[Prosecutor:] And what would that tend to -- what conclusion did you reach based on that slippage that you saw?

[Kubo:] That those marks are consistent with it being fired from the revolver.

[Prosecutor:] Now, in a handgun, handguns have various sizes of barrels; right?

[Kubo:] Yes.

[Prosecutor:] And the barrel is the part that the bullet passes through; right?

[Kubo:] Yes.

[Prosecutor:] What is the -- what is the purpose, or what happens as you get a longer barrel in a handgun?

[Kubo:] Well, a couple things. The longer the barrel length, the more velocity you'll get up to a certain point. The other thing is that all other things being equal, it would be easier to hit your target with a longer barrel length.

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Well, if you can imagine, on a short barrel, the distance between the rear sight and the front sight would be short. And when you go to a longer barrel length, it lengthens. So that any deviation from when you -- when you're aiming at something will be magnified more at a shorter barrel length.

[Prosecutor:] So more accurate is the longer barrel length. There's a converse to that right?

[Kubo:] Like I said, all other things being equal, too. It depends on who's shooting the gun and other things, also.

In addition, the chief medical examiner for the City and County of Honolulu, Alvin Omori, testified as follows:

[Prosecutor:] Dr. Omori, I'd like to direct your attention to November 22nd, 1999.

Did you perform an autopsy on a person identified as Gercel Ong?

[Omori:] Yes, I did.

[Prosecutor:] And to a reasonable degree of medical certainty, what is your opinion as to the cause of Mr. Ong's death?

[Omori:] Mr. Ong died as a result of what we call a perforating or a through-and-through gunshot wound through his chest. The entrance wound was over his left upper back. The bullet exited the front portion of his chest, just adjacent to the left nipple. And he had injuries to his left lung.

[Prosecutor:] Doctor, if I could ask you to step down. And perhaps using these diagrams, explain to the jury what your findings were.

[Omori]: 26. Basically we just have an outline of an individual. Mr. Ong had a single gunshot wound, and the entrance point was to his left upper back. . . . As the bullet traveled through the body, on State's Exhibit No. 27, it actually fractured the rib. This is what we call the sixth rib. It fractured the back portion of the sixth rib, went through the lung, which is this structure that is enclosed by the ribs, and it came out through the left fifth rib.

At the end of the trial, the court instructed the jury that Count I required a finding of "intentionally or knowingly" causing the death of another person. The court then instructed the jury that if it found Kim not guilty of Count I, it had to consider whether he committed the offense of manslaughter by "recklessly" causing the death of another person. The court also

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instructed the jury as follows:

[Reasonable doubt] is a doubt in your mind about the defendant's guilt which arises from the evidence presented or from the lack of evidence and which is based upon reason and common sense. Each of you must decide, individually, whether there is or is not such a doubt in your mind after careful and impartial consideration of the evidence.

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You must consider only the evidence which has been presented to you in this case and such inferences therefrom as may be justified by reason and common sense.

.
During the course of the trial, you have received all of the evidence you may consider to decide the case. You must not attempt to gather any information on your own which you think might be helpful. Do not engage in any outside reading on any matter having anything to do with this case. Do not refer to dictionaries or other outside sources. Do not visit any places mentioned in the case. Do not in any other way try to learn about the case outside the courtroom.

On October 11, 2000, the jury found Kim guilty on all three counts. On October 19, 2000, Kim filed a motion for judgment of acquittal and/or new trial.

During the hearing on Kim's motion for judgment of acquittal and/or new trial, Kim's attorney stated that Juror Seven, called him the day after the verdict and discussed the jury deliberations. As an offer of proof as to what Juror Seven would testify to, Kim's attorney stated,

They began deliberations by examining various photographs and physical evidence without discussing those matters, which included the photographs presented by the State and I believe the cartridges recovered by the State. Then there was an initial polling -- not polling -- a voting, I guess, as to a verdict, and the -- when they counted the voting, it turned out that it was 11 voting guilty for Murder and one voting for Manslaughter. And [Juror Seven] would testify that she was the person who cast her vote for the Manslaughter.

Then it was suggested by [Juror Nine], that they should at least discuss the evidence that was presented in court as well to discuss the Court's instructions to them. So it was determined that in an effort to do that, that each juror would read a particular instruction. And that went on until they reached [Juror Ten], who responded, What the fuck are we doing this for? I want to know who voted for the Manslaughter. And at that point he said that in a very angry

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and intimidating manner, which caused everything to stop. Then again, he said, I don't know why we're doing this. I want to know who the fuck said Manslaughter. At that point . . . the foreperson, asked [Juror Nine] if it was her who was the one who voted for Manslaughter. And [Juror Nine] responded by saying, no, it was not her. At that point, [Juror Seven], due to the manner in which things were proceeding in a very heated way said, It was me. I am the one who said Manslaughter.

There again was this -- a request that we should at least discuss the evidence that was presented as well as the Court's instructions before we come back with a verdict, so at least we could feel that, you know, we talked about this case. At that point, [Juror Ten] again in a very forceful manner started talking about how he on a weekly basis went to the shooting range and fired firearms. And in a very heated manner again, saying, Do you know the type of damage that a magnum can do? That that can do so much damage, that is a deadly weapon, and if anyone uses a magnum, they had to have a deadly intent. [The foreperson] also discussed his experience with firearms, and again supporting [Juror Ten's] assertions that it was a very dangerous weapon and that again relying on his personal experience, that it had to have been an intentional shooting.

Because of the manner that [Juror Seven] would characterize as brow-beating and angry, she responded by saying, okay, I'll just go along with everyone else. And at that point -- I guess at some point around that time, they notified the Court that they had reached a unanimous decision.

Upon being called into court, the Court did poll the jury, and [Juror Seven] would say that she told the Court that she agreed with the verdict because, in her mind, she believed that if she spoke up at that point, she would just be sent back to the deliberation room with again these 11 people, who were strongly disagreeing with her, and she didn't feel that that would be of any benefit.

(Emphasis added.) At the end of the hearing, the court orally denied Kim's motion for judgment of acquittal and/or new trial ruling that the offer of proof "[was] not sufficient to warrant there being evidence produced on that issue."

On March 19, 2001, the circuit court entered its judgment of guilty conviction. Kim was sentenced to life imprisonment with a mandatory minimum term of fifteen years for Count I, ten years' imprisonment for Count II, and five years' imprisonment for Count III. On April 17, 2001, Kim filed a

timely appeal.

II. STANDARD OF REVIEW

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 quotations omitted).

III. DISCUSSION

On appeal, Kim argues that he did not have a fair trial due to juror misconduct because "jurors disregarded the trial court's instruction regarding not referring to information from outside sources" and jurors intimidated and harassed Juror Seven. Because Kim failed to satisfy his burden of establishing a prima facie showing that the possibility of juror misconduct could have substantially prejudiced his right to a fair trial by an impartial jury, the circuit court did not abuse its discretion by denying Kim an evidentiary hearing on his motion for a new trial.

The sixth amendment to the United States Constitution⁵ and article I, section 14 of the Hawai'i Constitution⁶ guarantee the criminally accused a fair trial by an impartial jury. State

⁵ The sixth amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"

⁶ Article I, section 14 of the Hawai'i Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed"

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v. Gabalis, 83 Hawai'i 40, 45, 924 P.2d 534, 539 (1996) (citation omitted). If any juror was not impartial, a new trial must be granted. Id. However, "not all juror misconduct necessarily dictates the granting of a new trial. A new trial will not be granted if it can be shown that the jury could not have been influenced by the alleged misconduct." Furutani, 76 Hawai'i at 180, 873 P.2d at 59.

When a defendant claims a deprivation of a right to a fair trial by an impartial jury, he or she "bears the initial burden of making a prima facie showing of a deprivation that could substantially prejudice his or her right to a fair trial by an impartial jury." Id. at 181, 873 P.2d at 60 (internal quotations and brackets omitted).

[I]n order for a criminal defendant to make a prima facie showing that a juror's comment(s) during the jury's deliberations deprived him or her of the right to a fair trial by an impartial jury, the defendant must, by an objective evaluation of the comment . . . show that: (1) the comment was improper; and (2) the comment was used as a circumstance against the defendant.

Gabalis, 83 Hawai'i at 46, 924 P.2d at 540. "Whether it does rise to that level is ordinarily left to the discretion of the trial court." State v. Adams, 10 Haw. App. 593, 599, 880 P.2d 226, 232 (1994) (citation omitted).

The defendant's burden to show prejudice arising from juror misconduct during deliberations is difficult because, pursuant to Hawai'i Rules of Evidence (HRE) Rule 606(b),⁷ the

⁷ HRE Rule 606(b) provides:

Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon the juror's or any other juror's mind or emotions as

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court "cannot consider the jurors' testimony as to the effect of the improper statement upon them." State v. Larue, 68 Haw. 575, 579, 722 P.2d 1039, 1043 (1986). The court "can only consider whether such a statement was made (which is undisputed), and whether, given that statement, we can say that appellant had a trial before an impartial jury." Id.

influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. Nor may the juror's affidavit or evidence of any statement by the juror indicating an effect of this kind be received.

The commentary to HRE Rule 606 explains the origins and purpose of the rule:

Subsection (b): Under traditional English common law, the general competency of a juror to testify as a witness had one limitation: he was barred from giving testimony to impeach his own verdict. See McCormick § 68; Vaise v. Delaval, 1 T.R. 11, 99 Eng. Rep. 944 (K.B.1785). "The values sought to be promoted," according to the Advisory Committee's Note to the original proposal for federal Rule 606(b), "included freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." However, the blanket prohibition also bars testimony relevant to misconduct, irregularities, and improper influences external to the process of deliberation. The intent of this subsection is to strike a proper balance by excluding testimony relating to the internal deliberative process and allowing testimony about objective misconduct and irregularities. No attempt is made to specify substantive grounds for setting aside verdicts.

The Advisory Committee's Note to the original federal proposal, upon which subsection (b) is modeled, said: "The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room. . . . The jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion." For example, under this rule jurors would be competent to testify to the consumption of alcoholic beverages by deliberating jurors, a matter which under some circumstances may be cause for setting aside a verdict, see Kealoha v. Tanaka, 45 H. 457, 370 P.3d 468 (1962).

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Once the trial court determines that a juror's comments could substantially prejudice the defendant's right to a fair trial by an impartial jury, a rebuttable presumption is raised and "the trial judge is then duty bound to further investigate the totality of circumstances surrounding the alleged deprivation to determine its impact on jury impartiality." Furutani, 76 Hawai'i at 181, 873 P.2d at 60 (citation and brackets omitted). The burden then falls on the prosecution to show that the alleged deprivation was harmless beyond a reasonable doubt. Id.

In the instant case, Kim failed to satisfy his initial burden of establishing a prima facie showing that the possibility of juror misconduct could have substantially prejudiced his right to a fair trial. Kim asserted that Juror Seven would testify that Juror Ten, said, "What the fuck are we doing this for? I want to know who voted for the Manslaughter. I want to know who the fuck said Manslaughter." Juror Seven would also testify that Juror Ten, drawing on his personal experience with firearms, said, "Do you know the type of damage that a magnum can do? That that can do so much damage, that is a deadly weapon, and if anyone uses a magnum, they had to have a deadly intent," and that the foreperson supported Juror Ten. Juror Seven subsequently decided to "just go along with everyone else."

The above statements, if we accept that they were made, do not constitute information from outside sources, and, thus, were not improper. During his testimony, Kubo testified that a .357 magnum weapon has a longer case, resulting in the bullet having more velocity and power. Moreover, the bullets used were either jacketed hollowed point or jacketed soft point, both of

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which are designed to expand or mushroom out when hitting tissue. In addition, Dr. Omori testified that the victim died of a bullet that entered his back, fractured his rib, punctured his lung, and exited his chest. Based on the foregoing, Juror Ten's statement that a magnum can do "much damage" was established by Kubo and Dr. Omori during trial, and, thus, was neither information from outside sources nor improper.

Even if Juror Ten's statements were considered outside information, it is not the kind that would warrant a new trial. In Gabalys, this court held that a juror's comments regarding her impression of a particular establishment were not improper. Gabalys, 83 Hawai'i at 46, 924 P.2d at 541. This court noted that "[i]t is perhaps inevitable that, during jury deliberations, jurors may verbalize, based on their background and experiences, their perceptions regarding certain establishments or locations mentioned at trial." Id. In the instant case, Juror Ten verbalized that magnums can cause damage when used against a person. In fact, it is common knowledge that guns, in general, can cause damage when used against a person. Like the juror's statements in Gabalys, Juror Ten's statements were "insufficiently prejudicial to warrant the grant of a new trial." Id.

Assuming, arguendo, that Juror Ten's statements were improper, Kim would still be required to show how these statements were used as a circumstance against him. Pursuant to HRE Rule 606(b), Juror Seven would not be allowed to testify as to the effect Juror Ten's statements had upon her. As such, this court may not consider Juror Seven's belief that Juror Ten's

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statements influenced her decision.⁸ Because Kim's offer of proof made no other showing as to how Juror Ten's statements were used as a circumstance against him, his offer of proof was insufficient to warrant an evidentiary hearing. As such, based on the facts and circumstances in the instant case, we hold that the circuit court did not abuse its discretion by denying Kim an evidentiary hearing on his motion for a new trial based on juror misconduct.

Also of much importance, public policy demands that the sanctity of jury deliberations be vigorously guarded to ensure frankness and open discussion. It would be fatuous to expect or necessitate that all jurors be placid and composed during jury deliberations. Jury verdicts are reached only after open discussion, some of which may be assertive, contentious, and even offensive.

In 1915, the United States Supreme Court, albeit in a civil case, described the rationale supporting prohibition against a juror testifying as to the internal deliberations of the jury:

But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant

⁸ We do not hold that "jurors may not testify about incidents of jury misconduct during deliberations." Dissent at 6. We, instead, hold that jurors may not testify as to the effect an improper statement has on their decision, which is what Kim's offer of proof attempted to establish was a circumstance that was used against him.

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subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

McDonald v. Pless, 238 U.S. 264, 267-68 (1915). "The law is settled that, following dispersal of a jury, once it has been dismissed, if we allow such attacks by individual members on the composite verdict of all twelve we can expect an unsettling of the system out of all proportion to any expectable improvement in the administration of justice." United States v. Barber, 668 F.2d 778, 786 (4th Cir. 1982), disapproved for other reasons by United States v. Prince, 851 F.2d 234, 235 (4th Cir. 1988).⁹ Allowing inquiry into the effect of internal matters of jury deliberation upon the mental processes of particular deliberating jurors would discourage open discussion among jurors and severely impact the finality of judgments. Thus, public policy supports our holding in the instant case.

⁹ In Barber, the United States Court of Appeals for the Fourth Circuit based its decision pertaining to post-verdict juror interviews on the Federal Rules of Evidence (FRE) Rule 606(b). FRE Rule 606(b) provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Despite the dissent's claim that this court "in effect imports the greater restrictive scope of Federal Rule 606(b) into HRE Rule 606(b)," FRE Rule 606(b) was merely provided as a convenience to the reader in understanding Barber. At no time does this court base its opinion on FRE Rule 606(b). Dissent at 13.

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The dissent's proposed holding would likely inundate the circuit courts with new trials anytime a juror exhibits regret over a verdict. The dissent claims that: (1) Juror Ten's statements were improper because the statements intimidated Juror Seven and constituted extraneous information; (2) Juror Ten's statements were a circumstance against Kim because "[j]uror conduct that taints the integrity of the verdict manifestly redounds to the Defendant's detriment[;]" (3) Juror Ten and the foreperson made untruthful statements during voir dire; and (4) intimidation by fellow jurors "infringes upon a juror's right to serve." As discussed supra, regarding issues 1 and 2, the facts and circumstances in the instant case show that the circuit court did not abuse its discretion by denying Kim's motion for a new trial because Kim failed to meet his burden of making a prima facie showing in his offer of proof that Juror Ten's statements were improper, and, even if the statements were improper, Kim failed to show in his offer of proof that the statements were used as a circumstance against him. Regarding issues 3 and 4, these issues were neither raised nor argued by Kim on appeal, and, thus, will not be addressed by this court. See Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) ("Points not presented in accordance with this section will be disregarded except that the appellate court, at its option, may notice a plain error not presented."); HRAP Rule 28(b)(7) ("Points not argued may be deemed waived.").

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IV. CONCLUSION

Based on the foregoing, we affirm the circuit court's March 19, 2001 judgment.

On the briefs:

Keith Shigetomi
for defendant-appellant

Mangmang Qiu Brown,
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