NO. 23271

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
CHARLES WAGNER-SMITH, III, also known
as CHARLES SMITH, III,, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 99-0422(2))

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Foley, JJ.)

Defendant-Appellant Charles Wagner-Smith, III (Wagner-Smith) appeals from the Judgment[1] entered in the Circuit Court of the Second Circuit (circuit court) on February 10, 2000, following a jury trial at which Wagner-Smith was convicted[2] of the following charges:

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[1]/The Honorable Shackley F. Raffetto presided.

[2]/On December 13, 1999, during trial, a motion for judgment of acquittal was granted as to Count One (Assault in the Second Degree for bodily injury with a semiautomatic pistol). Judgment of Acquittal as to Count One was filed on February 7, 2000.

Count Two: Carrying or Use of Firearm in the Commission of a Separate Felony, in violation of Hawaii Revised Statutes (HRS) § 134-6(a) (Supp. 1998);[3]

Count Three: Prohibited Possession of a Firearm, in violation of HRS § 134-7(b) (Supp. 2001);[4]

[3/] In June 1998, HRS § 134-6(a) stated as follows:

> **§134-6 Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty.** (a) It shall be unlawful for a person to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not; provided that a person shall not be prosecuted under this subsection where the separate felony is:
>
> (1) A felony offense otherwise defined by this chapter;
> (2) The felony offense of reckless endangering in the first degree under section 707-713;
> (3) The felony offense of terroristic threatening in the first degree under section 707-716(1)(a), 707-716(1)(b), and 707-716(1)(d); or
> (4) The felony offenses of criminal property damage in the first degree under section 708-820 and criminal property damage in the second degree under section 708-821 and the firearm is the instrument or means by which the property damage is caused.

[4/] In June 1998, HRS § 134-7(b) stated, as it does now, as follows:

> **§134-7 Ownership or possession prohibited, when; penalty.**
> . . . .
> (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.

Count Four: Place to Keep Firearms, in violation of HRS § 134-6 (Supp. 2001)[5] for carrying a firearm, without it being in an enclosed container, in a vehicle on a public highway;

Count 5: Assault in the Second Degree, in violation of HRS § 707-711(1)(d) (1993),[6] for causing bodily injury with a PVC pipe;

Count Six: Terroristic Threatening in the First Degree, in violation of HRS § 707-716(1)(d) (1993),[7] by

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[5/] In June 1998, HRS § 134-6(c) stated, as it does now, as follows:

> **§134-6 Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty.**
> . . . .
> (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 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.

[6/] HRS § 707-711 states in relevant part as follows:

> **§707-711 Assault in the second degree.** (1) A person commits the offense of assault in the second degree if:
> . . . .
> (d) The person intentionally or knowingly causes bodily injury to another person with a dangerous instrument[.]
> . . . .
> (2) Assault in the second degree is a class C felony.

[7/] HRS § 707-716 states in relevant part as follows:

> **§707-716 Terroristic threatening in the first degree.** (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:
> . . . .

(continued...)

threatening to cause bodily injury with a semiautomatic pistol; and

Count Seven: Criminal Property Damage in the Second Degree, in violation of HRS § 708-821 (Supp. 2001).[8]

On appeal, Wagner-Smith contends the circuit court erred in allowing testimony about Wagner-Smith's drug use and that prosecutorial misconduct deprived Wagner-Smith of a fair trial. We disagree with Wagner-Smith and affirm the February 10, 2000 Judgment of the circuit court.

I. BACKGROUND

Prior to June 1998, Wagner-Smith's step-daughter (Cricket) had dated Reginald Yap (Yap). Vernon DeMello (DeMello) was Cricket's ex-boyfriend, and there was tension between DeMello and Yap as a result of their relationships with Cricket.

Yap testified that on June 28, 1998, he spent the day surfing in Halawa Valley on Molokai. That evening he drove a

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[7](...continued)

(d) With the use of a dangerous instrument.

(2) Terroristic threatening in the first degree is a class C felony.

[8]In June 1998, HRS § 708-821 stated, as it does now, as follows:

§708-821 Criminal property damage in the second degree.

(1) A person commits the offense of criminal property damage in the second degree if:

(a) The person intentionally damages the property of another, without the other's consent, by the use of widely dangerous means; or

(b) The person intentionally damages the property of another, without the other's consent, in an amount exceeding $1,500.

(2) Criminal property damage in the second degree is a class C felony.

friend home, drove to his home, and then drove back to Halawa Valley intending to surf early the next morning. On his way back to Halawa, Yap saw Cricket and DeMello, parked in their respective vehicles, talking on the side of the road. Yap drove past them without stopping.

Yap testified that he arrived at Halawa Valley at 11:30 or midnight, parked his truck facing the ocean, and fell asleep. He was awakened by the headlights of two vehicles that drove up and stopped behind his truck.

Yap testified that DeMello opened the truck door and began fighting with him. Yap blacked out for a short time after being hit on the head with a hard object by a second person. When Yap came to, he saw Wagner-Smith pointing a gun to Yap's forehead with his right hand and holding a stick in his left hand. DeMello jumped Yap from the side and knocked Yap down. As Yap lay curled up on the ground, he was repeatedly hit with the stick by Wagner-Smith and kicked.

Yap testified he ran, jumped into a river, and began swimming away. He heard windows breaking and saw his truck burning. Yap went to a friend's nearby house, where he spent the rest of the night. The following morning, he went to the hospital. As a result of the beating, Yap received injuries to his forehead, mouth, right wrist, and back.

As a result of the fire, the top of the motor melted and the entire truck burned. Captain Leonard Niemczyk, an expert in fire investigations, testified that separate fires were started in the passenger area and the engine area and were probably caused by the introduction of ignitable liquid.

Yap testified that he was unable to tell whether Wagner-Smith was high on drugs in the early morning of June 29 when Wagner-Smith was pointing a gun at Yap.

On cross-examination, Yap was asked about his personal use of crystal methamphetamine. Defense counsel then asked "[i]sn't it true that Charles Wagner-Smith did not want you around his home and Cricket because you were using that crystal methamphetamine? Yes or no, sir." Yap answered "No."

On redirect, the prosecutor requested a bench conference at which the following colloquy took place:

> [PROSECUTOR]: Counsel -- defense counsel asked [Yap] about isn't it true [Wagner-Smith] had a problem with using methamphetamine.
>
> THE COURT: With the daughter, yeah.
>
> [PROSECUTOR]: Yes. The witness has personal knowledge of [Wagner-Smith] himself using methamphetamine, and based upon the question that was asked by defendant I would like to ask that question in light of the motion in limine and approaching the bench first.
>
> THE COURT: Well, it seems like that's out of the bag now. That's the only question you're going to ask about?
>
> [PROSECUTOR]: About that.
>
> [DEFENSE COUNSEL]: Your Honor, I would object. I asked [Yap] specifically if [Wagner-Smith] was bothered by the fact that he was giving Cricket crystal methamphetamine.

THE COURT: It's relevant if there is methamphetamine and nobody's been making any objections to it.

[DEFENSE COUNSEL]: Your Honor, counsel opened the door with this witness to say he was using methamphetamine, and I believe I had a right to ask him what he believed was the reason why [Wagner-Smith] was mad at him. [Yap]'s already answered that it's not because he was using crystal methamphetamine with Cricket.

I don't believe that he should be -- [the Prosecutor] should be allowed to ask whether my client has used crystal methamphetamine.

THE COURT: Overrule the objection.

At the conclusion of the bench conference, Yap testified as follows:

Q.[PROSECUTOR]: [Yap], do you have personal knowledge that Charles Wagner-Smith was using crystal methamphetamine?

A.[YAP]: Yes.

Q. And was he using crystal methamphetamine at that time?

A. Yes.

Q. Was Cricket getting her crystal methamphetamine from you?

A. No.

Q. Were you getting your crystal methamphetamine from Cricket?

A. Yes.

Q. But not only from her; right?

A. No.

Wagner-Smith testified that shortly after midnight on June 29, 1999, he and DeMello drove to Halawa Valley in separate trucks. Wagner-Smith wanted to talk to Yap because he was concerned Yap might physically abuse Cricket since the previous evening Yap's car with its headlights off had followed Cricket's

car. Wagner-Smith stated that he did not take any type of firearm with him to Halawa Valley.

Wagner-Smith testified he saw DeMello approach Yap's truck, then saw Yap jump out of his truck and start swinging a bat at DeMello. Wagner-Smith intervened by kicking Yap in the ribs and head and then pulled Yap off DeMello. Yap attacked Wagner-Smith, who picked up a PVC plastic pipe and used it with his right hand to hit Yap in the head, shoulders and back. DeMello punched or kicked Yap a couple of times, and Yap ran off. Wagner-Smith noticed a fire in the cab of Yap's truck, and then he and DeMello left the area in their trucks.

In cross-examining Wagner-Smith about his record, the prosecutor asked: "what were you in jail for?" Defense counsel objected before Wagner-Smith answered, and the objection was sustained.

Defense witness Micah Buum (Buum) testified that he camped at Halawa Valley on the night of June 28, 1998, and observed Yap in his truck using a propane torch and a glass tube "to blow an ice pipe." Buum testified he then saw the following occur: DeMello arrived and yelled at Yap; Yap came out of "the vehicle" swinging a bat at DeMello; Wagner-Smith walked up and said something to Yap and then kicked Yap in the head; Yap fell off to the side and DeMello tackled Yap; Wagner-Smith picked up a PVC pipe and told Yap to stop fighting; Yap did not listen and

Wagner-Smith hit Yap "a couple of times with the bat"; Wagner-Smith yelled at Yap "don't hurt Cricket, or don't bother Cricket no more" and then walked away; Wagner-Smith walked away from "the vehicle"; "the vehicle was all on fire"; Yap ran off into the bushes; and Wagner-Smith and DeMello left. Buum saw no guns or gun-like objects in anyone's hands. Buum did not see Wagner-Smith do anything to cause the truck to burn and thought the fire started from the propane torch.

On cross-examination of Buum, the following colloquy occurred:

> [Q. PROSECUTOR] And, by the way, when we mentioned the reason why you were at MCCC[9] right now has nothing to do with this case; correct?
>
> A. [BUUM]: Correct.
>
> Q. You are in there for your own situation; correct?
>
> A. Yes.
>
> Q. But you have been convicted of crimes of dishonesty in the past?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Sustained.
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> [PROSECUTOR]: Your Honor, goes to credibility.
>
> THE COURT: Sustained.

At the close of Buum's testimony and after the jury had left the room, the Court noted for the record that Buum had appeared wearing an orange jail uniform and handcuffs that were very visible to the jury.

[9/] Maui Community Correctional Center.

Prior to trial, Wagner-Smith had filed a Motion in Limine, in which he asked the circuit court to preclude evidence of his criminal record or any other prior bad acts. At the hearing on the motion, the following colloquy occurred:

> [PROSECUTOR]: Your Honor, I do -- my concern is they do mention bad acts. In this case it appears that all if not most -- most if not all of the parties were involved in drugs, including the defendant, and especially if defense counsel puts certain witnesses on the stand, the drug scene or involvement -
>
> THE COURT: I don't want any bad acts that we haven't already talked about raised unless I hear about it first outside of the hearing of the jury.
>
> [PROSECUTOR]: Okay. So I can revisit that.
>
> THE COURT: Yeah, yeah. We can -- these are just advance rulings. You know, they can always be revisited based on changes that come up in the trial.
>
> [PROSECUTOR]: Okay.
>
> THE COURT: I just want to hear it first before the jury hears it.

Wagner-Smith agreed to stipulate for purposes of the prohibited possession charge (Count Three) that he had a prior conviction. The prosecutor read the following into evidence at the close of the State's case in chief:

> It is stipulated and agreed that one, prior to June 29th, 1998, the defendant, Charles Wagner Smith, III, also known as Charles Smith, III, was convicted of committing a felony; and two, prior to and on or about June 29th, 1998, Defendant Charles Wagner Smith, III, also known as Charles Smith, III, was aware that as a convicted felon he was prohibited from owning, possessing or controlling any type of firearm.

II. STANDARDS OF REVIEW

A. Admission of Evidence of Prior Bad Acts

> Evidentiary decisions based on [Hawai‘i Rules of Evidence] HRE Rule 403,[12] which require a "judgment call" on the part of the trial court, are reviewed for an abuse of discretion. [Hawai‘i Rules of Evidence Rule] 404[13] represents a

particularized application of the principle of HRE 403 (see Commentary to HRE 404), and we will employ the same abuse of discretion standard of review.

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[12]HRE Rule 403 provides:

Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[13]HRE Rule 404(b) [1993] provides in relevant part:

Other crimes, wrongs, acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

State v. Richie, 88 Hawai‘i 19, 37, 960 P.2d 1227, 1245 (1998) (internal quotation marks and citation omitted).

"Generally, to constitute an abuse, it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State v. Crisostomo, 94 Hawai‘i 282, 287, 12 P.3d 873, 878 (2000) (internal quotation marks and brackets omitted).

B. Prosecutorial Misconduct

"Prosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a

fair trial." State v. McGriff, 76 Hawai‘i 148, 158, 871 P.2d 782, 792 (1994).

"In order to determine whether the alleged prosecutorial misconduct reached the level of reversible error, we consider the nature of the alleged misconduct, the promptness or lack of a curative instruction, and the strength or weakness of the evidence against defendant." State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992).

III. DISCUSSION

A. Evidence of Prior Bad Acts

Wagner-Smith contends that Yap's testimony regarding knowledge of Wagner-Smith's drug use was highly prejudicial and not probative of any fact of consequence. The State argues that "the defense clearly opened the door for Yap on re-direct to explain why [Wagner-Smith's disapproval of Yap's drug use] was not true."

Initially, we address the State's argument that "[t]his evidence was not introduced in contravention to HRE 404(b) evidence to prove the character of a person in order to show action in conformity therewith, rather it was impeachment evidence." Thus, the State contends Yap's statement was properly used as impeachment evidence to rebut Wagner-Smith's purported defense that he did not want Yap around Cricket in part because of Yap's drug use.

Hawai‘i Rules of Evidence Rule 404(a)(3)[10] allows impeachment evidence, as provided under HRE Rules 607[11] or 608,[12] to impeach the witness. Yap was the witness in this instance, not Wagner-Smith. The State's contention is without merit.

"Although the trial court generally has the wide discretion to admit evidence, . . . [HRE] Rules 403 plus 404

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[10]/HRE Rule 404(a)(3) (2001) provides:

> **Rule 404 Character evidence not admissible to prove conduct; exceptions; other crimes.** (a) Character evidence generally. Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> . . . .
>
> (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, 609, and 609.1.

[11]/HRE Rule 607 provides:

> **Rule 607 Who may impeach.** The credibility of a witness may be attacked by any party, including the party calling the witness.

[12]/HRE Rule 608 provides:

> **Rule 608 Evidence of character and conduct of witness.**
> (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:
>
> (1) The evidence may refer only to character for truthfulness or untruthfulness, and
>
> (2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking the witness' credibility, if probative of untruthfulness, may be inquired into on cross-examination of the witness and, in the discretion of the court, may be proved by extrinsic evidence. When a witness testifies to the character of another witness under subsection (a), relevant specific instances of the other witness' conduct may be inquired into on cross-examination but may not be proved by extrinsic evidence.
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

specifically prohibit the introduction of prejudicial character evidence unless 1) an exception applies; and 2) there exists no other way to prove the accused's guilt." State v. Austin, 70 Haw. 300, 306, 769 P.3d 1098, 1101 (1989).

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

HRE Rule 404(b) (2001).

> Yet even when the evidence of other crimes, wrongs or acts tends to establish a fact of consequence to the determination of the case, the trial court is still obliged to exclude the evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

State v. Castro, 69 Haw. 633, 643, 756 P.2d 1033, 1041 (1988) (quoting HRE Rule 403).

Evidence of Wagner-Smith's use of crystal methamphetamine could be probative of Wagner-Smith's state of mind if the defense asserted that Wagner-Smith disapproved of Yap's use of illegal drugs. However, neither Yap nor Wagner-Smith asserted that Yap's drug use caused Wagner-Smith to be angry at Yap. Yap answered "No" on cross-examination when asked "[i]sn't it true that Charles Wagner-Smith did not want you around his home and Cricket because you were using that crystal methamphetamine?" Defense counsel's cross-examination of Yap concerning Yap's drug use and relationship with Cricket did not

open the door on redirect to the State's question about Wagner-Smith's drug use.

During the defense phase of the trial, Wagner-Smith testified that he went to Halawa Valley to talk to Yap after learning from Cricket and DeMello that Yap had followed Cricket that night in his car without his headlights on. Wagner-Smith believed there was a possibility that Yap might physically abuse Cricket. There was no mention of Yap's drug use as a reason for the confrontation.

Because Yap's statement regarding Wagner-Smith's drug use was not probative of any fact of consequence to the determination of the action nor allowable as impeachment evidence, we must determine whether Yap's statement created reversible error.

Wagner-Smith was convicted on all counts sent to the jury for deliberation. There was credible physical evidence to prove Counts Five and Seven, including photographs of injuries to Yap and the burned truck. Counts Two, Three, Four, and Six required the presence of a firearm, yet the only evidence that a firearm was present came from Yap's testimony. Wagner-Smith testified that he did not use a firearm. The jury's determination therefore found that Yap's testimony was more credible than Wagner-Smith's testimony.

Yap testified over the course of two days about the events on June 28 and 29, 1998. Yap testified that Wagner-Smith pointed the gun at Yap's forehead, right between his eyes, and that Yap was scared. Yap recognized Wagner-Smith as the holder of the weapon when he heard Wagner-Smith say, "Come on. Come on, Reg. Go ahead. Do it." Yap stood still and focused on the barrel of the gun until DeMello knocked him down from the side. Yap also gave a physical description of the gun and drew a picture that was admitted into evidence. The jury, therefore, had sufficient evidence with which it could convict Wagner-Smith.

We conclude that the admission into evidence of Yap's statement of Wagner-Smith's drug use was not "to the substantial detriment" of Wagner-Smith and, therefore, not reversible error. Crisostomo, 94 Hawai‘i at 287, 12 P.3d at 878. Wagner-Smith was not denied a "fair trial" by virtue of the admission into evidence of this one statement. Id.

B. Prosecutorial Misconduct

Wagner-Smith's second point of error states that "[t]he Prosecutor committed prosecutorial misconduct the cumulative effect of which was to deprive Wagner-Smith of his rights to a fair trial and to due process." Wagner-Smith cites two errors: (1) "the Prosecutor, without a factual basis, accused Buum, an important corroborating witness for Wagner-Smith, of a past

conviction for a 'crime involving dishonesty[,]'" and (2) the prosecutor asked Wagner-Smith "what were you in jail for."

"In assessing whether prosecutorial misconduct warrants a new trial, we consider three factors, namely, (1) the nature of the prosecution's conduct, (2) the promptness of a curative instruction (if any) to the jury, and (3) the strength of the evidence against the defendant." State v. Pacheco, 96 Hawai'i 83, 95, 26 P.3d 572, 584 (2001).

The State argues that because burglary is a crime of dishonesty, Buum's prior burglary conviction can be used to impeach Buum under HRE Rule 609.[13] The State, however, concedes "the trial court properly exercised its discretion to refuse admission of the burglary [footnote omitted] as a crime of dishonesty." We need not address the State's claim that burglary is a crime of dishonesty because we find the prosecutor's conduct harmless beyond a reasonable doubt.

The prosecutor's two questions were immediately objected to by defense counsel, and the objections were

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[13]/HRE Rule 609 provides in pertinent part:

> **Rule 609 Impeachment by evidence of conviction of crime.** (a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is inadmissible except when the crime is one involving dishonesty. However, in a criminal case where the defendant takes the stand, the defendant shall not be questioned or evidence introduced as to whether the defendant has been convicted of a crime, for the sole purpose of attacking credibility, unless the defendant has oneself introduced testimony for the purpose of establishing the defendant's credibility as a witness, in which case the defendant shall be treated as any other witness as provided in this rule.

sustained. There were no answers to the questions. The jury was previously aware of Buum's and Wagner-Smith's prior convictions because Buum appeared in court handcuffed and in prison clothing and Wagner-Smith had stipulated to his prior conviction for purposes of Count Three (Prohibited Possession of a Firearm). Thus, the prosecutor's conduct was not likely to have contributed to Wagner-Smith's conviction.

Assuming arguendo that the prosecutor's two questions constituted prosecutorial misconduct, we conclude these two questions did not prejudice Wagner-Smith's right to a fair trial. McGriff, 76 Haw. at 158, 871 P.2d at 792.

IV. CONCLUSION

For the foregoing reasons, we affirm the February 10, 2000 Judgment of the Circuit Court of the Second Circuit.

DATED: Honolulu, Hawai‘i, May 8, 2002.

On the briefs:

Joseph R. Mottl III
for defendant-appellant.

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

Chief Judge

Associate Judge

Associate Judge