NO. 23642

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAII, Plaintiff-Appellee, v.
LANCE KANESHIRO, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-1437)

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

Defendant-Appellant Lance Kaneshiro (Kaneshiro) appeals the July 10, 2000 judgment of the circuit court of the first circuit[1] that convicted him of assault in the first degree and sentenced him to a ten-year indeterminate term of imprisonment. We affirm.

I. Issues Presented on Appeal.

On appeal, Kaneshiro presents the following issues. First, whether the court committed plain error in allowing him to proceed *pro se*. Next, whether the court committed plain error in failing to conduct a proceeding to determine whether he was fit to proceed. Third, whether the court erred in refusing his request to subpoena surveillance videotapes from the bank where the incident in question occurred. Fourth, whether the court

[1] The Honorable John C. Bryant, Jr. presided over Lance Kaneshiro's (Kaneshiro) jury trial.

committed plain error in permitting the State's expert witnesses to opine on the etiology of the injuries suffered by the alleged victim. Next, whether the court erred in convicting him of assault in the first degree where there was insufficient evidence at trial to support the conviction. Sixth, whether the court erred in denying his motion for a new trial, that was based upon, *inter alia*, the prosecutor's alleged misconduct in violating the court's rulings *in limine* barring (1) admission of evidence of the alleged victim's drug abuse, (2) admission of evidence of Kaneshiro's drug abuse, (3) admission of evidence of Kaneshiro's prior abuse of the alleged victim, and (4) the use of the term "victim." And finally, whether Kaneshiro's standby counsel provided ineffective assistance of counsel by (1) failing to subpoena the alleged victim's son to corroborate her testimony about how she sustained her injuries, (2) failing to provide expert witnesses to testify on Kaneshiro's behalf, and (3) failing to object to inadmissible testimony that standby counsel knew was inadmissible.

II. Background.

On July 28, 1999, the State filed a complaint against Kaneshiro:

> On or about the 20th day of July, 1999, in the City and County of Honolulu, State of Hawaii, LANCE KANESHIRO did intentionally or knowingly cause serious bodily injury to Sharon Velasco, thereby committing the offense of Assault in the First Degree, in violation of Section 707-710 of the Hawaii Revised Statutes.

On September 15, 1999, the State filed an amended complaint in order to reflect an alias for Kaneshiro.

Hawaii Revised Statutes (HRS) § 707-710 (1993) provides that "[a] person commits the offense of assault in the first degree if the person intentionally or knowingly causes serious bodily injury to another person." HRS § 707-700 (1993) provides, in relevant part, that, "'Serious bodily injury' means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

In the proceedings below, Kaneshiro was represented by three court-appointed attorneys; *seriatim*, deputy public defender Walter J. Rodby, private attorney Valerie A. Vargo (Vargo) and, as standby counsel at trial, private attorney Mark A. Worsham (Worsham).

III. Evidence at Trial.

Kaneshiro's jury trial commenced on March 20, 2000. In the order of their appearances, the following witnesses testified.

Police evidence specialist Kristen Asmus (Asmus) testified that she was asked by the detective investigating the case to take photographs of the interior and exterior of the Waiʻanae branch of First Hawaiian Bank, the scene of the subject incident. She was also asked to draw a diagram of the bank.

During direct examination concerning these activities, Asmus made the following statements:

> Okay. So this is where I was told that this is the approximate location of where the victim fainted.
>
> . . . .
>
> And then I was told that the [recreational vehicle] had moved over here, and that's about 31 feet from where the victim was[.]
>
> . . . .
>
> Marker number 1 is in the proper location of where I was told the victim collapsed.
>
> . . . .
>
> This is a photograph from the interior of the bank looking out through the front entrance doors to the location where the victim ended up on the ground.
>
> . . . .
>
> This photograph was taken from the curb at the second place where the [recreational vehicle] came to rest looking back towards the front entrance of the bank and the site where the victim was on the ground.
>
> . . . .
>
> Again, the number 2 is the approximate site where the victim ended up on the ground.
>
> . . . .
>
> And this -- actually, right here would be approximately the area where the victim was on the ground.

Immediately after the last statement, the court called, *sua sponte*, a bench conference:

> THE COURT: Counsel, approach. On the record.
>
> (The following proceedings were held at the bench:)
>
> THE COURT: I want you to advise this witness outside the presence of the jury and all the rest of your witnesses that we do not use the "V" word.
>
> [PROSECUTOR]: Okay.
>
> THE COURT: We will not use victim. We will use complaining witness.
>
> [PROSECUTOR]: Yeah, I forgot to tell her. I forgot to tell her.
>
> THE COURT: You take her back to the bar area there and tell her, but I don't want her to use it

> anymore. Nor do I want to hear it from the rest of your witnesses.
>
> [PROSECUTOR]: Sure.
>
> THE COURT: Anything else?
>
> THE DEFENDANT: Thank you, Your Honor.

After the direct examination of Asmus was completed, Kaneshiro, on his own behalf, moved for a dismissal or mistrial on the ground that Asmus's use of the term "victim" "tainted the jury." The court denied the motion: "I don't think the jury, at this point, is tainted to the point where you cannot receive a fair trial." The court warned, however, that

> the State has been admonished regarding the use of the word victim. That will not occur anymore. If it does occur again, then the court will certainly entertain appropriate motions at the time. But at this point, the prosecutorial misconduct, if any, is certainly not sufficient to demand a mistrial or a dismissal.

At the same hearing, Kaneshiro requested that subpoenas be issued for eight defense witnesses. After some discussion, the list was whittled down to four or five. Kaneshiro also asked the court for expert witnesses:

> THE DEFENDANT: Okay, Okay. I got -- I got just one more little issue that I wanted to ask you about. Was the -- shoot. Who is the -- the -- for the State, isn't there an accidentologist or a legal photography -- who is the specialist that the State uses on this -- on the -- well, I don't have any -- what I'm saying is I don't have any -- what you want -- expert witnesses. And I wanted a expert -- I needed a expert witness. Either that or I'd like to have an investigator go out to the scene. I've never -- nobody's investigated it for me. [The prosecutor] had half the island doing it for him but --
>
> THE COURT: Well, you got the doctors coming in. Those are the only experts that are going to testify.
>
> THE DEFENDANT: I'd like to have an expert that shows, you know, the -- to speak of the physical scene, to go and investigate it on my behalf.
>
> THE COURT: I don't think you need an investigator.

THE DEFENDANT: I do, Your Honor.

After further discussion, Kaneshiro agreed to wait and see how he fared on cross-examination of the State's witnesses before seeking expert witnesses of his own.

Roberto Dumasig Rellin (Rellin), the head teller at First Hawaiian Bank in Waiʻanae, testified next. He remembered that on July 20, 1999, sometime between 8:30 and 9:00 in the morning, he was called from his office to the bank lobby. He saw a crowd in the "customer lobby line" standing around a woman lying full length on her side on the floor. Rellin described the woman as a "[l]ittle small lady, maybe five feet [or] so." When Rellin asked the woman if she was all right, she "[j]ust moaned on the floor." Rellin continued to ask the woman if she needed help. He also told "customer service" to call 911. At about the same time, Kaneshiro, a "pretty large, tall, Hawaiian-looking male[,]" walked into the bank and yelled angrily at the woman, "Stop playing around." Kaneshiro then "picked her up, put her on his shoulder, and then walked her out the door -- walked her towards the door." As Kaneshiro "grab[bed] her by the waist and threw her over his shoulder[,]" the woman moaned. "She was like in pain, or something, when he put 'em on her -- on his shoulder." Rellin picked up an identification card and a check the woman had dropped and told the bank's customer service representative to call the police. Rellin suspected domestic abuse. Rellin then walked out of the entrance to the bank and

saw the woman lying on her back on the ground right in front of the doors, holding her head with one of her hands, crying and moaning in pain. Rellin again asked the woman if she was all right, even though he knew she was not, and confirmed with bank staff that the police had been called.

While Rellin was waiting next to the woman on the ground, he noticed Kaneshiro, in a recreational vehicle in the bank parking lot, driving away. But then Rellin saw Kaneshiro again: "And he came back, I guess keep telling her that she was all right, she was all right, and that she was only playing around[.]" Kaneshiro angrily demanded the woman's check and ID from the assemblage at the scene. Rellin handed the items to Kaneshiro. The woman "was telling us . . . don't leave her, and she was crying. Can tell she was very hurt on the ground." After Kaneshiro obtained the items he had demanded, he got back in his vehicle, turned into one of the bank parking stalls, opened the vehicle door, and in a loud, angry voice, told three young children to get out. The children complied, crying. Kaneshiro then drove out of the bank parking lot.

Rellin recalled that he reviewed the bank's surveillance videotape right after the incident, at the request of the police. An Officer Spencer was with him during his review. Rellin maintained that the videotape did not show Kaneshiro or the woman. It did record "everybody hovering or circling her in the lobby like where she was."

Christy K. Kalili (Kalili) testified that she drove Rae Kinau McKeague and Liilani Ing to the bank the morning of the incident because Liilani Ing had to get money out of the ATM machine. While Kalili was parked in the bank parking lot, she heard some noises. She looked towards the entrance to the bank and saw Kaneshiro carrying a woman "-- he had her in his arms, and he was pushing her towards the door to get out. And as he pushed her, kind of like using her as a -- like a tool to open the door, and she -- they were walking out -- well, he was walking with her in his arms way -- he took several steps and immediately threw her on the ground." Kaneshiro "said a few words, and then he walked out towards the left." Because the woman "look[ed] like she was out" and because Kaneshiro was yelling at the woman, Kalili got out of her car and knelt down beside the woman to see if she was all right.

Kalili remembered that the woman "had hit her tailbone or her back side, her lower back, and landed on her back and then on her head. So she was laying on her back." Kalili confirmed that this meant the impact was to the "lower back and then upper back and then head[.]" When the woman came to, she complained about stomach pains and pointed to the right side of her stomach, saying she was hurt there. She also complained of pain in her shoulder.

Kaneshiro, who had been walking away, turned around and came back to where the woman was lying on the ground. Kalili

remembered that Kaneshiro was "[l]ike anxious kind, in a rush or really hyper." Then, in a "[v]ery loud and angry" voice, he "said she's only faking, to hurry up, get up, let's go, I going leave you here. And then that's when she told him -- me that please don't let him take me. Then I told him that you better go because the cops and the ambulance are coming." Kaneshiro was attempting to grab the woman, but left when Kalili told him the police and ambulance were coming.

The next time Kalili saw Kaneshiro, he had pulled his vehicle up directly in front of her and the woman. The woman repeated her plea that Kalili not let him take her. Then, "the next thing I knew, I looked and I saw three kids, and they were crying by the tree."

On cross-examination, Kaneshiro asked Kalili, "have you ever seen anybody stumble, Christy? . . . And could -- is it possible that I stumbled coming out of the door?" Kalili responded, "At the time, you seemed very mad. And when you were storming out, I was just paying attention to you, and it looked like you were mad enough, and you threw her down. So that's what I seen." Kalili added that Kaneshiro stomped his foot as he demanded that the woman get up off the ground. Kalili conceded, however, that it was "possible that [Kaneshiro] could have been scared and fidgety[.]" The following exchange occurred, without objection from Kaneshiro or Worsham, on redirect examination on this point:

Q. When you say fidgety, can you be more specific as to what you saw Mr. Kaneshiro doing at the time?
A. He was moving very fast.
Q. In what sense? Moving laterally back and forth or --
A. Yeah.
Q. -- hopping up and down or --
A. All of that and more.
Q. All of that?
A. He just looked like, you know, somebody who was on drugs. That's what I perceived it to be.
Q. And why do you know that?
A. We live in Waianae. Everybody in Waianae like that.
Q. Okay. And you're the exception, right?
A. Yeah.

Kaneshiro sought to counter on recross-examination:

Q. How does somebody on drugs look?
A. They look very agitated.
Q. Agitated?
A. And they sweat, and their eyes start going crazy.
Q. Yeah. And could that same thing possibly be perceived as somebody that was scared? Could it be perceived in the same way, if somebody was scared, Christy?
A. I guess you could say that, yeah.
THE DEFENDANT: I rest my case, Your Honor.

Rae Kinau McKeague (McKeague) testified that she and Kalili were sitting in Kalili's car that morning while Liilani Ing went to withdraw money from the ATM machine. She saw Kaneshiro, "carrying a woman out of the bank over his shoulder, and he took a few steps past the door, maybe three or four, and it looked like he flew her . . . on the ground." When asked whether "he stumbled or lost his balance before[,]" McKeague responded, "No, it didn't look like he did." McKeague remembered that the woman "landed straight on her back. She went -- her feet never touched the ground. It was her back and her head." The woman on the ground did not move or say anything.

After awhile, seeing that the woman did not get up, McKeague and Kalili got out of the car. The woman had started to move and cry. McKeague heard her say "don't let him take me." Kaneshiro had walked back to his vehicle, but returned when McKeague and Kalili were standing by the woman on the ground. "He asked her where his check was, told her to get up. And then he turned to everyone that was standing around [and said] that she was only faking, told her to get up again, and said he was going to leave her there. . . . Well, when he was talking to her, he was loud, you know, like he was real pissed [but then he] like turned around, and he talked to the crowd. He was, you know, like kind of calm, she only faking." McKeague heard the woman tell another woman, again, "don't let him take me."

Kaneshiro then walked back to his vehicle, drove to the front of the bank and stopped. Three children, two boys and a girl, ranging from three or four years of age to seven or eight years of age, came out of the vehicle. They walked over and "stayed by a tree and cried." Kaneshiro drove off and circled the block. McKeague lost sight of him after that.

Liilani Ing (Ing) testified that, as she was standing at the ATM machine outside of the bank, her attention was drawn to Kaneshiro, wearing denim shorts but otherwise, "no clothes on, no slippers on," who jerked open the door to the bank and went in. He looked upset. Ing turned her attention back to the ATM machine. Then, she saw Kaneshiro reemerge, carrying a woman

facing him, with both of his arms under her buttocks. He had used the woman's body to open the door. Kaneshiro then "slammed her to the ground." The woman "hit her back first, then her head." The woman "was like hurting." "She started crying, and her eyes was like kind of rolling back a little." Kaneshiro was "[t]elling her to get up and where's his check." His voice was loud and its tone, "Mad." The expression on his face was "[m]ad and upset." Kaneshiro returned to his vehicle and started driving out of the bank parking lot. Ing saw that three young children had been left behind.

Gail Tominaga, M.D. (Tominaga), a surgeon and Director of Trauma Services at Queen's Medical Center, testified for the State. After some qualifying questions, the State proffered Tominaga as "an expert witness in this case with a specialty in surgery and critical care." Kaneshiro, personally, answered in the negative when the court asked if there were any objections to the State's proffer.

Tominaga confirmed that Sharon Velasco (Velasco) was her patient at Queen's Medical Center, from admission on July 20, 1999 until discharge on July 27, 1999. Tominaga described Velasco's condition upon admission: "She had a ruptured spleen, and she had some confusion when she came in. So she may have had some evidence of head trauma." Consulting her notes, Tominaga recounted that "my impression was that she had a fractured spleen with free fluid in the abdomen. She had altered mental status,

and there is a question of assault as the mechanism." Tominaga also mentioned a broken right collarbone. As for her impression of Velasco's "altered mental status," Tominaga reported that she performed a toxicology screen, which was "positive for amphetamines or methamphetamines[,]" or "ice" in the vernacular. There was no objection to the testimony about the ice.[2]

Tominaga removed Velasco's spleen because "[s]he had a drop in her blood level that was evidence of ongoing bleeding." Tominaga was asked: "Do you have an opinion to a reasonable degree of medical certainty whether there was a substantial risk of death without your surgical intervention to remove Ms. Velasco's spleen?" She replied, "There's a high risk of -- of death. . . . She would have bled to death." Tominaga was also asked, "Would you agree that . . . her ruptured spleen, it was consistent with a history where she may have been slammed to the pavement?" She answered, "Yeah, some type of blow to the left side of her body." There was no objection to the last question.

Under cross-examination by Worsham, Tominaga confirmed that Velasco's altered mental state improved after the operation, and that this was consistent with any one or a combination of a relatively minor blow to the head, drug intoxication or bleeding. Tominaga recalled that Velasco had "some swelling around the

[2] During a subsequent hearing, Kaneshiro's standby counsel at trial, Mark A. Worsham, commented upon the toxicology screen: "We've already seen where the State has put -- has anticipatorily impeached Ms. Velasco by mention of the drugs."

right eye. It [(Tominaga's notes)] does say it appears somewhat old. And she had the deformity over her right collarbone." Tominaga could not remember or find in her notes any indication of the age of the collarbone fracture.

Worsham then engaged Tominga in the following colloquy:

> Q. With regard to the blow to the left side that you believe caused the rupture to the spleen, Doctor, were you able to tell whether that would have been to the front, the back, or directly to the side?
> A. No.
> Q. Which area, if any, would be more likely -- a blow in that area -- would be more likely to result in a ruptured spleen?
> A. I don't think there's any that's more likely. Any significant blow to anywhere in this left upper area or left lower chest area can cause a ruptured spleen.
> Q. But wouldn't it be more likely for a blow to the front of the chest cavity to cause a ruptured spleen than an equally forceful blow to the back?
> A. No.
> Q. Would not?
> A. (Shakes head from side to side)
> Q. The rib cage protects the back and protects the spleen on the back side, correct?
> A. Correct.
> Q. And the spleen is located, Doctor, if you will, just about here, and may the record reflect I'm showing about four inches under the left breast?
> A. Correct. But it depend -- it's a little variable in each patient, but it is more posterior, meaning it's more towards the back than the front, because the stomach is right underneath this area here.
> Q. But the tip of the spleen is palpable just below the edge of the rib cage in those cases where the spleen is swollen, is it not?
> A. Usually not anteriorly. More towards the side.
> Q. More towards the side?
> A. Yeah.
> Q. So it is possible in your medical opinion that she could have received this injury from being -- from crashing to the pavement, landing on her buttocks first and then her head?
> A. Correct.
> Q. And is it also possible that she could have received this injury by falling backwards while carrying some large object, very heavy object, that then fell on her abdomen?

A. If she fell more towards her left side.

James Gray (Gray), a licensed paramedic, testified that he and his partner were dispatched to the bank on the morning of July 20, 1999, "for an assault type of case." When they pulled up to the entrance to the bank, Gray noticed "a lady lying on the ground and some people standing around with HPD around." The woman identified herself as Sharon Velasco and disclosed that she was twenty-seven years of age. When asked where she was hurt, Velasco said it was "just mainly her shoulder." Gray's initial assessment detected abdominal pain as well, "but she wasn't too specific about it." An initial physical examination revealed a deformity to the right collarbone, and the paramedics "assumed that there might be a dislocation or a fracture there." Back pain, along with information from the police about the incident, led the paramedics to "put her in spinal precaution." Their subsequent physical examination failed to pinpoint the source of the abdominal pain. Gray observed bruises on Velasco's right eyelid and right cheek area, but "she wouldn't specify how" she got the bruises. When asked about the injury to her right collarbone, Velasco "stated that she hurt her shoulder two weeks ago but wasn't too specific about how or the circumstances as to how she hurt her shoulder." Velasco was likewise mum about the source of her back pain and her abdominal pain. Neither Kaneshiro nor Worsham had any objection to Gray's testimony. There was no cross-examination.

Joel R. Okazaki, M.D. (Okazaki), a radiologist, was proffered by the State as "an expert witness in the medical field or specialty of radiology." There was no objection by either Kaneshiro or Worsham to the proffer. Okazaki testified that on July 20, 1999, he examined x-rays and CAT scans of Velasco; specifically, "x-rays of the right shoulder, a CT scan of the head, and a CT scan of the abdomen and pelvis." Okazaki did not receive any information about how the injuries he detected allegedly occurred. He did not perform a physical examination of Velasco. The x-rays and CAT scans were prepared by a technician. Indeed, Okazaki did not remember ever having seen Velasco.

With respect to the x-rays of Velasco's right shoulder, Okazaki diagnosed a "displaced, overriding fracture" of the right collarbone, a "pretty severe injury" requiring "quite a bit of force" to inflict. The prosecutor elicited, without objection, the following opinions from Okazaki:

> Q. Would [the right shoulder injury] be consistent with somebody having been thrown to the ground from a height of about five feet on hard pavement?
> A. Possibly, if they hit the right location.
> Q. Okay. And if they hit the back side of the shoulder?
> A. It would depend on how the forces are transmitted, but that could occur.

Okazaki also noted that he saw no indication that the fracture was healing. Healing on such a fracture would commence within ten to fourteen days of injury, such that he would expect

to see some indication of healing in an injury inflicted two weeks before examination.

The CAT scan of Velasco's head looked normal. Okazaki did not see any fractures. He did detect, however, a hematoma about an inch in diameter on her right rear scalp. With respect to this injury, Okazaki offered, without objection, the following opinion:

> Q. And would that hematoma to the location on Miss Velasco's head be consistent with having struck her head on a hard surface?
> A. Yes.

The CAT scan of Velasco's abdomen showed a laceration of the spleen, that was bleeding into the abdomen. Okazaki opined that the laceration had been inflicted less than twenty-four hours before examination.

Worsham cross-examined Okazaki. Supplying a point missing on direct examination, Worsham elicited an estimate that the hematoma on Velasco's head had been inflicted within two to three weeks before examination. Worsham also elicited the following opinions from Okazaki concerning the causes of the various injuries:

> Q. Yes. Okay. So were you able to form an opinion as to how the injuries to the head and -- well, first of all, did you find the injury to the head and the injury to the clavicle consistent to an injury to the right side of the body?
> A. Well, there had to be direct injury to those two places.
> Q. And direct meaning, for example, if someone fell, they would have to fall on that side?
> A. Mh-hm. Yes.

Q. Because you're not going to get an injury to the right side of the head and the right clavicle by falling on the left side?

A. Right.

. . . .

Q. Barring something traumatic, such as an automobile accident in which a person's body can be thrown from side to side in the automobile, do you find the injuries to the right side of the body, that is, the scalp and the shoulder, consistent to a spleen rupture on the left side?

A. No. They would have to be injuries to all three different areas.

On redirect examination, the prosecutor followed up on the foregoing opinions:

Q. Now, with respect to the injury to the shoulder and to the right scalp, you're saying that those injuries are consistent with sustaining some type of trauma or blow to the head as well as to the right shoulder area?

A. Yes.

Q. Meaning the back side?

A. This area here, yes.

Q. You're pointing to the back of your right shoulder?

A. The back of the shoulder.

Q. Okay. Now, are you saying that in order to sustain a [(sic)] injury to the spleen that you have to have a blow directly to the left side of the body?

A. I believe so. In all the cases of a ruptured spleen, there has been trauma to that side right there.

Q. Okay. But if you're thrown on your back, could you sustain an injury from being -- from hitting your back -- left side of your back -- where is the spleen, by the way?

. . . .

A. The spleen is right under the rib cage little bit towards the back and in here.

Q. All right. So if you got hit or if you hit something -- if you hit your left lower back and then your right shoulder and your head, you could have sustained the spleen injury as well?

A. Yes.

On recross-examination, Worsham pursued the prosecution's last point:

Q. Doctor, under the hypothesis you were just given, a person lands on his left side and then somehow rolls with sufficient force to break the clavicle on the right and also cause this, I think you

said, two-centimeter thickness of hematoma on the right --

A. Yes.

Q. -- does that make sense?

A. Well, there can be different -- different ways of a body falling, and I'm not expert enough to tell you how a person would fall and hit various parts of their body.

Q. If the fall is described as being from an over-the-shoulder position to a kind of a throwdown onto the pavement and what is said is that the feet never touched the ground, what hits the ground is either the buttocks and the back first followed by the head, in other words, there's no rolling described, nothing else described, would you find that consistent with the claim that these injuries all came from the same incident?

A. Well, the -- the most significant injury would be the spleen, and that would be consistent with the patient landed on the left side or left back. And I think if the -- if the patient were to turn in the act of the fall and strike back here, doesn't take much to cause a little hematoma.

Q. I understand.

A. And the fracture of the clavicle would have to be more force than what you're describing.

Q. But to land on a flat surface as you're describing, the body would have to be twisted in almost a 90-degree angle, would it not, to cause the injury to the spleen on the left-hand side and, yet, also strike the area that you mentioned which is the back side of the right shoulder and the back side of the head?

A. If -- if all the parts landed at the same time, there would have to be twisting, as you said.

Q. Would have to be very twisted, and it's not consistent with being thrown flat down on the ground?

A. No, not if it was --

Q. Thank you.

A. -- just flat.

Sherry Wahl, R.N. (Wahl), was one of the receiving nurses for Velasco on July 20, 1999. Wahl performed a physical examination of Velasco. "She had bruises to the face, especially over the right eyelid area, the right shoulder, right arm. She was having pain in her abdomen, and there was some -- appeared to be some deformity over the right collarbone." The prosecutor established that Velasco told Wahl that the shoulder injury was

sustained sometime before July 20, 1999. The prosecutor was about to move on to the bruises on Velasco's face and arm when Worsham registered an objection, "Relevance." The following is from the bench conference that ensued:

> THE COURT: Mr. [Prosecutor], isn't the clear inference regarding the old bruises is that the defendant's been beating on this woman for some time?
> [PROSECUTOR]: Well, that's not what she says. So it's again anticipating that she will be denying any and all injuries that she sustained as attributable to the defendant.
> THE COURT: Well, don't these come up in the area of prior bad acts?
> [PROSECUTOR]: Well, I don't know. There's not going to be any testimony who inflicted those injuries.
> THE COURT: Well, the clear inference is is [(sic)] that the defendant did, I think.
> [PROSECUTOR]: Well, that would be a fair inference, Your Honor.
> THE COURT: All right, so I'm going to sustain the objection.

Neither Worsham nor Kaneshiro requested an admonition to the jury.

Lilibeth Garcia (Garcia), a licensed social worker, testified that she visited Velasco in the emergency room, at the request of an emergency room nurse. Before seeing her, Garcia reviewed Velasco's medical records. Velasco was lying in bed, awake and alert, but complaining of abdominal pain. Garcia asked her how she had sustained her injuries. Velasco refused to discuss "anything at all" about her injuries.

Police officer Yvette Eli (Eli) responded to a 911 drop call at First Hawaiian Bank in Waiʻanae on July 20, 1999, along with Officer Spencer. Upon arrival, Eli saw a crowd of people

standing around "[a] female laying on the ground on her back, moaning in pain." Eli asked Velasco what happened, but "she wasn't very cooperative. She didn't want to say what happened." Velasco did say, however, "that she made him do it." Later, Eli and Officer Spencer apprehended a suspect driving in a large recreational vehicle nearby, and identified him as Lance Kaneshiro. Upon returning to the bank to interview witnesses, Eli again spoke to Velasco. Velasco related at that time that her collarbone injury was an old one, sustained "last week at the beach when she fell in a hole."

Police officer Timothy Spencer (Spencer) accompanied Eli on the 911 drop call to First Hawaiian Bank in Waiʻanae. He remembered that after he finished interviewing witnesses, he reviewed the bank surveillance videotapes with Rellin. He confirmed that neither Kaneshiro nor Velasco was shown on the videotapes. Under cross-examination by Kaneshiro, Spencer admitted that Kaneshiro was cooperative when he was apprehended. Spencer also confirmed that Kaneshiro explained that he "didn't mean to drop her[.]" Spencer agreed that Kaneshiro was "concerned" and "concerned" about the baby he was holding in his arms. Also, Spencer allowed that Kaneshiro did not look angry.

Police officer Sean Asato (Asato) testified that on July 20, 1999, he was assigned to "locate the victim, Sharon Velasco, and get a statement from her [as] to what had happened." There was no objection to the foregoing statement. Asato talked

to Velasco at the hospital. She complained of pain in her stomach area, but did not want to give a statement about the incident. Asato got some information about Velasco's injuries from an attending physician, but could not get the physician to fill out an official form because Velasco would not give the physician her authorization to do so.

Howard Kawika Militante (Militante) testified that he and a friend were in the friend's car in the bank parking lot when he saw Kaneshiro carry Velasco out of the bank and "use the person he was carrying to open the door like forcefully." Kaneshiro walked two steps out of the door, "and then he slam her down on the ground." Velasco "hit the ground hard[,]" landing on her "upper back and maybe her head." Militante related that, because Kaneshiro was "like one friend of mine" at the time, he got out of the car and walked towards the couple in order to stop Kaneshiro from getting himself into any more trouble. Kaneshiro was pacing back and forth, angry and "kind of agitated," swearing and yelling at Velasco, "[s]omething about one check." Velasco was on her back, conscious, complaining of a sore back and "crying little bit for her kids." Kaneshiro then walked to his vehicle, said something to the children in the vehicle, came back to where Velasco was lying on the ground, and then left.

During cross-examination by Worsham, it was brought out that Militante had testified at the preliminary hearing and had said: "As I was sitting in the front of my vehicle, I saw a man

come out of the bank with a female being held in his arms above his shoulder, that he used her to push open the door and, for some reason, dropped or apparently slammed her to the ground." Militante maintained, however, that he had been "tricked" into making the equivocal statement. But he admitted that he now believes Velasco was slammed to the ground because he had heard that she was treated at the hospital as a result.

The State's final witness, police detective Gary Goeas (Goeas), testified that he attempted to interview Velasco at the hospital as part of his investigation of the incident. Velasco refused to meet with him and refused to be interviewed. Goeas ended up having to subpoena Velasco's medical records. Goeas completed his investigation on August 2, 1999. However, on September 14, 1999, he reopened the case because the prosecutor informed him that "Velasco insisted on giving a statement regarding the incident, the allegation on July 20th, 1999." That same day, Goeas conducted a taped and transcribed interview of Velasco.

In the course of the direct examination of Goeas were the following passages:

> [GOEAS]: This was -- initially, it was at Queen's Hospital on the day of the incident, July 20th. At about 7:00 p.m., after conducting my investigation at the scene, I went to Queen's Hospital to check on the victim. At that point, I met with Officer Kevin --
>
> THE COURT: Her name is Sharon.
>
> [GOEAS]: I'm sorry, Sharon.
>
> THE DEFENDANT: Objection.
>
> . . . .

[GOEAS]: We felt in the best interest of the victim, Sharon Velasco --
THE DEFENDANT: Objection.
[GOEAS]: -- we need to conduct further investigation.
THE COURT: Sustained. You will not use the word victim.

After the State rested, Worsham brought a motion for judgment of acquittal, which the court denied. At that point, the court inquired about the scheduling of defense witnesses. In that connection, Worsham discussed in some detail his ongoing attempts to have witness subpoenas served.

The defense opened with the testimony of Matthew Bruce Buckman (Buckman). Under direct examination by Kaneshiro, Buckman, a shipwright, testified that Kaneshiro and Velasco sold paint at the harbors for a living. He remembered seeing Velasco help Kaneshiro load and unload paint "[q]uite often." He estimated that a five-gallon can of antifouling paint weighs "between 120 and 150 pounds. It's full of lead." He had seen Velasco "manhandling" cans of such paint. On cross-examination, Buckman explained that Kaneshiro's business consisted of selling unused marine paint bought from the big shipyards to individual boat builders and owners at low prices.

Kaneshiro's next witness was Velasco, *n'ee* Sharon Mahi. Under direct examination by Worsham, she testified that she had been in a relationship with Kaneshiro for eight years. They had one daughter, four years old. Velasco had three other children, ages twelve, ten and seven. The oldest was a son, Roland Mahi

(Roland). Velasco said that her height was "five-six, five-seven." She estimated her weight, on July 20, 1999, as "about 120. Between 120, 130." Before the incident, she and Kaneshiro had a business reselling items that they bought at various auctions, such as marine paints. Velasco maintained that she helped load and unload the marine paint. She estimated that a five-gallon can of marine paint weighs between eighty and one hundred fifty pounds, depending upon type, antifouling paint being the heaviest. Velasco and Kaneshiro had been living on the beach with their children until about a week before the incident, when they acquired the recreational vehicle, a motor home that slept eight.

The day of the incident, they had to deliver paint to a boat broker at the Ala Wai Yacht Harbor. The purchaser had given them a one-hundred-fifty dollar check as payment. But first, they had to go to the bank to cash the check in order to have money to buy gas for the vehicle. Early that morning, Velasco and Roland were loading the paint into the vehicle while Kaneshiro "took the babies off to go get them ready in the shower." While Velasco and Roland were loading a can of antifouling paint, Roland neglected to "pull his weight," and as a result, Velasco fell on top of some other cans. The can they were loading fell on top of her. Roland was about to call Kaneshiro, but Velasco stopped him because she wanted to finish the job. About ten minutes later, however, "I just felt

tremendous pain in my stomach." She told Roland about the pain, and Roland again wanted to tell Kaneshiro. But Velasco insisted that they get on with the delivery, and "if I'm not feeling well, I will let him know, you know, then."

Kaneshiro drove them all to the bank and parked the vehicle. Velasco went into the bank to cash the check. While she was standing in the teller line, she started to feel bad. "My stomach was still burning and stuff." She sat down on top of a planter divider. The next thing she knew, she was looking up at the ceiling. People were asking if she was all right, and she kept shaking her head no. A lady's voice asked if she was there with anyone, and Velasco responded that her husband was inside the motor home with the children. Then came Kaneshiro, trying to pick her up and telling her to stand up in a soft tone of voice. "Everything was at a distance, you know." She kept saying that she could not stand up, yelling it because everything seemed so far away. But Kaneshiro, "[s]cared and nervous[,]" picked her up nevertheless, slung her over his shoulder, and with his hands under her buttocks, carried her towards the door. Her stomach was resting on his shoulder. "And the pain, it was just enormous." She tried to pull herself up to arrest the pain, and in her quest for leverage, grabbed one of the bank doors. But because Kaneshiro kept on going through the door, Velasco slipped out of his grasp and fell to the ground outside. "After my butt hit the ground, my head hit the ground, and it echoed."

Velasco denied that she and Kaneshiro had quarreled that morning. She denied that Kaneshiro used her body to open the bank doors. She acknowledged that "everyone was yelling he body-slammed her," but denied that was the actual case. She maintained that she hit her backside and the right side of her head when she fell out of Kaneshiro's grasp, and denied that she hit her shoulder in the process. She related that she had injured her right shoulder a week-and-a-half before the incident, when she tripped over a tent rope and landed in a hole her dog had dug. Although her shoulder hurt, she did not think it was broken and did not seek medical attention.

After Velasco fell to the ground outside the bank, Kaneshiro "was like running around panicking." Velasco was yelling at him not to touch her because she knew he would try to pick her up again to get her to the hospital. So she yelled at him to go get her aunt, who "lived down the road from the bank." Kaneshiro went to their vehicle and drove it up in front of the bank. He alighted and grabbed her purse, her ID card and the check. The man who was holding the ID and the check asked Velasco if it was all right to relinquish the items, and she told him it was. Velasco yelled for her children. They ran out of the vehicle just before Kaneshiro drove off. The ambulance arrived before Kaneshiro could return.

Velasco maintained that she refused to talk to the police while she was in the hospital because she was in too much

pain. After her discharge from the hospital, Velasco went "[s]traight to the Big Island." That had been her true residence all along. She returned to Honolulu in September 1999 because her mother told her that she needed to go back and make a statement. She made the statement to Goeas on September 13.[3]

The cross-examination of Velasco consisted primarily of a long impeachment of her testimony on direct examination. After some effort, the prosecutor was able to establish, at least obliquely, that Velasco had not wanted to press charges against Kaneshiro:

> Q. Can you answer my question, please. You didn't want to press any charges, did you?
> A. There was no charges to be pressed.

The following exchange occurred, sans objection, at the end of the cross-examination of Velasco:

> Q. Now, did you take ice the night before?
> A. Yes, I did.
> Q. How many hits?
> A. Two.
> Q. I mean was that for just recreational, or are you a chronic user --
> A. No.
> Q. -- back then?
> A. No.
> Q. What, recreational?
> A. That was the second time I tried it.
> Q. And were you still under the influence the next day?
> A. No, I felt fine.
> Q. What did you eat that morning?
> A. Peaches from a can.

The defense rested and the evidence was closed after Velasco's testimony.

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[3] Sharon Velasco's (Velasco) September 13, 1999 statement to the police was never proffered as evidence.

The prosecutor started his closing argument with some general remarks about the criminal justice system, including brief remarks about the principle that justice applies even to those who may appear sympathetic due to straitened circumstances. In this connection came the following passage:

> Now, take a look at the fact that they're [(Kaneshiro, Velasco and their children)] poor, okay. You know, there's a lot of people that are poor. They had only two bucks in their pocket. They had to go buy gas. They had a hundred-dollar check to cash. But they can still go out and buy ice and smoke. She admitted that. So you have to wonder.
>
> MR. WORSHAM: Objection. Misstates the evidence, Your Honor.
>
> THE COURT: Sustained.
>
> [PROSECUTOR]: Well, that's neither here nor there when you come down to it.

Further on in his closing argument, the prosecutor addressed the possibility that Velasco fainted in the bank due to pain from the broken collarbone and ruptured spleen she purportedly suffered before the incident:

> Well, the question is, well, she fainted didn't she? Didn't she say she was suffering pain and she fainted in the bank? Well, we don't know. There was no evidence to show what she really fainted from, right? Maybe she didn't eat enough. Maybe she didn't get enough sleep. You know, maybe she was coming down from something. We don't know. It's pure speculation. So you can't say just because she fainted that her story must be true.

The prosecutor then attempted to raise the question why Velasco's son Roland was not called by the defense to corroborate Velasco's claim that her spleen was injured when the paint can she and Roland were loading fell on her. Worsham objected because the law placed no burden of proof upon Kaneshiro. During the ensuing

bench conference, Worsham made the following representations to the court:

> But the reason we're not calling him is because these folks can't afford to bring him over [(from Maui)]. And I can't afford to bring him over. And if I had known about this argument in advance, I would have made that clear from the witness [(Velasco)]. I would have had an opportunity to ask her. And this is unfair surprise.

Worsham's objection was overruled.

Worsham made the defense's closing arguments. In arguing that Velasco was credible, Worsham pointed for example to her admission of drug abuse:

> But if she's so concerned about getting Lance Kaneshiro off at all cost, why would she be so upfront? The State also asked her you used ice -- did you use ice? Was there a second delay in her response? Yes, she explained, second time. She knew it was wrong. But there wasn't any delay. Don't you think that she was concerned about how this might be taken by the jury?
>
> But there's another question. Why was it so important to paint her with such a black brush? Because the State wants to tear down her testimony because it doesn't fit with their theory of the case.

Worsham also sought to turn Kalili's testimony, that Kaneshiro looked like "somebody who was on drugs[,]" to Kaneshiro's advantage:

> Liilani Ing [(sic)], I think -- I'm sorry, described Mr. Kaneshiro as looking wild, on drugs. Do you remember what she said when [the prosecutor] asked her, well what makes you think he was on drugs? Eh, Waianae, everybody's on drugs.
>
> Ladies and gentlemen, this kind of prejudice, this kind of preconceived notion by Liilani Ing [(sic)] . . . is exactly why we are in this trial, because people bring to every human experience their own prejudices, their own preconceived notions.

Worsham's closing argument also addressed the central issue of the etiology of Velasco's injuries:

> And as to Dr. Okazaki, what was his testimony? Bruise here, right shoulder blade broken, even assuming it was broken in the fall or a slam or whatever you end up calling it. But the spleen over on this side got damaged. How did that happen? Now, he said, oh, it's possible. Well, you know, almost anything is possible with the human body. Car accident, people get injuries all over the place. But if you listened, and I'm sure you did, of the description of the witnesses of how she landed, if you heard her explain how she landed, your next logical question is how in the world do you get an injury to the right side of the head and a ruptured spleen over here if you land on your butt?

Worsham also addressed the issue of Roland's absence:

> Where is Roland? Ladies and gentlemen, you will hear an instruction from the court that says the defense is not obligated to put on any particular witness or even put on any witnesses. It's a tactical choice that is sometimes made. And when you have a 12-year-old boy who's with family over on Maui and you no more money, you broke, you got to live in [a homeless shelter], and your husband, boyfriend, whatever you want to call him, is in jail, how you going get the boy back? And even if you do, you're going to put a 12-year-old on the stand? Your son, you're going to put him on the stand?
> . . . .
> So where is Roland? Roland is probably in the best place he could be right now. Does it mean that because he's not here today, that means Lance Kaneshiro was guilty?

In the end, the jury found Kaneshiro guilty of assault in the first degree, as charged. The jury rendered its verdict on March 24, 2000.

On April 3, 2000, Kaneshiro filed a handwritten motion for new trial. On the same day, Worsham filed a motion for judgment of acquittal or, in the alternative, for new trial. The two motions raised numerous issues about the conduct of Kaneshiro's trial. Those pertinent to this appeal involved the use of the term "victim" by the State's witnesses; evidence and comment concerning the use of ice by Kaneshiro and Velasco;

evidence about bruises on Velasco's face, shoulder and arm; the failure to call Velasco's son Roland to corroborate her testimony about the source of her injuries; and the failure to afford Kaneshiro an investigator and various other kinds of expert witnesses.

On July 10, 2000, the two motions for new trial were heard, along with other post-trial motions. Sentencing had been scheduled for the same hearing, in the event the motions filed by Kaneshiro or on his behalf were denied. During argument on the two motions for new trial, Worsham made the following comments:

> First, as to the issue of calling Roland Mahi, I made that decision in consultation with [Velasco] because there had been a questionable incident prior that Roland might testify to accidentally, if he were asked the right or wrong question, as it may be.
>
> Nevertheless, there was a motion in [limine] regarding prior bad acts of -- in prior bad acts. But to ask a 12-year-old boy to resolve the issue and make sense out of it would be asking a lot. Besides, I've appeared before this Court and family court, and I am aware that this Court is very reluctant to put children on as witnesses when it comes to violence in a family.
>
> . . . .
>
> It was a tactical choice, but I made it. The problem is, Your Honor, then we switched to pro se with no notice whatsoever to me. And at that point, when the Court allowed Mr. Kaneshiro to go pro se, his request to then call Roland Mahi was a horse of another color. The difficulty was, Roland was on Maui with his grandparents. We could not get in touch with them, and we certainly did not have the funds necessary to bring him over. We would have had to apply to the Court, and we would have had to have a continuance, and the continuance, Your Honor, is one of the things that Mr. Kaneshiro did ask for, although he did not articulate that particular point.
>
> Next, use [of] the word "victim." Mr. Kaneshiro informs me that after reviewing the transcripts, there's nine -- at least nine references. Now, the Court -- the first time I ignored, because simply to raise it as an issue would have only underlined it in the mind of the jury. I believe it was the second instance in which that word was used. The Court sua

> sponte cautioned the prosecuting attorney. But the problem is that this continued to happen. Now, I sat here in this chair and looked up at the Court. I saw the Court's eyes. I believed that the Court was aware of what was going on, and that the Court would deal with it appropriately. It's my fault, I did not make a proper objection for the record, but I do note that in my memorandum. It was my mistake, if anything.
> . . . .
> Next point. Ms. Velasco's use of drugs. [The prosecutor] says that no objection was raised. Your Honor, there are times when you do this kind of case that you trust and you rely on parties to act fairly and in the interest of justice -- and I'm not slamming [the prosecutor] on this point.
> . . . .
> But when you are faced with the situation where you have a bad act by someone who is not the defendant, but a witness, what is the appropriate way? Motion in limine. The problem is that it had no relevance to the case. And if I remember correctly, it was objected to on grounds of lack of relevance, and if it wasn't, it should have been. But then the Court will recall that this was a hybrid representation, and, quite frankly, it was a very confusing situation.

The court denied the two motions for new trial, and proceeded to sentence Kaneshiro to a ten-year indeterminate term of imprisonment.

IV. Pretrial Proceedings.

Certain pretrial events and proceedings are germane to the issues Kaneshiro presents on appeal.

At the November 30, 1999 return of a subpoena duces tecum for the bank surveillance videotapes,[4] Brian Horiki (Horiki) appeared as the bank's representative. Kaneshiro's counsel at the time, Vargo, told the court that

> I've been informed that the tapes that I had subpoenaed don't exist. Specifically, I wanted a tape of -- from the camera which faces the door, the

[4] The Honorable Michael A. Town, judge presiding.

> entrance to the bank. I was told that there is no camera facing that door. The only camera is behind the teller cages.

The court asked Horiki whether any videotape contained footage of the incident. Horiki replied:

> The tape which is an hour long time segment basically showed that there may have been a commotion in and around 8:45 that morning. There is no clear shot of the door. There is a shot of the foreground of the door and there is no one -- There is no evidence of anybody lying down.

Horiki also informed the court that there was no videotape of the area outside the door to the bank. In open court, it was arranged between Horiki and Vargo that Vargo would go to the bank to view the videotape Horiki had described. At this point, Kaneshiro explained why the videotape had been subpoenaed:

> Just before -- before -- when all this commotion happened, there was a lady that came from the bank and came out into the parking lot and she told me, she says, sir, your wife fainted inside the bank. This is the thing - nobody knows where this lady is, Judge Town, and this is the lady I need -- on the videotape this lady should be there. I mean, it should show it on there.

Kaneshiro also questioned Horiki's representation about the lack of videotape of the area outside the door to the bank:

> Judge Town, coming at the door, at the door of the First Hawaiian Bank, there's two cameras. There's one facing this way and there's one facing just like at your door, there's one going like that and one like that. And there's no -- I mean, there's no tapes for right there? They got two cameras at the door.

In response to Kaneshiro's rhetorical question, Horiki informed the court that "[t]he external shots are of the ATM machine so it doesn't shoot at the actual doorway." In light of the

arrangements made for viewing the videotape, Vargo withdrew the subpoena.

On December 13, 1999 Vargo filed a motion to withdraw as Kaneshiro's counsel. In her declaration in support of the motion, Vargo swore that she had viewed the bank videotape and that "said tape does not contain any material pertinent to this case[.]" (Emphasis in the original.) She further declared that she had explained this to Kaneshiro, but Kaneshiro had insisted that the videotape had been tampered with, and that he be allowed to personally view the videotape at the bank security office. At this impasse, Kaneshiro asked Vargo to withdraw as his counsel.

At the December 20, 1999 hearing on Vargo's motion to withdraw,[5] Kaneshiro remained focused on the bank videotape:

> Ms. Vargo tells me that I went in at First Hawaiian Bank and I picked up my wife off of the floor because she was fainted on the floor and I carried her out of the bank and out the door and I didn't show up on one of eight video cameras inside this bank. Well, I just don't believe that.
> . . . .
> I cannot -- not because I want to see the videotapes, it's because I know that somewhere those videotapes have got my picture and my wife's picture on there, Your Honor. I was rendering aid, okay. The lady -- they came and got me in the parking lot. She vanished. Nobody knows where she's at, okay. She fainted on the floor. This lady came out in the parking lot and said, sir, your wife fainted. I ran in the bank and there's my wife on the floor. Nobody knows where this lady is at, okay.
> . . . .
> Well, I told [(Vargo)] just the other day that I want a forensic specialist. I want a medical examiner. I want a private investigator. I want somebody to find out how come these tapes, if they

[5] The Honorable Richard K. Perkins (Judge Perkins), judge presiding.

> don't have my picture on them, how come they're not there.

When the court asked if Vargo had any response, she replied:

> Your Honor, about this tape, the tape is the property of First Hawaiian Bank. It's their security tape that is shot inside the Waianae branch of First Hawaiian Bank. For someone to say that First Hawaiian Bank has a reason to tamper with that tape or some motive to alter the tape I think is ludicrous.
>
> Second of all, it's not a regular videotape that you show on a regular VCR. This is a -- this tape is a time lapse photography tape. It show shots taken from eight different video cameras which are recorded in time lapse photography onto this one tape. So in order to play the tape, you have to have the time lapse photography video machines which I understand cost about $4,000. I'm not going to go out and buy a $4,000 machines so that he can see this tape.
>
> I don't really think that First Hawaiian Bank, this is a very secured area, I really don't think that they're going to allow him into that area in order for him to view the tape. I viewed the tape and I mean, when I say I viewed the tape, I'm talking normal speed, frame by frame, fast forward, forward, backwards. He is not on that tape. I mean that's all there is to it. He is not on that tape. The tape is not focused on the floor. It does not show anybody fainting or anybody being carried out of the bank.

When asked for his response, the prosecutor commented:

> Well, this whole thing about the tape is just a rouse [(sic)] because the incident that he's being charged with occurred outside of the bank. We have four eyewitnesses who gave statements to the police who claim that they saw Mr. Kaneshiro, also known as Robert Guillot, slam his wife on the pavement. So there are no cameras 'cause I sat there with Ms. Vargo on December the 3rd with the head of the director of security of First Hawaiian Bank James Femia and we went through the critical period when this incident occurred between 8:30 and 9 o'clock of July 20, 1999. And I can confirm there is nothing in those indoor shots that showed anything. There are no shots outside. And this incident happened outside. So this is just a bogus smoke screen.

On Vargo's motion to withdraw as counsel for Kaneshiro, the court concluded as follows:

> Listen, you've [(Kaneshiro)] given me three reasons; one, that Ms. Vargo hasn't said anything

> positive about your case. That's not a sufficient reason to discharge her.
> . . . .
> You say that she hasn't filed any pretrial motions but you can't identify any motions that she should have filed.
> . . . .
> To fire your attorney, you need to give me a valid reason. Just because she didn't file any motions is not a valid reason, unless you can point to a specific motion that has some merit and you haven't done that so you haven't given me a reason as far as that's concern [(sic)] to discharge her.
> Now, the last one is that you say there exist [(sic)] some sort of videotape that supports your defense. I have two attorneys who have seen the tapes for the day of the incident and have indicated that those tapes don't -- or the tape does not help you. And you have no evidence to the contrary except your own assertions, and I'm sorry, that's not sufficient for you to see the tape. So what that does is it crosses out one by one all three reasons you've given in support of your desire to discharge Ms. Vargo. There are no reasons, no sufficient reasons for you to discharge her. So that leaves us here with a choice on your part to proceed as your own attorney or to proceed with Ms. Vargo. She's your lawyer now. As long as you can work with her in some sort of civilized reasonable manner, I think you'll be all right, but if you . . . . continue to insist on things like viewing a videotape, then . . . . then you will have to represent yourself.

Despite its ruling, the court, at Kaneshiro's request, allowed him to file additional reasons why Vargo should be withdrawn as his attorney, and to accommodate him, set a further hearing for January 4, 2000.

Kaneshiro made his handwritten filing on January 4, 2000, asking that Vargo withdraw as his attorney, due to "irreconcilable differences[.]" In his filing, Kaneshiro stated various and sundry accusations about ineffective representation, including a claim that Vargo "withdrew the subpoena without her client's consent[.]"

At the January 4, 2000 hearing, the court attempted to address Kaneshiro's additional complaints about Vargo, but Kaneshiro continued to animadvert upon her handling of the videotape issue. In an attempt to "cut this short[,]" the court addressed Vargo:

> THE COURT: Are you able to represent Mr. Kaneshiro or is there a personal -- has his conduct alienated you to the degree that it would not be --
> MS. VARGO: Your Honor, if he's willing to be reasonable, I can represent him. But, I mean, first of all, he's got to stop this about the subpoena bit.

It was a vain attempt, as Kaneshiro continued to wrangle with the court:

> THE COURT: Now, you know, all of the paragraphs [of your filing] before that, I've reviewed, and I don't find a sufficient basis to discharge [Vargo]. And I asked her whether or not she can work with you. And you know, frankly, Mr. Kaneshiro, you appear to me to be a very very difficult person to work with because you think that you know how to run your case better than the lawyer does. And if that's your attitude, you might as well represent yourself, because it seems that's what you want.
> MR. KANESHIRO: Your Honor, I just want somebody that's on my side, that's all. That's all.
> THE COURT: Well, a lawyer appointed represent you has an ethical obligation to be on your side to raise reasonable defenses, reasonable arguments.
> MR. KANESHIRO: I don't want her for my attorney -- and if you want me to I'm going to try to get my own attorney but she's fired. I don't want her representing me, period.
> THE COURT: Well, what I'm trying to tell you, Mr. Kaneshiro, is, one, you want that videotape, you're not going to get it.
> MR. KANESHIRO: I will get it later, Judge.
> THE COURT: If I give you another attorney --
> MR. KANESHIRO: Yes, sir --
> THE COURT: And you want to fire that attorney because that attorney doesn't get you a videotape, then you're going to be representing yourself, because that -- and I don't know how many times I need to repeat that -- that is a totally meritless, frivolous reason, right, for changing an attorney.
> MR. KANESHIRO: That's not why. There's other reasons.

> THE COURT: Well, I've read the other reasons and they're not substantial reasons either. The only reason right now, and it has a little bit to do with my sympathy for Ms. Vargo more than anything else in having to work with you, that I will grant the motion, refer you to the public defender for new counsel but with the warning, okay, Mr. Kaneshiro, that, don't come to me next time saying your new lawyer hasn't shown you the videotape or refuses to subpoena that videotape to trial. I've already determined that the videotape is not going to help you. It's irrelevant.
>
> MR. KANESHIRO: How do you know, Judge, you haven't seen it.
>
> THE COURT: I heard statements from both attorneys. So that's finished. You can say it but if you do say it and that is the reason for your wanting to discharged [(sic)] your next attorney --
>
> MR. KANESHIRO: Yes, sir.
>
> THE COURT: -- you're going to be stuck representing yourself.
>
> MR. KANESHIRO: Okay.

At this point, the prosecutor interjected for the record:

> The court also had a hearing on a withdrawal of Walter Rodby,[6] from [the public defender's office] and it was based on an affidavit that Mr. Rodby prepared similar to Ms. Vargo's. And just for the record I want to say that those allegations made by Mr. Kaneshiro of Mr. Rodby almost parallel the same things that he's saying about Ms. Vargo. And I think there's a pattern here that Mr. Kaneshiro is really just manipulating the system, and I just want that stated for the record.

On January 14, 2000, the court filed its written order granting Vargo's motion to withdraw as counsel. An order appointing counsel made Mark A. Worsham (Worsham) Kaneshiro's third attorney.

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[6] Deputy public defender Walter J. Rodby (Rodby) was Kaneshiro's first attorney in this case. On September 27, 1999, Rodby filed a motion to withdraw as Kaneshiro's counsel, citing numerous allegations Kaneshiro had made about "declarant's shoddy services[,]" and concluding that there were "irreconcilable differences" between attorney and client necessitating his withdrawal as counsel. Judge Perkins granted the motion on October 26, 1999. An order appointing Valerie A. Vargo as Kaneshiro's next counsel was filed on October 29, 1999.

Just before Kaneshiro's jury trial was to start, Worsham informed the court[7] that

> Mr. Kaneshiro insists that the videotapes from the cameras at the First Hawaiian Bank in Haleiwa [(sic)] be made available to him for review so that he can use them in his defense. He insists that they are important and that they will help to exonerate him. My problem is, Your Honor, that on January 4th, 2000, the court, Judge Perkins, granted the motion to continue. However, he warned Mr. Kaneshiro not -- and this is a quote from the court minutes -- "not to come back to this court saying the new lawyer refuses to subpoena the videotape. This court has already determined that the tape is irrelevant." In light of that very clear mandate from Judge Perkins, I did not subpoena the tapes. It is my understanding, therefore, that Mr. Kaneshiro wishes to either, A, discharge me or proceed pro se and have me as standby counsel and to seek to have those tapes subpoenaed by himself.

Kaneshiro elaborated for the court his reasons for wanting to proceed *pro se* with Worsham as standby counsel:

> I would like to inform this honorable court that I would like to proceed pro se. See the case decided as State vs. Hutch, 861 P.2d 11, Hawaii, 1993. I would like the court to appoint attorney-at-law Mr. Mark Worsham as standby counsel.
>
> I also need Mr. Mark A. Worsham to file a writ of habeas corpus pursuant to HRS Chapter 660 to secure my release, where the preliminary hearing was procedurally defective on the grounds that the defendant was improperly denied a continuance to call my witness, my fiancee [(Velasco)], to the stand in my behalf. Also, I would like Mr. Mark Worsham to attain [(sic)] preliminary hearing transcripts.
>
> . . . .
>
> Since I will proceed pro se, I would need standby counsel, Mr. Mark Worsham, to obtain the videos from the bank, bring them to OCCC so I can look at them to see if they were needed for trial. See State vs. Hutch, 861 P.2d 11 at 20, number 8, Hawaii, 1993, says as a general matter, the pro se defendant must be allowed to control the organization and content of his or her own defense, to make motions, to argue points of law, et cetera. I need the video to show my fiancee collapsed in the bank and that I came to her aid. Also, the video will be for my fiancee's

[7] The Honorable John C. Bryant, Jr., judge presiding.

physician to show why my fiancee collapsed in the bank and what she was treated for at the hospital and to prove my innocence.

Also, I need a copy of the 911 telephone call from the bank on audio and transcribed, in print, so I can show the jury what was said and, also, what time the 911 call was made from the bank.

Also, I will need my -- I will need my son, Roland Mahi, who will testify that a lady came to my vehicle and told me my fiancee had fainted inside the bank. And the case should have been dismissed with prejudice because the lady that came to our vehicle who told me my wife had collapsed inside the bank is missing. She could have been a witness on my behalf to prove my innocence.

Also, I would need standby counsel, Mr. Mark A. Worsham, to obtain a complete file of what the prosecution has against me in this case, all police reports and statements, all ambulance/EMT statements, all bank statements, all physician statements, all my fiancee's statements, any and all information about any outstanding warrants from Texas or anywhere else.

Now concerning no bail. Defendant feels that no bail in this case is clearly an abuse of discretion. See the case cited as Sakamoto vs. Won Bae Chang, 56 Hawaii 447, 539 P.2d 1197, 1975. I seek a bail that I can afford, say $2,000 bail for I am not a threat to the community. I can support my family until there is a trial. The amount of bail rests at the discretion of the honorable judge, Your Honor. And now I seek a bail that is reasonable even if it means to set up another bail hearing, and I would like standby counsel, Mr. Mark A. Worsham, to set that bail hearing with the court.

Before granting Kaneshiro's request to proceed *pro se*, the court engaged him in the following colloquy:

THE COURT: Are you ready to waive counsel at this time? You have to give up your right to have an attorney if you want to act on your behalf, and I have to ask you some questions to make sure that you understand what that means.

THE DEFENDANT: I told you I'm taking psychological medicine. And, yeah, I'm having a good day today.[8]

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[8] Earlier in the same proceeding, Kaneshiro had moved to dismiss the complaint for violation of Hawai'i Rules of Penal Procedure (HRPP) Rule 48 (2000). The court denied the motion on the ground that Kaneshiro had waived the provisions of the rule. In arguing his motion, Kaneshiro told the court, "No, I don't -- I didn't understand when I was waiving it, Your Honor. Yeah, if I did, I mean - - I mean I been on medication ever since I been at OCCC, psychological medication, and for like eight months now, and it's all

THE COURT: Well, we'll talk about that. We'll talk about the medicine you're taking.

THE DEFENDANT: I've been mentally disabled since 1995, and I've got a physician in Hilo that'll tell you. That'll -- you know --

THE COURT: We're going to trial today.

THE DEFENDANT: Okay.

THE COURT: We're going to start picking jury as soon as we can.

THE DEFENDANT: Okay.

THE COURT: Now, you have indicated to me that you want to give up your right to have an attorney represent yourself in this case and have Mr. Worsham stand by as counsel, is that correct?

THE DEFENDANT: Yes, sir, it is.

THE COURT: All right. Let me ask you a few questions, please. How old are you?

THE DEFENDANT: 37.

THE COURT: And how much education have you had?

THE DEFENDANT: GED.

THE COURT: And you can read, write, and understand English?

THE DEFENDANT: Most definitely.

THE COURT: You're not under the influence of any type of alcohol or drugs at this time?

THE DEFENDANT: I told you I take psychological medicine.

THE COURT: That's my next question. You are under the -- what type of medication are you taking?

THE DEFENDANT: One is Zoloff (phonetic), and the other one is some new millennium drug. I don't know what it is.

THE COURT: And when was the last time you took those -- that medication?

THE DEFENDANT: This morning.

THE COURT: And is that affecting the way you're thinking or understanding this --

THE DEFENDANT: No, at this present time, I'm okay.

THE COURT: Have you been diagnosed with any type of mental health problem or emotional problem?

THE DEFENDANT: No, only -- only paranoid schizophrenic.

THE COURT: Who diagnosed you as paranoid schizophrenic[?]

THE DEFENDANT: Several doctors have.

THE COURT: Can you give me the name of one here in Hawaii?

THE DEFENDANT: I don't know -- I don't know the name of the one at OCCC.

THE COURT: The psychologist or doctor at OCCC had diagnosed you as paranoid schizophrenic?

THE DEFENDANT: Yes, sir.

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recorded. And so I have good days and bad days, and today's one of my clear days, 'cause I've gotten years of my life at stake."

THE COURT: You're understanding what we're talking about, though, at this time?

THE DEFENDANT: Seems to be, sir.

THE COURT: Now, you have a constitutional right to be represented by a lawyer at all times throughout the court proceedings. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And no one can take that right away from you unless you give up the right to have counsel. You're the only one that can take that right away from you, you understand that?

THE DEFENDANT: I think so.

THE COURT: A lawyer -- and Mr. Worsham's here today. A lawyer will help you and can help you throughout all stages of the criminal proceedings. The lawyer can research the law, conduct investigation, gather evidence, obtain witnesses, or determine if any technical matters exist which could result in a dismissal. The lawyer could stop the prosecution from bringing in evidence that would be against the Rules of Evidence and that might hurt your case and could and will help you explore all possible defenses, including no intent, factual dispute, self-defense, et cetera. Your attorney would be able to negotiate with the prosecutor to possibly amend or reduce the charges or seek a plea agreement or a dismissal. He can help you with the presentence report if you're convicted, argue for a minimum sentence, or ask for a stay of sentence in addition to seeking an appeal. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, you've indicated Mr. Kaneshiro, that you want to be your own lawyer during the trial. Have you been a defendant in a criminal trial before?

THE DEFENDANT: No, sir, I haven't. I've never been innocent before. I'm innocent now. I was always guilty whenever I go to court.

THE COURT: Have you ever represented yourself in court before?

THE DEFENDANT: No, sir, I haven't.

THE COURT: Now, in this particular case, you know the charges as well as anybody. You're charged with intentionally or knowingly causing serious bodily injury to Sharon Velasco, thereby committing the offenses [(sic)] of assault in the first degree. Maximum possible penalty in this case is 10 years in prison.

THE DEFENDANT: Okay.

THE COURT: I don't know if you're eligible for mandatory minimum or not. Now, if you represent yourself without a lawyer, I cannot help you in the case. I have to treat you as I would any other -- as a lawyer basically. I can't help you pick the jury. I can't help you make objections to the State. I can't help you call witnesses. You're going to have to be required to follow and know all of the rules and procedures regarding this trial.

THE DEFENDANT: Okay.

THE COURT: And [the prosecutor], he's had four years of college, three years of law school, and I think he's been practicing as a prosecutor for almost 17 years, and he's experienced and trained to try criminal cases. He's not under any obligation to give you any breaks because you'll be acting as your own attorney. You understand that?

THE DEFENDANT: I understand it's malicious prosecution, yes, sir, for the record.

THE COURT: All right. You understand I'm recommending that you have Mr. Worsham represent you in this case?

THE DEFENDANT: Do you understand that I'm proceeding pro se?

THE COURT: Yes, I do.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Did you understand my question?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Thank you. And finally, do you want to represent -- last question on this point, Mr. Kaneshiro. Do you want to represent yourself during the trial and give up your right to be represented by an attorney?

THE DEFENDANT: During the trial?

THE COURT: Yes.

THE DEFENDANT: Can we cross that bridge when we get there?

THE COURT: Oh, okay. I though we crossed it already.

THE DEFENDANT: Okay, then -- yeah, then let's do that, Your Honor. Yeah, I will handle it.

THE COURT: You're sure?

THE DEFENDANT: Yes, sir.

THE COURT: I'm going to have Mr. Worsham stand by. In other words, he'll sit at the table with you. And if you have any questions regarding anything that's happening in the trial or if you want to talk to him about anything that's happening during the trial, please feel free to do so.

THE DEFENDANT: Thank you, Your Honor.

(Footnote added.) The State objected to the court allowing Kaneshiro to proceed *pro se*, based upon Kaneshiro's lack of education and knowledge of procedural rules, and his lack of experience in conducting a jury trial. The court overruled the State's objection:

> First of all, I'm going to overrule the State's objections. I'm going to find that Mr. Kaneshiro has an absolute right under these particular facts and

> circumstances to represent himself. I'll find that he has been fully informed of his right to counsel and the benefits of having a lawyer and the possible pitfalls of self-representation without legal counsel. But I'll find that he has knowingly, freely, and voluntarily waived counsel and elected to proceed to trial pro se.

The court next confronted the question, raised by Worsham, of a bright-line rule for the respective trial roles and responsibilities of *pro se* defendant and standby counsel:

> [THE COURT:] In terms of the bright line, Mr. Worsham, and any relationship with Mr. Kaneshiro, I'm open to suggestions. Mr. Kaneshiro, what do you want Mr. Worsham to do, first of all? Be available to answer any question you might have?
>
> THE DEFENDANT: Well, I wanted some -- I wanted -- I want this -- I guess I'm going to have to file a writ of mandamus to get this -- to get these 911 tapes and these videos.
>
> THE COURT: That's the only way you're going to get it.
>
> THE DEFENDANT: So the writ of mandamus. And I want to -- I mean I want him to file a writ of habeas corpus, you know.
>
> THE COURT: What do you want him to do in the trial?
>
> THE DEFENDANT: In the trial?
>
> THE COURT: Yeah. I guess some of the options are he can give you suggestions about jury selection --
>
> THE DEFENDANT: Stand by for me and help me, yeah, with jury selection.
>
> THE COURT: Would you like him to just be there sitting and be responsive to your questions? What --
>
> THE DEFENDANT: I would like his assistance.
>
> THE COURT: Mr. Worsham.
>
> MR. WORSHAM: Your Honor, we start with the first question, does Mr. Kaneshiro wish me to conduct the voir dire of the jury, or does he wish to do it himself? That's threshold. Once we get past that, I have no problem in just making suggestions to him based on my investigation of the case.
>
> So that the court knows, the one witness that he specifically asked for, Roland Mahi, is 12 years old. He's currently residing on the island of Maui with his grandmother who we did not call him at this point, one, for tactical reasons but, two, because of cost. These folks have no money to ship him over.

Immediately after the court determined that Kaneshiro had exercised his right to proceed *pro se*, motions *in limine* were argued by the prosecutor for the State and Worsham for Kaneshiro. With respect to Kaneshiro's motion *in limine* to bar the introduction of evidence of prior bad acts, the colloquy went as follows:

> THE COURT: 2(b), I'll grant that. State's not going to use any prior bad acts, are they?
> [PROSECUTOR]: Only if he [(Kaneshiro)] opens the door, Your Honor.
> THE COURT: Very well. We'll cross that bridge when we come to it. If you do believe that the door has been opened, you shall get my permission prior to going into any of these areas.

The court also granted Kaneshiro's motion *in limine* against the use of the term "victim" to describe Velasco, the complaining witness. The court instructed the attorneys as follows:

> The complaining witness, I don't want anybody using the word victim. Okay, so this will be granted. She is the complaining witness. That's 2(g).

As it turned out, Worsham conducted jury selection. Worsham commenced his voir dire as follows:

> Good morning ladies and gentlemen. My name is Mark Worsham, as you heard the judge say, and I have the privilege of representing Lance Kaneshiro in this matter. Lance Kaneshiro is sitting right here, is an intelligent man. He knows what he wants, and he may, from time to time, actively participate in this trial. In fact, he may take over and let me take a break.

At one point during jury selection, the court addressed the question of how examination would be conducted during the trial:

THE COURT: All right. Each counsel will have 15 minutes to do opening, and then we will begin evidence. Mr. Worsham, Mr. Kaneshiro, I'm kind of inclined to leave it to you two -- because the State's going to be doing their direct examination, I'm not even sure it's proper if I -- under this type of relationship that you two have that I start mandating who's going to do cross-examination. So I think that's something that you two should hopefully be able to talk about and agree on.

THE DEFENDANT: Yes, sir.

MR. WORSHAM: I agree, Your Honor. The relationship is much less antagonistic than I thought it might have been, ... So that's fine.

THE COURT: Well, if there is a problem, let me know.

MR. WORSHAM: Right.

THE COURT: Let me know and we'll talk about it. But --

THE DEFENDANT: No, sir everything seems to be going all right with me.

During jury selection, Kaneshiro indicated to the court that Worsham would be giving Kaneshiro's opening statement to the jury. However, Kaneshiro ended up giving his opening statement. At the end of his opening statement, Kaneshiro told the jury, "Sorry. Realize I'm no professional but you guys just bear with me. And I guess Mr. Worsham will probably take over. Thank you much for your time." But during the State's presentation of evidence, Kaneshiro initially conducted cross-examination of the witnesses. Worsham made the objections. Worsham began conducting cross-examination during the testimony of the State's expert witnesses, Tominaga and Okazaki, and continued to do so thereafter, until Kaneshiro cross-examined Spencer and Asato. Worsham took up the cross-examination again with Militante. Then Kaneshiro cross-examined the State's final witness, Goeas. With a few isolated exceptions, Worsham made the objections throughout

the State's evidence. Kaneshiro commenced his case by conducting the direct examination of Buckman. Worsham conducted the direct examination of Velasco.

During the testimony of the State's second witness, Rellin, the prosecutor requested clarification of the "hybrid representation" being conducted by Kaneshiro and Worsham:

> [PROSECUTOR]: One more matter, Your Honor. Just so that the State is not prejudiced and the record is not confused, can we have the court order the defendant to decide who's going to be asking the questions. And I don't want to have to be anticipating two guys jumping up here. So if we can get a clarification. If objections are going to be done by standby counsel, that's fine with me. If cross-examination is going to be done by Mr. Kaneshiro, that's fine with me. But I'd like to have some clarification. Because he is pro se, he is supposed to be doing his own job and only getting assistance from Mr -- or advice from Mr. Worsham. But I think we're kind of in a hybrid situation right now which is difficult for the State.
>
> THE COURT: Well, I think we're in a hybrid situation, but I'm not sure it prejudices the State. Mr. Worsham has stepped in, made some objections. I'm going to allow him to do that.
>
> [PROSECUTOR]: I want to be sure the record is clear so that at some point later, Mr. Kaneshiro doesn't raise a Rule 40 saying his standby counsel was interfering with his role. So I want it on the record that Mr. Kaneshiro is willing to proceed on that fashion and that he's not going to use it as a sword later on. I don't know. Mr. Worsham might have a position as well.
>
> THE COURT: Well, I'm going to expect either Mr. Kaneshiro or Mr. Worsham to let us know if they have a problem with the way this trial is going in terms of presenting the defense case and cross-examining the defense case [(sic)].
>
> THE DEFENDANT: What is -- standby counsel -- what is -- more or less, with all due respect, what is the definition? I mean if I don't -- if I don't handle something, then he stands by, and he takes over, yes?
>
> THE COURT: It's basically what I allow.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Within the rules and discretion, my discretion. And I don't see any problem with the way things have been going through the first couple witnesses in terms of you asking the question, Mr.

Worsham helping clarify the record in terms of what photographs are being looked at and also in terms of making some objections to the State's questions. So is that all right with you, Mr. Kaneshiro, the way things are going?

THE DEFENDANT: Yes, sir, I'd like it on the record that this isn't meant as to -- to humiliate anybody. It's really just -- you know, I just --

THE COURT: I understand.

THE DEFENDANT: -- feel like there are some issues that I'd like --

THE COURT: You have an absolute right.

Mr. Worsham, you have any problems with the way things are going?

MR. WORSHAM: It's extremely awkward, Your Honor. But under the circumstances, I'll do what I can to fulfill the role that I have. The only thing that I would like clarified in addition -- it's kind of the parallel -- is the one voice -- I mean one-cause/one-voice rule that's applied, that we're not going to be switching courses in midstream on cross-examination of a particular witness between Mr. Kaneshiro and myself. My understanding is that if the person starts that examination, that same person finishes it. We don't have standby counsel jumping in and start messing --

THE COURT: Well, you're not going to do it without my permission. In other words, if you start to cross, Mr. Kaneshiro, you finish it. Then if, Mr. Worsham, at some point, you want him to cross-examine the witness, he will finish it. But if you two want to tag-team, so to speak, then get my permission first.

THE DEFENDANT: Yes, sir. Well, there's -- there's some -- well, Mr. Worsham is thorough -- he's a thorough and competent attorney. And so if -- but, you know, I mean nobody's perfect. So, you know, it's possible to miss -- and so if I was to, you know -- two heads are better than one. So if I was to observe that he might have missed a -- you know, maybe a small, you know --

THE COURT: Then write him a note.

THE DEFENDANT: Write him a note?

THE COURT: Write him a note.

THE DEFENDANT: Okay.

THE COURT: Talk to him. Whisper between yourselves.

THE DEFENDANT: Okay, Your Honor.

V. Discussion.

A. The Matter of Representation.

Kaneshiro first contends the court committed plain error in allowing him to proceed *pro se*.

"We may recognize plain error when the error committed affects the substantial rights of the defendant." State v. Lee, 90 Hawai'i 130, 134, 976 P.2d 444, 448 (1999) (citations and internal block quote format omitted). See also Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) (2000) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

Kaneshiro misapprehends the situation at trial. He did not proceed *pro se*. He asked to proceed *pro se* with the assistance of Worsham as standby counsel. That is what the court allowed and that is how Kaneshiro's defense proceeded. Indeed, elsewhere in this appeal, Kaneshiro argues ineffective assistance of counsel.

The trial court may permit such hybrid representation, "in its discretion, as a matter of grace." State v. Hirano, 8 Haw. App. 330, 334, 802 P.2d 482, 484 (1990) (internal quotation marks and citation omitted). "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. Cullen, 86 Hawai'i 1, 9, 946 P.2d 955, 963 (1997) (internal quotation marks and citations omitted).

We see no abuse of discretion here. Before allowing hybrid representation, the court conducted a colloquy with

Kaneshiro commensurate with that required before it could allow Kaneshiro to proceed purely *pro se*. The court continually monitored the hybrid representation as the trial progressed and made sure that it remained appropriate. See State v. Hutch, 75 Haw. 307, 323, 861 P.2d 11, 20 (1993) ("As a general matter, the *pro se* defendant must be allowed to control the organization and content of his or her own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial. In determining whether the right of self-representation has been respected, the primary focus must be on whether the defendant had a fair chance to present his or her case in his or her own way." (Brackets, internal quotation marks and citations omitted.)). And Kaneshiro did not, at any time during the trial, complain of any problems with his hybrid representation as it unfolded.

Even if we assume, *arguendo*, that what the court allowed was for Kaneshiro to proceed purely *pro se*, we see no error. In this respect, Kaneshiro contends he was not competent to waive his right to counsel because he was medicated and suffered from a mental illness. We disagree. Kaneshiro assured the court that these circumstances were not affecting his thinking or understanding. And the description of the colloquy and the ensuing trial that precedes this discussion demonstrates

that Kaneshiro knew, at all times, exactly what was going on and what he was doing.

Kaneshiro also argues that he did not voluntarily waive his right to counsel because he believed he had to proceed *pro se* in order to obtain the bank surveillance videotape. This is simply not true. The court iterated and reiterated to Kaneshiro *ad nauseam* that he could not have the videotape, no matter what.

Citing State v. Dowler, 80 Hawai‘i 246, 909 P.2d 574 (App. 1995), Kaneshiro contends the court's colloquy lacked certain advisements required before a criminal defendant may be deemed to have waived the right to counsel; specifically, that

> he was not advised that self-representation may be detrimental to his defense and that he bore the entire responsibility if he failed to advance a critical defense or to protect his rights at trial should he failed [(sic)] to object to improper evidence or to proffer the requisite offers of proof. He was not advised that he may not afterward claim that he had inadequate representation.

On the contrary, the overall tenor of the colloquy conducted by the court was to that effect. And at any rate, the purportedly mandatory advisements adverted to are not mandatory, only "guidelines which a trial court should follow to ensure that a defendant who elects to proceed *pro se* at trial has voluntarily, knowingly, and intelligently waived his or her right to the assistance of counsel at trial[.]" Dowler, 80 Hawai‘i at 250, 909 P.2d at 578. Rather, the critical inquiry is into "the totality of facts and circumstances of each particular case[.]" Id. The totality of facts and circumstances of this case show --

if it were necessary so to show in this case of hybrid representation -- that Kaneshiro voluntarily, knowingly and intelligently waived his right to the assistance of counsel at trial.

We conclude the court did not err in the matter of Kaneshiro's representation.

B. Fitness to Proceed.

Kaneshiro next contends the court committed plain error in failing to conduct a proceeding, pursuant to HRS § 704-404 (1993 & Supp. 2001),[9] in order to determine Kaneshiro's fitness to proceed, where there was "reason to doubt [his] fitness to proceed." HRS § 704-404(1).

> In this respect, the plain language of HRS § 704-404(1) establishes that the question whether to stay the proceedings - thereby triggering the trial court's obligation to appoint a panel of examiners pursuant to HRS § 704-404(2) - in circumstances where there is . . . "reason to doubt the defendant's fitness to proceed" . . . is left to the sound discretion of the trial court; that being so, the applicable standard of review on appeal of a trial court's refusal to stay the proceedings and to appoint a panel of examiners is obviously abuse of discretion.

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[9] Hawaii Revised Statutes (HRS) § 704-404 (1993 & Supp. 2001) provides, in pertinent part, that "[w]henever . . . there is reason to doubt the defendant's fitness to proceed, . . . the court may immediately suspend all further proceedings in the prosecution. . . . Upon suspension of further proceedings in the prosecution, the court shall appoint three qualified examiners in felony cases . . . to examine and report upon the physical and mental condition of the defendant." HRS § 704-405 (1993) provides, in relevant part, that "[w]hen the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. . . . If . . . contested, the court shall hold a hearing on the issue." HRS § 704-406 (1993) provides, in pertinent part, that "[i]f the court determines that the defendant lacks fitness to proceed, the proceeding against the defendant shall be suspended, . . . and the court shall commit the defendant to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment."

State v. Castro, 93 Hawai‘i 424, 426, 5 P.3d 414, 416 (2000) (citations omitted). In this respect, "only some rational basis for convening a panel is necessary to trigger the trial court's power to stay the proceedings and, thereafter, to appoint examiners." Id. at 427, 5 P.3d at 417 (internal quotation marks, brackets and ellipsis omitted).

On this point, Kaneshiro argues that,

> [a]lthough Kaneshiro stated that the medication did not affect his thinking and understanding at the present time, he stated that he had "good days and bad days," leaving unanswered the question as to his mental capacity on his "bad days" and when he might have them. He was diagnosed as a "paranoid schizophrenic."

These circumstances do not constitute a "rational basis" for believing that Kaneshiro was, at any time below, unfit to proceed. They constitute, at best, a purely speculative basis. And perusal of the record reveals that Kaneshiro had no "bad days" during the proceedings, only "good days."

Kaneshiro also contends that he was confused and lacked understanding of what was happening at certain points in the proceedings below. It is true that Kaneshiro appeared momentarily confused at certain junctures in the record. However, in those instances, his confusion immediately abated or was immediately remedied. A review of the whole record demonstrates that Kaneshiro's moments of confusion were just that, momentary, and minor.

C. The Bank Surveillance Videotape.

Kaneshiro claims the court erred in refusing his request to subpoena the bank surveillance videotape.

> We review a trial court's ruling limiting the scope of discovery under the abuse of discretion standard. A trial court's denial of a discovery request based on relevance, however, will be reviewed under the right/wrong standard.

State v. White, 92 Hawai'i 192, 196, 990 P.2d 90, 96 (1999) (citations omitted). The court denied Kaneshiro's request because it was not relevant. The court was right.

"Although a defendant should be afforded the opportunity to subpoena *relevant* documents, a defendant may not use the subpoenas duces tecum to launch a fishing expedition." Id. at 204, 990 P.2d at 102 (citations omitted; emphasis in the original). In seeking the videotape, Kaneshiro was patently trolling. Five people who reviewed the videotape appeared in court. Horiki, the bank's representative; the prosecutor; and Vargo, Kaneshiro's second counsel, all reported to the court that the videotape of the bank's lobby did not show Kaneshiro or Velasco, or any part of the incident. At trial, Rellin and Spencer testified to the same effect. Horiki also informed the court that the bank's outside security cameras are trained on the ATM machine, and not on the entrance to the bank where the critical, later part of the incident occurred. Kaneshiro's *idée fixe* to the contrary notwithstanding, neither the incident nor its protagonists were shown on the videotape. Hence, it was not

relevant and the court was right in refusing to issue a subpoena for it.

Rellin testified, however, that the videotape showed "everybody hovering or circling [Velasco] in the lobby like where she was." With this in mind, we consider Kaneshiro's averment that the videotape would help him identify the woman who allegedly went to his vehicle and told him that Velasco had fainted in the bank. We assume this assertion is somehow related to his insistence that the videotape would show him rendering aid to Velasco inside the bank. But this assertion is mere speculation, indistinguishable from the kind of wishful thinking that actuates your typical "fishing expedition." Id. And assume, for the nonce, that woman would be shown on the videotape, and further assume, she would be identified and found. The story Kaneshiro insists she would tell does not say whether Kaneshiro thereafter entered the bank with grave concern or with great anger. Kaneshiro nowhere enlightens us on this point. Indeed, there was nothing preventing Kaneshiro himself from testifying about what the woman told him and what he did in response.

We conclude the court was right in refusing to issue the subpoena.

D. The State's Expert Witnesses.

Kaneshiro maintains that the court committed plain error in permitting the State's expert witnesses, Tominaga and Okazaki, to opine on the cause of Velasco's injuries, because, he alleges, they were not qualified to do so. Kaneshiro explains that Tominaga was qualified as an expert only in the area of surgery and critical care, and Okazaki only in the area of radiology. Because neither was qualified as an expert in forensics, he argues, neither was qualified to give an opinion as to the cause of Velasco's injuries.

"[W]e apply an abuse of discretion standard when reviewing a trial court's decision regarding the reliability of expert testimony." State v. Vliet, 95 Hawai'i 94, 108, 19 P.3d 42, 56 (2001). We do not believe the court abused its discretion in this respect.

We first observe that Tominaga and Okazaki did not opine as to the cause or causes of Velasco's injuries. They opined that certain injuries were consistent with certain causes. They also addressed whether certain impacts could result in certain injuries.

But even if we take Kaneshiro's argument at face value, we do not agree that, generally, a court abuses its discretion in admitting a physician's opinion about the cause of an injury within his or her field of expertise. Etiology is part and

parcel of diagnosis and treatment. We would expect that physicians concern themselves with the causes of the injuries afflicting their patients. We would hope they would be vitally interested, for example, in whether a burn was caused by heat, chemical or radiation. The fact that neither physician in this case was qualified in forensics goes to weight and not to admissibility. Cf. Ditto v. McCurdy, 86 Hawai'i 93, 109, 947 P.2d 961, 977 (App. 1997) ("extensive cross-examination of the expert so as to elicit his or her assumptions and test his or her data is a more practical truth-seeking method than the exclusion of relevant opinion testimony" (citation, internal quotation marks and brackets omitted)).

Furthermore, we are aware of no rule against an expert witness rendering not only expert opinions, but lay opinions as well. This being so, we question whether the opinions of the physicians were, if not admissible as expert opinions, admissible as such. Hawaii Rules of Evidence (HRE) Rule 701 (1993).[10]

Finally, we observe that Kaneshiro's standby counsel, Worsham, utilized his cross-examination of the physicians to score points critical to Kaneshiro's contention that Velasco's injuries were not caused by the fall or slam to the ground. Cf.

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[10] Hawaii Rules of Evidence (HRE) Rule 701 (1993) provides that "[i]f the witness is not testifying as an expert, the witness' [(sic)] testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of the witness' [(sic)] testimony or the determination of a fact in issue."

Roxas v. Marcos, 89 Hawai‘i 91, 124, 969 P.2d 1209, 1242 (1998) (the doctrine of judicial estoppel "prevents parties from playing 'fast and loose' with the court or blowing 'hot and cold' during the course of litigation" (citations and some internal quotation marks omitted)).

E. Sufficiency of the Evidence.

Kaneshiro next contends there was insufficient evidence adduced at trial to convict him of assault in the first degree.

The test on appeal for a claim of insufficient evidence is "whether, viewing the evidence in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact." State v. Ildefonso, 72 Haw. 573, 576, 827 P.2d 648, 651 (1992) (citations omitted). See also State v. Tamura, 63 Haw. 636, 637, 633 P.2d 1115, 1117 (1981). "Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion." Ildefonso, 72 Haw. at 577, 827 P.2d at 651 (citation, internal quotations marks and ellipsis omitted). "The jury, as the trier of fact, is the sole judge of the credibility of witnesses or the weight of the evidence." Tamura, 63 Haw. at 637-38, 633 P.2d at 1117 (citations omitted). "[V]erdicts based on conflicting evidence will not be set aside where there is substantial evidence to support the jury's findings." Tsugawa v. Reinartz, 56 Haw. 67, 71, 527 P.2d 1278,

1282 (1974) (citation and internal quotation marks omitted). "It matters not if a conviction under the evidence as so considered might be deemed to be against the weight of the evidence so long as there is substantial evidence tending to support the requisite findings for the conviction." Ildefonso, 72 Haw. at 576-77, 827 P.2d at 651 (citation and internal quotation marks omitted).

On this issue, Kaneshiro focuses on certain specific deficits he detects in the evidence adduced at trial.

We have discussed and rejected his contention that the State's expert witnesses were not qualified to opine on the cause of Velasco's injuries.

Kaneshiro also complains that neither doctor gave all[11] of his or her opinions to "a reasonable degree of medical certainty." We know of no rule requiring such an incantation. Besides, the opinions of the physicians were not the only sources the jury could rely upon in deciding, beyond a reasonable doubt, that Kaneshiro caused serious bodily injury to Velasco.

Kaneshiro would remind us that both physicians testified there had to be a blow or direct trauma to the left side of the body to cause the ruptured spleen, but there was "a total lack of evidence" that there was any blow to the left side of Velasco's body. This claim is simply not borne out by the

[11] We observe that one of the State's expert witnesses, Gail Tominaga, M.D., gave her opinion that Velasco's ruptured spleen posed a high risk of death, "to a reasonable degree of medical certainty[.]"

evidence and reasonable inferences the jury could draw from the evidence.

Kaneshiro points to the dichotomy of the left-side spleen injury and the right-side collarbone and head injuries in arguing that it was impossible for Velasco to have suffered both the former and the latter in the same incident. This point is neither here nor there, for it was precisely the position of the State that the ruptured spleen, at least, was the result of Kaneshiro's actions.

Kaneshiro complains that there was no post-operative examination of the spleen to determine that it was the ground rather than the paint can that caused the rupture. Given the totality of the evidence adduced at trial, no such examination was necessary.

Finally, Kaneshiro contends there was "absolutely no evidence" that he intended or knew that his conduct would cause, specifically, a ruptured spleen.[12] But that is not what the State was required to prove. Assault in the first degree is committed if a person "intentionally or knowingly causes serious bodily injury to another person." HRS § 707-710. The *mens rea* of the offense need not apply to the specific kind of serious bodily injury involved in the particular case.

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[12] HRS § 702-204 (1993) provides, in pertinent part, that "a person is not guilty of an offense unless the person acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense."

With respect to the material elements of the offense, our review of the evidence adduced at trial, taken in the light most favorable to the State, reveals that there was substantial, nay ample, evidence to support the jury's verdict. The evidence was sufficient to convict Kaneshiro as charged.

F. Motion for a New Trial.

Kaneshiro argues that the court erred in denying his motion for a new trial, that was based upon, *inter alia*, the prosecutor's alleged misconduct in violating the court's rulings *in limine* barring (1) admission of evidence of Velasco's drug abuse, (2) admission of evidence of Kaneshiro's drug abuse, (3) admission of evidence of Kaneshiro's prior abuse of Velasco, and (4) the use of the term "victim."

HRPP Rule 33 (2000) provides that "[t]he court on motion of a defendant may grant a new trial to him if required in the interest of justice." See also State v. Matyas, 10 Haw. App. 31, 37, 859 P.2d 1380, 1383 (1993) ("HRPP Rule 33, which is modeled after Federal Rules of Criminal Procedure (FRCP) Rule 33, provides that the standard for granting new trials is 'in the interest of justice.'"). "[T]he trial court has broad powers to grant a new trial if for any reason it concludes that the trial has resulted in a miscarriage of justice. Despite this broad authority, however, motions for new trials are not favored and

new trials are to be granted with caution." Id. (brackets, internal quotation marks and citations omitted).

"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. To determine whether reversal is required under HRPP Rule 52(a)[13] because of improper remarks by a prosecutor which could affect Defendant's right to a fair trial, we apply the harmless beyond reasonable doubt standard of review. Furthermore, we may consider the nature of the misconduct, the promptness of a curative instruction or lack of it, and the strength or weakness of the evidence against the defendant." State v. Schmidt, 84 Hawai'i 191, 201, 932 P.2d 328, 338 (App. 1997) (internal quotation marks and citations omitted; footnote added).

Kaneshiro complains that evidence of Velasco's drug abuse was unalloyed character evidence and, as such, had no probative value.[14] He argues, in the alternative, that the

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[13] HRPP Rule 52(a) (2000) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

[14] HRE Rule 404(b) (Supp. 2001) provides:

> 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

probative value of the evidence was slight and substantially outweighed by its unfairly prejudicial impact.[15]

Velasco, the alleged victim in this case, was hostile to the State. This was implied by evidence presented at trial of her unwillingness to cooperate in Kaneshiro's prosecution, and confirmed by the substance of her testimony. Evidence of her drug abuse elicited by the State was relevant to impeach her testimony in two respects. First, evidence that she had used ice the night before tended to cast doubt upon her memory and perception of the incident. Second, the evidence offered an alternative explanation for her fainting spell in the bank -- that she fainted because of her drug use the night before and not because of the pain of her purportedly prior injuries. Worsham as much as conceded the evidence had relevance when he told the court that the results of Tominaga's toxicology screen of Velasco had "anticipatorily impeached" Velasco.

Hence, the evidence was not purely character evidence barred by HRE Rule 404(b) (Supp. 2001). And we do not believe,

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> mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

[15] HRE Rule 403 (1993) provides that "[a]lthough 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."

upon a review of all of the evidence, that its prejudicial impact substantially outweighed its probative value under HRE Rule 403 (1993). In this connection, we remember that the defense made no objection to the evidence. We are also reminded that Worsham made use of the evidence in closing argument in an attempt to bolster Velasco's credibility. On balance, we do not believe that the State's introduction of evidence of Velasco's drug abuse, if it was prosecutorial misconduct in that it violated the court's ruling *in limine*, prejudiced Kaneshiro's right to a fair trial. Schmidt, 84 Hawai'i at 201, 932 P.2d at 338. Nor do we believe it was a miscarriage of justice entitling him to a new trial. Matyas, 10 Haw. App. at 37, 859 P.2d at 1383.

With respect to Kaneshiro's condemnation of the State's introduction of evidence of his drug abuse, we first question whether such evidence was indeed introduced by the State. Kalili's testimony was that Kaneshiro, as he was standing over Velasco outside the bank, "looked like, you know, somebody who was on drugs. That's what I perceived it to be." (Emphasis added.) Furthermore, this testimony was apparently not asked for nor otherwise elicited by the prosecutor. And it was immediately followed by Kalili's admission that her observation was based upon a patent preconception about Wai'anae residents. Moreover, on cross-examination, Kaneshiro got Kalili to admit that the agitation she had observed in him could just as easily have been

a sign that he was afraid for Velasco's welfare. And Worsham, during closing argument, used Kalili's admitted preconception to tar the reliability of all of the State's witnesses. Here again, we do not believe, on balance, that evidence of Kaneshiro's drug abuse -- if Kalili's observation could be considered evidence of such -- prejudiced Kaneshiro's right to a fair trial. Nor can we say that it constituted a miscarriage of justice entitling him to a new trial.

We acknowledge that the prosecutor, during his closing argument, obtusely referred to Kaneshiro's and Velasco's alleged drug abuse in an attempt to counter any sympathy the jury might have about the couple's penury. This was improper. But that reference was immediately objected to, and the objection sustained, after which the prosecutor disavowed his remarks. In light of the copious evidence against Kaneshiro adduced at trial, any residual prejudice was harmless beyond a reasonable doubt. Cf. Schmidt, 84 Hawai'i at 200-203, 932 P.2d at 337-40 (in light of the overwhelming evidence of the defendant's guilt, the cumulative effect of several instances of improper or arguably improper comments by the prosecutor was harmless beyond a reasonable doubt).

Kaneshiro also complains of the State's introduction of evidence of Kaneshiro's prior abuse of Velasco. We again question whether Kaneshiro's characterization of the evidence is accurate. What he is complaining about is evidence from State

witnesses Gray and Wahl about bruises they detected on the right side of Velasco's body -- to the eye, the cheek, the shoulder and the arm. Other than this, there was no other evidence or argument presented to the jury that would directly or by inference connect the bruises with prior abuse by Kaneshiro. At the point during Wahl's testimony that the prosecutor was about to get into the subject of the age of the bruises, Worsham objected on the ground of relevance and the court sustained the objection. We cannot conclude, under these circumstances, that the inference of prior abuse by Kaneshiro was reasonably before the jury. In doing so, we keep in mind that one of the critical issues legitimately before the jury was the dichotomy between right-side injuries and left-side injuries, and the corresponding issue of their respective ages, all made relevant by Kaneshiro's defense that Velasco had sustained the incriminating injuries before the incident at the bank. Indeed, the first mention of the age of the bruises was made by Tominaga, under cross-examination by Worsham.

Citing State v. Nomura, 79 Hawai'i 413, 903 P.2d 718 (App. 1995), Kaneshiro argues that the use of the word "victim," a total of ten times during the testimonies of several State witnesses, was conclusive and connoted a predetermination that Kaneshiro had indeed committed a crime against Velasco.

In Nomura, we held that under the circumstances of that case, the use of the term "victim" in jury instructions

constituted an improper comment upon the evidence by the court, prohibited by HRE Rule 1102 (1993).[16] Nomura, 79 Hawai‘i at 416-17, 903 P.2d at 721-22. We noted that whether the complaining witness was the object of the crime and whether she suffered abuse were matters for the jury to decide. Id. at 417, 903 P.2d at 722. We determined, however, that viewing the instructions in their entirety, the use of the term "victim" was not prejudicial and thus, was harmless error. Id. at 418, 903 P.2d at 723.

The ruling in Nomura precludes only the court from referring to the complaining witness as the "victim" in its jury instructions. As we explained in Nomura, the rationale behind HRE Rule 1102 is that "judicial comment upon evidence risks placing the court in the role of an advocate." Nomura, 79 Hawai‘i at 417, 903 P.2d at 722. "It is essential that the presiding judge endeavor at all times to maintain an attitude of fairness and impartiality." Id. (internal quotation marks and ellipsis omitted). That rationale does not apply here.

Here, all ten references to Velasco as the "victim" were made by State witnesses. We note, in addition, that seven of the references were made by Asmus, the State's first witness and a purely foundational one, before the court *sua sponte*

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[16] HRE Rule 1102 (1993) states:

> The court shall instruct the jury regarding the law applicable to the facts of the case, but shall not comment upon the evidence. It shall also inform the jury that they are the exclusive judges of all questions of fact and the credibility of witnesses.

intervened and admonished the prosecutor regarding future use of the term by his witnesses. The remaining three references came during the testimonies of collateral State witnesses Asato and Goeas, with the last two references drawing the court's *sua sponte* admonition on the point, in the hearing of the jury.

In light of the foregoing circumstances, and in light of the totality of the evidence, we conclude the use of the term "victim" by the State witnesses, if improper, was harmless beyond a reasonable doubt.

G. Ineffective Assistance of Counsel.

For his final point on appeal, Kaneshiro contends his standby counsel, Worsham, provided ineffective assistance of counsel by (1) failing to subpoena Velasco's son Roland to corroborate Velasco's testimony that she was injured by the paint can before the subject incident, (2) failing to provide expert witnesses to testify on Kaneshiro's behalf, and (3) failing to object to inadmissible testimony that Worsham knew was inadmissible. The standard for reviewing ineffective assistance of counsel claims is well established. We apply it to this instance involving standby counsel:

> When an ineffective assistance of counsel claim is raised, the question is: When viewed as a whole, was the assistance provided to the defendant within the range of competence demanded of attorneys in criminal cases? Additionally, the defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions

> resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.

State v. Janto, 92 Hawai‘i 19, 31, 986 P.2d 306, 318 (1999) (citation and internal quotation marks and block quote formats omitted).

Kaneshiro first claims that Worsham rendered ineffective assistance of counsel by failing to subpoena or to otherwise call Roland to trial to corroborate Velasco's testimony that the can of antifouling paint she and Roland were loading fell on and injured her the morning of the incident in question. This claim is spurious.

It is true that, before he was allowed to proceed *pro se* with Worsham as standby counsel, Kaneshiro harped upon the need to call Roland as a witness at trial. However, when Worsham was relegated to the status of standby counsel, just before jury selection, Kaneshiro thus and then gained "actual control of his defense[.]" Hutch, 75 Haw. at 324, 861 P.2d at 20. Thereafter, no mention was made of subpoenaing Roland or calling him as a witness at trial, let alone mention of a refusal or neglect by Worsham to subpoena or otherwise assist Kaneshiro in getting Roland to trial. Indeed, after the direct examination of the State's first witness, Asmus, Kaneshiro asked the court to subpoena a number of defense witnesses. There was no mention then of subpoenaing Roland or calling him as a witness, or of any problems relating thereto. And after the State rested its case,

Worsham informed the court about his progress in having the defense witness subpoenas served. There again, there was no mention of subpoenaing Roland or calling him as a witness at trial, or of any problems relating thereto.

The next mention of the issue came in the motions for new trial. Despite Worsham's attempt to fall on his sword at the hearing on the motions, the fact remains that Roland was not called as a witness because of cost considerations, concern for the twelve-year-old's welfare and the fear that Roland might reveal on the witness stand untoward information about "a questionable incident prior[.]" This Worsham explained repeatedly -- before, during and after the trial -- to the court and, in one instance, to the jury. The record clearly shows that these were the true reasons for the failure to call Roland as a witness at trial, not any refusal or neglect by Worsham. There was no ineffective assistance of counsel in this respect.

Kaneshiro next claims that Worsham rendered ineffective assistance of counsel by failing to obtain expert witnesses for the defense. This claim was stated in various ways at various junctures below. On appeal, the claim has become the failure to provide a forensic witness on the trauma to Velasco's spleen. This, despite Worsham's success in eliciting favorable opinions on the subject from expert witnesses Tominaga and Okazaki. However, Kaneshiro has never, neither below nor on appeal, specified exactly what kinds of expert witnesses would have

helped him, in what ways and with what testimonies. Here again, Kaneshiro was, and still is, just fishing. White, 92 Hawai‘i at 204, 990 P.2d at 102. There was no ineffective assistance of counsel in this respect, either.

Finally, Kaneshiro claims that Worsham rendered ineffective assistance of counsel by failing to object to inadmissible evidence that Worsham knew was inadmissible. This claim arises primarily from various "admissions" Worsham made at the hearing on the motions for a new trial. Again, it is rather obvious that Worsham fell on his sword for his client at the hearing. And, in any event, the alleged failings were in connection with the admission of prior bad acts evidence and the use of the term "victim." We have considered these alleged errors and determined them to be, at worst, harmless beyond a reasonable doubt. There is nothing here that "resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Janto, 92 Hawai‘i at 31, 986 P.2d at 318. Hence, there was, in this final respect, no ineffective assistance of counsel.

VI. Disposition.

The court's July 10, 2000 judgment is affirmed.

DATED: Honolulu, Hawaii, March 27, 2002

On the briefs:

Theodore Y. Chinn, for
defendant-appellant.

Maurice Arrisgado,
Deputy Prosecuting Attorney,
City and County of Honolulu
for plaintiff-appellee.