NO. 23759

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
KENNETH BATONGBACAL, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-2062)

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

Defendant-Appellant Kenneth K. Batongbacal (Batongbacal) appeals the judgment entered on August 25, 2000, in the circuit court of the first circuit, the Honorable Victoria S. Marks, judge presiding, that convicted him of assault in the second degree and burglary in the first degree. The court sentenced Batongbacal to concurrent, indeterminate terms of imprisonment of five years and ten years, respectively.

On appeal, Batongbacal stakes out the following points of error: (1) that he was denied the effective assistance of counsel in several respects; (2) that the court erred by excluding evidence of his nonviolent character; (3) that the court erred in admitting hearsay testimony; and (4) that the court erred in refusing to give the jury an alibi instruction. We have examined each of his claims, and for the reasons set forth below, we affirm the judgment of the court.

I. Background.

On October 18, 1999, the State charged Batongbacal via complaint with committing one count of assault in the second degree, in violation of Hawaii Revised Statutes (HRS) § 707-711(1)(d) (1993),[1] and one count of burglary in the first degree, in violation of HRS § 708-810(1)(c) (1993).[2] The State accused Batongbacal of entering the residence of Rita Le Stronge (Le Stronge) and therein assaulting Le Stronge's daughter, Casey Inocelda (Inocelda), with a dangerous instrument.

Three days before trial, the State filed a motion *in limine* to exclude, *inter alia*, testimony from any witness, other than Batongbacal, establishing or tending to establish an alibi defense. The State wanted to prevent the defense from springing surprise witnesses during trial, since Batongbacal had not given the State notice of an alibi defense. At trial, Batongbacal moved *in limine* to present evidence of, *inter alia*, his whereabouts during the incident and relevant time frames. The court granted Batongbacal's motion but denied the State's. The

---

[1] Hawaii Revised Statutes (HRS) § 707-711(1)(d) (1993) provides that "[a] person commits the offense of assault in the second degree if: . . . . The person intentionally or knowingly causes bodily injury to another person with a dangerous instrument[.]" (Enumeration omitted.)

[2] HRS § 708-810(1)(c) (1993) provides that "[a] person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and: . . . . The person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling[.]" (Enumeration omitted.)

court ruled that the State's request was moot because the State's witness list named the same people as Batongbacal's witness list.

Jury trial commenced on May 15, 2000. Inocelda testified first for the State. Inocelda lived in an apartment with Le Stronge and her brother, William Inocelda (William). Batongbacal and his mother, Clarencia Batongbacal (Clarencia), lived in the same apartment complex as Inocelda, almost directly across the parking lot from Inocelda's unit. Inocelda had lived at the apartment complex for nineteen years. According to Inocelda, Batongbacal had been her neighbor for "[a]s long as I remember. I don't remember when I was a kid but at least in my teens, maybe seven years. . . . . Could be longer, could be shorter." Inocelda saw Batongbacal "at least every other day[,]" either washing his car, watering his lawn, taking out the rubbish or incidentally when Inocelda was outside doing some chore. Inocelda had exchanged greetings with Clarencia, but never with Batongbacal.

Each apartment unit was assigned two parking stalls. A few days before the incident, Inocelda and Clarencia had a less-than-cordial conversation about a couple of parking stalls assigned to an unoccupied apartment unit near Batongbacal's apartment. The night before this colloquy occurred, Inocelda had parked her car straddling the line separating the two open stalls. She did not want to park her car in her assigned stall

because sap from a tree close by the stall would fall on and stain her car. When Inocelda went to check on her car in the morning, she found that it had been "egged[.]" She was wiping the egg off her car when Clarencia came over and said a few words to her.

Clarencia asked Inocelda to park in just one of the stalls, instead of taking up both stalls, because Batongbacal also liked to park his car in one of the two open stalls. Having just cleaned up the egg on her car, Inocelda took on a "sassy" attitude towards Clarencia, pointing out that the Batongbacals have their own, assigned parking stalls. Clarencia retorted that the open stalls did not belong to Inocelda, either. Inocelda testified that Clarencia was "a little rude to [her,]" but acknowledged that she also acted rudely towards Clarencia. That night, Inocelda parked her car within one of the two open stalls. No further confrontation occurred expressly over the parking stalls. A few days later, on October 7, 1999, Inocelda was attacked in her apartment.

On the night of the attack, Inocelda arrived home a little before 9:00 p.m., after watching a movie with her boyfriend, Christopher Kornegay (Kornegay). Inocelda usually spent three or four evenings a week at Kornegay's house, who lived approximately seven minutes away. Inocelda left Kornegay's house at around 8:45 p.m. This time, Inocelda parked her car in

her assigned stall. She entered her apartment through the side kitchen door, which she closed and locked behind her. The screen on the nearby kitchen window was not fully attached -- part of the screen was cut and could be opened. At times, when Inocelda and her family did not have their keys, they would open the kitchen door by sticking their hands through the flap in the screen.

As soon as she got into the apartment, Inocelda went upstairs, put her bags down, removed her clothes and went into the bathroom to take a shower. The bathroom is located at the top of the stairs directly to the right of the staircase. Nobody was home, so she left the bathroom door open because she wanted to be aware if somebody came home. It was about 9:10 p.m. to 9:15 p.m. when Inocelda finished taking her shower. She stepped out of the shower, stood by the doorway of the bathroom and started to dry herself. Then she saw a man, almost at the top of the staircase, "sneaking" up. The bathroom and hallway lights were on.

Inocelda was shocked at the man's presence. She did not have time to react. She stood there looking directly at him as he attacked her. "Come here, you fucker[,]" he exclaimed. The man ran at Inocelda and as soon as he reached the top of the stairs, grabbed her arms and pulled her to the floor in the hallway. Inocelda testified that she got a good look at his

face, especially remembering his eyes. Once Inocelda hit the floor, the man started striking her with a club. She described the club as a black, wooden club, akin to a police baton but without a handle, about a foot-and-a-half long with rounded edges.

Inocelda was lying on her back looking up at her attacker. He was shirtless and wearing dark pants or pantshorts. The assailant held Inocelda down by her chest and beat her on the right side of her head with the club at least five times, then choked her. Inocelda did not remember what happened after that. The beating left her unconscious. The next thing she remembered was waking up in the hospital strapped to a bed, with breathing tubes in her mouth and in her nose. She could not talk. Kornegay testified that it was several days before Inocelda could utter a word to anybody. Inocelda spent a week in the hospital.

Inocelda described her injuries. She had a bruised tongue from biting it during the attack. She suffered bruises and scratches on her left and right shoulders, on her neck, on the left side of her back, on her knee and on her arm. Her right hand was swollen from her attempts to block the assailant's blows, and her chin had to be stitched, leaving a visible scar. Earlier, the parties had stipulated that Inocelda was diagnosed

with a serious concussion and multiple contusions as a result of the assault.

At the hospital, Le Stronge asked her daughter if their neighbor across the parking lot was the person who had attacked her. Inocelda nodded in the affirmative. At the conclusion of both direct and redirect examination, Inocelda identified Batongbacal as the man who had assaulted her on the night of October 7, 1999.

Under cross-examination by trial defense counsel, Richard Gronna (Gronna), Inocelda admitted that Batongbacal had never confronted her about her conversation with Clarencia regarding the open parking stalls. Inocelda testified as follows regarding the presence or absence of her family and her boyfriend in the apartment the week prior to the incident:

> [Gronna]: Okay. You recall seeing your brother in your home that week?
> [Inocelda]: Actually, no.
> [Gronna]: You recall seeing your mother in your home that week?
> [Inocelda]: Yes.
> [Gronna]: Okay. And your boyfriend, your boyfriend ever come home, come over to your home that week?
> [Inocelda]: That week, no.

When Gronna asked Inocelda to describe her assailant, Inocelda recalled that he had short hair, was clean-shaven and had no outstanding facial characteristics such as moles, freckles or pockmarks. Inocelda testified that she remembered the perpetrator's semi-muscular build, as he was not wearing a shirt during the attack. Gronna showed Inocelda a photograph of

Batongbacal, which was marked and admitted into evidence as State's exhibit no. 30. Inocelda acknowledged that Batongbacal was not clean-shaven in the photograph, that it depicted him with a mustache and a beard. Also, Inocelda confirmed that Batongbacal's eyes appeared black in the photograph. Inocelda testified that her assailant's eyes had "[stuck] out most prominently" to her. Later, however, Inocelda admitted she could not remember what color her attacker's eyes were, only that they were "dark." No evidence was presented to the jury, either by Batongbacal or the State, regarding the date the photograph was taken. The photograph was one of the State's exhibits entered into evidence by a pretrial stipulation of the parties.

Gronna asked Inocelda whether she had ever heard Batongbacal speak. Inocelda answered that she had not. She added, however, that she had heard him scream at Christina Wolcott (Wolcott), his girlfriend, when Batongbacal and Wolcott were in his room across the way. Inocelda explained that she knew it was Batongbacal screaming because she looked out of her window and saw him. She did not remember whether she had shared this bit of information with the police or anyone else investigating her case. This particular exchange unfolded as follows:

> [Gronna]: Okay. But you never said anything, never said hi, never said anything to [Batongbacal], right?
> [Inocelda]: No.

[Gronna]: Never heard him talk then; is that right?
[Inocelda]: I did hear him talk. I would hear him scream actually.
[Gronna]: Oh, you would hear him scream?
[Inocelda]: If -- if you want me to say, you know.
[Gronna]: Who would he scream at?
[Inocelda]: His girlfriend.
[Gronna]: I see.
[Inocelda]: In the room.
[Gronna]: I see. And when did he scream at his girlfriend? Did he scream at his girlfriend, say, a month or two before this happened?
[Inocelda]: No.
[Gronna]: Okay. Where would he be when he'd be screaming at his girlfriend?
[Inocelda]: In his room.
[Gronna]: In his room. And how did you know he was in his room?
[Inocelda]: 'Cause I would see.
[Gronna]: You would see him in his room?
[Inocelda]: Um-hum.
[Gronna]: I see. So you'd look out the window, you'd see him in his room?
[Inocelda]: Um-hum.
[Gronna]: I see. Did you ever tell anybody about this, anybody investigating this case before today?
[Inocelda]: Tell anybody about him?
[Gronna]: Screaming.
[Inocelda]: No.
[Gronna]: Okay. So you never told any of the police about the fact that you heard him screaming before?
[Inocelda]: I don't remember.
[Gronna]: Okay. You didn't tell any of the police about that, did you?
[Inocelda]: I don't remember.

Gronna also cross-examined Inocelda about how she enters her apartment through the kitchen door when she does not have her keys. The following dialogue ensued:

[Gronna]: Now [Batongbacal] had never been over to your home, had he?
[Inocelda]: Right.
[Gronna]: He had never gone over, knocked on your door for any reason at all, had he?
[Inocelda]: No.
[Gronna]: He'd never been inside your kitchen, had he?
[Inocelda]: No.

[Gronna]: And you've never seen him get entry into your house that way, had he?

[Inocelda]: His window, from his window he can see exactly how I enter.

[Gronna]: Okay. Did you ever see him watch you?

[Inocelda]: Looking. Sometimes, yes. When I would walk to my house, I would see him look out the window. And I didn't watch if anybody -- when I was breaking in, I didn't watch if anybody was watching me, but standing right there I can see his room.

[Gronna]: Okay. And so basically you know when [Batongbacal] saw you actually do this.

[Inocelda]: No.

[Gronna]: So as far as you're aware, he never saw you do it, right?

[Inocelda]: I don't know when -- I don't know when but -- I don't know the exact date but I went in my house through that way and -- before I would put my hand in there, I would watch going into the gate and I would see him look out the window and --

[Gronna]: Okay. You see him look out the window, he would see you and he'd turn away, wouldn't he?

[Inocelda]: Right.

[Gronna]: So he wasn't there staring at you going into your home, was he?

[Inocelda]: From the window?

[Gronna]: Yeah.

[Inocelda]: I don't know because my back was facing him so he could have.

[Gronna]: Okay. But before your back -- but before you turned your back on him, you'd both look at each other, right? You'd see [Batongbacal] up in the window; he'd see you coming home, right?

[Inocelda]: Right.

[Gronna]: And that's all there was, right?

[Inocelda]: Right.

[Gronna]: You'd see him, he'd see you, he'd watch you and turn away from the window, right?

[Inocelda]: As far as I know, right.

[Gronna]: By the way, how often did you get -- go in and out of your home that way?

[Inocelda]: How often during that week or how often in my lifetime?

[Gronna]: Well, just say in the month before this happened, how often were you getting in and out of your home through that jalousie -- through the screen?

[Inocelda]: Once or twice.

. . . .

[Gronna]: So to an untrained eye and somebody didn't know, it looked like you couldn't get in that way, right?

[Inocelda]: Right.

The State called Le Stronge to the witness stand. Le Stronge testified that she came home that night to find the lights in the hallway, the bathroom and Inocelda's bedroom on, and Inocelda lying naked in her bed underneath the covers gasping for air, with blood on her face and leg. Le Stronge testified that it appeared as though her daughter had been placed on the bed because of the way her body was positioned. Immediately, Le Stronge grabbed the phone and ran downstairs out of the apartment through the kitchen door. Once outside, Le Stronge placed a phone call to the police and alerted her neighbors by screaming for help. While outside, Le Stronge noticed Batongbacal standing in the parking lot leaning on his car. She approached him and asked him if he had seen or heard anything. He replied that he had not. Shortly thereafter, the police and paramedics arrived. Inocelda was driven by the paramedics to a park nearby, where she was airlifted to Queen's Hospital.

After the incident, Le Stronge surveyed her apartment and found that nothing was missing. William informed Le Stronge that the front door was unlocked, and that he had noticed this during the time the police were in the house. This appeared strange to Le Stronge and William because, according to Le Stronge, the front door is always locked. Officer Herbert Soria testified that the front door was already unlocked by the time he

responded to the emergency call. Fire emergency personnel had arrived moments before him.

Senio Slawson (Slawson) testified that he had been Batongbacal's next-door neighbor for about eight months. Although Slawson had moved to an apartment in another part of the complex prior to the incident, he still saw Batongbacal every so often. On the evening of the incident, Slawson had been home since 3:30 p.m. He was watching a movie on television when he decided to step outside of his apartment to smoke a cigarette. This was sometime between 9:00 p.m. and 10:00 p.m. While standing in his front yard, he saw Batongbacal emerge from the area of the back apartment units close to his apartment. A street lamp illuminated the area from which Batongbacal emerged. Slawson remembered that he thought Batongbacal had just come from working out because his shirt stuck to his body as if he were perspiring. Slawson noticed that Batongbacal had on a white shirt and a pair of blue denim shorts. It was unusual for Slawson to see Batongbacal at the back apartment units, or anywhere around Slawson's apartment, because as far as Slawson could remember, he had only seen Batongbacal in his front yard washing his car, or emptying the rubbish at the dumpster, or checking the mail across the street. Slawson did not talk to Batongbacal at this point. He went back into his apartment to continue watching the movie.

Shortly thereafter, Slawson's girlfriend told him there were police on the project premises. Slawson saw several police cars, a fire truck and an ambulance. Curious, he walked out of his apartment to see what the commotion was about. Ten minutes later, after hearing what had happened to Inocelda, Slawson saw Batongbacal again. This time, Batongbacal was walking out of his apartment. At this point, about fifteen to twenty minutes had passed since Slawson had seen Batongbacal by the back apartment units. Slawson approached Batongbacal and began to question him. Slawson asked Batongbacal why earlier he had been coming from the area of the back apartment units. Batongbacal told him that he had been looking for a man named Kaipo, who lived up the street from Slawson. The following testimony ensued:

> [Deputy Prosecuting Attorney (DPA)]: Now, when you're talking to [Batongbacal], did you ask him anything else?
>
> [Slawson]: Then I asked him why did he change his clothes, you know, he -- I asked him if he had a white shirt on earlier, which I saw him with a white shirt on earlier, and then he says, oh -- no, I asked him -- this is exactly what happened what I asked him. I asked him, why did you change your clothes, I mean, how come you changed your clothes? And then he says, I cannot change my clothes? You know, just -- I don't know -- exactly remember what word for word he said and what I said but I got an idea 'cause I asked him about why did he change his clothes and then he says --
>
> [Gronna]: Wait. He can leave his ideas out, judge. Instruct the witness.
>
> THE COURT: You can respond what he said.
>
> [Slawson]: And then he says, he said -- he said something like -- like, I don't know, I changed my shirt.
>
> [DPA]: Okay.
>
> [Slawson]: That's just something like that, right around there.
>
> [DPA]: Okay. And then what did you do?

[Slawson]: And then I asked him where he was going and then he told me that he was going to his girlfriend's house. And then I asked him again about his shirt, how come he had to change his shirt. Because all of a sudden we -- you know, everybody's looking for a guy with a white shirt. So you go in your house and you change your shirt, that's why I said --

[Gronna]: Wait, wait. Objection. That last statement, I move to strike that. That statement assumes a fact that's never been put in evidence.

[DPA]: Your honor, this is what he -- his direct question to the defendant was. That's what he said.

[Gronna]: Objection. I move that that last response be stricken.

THE COURT: Ask the question again.

[DPA]: Okay. What exactly did you say?

[Slawson]: What exactly did I say about what?

[DPA]: Okay. You were saying -- you were asking him a question about the shirt, right?

[Slawson]: Yes.

[DPA]: What was your question to him, to [Batongbacal], about the shirt?

[Slawson]: I told him -- I asked him first time about his shirt. Then I asked him where was he going and then he said he was going to his girlfriend's house and then he says -- then I said -- then I told him again, like, how come you had to change your shirt because, you know, now we looking for a guy with a white shirt and blue shorts and you go in your house and you change your shirt. That's what I said.

[Gronna]: Objection. Wait, wait, wait.

THE COURT: Your objection's overruled.

[DPA]: Thank you, your honor.

And what did he say to you?

[Slawson]: And then he said, oh, so -- so what? I cannot go? That's what he told me, I cannot go? I said, go where? He said, to my girlfriend's house. I said, you can go. I'm just letting you know now you're a suspect in my eyes, that's what I told him, and then he went on his way and he left.

On cross-examination, Slawson testified that, about ten minutes before his interrogation of Batongbacal, he had heard that people were looking for a man wearing a white shirt, presumably the perpetrator. Slawson had heard this from a man named Lisone Eva (Eva) and "several other neighbors[,]" including his brother-in-law, Ira.

The State rested its case after Slawson's testimony. Gronna then moved for a judgment of acquittal, which the court denied.

Batongbacal called his mother, Clarencia, as his first witness. Clarencia worked a night shift at the post office. She testified that it was approximately 8:30 p.m. on the night of the incident when she first saw her son in their apartment. She had just stepped out of the shower when she saw Batongbacal sitting on his bed watching television. Clarencia finished getting ready for work, then left her apartment at approximately 9:05 p.m. Before leaving, she said goodbye to Batongbacal. Clarencia did not sense anything out of the ordinary.

Clarencia did not hear about the attack on Inocelda until the next day, when Batongbacal told her that Le Stronge had accused him of the crime. Clarencia remembered that Batongbacal was shocked and confused at the accusation. Clarencia testified that Batongbacal told her he did not assault Inocelda.

In the course of Clarencia's testimony, the following exchange occurred:

> [Gronna]: Okay. And you've seen [Batongbacal] before. Has there ever been any times, to your knowledge, that he's ever yelled or screamed at his girlfriend [Wolcott]?
> [Clarencia]: Yes, he has.
> [Gronna]: You ever seen anything like that? Has it been loud?
> [Clarencia]: Yes, it has been loud.

[Gronna]: Okay. And when he's been that way, I take it he's been upset at his girlfriend [Wolcott], right?
[Clarencia]: Yes.
[Gronna]: Okay. He's never -- he's never done anything to hurt her, has he, even though he's been made at her?
[DPA]: Your honor, I would object.
[Clarencia]: No, not to my knowledge.
THE COURT: Sustained.

Eva testified that he lives with his mother at Batongbacal's apartment complex. On the night of the attack, Eva and his girlfriend left his mother's apartment sometime around 9:00 p.m. to walk to a nearby convenience store. They walked down a path on the same side of the apartment complex as Batongbacal's apartment. They stopped somewhere in front of Batongbacal's apartment because they heard noises emanating from directly across the way. Eva and his girlfriend heard a woman screaming, "no, no." Eva testified that he distinctly remembered hearing the woman say "no" twice. Because Eva attributed the screaming to people having "rough sex[,]" neither he nor his girlfriend bothered to go across the way to check on the noise. But as they momentarily stopped near Batongbacal's apartment, Eva saw Batongbacal's and Clarencia's cars parked by the apartment. The screaming caused Eva neither concern nor alarm until after he and his girlfriend returned from the store, when Eva saw the neighbors congregating outside and heard what had happened to Inocelda.

After he found out what had happened to Inocelda, Eva accompanied Slawson to talk to Batongbacal. Eva testified that

he heard Slawson ask Batongbacal why he had changed his clothes, and that he heard Batongbacal reply, in a calm manner, that he was going to work and this was why he had changed his shirt.

Batongbacal's girlfriend, Wolcott, took the witness stand next. Immediately before her testimony commenced, Gronna approached the bench:

> [Gronna]: . . . [Inocelda] made a comment about [Batongbacal] and his yelling and screaming at his girlfriend and I just wanted to just know the boundaries, questions I can ask her in terms of whether or not [Batongbacal's] ever -- although he may have been angry at her, yelled at her, that he's never struck her, hit her, done anything like that so -
>
> [DPA]: Your honor, we're going to be objecting to all of that. It's irrelevant to this case.
>
> THE COURT: Sustained.

Wolcott testified that on the day of the attack, she and Batongbacal had spent most of the afternoon and early evening together. According to Wolcott, it was around 7:45 p.m. when Bataongbacal left her house and headed back to his mother's apartment. She remembered that Batongbacal was wearing a t-shirt and denim shorts when he left. She spoke to Batongbacal at around 8:20 p.m., when he called her on her cellular phone. She spoke to him two more times on the phone before she saw him again that night. Batongbacal returned to her house at around 10:20 p.m. Batongbacal did not tell Wolcott that night about the attack on Inocelda.

Honolulu police detective Robert K. Kupukaa, Jr. (Detective Kupukaa) testified that he was in charge of the investigation of the case. He inspected the scene of the attack

on the night of the attack. In the bathroom, he noticed that the shower curtain had been pulled down and off its curtain rod, indicating that a struggle had occurred there. Detective Kupukaa did not remember seeing any blood in the bathroom, or in the hallway leading from the bathroom to Inocelda's bedroom. But Detective Kupukaa did notice blood "splattered on the wall" of Inocelda's bedroom and drops of blood on her bed linen.

As part of their investigation, the police dusted the stairway railing for fingerprints. They also dusted the front door, the assailant's possible exit point, recovering a latent print from it that was unidentifiable or, in Detective Kupukaa's words, "junk." Detective Kupukaa confirmed that the police were unable to find any physical evidence that would link Batongbacal to the attack.

On redirect examination, Detective Kupukaa testified that, in the course of the police investigation, he interviewed Batongbacal's neighbor a "couple doors down[,]" Russell Leighton (Leighton). Leighton informed Detective Kupukaa that somebody had entered his home "unannounced[,]" and that this person was wearing a t-shirt and blue denim shorts. Detective Kupukaa showed Leighton a photo montage that included Batongbacal's picture. Leighton was unable to identify anyone in the photo montage as the person who had entered his apartment. Gronna did not ask whether Leighton had told Detective Kupukaa the date the unidentified man had been discovered in Leighton's apartment.

The State did not further cross-examine Detective Kupukaa after his testimony on redirect.

The defense rested after Detective Kupukaa's testimony. Batongbacal renewed his motion for judgment of acquittal. The court denied the motion, ruling that the State had established a *prima facie* case against Batongbacal.

The parties then addressed jury instructions. Over a defense objection, the court refused Batongbacal's alibi defense instruction. Gronna argued that Batongbacal's proposed alibi defense instruction was the model United States Ninth Circuit Court of Appeals criminal jury instruction, that under federal case law "can" be given whenever there is evidence to support an alibi defense. Gronna further asserted that "some of the evidence would indicate that [Batongbacal] may not have been the perpetrator of this crime, in that he was at home[.]" The proffered instruction read:

> ALIBI
>
> Evidence has been introduced that the defendant was not present at the time and place of the commission of the crime charged in the indictment. The government has the burden of proving beyond a reasonable doubt the defendant's presence at that time and place.
>
> If, after consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, you must find the defendant not guilty.

On this issue, the State argued that there had been no evidence of an alibi defense, and that "Defense's own witness[es] place

[Batongbacal] at home which is right across the parking lot from [Inocelda's] home at the time of the incident."

On May 18, 2000, the jury found Batongbacal guilty as charged on both counts. On June 1, 2000, Batongbacal filed his third motion for judgment of acquittal, and a motion for new trial. A hearing on both motions was held on June 9, 2000.

On his motion for judgment of acquittal, Batongbacal contended there was not sufficient evidence for either conviction. Batongbacal claimed there was reasonable doubt as to Inocelda's identification of him, because Inocelda's description of her assailant did not match Batongbacal's appearance at or near the time of the incident, as captured in the photograph of Batongbacal in evidence as State's exhibit no. 30. Further, Batongbacal argued, Inocelda never mentioned that her attacker had a quarter-inch mole under his chin, an identifying mark that Inocelda should have been able to point out if Batongbacal was, indeed, the perpetrator. Instead, Inocelda described her assailant as clean-shaven, without any outstanding facial characteristics. Batongbacal also claimed jury nullification. He argued that passion may have had a hand in the jury's guilty verdicts, that the jury "seems to have been swayed more from passion of the fact that . . . this was a horrible crime."

As for his motion for new trial, Batongbacal asserted that a new trial was warranted because of newly discovered,

exculpatory evidence. He averred that the new evidence came from another of Batongbacal's neighbors, a "Mr. Iosone" (Iosone):

> [Iosone] has since related to [Batongbacal] that earlier in the evening he had seen a local person clean shaven, wearing a white t-shirt and denim shorts with a "tail" pony tail wandering around the building. He also said that he saw this person while the police and ambulance were outside the building. This description also coincides with the description of a person that the Lefua sisters had given to police, and the same description of the person that [Leighton] had given to police. It is believed that this person lives in the units behind [Slawson]. It is believed that [Iosone] did not give this information out because of the lack of details of the incident that was known.

The court denied both motions. At the hearing on the motions, the court stated, as to Batongbacal's motion for judgment of acquittal, as follows:

> [I]n viewing the evidence in the light most favorable to the Prosecution, there is substantial evidence to support the jury's verdict.
>
> You have an individual, [Inocelda], who was the eyewitness who had known [Batongbacal] or seen [Batongbacal] for years. They had been neighbors. The fact that in an apartment complex she was one apartment over, you know, I think that's a credibility determination.
>
> There were other witnesses placing [Batongbacal] at the scene at the time, including his own mother. And there is more of a substantial evidence to support the jury's verdict.[3]

---

[3] The court's written order denying Batongbacal's third motion for judgment of acquittal was accompanied by the following findings of fact and conclusions of law:

> FINDINGS OF FACT AND CONCLUSIONS OF LAW
>
> 1. [Inocelda] had lived across the parking lot from [Batongbacal] for eight years and seen him in passing several times a week. [Inocelda] identified [Batongbacal] as her attacker.
>
> 2. There were several witnesses that placed [Batongbacal] at the scene during the time of the offense including [Batongbacal's] mother.
>
> 3. The Court finds that viewing the evidence in the light most favorable to the State there was

(Footnote supplied.) As to Batongbacal's motion for new trial, the court stated that, "under the case law, there's not a sufficient showing that the information that [Gronna] referenced was not discoverable before the time of the trial."[4]

Batongbacal was sentenced and the court entered judgment on August 25, 2000. Batongbacal filed this timely appeal on September 25, 2000.

II. Points of Error on Appeal.

Batongbacal raises the following points of error on appeal.

> substantial evidence as to every material element to support the jury's verdict. State v. Eastman, 81 Haw. 131, 135, 913 P.2d 57, 61 (1996).
>
> 4. The discrepancies in the physical description of [Inocelda's] description of [Batongbacal] on the night of the attack are matters of credibility and the trial court must give full play to the right of the jury to determine credibility and weigh the evidence. State v. Yabusaki, 58 Haw. 404, 411, 570 P.2d 844, 848 (1977).
>
> ACCORDINGLY IT IS HEREBY ORDERED that the Third Motion for a Judgment of Acquittal be and the same is hereby denied.

(Capitalization in the original).

[4] The court's written order denying Batongbacal's motion for new trial was accompanied by the following findings of fact and conclusions of law:

> FINDINGS OF FACT AND CONCLUSIONS OF LAW
>
> 1. [Batongbacal] has failed to show that the new information that [Batongbacal] is alleging was not discoverable through due [(sic)] before or during trial. State v. McNulty, 60 Haw. 337, 588 P.2d 438 (1978).
>
> ACCORDINGLY IT IS HEREBY ORDERED that the Motion for a New Trial be and the same is hereby denied.

(Capitalization in the original).

First, Batongbacal claims he was denied effective assistance of counsel (1) by Gronna's cross-examination of Inocelda, which elicited testimony that substantially impaired Batongbacal's defense; (2) by Gronna's failure "to introduce evidence establishing the date when the photograph of [Batongbacal] in State's Exhibit no. 30 was taken," and the date the unknown male entered Leighton's apartment; and (3) by Gronna's failure "to present any evidence to satisfy the requirements for the granting of [a] motion [for new trial] based on newly-discovered evidence."

Second, Batongbacal contends the court "erred in refusing to allow the defense to present evidence of [Batongbacal's] character for nonviolence under Hawai‘i Rules of Evidence (HRE) [Rule] 404(a)(1) through the testimony of the defense witnesses."

Third, Batongbacal avers the court "erred or committed plain error in admitting into evidence the prejudicial hearsay testimony of [Slawson], that everyone was looking for a man with a white shirt when no such evidence had been established by any of the State's witnesses at trial."

Finally, Batongbacal claims the court "erred in refusing the defense instruction on alibi[.]"

III. Discussion.

A. Ineffective Assistance of Counsel.

The Hawai‘i Supreme Court has stated that, when the constitutional guarantee of effective assistance of counsel is raised, "[w]ithout an evidentiary hearing by the trial court, which establishes on the record the defendant's objections to assigned counsel, it is impossible for a reviewing court to determine whether a claim of inadequate representation is justified." State v. Kane, 52 Haw. 484, 487, 479 P.2d 207, 209 (1971) (citation omitted). However, "where the record on a direct appeal of a criminal conviction amply demonstrates the infirmity of a claim of ineffective assistance of counsel, the appellate court may dispose of the claim, thus avoiding the unnecessary delay and expense that would be engendered by subsequent HRPP Rule 40 proceedings. State v. Brantley, 84 Hawai‘i 112, 122, 929 P.2d 1362, 1372 (1996) (brackets in the original). Cf. State v. Silva, 75 Haw. 419, 438-39, 864 P.2d 583, 592 (1993) (citation omitted) ('[I]n some instances, [an] ineffective assistance of counsel [claim] may be so obvious from the record that a Rule 40 proceeding would serve no purpose except to delay the inevitable and expend resources unnecessarily.')." Therefore, "claims of ineffective assistance of counsel may be raised for the first time on appeal." State v.

Reed, 77 Hawai‘i 72, 83, 881 P.2d 1218, 1229 (1994) (citation omitted).

Here, the record "amply demonstrates the infirmity of a claim of ineffective assistance of counsel," Brantley, 84 Hawai‘i at 122, 929 P.2d at 1372, and we will dispose of Batongbacal's claim.

"In assessing claims of ineffective assistance of counsel, the applicable standard is whether, viewed as a whole, the assistance provided was within the range of competence demanded of attorneys in criminal cases." Dan v. State, 76 Hawai‘i 423, 427, 879 P.2d 528, 532 (1994) (brackets, citation and internal quotation marks omitted). "The burden of establishing ineffective assistance of counsel rests upon the appellant. His burden is twofold: First, the appellant must establish specific errors or omissions of defense counsel reflecting counsel's lack of skill, judgment or diligence. Second, the appellant must establish that these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Antone, 62 Haw. 346, 348-49, 615 P.2d 101, 104 (1980) (citations and footnote omitted). A defendant who meets the two-prong test has proven "the denial of assistance within the range of competence demanded of attorneys in criminal cases." Antone, 62 Haw. at 349, 615 P.2d at 104 (internal quotation marks omitted).

1. Gronna's Cross-Examination of Inocelda.

Batongbacal's first allegation of ineffective assistance of counsel is, that Gronna elicited testimony from Inocelda on cross-examination that substantially impaired Batongbacal's defense. Batongbacal references the cross-examination testimony of Inocelda, that

> (1) [Batongbacal] could have seen [Inocelda] from his apartment when she entered her apartment through the broken window screen and opened the kitchen door, (2) the week before the incident herein, [Inocelda] had not seen her brother or her boyfriend come over to her apartment and that three to four times a week she would come home late at night, and (3) [Inocelda] had seen [Batongbacal] scream at his girlfriend."

Batongbacal asserts that, from this testimony,

> the jury learned that [Batongbacal] knew how to enter [Inocelda's] apartment without breaking in, that he knew her routine during that week and knew that neither her brother nor her boyfriend were likely to be at the residence on the evening of the offense. From this information, the jury could have inferred that [Batongbacal] had both the opportunity and ability to commit the offenses herein quickly and without interference from family members. The jury also learned that [Batongbacal] had verbally abused his girlfriend and from this evidence, could have inferred that [Batongbacal] had a propensity toward violence against women and was more likely to have committed the assault herein.

The supreme court has acknowledged that certain strategic decisions at trial are ultimately the province of defense counsel, and include, "whether and how to conduct cross-examination," and "what evidence should be introduced." State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998) (quoting American Bar Association, Standards for Criminal Justice -- Prosecution Function and Defense Function, Standard 4-5.2 (3d ed.

1993)) (internal block quote format omitted). "Lawyers require and are permitted broad latitude to make on-the-spot strategic choices in the course of trying a case." State v. El'Ayache, 62 Haw. 646, 649, 618 P.2d 1142, 1144 (1980) (citation omitted). In the context of an ineffective assistance of counsel claim, "matters presumably within the judgment of counsel, like *trial strategy*, will rarely be second-guessed by judicial hindsight." Richie, 88 Hawai'i at 39, 960 P.2d at 1247 (citation and internal quotation marks omitted; emphasis in the original).

In this case, Gronna's conduct of the cross-examination of Inocelda was trial strategy and will not be second-guessed by our judicial hindsight. Cf. id. at 40, 960 P.2d at 1248 ("In the present case, the decision of trial counsel not to call the four women [as witnesses] appears to have been a strategic decision, and it will not be second-guessed on appeal."). However, even if we were to review Gronna's cross-examination of Inocelda, we would conclude that Batongbacal's claim of ineffective assistance of counsel in this respect must fail.

First, the cross-examination of Inocelda, with respect to whether Batongbacal had seen how to open her kitchen door through the flap in the window screen, ultimately resulted in testimony that he could have seen, as could anyone else who lived in or frequented the apartment complex, both obvious conclusions even without the testimony in question. Second, the cross-

examination of Inocelda, with respect to the presence or absence of her family and her boyfriend in the apartment the week prior to the incident, did not establish any of their routines that week with such regularity and certainty that might reasonably assure an attacker that Inocelda would be alone in her apartment. Indeed, this part of the cross-examination established that Inocelda's mother was likely to be in the apartment at any given time. Similarly, the cross-examination of Inocelda, with respect to the incident or incidents she witnessed in which Batongbacal screamed at his girlfriend, did not, in our judgment, rise to that level that might cause the jury reasonably to infer "that [Batongbacal] had a propensity toward violence against women and was more likely to have committed the assault herein." Thus, in none of these three instances was there a "substantial impairment of a potentially meritorious defense[,]" Antone, 62 Haw. at 348-49, 615 P.2d at 104 (citations and footnote omitted), and hence, no ineffective assistance of counsel.

2. Omission of the Date of Certain Events.

Batongbacal's second allegation of ineffective assistance of counsel is, that Gronna failed to introduce evidence establishing (1) the date that Batongbacal's photograph, State's exhibit no. 30, was taken, and (2) when the unidentified man entered Leighton's apartment. A review of the record reveals, instead, that Gronna's omissions were a deliberate and

strategic bolstering of Batongbacal's defense that Inocelda misidentified him as her attacker. "Specific actions or omissions alleged to be error but which had an obvious tactical basis for *benefitting* the defendant's case will not be subject to further scrutiny." Briones v. State, 74 Haw. 442, 462-63, 848 P.2d 966, 976 (citations omitted; emphasis in the original).

With respect to the former omission, our conclusion is evident from the following colloquy between Gronna and the court during the hearing on Batongbacal's third motion for judgment of acquittal and motion for new trial:

> [Gronna]: Your Honor, all I would just suggest and submit to the Court is that normally, I would say that in a setting such as this where you basically have an I.D. issue, you have a victim who essentially has the opportunity to see the perpetrator of the crime.
>
> And what's troublesome to me, Your Honor, is the fact that on her examination in the course of trial, [Inocelda] gave a description of this gentleman's appearance at the time that this offense took place. And I think if the Court looks at the defendant now, there are certain distinguishing characteristics facially that you can see -- certainly has a large mole underneath his lower lip which is readily identifiable. At the time that he had -- the offense took place, he had a goatee. He had growth on his face -- hair growth on his face -- which seems to contradict -
>
> THE COURT: Where did you get that?
>
> [Gronna]: That was from the photograph that was taken -
>
> THE COURT: There's nothing in the record regarding the date that photograph was taken.
>
> [Gronna]: Well, it seemed to me, Your Honor, that that had been established that this was the appearance of the defendant at the time that —
>
> THE COURT: Might have been his appearance at the time of his arrest or at the time that the photograph was taken. But it wasn't established what that date was. It wasn't established that that was the date of the offense.
>
> [Gronna]: Well, he was arrested a few days later.
>
> THE COURT: That wasn't in the record either.

[Gronna]: Well, you know, Your Honor, for that reason, I think that that fact alone certainly should enable this defendant the right to have a new trial on that issue. I mean, if —

THE COURT: I thought it was very much a strategic move on your part because you didn't establish it. And the inference you were trying to draw was that that was what he looked like on the day of the incident so that you were undercutting the identification that the complaining witness made. I thought that was very much purposeful on your part.

[Gronna]: Well that was the whole idea, Your Honor. And I thought —

THE COURT: Exactly.

Similarly, with respect to the latter omission, no evidence was presented as to when the unidentified man entered Leighton's apartment so as to draw the jury's favorable -- and perhaps erroneous -- inference that the man entered Leighton's apartment near the time of the assault, to lend credence to Batongbacal's misidentification defense. From the same hearing:

[Gronna]: And certainly, Your Honor, when there's other testimony that there's another person who does match this gentleman's description, who is not this person, as [Detective Kupukaa] testified to, that there was some guy that walked into the house nearby –

THE COURT: That's your take on the testimony. That isn't exactly what the testimony was.

[Gronna]: The testimony was that they gave the next door neighbor a photograph identifying [Batongbacal], and he was unable to identify [Batongbacal] out of the photo lineup.

THE COURT: Didn't mean that there was somebody else or they testified that there was somebody else. And the other thing that wasn't established at the trial -- again, I thought it was very purposeful on your part -- was that there wasn't a date or a time for that alleged occurrence set forth at the trial, either. And so that allowed all sorts of inferences in your client's favor to be drawn.

[Gronna]: Well, certainly, that was the idea, Your Honor. But the idea was that -- Well, the date -- well, certainly on the same day. I think that was what was given to [Detective Kupukaa] that on the same date, this individual had come to the place in the apartment.

> THE COURT: I don't know. All I know is the testimony I heard and my recollection of that as of today.
>
> [Gronna]: Well, that was what I had thought was given to [Detective Kupukaa] – that on the same date, somebody -- this person had gone in wearing essentially the same clothing and the same, you know –
>
> THE COURT: But then you had the one neighbor [(Slawson)] that also testified that that was the clothing that [Batongbacal] was wearing and that he knew [Batongbacal] and saw him.

3. Failure to Subpoena Iosone.

Batongbacal's final allegation of ineffective assistance of counsel is, that Gronna failed to subpoena Iosone to testify in support of Batongbacal's motion for new trial. The motion was based on newly discovered evidence; namely, Iosone's testimony. But the court denied the motion because "there's not a sufficient showing that the information that you [(Gronna)] reference was not discoverable before the time of the trial." Hence, Iosone's testimony at the hearing would have been of little utility.

As for Batongbacal's alternative assertion, that Gronna's failure to discover Iosone prior to trial was ineffective assistance of counsel, we note that Iosone's testimony would have been largely cumulative to that of Detective Kupukaa, who recounted at trial Leighton's report to the effect that the same or a similar unidentified man had entered his home. State v. Mabuti, 72 Haw. 106, 112-13, 807 P.2d 1264, 1268 (1991) ("A motion for new trial based on newly discovered evidence will only be granted if (1) the evidence has been discovered after

trial; (2) such evidence could not have been discovered before or at trial through the exercise of due diligence; (3) the evidence is material to the issues and not cumulative or offered solely for purposes of impeachment; and (4) the evidence is of such a nature as would probably change the result of a later trial." (Citation and internal block quote format omitted; emphasis supplied.)). And given that the attack was undisputed and that Inocelda identified a neighbor of many years whom she had seen countless times before as the assailant, and who had a possible motive for attacking her, we question whether "the evidence is of such a nature as would probably change the result of a later trial." Id. at 113, 807 P.2d at 1268 (citation and internal block quote format omitted). Hence, any failure of counsel with respect to Iosone's testimony did not affect the outcome of Batongbacal's motion for new trial, and thus did not result in the "substantial impairment of a potentially meritorious defense." Antone, 62 Haw. at 348-49, 615 P.2d at 104 (citations and footnote omitted).

We observe in this respect that neither Gronna nor Batongbacal ventured to attach to the motion for new trial his affidavit, declaration or other statement, given under oath, regarding Iosone's testimony or the circumstances of its discovery. Nor was such a statement from Iosone attached. And at the hearing on the motion for new trial, Gronna argued only the motion for judgment of acquittal that was being heard at the

same time. He made absolutely no mention of the motion for new trial or Iosone's testimony. Batongbacal was present at the hearing, and presumably could have testified, under penalty of perjury, about what Iosone told him about Iosone's encounter with the unidentified man, and how and when Iosone came to tell him. Under the circumstances, we cannot say the denial of Batongbacal's motion for new trial resulted from ineffective assistance of counsel.

B. Evidentiary Issues.

"We apply two different standards of review in addressing evidentiary issues. Evidentiary rulings are reviewed for abuse of discretion, unless application of the rule admits of only one correct result, in which case review is under the right/wrong standard." State v. Ortiz, 91 Hawai'i 181, 189, 981 P.2d 1127, 1135 (1999) (citations and internal quotation marks omitted).

1. Evidence that Batongbacal Never Hit or Hurt His Girlfriend.

Batongbacal argues that "[t]he lower court erred in refusing to allow the defense to present evidence of [Batongbacal's] character for nonviolence under [HRE Rule] 404(a)(1) through the testimony of the defense witnesses[,]" and claims, summarily, that the court's error deprived him of his constitutional right to a fair trial and to present evidence. Batongbacal references Clarencia's stricken testimony that,

although at times Batongbacal yelled or screamed at his girlfriend, he never did anything to hurt her, and Wolcott's proffered testimony that, although Batongbacal may have been angry with her and yelled at her, he never hit or struck her or did anything of the sort.

In reviewing the court's evidentiary decisions based on HRE Rule 404, "we will employ the . . . abuse of discretion standard of review." Richie, 88 Hawai'i at 37, 960 P.2d at 1245 (citation and internal quotation marks omitted).

HRE Rule 404(a)(1) (Supp. 2001) provides that "[e]vidence of a person's character or a trait of a person's character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: Evidence of a pertinent trait of character of an accused offered by an accused, or by the prosecution to rebut the same[.]" (Enumeration and subheadings omitted.)

In this respect, we first observe that HRE Rule 405(a) (1993) provides that "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." The stricken and proffered testimonies in question here were neither reputation nor opinion testimony and were elicited or to be elicited on direct examination.

At any rate, proof that Batongbacal may have yelled or screamed at a loved one but never hit or hurt her in any way had, at most, an extremely attenuated relevance to proof of a peaceful or nonviolent character applicable to the world at large. Given this quantum of probative value, we do not believe it was an abuse of discretion for the court to exclude the evidence, given 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." HRE Rule 403 (1993).

If error there was in this respect, constitutional or otherwise, we conclude it was harmless beyond a reasonable doubt, in light of the quantum of evidence adduced against Batongbacal at trial. See State v. Holbron, 80 Hawai'i 27, 32, 904 P.2d 912, 917 (1995) ("the real question becomes whether there is a reasonable possibility that error might have contributed to conviction. . . . [If so], then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside" (internal block quote format and citations omitted)).

2. Hearsay Evidence.

Batongbacal asserts that "[t]he lower court erred or committed plain error in admitting into evidence the prejudicial

hearsay testimony of State's witness, [Slawson], that everyone was looking for a man with a white shirt when no such evidence had been established by any of the State's witnesses at trial." In this respect, Batongbacal also claims, again summarily and without argument or clarification, a violation of his constitutional right to confrontation. As an initial point of correction, we note that such evidence had been established by the State at trial, in that Slawson testified under cross-examination by Gronna that Eva and several other neighbors, including his brother-in-law, Ira, had told him that everyone was looking for a man wearing a white shirt.

"[W]here the admissibility of evidence is determined by application of the hearsay rule, there can be only one correct result, and the appropriate standard for appellate review is the right/wrong standard." State v. Moore, 82 Hawai'i 202, 217, 921 P.2d 122, 137 (1996) (citation and internal quotation mark omitted).

HRE Rule 801(3) (1993) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Here, Slawson's testimony that everyone was looking for a man wearing a white shirt was not hearsay, as it was not "offered in evidence to prove the truth of the matter asserted." HRE Rule 801(3). Inocelda had testified that her assailant was shirtless. Rather, the testimony, whether true or

not, explained why Slawson, who had earlier seen Batongbacal wearing a white shirt, approached and interrogated him and thus elicited a defensive response from him. Cf. State v. Kapela, 82 Hawai‘i 381, 386, 922 P.2d 994, 999 (App. 1996) (testimony of police officers that the complainant had told them defendant had hit her was not hearsay because it was not offered to prove the truth of the statement, but to establish the basis for the officers' subsequent actions in issuing the defendant a warning citation); State v. Mason, 79 Hawai‘i 175, 180, 900 P.2d 172, 177 (App. 1995); State v. Perez, 64 Haw. 232, 233, 638 P.2d 335, 336 (1981). This being so, we fail to see what value lay in confronting the declarant or declarants at trial. The court was correct in this respect and there was no error, constitutional or otherwise. Holbron, supra.

C. Jury Instructions on the Purported Alibi Defense.

Batongbacal avers that the court "erred in refusing the defense instruction on alibi[,]" where there was evidence in support of the defense of alibi, and that the "failure to fully instruct the jury violated [Batongbacal's] right to a fair trial under Article I, Section 5 of the Hawai‘i Constitution and the Fifth and Fourteenth Amendments to the United States Constitution." The latter claim is Batongbacal's constitutional argument in its entirety.

"When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Opupele, 88 Hawai'i 433, 438, 967 P.2d 265, 270 (1998) (citation and internal quotation marks omitted). "Whether a jury instruction accurately sets forth the relevant law is a question that this court reviews *de novo*." In re Herbert, 90 Hawai'i 443, 467, 979 P.2d 39, 63 (1999) (citation omitted, italics in the original).

"It is the duty of the circuit judge to see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what it is they are to decide, and he or she shall state to them fully the law applicable to the facts. This requirement is mandatory to insure the jury has proper guidance in its consideration of the issues before it." State v. Robinson, 82 Hawai'i 304, 311-12, 922 P.2d 358, 365-66 (1996) (brackets, citations and internal quotation marks omitted).

"The defendant in a criminal case tried before a jury is entitled to an instruction on every defense or theory of defense having *any* support in the evidence." State v. Cordeira, 68 Haw. 207, 208, 707 P.2d 373, 374 (1985) (citation and internal quotation marks omitted; emphasis in the original). However, while "it is well recognized that it is prejudicial error for the

court to refuse to give an instruction relevant under the evidence which correctly states the law[,]" there is no error if "the point is adequately and fully covered by other instructions given by the court. Correlatively, jury instructions must be considered as a whole. Moreover, a refusal to give an instruction that correctly states the law is not error if another expressing a substantially similar principle is given." Herbert, 90 Hawai'i at 467, 979 P.2d at 63 (ellipsis, original brackets, citations and internal quotation marks and block quote format omitted).

In this case, it is apparent that Batongbacal's purported alibi defense lacked "*any* support in the evidence." Cordeira, 68 Haw. at 208, 707 P.2d at 374 (citation and internal quotation marks omitted; emphasis in the original). "In the context of a criminal prosecution, 'alibi' denotes an attempt by the defendant to demonstrate he did not commit the crime because, at the time, he was in another place so far away, or in a situation preventing his doing the thing charged against him." Id. at 210, 707 P.2d at 376 (citation and some internal quotation marks omitted). Here, the evidence -- including the testimony of Batongbacal's mother -- placed Batongbacal in or near his apartment right across the parking lot from the scene of the crime, at or around the time of the crime. Batongbacal was not "in another place so far away, or in a situation preventing his

doing the thing charged against him." Id. (citation and internal quotation marks omitted). It was not error for the court to refuse Batongbacal's alibi defense instruction.[5]

Even assuming, *arguendo*, that Batongbacal asserted a true alibi defense, "the point [was] adequately and fully covered by other instructions given by the court." Herbert, 90 Hawai'i at 467, 979 P.2d at 63 (citation and internal quotation marks and block quote format omitted).

In Cordeira, a true alibi defense case (the subject robbery was committed in Wai'anae; Cordeira claimed to have been in Aiea at the time), Cordeira, 68 Haw. at 208-9, 707 P.2d at 375, the supreme court observed that "[s]trictly speaking, *alibi evidence* is merely rebuttal evidence directed to that part of the state's evidence which tends to identify the defendant as the person who committed the alleged crime." Id. at 210, 707 P.2d at 376 (citation and internal quotation marks omitted; italics in the original). This being so, the supreme court noticed that the

---

[5] See also Owens v. State, 809 So.2d 744, 746-47 (Miss. Ct. App. 2002) ("However, the law relating to an alibi defense involves something more than a simple denial by the defendant that he was present at the precise time the crime was committed. Black's Law Dictionary suggests that the defense requires evidence that the defendant's location at the relevant time was 'so removed therefrom as to render it impossible for him to be the guilty party.' *Black's Law Dictionary* 71 (7th ed. 1999). Thus, a defendant in close enough physical proximity to have committed the crime may deny the criminal activity and may affirmatively assert that he was elsewhere at the critical time. However, if the asserted alternate location is such that, based on the version of events contended for by the defense, it would remain within the realm of physical possibility for the defendant to have committed the crime, then the defense is nothing more than a denial and would not rise to the level of alibi." (Italics in the original.)).

trial court had given the jury a general instruction on the presumption of innocence and the State's burden to prove the defendant guilty beyond a reasonable doubt of every material element of a crime charged. Having noted this, the supreme court held that "[w]hen the court apprised the jury of the elements of the crimes charged, it reiterated the State's burden of proof and expressly instructed the jury that this 'included the burden of proving beyond a reasonable doubt the identity of the defendant as the person responsible for a crime charged.' Viewing this instruction in perspective we can only conclude the jury was properly guided." Id. at 212, 707 P.2d at 377 (citation and original brackets omitted).[6] Under essentially identical circumstances, it has been held that no denial of federal due process occurred. Duckett v. Godinez, 67 F.3d 734, 743-46 (9th Cir. 1995).

Similarly, here, the court gave the jury a general instruction on the presumption of innocence and the State's burden to prove Batongbacal guilty beyond a reasonable doubt of every material element of a crime charged. Here also, in instructing the jury on the material elements of the crimes charged, the court reiterated the State's burden to prove them

[6] Cf. People v. Sabin, 620 N.W.2d 19, 21 (Mich. Ct. App. 2000) ("Michigan law is clear that a trial court's failure to give an unrequested alibi instruction is not error requiring reversal where proper instruction is given on the elements of the offense and on the requirement that the prosecution must prove each element beyond a reasonable doubt." (Citations omitted.)).

beyond a reasonable doubt. And in the course of its general instructions on judging the credibility and weight of a witness's testimony, the court gave the following specific instructions on eyewitness identification that had been proposed by Batongbacal:

> You have heard testimony of eyewitness identification. In deciding how much weight to give to this testimony, you may take into account the various factors mentioned in these instructions concerning credibility of witnesses.
>
> In addition to those factors, in evaluating eyewitness identification testimony, you may also take into account:
>
> 1. The capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation;
> 2. Whether the identification was the product of the eyewitness' [(sic)] own recollection or was the result of subsequent influence or suggestiveness;
> 3. Any inconsistent identifications made by the eyewitness;
> 4. Whether the witness had known or observed the offender at earlier times; and
> 5. The totality of circumstances surrounding the eyewitness' [(sic)] identification.

Viewing the instructions in this case in perspective, "we can only conclude the jury was properly guided[,]" Cordeira, 68 Haw. at 212, 707 P.2d at 377, and Batongbacal's constitutional right to a fair trial safeguarded. Duckett, supra.

D. Cumulative Error.

Batongbacal avers, again summarily and in passing, that the cumulative effect of the alleged errors discussed supra deprived him of his constitutional right to a fair trial. However, "after carefully reviewing the record, we conclude that the individual errors raised by [Batongbacal] are by themselves insubstantial. Thus, it is unnecessary to address the cumulative

effect of these alleged errors." State v. Gomes, 93 Hawai'i 13, 22, 995 P.2d 314, 323 (2000) (original brackets, citations and internal quotation marks omitted).

IV. Conclusion.

Accordingly, we affirm the August 25, 2000 judgment.

DATED: Honolulu, Hawaii, June 10, 2002.

On the briefs:

Joyce Matsumori-Hoshijo,
Deputy Public Defender,
for defendant-appellant.

Acting Chief Judge

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge