NO. 23877

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
DARIUS MAXWELL, also known as Leroy Beaver, Jr.,
Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-01-0381)

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

Following a jury trial presided over by Circuit Court Judge Dexter D. Del Rosario, Defendant-Appellant Darius Maxwell, also known as Leroy Beaver, Jr. (Maxwell or Defendant), appeals from the October 25, 2000 Judgment that convicted him of: (1) Count I, the included offense of Terroristic Threatening in the Second Degree, Hawaii Revised Statutes (HRS) § 707-717 (1993),[1] and (2) Count II, Promoting a Dangerous Drug in the

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[1] Hawaii Revised Statutes (HRS) § 707-717 (1993) states as follows:

> **Terroristic threatening in the second degree.** (1) A person commits the offense of terroristic threatening in the second degree if the person commits terroristic threatening other than as provided in section 707-716.
>
> (2) Terroristic threatening in the second degree is a misdemeanor.

The jury found Defendant-Appellant Darius Maxwell, also known as Leroy Beaver, Jr. (Maxwell or Defendant), not guilty of Terroristic Threatening in the First Degree, HRS § 707-716. In other words, it found him guilty of terroristic threatening other than with the use of a dangerous instrument or other than with the use of the knife.

Third Degree, HRS § 712-1243 (1993).[2] Maxwell was sentenced to maximum terms of incarceration of one year for Count I and five years for Count II, to be served concurrently with any other sentence being served. In addition, Maxwell was sentenced to a mandatory minimum term of imprisonment of one year and eight months as a repeat offender.[3]

In this appeal, Maxwell contends that (A) the court committed plain error in entering a guilty verdict and sentence to Count II, Promoting a Dangerous Drug in the Third Degree; (B) the conviction of Count I, Terroristic Threatening in the Second Degree, was not supported by substantial evidence; (C) prosecutorial misconduct warrants dismissal of the charges; and (D) the acts or omissions of defense counsel (Defense Counsel)[4] warrant a new trial. We disagree with Maxwell

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[2] HRS § 712-1243 (1993) states, in relevant part, as follows:

> **Promoting a dangerous drug in the third degree.** (1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.
>
> (2) Promoting a dangerous drug in the third degree is a class C felony.

[3] Maxwell was eligible to be sentenced as a repeat offender, pursuant to HRS § 706-606.5 (Supp. 2000), because of his September 8, 1999 conviction of Promoting a Dangerous Drug in the Third Degree, in violation of HRS § 712-1243 (1993).

[4] Maxwell was originally represented by the Office of the Public Defender, but based on a conflict of interest, the court appointed private counsel to represent Defendant.

regarding (A), (C), and (D). We agree with Maxwell regarding (B). Therefore, we affirm the October 25, 2000 Judgment with respect to Count II and reverse the October 25, 2000 Judgment with respect to Count I.

I.

BACKGROUND

On February 28, 2000, Plaintiff-Appellee State of Hawai‘i (the State) charged Maxwell by Complaint as follows: (1) Count I, Terroristic Threatening[5] in the First Degree, in violation of HRS § 707-716(1)(d) (1993)[6]; (2) Count II, Promoting a Dangerous Drug in the Third Degree, in violation of

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[5] HRS § 707-715(1) (1993) states, in relevant part, as follows:

> A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony: . . . [w]ith the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person[.]

[6] HRS § 707-716 (1993) states, in relevant part, as follows:

> (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:
>
> . . . .
>
> (d) With the use of a dangerous instrument.
>
> (2) Terroristic threatening in the first degree is a class C felony.

HRS § 712-1243 (1993); and (3) Count III, Unlawful Use of Drug Paraphernalia, in violation of HRS § 329-43.5(a) (1993)[7].

A. Jury Selection

During jury selection on August 28, 2000, Defense Counsel questioned the prospective panel, in relevant part, as follows:

> [Defense Counsel]: . . . Is there anyone or does anyone here know of Aala Park? Do you know where that is -- Aala Park?
>
> And let me ask, [Prospective Juror No. 27], what's your -- you know, just right now as I mentioned it, what do you think when I mention Aala Park?
>
> Prospective Juror No. 27: I know of one time, and I haven't been there recently, but there was a lot of problems with homelessness, removed a lot of people out of there. Just from being in my profession, it's a place with a lot of crime.
>
> [Defense Counsel]: Right. Right.
>
> Prospective Juror No. 27: But I also know it's a park trying to make better so --
>
> [Defense Counsel]: So as far as your occupation you know that it has a representation [sic] for, I guess, not the most positive things in life.
>
> Prospective Juror No. 27: Yeah, yeah; right. I've heard a lot of things; correct.
>
> [Defense Counsel]: All right. And because of your -- I guess, just your thinking on that, you know, the scene of this particular case is Aala Park. The fact that you know about Aala Park, you know, from past, I guess, contacts and just its general representation [sic], would that affect you as far as being fair and impartial in just evaluating the facts of this case?

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[7] HRS § 329-43.5(a) (1993) states, in relevant part, as follows:

> It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. Any person who violates this section is guilty of a class C felony and upon conviction may be imprisoned pursuant to section 706-660 and, if appropriate as provided in section 706-641, fined pursuant to section 706-640.

Prospective Juror No. 27: No, not at all.

[Defense Counsel]: Okay. And, [Prospective Juror No. 43], you know where Aala Park is; right?

Prospective Juror No. 43: Yes.

[Defense Counsel]: And you have the same kind of impression as [Prospective Juror No. 27] about that?

Prospective Juror No. 43: Previously, because it was pretty run down. It's a neighborhood that's not frequented by me too often, but they've done great strides in bringing that up to par, the community, the downtown area; and I don't have any preconceived notions about Aala Park --

[Defense Counsel]: Okay.

Prospective Juror No. 43: -- or that kind of thing.

[Defense Counsel]: Okay.

Prospective Juror No. 43: I know there is a lot of the elderly there, but that's my knowledge about Aala Park.

[Defense Counsel]: Okay. And does anyone feel like that? [Prospective Juror No. 7], you know where Aala Park is?

Prospective Juror No. 7: Uh-huh.

[Defense Counsel]: Okay. What's your feeling about Aala Park? What did you think of when I first mentioned something like that?

Prospective Juror No. 7: Not the greatest place.

[Defense Counsel]: Beg your pardon?

Prospective Juror No. 7: It's not the greatest place to go to.

[Defense Counsel]: And why do you say that?

Prospective Juror No. 7: Well, got a lot of happenings in that area.

[Defense Counsel]: When you say happenings --

Prospective Juror No. 7: Robbery, drugs, and everything.

[Defense Counsel]: Okay. So you know that it's an area --

Prospective Juror No. 7: Right.

[Defense Counsel]: -- where there's a lot of crimes that's going on.

Prospective Juror No. 7: Right.

[Defense Counsel]: Okay. And the fact that I tell you about this case that, you know, it happened in that area, that wouldn't affect you one way or the other?

Prospective Juror No. 7: No.

[Defense Counsel]: Okay. Is there anyone that, because of that reputation in the Aala Park area, who would feel that way that -- that would affect them as far as deciding the facts of this case?

[Prospective Juror No. 46.]

Prospective Juror No. 46: No.

[Defense Counsel]: No. Okay. You know Aala Park? You've been there?

Prospective Juror No. 46: Yes.

[Defense Counsel]: Okay. Well --

Prospective Juror No. 46: Not well. I wouldn't go there particularly.

[Defense Counsel]: Okay. And why wouldn't you go there?

Prospective Juror No. 46: Because of the history, because of the transiency, and because of all the negative things you read and hear about.

[Defense Counsel]: Okay. Right. Right. Okay. But that wouldn't affect you just, you know, just the fact that that's the scene of this alleged crime?

Prospective Juror No. 46: No.

. . . .

[Defense Counsel]: . . . Thank you. Pass this jury [sic] for cause, Your Honor.

. . . .

[Defense Counsel]: . . . You heard the questions I asked, basically, about when you could be fair and impartial in this case, and you said that you'll try.

Prospective Juror No. 6: (Nods head.)

[Defense Counsel]: Okay. And if I were to look in your mind right now, it would be one of -- your mind would be open, you would be fair and impartial?

Prospective Juror No. 6: Yes.

[Defense Counsel]: Okay. Is there anything about this case or the nature of this case that, you know, concerns you or makes you feel like you may not be able to be fair and impartial?

Prospective Juror No. 6: Well, all I remember is Aala Park.

[Defense Counsel]: Uh-huh.

Prospective Juror No. 6: And I was eight years old, and we were passing, and there was an old man on the ground, and a young man with a metal chair whacking him, and it's been buried in my mind since.

[Defense Counsel]: And just because of being called as a juror in this case, you heard me mention Aala Park, and that triggered that memory?

Prospective Juror No. 6: Yes.

[Defense Counsel]: Okay.

Prospective Juror No. 6: That's all.

[Defense Counsel]: As far as that specific memory that you have, can you put that aside and just deal with the facts of this particular case --

Prospective Juror No. 6: Sure.

[Defense Counsel]: -- and not let that affect you one way or another?

Prospective Juror No. 6: Sure.

[Defense Counsel]: Thank you.
Pass for cause, Your Honor.

Prospective Jurors Nos. 27, 43, 7, and 46 were each passed for cause by both the State and the Defense Counsel. The State used its third peremptory challenge to dismiss Prospective Juror No. 6.

B. Evidence

Following jury selection, outside the presence of the jury, the court granted Defendant's August 25, 2000 Motion in Limine which asked the court to preclude: (1) any evidence of

the prior arrests of Maxwell for drug dealing; and (2) any references to Maxwell's alias name, "Leroy Beaver, Jr."[8]

Following the hearing on Maxwell's Motion in Limine, and outside the presence of the jury, the court acknowledged the Stipulation as to Evidence (Stipulation) "as to the chain of custody and introduction of the pipe as well as the contents of the pipe." The Stipulation was signed by the deputy prosecuting attorney (DPA), Defense Counsel, Defendant, and the Judge and it stated, in relevant part, as follows:

> IT IS HEREBY STIPULATED AND AGREED by and between the State of Hawaii, through . . . Deputy Prosecuting Attorney for the City and County of Honolulu, and Defendant Darius Maxwell, and [Defense Counsel] that the following facts are true and accurate and will be admitted into evidence in lieu of other evidence or testimony that:
>
> 1. If Kauiopuna Carreiro were called to testify, she would testify that she is employed as an evidence custodian with the Honolulu Police Department. Ms. Carreiro received State's Exhibit #5 from Officer Joseph Lum on February 16, 2000 at 6:25 p.m..[sic] Ms. Carreiro kept State's Exhibit #5 in the evidence room located at the Main Police Station. While State's Exhibit #5 was in her custody, she did not tamper with, alter or substitute State's Exhibit #5 in any way.
>
> 2. If Kevin Masuda were called to testify, he would testify that he is employed as an evidence custodian with the Honolulu Police Department. Mr. Masuda turned over State's Exhibit #5 to Hassan Mohamed, a criminalist employed with the Honolulu Police Department, on February 17, 2000 at 8:00 a.m..[sic] While State's Exhibit #5 was in his custody, Mr. Masuda did not tamper with, alter or substitute State's Exhibit #5 in any way.

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[8] The Declaration of Counsel attached to Maxwell's Motion in Limine filed on August 25, 2000, states, in relevant part, as follows:

> a. Darius Maxwell is the defendant's legal name; and
>
> b. Defendant was identified by his legal name, Darius Maxwell, throughout the police reports in the instant case and the Complaint was amended to include "LEROY BEAVER, JR." only after a fingerprint check revealed that the defendant had [a] previous case under his alias, Leroy Beaver, Jr.

3. If Hassan Mohamed were called to testify, he would testify that he is employed as a trained criminalist with the Honolulu Police Department. On February 16, 2000 at 8:00 a.m., Mr. Mohamed tested the contents of State's Exhibit #5 and found that the brownish and off-white substance in State's Exhibit #5 weighed 0.018 grams and was found to contain cocaine. Mr. Mohamed is an expert in the area of chemically testing substances for the presence of illegal narcotics, such as cocaine. While State's Exhibit #5 was in his custody, Mr. Mohamed did not tamper with, alter or substitute State's Exhibit #5 in any way.

4. Proper chain of custody was completed at all times.

5. Defendant Darius Maxwell, hereby knowingly, voluntarily, and intelligently waives his constitutional right to confront and cross examine any of the above-named persons, whose testimonies are stipulated to, as evidenced by his signature below.

6. Defendant Darius Maxwell, hereby knowingly, voluntarily, and intelligently waives his constitutional right to force the prosecution to independently prove these stipulated facts and to establish these facts.

C. Trial

The DPA stated, in his opening statement to the jury, in relevant part, as follows:

> Officer Torco, prior to entering Aala Park, waited outside of the park, made observations, saw a group of individuals sitting in the park. And as he observed these three unidentified Polynesian males, he observed numerous people going to these individuals. So now, based on his training and experience, Officer Torco recognized that, possibly, these individuals were involved in dealing drugs and, perhaps, in furtherance of his investigation, he could go and approach these individuals in an attempt to purchase drugs and to work up a case.
>
> So Officer Torco approaches these three unidentified Polynesian males to purchase drugs, and this occurred in the [Ewa] most end of Aala Park.

Defense Counsel stated, in his opening statement to the jury, in relevant part, as follows: "[Maxwell] knew Officer Torco from before, and what he did was he -- as soon as he saw Officer Torco, he started saying things to the effect of 'Officer' -- or 'Uncle, that guy is a confidential informant. He's a police officer.'"

Evidence of the following was presented at the trial. On February 16, 2000, Honolulu Police Department (HPD) Officer Travis Torco (Officer Torco) was posing as a drug buyer in an undercover capacity[9] to target any drug trafficking occurring in ʻAʻala Park. Officer Torco testified that, on that day, the Ewa end of ʻAʻala Park had been selected because "we observed several males and females going up and down to this particular area, making hand transactions."

At approximately 3:00 p.m., Officer Torco went to ʻAʻala Park unaccompanied by other undercover officers. Officer Torco's back-up officers were in and around the area, but not inside the park itself. Officer Torco testified that as he entered ʻAʻala Park, he "proceeded to the [Ewa] end . . . to approach three males, three Polynesian-type males sitting on a park bench." Officer Torco approached one of the males and asked him if he had "a twenty," which is a street term for a twenty-dollar piece of rock cocaine. At that time, the male told Officer Torco to sit down. After ten to fifteen seconds, the male called Officer Torco back over, and Officer Torco "proceeded to converse with him, the Polynesian-type male." Officer Torco testified that as

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[9] Police Officer Travis Torco testified that on February 16, 2000, "I was attired in a blue T-shirt, black surf shorts, and slippers. . . . I had my hair puffed out a little bit, and I had kind of grown out my beard to fit in." Officer Torco further testified that "we are not armed. . . . [W]e don't use microphones . . . . In the event that the people want to pad [sic] us down, it may jeopardize our safety."

he was talking to the male, Maxwell started to walk towards Officer Torco and stated in a loud and aggressive voice, "Uncle. Uncle. This guy's a cop. He's a fuckin cop." Maxwell was twelve to fifteen feet apart from Officer Torco when they made the following statements. Officer Torco responded to Maxwell, "What? What you said?" Officer Torco testified that Maxwell then stated, "What? You like go right now, Punk? You like go right now?," which Officer Torco understood to mean a desire for a "physical confrontation." Officer Torco described that Maxwell was acting "[p]retty much, you know, the local boy style with head bobbing and just saying, 'What? Let's go. Let's go right here, Punk." Officer Torco testified that Maxwell was "waiving [his hands] around, you know, just throwing them up in the air, saying, you know, trying to get the -- just the local boy mentality." Regarding his safety, Officer Torco stated, in relevant part, as follows:

> I was more concerned for my safety because I had my back to the Polynesian-type males, and I didn't like that for my safety. So I started to position myself, making my back towards . . . Beretania Street so I could have a visual of all four people that I was trying to deal with, yeah.

After Officer Torco repositioned himself, Maxwell was in a boxer-type stance, facing Officer Torco, and took off his white tank top shirt, and threw it on the ground. Then, Officer Torco testified to the following sequence of events:

> [Maxwell] reached into his left front pocket and pulled out what appeared to be a black handle with a silver clip.

. . . .

. . . [Maxwell] flipped it out like he opened it, and I saw a blade of some sort.

. . . .

. . . And [Maxwell] began to move it in a left-to-right motion, yeah, pointing the blade at me.

. . . .

A. . . . I started to back up; at which time, he made a comment, "Yeah, that's what I thought, Punk," because I was trying -- I was creating distance for my safety. At which time, as I started to move back and he made that comment, he returned to his original position, . . . and stuck the blade, jammed the blade into the wooden bench.

. . . .

A. . . . When . . . [Maxwell] stabbed the knife into the bench, he sat down. So as he sat down, I knew he was in a sitting position, I knew where he was, and then I immediately left the area.

During cross-examination, Defense Counsel asked Officer Torco if he had previously known Maxwell.

Q. Officer Torco, before this date of February 16th, when this incident occurred at Aala Park --

A. Yes, sir.

Q. -- you had known [Maxwell] previously; right?

A. I dealt with him before, yes, sir.

Q. Okay. Okay. So when he first came up to you, you know, while you were talking with that Polynesian male . . . did you immediately recognize him already at that point?

A. Not immediately, sir.

Prior to Officer Torco's testimony, the State's only other witness was HPD Officer Joseph Lum (Officer Lum). Officer Lum testified that on February 16, 2000, he and HPD Officer Thomas Santos (Officer Santos) went into ʻAʻala Park to look for Maxwell "because one of our undercover officers related to us via

police radio that a male known to him [as Maxwell] threatened him with a knife." Officer Lum testified that he first saw Maxwell sitting on the ground on a blue plastic-type tarp within arm's reach of another male. Officer Lum stated that he "observed in [Maxwell's] right hand what appeared to be a cylindrical glass pipe, the end of the pipe." Officer Lum stated that, as he approached Maxwell, he "observed this item drop from [Maxwell's] right hand on to the tarp," and then Maxwell rolled to his left "as if he was going to flee." At that point, Officers Lum and Santos placed Maxwell under arrest. Officer Lum further testified that the male seated next to Maxwell "just moved off to the side." Officer Lum testified that, after Maxwell was placed under arrest:

> A. I proceeded to conduct a search of the -- for a knife because we were told that our undercover officer was threatened with a knife. So we were looking for a knife near where [Maxwell] was seated. Instead, I found a cylindrical glass pipe.
>
> Q. Okay. And where exactly did you find the glass pipe in relation to where [Maxwell] was seated?
>
> A. Well, where he was seated was directly where I found the pipe.
>
> Q. And could you describe the pipe?
>
> A. It was about three inches in length. It's a cylindrical glass pipe. It's clear. Within it, contained a steel wool-type item in there and also a brown and white burnt residue.
>
> Q. Now, based on your training and experience, what is a cylindrical glass pipe like that commonly used for?
>
> A. That is commonly used for -- to smoke the illegal narcotic, rock cocaine.
>
> Q. And based on your training and experience, what did the residue in the pipe resemble?
>
> A. That also resembled burnt rock cocaine.

Officer Lum testified that the glass pipe recovered from Maxwell was submitted to Ms. Carreiro at the HPD evidence room on February 16, 2000, at 6:25 p.m. The court accepted the glass pipe into evidence as State's Exhibit No. 5, without objection. Officer Lum further testified that after recovering the glass pipe, he continued to look for the knife. He located the male who had been seated next to Maxwell on the tarp and, upon questioning, the male produced the knife. Officer Lum testified that the knife was a "folding-type locking knife; overall length, about eight inches with a three and a half inch partially serrated single-edge blade." After Officer Lum identified the knife, the court accepted the knife into evidence as State's Exhibit No. 4, without objection.

During cross-examination, Officer Lum testified that Maxwell had to be restrained after being arrested.

> A. [Maxwell] kept -- he went towards his pockets with his hands. He tried to get up and run. We kept telling him verbally, many times, to give us -- give us his hands. He was clenching it and putting it under his chest.
>
> Q. Okay. And was any kind of, I guess, special restraint or force used to, you know, arrest him?
>
> A. Officer Santos attempted compliance techniques. I don't exactly know which ones he used; but, eventually, he did get [Maxwell] cuffed.
>
> Q. Okay. When you say compliance techniques, you mean physically having to --
>
> A. Some type of physical strength technique or what they call just trying to force his hands behind his back, trying to just take it out.
>
> Q. Now, you mentioned also that [Maxwell] had to be taken to the hospital.
>
> A. Yes.

> Q. Okay. And was that a result of the struggle that had occurred when he was arrested?
>
> A. Partially, some of the injuries.

Defense Counsel cross-examined Officer Lum, in relevant part, as follows:

> Q: Okay. Officer Lum, you yourself know [Maxwell] or knew [Maxwell] before February 16th; correct?"
>
> A. Yes.
>
> Q. Okay. So when you were going into the Aala Park area, you -- did you know who -- did you have a name at that point or just an individual, male individual with a clothes description?
>
> A. I had a name.
>
> . . . .
>
> Q. Okay. Okay. So you knew from knowing who that person was before, specifically, who you were looking for then?
>
> A. Yes.

Following the testimony of Officer Lum, the court instructed the jury as follows:

> Before you read the stipulation to the jury, I have an instruction for the jury.
>
> Ladies and gentlemen, at this time, the State, as far as their evidence, is going to read a stipulation to you. A stipulation is an agreement between the parties that, if a particular witness is called to testify, the witness will testify to those facts that are read to you. The purpose of a stipulation is one of convenience. Since both parties agree as to what the witness would say, they have agreed to put it in writing rather than having the witness come all the way to court and take an oath and testify so we do not have to inconvenience the witness or take up our time.
>
> So at this time, [DPA], you may read the stipulation which is identified in paragraphs 1, 2, and 3 of the stipulated evidence.
>
> . . . .
>
> . . . Ladies and gentlemen, you are also instructed that you are to accept, as conclusively proven, all the facts to which the parties have stipulated.

When the State rested its case, Defense Counsel moved for a "Judgment of Acquittal; that the State has not made out a prima facie case in each of the counts charged in this case," and in the alternative a "Motion to Dismiss on the grounds of deminimus [sic] as far as the actual quantity of cocaine that was recovered." The court denied both motions.

Maxwell testified as to the events on February 16, 2000, in relevant part, as follows:

> I was sitting down talking to my friends, and I saw [Officer Torco] walking through the park, and he wen' sit down, and he asked my friend them for buy something. I could see that from where I was sitting. So I -- I knew him from before, yeah. So I told my friend, I call him uncle, I told him that, "That's one cop. That's one cop." I mean that what I told him, "That's one cop." And then [Officer Torco] wen' stand up and told me, "What? What you talking about, you punk." He called me one punk. "What you talking about? You don't know what you talking about. You like go right now?" So I knew that was one cop. So I -- I wen' -- I wen' tell him, "Brah" -- I -- I -- I wen' tell him in an angry voice too. I -- I -- I was angry. I told him -- you know, I told him, "What, Brah?" You know, what I mean? I told him what back. You know what I mean? Like -- like -- like we was ready for argue, yeah, but he was, like, from here to the door right there . . . . That's how far we was talking. We was talking from pretty far away, and he told me -- he told me he going call me out. I told him, "I like see. Come right now. I like see." You know what I mean? So he never do nothing. He wen' turn around, and he wen' walk -- he walked a little bit further, and then he wen' walk out the park, and then I was sitting down talking to my friends. I make like nothing -- I never thought they go come back and beat me up. They came back to the park.

("Sics" were not added to above quotation.) Maxwell stated that as he was talking to his friend, HPD officers approached him and "shoved [him] on the ground" and said, "'What? You want to pull it? What? You want to pull knife?' And [the officers] started kicking [Maxwell] repeatedly on the ground." Maxwell testified that the officers searched his pockets and did not find the

knife. Maxwell further testified that he did not have the knife or threaten Officer Torco with a knife, nor did he have possession of the glass pipe.

On cross-examination by the State, Maxwell testified that he had known Officer Torco before February 16, 2000. Maxwell admitted that he wanted to let his friends know that Officer Torco was a police officer to "blow [Officer Torco's] cover" and warn his friends. Maxwell testified that (1) Officer Torco initiated the confrontation, but Maxwell "took off his white tank top" and threw it on the ground, while "bobbing" his head up and down waiting for Officer Torco to approach Maxwell; (2) three people, including Maxwell, were sitting on the blue tarp when Officer Lum approached Maxwell; and (3) the HPD "set [Maxwell] up because [HPD] wanted Maxwell . . . out of the way" so that HPD could "handle their business at the [ʻAʻala Park] without any more interruptions from [Maxwell]."

On October 25, 2000, the jury found Maxwell guilty of Count I, Terroristic Threatening in the Second Degree, and Count II, Promoting a Dangerous Drug in the Third Degree. Maxwell was sentenced to a maximum term of incarceration of one year for Count I and five years for Count II, to be served concurrently with any other sentence being served. In addition, Maxwell was sentenced to a mandatory minimum term of imprisonment of one year and eight months as a repeat offender.

II.

RELEVANT STANDARDS OF REVIEW

A. Plain Error

> "We may recognize plain error when the error committed affects substantial rights of the defendant." State v. Cullen, 86 Hawaiʻi 1, 8, 946 P.2d 955, 962 (1997) (citations and internal quotation signals omitted). See also Hawaiʻi Rules of Penal Procedure (HRPP) Rule 52(b) (1993) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

State v. Staley, 91 Hawaiʻi 275, 282, 982 P.2d 904, 911 (1999) (citations omitted).

"[T]his Court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Sawyer, 88 Hawaiʻi 325, 330, 966 P.2d 637, 642 (1998) (citations omitted).

> This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system--that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes.

State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993) (citing State v. Fox, 70 Haw. 46, 55-56, 760 P.2d 670, 675-76 (1988)). "If the substantial rights of the defendant have been affected adversely, the error will be deemed plain error." Sawyer, 88 Hawaiʻi at 330, 966 P.2d at 642 (citing State v. Pinero, 75 Haw. 282, 291-92, 859 P.2d 1369, 1374 (1993)).

"[T]he decision to take notice of plain error must turn on the facts of the particular case to correct errors that 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" Fox, 70 Haw. at 56, 760 P.2d at 676 (quoting United States v. Atkinson, 297 U.S. [157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936))].

> [E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction.

State v. Heard, 64 Haw. 193, 194, 638 P.2d 307, 308 (1981) (citations omitted).

B. Substantial Evidence

Regarding appellate review for insufficient evidence, the Hawai‘i Supreme Court has repeatedly stated:

> Evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

State v. Richie, 88 Hawai‘i 19, 33, 960 P.2d 1227, 1241 (1998) (citations and brackets omitted).

C. De Minimis Infractions

> Before a trial court can address whether an offense constitutes a de minimis infraction, the court must make factual determinations regarding the circumstances of the offense; these findings of fact are reviewed under the clearly erroneous standard. State v. Viernes, 92 Hawai‘i 130, 133, 988 P.2d 195, 198 (1999). The court must then decide whether to dismiss the charge as a de minimis offense under the circumstances established in the findings of fact. The court's ruling is reviewed under the abuse of discretion standard. Id. A court abuses its discretion "'if the court clearly exceeded the bounds of reason or disregarded rules or principles of

> law or practice to the substantial detriment of a party litigant." Id. (quoting State v. Ornellas, 79 Hawaiʻi 418, 420, 903 P.2d 723, 725 (App. 1995)).

State v. Balanza, 93 Hawaiʻi 279, 283, 1 P.3d 281, 285 (2000).

D. Prosecutorial Misconduct

> Allegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of whether there is a reasonable possibility that the error complained of might have contributed to the conviction. . . . Factors to consider are: (1) the nature of the conduct; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant.

State v. Rogan, 91 Hawaiʻi 405, 412, 984 P.2d 1231, 1238 (1999) (citations and internal quotation marks omitted).

E. Ineffective Assistance of 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?" State v. Silva, 75 Haw. 419, 439-40, 864 P.2d 583, 593 (1993) (internal quotation marks, brackets and citation omitted). Additionally,

> [t]he 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.

Id. at 440, 864 P.2d at 593 (citations omitted).

III.

DISCUSSION

A.

Maxwell contends that the conviction of Count II, Promoting a Dangerous Drug in the Third Degree, was the result of four errors.

First (Plain) Error

Maxwell notes that (1) the Stipulation was internally inconsistent in stating that Officer Lum turned in the glass pipe on February 16, 2000, at 6:25 p.m., but Mr. Mohamed tested the glass pipe on February 16, 2000, at 8:00 a.m.; (2) the Stipulation posed a factual impossibility because the incident and seizure occurred between 3:00 p.m. and 3:35 p.m. on February 16, 2000, while the Stipulation states that Mr. Mohamed tested the residue of the pipe at 8:00 a.m., on February 16, 2000, before the alleged incident and seizure occurred; and (3) the jury was instructed by the court that "[the jury] must accept, as conclusively proved, any facts that the parties stipulated." In light of the above, Maxwell contends that "the scientific proof as to the presence of cocaine was insufficient to sustain the conviction here, because the stipulation on which it rested was fatally flawed."

The State responds that Maxwell should not be able to raise this point of error on the first time on appeal. See Hawai‘i Rules of Appellate Procedure Rule 28(b)(4)(A). See also HRS § 641-16.[10] The State further responds that there was no plain error because the evidence in the record, when considered as a whole, indicates that the date stated in "paragraph 3" of the Stipulation was a mistake that should not invalidate the fact that the residue was cocaine.

We note that the Stipulation was signed by Defense Counsel and Maxwell and nothing was said during the trial about any errors in the Stipulation. We conclude that a defendant who, at trial, is a party to a stipulation of fact presented to the jury, cannot, on appeal, challenge that stipulated fact on the ground that it is inconsistent with another fact stated in the stipulation, and is bound by that stipulation. Thus, Maxwell is bound by his Stipulation and the facts stated therein and the Stipulation was not "fatally flawed."

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[10] HRS § 641-16 (1993) states the prerequisite of a timely objection to the admission of evidence as follows:

> Except as otherwise provided by the rules of court, there shall be no reversal for any alleged error in the admission or rejection of evidence or the giving of or refusing to give an instruction to the jury unless such alleged error was made the subject of an objection noted at the time it was committed or brought to the attention of the court in another appropriate manner.

However, where plain errors were committed and substantial rights were affected thereby, the errors "may be noticed although they were not brought to the attention of the trial court." State v. Fox, 70 Haw. 46, 55, 760 P.2d 670, 675 (1988) (quoting Hawai‘i Rules of Penal Procedure (HRPP) Rule 52(b) (brackets omitted)).

Moreover, there is nothing in the record to suggest that the apparent error in the Stipulation affected Maxwell's substantial rights. There was substantial evidence for the jury to conclude that Maxwell was guilty of Promoting a Dangerous Drug in the Third Degree. Officer Lum testified that as he approached Maxwell, Officer Lum "observed in [Maxwell's] right hand what appeared to be a cylindrical glass pipe, the end of the pipe." Officer Lum described the pipe as drug paraphernalia used to smoke rock cocaine. Furthermore, Officer Lum testified that based on prior training and experience, he decided that the residue in the pipe resembled burnt rock cocaine. The court accepted the glass pipe into evidence as State's Exhibit No. 5, without any objection by Defense Counsel.

Second Error

Maxwell argues that the verdicts regarding the two drug offenses were inconsistent, as the jury did not convict him of Unlawful Use of Drug Paraphernalia, yet convicted him of Promoting a Dangerous Drug in the Third Degree. Maxwell notes that the State's case, with respect to Promoting a Dangerous Drug in the Third Degree, rested on the jury finding that Maxwell possessed the drug paraphernalia, a glass pipe containing the residue cocaine. However, the jury acquitted Maxwell on Unlawful Use of Drug Paraphernalia and, thus, Maxwell should not have been convicted of Promoting a Dangerous Drug in the Third Degree.

The State responds that Maxwell overlooks the difference between the two offenses. Promoting a Dangerous Drug in the Third Degree requires Maxwell to knowingly possess cocaine. In contrast, Unlawful Use of Drug Paraphernalia requires that Maxwell possessed the pipe with "intent to use" the pipe.

We agree with the State. Count II, HRS § 712-1243 (Promoting a Dangerous Drug in the Third Degree) required that Maxwell "knowingly possesses any dangerous drug in any amount." Count III, HRS § 329-43.5(a) (Unlawful Use of Drug Paraphernalia) required Maxwell to "use, or to possess with intent to use" the glass pipe "to . . . ingest, inhale, or otherwise introduce into the human body a controlled substance[.]" It appears that the jury decided that Maxwell knowingly possessed the glass pipe and the cocaine in it but that Maxwell did not use the glass pipe or possess it with intent to use it.

Third Error

Maxwell contends that the conviction for "knowing possession" of the dangerous drug cocaine was not supported by substantial evidence. The State responds that the testimonies of Officers Lum and Torco and Maxwell provide evidence that Maxwell "knowingly" possessed the cocaine.

It has been stated that

> given the difficulty of proving the requisite state of mind by direct evidence in criminal cases, we have consistently held that . . . proof by circumstantial evidence and reasonable inferences

> arising from circumstances surrounding the defendant's conduct is sufficient. . . . Thus, the mind of an alleged offender may be read from his acts, conduct and inferences fairly drawn from all the circumstances.

Staley, 91 Hawaiʻi at 286, 982 P.2d at 915 (citations, brackets, and internal quotation marks omitted; ellipses in original).

In this case, there was testimony that Officer Lum (1) saw Maxwell in possession of the glass pipe in his right hand; (2) as Officer Lum approached Maxwell, he observed the pipe drop from Maxwell's right hand on to the tarp; (3) after Maxwell was arrested, Officer Lum found the pipe next to where Maxwell was seated; (4) the pipe was the type commonly used to smoke rock cocaine; and (5) the residue of rock cocaine was plainly visible within the glass pipe. Thus, according to the evidence presented to the court, the acts of Maxwell provided substantial evidence that Maxwell knowingly possessed cocaine.

Fourth (Plain) Error

Maxwell argues the substance and nature of the drug possession was de minimis[11] because the weight of the specimen

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[11] HRS § 702-236 states as follows:

> **De minimis infractions.** (1) The court may dismiss a prosecution if, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct:
>
> (a) Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the offense; or
>
> (b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

(continued...)

was 0.018 grams, and there is no evidence of the weight of cocaine within the 0.018 specimen and, thus, could not support a (1) conviction or (2) sentencing under the repeat offender statute.

The State responds that Maxwell failed to introduce any evidence that the quantity of cocaine he possessed was neither useable nor saleable, nor provide the court with evidence that the cocaine did not threaten the harm sought to be prevented by HRS § 712-1243.

The Hawaiʻi Supreme Court has held that the court did not abuse its discretion in ruling that defendant's infraction of HRS § 712-1243 was de minimis within the meaning of HRS § 702-236 where "defendant's conduct did not actually cause or threaten the harm sought to be prevented by the law or did so only to an extent too trivial to warrant the condemnation of conviction." State v. Viernes, 92 Hawaiʻi 130, 134, 988 P.2d 195, 199 (1999). Under Viernes, to establish a de minimus infraction, the defendant must show that (1) the quantity of drug at issue was "infinitesimal and in fact unusable as a narcotic"; or, in the alternative, (2)(a) the drugs at issue "could not produce *any*

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[11](...continued)

(c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

(2) The court shall not dismiss a prosecution under subsection (1)(c) of this section without filing a written statement of its reasons.

pharmacological action or physiological effect" and (b) were not saleable. (Emphasis in original.) Id.

In this case, (1) the State presented evidence that the 0.018 specimen in the pipe was visible to the naked eye and not infinitesimal; and (2) there was no evidence that the cocaine within the 0.018 specimen (a) could not produce any pharmacological or physiological effect and (b) was not saleable. Thus, the court did not abuse its discretion in denying Maxwell's motion contending that the offense was de minimis.

B.

Maxwell argues Terroristic Threatening in the Second Degree is not supported by substantial evidence because the jury rejected the State's version of the incident, which included the allegation that Maxwell terrorized Officer Torco with the knife. Thus, at best, Maxwell only "called the officer out" to fight.

In this case, the jury was instructed that if they were unable to reach a unanimous verdict as to Terroristic Threatening in the First Degree, they could find Maxwell guilty of Terroristic Threatening in the Second Degree if two elements were proven: (A) on February 16, 2000, on the island of Oahu, Maxwell "threatened, by word or conduct, to cause bodily injury to another person" and (B) Maxwell did so in reckless disregard of the risk of terrorizing that person. In other words, as specified in HRS § 707-715, the jury could decide that Maxwell

was guilty of Terroristic Threatening in the Second Degree if the following elements were met: (A)(i) By words or conduct, Maxwell threatened Officer Torco, (A)(ii) to cause bodily injury to Officer Torco and (B) in reckless disregard of the risk of terrorizing Officer Torco.

The court's instructions to the jury did not define the word "threatened." It is reasonable to assume that the jury interpreted it to mean that Maxwell expressed an intention to inflict pain or harm upon Officer Torco.

The relevant precedent is that

> threats punishable consistently with the First Amendment are only those which according to their language and context conveyed a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected "vehement, caustic and unpleasantly sharp attacks." . . .
>
> Proof of a "true threat" focuses on threats which are so unambiguous and have such immediacy that they convincingly *express* an *intention* of being carried out.
>
> So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, so as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied.

State v. Chung, 75 Haw. 398, 416-17, 862 P. 2d 1063, 1072-73 (1993) (quoting United States v. Kelner, 534 F.2d 1029, 1026-27 (2d. Cir. 1976), *cert. denied*, 429 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976)) (original ellipses and brackets omitted, emphasis in original).

> [A]s a general matter, the prosecution must prove that the threat was objectively susceptible to inducing fear of bodily injury in a reasonable person at whom the threat was directed and who was familiar with the circumstances under which the threat was uttered. . . . [O]ne means of proving the foregoing would be to establish, . . ., that the threat

> was uttered under circumstances that rendered it "so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." But another would be to establish that the defendant possessed "the apparent ability to carry out the threat," such that "the threat would reasonably tend to induce fear of bodily injury in the victim."
>
> . . . .
>
> . . . "[W]here abusive speech is directed at a police officer, it must generally be coupled with outrageous physical conduct, which exacerbates the risk that the officer's training and professional standard of restrained behavior will be overcome such that the officer will be provoked into a violent response."
>
> . . . .
>
> . . . [T]he particular attributes of the defendant and the subject of the threatening utterance are surely relevant in assessing whether the induced fear of bodily injury, if any, is objectively reasonable.

State v. Valdivia, 95 Hawaiʻi 465, 477, 479, 24 P.3d 661, 673, 675 (2001) (citations, original brackets, and ellipses omitted).

In light of this precedent, we conclude that the record lacks the substantial evidence necessary to support element (A)(i) stated above.

In this case, the evidence is that (1) Maxwell was twelve to fifteen feet apart from Officer Torco; (2) Maxwell stated to Officer Torco in a loud and aggressive voice, "What? You like go right now, Punk? You like go right now?"; (3) Officer Torco understood these words to mean that Maxwell desired a "physical confrontation"; (4) Maxwell was "waiving [his hands] around, . . . in the air"; (5) Maxwell took a boxer-type stance facing Officer Torco; (6) Maxwell took off his white tank top shirt and threw it on the ground; Maxwell pulled out a knife

and moved it from left to right while pointing the blade at Officer Torco; (7) Officer Torco started to back up, Maxwell said, "Yeah, that's what I thought, Punk," jammed the blade into the wooden bench and sat down; and (8) Officer Torco left the area.

We conclude that Maxwell's words and actions while no closer than twelve to fifteen feet away from Officer Torco:

(1) do not show a "likelihood of execution" of a physical battle absent Officer Torco's indication of his willingness to engage in a physical battle;

(2) are not "so unambiguous" and do not have "such immediacy" that they convincingly *express* an *intention* of being carried out" absent Officer Torco's indication of his willingness to engage in a physical battle;

(3) is not evidence of a threat that "on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to [Officer Torco], so as to convey a gravity of purpose and imminent prospect of execution"; and

(4) is not "abusive speech . . . directed at . . . a police officer, . . . coupled with . . . outrageous physical conduct, . . . which exacerbates the risk that the officer's training and professional standard of restrained behavior will be

overcome such that the officer will be provoked into a violent response[.]"

If the record contained the substantial evidence necessary to support a conviction, it is likely we would have concluded that the court's failure in its instructions to the jury to define the word "threatened" was plain error.[12]

C.

Maxwell contends that prosecutorial misconduct warrants dismissal of the charges.

Allegations of prosecutorial misconduct involve the following three-step inquiry:

(1) What was the DPA's conduct?

(2) Was the DPA's conduct misconduct?

(3) Was the DPA's misconduct harmless beyond a reasonable doubt?

Question (3) "requires an examination of the record and a determination of whether there is a reasonable possibility that the error complained of might have contributed to the

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[12] Although an error in the instructions to which no objection is made at trial may not be assigned as error on appeal . . . and an error in the instructions which is not properly cited in the points on appeal . . . will not be considered on appeal, . . . appellate courts *may* notice plain errors or defects affecting substantial rights which were not brought to the attention of the court.

State v. Halemanu, 3 Haw. App. 300, 306, 650 P.2d 587, 592 (1982) (citations omitted, emphasis in original).

conviction." Rogan, 91 Hawai‘i at 412, 984 P.2d at 1238 (citations and internal quotation marks omitted). "Factors to consider are: (1) the nature of the conduct; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant." Id. (citation omitted).

Maxwell complains of the references to the dangerous nature of ‘A‘ala Park. As noted above, however, these references occurred on *voir dire* during Defense Counsel's questioning of prospective jurors. Moreover, "information regarding the reputation of an establishment or a community location is, in and of itself, insufficiently prejudicial to warrant the grant of a new trial." State v. Gabalis, 83 Hawai‘i 40, 46, 924 P.2d 534, 540 (1996).

Maxwell complains of the references to race/ethnicity. Specifically, Maxwell cites (1) the DPA's statements regarding Officer Torco observing "three unidentified Polynesian males" and Officer Torco approaching "these three unidentified Polynesian males to purchase drugs"; (2) Officer Torco's testimony regarding "convers[ing] with . . . the Polynesian-type male"; (3) the DPA's question to Officer Torco regarding "what specifically happened when you were conversing with one of the unidentified Polynesian males about the twenty you wanted to buy"; and (4) Officer Torco's testimony describing Defendant's actions as "the local

boy style with head bobbing" and waiving his hands, "just throwing them up in the air . . . just that local boy mentality."

With respect to (1), (2), and (3), we note that "the mere mention of the status of the accused as shown by the record may not be improper if it has a legitimate bearing on some issue in the case, such as identification by race." Rogan, 91 Hawaiʻi at 413, 984 P.2d at 1239 (quoting the 1979 commentary to ABA Prosecution Function Standard 3-5.8(c) (3d ed. 1993). The following facts are additional evidence that the statements were not improper: (a) Maxwell did not object to any of the references and (b) Defense Counsel asked Officer Torco "[s]o when he first came up to you, you know, while you were talking with that Polynesian male -- . . . -- did you immediately recognize him already at that point?"

It is apparent that Officer Torco's statement describing Maxwell's actions as "the local boy style" sought to further describe in detail to the jury how Maxwell was acting with "head bobbing" and waiving his hands, "just throwing them up in the air."

D.

Maxwell contends that the acts or omissions of Defense Counsel warrants a new trial because Defense Counsel: (1) failed

to argue points A, B, and C above; (2) failed to file post-conviction motions; (3) suggested that Maxwell had been arrested before; and (4) failed to retain a defense expert to establish that Maxwell's possession, if any, was de minimus.

"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?" State v. Silva, 75 Haw. 419, 439-40 864 P.2d 583,593 (1993) (internal quotation marks, brackets and citation omitted.) Additionally,

> [t]he 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.

Id. at 440, 864 P.2d at 593 (citations omitted). In this case, after a review of the entire record, we conclude that Maxwell has failed his burden.

IV.

CONCLUSION

Accordingly, with respect to the October 25, 2000 Judgment pertaining to Defendant-Appellant Darius Maxwell, also known as Leroy Beaver, Jr., (1) we reverse the conviction as to Count I, Terroristic Threatening in the Second Degree, HRS § 707-717 (1993), and (2) we affirm the conviction as to

Count II, Promoting a Dangerous Drug in the Third Degree, HRS § 712-1243 (1993).

DATED: Honolulu, Hawai‘i, July 31, 2002.

On the briefs:

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Chief Judge

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Associate Judge

Associate Judge