NO. 23897

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
VAN K. KAHUMOKU, Defendant-Appellant

APPEAL FROM THE THIRD CIRCUIT COURT
(CR. NO. 99-0-288)

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

Defendant-Appellant Van K. Kahumoku (Kahumoku) was charged by complaint on May 17, 1999, with the following:

> Count I, Murder in the Second Degree in violation of Hawaii Revised Statutes (HRS) §§ 707-701.5(1) (1993)[1];
>
> Count II, Terroristic Threatening in the First Degree, in violation of HRS §§ 707-715(1) and 707-716(1)(d) (1993)[2];
>
> Count III, Place to Keep Firearms, in violation of HRS § 134-6(c) (2001)[3]; and

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[1]/HRS § 707-701.5 provides as follows:

> **§707-701.5 Murder in the second degree.** (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.
>
> (2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656.

[2]/Count II was dismissed on September 24, 1999.

[3]/HRS § 134-6 provides, in relevant part, as follows:

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

(continued...)

Count IV, Promoting a Detrimental Drug in the Third Degree, in violation of HRS § 712-1249(1) (1993).[4]

Pursuant to a jury trial in the Circuit Court of the Third Circuit (the circuit court)[5], Kahumoku was convicted as to Counts I and III as charged.[6]

Kahumoku contends the circuit court (1) erred by denying the introduction of hearsay testimony regarding

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[3/](...continued)

(c) Except as provided in sections 134-5 and 134-9, all firearms and ammunition shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms or ammunition or both in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following: a place of repair; a target range; a licensed dealer's place of business; an organized, scheduled firearms show or exhibit; a place of formal hunter or firearm use training or instruction; or a police station. "Enclosed container" means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.

. . . .

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

A conviction and sentence under subsection (a) or (b) shall be in addition to and not in lieu of any conviction and sentence for the separate felony; provided that the sentence imposed under subsection (a) or (b) may run concurrently or consecutively with the sentence for the separate felony.

[4/]The State's Motion for Nolle Prosequi with Prejudice of Count IV was granted on September 15, 2000.

[5/]The Honorable Greg Nakamura presided.

[6/]The Judgment omits the original Count II (Terroristic Threatening in the First Degree) from the original charges and states that Kahumoku was found guilty of "Count 2: Place to Keep Firearms"; the Judgment should read "Count 3: Place to Keep Firearms" (emphasis added). The circuit court and counsel are advised to carefully read all judgments.

statements made by a potential defense witness, (2) abused its discretion by refusing his request for a continuance in order to subpoena and secure the attendance of a potential defense witness, and (3) relied on insufficient evidence to support a finding that he did not act in self-defense. We disagree with Kahumoku and affirm the October 23, 2000, Judgment of the circuit court.

I. BACKGROUND

The charges in this case followed a fatal shooting incident that occurred during the early morning hours on May 15, 1999, following an altercation between Kahumoku and Randolph Hall (Hall).

Jon Hall (Jon), Hall's brother, testified that on May 15, 1999, Hall was temporarily living in a bus on Jon's five-acre property in Panaewa (Hall property). Kahumoku's wife, Libby Kahumoku (Libby), was involved in a relationship with Hall and was with Hall in the bus that night. During the evening of May 14 and early morning hours of May 15 Jon was "drinking and talking story" with friends in a shed on the property, about fifty to seventy feet from the bus. At some point in the early morning, Jon noticed a vehicle come on the property and pull directly behind his brother's truck, which was parked on the passenger side of the bus. He noticed that the vehicle's headlights remained on "kind of long." Jon testified "[t]hen all

of a sudden I heard some shots." He heard three to five shots. Jon called the police and waited for them to arrive before going outside.

Federal Bureau of Investigation Special Agent Edward Ignacio (Agent Ignacio) testified that on May 15, 1999, he was employed as a police officer for the Hawai‘i County Police Department. On that date, Agent Ignacio was assigned to respond to a gunshot call in the Panaewa area. Upon arriving at the Hall property, Agent Ignacio met Officer Chong and Sergeant Rodrigues. The three officers separately drove their cars up a dirt road into a large open area where Agent Ignacio observed Kahumoku waving a flashlight, "back and forth like waiving [sic] us down". Sergeant Rodrigues stated over the radio that Kahumoku had "a gun in his left hand." Agent Ignacio stopped his vehicle about 200 feet away from Kahumoku.

Agent Ignacio testified that as the officers got out of their vehicles, Kahumoku started walking towards them. Yelling "help him, help him," Kahumoku pointed the flashlight towards a person (Hall) laying on the ground. As Kahumoku continued walking towards the officers, he put a gun to his head. The officers repeatedly ordered Kahumoku to drop the gun, but Kahumoku continued walking with the gun pointed at his head. About fifty feet from the officers, Kahumoku dropped to his knees, saying, "Oh, Lord, please forgive me." The officers

repeated the order to drop the gun. Kahumoku threw the gun to the side into a grassy area. Agent Ignacio ordered Kahumoku down on his stomach and placed Kahumoku under arrest. Agent Ignacio did not see any other firearms in the area. Agent Ignacio then went to Hall, who was bleeding from his forehead area. Libby was "over" Hall on the ground; she was "irate," "crying," and "hysterical."

Hawai‘i County Police Officer Joel J. Field (Officer Field) testified that on May 15, 1999, at approximately 1:30 a.m., he responded to the shooting incident with his recruit officer, Officer Hatada (Officer Hatada). Upon arriving at the location, Officer Field noticed Kahumoku "walking in a lateral motion" with "a gun to his head." Other officers, including Sergeant Rodrigues, Officer Ignacio, and Officer Chong, were present at the scene. Officer Field instructed Officer Hatada to, "get out of the vehicle, draw his weapon, and take cover" because they were going to attempt securing the weapon from Kahumoku.

Officer Field testified that once Kahumoku threw away the gun and was placed under arrest, Officer Field recovered the firearm and noticed it was "cocked back in a ready to fire position." Officer Field "made [the gun] safe by decocking it and removing the cylinder from the weapon itself." When Officer Field opened the cylinder, he noticed that two cylinders housed

spent casings, three had live ammunition, and one was empty. Officer Field bagged Kahumoku's hands with two manila envelopes to prevent any contamination before a gunshot residue test could be conducted. When Officer Field placed the manila envelope over Kahumoku's right hand, Kahumoku said "I'm right-handed. That's the hand I used."

Officer Field testified that Kahumoku was then transported to the police station, where Kahumoku made spontaneous, voluntary statements to Officer Field. Officer Field testified, "[w]e told [Kahumoku] not to make any statements and he said something to the effect that he hunted him down today, he had shot somebody, he was looking for him. Statements to that nature." Kahumoku said "it was all his fault and it wasn't the other guy's fault. It was all his fault." Kahumoku appeared to Officer Field to be "level headed" and was "talking at a good rate," "not being too hyper." Kahumoku did not seem to have an alcohol smell on his breath nor appear to be on any type of substances or drugs. Kahumoku never made any statements about Hall's having a firearm.

Hawai‘i County Police Lieutenant Chad Fukui (Lieutenant Fukui) testified that at approximately 2:10 a.m. on May 15, 1999, he was on duty as the watch commander and at the receiving desk when Kahumoku was brought in. Lieutenant Fukui escorted Kahumoku from the "blue and white" into the processing room area, during

which Kahumoku said "I think I wen kill the wrong guy" and "I think I wen kill one innocent guy." Lieutenant Fukui did not question Kahumoku or elicit the statements.

Detective Glenn Uehana (Detective Uehana) testified that as a police detective with the Hawai‘i County Police Department, he investigated the shooting incident at the scene. Also present at the scene were police department criminalists Ed Oshiro (Oshiro) and Brian Koge (Koge). As Oshiro and Koge were collecting hair samples from where Hall's head had lain on the ground, they noticed a hole in the ground. State's exhibit 90 depicted the hole in the ground from which the policemen recovered a bullet covered with a "reddish gelatinous substance." Detective Uehana walked around the area where the shooting had occurred and the vehicles at the scene and he saw no firearm in the area. He saw only .22 caliber ammunition and .22 caliber spent cartridges in the area. At the time Hall's autopsy was done, there was no indication that Hall may have been in possession of or fired a firearm that night.

Dr. Alvin Omori (Dr. Omori) testified that he is the Chief Medical Examiner for the City and County of Honolulu, and, as a forensic pathologist, he performed the autopsy on Hall. Dr. Omori determined that Hall died as a result of gunshot wounds to the head and chest. Dr. Omori performed toxicology tests on Hall as part of the autopsy. The tests revealed the presence of

methamphetamine and amphetamine in Hall, although these drugs were unrelated to Hall's cause of death.

Dr. Omori testified that Hall sustained four gunshot wounds, three of which were "'through-and-through' gunshot wounds or perforating gunshot wound[s]." The first through-and-through wound Dr. Omori described was a "contact gunshot wound" to the forehead (the weapon was in contact with the skin of the forehead when the weapon was fired) where the bullet "traveled in a right-to-left direction" through the left side of Hall's brain prior to exiting the left side of his head. The second wound was in Hall's chest; the bullet passed from right to left through his heart. The third wound was to Hall's "left lower back of the flank area." The fourth wound was not a through-and-through gunshot wound; the bullet entered slightly to the back of the right upper arm, went through the collar bone, and lodged in the right upper chest area over the collar bone fracture. Dr. Omori described the gunshot wounds to the forehead and chest as "immediately fatal."

Kahumoku testified on his own behalf. He testified that on the afternoon of May 14, 1999, he was at home waiting for a call from Libby. Kahumoku expected to hear from Libby "before the day was up"; as it got "closer to midnight," Kahumoku "became quite concerned." Prior to May 14, Kahumoku had received information from various sources that led Kahumoku to believe

Hall was dealing drugs and using methamphetamines. Kahumoku believed that the Hall property was an "ice house" and that large amounts of money and guns were typically associated with selling drugs. Kahumoku stated that he "feared for Libby's life because she was telling an individual that had a hard time with the relationship [with Hall] in the first place in the way it existed that she was gonna leave him for her, uh, her husband."

Kahumoku testified that when it became late in the evening and there was still no word from Libby, he drove up to the Hall property at approximately 1:00 a.m. to check on her. Kahumoku turned into the Hall driveway, put his car headlights "on bright so occupants within the area would know that I was arriving," and remained there for approximately three to four minutes before proceeding up to "the bus." He parked his car approximately twenty to thirty feet away from the bus. Kahumoku called out, and Hall stepped out of the bus. Hall walked to the back of his truck and said "what do you want?" Kahumoku responded that he needed to speak to Libby. When Hall said Libby was sleeping, Kahumoku responded, "I just need to talk to her for one second." Kahumoku testified as follows:

> A. Well, Mr. Randolph Hall looked at me, and he -- there's some people -- excuse me. There's some people that telegraph their intention, and Mr. Randolph Hall was one of those people that telegraphed their intention.
>
> In the twenty years I've spent in the military, I was -- I had to learn how to discern aggressive versus non-aggressive behavior, and his behavior was aggressive as -- as opposed to earlier during the day that I initially met him for the first time in my life where he was just, you

know, just a regular person. He had, uh, no aggression to him at all earlier in the day.

And then when I met him that -- he -- he just turned to a different -- his demeanor changed. That's what I looked at it. His demeanor changed, and I looked in his eyes, and his eyes projected bright. I became fearful.

. . . .

Well, he started to look in the back of his truck, and I looked at him. I said, "Are you sure?" And his response was, "Yes."

So I went to my vehicle, and I searched on the passenger side of my vehicle, and I retrieved a six-cylinder Ruger – Ruger .22 pistol

And I went to the front of my vehicle, and, uh, put the pistol -- was in my left hand. I put the pistol in front of the lights so he could see what I had.

And then I verified again, "Are you sure?" And he said, "Yes," and I proceeded to -- proceeded to go into action. He moved in aggressive manner.

When asked what happened next, Kahumoku testified:

A. This is the part I'm not really sure. I believe [Hall] fired a weapon off first, and all I seen was the flash one that -- and then I returned fire. And I returned two shots.

. . . .

A. Then I hesitated, and he -- he still was aggressive coming towards me. But when I looked at -- at him, I didn't see anything in his hands anymore. And I continued to fire.

And then he got up to kind of close because I was moving in a lateral motion. I was moving to my left as he was advancing towards me. I was trying to get out of the light so he couldn't -- I mean, the light would blind him so he wouldn't be able to shoot me, but I was trying to make my body smaller, too.

Kahumoku testified that he and Hall were within two feet of each other when Kahumoku fired the final shot; Hall then fell to the ground on his back.

Kahumoku testified he did not run from Hall because Hall had a rifle (Kahumoku had only a .22 short barrel rifle) and Kahumoku was afraid he would be shot while running. Kahumoku stated "I believe his aggression was sufficiently exposed to me where I would not get to live. I feared for my life." During the period that shots were fired, Kahumoku felt "primal fear" because

> I hadn't heard from my wife during this interval time, I feared for the life of my wife and that -- well, in his aggression, since he was showing me aggression, that he might have terminated her life at that time and, um rape, murder, pillage, all of the above.

Kahumoku testified that he used force against Hall in "self defense" because Hall was the first one to initiate force.

On August 30, 2000, prior to closing arguments, Kahumoku moved for a continuance "for the opportunity to subpoena . . . a critical witness for the Defense, . . . Libby Kahumoku." Libby had unexpectedly appeared at the circuit court that morning prior to the start of court and had been interviewed by defense investigator William Lyman (Lyman). Libby had then left the courthouse without any explanation. On August 30, 2000, the circuit court granted the motion, stating:

> THE COURT: Okay. I'm going to allow the continuance in light of the offer of proof and, if, uh, Libby Kahumoku testifies, the value to the Defense of the proposed testimony.
>
> But, [Defense Counsel], I'm sure you understand that we can not [sic] delay the trial forever. I would, uh, I would be inclined to go forward with the trial, um, tomorrow even if Libby Kahumoku is not present. In other words, go through the reading of the instructions and closing tomorrow.

On August 31, 2000, Kahumoku again moved the circuit court for a continuance, stating:

> And the purpose for that continuance, Your Honor, is -- is to continue to pursue two avenues. Um, first avenue would be to continue to attempt to get Libby Kahumoku under subpoena and to have her appear and testify in this particular matter.
>
> If in fact, after reasonable efforts, she cannot be secured to testify in this matter, Your Honor, I would be -- it would be our intent to ask this Court to reopen the defense case to be able to call either Libby Kahumoku live, or failing that, your Honor, to call investigator William Lyman in order to testify as to a statement that Mr. Lyman took from, uh, Ms. Kahumoku yesterday, August 30th, um, year 2000, in the -- in the morning hours here in, uh, at the courthouse.

Following Kahumoku's offer of proof as to Libby's proposed testimony or Lyman's testimony in exchange for Libby's if she did not testify (declarant unavailable circumstances under Hawai‘i Rules of Evidence (HRE) Rule 804(b)(3) and (7)), the circuit court stated:

> [R]egarding the motion to continue the trial, if it were only for the purpose of having Libby Kahumoku testify I would deny the motion because there's no assurance that she would be -- she would appear if there were a continuance.
>
> . . . .
>
> Um, having said that, I still think we gotta address this [HRE] 804(b)(7) issue that's been raised. So I will allow a continuance to address that particular issue. Um, I would ask that you make a written offer of proof as to what Mr. Lyman would testify to.

After requesting written memoranda from both sides, including the State's Exhibits Nos. 1, 2, and 3 (two videotapes and one transcript of an audiotape of police interviews with Libby done within 48 hours of the shooting), the circuit court set a hearing

on the issues for September 5, 2000, and continued the trial until September 6, 2000.

On September 5, 2000, the circuit court heard arguments on Kahumoku's motions to have Lyman testify regarding Libby's August 30, 2000, statements to Lyman and to continue the trial. The circuit court denied Kahumoku's motion, stating that Libby's "statement that she used methamphetamine and the statement that she recovered the spent cartridge" may have qualified as statements against interest for HRE Rule 804(b)(3) purposes; however, the statement that Libby used methamphetamine had "minimal probative value." Regarding Libby's statement that she had recovered a spent cartridge, the circuit court stated that under Rule 804(b)(3), a statement made against interest "must be supported by corroborating circumstances which clearly indicate the trustworthiness of the statement." The court further stated:

> In this case, there is no corroborating evidence that the spent cartridge was discharged at the time of the incident in this case. In fact, even the offer of proof does not provide factual circumstances which would lead one to conclude that the spent cartridge was probably discharged during the incident as compared to some other time.

Turning to Kahumoku's contention that the statements were admissible under HRE Rule 804(b)(7), the circuit court found the statements failed to have substantial guarantees of trustworthiness as required by the rule. The circuit court denied the reopening of the case to allow further testimony and also denied Kahumoku's motion to continue the trial.

On September 6, 2000, the circuit court heard Kahumoku's motion to reconsider the denial of the motions made on the prior day, as well as another motion to continue trial. The circuit court denied both motions. Kahumoku made a second motion for judgment of acquittal, which the circuit court denied.

II. STANDARD OF REVIEW

A. Denial of a Motion to Admit Hearsay Testimony

> [D]ifferent standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard. However, the traditional abuse of discretion standard should be applied in the case of those rules of evidence that require a "judgment call" on the part of the trial court.

Kealoha v. County of Hawaii, 74 Haw. 308, 319-20, 844 P.2d 670, 676, reconsideration denied, 74 Haw. 650, 847 P.2d 263 (1993). "Under the right/wrong standard, [the appellate court] examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answer to it." State v. Timoteo, 87 Hawai‘i 108, 113, 952 P.2d 865, 870 (1997) (internal quotation marks omitted; brackets added).

B. Denial of a Motion for Continuance

"A motion for continuance is addressed to the sound discretion of the trial court, and the court's ruling will not be disturbed on appeal absent a showing of abuse of that discretion." State v. Lee, 9 Haw. App. 600, 603, 856 P.2d 1279,

1281 (1993). "Generally, to constitute an abuse, it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State v. Crisostomo, 94 Hawai‘i 282, 287, 12 P.3d 873, 878 (2000) (internal quotation marks and brackets omitted).

C. Motion For Judgment of Acquittal

> The standard to be applied by the trial court in ruling upon a motion for a judgment of acquittal is whether, upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the jury, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. An appellate court employs this same standard of review.

State v. Alston, 75 Haw. 517, 528, 865 P.2d 157, 164 (1994) (citations omitted).

D. Sufficiency of the Evidence

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

> [E]vidence 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 the 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. Quitog, 85 Hawai‘i 128, 145, 938 P.2d 559, 576 (1997) (quoting State v. Eastman, 81 Hawai‘i 131, 135, 913 P.2d 57, 61 (1996)) (emphasis omitted). "'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Eastman, 81 Hawai‘i at 135, 913 P.2d at 61.

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

III. DISCUSSION

A. Hearsay Testimony

Kahumoku contends the circuit court erred by denying his request to admit hearsay testimony by defense investigator Lyman regarding statements made by Libby to Lyman on August 30, 2000. Kahumoku argues that under HRE Rule 804(b)(3) and (7), such statements are admissible.

Hawai‘i Rules of Evidence Rule 804(b)(3) and (7) provides:

> **Rule 804 Hearsay exceptions; declarant unavailable.**
>
> . . . .
>
> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement;
>
> . . . .
>
> (7) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the

> proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Under State v. Bates, 70 Haw. 343, 771 P.2d 509 (1989), in addition to a hearsay declarant being unavailable,

> his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other words, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 348, 771 P.2d at 512 (internal quotation marks omitted).

Furthermore, for statements made against penal interest, HRE Rule 804(b)(3) explicitly provides that statements are not admissible unless "corroborating circumstances clearly indicate the trustworthiness of the statement." Regarding what type and how much corroboration is required by the rule,

> [c]ourts have looked to both the reliability of the declarant when the statement was made, as well as corroboration of the truth of the declarant's statement, focusing on whether the evidence in the record supported or contradicted the statement, or both.

Bates, 70 Haw. at 349, 771 P.2d at 513.

After granting a trial continuance until September 6, 2000, reviewing written memoranda and Kahumoku's written offer of proof as to Libby's testimony to be offered through Lyman, and holding a hearing on September 5, 2000, the circuit court rejected Kahumoku's argument. The circuit court stated that

while Libby's statement that she used methamphetamine may have qualified as an admissible hearsay statement under HRE Rule 804(b)(3), such statement was of "minimal probative value." The circuit court further stated that while Libby's statement that she recovered the spent cartridge may have also been admissible under HRE 804(b)(3), there was no corroborating evidence or factual circumstances that the spent cartridge was discharged at the time of the incident.

The circuit court did not err by disallowing hearsay testimony by Lyman. Dr. Omori testified that Hall's toxicology screens indicated the presence of methamphetamine and amphetamine, so Libby's statement on August 30 to Lyman that Libby and "everybody at the farm was either loaded on ice or drunk" was irrelevant. The record contains no corroborating evidence that the spent cartridge was fired during the incident, and Kahumoku's offer of proof provides no "corroborating circumstances clearly indicating the trustworthiness of the statements" as required by HRE Rule 804(b)(3). The evidence in the record contradicted Kahumoku's suggestion that Hall fired a gun during the incident. Therefore, it was not error for the circuit court to exclude Lyman's hearsay statements because of lack of corroborating circumstances.

B. Denial of Continuance

Kahumoku next contends the circuit court abused its discretion by refusing his request for a continuance in order to subpoena and secure the attendance of defense witness Libby.

This court has recognized that in moving for a continuance based on the unavailability of a witness, the movant must generally show that

> due diligence has been exercised to obtain the attendance of the witness, that substantial favorable evidence would be tendered by the witness, that the witness is available and willing to testify, and that the denial of the continuance would materially prejudice the defendant.

Lee, 9 Haw. App. at 604, 856 P.2d at 1282 (quoting United States v. Walker, 621 F.2d 163, 168 (5th Cir. 1980), cert. denied, 450 U.S. 1000, 101 S. Ct. 1707, 68 L. Ed. 2d 202 (1981)).

The circuit court granted a continuance on August 30, 2000, to give Kahumoku time to subpoena Libby, but Kahumoku failed to do so. Despite having been served by the State with a subpoena duces tecum on August 11, 2000, commanding her appearance at trial on August 24, 2000, Libby failed to appear. Kahumoku fails to show that substantial favorable evidence would be tendered by Libby, that she was willing to testify, and that the eventual denial of the continuance materially prejudiced him. Under these circumstances, the circuit court did not abuse its discretion in denying the continuance.

C. Denial of Judgment of Acquittal

Kahumoku contends the evidence adduced at trial did not support a reasonable finding that there was proof beyond a reasonable doubt of the absence that he acted in self-defense. We affirm the circuit court's denial of Kahumoku's oral motion for a judgment of acquittal.

Hawai‘i Rules of Penal Procedure Rule 29(a) provides, in relevant part, the following:

> **RULE 29. MOTION FOR JUDGMENT OF ACQUITTAL.**
>
> **(a) Motion Before Submission to Jury.** Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses alleged in the charge after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without having reserved the right.

In order to convict Kahumoku of Murder in the Second Degree under HRS § 707-701.5, the State was required to prove beyond a reasonable doubt that Kahumoku intentionally or knowingly caused the death of Hall. Among other evidence at trial, Kahumoku testified that once he verified with Hall that Libby was sleeping, he "proceeded to go into action." In addition, according to the testimony of Officer Field, Kahumoku voluntarily admitted that "it was all his fault and it wasn't the other guy's fault. It was all his fault." Officer Fukui

testified that Kahumoku voluntarily admitted, "I think I wen kill one innocent guy."

With respect to the requisite state of mind for Murder in the Second Degree, i.e., intentionally or knowingly, Kahumoku's testimony tended to show that Kahumoku acted intentionally or knowingly. Kahumoku said he shot Hall to protect himself. Moreover, based on all of the evidence adduced at trial, the jury could infer that Kahumoku acted intentionally or knowingly, because "[t]he mind of an alleged offender may be read from his acts, conduct and inferences fairly drawn from all the circumstances." State v. Eastman, 81 Hawai‘i 131, 141, 913 P.2d 57, 67 (1996) "[I]t is not necessary for the [State] to introduce direct evidence of a defendant's state of mind in order to prove that the defendant acted intentionally, knowingly or recklessly." Id. at 140-41, 913 P.2d at 66-67. The Hawai‘i Supreme Court has 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.

State v. Sadino, 64 Haw. 427, 430, 642 P.2d 534, 536-37 (1982) (citations omitted); see also State v. Simpson, 64 Haw. 363, 373 n.7, 641 P.2d 320, 326 n.7 (1982).

Kahumoku attempted to justify his shooting of Hall by asserting that his actions were necessary in order to protect himself pursuant to HRS § 703-304(1) (1993), which provides:

> **§703-304 Use of force in self-protection.** (1) Subject to the provisions of this section and of section 703-308, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.
>
> (2) The use of deadly force is justifiable under this section if the actor believes that deadly force is necessary to protect himself against death, serious bodily injury, kidnapping, rape, or forcible sodomy.
>
> (3) Except as otherwise provided in subsections (4) and (5) of this section, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used without retreating, surrendering possession, doing any other act which he has no legal duty to do, or abstaining from any lawful action.
>
> (4) The use of force is not justifiable under this section:
>
> (a) To resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful; or
>
> (b) To resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:
>
> (i) The actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest; or
>
> (ii) The actor believes that such force is necessary to protect himself against death or serious bodily injury.
>
> (5) The use of deadly force is not justifiable under this section if:
>
> (a) The actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or

> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:
>
> (i) The actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and
>
> (ii) A public officer justified in using force in the performance of his duties, or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape, is not obliged to desist from efforts to perform his duty, effect the arrest, or prevent the escape because of resistance or threatened resistance by or on behalf of the person against whom the action is directed.
>
> (6) The justification afforded by this section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime.

Because the Hawai'i Penal Code does not designate the justification of use of force for self protection as an affirmative defense, once a defendant adduces evidence of having used force for the protection of another person, "the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in the light of any contrary prosecution evidence, raises a reasonable doubt as to the defendant's guilt." HRS § 701-115(2)(a) (1993).[7] In other words,

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[7]/HRS § 701-115 reads as follows:

> **§701-115 Defenses.** (1) A defense is a fact or set of facts which negatives penal liability.

(continued...)

once a defendant has adduced evidence of having used force for self protection, the burden is on the prosecution to disprove the facts showing that the defendant used force for the protection of another person, or to prove facts negativing the justification defense and to do so beyond a reasonable doubt. State v. McNulty, 60 Haw. 259, 262, 588 P.2d 438, 442 (1978); Raines v. State, 79 Hawai‘i 219, 225, 900 P.2d 1286, 1292 (1995).

Kahumoku adduced evidence of having used force for self protection by testifying that Hall was the first aggressor and fired a gun first, causing Kahumoku to believe that his life was in danger. Accordingly, the trial court properly instructed the

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[7/](...continued)

(2) No defense may be considered by the trier of fact unless evidence of the specified fact or facts has been presented. If such evidence is presented, then:

(a) If the defense is not an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in the light of any contrary prosecution evidence, raises a reasonable doubt as to the defendant's guilt; or

(b) If the defense is an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in light of any contrary prosecution evidence, proves by a preponderance of the evidence the specified fact or facts which negative penal liability.

(3) A defense is an affirmative defense if:

(a) It is specifically so designated by the Code or another statute; or

(b) If the Code or another statute plainly requires the defendant to prove the defense by a preponderance of the evidence.

jury regarding the defense of use of force for self protection. Nevertheless, the jury found Kahumoku guilty of Murder in the Second Degree.

As a rule, we presume that the jury followed all of the trial court's instructions. State v. Knight, 80 Hawai‘i 318, 327, 909 P.2d 1133, 1142 (1996). In addition, because the jury found Kahumoku guilty of Murder in the Second Degree, it is apparent that the jury did not find his testimony credible when Kahumoku testified that Hall had been the first aggressor and that Kahumoku was justified in shooting him. As the trier of fact, the jury had the prerogative to believe or disbelieve Kahumoku when he admitted to the shooting of an innocent man to police officers and to disbelieve Kahumoku when he testified that he was acting in self-defense. Eastman, 81 Hawai‘i at 139, 913 P.2d at 65 ("It was within the trial court's prerogative to believe [defendant]'s prior inconsistent statements . . . and to disbelieve [defendant]'s oral testimony in court.").

In a jury trial, the jury is the trier of fact and the sole judge of the credibility of the witnesses and the weight of the evidence. State v. Tamura, 63 Haw. 636, 637-38, 633 P.2d 1115, 1117 (1981). "It is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trier of fact." State v. Jenkins, 93 Hawai‘i 87, 101, 997

P.2d 13, 27 (2000) (internal quotation marks and brackets omitted) (quoting State v. Mattiello, 90 Hawai‘i 255, 259, 978 P.2d 693, 697 (1999)).

The prosecution disproves a justification defense beyond a reasonable doubt when the jury believes the prosecution's case and disbelieves the defendant's case. State v. Gabrillo, 10 Haw. App. 448, 456-57, 877 P.2d 891, 895 (1994); Commentary to HRS § 701-115 (1993). It is evident from the verdict that the jury believed Kahumoku's voluntary admissions beyond a reasonable doubt and disbelieved Kahumoku's testimony with respect to his assertion that he was acting in self-defense when he shot and killed Hall.

The record contains credible evidence of sufficient quality and probative value to enable a person of reasonable caution to support the jury's conclusion that Kahumoku intentionally or knowingly shot Hall "through the heart" and "contact shot" Hall in the side of the head as Hall lay on the ground (either of which injuries killed Hall instantly) without a justification of self-defense. Accordingly, substantial evidence supports every material element of Murder in the Second Degree without justification. As a result, substantial evidence supports the jury's verdict.

Viewing the evidence in the light most favorable to the State and in full recognition of the province of the trier of

fact, we hold that the evidence was sufficient to support a case of Murder in the Second Degree without justification; therefore, a reasonable mind might fairly conclude that Kahumoku was guilty beyond a reasonable doubt. The circuit court did not err when it denied Kahumoku's motion for judgment of acquittal.

IV. CONCLUSION

Accordingly, the October 23, 2000, Judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai‘i, April 11, 2002.

On the briefs:

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Chief Judge

Associate Judge

Associate Judge