NOT FOR PUBLICATION

NO. 24489

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
FRANK ORLANDO LOHER, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-1621)

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

Frank Orlando Loher (Loher) appeals the July 18, 2001 judgment of the circuit court of the first circuit, the Honorable Dexter D. Del Rosario, judge presiding. Loher's notice of appeal also specifies the two July 30, 2001 findings of fact, conclusions of law and orders of the court that granted the State's motion for sentencing of repeat offender and the State's motion for extended and consecutive terms of imprisonment, respectively. The judgment convicted Loher of the offense of attempted sexual assault in the first degree and sentenced him to an extended term of imprisonment of life with the possibility of parole, subject to a mandatory minimum term of thirteen years and four months, to be served consecutively to Loher's concurrent,

twenty-year sentences for three previous sex offense convictions. We affirm.

I. Background.

On August 19, 1999, the grand jury handed down a two-count indictment against Loher:

> COUNT I: On or about the 29th day of July, 1999, in the City and County of Honolulu, State of Hawaii, FRANK LOHER, did intentionally engage in conduct which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in his commission of the crime of Sexual Assault in the First Degree against [the complaining witness (the CW)], thereby committing the offense of Attempted Sexual Assault in the First Degree, in violation of Sections 705-500[1] and 707-730(1)(a)[2] of the Hawaii Revised

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[1] Hawaii Revised Statutes (HRS) § 705-500 (1993) provides:

> (1) A person is guilty of an attempt to commit a crime if the person:
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.
> (2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.
> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

HRS § 705-502 (1993) provides that "[a]n attempt to commit a crime is an offense of the same class and grade as the most serious offense which is attempted."

[2] HRS § 707-730(1)(a) (1993 & Supp. 2002) provides that "[a] person commits the offense of sexual assault in the first degree if: The person knowingly subjects another person to an act of sexual penetration by strong compulsion[.]" HRS § 707-700 (1993) defines "sexual penetration" as "vaginal intercourse, anal intercourse, fellatio, cunnilingus, analingus, deviate sexual intercourse, or any intrusion of any part of a person's body or of any

> Statutes [(HRS)]. A person who [(sic)] commits the offense of Sexual Assault in the First Degree, in violation of Section 707-730(1)(a) of the [HRS], if the person knowingly subjects another person to an act of sexual penetration by strong compulsion.
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> COUNT II: On or about the 29th day of July, 1999, in the City and County of Honolulu, State of Hawaii, FRANK LOHER, did intentionally engage in conduct which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in his commission of the crime of Kidnapping of [the CW], thereby committing the offense of Attempted Kidnapping, in violation of Sections 705-500 and 707-720(1)(d)[3] of the [HRS]. A person commits the offense of Kidnapping, in violation of Section 707-720(1)(d) of the [HRS], if the person intentionally or knowingly restrains another person with intent to inflict bodily injury upon that person or subject that person to a sexual offense.

(Footnotes supplied.)

Loher's jury trial started on November 13, 2000. Honolulu Police Department (HPD) officer Oryn Baum (Officer Baum) testified that on July 29, 1999, at 3:49 a.m., she was dispatched to a specific address in the Mapunapuna area of Honolulu. At about 3:52 a.m., at the intersection of Kakoi and Kilihau

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object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight, but emission is not required. For purposes of this chapter, each act of sexual penetration shall constitute a separate offense." HRS § 707-700 (1993) defines "strong compulsion" as "the use of or attempt to use one or more of the following to overcome a person: (1) A threat, express or implied, that places a person in fear of bodily injury to the individual or another person, or in fear that the person or another person will be kidnapped; (2) A dangerous instrument; or (3) Physical force." HRS § 707-730(2) (1993 & Supp. 2002) provides that "[s]exual assault in the first degree is a class A felony." In the ordinary course, a class A felony carries a mandatory, indeterminate term of imprisonment of twenty years. HRS § 706-659 (Supp. 2002).

[3] HRS § 707-720(1)(d) (1993) provides that "[a] person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to: Inflict bodily injury upon that person or subject that person to a sexual offense[.]" HRS § 707-700 (1993) provides, in pertinent part, that "restrain" means "to restrict a person's movement in such a manner as to interfere substantially with the person's liberty: By means of force, threat, or deception[.]" HRS § 707-720(2) (1993) provides, in relevant part, that "kidnapping is a class A felony."

streets, Officer Baum was "flagged down" by the complaining witness (the CW). The CW was standing on a corner of the deserted intersection near a telephone booth, waving at Officer Baum with one arm and holding the other across her breast. According to Officer Baum, the CW was wearing "a halter top, kind of top on and a bra underneath, but it had been ripped in the back, so she was holding the front[.]"

The CW told Officer Baum what had happened to her, and rendered a description of the suspect and his car. Officer Baum: "the description of the suspect was a local male, late 30s. She said approximately about 5'9" tall and a heavy build. He had brown and gray hair. She said it was short, and she said he had, like, a stubble, like he was unshaven for a few days and also he had glasses on and an aqua T-shirt." The CW described the suspect's car as a red four-door sedan, newer make. The CW had also managed to get the Hawai'i license plate number of the car, HYB 364. Officer Baum's followup investigation revealed that the car was a red 1998 Dodge four-door sedan registered to Loher and his wife Andrea Loher (Mrs. Loher). Officer Baum had the address on the car registration checked, but discovered that it was a post office box. Officer Baum recovered the CW's halter top and bra, both of which were ripped. Officer Baum also noticed that the CW had "kind of a scratch, a red welt mark on her back." HPD

fingerprint identification technician Stephanie Kamakana testified that four latent fingerprints lifted from the car were of no value, and one did not match known fingerprints of the CW.

The twenty-seven-year-old CW testified that in the early morning hours of July 29, 1999, she was walking alone on Kapiʻolani Boulevard towards downtown Honolulu. When asked where she was headed, she responded, "I wasn't really sure. I thought I was going to go to the airport. I was fighting with my boyfriend." She had only sixty cents on her. She noticed a car turn around, pull into the driveway of a Kinko's Copies near the intersection with Piʻikoi Street, and stop -- "A bright red shiny car. It was a [four-door] Plymouth Neon." A man the CW had never seen before was sitting alone in the car, with the engine idling. The CW identified Loher as that man. Loher asked the CW whether she wanted a ride. Although the CW acknowledged that it was "a dumb idea," she accepted Loher's offer to give her a ride to the airport. She refused his invitation to "a party in Waianae." The CW got into the front passenger seat of the car. As they got on the freeway, she fell asleep.

The CW awoke in the car, "[i]n some kind of an industrial area. There were Caterpillars and stuff around, Kakoi and Kilihau. . . . It was -- it was deserted. . . . it didn't look like a great area. . . . I wouldn't walk there." The car

was parked on Kakoi Street facing towards Tripler Hospital. Loher was sitting behind the wheel. "He was really quiet." Then, Loher told the CW, "You have to give me head -- you can't get out of the car unless you give me head." Thereupon, the CW opened the front passenger door, got one foot out of the car, and was leaning forward trying to unfasten the seat belt when Loher tore her halter top and bra. At the same time, the CW felt a stinging sensation on her back (Later, she noticed "a big scratch on my back. It started to welt up."). The CW screamed, ran out of the car to a pay phone, and called 911.

While the CW was on the phone, Loher drove the car past her, turned around at the dead end on Kakoi Street, then drove past her again and stopped on Kilihau Street. As Loher was turning around at the dead end, the CW noticed the car's Hawai'i license plate number -- HYB 364 -- and relayed it to 911. Fearing that Loher was coming after her, the CW yelled that she had his license plate number. Loher got out of his car and glared at her. He then put a "shirt or something" over the license plate and drove off. The CW recalled that Officer Baum arrived on the scene after what "seemed like a long time." Officer Baum gave the CW a T-shirt to wear. Then, the CW related, "I -- I stayed there long enough to fill out the police report."

The CW remembered that Loher was wearing an aqua T-shirt, which she identified in a photo exhibit. She could not remember whether he was wearing long or short pants. She also identified Loher's car in a photo exhibit. She testified that she picked Loher out of a photographic lineup that HPD Detective Earl Takahashi (Detective Takahashi) showed her.

The audiotape of the CW's 911 call was played for the jury. In it, the CW is heard answering questions from the 911 dispatcher:

> Q. So do you know -- do you know who the male is?
> A. I honestly don't. He had tried to pick me up a few blocks before, but because it was dark and I didn't know who I was riding with, I thought I would wait until -- I told him, pick me up if you're going to pick me up, pick me up at Kinkos.
> Q. So why did you accept the ride with him?
> A. Why, because I'd been working and so many people, there's, like, people out on the street walking. There's people, like, trying to pull over, and there's, like, I didn't want to walk anymore. I'd already walked from Lawrence back to Doubletree, and Doubletree to Kapiolani where Kinkos is, and wasn't running yet.

On cross-examination, the CW admitted that she had seen Loher in his car before the incident that night, on Kapiʻolani Boulevard near the convention center. She also admitted that, after Loher had turned around on Kapiʻolani Boulevard and pulled over near her, she directed him to park at Kinko's, "so I can get a better look at you[.]" The CW did not remember seeing anything in particular between the two front seats of the car, on its dashboard, on the passenger seat sun visor or hanging from the rear view mirror. She described the car's upholstery: "Black

and it was gray inside." She was pretty sure there were no seat covers.

Detective Takahashi testified that he showed a photographic lineup of eight photos to the CW on August 9, 1999. She picked Loher's photo out of the lineup and identified him as the perpetrator. When she did, "She appeared to be traumatized and her eyes became watery." Detective Takahashi also revealed that he tried to recover the sign-in-sign-out log from Loher's residence, the halfway house in Kalihi called Victory Ohana. But he was told the log had been taken by Loher. On cross-examination, Detective Takahashi confirmed that the fingerprints and hair samples taken from Loher's car did not match those taken from the CW. No clothes fibers could be recovered from the car. Detective Takahashi found no traces of blood, skin or other evidence under Loher's fingernails, although he testified on redirect that Loher's fingernails were either chewed or cut to the quick. Detective Takahashi also remembered that Mrs. Loher told him the aqua shirt recovered by the police belonged to Mrs. Loher's son. After Detective Takahashi's testimony, the State rested. The court denied Loher's motion for judgment of acquittal.

Loher testified in his defense. He recalled that on July 28, 1999, he was living at the Victory Ohana halfway house

and his wife was living "in middle Nuuanu." At that time, they had been married for only a few months. It was an emotional time for them, because Mrs. Loher had just been diagnosed with cancer. That noon, he had just gotten off work when he accepted another assignment from his temporary job agency, a job at the Sweet Bread Factory in Waipahu. Mrs. Loher, a nurse, had to be at work at Straub Clinic & Hospital on Beretania Street at around 2:30 p.m., so Loher dropped her off there, then drove to his Waipahu job. Loher had to be at his job between 4:00 and 5:00 p.m. At around midnight, Mrs. Loher called him at work and told him she had to work a double shift. She was hungry and sick from her cancer treatment and asked if he could bring her some food. Loher finished work at the Sweet Bread Factory at around 1:00 a.m. He jumped on the freeway and got off at the Vineyard Boulevard exit. The Jack in the Box restaurant near there was "full," so Loher headed to the Jack in the Box near Straub, where he got some food. He then stopped at a gas station at Ward Avenue and Beretania Street and picked up some coffee. Loher got to Straub at around 2:00 a.m., and parked "at the emergency exit right there." That was where he normally parked. There were two security guards there who knew him, and he told them he would be upstairs for awhile with his wife and got their okay. Loher spent thirty to forty minutes with his wife in a staff conference

room, giving her emotional support -- "me and my wife were embracing awhile." Loher left Straub for Victory Ohana at about 2:40 a.m.

At around 2:50 a.m., Loher arrived at Victory Ohana and signed in. Then his wife called to make sure he had gotten home safely. Loher explained that, as newlyweds and with the future so uncertain, he and Mrs. Loher talked on the phone whenever they could. He told her he would call her back after he took a shower. At around 3:10 a.m., he did, and they talked for about fifteen or twenty minutes. Loher then slept for perhaps half an hour. He got up at around 4:00 a.m. to pick up his wife's "stepson" Moses and take him to work. Loher left Victory Ohana at around 4:30 a.m. and got to his wife's Nu'uanu residence at about 4:45 a.m. He made breakfast for the kids and left at around 5:30 a.m. to drop Moses off at the Pearl Kai Shopping Center. Along the way, they picked up some coffee and pastries and dropped them off at Straub for Mrs. Loher. They got to Pearl Kai a few minutes after 6:00 a.m. Loher then returned to Straub and waited for his wife to get off work.

Loher testified that he was wearing blue jean long pants that night, a black T-shirt "with logo on it" and suede work boots. He was also wearing a back support safety belt required by his employment. Loher denied owning an aqua shirt of

the type described by the State's witnesses. He claimed that the only aqua shirt he owned was "kind of a Hawaiian shirt" he got for volunteering at the Food Bank. He said that his car has Hawaiian flower print seat covers, a rosary hanging from the rear view mirror, a Bible between the front seats, a statue of the Virgin Mary on the dashboard, and pictures of his wife and her kids on the passenger side sun visor. Loher denied he had done what the CW testified he had done.

On cross-examination, Loher confirmed his age: "40, 41." He remembered that he weighed "[a]bout 175" in July 1999. Loher acknowledged that an interview with Detective Takahashi on July 29, 1999, in the "[l]ate morning, early afternoon[,]" had made him aware of the CW's allegations. When asked whether he thus knew that the issue of his whereabouts during the early morning hours of July 29, 1999 was of critical importance, Loher responded, "Yes, and yes and no." Loher admitted he "probably forgot" to tell Detective Takahashi about the telephone conversations he had with his wife after he got home to Victory Ohana that night. He also confirmed that the car the CW had identified in the photo exhibit was his car, and that he had "custody and control" of the car at the time of the incident. He acknowledged that Detective Takahashi told him during the interview that the CW had identified his car as the vehicle

involved. When asked to confirm that he did not make his car available to the police "until the afternoon" of the day of the interview, Loher maintained that he was asleep when the police called, but delivered the car to them "in ten minutes." Loher admitted he told Detective Takahashi that he had signed out of Victory Ohana to pick up Moses at about 5:30 a.m., and not around 4:30 a.m., as he had testified. Loher also agreed that no one saw him when he got back to Victory Ohana from Straub at about 2:50 a.m. Loher testified that he took the sign-in-sign-out log from Victory Ohana in order to deliver it to his attorney, "to prove my innocence[.]" But after he gave the log to his wife, it was mislaid as she moved from residence to residence. When asked to explain his statement to Detective Takahashi, that he was wearing gray pants and a green T-shirt the night of the incident, Loher responded, "It was not an aqua color or a blue color that the victim is saying because aqua is blue. Aqua is blue not green." When asked to admit he was seen to be unshaven the morning after the incident, Loher testified, "No, ma'am. I shave constantly everyday because my wife has a skin reaction." He added that he has a fast-growing beard.

After Loher completed his testimony, the court recessed the trial for a day. When court reconvened the morning after the

recess day, the deputy prosecuting attorney (DPA) told the court that Loher's counsel had informed her, just the night before, that Mrs. Loher had located the lost Victory Ohana log.

Moses testified next for the defense. He remembered that Loher arrived at Mrs. Loher's Nu'uanu residence at around 4:45 a.m. on July 29, 1999, and made breakfast for the kids. Loher and Moses left the house at about 5:15 a.m., went to Straub to "check on" Mrs. Loher and bring her breakfast because she was not feeling well, and made it to the Pearl Kai Shopping Center "a little bit after 6 because the traffic." Moses recalled that Loher was wearing a black T-shirt and a safety harness belt that morning. Moses maintained that Loher always speaks "proper English." Loher does not speak pidgin and has trouble pronouncing Hawaiian names. Moses insisted that he had never seen Loher wear a bluish-green or aqua shirt. He acknowledged, however, that his brother Rubin owned such a shirt, and that Rubin and Mrs. Loher would wear it. On cross-examination, Moses confirmed that the car Loher was driving that morning was the one identified by the CW in the photo exhibit.

Mrs. Loher testified next. She and Loher had been married for about a year-and-a-half at the time of the incident. She identified Moses as her oldest son. Mrs. Loher remembered that on July 28, 1999, her husband dropped her off at Straub,

then went to his job. Just before 10:30 p.m., she was told she would have to work a double shift. She called to inform her husband a little after midnight. Because she was not feeling well, Mrs. Loher asked him to bring food and her medicine after he got off work. Loher arrived at Straub just a little before 2:00 a.m. Mrs. Loher took a break and ushered him into a conference room, where they "made love." Mrs. Loher remembered that her husband left the hospital "around about 2:30, 2:35" a.m. to go back to Victory Ohana. She phoned him there at "about 2:45 or 2:50, around that time[,]" to make sure he had gotten home safely. Loher had to call her back because he was "in the middle of doing something, and he wanted to wash." He called her back at about 3:15 a.m. and they talked for fifteen or twenty minutes. Mrs. Loher recalled that she telephoned her husband again at Victory Ohana, at around 4:00 a.m., because he had asked her give him a wake up call so he could take Moses to work. He and Moses dropped by before going to Pearl Kai because Moses had wanted to make sure she was okay. Loher returned to pick her up from work a little before 7:00 a.m.

Mrs. Loher remembered that her husband was wearing dark blue jeans and a black T-shirt that night, and had borrowed her safety belt. The T-shirt had "a small little logo[,]" and a Hawaiian print on the back. Loher also had a "bluish-green and

purple" Arizona Diamondbacks baseball cap on, worn backwards. Mrs. Loher claimed she could recall what her husband was wearing because, "I lay out his clothes[.]" Mrs. Loher maintained that her husband was clean shaven when he came to see her at Straub that night: "Frank was very meticulous, meaning, that he had a routine. He shaved every day, and he got more so in the habit of it because I wouldn't allow him to either make love to me or kiss me unless he was clean shaved because he would irritate me." Mrs. Loher added that her husband always speaks "proper English," and does not even understand pidgin or consider it a language.

Mrs. Loher further testified that "a lot of police" came to her residence later that day, looking for her husband. According to Mrs. Loher, the police did not believe her protestations that her husband did not live there, so "they started searching the house and things got upside down and all that[.]" A few minutes later she got a call, "and it was the detective, and he explained to me that he needed the clothes that my husband was wearing." So she started looking through the laundry pile for the clothes he had worn, but as she did, one of the officers grabbed a shirt belonging to her son Rubin that she had just worn. Then the police left, even though she explained to them that the shirt they had taken was not her husband's. The color of that shirt was "like a bluish-green, maybe like aqua."

Mrs. Loher called the detective about the mistake, but he "just kept brushing me off. . . . He didn't want to hear it."

Mrs. Loher then reiterated, almost to the letter, her husband's earlier testimony about the distinctive objects -- the rosary, the Bible, the Virgin Mary statue and the family photos -- that were contained in their car that night. She also related that she "retrieve[d]" the sign-in-sign-out log from Victory Ohana. Her husband's former attorney had advised her to, "because it would prove my husband's innocence on what time he came home." She put the log into a box of her husband's belongings, and managed to find it only the night before her trial testimony.

Under *voir dire* by the DPA, Mrs. Loher testified that she took the log about a week or so after her husband was taken into custody by the police. She did so without the permission or knowledge of Victory Ohana, when she went there to retrieve her husband's belongings. "I didn't know it was illegal to take it."

On cross-examination, the DPA attempted to impeach Mrs. Loher with her August 11, 1999 statement to Detective Takahashi, in which she apparently made statements inconsistent with the various times she had related in her testimony. The DPA also mentioned a July 30, 1999 statement to Detective Takahashi, in which Mrs. Loher apparently told the detective that

her husband was wearing "a greenish shirt" the night of the 29th. Mrs. Loher did not respond directly to these questions, choosing instead to charge that Detective Takahashi had harassed and terrified her constantly, at a time when "I wasn't thinking clearly because I wasn't while I was going in and out of the hospital." She also claimed that Detective Takahashi had threatened her with arrest and the loss of her children if she did not submit to his questioning.

Under further cross-examination, Mrs. Loher maintained that she and her husband had "never breathed one word about the case to each other." When asked whether she had been in possession of the Victory Ohana log for over a year, Mrs. Loher explained that she had first given it to her husband's former attorney, but that attorney had refused to return it unless she paid him for it. After Mrs. Loher's testimony, the defense rested.

In rebuttal, the State presented Andrew Scott, who testified that he saw Loher on July 29, 1999, at around 8:00 a.m. "He looked like someone who was tired. He was unshaven."

The State also called William McIntosh (McIntosh), the program director of Victory Ohana. He identified Loher as a resident during July 1999. McIntosh also identified the sign-in-sign-out log in question. At the time of the incident, the logs

were kept in the residents' apartments and were filled out by the residents on the honor system. The logs were collected at the end of the day. At some point after July 29, 1999, McIntosh discovered that the log for Loher's apartment was missing. On cross-examination, McIntosh read the log. It indicated that Loher had signed out at 3:45 p.m. on July 28, 1999, to go to "Fresh Bakery at Waipahu[,]" and that he had signed in again at 2:50 a.m.

Further in rebuttal, the State re-called Detective Takahashi, who denied that he had harassed, threatened or misled Mrs. Loher. He also testified that he had asked her for the log, but never received it. Detective Takahashi confirmed that Mrs. Loher had told him her husband was wearing a green shirt on the night in question. He identified the audiotape of his August 11, 1999 interview of Mrs. Loher, which was then played for the jury (but not transcribed). After Detective Takahashi completed his testimony, the State rested its rebuttal and all evidence was closed.

With the agreement of the parties, the court instructed the jury on the material elements of the charges, as follows:

> In Count I of the Indictment, Defendant FRANK LOHER is charged with the offense of Attempted Sexual Assault in the First Degree.
>
> A person commits the offense of Attempted Sexual Assault in the First Degree if, he intentionally engaged in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of Sexual

Assault in the First Degree.

There are two material elements of the Offense of Attempted Sexual Assault in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These two elements are:

1. That on July 29, 1999, on the island of Oahu, the Defendant did engage in conduct which, under the circumstances as the Defendant believed them to be, was a substantial step in a course of conduct intended by the Defendant to culminate in the commission of Sexual Assault in the First Degree; and

2. That the Defendant engaged in such conduct intentionally.

Conduct shall not be considered a substantial step unless it is strongly corroborative of the Defendant's intent to commit Sexual Assault in the First Degree.

A person commits the offense of Sexual Assault in the First Degree if he knowingly subjects another person to an act of sexual penetration by strong compulsion.

"Sexual penetration" means fellatio; it occurs upon any penetration, however slight, but emission is not required.

"Strong compulsion" means the use of or attempt to use one or more of the following to overcome a person:

1. A threat, express or implied, that places a person in fear of bodily injury to the individual, or in fear that the person will be kidnapped; or
2. Physical force.

. . . .[4]

In Count II of the Indictment, Defendant FRANK LOHER is charged with the offense of Attempted Kidnapping.

A person commits the offense of Attempted Kidnapping, if he intentionally engaged in conduct, which under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of Kidnapping.

There are two elements of the offense of Attempted Kidnapping, each of which the prosecution must prove beyond a reasonable doubt.

These two elements are:

1. That on July 29, 1999, on the island of Oahu, the Defendant engaged in conduct which, under the circumstances as the Defendant believed them to be, was a substantial step in a course of conduct intended by the Defendant to culminate in the commission of Kidnapping of [the CW]; and

2. That the Defendant engaged in such conduct intentionally.

Conduct shall not be considered a substantial step unless it is strongly corroborative of the Defendant's intent to commit Kidnapping.

A person commits the offense of Kidnapping, if the person intentionally or knowingly restrains another person with intent to inflict bodily injury upon that person or subject that person to a sexual offense.

"Restrain" means to restrict a person's movement in such a manner

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[4] Omitted are the definitions of "intentionally" and "knowingly" that were taken verbatim from HRS § 702-206(1) (1993) and HRS § 702-206 (2) (1993), respectively.

> as to interfere substantially with the person's liberty by means of force or threat.
>
> "Bodily injury" means physical pain, illness, or any impairment of physical condition.
>
> In order to find the Defendant guilty of both Attempted Kidnapping and Attempted Sexual Assault in the First Degree, the jury must find that the attempted restraint in the act of Attempted Kidnapping had to extend beyond any attempted restraint necessarily and incidentally committed during the Attempted Sexual Assault offense.
>
> Therefore, if you find the prosecution has proven beyond a reasonable doubt that the Defendant committed the offense of Attempted Kidnapping and that the prosecution has proven beyond a reasonable doubt that the Defendant committed the offense of Attempted Sexual Assault in the First Degree, then you must answer the following question with respect to these offenses on a special interrogatory form which will be provided to you.
>
> Did the prosecution prove beyond a reasonable doubt that the offense of Attempted Kidnapping was not necessary or incidental to the commission of the Attempted Sexual Assault offense?
>
> A "Yes" answer must be unanimous, if you are not unanimous, then you must answer the question "No".
>
> If your answer is "Yes" then you must find the Defendant guilty of both Attempted Kidnapping and Attempted Sexual Assault in the First Degree. If the answer is "No", then you must find the Defendant guilty of Attempted Sexual Assault in the First Degree, but you must not return a verdict on the offense of Attempted Kidnapping.

(Footnote supplied.)

The jury retired to its deliberations at 3:50 p.m. on November 16, 2000. At 11:40 a.m. the next day, the jury sent the court a communication: "If we vote guilty on both counts and vote no on the special interrogatory question. Do we leave the verdict sheets blank on count 2?" At 1:50 p.m., and with no objection from the parties, the court responded, "Yes." At 1:55 p.m., the jury informed the court that it had reached a verdict. In count I, the jury found Loher guilty as charged of attempted sexual assault in the first degree. It answered the court's special interrogatory in the negative.

On January 11, 2001, the State filed a motion for

extended and consecutive terms of imprisonment. The State based its request for an extended term of imprisonment on HRS §§ 706-661 (Supp. 2002),[5] -662(1) (Supp. 2002)[6] and -662(4)(a) (Supp. 2002).[7] The State based its request for consecutive terms of imprisonment on HRS §§ 706-668.5 (1993)[8] and 706-606 (1993).[9]

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[5] HRS § 706-661 (Supp. 2002) provides, in pertinent part, that "[i]n the cases designated in section 706-662, a person who has been convicted of a felony may be sentenced to an extended indeterminate term of imprisonment. When ordering such a sentence, the court shall impose the maximum length of imprisonment which shall be as follows: . . . . For a class A felony -- indeterminate life term of imprisonment[.]"

[6] HRS § 706-662(1) (Supp. 2002) provides that "[a] convicted defendant may be subject to an extended term of imprisonment under section 706-661, if the convicted defendant satisfies one or more of the following criteria: The defendant is a persistent offender whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has previously been convicted of two felonies committed at different times when the defendant was eighteen years of age or older."

[7] HRS § 706-662(4)(a) (Supp. 2002) provides, in relevant part, that "[a] convicted defendant may be subject to an extended term of imprisonment under section 706-661, if the convicted defendant satisfies one or more of the following criteria: The defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless: The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony[.]"

[8] HRS § 706-668.5 (1993) provides that "[i]f multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an unexpired term of imprisonment, the terms may run concurrently or consecutively. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms run concurrently. The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider the factors set forth in section 706-606."

[9] HRS § 706-606 (1993) provides:

The court, in determining the particular sentence to be imposed,

Also on January 11, 2001, the State moved the court to sentence Loher to a mandatory minimum term of imprisonment of thirteen years and four months, under HRS § 706-606.5 (Supp. 2002).

In the DPA's declarations in support of the motions, and in evidence adduced at the hearing on the motions, the State first referenced Loher's birth date, June 8, 1959. The State then referenced Cr. No. 89-0331, in which Loher was convicted of the felony offense of escape in the second degree, committed on September 13, 1988; Cr. No. 88-0507, in which Loher was convicted of sexual assault in the first degree, committed on March 22, 1988; and Cr. No. 88-1973, in which Loher was convicted of attempted sexual assault in the first degree, committed on July 16, 1987, and kidnapping, committed on December 28, 1987. The sexual assault, attempted sexual assault, and kidnapping were each committed after Loher had picked the victim up in his car

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shall consider:
(1) The nature and circumstances of the offense and the history and characteristics of the defendant;
(2) The need for the sentence imposed:
(a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
(b) To afford adequate deterrence to criminal conduct;
(c) To protect the public from further crimes of the defendant; and
(d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) The kinds of sentences available; and
(4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

and threatened harm to her if she did not perform a sex act. In two of these instances, Loher had also threatened harm to the baby the victim was holding. While Loher was in detention awaiting trial on these charges, he escaped from a work detail. In accordance with a plea agreement, Loher pled no contest to the charges. On May 16, 1990, he was sentenced to concurrent, indeterminate terms of imprisonment of twenty years for the sex offenses and five years for the escape. While imprisoned, Loher completed sex offender treatment. He was paroled in January 1998, but his parole was revoked in July 1998 for noncompliance with the terms and conditions of his parole. He was paroled again in February 1999, but that parole was revoked for the instant offense. Upon this record, the court sentenced Loher to an extended term of imprisonment of life with the possibility of parole, subject to a mandatory minimum term of thirteen years and four months, to be served consecutively to the twenty-year prison terms imposed for Loher's prior sex offense convictions.

The court's July 30, 2001 findings of fact, conclusions of law and order granting the State's motion for extended and consecutive terms of imprisonment included the following:

> 3. An extended term of imprisonment is necessary for the protection of the public because of the following:
>
> a. In the instant case, [Loher] has been found guilty beyond reasonable doubt of Attempted Sexual Assault in the First Degree.
>
> b. Rehabilitation is unlikely to be achieved within an ordinary term of imprisonment.

> c. [Loher] has an extensive criminal history. He is a sex offender with two prior criminal numbers involving sexually related offenses.
>
> d. [Loher] committed the instant offense while on parole.
>
> e. While on parole on two separate occasions, [Loher] was non-compliant. His performance was unsatisfactory. His parole was ultimately revoked.
>
> f. The offenses in all three criminal numbers involving sexually related offenses indicate that [Loher] used his vehicle to commit the above-referenced offenses.
>
> g. [Loher] has had the benefit of previous sex offender treatment programs.
>
> 4. A consecutive sentence is warranted pursuant [to HRS §§ 706-668.5 & 706-606] because of the long criminal history and characteristics of [Loher], the serious nature of the instant offense, the need to promote respect for the law, the need to provide just punishment and the need to deter [Loher] from future crimes and to protect the public.

II. Discussion.

A. Sufficiency of the Evidence.

On appeal, Loher first asserts that "[t]he evidence does not support the jury verdict that [Loher] took a substantial step toward the culmination of the sexual assault." Opening Brief at 9. Loher explains:

> To constitute a "substantial step" toward the commission of a crime, defendant's conduct must be strongly corroborative of his criminal intent. The trial court in its jury instructions stated "strong compulsion" means the use of or attempt to use one or more of the following to overcome a person:
>
> 1. A threat expressly implied [(sic)] that places a person person [(sic)] in fear of bodily injury to an [(sic)] individual or in fear that the person would be kidnapped[;] or
>
> 2. Physical force.
>
> In the present case, there was no threat of bodily injury. There was testimony of [Loher] ripping off the shirt and bra of [the CW] and she sustaining a scratch as she exited the vehicle which could support the use of physical force. There was testimony of a statement by [Loher] "you can't get out of the car unless you give me head.["] However, the act of ripping off [the CW's] shirt and bra, and scratching her was not a "substantial step" in corroborating his criminal intent. His conduct was corroborative of his intention to "restrain" [the CW] or prevent her from exiting the car. The offense of kidnapping involves the restraint of another person to inflict bodily injury upon that person or subject that person to a sexual offense. Restrain means to

> restrict a person's movement by means of force or threat. [Loher's] conduct of ripping [the CW's] shirt, bra and scratching her was not with the intent to subject [the CW] to an actual sexual penetration by strong compulsion but to restraining [(sic)] her from getting out of the vehicle and to subject her to a sexual offense.

Opening Brief at 19-20 (citation and citations to the record omitted).

We disagree. Taking the evidence in the light most favorable to the State, there was substantial evidence to support the jury's verdict. State v. Matias, 74 Haw. 197, 207, 840 P.2d 374, 379 (1992). Loher's act of attempted restraint was strongly corroborative of his stated intent ("You have to give me head -- you can't get out of the car unless you give me head.") to employ strong compulsion -- which can involve a dangerous instrument, physical force, a threat of bodily injury, or a threat of kidnapping, HRS § 707-700 (1993) (definition of "strong compulsion") -- to force the CW to perform fellatio.

B. Ineffective Assistance of Counsel.

Loher next argues:

> [Loher] had ineffective assistance of counsel. [Loher's] defense was an alibi defense. In [Loher's] counsels [sic] opening statement he stated to the jury that the security guards at the Straub Medical Center would testify that they saw [Loher] visiting his wife to establish [Loher's] whereabouts at the time in question. However, [Loher's] counsel did not subpoena the security guards nor did the security guards testify.

Opening brief at 9-10 (citations to the record omitted).

We disagree. First, Loher did not support this assertion with affidavits or sworn statements describing the testimony of the missing witnesses:

> Ineffective assistance of counsel claims based on the failure to obtain witnesses must be supported by affidavits or sworn statements describing the testimony of the proffered witnesses. [State v.]Fukusaku, 85 Hawai'i [462,] 481, 946 P.2d [32,] 51 [(1997)]; State v. Reed, 77 Hawai'i 72, 84, 881 P.2d 1218, 1230 (1994); State v. Aplaca, 74 Haw. 54, 68-69, 837 P.2d 1298, 1306 (1992). Inasmuch as Richie has not supported his ineffective assistance claim with affidavits or sworn statements, his claim fails.

State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998).

Second, even if we assume, *arguendo*, that the failure to subpoena the security guards was a "specific error[] or omission[] reflecting counsel's lack of skill, judgment, or diligence[,]" State v. Janto, 92 Hawai'i 19, 31, 986 P.2d 306, 318 (1999) (citation and internal block quote format omitted), we cannot say that "such error[] or omission[] resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Id. (citation and internal block quote format omitted). The 2:00 a.m. time of Loher's arrival at Straub was not "the time in question[,]" Opening Brief at 10, as Loher would have it. The critical time was sometime after 3:00 a.m., when Loher's alibi defense placed him back at Victory Ohana after returning from Straub. As Loher's counsel told the jury during his closing argument:

> But if you really look at it, it flows. It is consistent because each of the times are a little off, both by -- Ms. Loher and Mr. Loher.

> I mean, basically it tells the same story. That he was at Victory Ohana at the time that it was essential that -- that he could not have been in the area of Kapiolani Boulevard.
> . . . .
> Okay. His wife called him when he got back [to Victory Ohana], just to see how he was, okay. They converse for a little while. She called him back and later he called back as well, okay. So it is consistent, even though the times at times may be a little off, the fact is, they were conversing during the important time. That if, indeed, he committed these offenses, that he would have been in the area of Kapiolani Boulevard.
> We submit to you that if it was Mr. Loher who picked up this woman, it had to have occurred right after 3 'cause the 911 call came in at 3:40.
> So he would have had to been [(sic)] in the area sometime around 3:15, and we know from the testimony of both Andrea Loher and Frank Loher that they were on the phone at this time.

Loher and his wife both testified that he arrived at Straub at about 2:00 a.m. The purportedly confirming testimony of the security guards would have added little exculpatory value to his alibi defense, if any. Its absence may have raised a question about the alibi defense as it was presented in the opening statement, but only in a collateral and largely inconsequential respect.

C. Extended and Consecutive Sentencing.

Loher also complains that the court abused its discretion in sentencing him to an extended term of imprisonment, and in running the prison term consecutively.

> The authority of a trial court to select and determine the severity of a penalty is normally undisturbed on review in the absence of an apparent abuse of discretion or unless applicable statutory or constitutional commands have not been observed. In other words, while a sentence may be authorized by a constitutionally valid statute, its imposition may be reviewed for plain and manifest abuse of discretion.
> Admittedly, the determination of the existence of clear abuse is a matter which is not free from difficulty, and each case in which abuse is claimed must be adjudged according to its own peculiar circumstances. 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. Cornelio, 84 Hawai'i 476, 483, 935 P.2d 1021, 1028 (1997) (brackets, citations and internal quotation marks and block quote format omitted).

With respect to the extended term, Loher argues that the age of his prior convictions, his completion of sex offender treatment and his attainment of two paroles "indicate that [Loher] can be rehabilitated within the ordinary term and is not in need of an extended term of imprisonment for the protection of the community." Opening Brief at 23. On the other hand, these factors may be seen in a different light, one that shows Loher to be an inveterate sexual predator with an established *modus operandi*, and a hopelessly unregenerate one, given his recidivism despite four previous prison sentences, completion of sex offender treatment and two chances at parole. Clearly, the court did not abuse its discretion in this respect. We may reject, by the same token, Loher's claim that

> [h]ad the trial court not imposed the consecutive sentencing of imprisonment, . . . [Loher's] new sentence . . . would have made [him] approximately 64 years [old] before he would be eligible for parole. Such a sentence would have met the requirements of [HRS §] 706-606 in that it would reflect the seriousness of the offense, promote respect for the law, . . . provide punishment for the offense, afford adequate deterrence to criminal conduct, protect the public from further crimes
>
> and provide [Loher] with educational, vocational or other correctional treatment.

Opening Brief at 24. In this latter connection, we also note the

presumption of consecutive sentencing contained in HRS § 706-668.5.

D. Jury Instructions.

Loher avers that

> [t]he trial court committed plain error[10] in its instructions to the jury in failing to specify the particular criminal conduct that gave rise to the charges of Attempted Sexual Assault In The First Degree and Attempted Kidnapping. The instructions were prejudicially ambiguous as [Loher] is entitled to a unanimous verdict on each count.

Opening Brief at 12 (footnote supplied).

> When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading.
>
> Erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.
>
> Error 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. If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.

State v. Holbron, 80 Hawai‘i 27, 32, 904 P.2d 912, 917 (1995)

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[10] "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) (citation omitted). "This 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. Vanstory, 91 Hawai‘i 33, 42, 979 P.2d 1059, 1068 (1999) (brackets, citation and internal quotation marks omitted). Hawai‘i Rules of Penal Procedure (HRPP) Rule 52(a) (2001) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." HRPP Rule 52(b) (2001) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

(emphasis, brackets, citations, internal quotation marks and block quote format omitted).

It is difficult to discern Loher's point. First, he seems to argue that Loher could not be convicted of both attempted sexual assault in the first degree and attempted kidnapping based upon the same conduct. We agree. That is what the court's special interrogatory was designed to prevent, and did prevent. Loher states, however, that "while the jury did not convict [Loher] of both charges due to the court's special interrogatory the jury did find that [Loher] was guilty of both offenses in its [communication] to the court." Opening Brief at 25 (citation to the record omitted). Even assuming, *arguendo*, that the jury could find Loher guilty of both charges in a jury communication, in light of his subsequent conviction of only one, we believe that, if this is Loher's point, it is inconsequential.

Loher also seems to argue the issue of jury unanimity -- that the court's jury instructions were plainly erroneous because

> the jury in the present case would have based its finding of guilty on several specific conduct [(sic)] of [Loher]. The jury could have determined "restraint" and/or "strong compulsion" was due to the threat [the CW] could not "get [out] of the car unless she gave him head[,]" the ripping of [the CW's] shirt and bra or the scratch on [the CW's] back[.]

Opening Brief at 26 (citations to the record omitted). This, too, is not a problem. In a case like this one, the focus is on

the single incident, and not its component acts. State v. Valentine, 93 Hawai‘i 199, 208-9, 998 P.2d 479, 488-89 (2000) (even in the absence of a jury unanimity instruction, there was no danger that the jury could have predicated conviction of attempted prohibited possession of a firearm upon inconsistent factual findings, where the defendant's struggle with a police officer, in which the defendant grabbed the officer's belt, touched the officer's firearm and held onto the handle of the firearm, constituted "but a single incident of culpable conduct"); State v. Rapoza, 95 Hawai‘i 321, 328-30, 22 P.3d 968, 975-77 (2001).

E. The Merger Instruction.

Last, Loher contends the court's special interrogatory "required the jury to return a verdict of guilty as to the Attempted Sexual Assault In The First Degree but not as to the Attempted Kidnapping. This prohibited the jury from finding [Loher] only guilty of Attempted Kidnapping." Opening Brief at 28 (citation to the record omitted). This is patently untrue. The court's instruction did not prohibit the jury from finding Loher guilty of attempted kidnapping but not of attempted sexual assault in the first degree.

III. Conclusion.

The July 18, 2001 judgment of the court is affirmed.

DATED: Honolulu, Hawaii, April 21, 2003.

On the briefs:

Randall I. Shintani,
for defendant-appellant.

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

Chief Judge

Associate Judge

Associate Judge