NOT FOR PUBLICATION

NOS. 24705 AND 24707

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

NO. 24705
STATE OF HAWAI'I, Plaintiff-Appellee, v.
CHAD D. WILDERMAN, Defendant-Appellant
(CR. NO. 01-1-0422)

and

NO. 24707
STATE OF HAWAI'I, Plaintiff-Appellee, v.
VINCENT SCANLAN, Defendant-Appellant
(CR. NO. 01-1-0558)

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

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

In No. 24705 (Cr. No. 01-1-0422), Chad D. Wilderman (Wilderman) appeals the October 23, 2001 judgment of the circuit court of the first circuit, the Honorable I. Norman Lewis, judge presiding, that convicted him of robbery in the first degree, a class A felony.[1] In No. 24707 (Cr. No. 01-1-0558), Vincent

[1] Hawaii Revised Statutes (HRS) § 708-840(1)(b)(ii) (1993 & Supp. 2002) provides:

> (1) A person commits the offense of robbery in the first degree if, in the course of committing theft:
>
> . . . .
>
> (b) The person is armed with a dangerous instrument and:

(continued...)

Scanlan (Scanlan) appeals the October 23, 2001 judgment of the court that convicted him of the same offense. The judgments were entered upon jury verdicts of guilty as charged, rendered in a consolidated trial. Because both appeals arise out of the same incident and trial, we consolidated them for disposition purposes. Hawai‘i Rules of Appellate Procedure (HRAP) Rule 3(b). In each appeal, we affirm.

I. Background

Steven Pang (Pang), owner of a mobile auto mechanic business, testified for the State at trial. On January 3, 2001, Pang received a phone call from someone by the name of "Sam," requesting Pang's service on a broken-down truck located at Pearl Country Club. "Sam" called back later and told Pang the truck had been moved to the Leeward Community College (LCC) area. Pang was accompanied that day by his assistant, James B. Taylor (Taylor). Pang drove his utility van to a cul-de-sac by a rural area near LCC, where they were supposed to meet "Sam."

After waiting about twenty minutes in the cul-de-sac,

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[1](...continued)

. . . .

(ii) The person threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property.

Robbery in the first degree is a class A felony. HRS § 708-840(3) (1993). In the ordinary course, a class A felony carries a twenty-year indeterminate term of imprisonment. HRS § 706-659 (Supp. 2002).

Pang saw a man he later identified in a police photo lineup as Wilderman ride up on a bicycle. Wilderman told Pang the truck was further down the road. Pang drove down the road, passing Wilderman on the bike, until he got to the end of the road. Wilderman yelled at Pang to reverse because he had driven too far. As Pang came up even with him, Wilderman pulled out a gun, cocked it, and pointed it through the driver-side window of the van. Wilderman demanded, "Where's the money?" Wilderman was saying other things as well, but Pang did not know what he was talking about. "Something like I wen' rip off his sister and this and that, I don't know."

At this point, a man Taylor later identified in another police photo lineup as Scanlan punched Taylor in the eye through the passenger-side window of the van, drawing blood. Scanlan let Taylor out of the van and Taylor moved some distance away. Pang was then ordered out of the van. "They told me to, 'Come over here, let me talk to you.' And I said, 'No way.' And I started backing up." As Pang ran away, Scanlan threw a pipe at him, but missed. Pang climbed over a fence and ran to LCC, where he called the police. Pang then returned to the scene, where he found Taylor tending to the ransacked van. Pang's keys, wallet containing cash and a check, cell phone and global positioning system (GPS) device were missing from the van.

On January 18, 2001, Pang and Taylor went to the Pearl

City police station. There, Pang identified Wilderman as the gunman in a six-photo lineup. When asked whether the gunman was present in court, Pang pointed out Wilderman. "He kind of looks like the gunman. I think he's seated over there." "I guess kind of looks like the guy. Not sure positive." "I think that's him." Under questioning by the deputy prosecuting attorney (DPA), Pang acknowledged that the police interviewed him after he viewed the photo lineup, and that when the police asked about his identification of Wilderman, he responded with words such as, "I'm definite about him[,]" and, "Guarantee, this is the guy. That gotta be, you know what I mean?" The DPA had Wilderman stand in court, and thereupon Pang stated, "Okay. That's him." The DPA asked Pang whether he "wanted to prosecute and testify." Pang answered, "Yes, I do, but I want to make sure I get the right guy." When asked by Wilderman's attorney whether he was sure Wilderman was the gunman, Pang reiterated, "Not one hundred percent. 80 percent, 90 percent." In a sidebar, the DPA told the court:

> It's really clear, well, at least to me, that Mr. Pang is trying to recant and minimize on the I.D. part of it and it's because of what I told counsel earlier. And that is, that he's basically been contacted in violation of the [no-contact] order that was issued at the preliminary hearing and pressured not to identify Wilderman.
>
> And by the way, your Honor, during this last recess, [Taylor's attorney,] who's been in court watching Mr. Taylor's testimony, . . . reported during the recess to our victim witness counselor that defendant Scanlan's girlfriend or wife, that person right there, threatened James Taylor during the recess.

Taylor's trial testimony revealed that he was sleeping in the front passenger seat of the van as he and Pang drove to the rendezvous near LCC. He awoke when Wilderman first rode up to their van on the bike. They followed Wilderman down the road, passing him, then stopped. The truck that was supposed to be out of commission reversed behind the van, blocking it (Taylor testified later in the trial that it was a different truck that blocked the van). Wilderman pulled out the gun, which Taylor described as a "dirty chrome" nine-millimeter semiautomatic, pointed it at Pang, and demanded, "Give me money and the dope." At that point, Taylor looked out the window on his side of the van and was punched in the left eye. The injury started to bleed (ultimately, eight stitches were required to close the injuries around Taylor's left eye). Taylor's assailant told him to get out and to "take a walk." Taylor complied, and as he walked away, he looked back and saw his assailant throw the pipe at Pang and Pang go over the fence. When Taylor stopped a safe distance away, he saw "two guys looking in the van." Taylor explained that he could see only the legs of the two men because their upper bodies were obscured by the body of the van.

The DPA then asked, "So what happens after this?" Taylor answered, "They wen' dig out. Third truck comes in and they both, you know, had two [pickup trucks] and they followed each other out." When asked whether he saw where the gunman and

the assailant went, Taylor responded, "No, I just know they all jumped inside the vehicle and they went, I don't know which order." That was the last Taylor saw of the two men that day. Taylor testified that, in total, four people and three trucks pulled off the robbery. Taylor viewed some photo exhibits and identified the decoy truck, the truck they were supposed to fix, which was driven away from the scene but abandoned nearby.

Taylor recalled that when he was shown photo lineups later at the Pearl City police station, he identified Wilderman as the gunman and Scanlan as the assailant. Taylor also pointed them out in court. Under cross-examination by Wilderman's counsel, Taylor denied that the police or Pang had told him the gunman was Wilderman. "Well, I had his name from -- I recognized him." When asked whether he had known Wilderman before the day of the robbery, Taylor replied, "No, but I seen him where I live."

After the close of the State's case-in-chief, Wilderman put Exhibits K and L into evidence by stipulation of the parties. Wilderman also placed Exhibit M in the record for purposes of appeal, but not as evidence or for publication to the jury.

Exhibit K was a police request for comparison of latent fingerprints recovered at the scene with those of "suspect" Jon K. Ajifu (Ajifu). Matches were found for Ajifu's left index finger and a latent from the back of a "Raiders" license plate,

and for Ajifu's right thumb and a latent from a plastic cup. Photo exhibits admitted at trial showed both items lying loose in the bed of the truck that was abandoned near the scene of the robbery. Exhibit L was a police request for comparison of latent fingerprints recovered at the scene with those of "suspects" Wilderman and Scanlan. The exhibit showed no results. Exhibit M was a police request for comparison of latent fingerprints recovered at the scene with those of "suspects" Ajifu and Scanlan. The results shown were the same as those in Exhibit K regarding Ajifu's latents, but in addition, a match was found for Scanlan's left middle finger and a latent from the "interior side passenger window" of the abandoned truck.

During the State's case, Wilderman's counsel had asked the police detective who conducted the photo lineups, "Was the picture of a person named John Ajifu included in any of the line-ups you showed [Pang] of the complaining witnesses [(sic)]?" The detective answered, "No." This was the only reference to Ajifu in the testimonies at trial.

After the exhibits were received, Wilderman and Scanlan rested. The jury returned a verdict of guilty as charged for both Wilderman and Scanlan. The jury also found that Wilderman had possessed, used or threatened to use a firearm while engaged in the offense.

On August 10, 2001, Scanlan moved for a new trial. In

support of his motion, Scanlan invoked several instances of alleged prosecutorial misconduct. Scanlan also faulted the court for allowing the DPA substantive use in argument of evidence that was admitted for a limited purpose only. Finally, Scanlan moved "for joinder" in any motion for new trial that Wilderman might bring. At an August 31, 2001 hearing, the court orally denied Scanlan's motion. A written order was filed on October 10, 2001.

On August 16, 2001, Wilderman moved for a judgment of acquittal after discharge of jury. Wilderman asserted the following:

> (a) given the questionable nature of the identification testimony and the fact that Defendant WILDERMAN'S fingerprints were not found at the scene but the fingerprints of another individual was [(sic)] found in the bed of truck alleged [(sic)] used by the perpetrators of the crime, there was reasonable doubt that Defendant WILDERMAN committed the instant offense and (b) there was no showing made by the State that a theft was committed in the presence of complaining witness Steven Pang and that under the Supreme Court decision in ***State v. Mitsuda***, 86 Haw. 37, 947 P.2d 349 (1997) Defendant WILDERMAN should be acquitted of the offense of Robbery in the First Degree.

(Bold, italic and capital typesetting in the original.) At a hearing held on October 23, 2001, the court denied the motion. A written order followed on November 13, 2001.

Also on August 16, 2001, Wilderman moved for a new trial. This motion was based, first, upon an allegation that Pang had solicited $20,000.00 from Roy Apao (Apao), a friend of Wilderman's, to "drop" the case against Wilderman; and second, upon an "Affidavit of Recantation Made by Jim Taylor[,]" in which Taylor essentially stated that he was high on crystal

methamphetamine during his testimony at trial, and that his testimony was unreliable due to suggestion and coercion. After an evidentiary hearing held on October 15 and 23, 2001, the court entered its December 6, 2001 findings of fact, conclusions of law and order denying Wilderman's motion for new trial. The court found and concluded, in pertinent part, as follows:

FINDINGS OF FACT

. . . .

11. At approximately 4:35 P.M. on January 3, 2001, Pang provided a written statement to the police regarding the incident.

12. In his **written statement** Pang related that:

> He was responding to a call to fix a broken truck at Leeward Community College;
> A male arrived on a bike and told him that the truck was down the road;
> The male on the bike led them down the road;
> The male on the bike stopped him, pulled a silver colored handgun out of his waistband and demanded money;
> He got out of the van and ran;
> He discovered that his wallet, keys, and phone were taken from his van; and
> One of the suspects name may be named [(sic)] 'Scanlan'.

13. Pang described the male with the silver hand gun as a Portuguese/Caucasian male in his early 20's, 5' 10", 160 lbs., slim build, brown crew cut hair, and a fair complexion.

14. At approximately 5:00 P.M. on January 3, 2001, Taylor provided a written statement to the police regarding the incident.

15. In his **written statement** Taylor related that:

> They were there to service a car;
> They met with a Portuguese male on a bicycle who told them that the car was down the road;
> They followed him down the road;
> The male took out a hand gun and demanded money;
> The male cocked the gun and again demanded money;

> Another male came out of the bushes and 'false cracked' him in the left eye;
> He saw the Portuguese male search the van and leave in a truck; and
> He saw the male that hit him leave in a truck.

16. Taylor described the male with the handgun as a Portuguese male in his 20's - 30's, 5' 10", 200 lbs., medium build, brown crew cut hair, with hazel colored eyed and a fair complexion.

17. Taylor described the male who 'false cracked' him as a local male in his 40's, 5' 8", 160 to 180 lbs., medium build, black, shoulder length hair with a receding hair line, and a tan complexion.

18. Through investigation, the police identified [Wilderman] and [Scanlan] as the probable suspects in the robbery.

19. At approximately 8:40 P.M. on January 18, 2001, Detective Darryl Kon [(Detective Kon)] met with Pang and showed him a photographic line-up.

20. Pang positively identified photograph number '2' (Wilderman) as the gunman.

21. When Pang positively identified Wilderman as the gunman he provided [Detective Kon] with a taped statement.

. . . .

23. At approximately 9:20 P.M. on January 18, 2001, [Detective Kon] met with Taylor and showed him two (2) photographic line-ups.

24. Taylor positively identified photograph number '2' (Wilderman) from the first photographic line-up as the person who had the gun, and positively identified photograph number '1' (Scanlan) from the second photographic line-up as the person who punched him.

25. When Taylor positively identified Wilderman and Scanlan he provided [Detective Kon] with a taped statement.

. . . .

29. On February 16, 2001, Wilderman elected to waive his right to have a preliminary hearing and the case was committed to Circuit Court.

. . . .

33. On March 7, 2001, Scanlan's preliminary hearing was held. Pang and Taylor testified at the preliminary

hearing.

34. During his **preliminary hearing testimony**, Pang testified that:

> He is a mobile mechanic;
> On January 3, 2001, he received a call regarding a broken car; the car was by [LCC];
> He went by [LCC]; Wilderman, who was on a bike, told him the car was down the road;
> He followed Wilderman down the road; when he came to the end of the road he reversed;
> Wilderman pulled out a semi-automatic silver gun and pointed it at him;
> Taylor was in the van with him, in the passenger seat;
> Wilderman asked, 'Where's the money?';
> Scanlan appeared out of nowhere, approached [Taylor] and hit him in the eye;
> He got out of the car, ran to [LCC] to call [the] cops;
> He could see Wilderman inside of the van; and
> When he returned to the van after calling the police he found his wallet, keys, cell phone, and GPS were missing.

35. During his **preliminary hearing testimony**, Taylor testified that:

> On January 3, 2001, he was working as a mechanic's helper; he went with Pang on a trouble call behind [LCC];
> Wilderman came up to the van on a bicycle and told them the truck is up the road, and to follow him;
> He and Pang drove up the road to a dead end;
> Wilderman pulled out a dirty chrome semi-automatic gun from his waist and asked, 'Where's the fucking money?';
> Scanlan came up to his side of the car, hit him in the left eye, and told him to 'take a walk';
> He got out, went towards the dead end, and saw Wilderman going through the van and Scanlan looking through the stuff in the van;
> He saw Pang go toward the college; and
> Then he saw the suspects leave together in two vehicles.

36. On cross-examination, Taylor testified that:

> The police asked him to looked ([sic]) at several photographs;
> He identified Wilderman's photograph as the person who had the firearm and Scanlan's photograph as the person who punched him above

> the eye;
> He mention ([sic]) that, while waiting in the coffee room at the Pearl City police station and before the police showed him the possible suspect photographs, he happened to see Wilderman's photograph in the room.

37. At the conclusion of the preliminary hearing, the Court found that sufficient evidence was presented to determine probable cause and committed the case to Circuit Court.

. . . .

39. On April 12, 2001, the State's motion to consolidate . . . for trial was heard and granted. The transcript from Scanlan's preliminary hearing was completed and available to all parties on April 16, 2001.

. . . .

41. Trial . . . was held the week of July 30, 2001, before the Honorable I. Norman Lewis.

. . . .

45. On August 3, 2001, the jury found Wilderman and Scanlan guilty as charged of the offense of Robbery in the First Degree.

46. Thereafter, the defendants' associates attempted to manufacture 'newly discovered evidence' in order to overturn the jury's unanimous verdicts in this case. Specifically, the evidence adduced during the hearing on the defendant's ([sic]) motion for new trial demonstrated that associates of [Scanlan] created a 'fake affidavit' and attempted to bribe [Taylor].

47. First, the Court finds that [Scanlan's] associates created a 'fake affidavit' purportedly signed by Taylor and an alleged notary public named 'Ann Au'.

48. Ann Yuuki, an employee of the Department of the Attorney General, testified that all valid notary publics in the State of Hawaii are registered with the Notary Office of the Department of the Attorney General. Ms. Yuuki testified that the Notary Office had no record of a person named 'Ann Au', and therefore, 'Ann Au' (if there is such a person) was not a valid notary public in the State of Hawaii.

49. Elsie Shimizu, an employee of the Legal Documents Branch of the First Circuit Court, testified that the Legal Documents Branch of the First Circuit Court maintains records of all valid notary publics authorized to

practice in the First Circuit. Ms. Shimizu testified that the Legal Documents Branch of the First Circuit Court had no record of a person named 'Ann Au', and therefore, 'Ann Au' was not a valid notary public in the First Circuit.

50. [Taylor] testified that, soon after the August 3rd verdicts, [Scanlan's] wife/girlfriend approached him and asked him to sign a document. The document had already been typed out before she approached Taylor. The document turned out to be the 'fake affidavit', which was received in evidence as State's Exhibit 15. Taylor testified that, when he signed the document, it did not contain the underlined title at the top of the document that identified the document as an 'Affidavit of Recantation'.

51. Taylor testified that, when he signed the document, there was no notary public present, he did not swear or affirm the document or its contents to be true, and that he did not sign a 'notary book'. Taylor testified that the only people present when he signed the document were himself, [Scanlan's] wife/girlfriend, and her friend - a 'Samoan guy' who videotaped his signing of the 'fake affidavit'.

52. In addition, Taylor testified that, in return for signing the document, he was promised $6,000.00 and the possibility of a job with a company owned by [Wilderman's] father. (Taylor was living on the beach at the time he signed the 'fake affidavit'). Taylor testified that he never did receive any money or a job offer.

53. Meanwhile, the defendants alleged that Pang offered to recant his allegations if the defendants would pay him $20,000. Notwithstanding the defendants' allegation, Pang testified that he never met with, or communicated with, any of the defendants' associates, and never accepted any bribe money. The Court finds that the defendant's [(sic)] allegation that Pang attempted to solicit money in exchange for his recantation to be incredible and unworthy of belief.

54. After the trial in this case, Taylor testified that he was interviewed by defense counsel Keith Kiuchi, Esq. and a defense investigator. He said that his statement to them was not the truth; that he was just trying to help the defendants get a lighter sentence and avoid any further harm to himself and his family. Taylor further testified that 'all he ever wanted in this case' was an apology for being punched in the face and for his medical bills to be paid (Taylor received several stitches over his left eye).

55. Taylor emphasized that his sworn testimony at trial was the truth and that he stood by his trial testimony. The Court finds that Taylor was a credible witness, and further, that his trial testimony was consistent with his prior statements to the police and his

prior sworn testimony during the preliminary hearing.

. . . .

CONCLUSIONS OF LAW

1. In State v. McNulty, 60 Haw. 259, 267-268, 588 P.2d 438, cert. denied, 441 U.S. 961 (1979), the Hawaii Supreme Court established a four-part test to be applied to a motion for a new trial based on newly discovered evidence:

> A motion for a new trial based on newly discovered evidence will only be granted if all of the following requirements have been satisfied: (1) the evidence has been discovered after trial; (2) such evidence could not have been discovered before or at trial through the exercise of due diligence; (3) the evidence is material to the issues and not cumulative or offered solely for the purposes of impeachment; and (4) the evidence is of such a nature as would probably change the result of a later trial.

2. The burden of proof is on the Defendant to satisfy each and every element of the four part test. State v. McNulty, supra.

3. In determining whether evidence is, in truth, newly discovered, the combined knowledge of both the accused and his counsel will be considered. State v. McNulty, supra, 60 Haw. at 268. Newly discovered evidence 'must be evidence consisting of facts that were in existence and hidden at the time of trial'. State v. Faulkner, 1 Haw. App. 651, 657, 624 P.2d 940 (1981).

4. In order to prevail on a motion for new trial, the defense must demonstrate that due diligence was used to discover the new evidence **before or at trial**. State v. Caraballo, 62 Haw. 309, 615 P.2d 91 (1980) (emphasis added).

5. Based on the 'findings of fact' set forth above, the Court concludes that the defendants have failed to satisfy the four-part test articulated by the Hawaii Supreme Court in McNulty. State v. McNulty, supra.

(Bold typesetting in the original.)

The court sentenced Scanlan to a twenty-year indeterminate term of imprisonment. The court sentenced Wilderman to a twenty-year indeterminate term of imprisonment, with a mandatory minimum term of six years and eight months as a

repeat offender, Hawaii Revised Statutes (HRS) § 706-606.5 (1993 & Supp. 2002), and a mandatory minimum term of ten years for his use of a firearm in the commission of a felony. HRS § 706-660.1(1)(b) (1993). The court ordered that Wilderman's sentence run consecutively, HRS § 706-668.5(1)(a)(ii) (1993), to the concurrent five- and ten-year prison terms simultaneously imposed by the court upon revocation of Wilderman's terms of probation in Cr. Nos. 94-1657, 94-1932 and 95-0192.[2] The net effect of Wilderman's sentence was a maximum thirty years in prison. The court denied the State's motion to sentence Wilderman to an extended life term of imprisonment as a persistent offender. HRS §§ 706-661(2) & -662(1) (Supp. 2002).

II. Discussion

A. Scanlan's Appeal (No. 24707)

1. Prosecutorial Misconduct

On appeal, Scanlan first contends the DPA committed prosecutorial misconduct by violating in several instances the court's order *in limine* against evidence of Scanlan's other bad acts.[3]

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[2] On February 15, 1995, in Cr. No. 94-1657, Defendant-Appellant Chad D. Wilderman (Wilderman) was convicted of unauthorized control of propelled vehicle (UCPV) and burglary in the first degree. On the same day, in Cr. No. 94-1932, Wilderman was convicted of UCPV. On December 15, 1995, in Cr. No. 95-0192, Wilderman was convicted of UCPV.

[3] Hawaii Rules of Evidence (HRE) Rule 401 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." HRE Rule 402 provides: (continued...)

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

State v. Klinge, 92 Hawai'i 577, 584, 994 P.2d 509, 516 (2000) (citations and internal quotation marks omitted).

First, Scanlan asserts that police officer Robin Puahala's (Officer Puahala) trial testimony implied that Scanlan was a gang member:

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[3](...continued)
"All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible." HRE Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." HRE Rule 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of any other fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial." "This court reviews questions of relevancy, within the meaning of [HRE] Rules 401 and 402 under the right/wrong standard, inasmuch as the application of those rules can yield only one correct result." State v. White, 92 Hawai'i 192, 204, 990 P.2d 90, 102 (1999) (footnotes, citation and internal quotation marks omitted). However, "the determination of the admissibility of relevant evidence under HRE [Rule] 403 is eminently suited to the trial court's exercise of its discretion because it requires a cost-benefit calculus and a delicate balance between probative value and prejudicial effect." State v. Faufata, 101 Hawai'i 256, 266, 66 P.3d 785, 795 (App. 2003) (citation and internal quotation marks omitted). "Generally, to constitute an abuse [of discretion], 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) (citations, block quote formats and original brackets omitted).

BY [THE DPA]:

. . . .

Q. All right. And what is the nature of your current assignment?

A. I'm currently assigned to the District 3 Crime Reduction Unit [(CRU)].

Q. Okay. And what are your duties with the [CRU]?

A. Part of my duties with the [CRU] is felony arrests and drug and gang enforcement.

Q. Okay. Were you working on February 13, 2001?

A. Yes, sir, I was.

Q. On that date, were you assigned to assist Detective Darryl Kon of the Criminal Investigation Division [(CID)] with a reported robbery that he was investigating?

[SCANLAN'S COUNSEL]: Objection, your Honor. May we approach?

THE COURT: You make the objection from there.

[SCANLAN'S COUNSEL]: Your Honor, the testimony provided is outside the -- is within the motion in limine.

[WILDERMAN'S COUNSEL]: Join in the objection.

[THE DPA]: No, it's not, your Honor.

THE COURT: The objection is overruled.

. . . .

A. Yes, sir, I did.

(Emphasis supplied.) This was not prosecutorial misconduct because Officer Puahala's testimony did not imply that Scanlan was a gang member. Officer Puahala may have been assigned to the CRU at the time of trial, but for the police investigation in this case he was assigned to the CID, which was not associated with gang enforcement by any evidence at trial. The purported implication was tenuous, at best, and the "gang" reference

itself, innocuous. Cf. People v. Crisp, 609 N.E.2d 740, 748 (Ill. App. Ct. 1992) ("the preliminary question regarding the police officer's [gang enforcement unit] assignment was an innocuous part of the foundational requirements"). Besides, and for what it is worth, Officer Puahala testified at trial that he was assigned to arrest Wilderman, not Scanlan. It was police officer Calvin Sung (Officer Sung) of the CID who arrested Scanlan. This point on appeal has no merit.

Scanlan avers that two more implications of other bad acts occurred during the DPA's direct examination of Officer Sung:

> Q. Officer, let me ask you this. On March 1st, 2001, were you asked to assist [Detective Kon] with the [CID]?
>
> A. Yes.
>
> Q. And what were you asked to do?
>
> A. Locate the robbery suspect named Vince Scanlan and locate him and arrest him for robbery, two counts of robbery and one [unauthorized entry into motor vehicle] case and one assault second case.
>
> . . . .
>
> Q. You said you located him at the Aiea Cue?
>
> A. Yes, it's located on the second floor.
>
> Q. Okay, and what did you do when you first located him at that location?
>
> A. We went up to the store and then found him and --
>
> [SCANLAN'S COUNSEL]: Objection. Relevance, your Honor.
>
> THE COURT: Objection is overruled.
>
> A. I found the suspect. I recognized him from the H.P.D. mugshot and then --

> [SCANLAN'S COUNSEL]: Objection. Your Honor, move to strike.
>
> THE COURT: Approach the bench.
>
> (THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH)
>
> . . . .
>
> THE COURT: Here's what we'll do. First of all, I am going to at this point in time strike the officer's testimony as to the recognition of [Scanlan] through the -- what did he call it?
>
> [WILDERMAN'S COUNSEL]: Mugshot.
>
> . . . .
>
> [SCANLAN'S COUNSEL]: Your Honor, what are you going to do about these gratuitous remarks about these charges [Scanlan] was arrested for?
>
> . . . .
>
> THE COURT: Okay. I've ruled. You've made your records.
>
> (BENCH CONFERENCE CONCLUDED)
>
> THE COURT: Ladies and gentlemen of the jury, you have heard testimony by this witness as to how he's -- how he initiated his investigation. There was reference made to 'mugshot.' This court does not have any mugshot evidence before it at this time. Disregard that testimony. That evidence is struck. Continue.

(Emphases supplied.)

Scanlan argues that Officer Sung's reference to the offenses for which he arrested Scanlan implicated other bad acts. This is simply not true. The offenses were, in a manner of speaking, merely proposed legal descriptions of the various acts Scanlan committed during the *res gestae*. The fact that only the robbery offense was ultimately charged did not transform Officer Sung's mention of the other possible charges into objectionable evidence of other bad acts. This argument is unavailing.

As for Officer Sung's reference to Scanlan's mugshot, the court upon Scanlan's objection immediately struck the reference and instructed the jury to disregard it. In addition, the court's general instructions to the jury contained the following:

> The evidence has referred to a photograph of the defendant in the possession of the police. The government has access to photographs of people from different sources and for different purposes. The fact that the police had the defendant's photograph does not mean that he committed any offense.

Assuming *arguendo* the reference was objectionable as an implication of other bad acts, any prejudice was thereby cured. Cf. Klinge, 92 Hawai'i at 592, 994 P.2d at 524 ("the trial court's prompt admonishment to the jury . . . , the court's instructions, and arguments of counsel adequately corrected any misconception that may have been conveyed to the jury" by the prosecutor's misleading remarks (brackets, citation and internal quotation marks omitted)).

Scanlan charges that the DPA committed prosecutorial misconduct when he introduced into evidence photographs of the abandoned truck which purportedly showed that the truck was stolen, despite the court's pretrial order granting Scanlan's motion *in limine* against references to a stolen truck. The photographs, Scanlan contends,

> indicate that the van had its lock[s] punched in, the ignition wires had been pulled out and the stereo speakers were also missing. These photographs were unnecessary as there were other photographs of the truck. They were irrelevant and prejudicial under [Hawai'i Rules of Evidence

> (HRE) Rules] 402 and 403 and should therefore have been excluded. They served only to create prejudice against [Scanlan] and [Wilderman] as the jury could have easily concluded that the van used was stolen, thus making it all the more easy for the jury to conclude guilt in this matter. As a result of the DPA's actions, [Scanlan] was deprived of a fair trial and a new trial is therefore warranted.

We question, first, whether this was prosecutorial misconduct. The court's order *in limine* was as follows:

> THE COURT: All right. I'm ready to rule on this. First of all, the motion is granted and it will be so far as specifically no references are to be made to the vehicle being stolen. . . .
>
> [THE DPA]: Your Honor, I mean on the car part of it, let's -- I can show the court the pictures that the police took. A car was used by one of the accomplices to block in the victim's van and --
>
> THE COURT: We're not talking about there was [(sic)] car there. We're talking about the reference to a stolen vehicle.
>
> [THE DPA]: Okay. So I can't mention the fact that it was stolen?
>
> THE COURT: Right.
>
> [THE DPA]: Evidence of the car, pictures, et cetera?
>
> THE COURT: There's no problem with that.
>
> [THE DPA]: Okay.

In consonance with the court's order *in limine*, the DPA proffered photo exhibits depicting the abandoned truck. And other than Scanlan's successful objection to a photo exhibit of the truck showing what Scanlan's counsel referred to as "a stolen license plate[,]" no objection was made at proffer to the purportedly objectionable photo exhibits of the truck, despite the identifying witness's testimony that two of the photo exhibits showed, respectively, "a photograph of the door lock of the

driver's side door[,]" and "a photograph of that door lock on that truck on the passenger side door." It was only at the beginning of the following day of trial that Scanlan's counsel incorporated the issue of the photo exhibits of the truck -- "which I missed yesterday" -- into an unsuccessful motion for mistrial. Even assuming, for the sake of argument, that Scanlan did not waive objection to the subject photo exhibits for purposes of appeal by his failure to make timely objection, HRE Rule 103(a);[4] Lee v. Elbaum, 77 Hawai'i 446, 452-53, 887 P.2d 656, 662-63 (App. 1993), we conclude the DPA did not commit prosecutorial misconduct in this respect.

At any rate, in our view, the possible implication that the abandoned truck was stolen was not irrelevant under HRE Rules 401 and 402, or enjoined by HRE Rules 404(b) and 403.[5] The use in crime and subsequent abandonment of a stolen vehicle, which because stolen presumably cannot easily be traced to the perpetrators, is quintessential criminal common sense, and shows highly-relevant contemplation and planning of the crime. In our case, such reference was relevant, HRE Rules 401 and 402, and not prohibited as pure propensity evidence by HRE Rule 404(b), and

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[4] HRE Rule 103(a) provides, in pertinent part, that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and: (1) . . . . In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.]"

[5] See footnote 3, supra.

its probative value was not "substantially outweighed by the danger of unfair prejudice[.]" HRE Rule 403.

For his last averment of prosecutorial misconduct, Scanlan asserts:

> During closing argument, the DPA argued to the jury that attorneys are not allowed to misstate the evidence, clearly an improper statement that bolstered the DPA's position and vouched for his own credibility and the credibility of the evidence he presented.

The allegedly improper closing remarks of the DPA immediately followed and were apparently made in response to a ruling and instruction the court rendered on an objection and motion to strike brought by Scanlan:

> [BY THE DPA]
>
> . . . .
>
> So that's the key question. Did Scanlan plan or participate in this robbery? Let's look at the evidence and we'll see that, in fact, he did plan, he did participate in this robbery. First of all, these guys were lured to this isolated area by this guy named Sam. Detective Kon traces the pager number to Scanlan.
>
> [SCANLAN'S COUNSEL]: Objection, your Honor. Previously argued.
>
> THE COURT: Excuse me?
>
> [SCANLAN'S COUNSEL]: Objection. It's hearsay.
>
> THE COURT: Objection is overruled.
>
> [THE DPA]: That's what Detective Kon did. He wanted to know because, you know, Pang and Taylor got paged. You know, hey, I got a broken truck, it's by Pearl Country Club, now it's by L.C.C. so they gotta call him back. Detective Kon wants to find out well, who's that pager number belong to? Scanlan.
>
> . . . .
>
> Scanlan comes from the passenger side and punches Taylor. He orders him out, orders him to take a walk, throws a pipe at Steven Pang. Did Scanlan participate in

> this? Of course he did. Did he help plan this? He was the one making the calls. At least it came from his pager number.
>
> [SCANLAN'S COUNSEL]: Objection, your Honor. Move to strike.
>
> THE COURT: Objection is overruled. This is argument. The jury has heard the evidence and you can make your own determination as to what the evidence has shown. As I said, you do not have to rely upon counsel. If there's a discrepancy between you and what you believe the evidence shows and what counsel says the evidence shows, you rely on your recollection. Proceed.
>
> [THE DPA]: One of the things in closing arguments, attorney [(sic)] are not allowed to misstate the evidence. If an attorney gets up here and says something that was never in evidence, they can't do that. In this case, there was certainly evidence from Detective Kon's testimony about tracing that pager number to Scanlan. So that -- that's pretty good evidence that he was involved in this from the beginning.

(Emphasis supplied.) Because he did not object to this part of the DPA's closing argument, Scanlan relies on plain error.[6]

Scanlan complains that the DPA's statement was an improper assertion of personal knowledge, and that the DPA thereby improperly vouched for his own credibility and that of the State's evidence. We do not discern such delicts in the

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[6] Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) provides that, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Obversely, HRPP Rule 52(a) provides that, "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." "The general rule is that a reviewing court will not consider issues not raised before the trial court." State v. Corpuz, 3 Haw. App. 206, 211, 646 P.2d 976, 980 (1982). "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).

DPA's correct and generally applicable statement that attorneys -- which includes Scanlan's attorney and Wilderman's attorney -- are not allowed in closing to misstate what evidence was admitted at trial; hence, we cannot conclude this was prosecutorial misconduct.

Besides, just before the DPA made the subject remarks, the court instructed the jury that it was to ignore arguments of counsel that conflicted with its own recollection of the evidence. Similarly, the court told the jury in its general instructions that, "Statements or remarks made by counsel are not evidence. You may consider their statements to you, but you are not bound by their recollections or interpretations of the evidence." And, during closing arguments, the court twice reminded the jury:

> And as I said before, ladies and gentlemen of the jury, if there's a discrepancy between what you believe the evidence has shown and what the counsel believes the evidence has shown you go with your recollection, not counsel's recollection.
>
> . . . .
>
> Please recall that as I told you before and I have said numerous times already, when counsel are arguing the case to you, they're defending the side they represent, giving you a recitation of the evidence as they have perceived it before you. There may be discrepancies in what they say and what you believe the evidence as [(sic)] shown. Again, you go with your recollection, not counsel's recollection, okay? Proceed, counsel.

We presume the jury followed these instructions. State v. Kupihea, 80 Hawai'i 307, 317-18, 909 P.2d 1122, 1132-33 (1996) ("this court has repeatedly held that improper comments by a

prosecutor can be cured by the court's instructions to the jury and that it will be presumed that the jury adhered to the court's instructions" (citations omitted)). *A fortiori*,

> [i]t is well-established, . . . that generally relevant jury instructions can cure improper arguments by a prosecutor; especially where, as here, such instructions were given repeatedly. See, e.g., Kupihea, 80 Hawai'i at 317-18, 909 P.2d at 1132-33 (repeated instructions to the jury that remarks by counsel are not evidence were sufficient to cure a specific instance of arguably improper prosecutorial argument); State v. Valdivia, 95 Hawai'i 465, 481, 24 P.3d 661, 677 (2001) (where no specific curative instruction was given at the time the prosecutor made improper remarks, the misconduct was nevertheless harmless beyond a reasonable doubt because 'the court did generally instruct the jury no less than three times that the statements and arguments of counsel were not evidence and were not to be considered as such during the jury's deliberations[,]' and the evidence against the defendant was not 'so weak ... as to weigh in favor of finding the misconduct prejudicially harmful').

State v. Meyer, 99 Hawai'i 168, 172-73, 53 P.3d 307, 311-12 (App. 2002) (ellipsis and some brackets in the original). All in all, we conclude the DPA's statement did not affect Scanlan's substantial rights, and we therefore decline to notice it as plain error. Hawai'i Rules of Penal Procedure Rule 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). This particular issue is connected to Scanlan's second point of error on appeal, which we discuss next.

2. Substantive Use In Argument Of Evidence That Was Admitted For A Limited Purpose Only.

Scanlan argues that "the lower court erred when it allowed the DPA to use evidence that had been admitted for a limited purpose as substantive evidence during closing and

rebuttal." Scanlan is referring to Detective Kon's testimony on direct that he traced the phone number "Sam" left on Pang's pager to Scanlan:

> Q. [BY THE DPA] Okay. Detective, one of the things -- strike that. Did you attempt to investigate the source of a pager that was allegedly used or reportedly used during the incident?
>
> A. Yes, I did.
>
> Q. How did you go about investigating that part of the case?
>
> A. I basically got the information from the complainant in this case that he was paged. Without going into detail, I got an administrative subpoena from the Prosecutor's Office granting me the power to subpoena information from a Mainland company called Page Mark. They informed me that --
>
> [SCANLAN'S COUNSEL]: Objection. Calls for hearsay. Non-responsive.
>
> [THE DPA]: Not offered for the truth, your Honor.
>
> [SCANLAN'S COUNSEL]: We would ask for a limiting instruction.
>
> THE COURT: Finish the question.
>
> Q. [BY THE DPA]: Go ahead and finish your answer.
>
> A. I finally got the name of the service rep for Page Mark who granted me permission to obtain information which was T.K. Communication on Keeaumoku Street. I approached them with a copy of the administrative subpoena that I sent to Page Mark. They told me that the phone number in question -- I used two phone numbers because the complainant said it was either one or this other number. One was to Lucy Chang who I do not know and the other was to [Scanlan].
>
> A. Okay.
>
> [SCANLAN'S COUNSEL]: At this time --
>
> THE COURT: Ladies and gentlemen of the jury, that testimony you just heard from the officer about the pager and the numbers and so forth is not coming in to you for the truth of the matter of those matters, but only to show why the officer continued doing what he was doing, that's all. Okay.
>
> [THE DPA]: Thank you.

> Q. Okay. Detective, let me show you Exhibit 52. Do you recognize Exhibit 52?
>
> A. Yes.
>
> Q. How do you recognize 52?
>
> A. It's the copy I obtained from T.K. Communications which was handed to me and I submitted it into the report.
>
> Q. Okay. And that was obtained pursuant to the subpoena that you had referred to earlier?
>
> A. Yes.
>
> Q. Does it appear to be in the same condition or substantially the same condition now as it was in when you received it from them pursuant to your investigation?
>
> A. Yes.
>
> [THE DPA]: Your Honor, we'll offer Exhibit 51 [(sic)] into evidence.
>
> [SCANLAN'S COUNSEL]: Objection.
>
> THE COURT: Court defers its ruling.

(Emphasis supplied.) Despite the court's rendition of the jury instruction precluding substantive use of the pager evidence, by the time jury instructions and closing arguments came around, the court and counsel seemed confused as to what the court had done:

> [SCANLAN'S COUNSEL]: Your Honor, there's one other issue I've come up with that also concerns me and that is the fact that the court -- [the DPA] just moved or asked for admission of the exhibit and I'm sorry, I don't know the number of the digital pager records and that exhibit was denied [admission into evidence] by the court.
>
> [WILDERMAN'S COUNSEL]: 52.
>
> [SCANLAN'S COUNSEL]: However, [the DPA] was arguing that there was testimony to that effect. I believe the testimony to that effect was limited by the court.
>
> [THE COURT]: You're talking about this?
>
> [SCANLAN'S COUNSEL]: Yes.
>
> [THE DPA]: No, that's not accurate.

> [SCANLAN'S COUNSEL]: The testimony by the officer about the investigation of that was objected to and limited and should be limited. It is not admissible as truth of the matter in the document and I think [the DPA] needs to be in limined not to argue that.
>
> [THE DPA]: That's not correct, your Honor. It was not limited. That was testimony by Detective Kon about getting that pager information and he testified that the pager number used by the suspects was traced to the defendant Scanlan. Then I offered it in addition as documentary evidence. The court denied it, didn't give its reasons, but it was cumulative. The testimony -- there was no limiting instruction. In fact, [Scanlan's counsel] only yesterday in chambers -- there was only one limiting --
>
> . . . .
>
> [THE DPA]: I mean [Scanlan's counsel] represented in chambers yesterday there was only one limiting instruction and that was when Detective Kon was down here talking about the photographs and about why he did certain things with the photographs. That was the only limiting instruction.
>
> [SCANLAN'S COUNSEL]: But there were a number of requests for it and I still believe that the evidence was hearsay and that the court erred in not giving a limiting instruction on that because that's total hearsay through the officer and it cannot be used as truth of the matter of what the pager number of the defendant is.
>
> [THE DPA]: Your Honor, if she wanted a limiting instruction, we could have addressed it. Then it would have been admissible.
>
> [SCANLAN'S COUNSEL]: We did [.]
>
> [THE DPA]: It would have been admissible. Now she's trying to all of a sudden limit my arguments on that point.
>
> . . . .
>
> [WILDERMAN'S COUNSEL]: Your Honor, my recollection is that it wasn't addressed at the time, but at this point, if it came in, it couldn't have come in for the truth of the matter asserted, your Honor. It would only go to explain what the officer did next so I would simply argue that [the DPA] cannot argue in closing that it comes in for the truth of the matter asserted. It only comes in to explain what the officer did next.
>
> THE COURT: Over objection. I'm not going to give the instruction. You've made your records.

As an apparent result, the DPA argued the pager evidence as

substantive evidence at several junctures during his closing and rebuttal arguments.

On this point, Scanlan argues:

> This evidence clearly constituted improper hearsay evidence because it was being offered to the jury for the truth of the matter, i.e., that the pager number traced did in fact belong to [Scanlan]. . . . Yet this improper argument was crucial because it tied [Scanlan] directly to the pager used to page Steven Pang prior to the robbery. The error in this case was therefore not harmless beyond a reasonable doubt because there is more than a reasonable possibility that the DPA's improper argument contributed to a conviction in [Scanlan's] case. The conviction must be set aside.

We disagree. At the close of evidence, as far as the jury was concerned, the pager evidence was to be considered only for the limited purpose of showing -- in the words of the jury instruction the court rendered when the evidence came in -- "why the officer continued doing what he was doing, that's all." Before closing arguments, the court reinforced this notion during its general jury instructions: "You have heard evidence on several occasions which was admitted for the limited purpose of showing what the witnesses did in their investigation and why. Such evidence was admitted only for that purpose and no other." And when Scanlan's attorney dealt with the pager evidence during her closing argument, she reread the foregoing instruction to the jury, and argued that the evidence

> is not proof that that's true and it can't be considered by you as proof that it's true. It only goes to show you what the officers did next and what he did next was he got a photograph of Mr. Scanlan because of that evidence and put it in a photo spread.

Again, we presume the jury followed the court's instructions.

Kupihea, 80 Hawai'i at 317-18, 909 P.2d at 1132-33. The court's repeated instructions regarding limited use of the pager evidence cured any jury misconceptions arising out of the DPA's substantive use of the evidence during his closing and rebuttal arguments. Meyer, 99 Hawai'i at 172-73, 53 P.3d at 311-12. This is true *a fortiori* when we also consider the court's repeated jury instructions generally regarding arguments by counsel, detailed supra. We conclude this point of error on appeal is devoid of merit.

3. Wilderman's Motion For New Trial.

For his final point of error on appeal, Scanlan maintains that the court abused its discretion in denying Wilderman's motion for new trial, in which Scanlan had joined.[7] Scanlan bases this contention upon his previous points regarding prosecutorial misconduct and improper use of limited evidence during argument, and also argues that

> the lower court should have granted [Scanlan's] motion for new trial based on the newly discovered evidence that Taylor may have been high at the time that he testified at trial and that he made two subsequent statements that totally contradicted his trial testimony. Thus his credibility is clearly called into question.

(Citation omitted). We have dealt with Scanlan's previous points, supra. We disagree with his new points, as well. As we have held, where a defendant seeks a new trial because a

[7] "The denial of a motion for new trial is within the sound discretion of the trial court and will not be upset absent a clear abuse of discretion." State v. Teves, 5 Haw. App. 90, 94-95, 679 P.2d 136, 140 (1984) (citations and block quote format omitted).

prosecution witness allegedly gave false testimony at trial,

> a new trial must be granted by the trial court when it decides that (1) it is reasonably satisfied that the testimony at trial of a material prosecution witness is false; (2) defendant and his agents did not discover the falseness of the testimony until after the trial; (3) the late discovery is not due to a lack of due diligence by defendant or his agent; and (4) the false testimony is not harmless because there is a reasonable possibility that it contributed to the conviction.

State v. Teves, 5 Haw. App. 90, 97, 679 P.2d 136, 141 (1984). Here, the court judged the credibility of the witnesses who testified at the hearing on Wilderman's motion for new trial and concluded that Taylor's testimony was credible; to wit, that he was sober and not high on crystal methamphetamine while testifying at trial, and that his affidavit and his statement to Wilderman's attorney were both false while his trial testimony was the truth. Accepting the court's judgment on the credibility of the witnesses and the weight of evidence, State v. Eastman, 81 Hawai‘i 131, 139, 913 P.2d 57, 65 (1996) ("[a]n appellate court will not pass upon the trial judge's decisions with respect to the credibility of witnesses and the weight of the evidence, because this is the province of the trial judge" (citations omitted)), we conclude the court was not "reasonably satisfied that the testimony at trial of a material prosecution witness [was] false[.]" Teves, 5 Haw. App. at 97, 679 P.2d at 141. Hence, the court did not abuse its discretion in denying Wilderman's motion for new trial.

B. Wilderman's Appeal (No. 24705)

1. "*Brady*" Violation

For his first contention on appeal, Wilderman avers that "the prosecution violated his due process rights under Brady v. Maryland, 373 U.S. 83 (1963), because it failed to release exculpatory evidence to him until the middle of trial."[8] The exculpatory evidence Wilderman refers to is Exhibit M, which showed that Ajifu's fingerprints were found on two items lying loose in the bed of the abandoned truck, and that Scanlan's fingerprint was found on the inside of the passenger window of the truck. The DPA did not disclose Exhibit M to Wilderman until the morning of the second day of presentation of evidence at trial, despite Wilderman's previous written and oral requests for disclosure of fingerprint test results. Wilderman does not allege that the DPA's failure to timely disclose the exhibit was in bad faith.

In Brady, the United States Supreme Court held that

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution.
>
> The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of

[8] "We review questions of constitutional law by exercising our own independent constitutional judgment based on the facts of the case. Accordingly, we review questions of constitutional law *de novo* under the 'right/wrong' standard." State v. Rogan, 91 Hawai'i 405, 411, 984 P.2d 1231, 1237 (1999) (citations and some internal quotation marks omitted).

> the administration of justice suffers when any accused is treated unfairly.

Id. at 87. However, in order to establish a Brady violation, "an appellant must make a showing that the suppressed evidence would create a reasonable doubt about the appellant's guilt that would not otherwise exist." State v. Fukusaku, 85 Hawai'i 462, 479, 946 P.2d 32, 49 (1997) (brackets, citation and internal quotation marks omitted).

Wilderman seeks to make the required showing, thus:

> The evidence here is material, as it points towards another person being present at the scene instead of [Wilderman]. The fact is that Scanlan's fingerprints and the fingerprints of John Ajifu were found on the same items [(sic)] and [Wilderman's] fingerprints were nowhere to be found.

Wilderman fails. The fingerprint findings may well point to another person being present at the scene -- evidence that the truck was stolen from someone else notwithstanding -- and that is no surprise because Taylor testified at trial that four persons were involved in the robbery. But the findings say nothing vis ´a vis Wilderman's guilt, because Taylor testified that the four left the scene in three trucks, but he did not or could not say which in which. Wilderman's proffered showing is not, as he would have it, axiomatic. "Fingerprints by their very nature are probative only of the presence of someone; their absence does not prove the absence of that individual." State v. Romero, 54 P.3d 1255, 1265 (Wash. Ct. App. 2002) (citation and internal quotation marks omitted). Surely, the absence of Wilderman's fingerprints

from the scene has some vaporous tendency to prove he was not at the scene, but then again, Wilderman knew all along that his fingerprints were not found there. Thus, we conclude that Wilderman's due process rights were not violated.

In this connection, Wilderman complains the court should have at least granted his request for a continuance based upon the dilatory disclosure of Exhibit M.[9] At the time of disclosure, Wilderman's counsel justified the request for continuance to the court, thus, "I need to investigate who Mr. Ajifu is. I need to find out more information regarding this." On appeal, almost nine months later, Wilderman continues to argue simply that "the defense needed the time to investigation [(sic)] the circumstances of the fingerprints." Because Wilderman was and remains unable to state what substantial favorable evidence would have been unearthed during the continuance, we conclude the court did not abuse its discretion in denying Wilderman's request for a continuance. Cf. State v. Lee, 9 Haw. App. 600, 604, 856 P.2d 1279, 1282 (1993) (motion for continuance of trial based upon the unavailability of a witness must show, *inter alia*, "that substantial favorable evidence would be tendered by the witness" (citations and block quote format omitted)).

[9] "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) (citation omitted).

2. Wilderman's Motion for New Trial.

Wilderman next contends the court erred in denying his motion for new trial. On this point, Wilderman first argues that Pang's offer to Apao -- to "drop" the case against Wilderman for $20,000.00 -- "reflects his willingness to sell out to the highest bidder and to alter his testimony." Wilderman presents this issue as one of "newly discovered evidence"[10] because Apao did not come forward with his accusation until after trial.

However, the court found, after an evidentiary hearing on Wilderman's motion for new trial in which Pang and Apao testified, that "the defendant's [(sic)] allegation that Pang attempted to solicit money in exchange for his recantation [is] incredible and unworthy of belief." Accepting the court's judgment on the credibility of the witnesses and the weight of evidence, Eastman, 81 Hawai'i at 139, 913 P.2d at 65, we conclude that this was not an instance of newly-discovered evidence justifying a grant of Wilderman's motion for new trial, but instead, an instance of newly-fabricated evidence justifying a

[10] A motion for new trial based on newly discovered evidence will be granted only if all of the following requirements have been satisfied: (1) the evidence has been discovered after trial; (2) such evidence could not have been discovered before or at trial through the exercise of due diligence; (3) the evidence is material to the issues and not cumulative or offered solely for the purposes of impeachment; and (4) the evidence is of such a nature as would probably change the result of a later trial.

State v. McNulty, 60 Haw. 259, 267-68, 588 P.2d 438, 445 (1978) (citation omitted), overruled on other grounds by Raines v. State, 79 Hawai'i 219, 900 P.2d 1286 (1995).

denial.

Wilderman also argues that Taylor gave false testimony at trial, based upon the same circumstances and arguments cited by Scanlan in his appeal. We rejected Scanlan's arguments, supra, and reject them here as well. We conclude the court did not abuse its discretion in denying Wilderman's motion for new trial.

3. Sentencing.

Last, Wilderman argues that the court abused its discretion in sentencing[11] him to consecutive terms of imprisonment[12] at the same time it denied the State's motion for

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[11] "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." Cornelio, 84 Hawai'i at 483, 935 P.2d at 1028 (citations, internal quotation marks and block quote format omitted).

[12] HRS § 706-668.5 (1993) provides:

> (1) If 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.
>
> (2) 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.

HRS § 706-606 (1993) provides:

> The court, in determining the particular sentence to be imposed, shall consider:

(continued...)

an extended term of imprisonment.[13] First, Wilderman avers that,

---

[12](...continued)

(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.

[13] HRS § 706-662(1) (1993 & Supp. 2002) provides:

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:

(1) 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.

HRS § 706-661 (Supp. 2002) provides, in pertinent part:

In 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:

(continued...)

> While [Wilderman's] counsel acknowledges that . . . consecutive sentencing and enhanced sentencing under the extended term statute are not the same, there is still something inherently wrong with sentencing a defendant to consecutive terms where the court decides that the factors for an extended term have not been met.

Wilderman does not specify what that "something inherently wrong" is, and we can find nothing in the language of the applicable statutes or elsewhere in the law that supports his intuition. Second, Wilderman points to the following comment the court made at sentencing:

> So after the 10 years [for re-sentencing on the burglary in the first degree conviction], then the sentence in the robbery term will go into effect, so there's 20 from that. Now, ultimately, after the mandatory is passed, of course, the Paroling Authority will take over. However, this is all subject -- but it's over the objection of defense, because my understanding is you'll appealing [(sic)]?

From this comment, Wilderman somehow gleans a transgression of the prohibition against consecutive sentencing for the sole purpose of maximizing paroling authority supervision over him. State v. Gaylord, 78 Hawai'i 127, 154-55, 890 P.2d 1167, 1194-95 (1995). The court's comment neither expressed nor implied anything of the sort. Wilderman's last point of error on appeal lacks merit.

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[13](...continued)

> . . . .
>
> (2) For a class A felony--indeterminate life term of imprisonment;
>
> . . . .
>
> The minimum length of imprisonment for [paragraphs] (2), (3), and (4) shall be determined by the Hawaii paroling authority in accordance with section 706-669.

III. Conclusion

In each appeal, we affirm the October 23, 2001 judgment of the court.

DATED: Honolulu, Hawai‘i, October 29, 2003.

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