

NO. 28478

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ERIC ANTHONY WILSON, Defendant-Appellant

EMERSON
CIRK APPELLATE COURTS
STATE OF HAWAI'I

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 05-1-2201)

MEMORANDUM OPINION

(By: Watanabe, Presiding J., Foley, and Fujise, JJ.)

Defendant-Appellant Eric Anthony Wilson (Wilson) appeals from the judgment entered by the Circuit Court of the First Circuit¹ (circuit court) on March 14, 2007, convicting and sentencing him, pursuant to a December 5, 2006 jury verdict, for four counts of assault in the second degree (assault 2) in violation of Hawaii Revised Statutes (HRS) § 707-711(1)(a) or (d) (1993),² three counts of abuse of family and household members (household abuse) in violation of HRS § 709-906 (Supp.

¹ The Honorable Virginia Lea Crandall presided.

² At the time Wilson was alleged to have committed various counts of assault 2, HRS § 707-711 provided, in pertinent part, as follows:

Assault in the Second Degree. (1) A person commits the offense of assault in the second degree if:

(a) The person intentionally or knowingly causes substantial bodily injury to another; [or]

. . . .

(d) The person intentionally or knowingly causes bodily injury to another person with a dangerous instrument[.]

. . . .

(2) Assault in the second degree is a class C felony.

Although HRS § 707-711 has since been amended, subsections (a) and (d) have remained unchanged. See HRS § 707-711(1)(a) and (d) (Supp. 2007).

2004),³ and two counts of terroristic threatening in the first degree (TT1) in violation of HRS § 707-716(1)(d) (1993).⁴

³ At the time Wilson was alleged to have committed the various counts of abuse, HRS § 709-906 provided, in pertinent part, as follows:

Abuse of family or household members; penalty.

(1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member
.

For the purposes of this section, "family or household member" means . . . persons jointly residing or formerly residing in the same dwelling unit.
.

(5) Abuse of a family or household member . . . [is a] misdemeanor[.]
.

(11) This section shall not operate as a bar against prosecution under any other section of this Code in lieu of prosecution for abuse of a family or household member.
.

(13) This section shall not preclude the physically abused or harmed family or household member from pursuing any other remedy under law or in equity.

The quoted sections of HRS § 709-906 are identical to those currently in effect, except that subsections (11) and (13) have been renumbered as subsections (12) and (14), respectively. See HRS § 709-906(1), (5), (12), and (14) (Supp. 2007).

⁴ At the time Wilson was charged, HRS § 707-716 provided, in pertinent part:

Terroristic threatening in the first degree. (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:
.

(d) With the use of a dangerous instrument.

(2) Terroristic threatening in the first degree is a class C felony.

Paragraph (d) of subsection (1) of HRS § 707-716 was subsequently renumbered as paragraph (e), but the quoted language is identical to that currently in effect. See HRS § 707-716(1)(e) (Supp. 2007).

HRS § 707-715 (1993) defines "terroristic threatening" as follows:

A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony:

(continued...)

Wilson contends that the circuit court erred in:

- (1) Denying his motion to sever the trial of the different offenses by the dates the offenses allegedly occurred;
- (2) Denying his motion to dismiss the household-abuse counts;
- (3) Not giving a merger instruction to the jury regarding the household-abuse and assault 2 charges;
- (4) Admitting into evidence: (a) x-rays of the complaining witness (CW) that were taken in Japan on September 4, 2005; (b) a photograph that depicted a cigarette burn mark on CW's hand; and (c) testimony that Wilson had threatened CW with an ice pick;
- (5) Excluding evidence of: (a) an application for victim compensation submitted by CW to the Crime Victim Compensation Commission (CVCC) of the State of Hawai'i; (b) the police report regarding Wilson's complaint that CW had committed theft and forgery of Wilson's employment checks; (c) the police report regarding a complaint by CW that she had been sexually harassed by her former employer; (d) the medical report of CW's August 23, 2005 visit to Kapi'olani Medical Center (Kapi'olani); and (e) a letter CW wrote to her former landlord concerning alleged civil-rights violations committed by the landlord;
- (6) Giving Wilson an enhanced sentence as to Count VII.

We conclude that the circuit court erred in failing to give the jury a merger instruction regarding the assault 2 and household-abuse offenses. Accordingly, we vacate the judgment as to those offenses and remand for further proceedings consistent with this opinion. In all other respects, we affirm.

⁴(...continued)

- (1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person; or
- (2) With intent to cause, or in reckless disregard of the risk of causing evacuation of a building, place of assembly, or facility of public transportation.

BACKGROUND

A. The Charges Against Wilson

On January 9, 2006, Plaintiff-Appellee State of Hawai'i (State) filed an amended complaint in the circuit court, charging Wilson with committing nine offenses against CW, his ex-girlfriend.

As a result of an incident that allegedly occurred on July 20, 2005, the State charged Wilson with one count of assault 2 in violation of HRS § 707-711(1)(a) (Count I), one count of assault 2 in violation of HRS § 707-711(1)(d) (Count II), and one count of household abuse (Count III). The State also charged Wilson with committing TT1 on or about July 31, 2005 to and including September 1, 2005 (Count IV).

The State charged Wilson with committing, on or about August 3 to 5, 2005, one count of assault 2 in violation of HRS § 707-711(a) (Count V) and one count of household abuse (Count VI).

Finally, the State charged Wilson with committing, on or about August 31 to September 1, 2005, one count of assault 2 in violation of HRS § 707-711(1)(a) (Count VII), one count of TT1 (Count VIII), and one count of household abuse (Count IX).

B. The Motion to Sever

On February 10, 2006, Wilson filed a motion to sever pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rules 8⁵ and

⁵ HRPP Rule 8 provides currently, as it did when Wilson filed his motion to sever, in relevant part, as follows:

Rule 8. JOINDER OF OFFENSES AND DEFENDANTS.

(a) Joinder of offenses. Two or more offenses may be joined in one charge, with each offense stated in a separate count, when the offenses:

(1) are of the same or similar character, even if not part of a single scheme or plan; or

(2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

. . . .

(c) Failure to join related offenses.

(continued...)

14.⁶ In short, Wilson argued that joinder of all nine counts under one complaint for trial "is prejudicial and unfair to" him because "the prosecution will be allowed to present prior bad acts, contrary to Rule 404(b) [of the Hawai'i Rules of Evidence (HRE)], by presenting facts on different dates." Wilson requested separate trials for Counts I, II and III; Count IV; Counts V and VI; and Counts VII, VIII, and IX.

The motion was argued and denied on March 8, 2006, on the bases of judicial economy (same witnesses and same issues) and lack of prejudice (a strong possibility exists that evidence regarding the July 20, August 3, and August 31, 2005 incidents will be presented even if the counts stemming from these incidents are severed).

C. Motion to Dismiss

On February 15, 2006, Wilson filed a motion to dismiss Counts II, III, VI,⁷ and IX of the complaint. The motion alleged that based on the preliminary-hearing testimony, Counts II, III,

⁵(...continued)

(1) A defendant who has been tried for one offense may thereafter move to dismiss a charge in a subsequent trial for any related offense, as defined in Rule 13(b)(1), unless the related offense is one which was pending in court prior to the commencement of the first trial. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecutor did not have sufficient evidence to warrant trying the offense charged in the second trial at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

(2) Entry of a plea of guilty or nolo contendere to one offense does not bar the subsequent prosecution of a related offense.

⁶ HRPP Rule 14 (2007) provides, as it did at the time of Wilson's motion to sever, as follows:

Rule 14. RELIEF FROM PREJUDICIAL JOINDER.

If it appears that a defendant or the government is prejudiced by joinder of offenses or of defendants in a charge or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

⁷ Although Wilson's motion was entitled, "Motion to Dismiss Counts II, III, IV, and IX of the Complaint[,]," the substance of the motion and memorandum in support of the motion requested that Count VI (not Count IV) be dismissed.

VI, and IX should be merged with other counts of the complaint and were unlawfully duplicitous. The motion was argued and denied on March 8, 2006. The circuit court stated:

The court has reviewed the motions that were submitted as well as the transcript of the preliminary hearing that occurred. And, the court finds based on the court's review of those matters that in reviewing the transcript while the alleged offenses occurred on the same day there was indication in the transcript which will be more fully developed during the course of the trial that the incidents lasted over a period of time on those days and there were separate acts that the complaining witness testified to that were allegedly committed by [Wilson] that would set forth the charges set forth in this complaint.

If there are issues that develop at trial with respect to it being more of a simultaneous incident and dealing with issues of finding lesser included offense then the court can address the issues of merger but the court denies the Motion to Dismiss Counts II, III, VI and IX.

D. Subpoena for Victim-Compensation-Claim Information

On March 23, 2006, the circuit court issued, at Wilson's request, a subpoena duces tecum that commanded the CVCC of the State of Hawai'i to "bring records of the [victim] compensation claim made by [CW]." The CVCC moved to quash the subpoena on various grounds, or in the alternative, requested that the circuit court conduct an *in camera* review of the CVCC's records and issue a protective order sealing the documents and preventing their dissemination to anyone other than Wilson and his counsel and the State's counsel for purposes of this case.

The motion was argued on April 6, 2006, and the circuit court granted the motion in part and denied the motion in part. The circuit court denied the motion as to any statements made by CW that were included in the CVCC records and ordered that CW's application for crime-victim compensation be submitted to the court for *in camera* review of any such statements. The circuit court granted the motion as to any other information in the CVCC records. The circuit court also granted the CVCC's request for a protective order as to any information disclosed to Wilson and to the State as a result of the subpoena duces tecum. Apparently, there were no statements by CW in her application for crime-victim compensation that needed to be disclosed to Wilson.

E. Motions in Limine

On June 23, 2006, Wilson filed his motion in limine No. 1, which sought to prohibit "the introduction of all evidence, testimonial or otherwise, at trial, relating to alleged drug use, prior bad acts of uncharged assaults or prior criminal arrest and or record." The circuit court granted the motion to preclude any mention of drug paraphernalia, sale or possession of drugs, drug use, prior bad acts of uncharged assaults, and directed that no mention be made "without prior Court approval [of] any prior criminal record of the defendant of Theft 4." The circuit court specifically declined to rule on whether a photograph of a cigarette burn mark on CW's hand could be admitted into evidence until both Wilson and the circuit court had reviewed the photograph.

Also on June 23, 2006, Wilson filed his motion in limine No. 3, which sought "an order prohibiting the introduction of all evidence, testimonial or otherwise, at trial, relating to an alleged hospital visit and x-rays of [CW] while in Japan on or about September 4, 2005." Wilson argued that such evidence "is uncorroborated, hearsay, [and] unreliable, and there is no chain of custody for any x-rays or hospital report in Japan, therefore, [it is] inadmissible under Rule 802, HRE."

At a November 27, 2006 hearing on this motion, the State noted that it would not attempt to introduce the hospital report. The circuit court denied without prejudice the part of Wilson's motion in limine No. 3 regarding the Japanese x-rays and ordered that "the State will be allowed to attempt to lay the foundation for the introduction of the x-rays." The Japanese x-rays were admitted into evidence at trial on December 1, 2006.

At the November 27, 2006 hearing, the circuit court also heard the State's motion in limine, which was filed on November 21, 2006. The State's motion sought, among other things, to exclude evidence of "all 'prior bad acts' of any prosecution witness, including [CW]," pursuant to HRE Rule 404(b). Specifically, and relevant to the points raised on appeal, the State sought to exclude evidence that Wilson had filed complaints against CW with the Honolulu Police Department

(HPD) for theft and forgery of Wilson's employment checks and for giving him a sexually transmitted disease. Wilson's counsel argued that such evidence "goes to intent and credibility on the part of [CW] because the charges were filed before, not after, but before she filed charges against [Wilson]." The circuit court reserved ruling on this issue until the State had had a chance to review the police reports on Wilson's complaint. The circuit court also stated that it would reconsider at trial, if requested, its earlier rulings regarding complaints filed by CW against her former landlord and employer in Mānoa.

The next day, the first day of trial, the circuit court ruled that Wilson's complaint against CW for theft and forgery may not be used because it was made "after [CW] had made her disclosure to HPD" so "it's irrelevant and immaterial to the issue of motive of her making her complaint." However, the circuit court allowed limited questioning of CW concerning her knowledge that Wilson had filed a police report that she had given him a sexually transmitted disease "as it goes to the issue of credibility and motivation in making the complaint."

THE TRIAL PROCEEDINGS

Wilson's four-day jury trial was conducted from November 28 through December 1, 2006.

A. The State's Witnesses

1. Officer Shellie Paiva

At trial, the State's first witness was HPD Officer Shellie Paiva (Officer Paiva). She testified that she opened an investigation sometime in September 2005, after receiving information that CW may be missing. After contacting CW, Officer Paiva convinced CW to return to Hawai'i and initiate a criminal case against Wilson.

Officer Paiva testified that she picked up CW at the airport upon CW's return to Hawai'i and drove CW to the emergency room of Kapi'olani. At Kapi'olani, Dr. Sydney Lee (Dr. Lee) attended to and took x-rays of CW. Officer Paiva, along with HPD Detective Christopher Lee (Detective Lee), then interviewed CW, took photographs of CW and the scenes of the three incidents that led to the charges against Wilson, and recovered evidence (a

glass cup, a kitchen knife, an ice pick, a blow torch, and a men's black-leather belt) from the house where the incidents took place.

2. CW

CW testified that she was born and raised in Tokyo, Japan, obtained a bachelor-of-arts degree from a university in Texas, and was formerly married to an American military officer with whom she had two children.

In April 2005, she and Wilson, who had been living together in an apartment in Mānoa, moved into a house in Kaimukī (Kaimukī house) that she had rented. According to CW, three incidents took place in the Kaimukī house that led to her sudden departure from Hawai'i.

a. The July 20, 2005 Incident

CW testified that on the night of July 19, 2005, she spent the night at a hotel because she was "very, very tired [and] exhausted" and "sleep deprived" because Wilson's busy lifestyle "pretty much disrupted" her "resting hours" and her lack of sleep was causing her to fall asleep during the day. She did not tell Wilson of her hotel stay because she "just didn't want to get into another argument or conflict." CW testified that when she returned home a little after noon on July 20, 2005, Wilson was upset and accused her of lying to him and being "with somebody else or somewhere else." The discussion thereafter escalated to physical violence.

CW related that first, Wilson "slapped [her] face and splashed a drink over [her] head and body." Later, Wilson had her sit on the chair in the living room, repeatedly questioned her, demanded that she disclose whatever she was hiding, and got more and more upset when CW repeatedly denied lying. CW stated that Wilson was pacing around and throwing objects randomly. Wilson then started tearing her hair: "I used to have very long hair, down the waistline. And he just grab and start tearing my hair out." CW testified that the hair-pulling occurred "all through the night" so she didn't know how many times he had grabbed and pulled her hair.

CW related that Wilson accused her of hiding things, brought up "everything, small things we had in the past, any small argument or mistakes I made," and told her that she had no self-esteem or self-discipline. Wilson then threw her "over the chair, and he still keep tearing [her] hair out." Wilson next took her "to the bedroom[,] "threw [her] over the bed . . . [s]o [she] end[ed] up [on] the other side of the bed on the floor," "kept tearing [her] hair," and when she got up and tried to go toward the door, "he used the black leather belt to . . . whip [her] on [her] back once." Next, CW testified, Wilson

start tearing my hair out. Sometimes he grab the bigger chunk. And -- and one moment, he lifted me up by the hair into the air. I was off the floor. I was holding on to his arm and forearm. He was shaking me few seconds and then drop me down to the floor. He kicked my left thigh. . . . And then I was still on the floor. I was looking at him, and he's coming down on me, but I didn't know what he was going to do. He -- the first thing he did was stepped on my left shoulder area generally. And then the next time, he stomped on my left side of the body right underneath my breast, and he did twice. The second time, he push down with his body weight[.]

(Formatting revised.) In response to a question by the State, CW explained that she was almost five-feet, one-inch tall and weighed "[b]etween 98 and 102" pounds, although she may have been thinner in July 2005. She also testified that Wilson was six-feet, three-inches tall and he had told her that "his usual average weight is 185 or more."

CW stated that when Wilson first pressed down on her, she felt "excruciating pain. Then the second stomp, [she] felt little [sic] snap or pop" on her left side, at which point breathing became "difficult."

CW testified that at that point, she managed to crawl and walk to the bed, because she "thought [she] needed to lie down." She further stated: "[E]verytime I breathe, I felt the pain. . . . but I wasn't sure altogether what really exactly happened." CW asked permission to use the bathroom, and "[e]ventually . . . he let me." She got herself a drink of water and asked Wilson if he needed anything from the kitchen. CW recalled that Wilson requested a drink so she made and brought him a "vodka tonic in this thick Mexican glass type of tumbler

with the blue line. And he told me to sit on the same chair by the couch in the living room."

At this point, CW testified, Wilson began to pace and use a "variety of verbal threat [sic] or humiliation to intimidate me." CW related:

[S]ometimes he was speaking to me just like almost teaching me something or lecturing me. But some other moment, he was screaming at the top of lung. His mood changes so rapidly and erratic. So I was listening to him, but sometimes I was confuse what he was saying. Although he demands me my answer, usually he keep talking. So I was just sitting there listening to him.

Then I don't know how long it pass. In between, he was still grabbing my hair, tearing. Then this particular moment, he came to me, toward me. I didn't know why. I was still sitting. And he struck me on my forehead with the same glass I mentioned earlier.

CW stated that she was struck by the hairline and still had a scar. CW further testified:

When he struck, I don't remember what he was saying. The next moment, I was in total shock, and I was holding my head, and I was holding my ribs and didn't know what to do. And when I opened my eyes, he was approaching toward me. So I didn't know what he was going to do. But what he did was he just grab me up and started dragging me toward the bathroom.

. . . .

He said ["]you fucking idiot, you just don't keep dripping your blood on the white carpet so that you can -- so that everybody can see["], so that I realize [sic] that was the reason he grabbed me and dragged me to the bathroom. And he just push me into the bathroom. That's the first time I saw myself in the bathroom mirror.

CW stated that she then realized she was bleeding from the gash. Wilson then told her: "[Y]ou been a mother for a long time, you better know how to stop your bleeding. And then he walked out the bathroom, went back to the living room, and started playing a video game."

At that point, CW said, she washed her face and hands, poured hydrogen peroxide over the wound, and used a feminine pad to press the wound and a tight headband to keep the pad in place. She also cleaned up the bloody sink, bathtub, towels, and bathroom. CW considered going to a hospital due to the "awful[] pain[]" but "couldn't even think about how to go to the

hospital[.]" Instead, she wrapped her chest with wide Ace bandages.

At some point thereafter, CW testified, Wilson came into the bedroom and he "was calmer . . . and even sounded gentle. . . . but he was telling me that all of those things he did to me or he has been doing to me was because that I was making him to do." CW testified that Wilson then said he would continue to watch over her and that "we can reconcile, and let's have a reconciliation period." He then "wanted to have sex with me" and she acceded to his request. CW believed that Wilson knew that she was, in fact, in pain. During their sexual intercourse, she felt pain in her rib area.

b. The August 3, 2005 Incident

CW testified that on August 3, 2005, she returned home at approximately sunset. Wilson was upset because she had met her daughter at Costco earlier that day. CW stated that although her meeting with her daughter was not planned, Wilson became angry and insisted that she was hiding a secret from him. At some point later, CW related, Wilson grabbed a rubber belt "similar to the kind used for a . . . fan belt for [an] automobile" and used it to strike her left thigh. Next, CW recalled:

[Wilson] told me that ["]you have a lot to tell me if you are -- if your lips are not to start moving [sic], I'm going to smack your face, and we -- we have a lot to do tonight.["] And he declare to me that he -- he was going to cut my hair every minute. He was holding the scissors already. And he is just -- he started cutting my hair randomly. . . . He just grabs -- he just grabs this much (Indicate) and snip, and then another snip, and another part and cut. So randomly, maybe he did twice. Maybe three times for the first moment.

(Formatting revised.) CW explained that "through the evening, among other things happening, he interspersedly continued to keep snipping, clipping, cutting my hair," all the while telling her that she was damaging their relationship, hiding, and disclosing lies. CW stated that she "was in a pretty much state of shock" but "tried to act calm." However, when he started cutting her hair, she "was terrified."

Sometime thereafter, CW said, Wilson "turn me over the chair while I was sitting in the chair This chair end up over me. I end up on the floor. I push the chair to the side, and I was sitting on the floor. He stomp on me again." CW testified that when Wilson stomped on her, "I was on my back, but I tried to keep my leg up in the air, try -- in the defense action, and I don't know what he was going to do. But this time, he just stomped on me. Almost the -- almost the same area." CW stated that when Wilson stepped on the left side of her ribs, she once again heard a "little pop or snap" and felt "the sharp pain, sharper, harder than the first time." She tried pushing him away, but "while I was pushing him away, he struck my face around my forehead over my head a few times." CW described painful impacts around her forehead, ear, and jaw -- "just a combination of smacking or slapping, not the punch [sic], but striking." CW related that Wilson cut her hair two or three more times, but no other physical violence occurred. CW then pointed out on a diagram provided by the State the locations of the events that she had described.

c. August 4 to August 29, 2005

CW testified that on August 8, 2005, she got a haircut at a hair salon in Mānoa Marketplace from a stylist whose name she recalled as either "Jen or Jennifer." She stated that she got her hair cut because "after the incident of August 3rd [when Wilson] cut my hair randomly I -- I look [sic] horrible. So I cut my own hair . . . to make it look even, and I was like putting my hair up, and I was usually wearing bandana or something to cover my hair. . . . But, that day, I just thought about I just needed professional help to make myself look decent."

Asked why she didn't go to the hospital after the July 20 or August 3 incidents, CW testified:

I was tolerating [the injury by using large Ace bandages]. So the first four, five days I wasn't sure, and then . . . pain is getting lighter [sic]. So I assume [sic] I was getting better. And I just didn't go to the hospital. I was afraid, what I have to say if I do so.

She similarly testified that she did not go to the police because

I was embarrassed. . . . I was afraid. I didn't know really how the system works. If -- if [Wilson], if he figures out that I was -- I attempted or I call the police for help, what if he finds out before police arrives or all sorts of possibilities. I just -- I was so afraid. I just cannot -- I couldn't -- I couldn't think about it at the time. I just didn't talk to anybody. I was so afraid what he was going to do next to me or anybody involve.

She also wanted to make the relationship work and make Wilson "come back to the senses, to become a man I once fell in love with."

On August 23, 2005, CW testified, she had an annual checkup at Kapi'olani with a doctor specializing in obstetrics and gynecology (OBGYN). She was having an irregularity with her monthly period and needed a vitamin B-12 shot due to her stomach being removed as a result of cancer. She had a breast exam and felt "discomfort" that was "bearable." CW testified that at the time of the exam, she had no obvious physical injuries and did not tell the doctor what Wilson had done to her on July 20 and August 3.

d. The Incident on August 31 to September 1, 2005

CW testified that on the evening of "August 31st, if not the early morning of September 1st" Wilson punched "the right hand side of [her] body under the breast" twice. "After the second punch -- at the second punch [she] felt the pop snap, a little sharp pain and a numb feeling." CW stated that she and Wilson had had an argument about the couple's finances after she expressed concern that Wilson's expenses were exceeding his earnings and asked him to bring a "bank transaction record or store purchase receipt so [she] can keep good track of [her] finance, especially since he had access to [her] bank account and he was using [her] ATM." CW testified that when she asked Wilson about a withdrawal of money and requested a receipt, he got "louder and louder, saying something like I don't give a damn about your fucking credit." CW stated that Wilson again began throwing random objects, tried to overturn a table, and "splashed his drink over [her] head once again." Wilson also "smack[ed her] on [her] lips" with his hand at least once. Next, CW testified,

[h]e threw a cell phone toward me that hit my forehead and went to my side. I picked up. And he was in front of me standing. And he picked up this black metal box. It's like a one of the kind of electric audio equipment type, about telephone book size. The black metal instrument, I would say. And he struck me just over . . . both knees with that. I was sitting. And he was to -- walking side-by-side, back and forth toward me. And he was telling me ["]it's gonna be another long night if you don't start talking. Your lips are not moving. I'm watching you. I'm telling you that you better start to remedy this whole thing.["]

CW related that after Wilson twice appeared to call a friend to ask the friend to take money from CW's account with an ATM card, things got physical. Then,

[h]e went to the kitchen. Brought the ice pick. He pointed the ice pick in between my eyes. The sharp edge. And he was saying the same thing. ["]You better start moving your lips. And don't lose your eye contact.["] And I was terrified. But I just tried to be as still as possible. And he was telling me that ["]if you don't start talking, if you don't tell me what I'm asking to tell you, disclose all the lies and secret, or next time this gonna be in your skull [sic]["].

After CW denied having any secrets, Wilson "was facing, walking around [CW] . . . [a]nd sometimes he sat down. And still throwing things in his reach, like anything." Wilson then went into the kitchen again, this time bringing out a kitchen knife.

And he placed the blade of the kitchen knife on my neck, the throat. A little bit left to the side. On the center. Little to the left. And I saw his eyes. It's really bearing looking at me. But I don't remember. That moment I was horrified. And I tried to be still, since the blade was on my neck. And he start making slow motion up and down. Up and down. Like shaving like motion, I would say. . . .

And he was keep [sic] humiliating me. You better start thinking with your pin sized brain. And he was just the weakest human being I have ever seen. You're pathetic. And you have no self esteem, no self discipline. Even as a parent. And you have no self discipline. And I -- oh, I know. By the way, I know where your son lives. I know which high school your daughter goes. And I'm always watching you. This is gonna be a long night.

At some point thereafter, CW testified,

[Wilson] picked up the blow torch. He had a gas bomb blow torch. And he came to my side and lit up the blow torch, that it's an open flame next to my face. The next moment I had my wisp of my hair burning and smell the burn of it. He was still screaming.

Wilson also represented that he was calling a friend to have money taken from CW's account using an ATM card. Sometime thereafter, CW stated,

[Wilson] turn me over the chair to [sic] -- and then I was on the floor. And he approached me. So I thought that -- what I thought was ["]oh, not again, no more stamping["] because I was -- because he was coming toward me. And as he coming over me, this time I grabbed him. I tried to fight back.

And I was holding onto his T-shirt. I might have lift his T-shirt by the shoulder. I was struggling. And during this real pushing, me pushing away with him, I don't know what he's trying to do. But he was good hold on me. And during this struggle once his hand struck on my forehead, and there are some strikes. . . . And then he punched me on my right side. . . . Under the breast, on my ribs. . . . Basically, I was on the floor. And he was on me. . . . I was on the floor. I couldn't control my position. I was struggling with him. . . . I think he tried [to punch me] twice. But the -- this one strong punch I remember because of the pain I felt, and another snap I felt at the strike.

(Formatting revised.) CW explained that on this occasion, in contrast to her other rib injuries, she felt a snap in her ribs on her right side. Wilson let her sit on her bed, but he forced her to completely undress and maintain eye contact.

CW testified that she tried her best to calm Wilson. And then she noticed that "his eyes are closed" and she kept talking quietly, so he would fall asleep. CW related that Wilson took off his jeans and eventually fell asleep. After making sure that Wilson was really asleep, CW took her car keys from Wilson's jeans pocket, put nothing but a t-shirt on, and drove away, taking her purse with the wallet and some other items with her. When she got a few blocks away, she put on the rest of her clothes. She noticed that it was then about 4 a.m. She checked her account balance at an ATM, confirmed that Wilson was merely pretending to call his friends to have them withdraw her money, and changed her PIN number.

e. After the August-31-to-September-1,-2005 Incident

CW testified that she then went to a Starbucks in Mānoa, recharged her cell phone, and a bit later, called Wilson to remind him that he needed to get up to go to work for a "really important job." She "wanted him to think that I was still coming back, and just so that he can continue his regular daily activities. I didn't want him to think that I was now seriously thinking to leave."

CW testified that she drove around and eventually thought to call her friend, Brites Calcado (Calcado). After meeting with Calcado, CW resolved to return to Japan to get away from Wilson and visit her mother. Calcado helped arrange for a police officer to escort CW to her house so CW could get her things out without fear of harm from Wilson. CW testified that she did not tell the police anything about the three incidents, stayed with Calcado that evening, and left for Japan early the next morning.

Upon her arrival in Japan, she got to her mother's house exhausted and in pain. She slept for a day and "couldn't really move" so her mother called a doctor to come to the house. After the doctor's visit, she went to a hospital, where x-rays were taken of her upper torso. CW testified that she was given the x-rays, which she brought back to Hawai'i. She also pointed out that her name, birth date, the name of the hospital, and the date of the x-rays were marked on the x-ray images in the kanji form of Japanese writing.

Sometime in September 2005, CW testified, she left Japan and went to the mainland United States. While there, Calcado called to let her know that Officer Paiva wanted to speak with her. Eventually, over the course of no more than three telephone calls, CW informed Officer Paiva about the three incidents involving Wilson. CW returned to Hawai'i on October 5, 2005 and was picked up at the airport by Officer Paiva. She was interviewed by Officer Paiva and Detective Lee, her injuries were photographed, and she was sent to the emergency room at Kapi'olani, where Dr. Lee examined her and took x-rays. CW related that she decided to press charges against Wilson in late September or early October, right before Officer Paiva called, mainly because the distance in time and space between her and Wilson had made her more confident.

f. Cross-Examination of CW

During cross-examination of CW, defense counsel asked questions to show that: (1) CW was free to leave the Kaimukī house, or request that Wilson leave the Kaimukī house after the three incidents, (2) delayed reporting the alleged incidents for

over two months, and (3) did not complain of pain in her breast area when she went for her doctor's appointment on August 23, 2005. While CW admitted that she asked her doctor about an episode in which a condom broke with a new sexual partner, she said that her question was incidental and not a reason why she went to see the doctor.

CW also admitted that she called the police in 2005 to complain that a prospective male employer was sexually harassing her. The circuit court did not allow Wilson to use the police report concerning this complaint (252 police report) during his cross-examination of CW.

CW further admitted that she filed a complaint against a former landlord and that Virginia Herron Bennett (Professor Bennett), a professor of Russian and French languages and literature at the University of Hawai'i, helped her write the complaint in the form of a letter. CW explained that she lodged the complaint "[a]s [Wilson] advised me to." The circuit court did not allow a copy of CW's complaint letter that was subsequently located by Professor Bennett to be admitted into evidence.

CW answered questions about why she did not ask for help from neighbors, the police, or Wilson's musician friends who periodically came over to play music in their basement. She also admitted that she and Wilson had sex almost nightly after the incidents. Additionally, she was aware that Wilson was talking about her giving him a sexually transmitted disease but thought "it was just like rumor that he was creating."

When asked whether she had herpes, the disease that Wilson was complaining about, CW answered: "I have a herpes simplex antibody and the outbreak on my hip long time since before my second child. So I've been treated by dermatology." CW stated that she did not have genital herpes and had been told by her dermatologist to expect to have a recurrence of the herpes virus in the future and that "it may occur every month, or when you are stressing out. . . . It's like a shingles." CW described her herpes condition as "just a two small like little pimples on my right hip" that she treated with an ointment and covered with

a bandage. CW also acknowledged that her ex-husband had sent a fax to her while she was in Japan, complaining that Wilson was telling people that CW had gotten herpes from her ex-husband, who was "cheating on her," and in turn, CW had infected Wilson with herpes.

3. Dr. Lee

Dr. Lee, a physician who is board-certified in the specialty area of emergency medicine, testified that on or about October 7, 2005, CW "came to the emergency department with complaints of chest pain from an alleged assault." Dr. Lee testified that he ordered x-rays to be taken of CW's chest and ribs. Upon reviewing the x-rays, he found "evidence of healing rib fractures on the right side and on the left side." Dr. Lee testified that CW had "right sixth and seventh rib fractures and left third, fourth, seventh, eighth, and ninth rib fractures." He indicated that the bone fractures were consistent with being kicked, stomped, or punched by someone.

On cross-examination, Dr. Lee acknowledged that there are many ways a person can have rib fractures. Dr. Lee could not recall if CW had told him that she saw a doctor in late August 2005. Dr. Lee admitted that he could not establish an exact date as to when the fractures occurred but could "tell from the appearance of some of the fractures that they are older, that they would be over a week old." Dr. Lee explained that in reviewing x-ray films, "if there's evidence of what we call a callus formation of new bone growing in[,] that means that the fractures are old." Dr. Lee could tell that CW's fractures were over a week old. However, he could not tell if they were over six months old "[b]ecause the ribs . . . move and so if the area was healing and then it was either reinjured or rebroken or if the patient had, for example, a persistent cough then the ribs would actually essentially never heal." Dr. Lee indicated that he had not seen any x-rays of CW that pre-existed the x-rays he had ordered of her chest and ribs.

4. Dr. Robert DiMauro

Dr. Robert DiMauro (Dr. DiMauro), a board-certified radiologist and the director of imaging at Kapi'olani, testified

that he had compared the x-rays taken in Japan with the x-rays taken at Kapi'olani and concluded that they were of the same person because

on both sides the patient has rib fractures and the rib fractures are identical on the two sets of films. The only difference between them is that on one set there's some healing which is taking place but otherwise they're the same fractures.

Dr. DiMauro observed that based on the healing patterns, "the [fractures] on the right look like they were newer fractures than the ones on the left. . . . The ones on the right had no sign of healing." Dr. DiMauro also concluded, based on healing patterns, that the fractures on the right side "could be anywhere from one day to a week, ten days of age[,] " that the injuries on the right side were consistent with an injury occurring on August 31, 2005, and the injuries on the left side were consistent with fractures occurring on July 20 and/or August 3, 2005, "making those injuries about four to six weeks old." Dr. DiMauro agreed that the injuries could not be as old as six months and that they were consistent with being stomped, stepped, or pressed on, or punched. Dr. DiMauro agreed, based on his expert opinion, that people frequently say that they "actually hear or feel their rib fractures when it happens[.]" Dr. DiMauro testified that there is not much a physician can do to treat a patient with rib fractures, except give pain medication and maybe strap up the chest, and a person with rib injuries basically has to bear the pain and just wait until it heals. Finally, Dr. DiMauro stated, an individual could do normal day-to-day functions, even a day or two after the rib fractures occur, although the individual would have pain when moving around, coughing, or breathing.

On cross-examination, Dr. DiMauro agreed that it was not possible to tell exactly when a rib had been fractured by looking at x-rays; however, it was possible to give a range of time that a rib fracture had occurred. According to Dr. DiMauro, a fresh rib fracture has no callus, and a callus that has just begun to form looks different from a callus at the end of three months. Dr. DiMauro further testified that all the Kapi'olani x-rays of CW's ribs showed calluses. Additionally, the fractures

looked newer on the Japanese x-rays than the Kapi'olani x-rays. Dr. DiMauro also opined that based on the location of the fractures on both sets of x-rays, the x-rays were of the same person. The State attempted to admit the Japanese x-rays, Exhibits 32 and 33, into evidence during questioning of Dr. DiMauro, but the circuit court reserved its ruling until CW took the stand again to further authenticate the x-rays.

5. Calcado

Calcado testified that on September 1, 2005, she was contacted by CW, a former employee and friend. Calcado described how "horrible" CW looked when she arrived at Calcado's workplace:

[I]t took me a second to recognize her. And I just was taken back. Her face was completely swollen. Her lips was -- I couldn't believe it. They were swollen. She had blood. Her hair was a mess. You could tell it was chopped. It was short. She was wearing raggedy clothes. She just looked so bad, so horrible.

Calcado testified that normally, CW "had long hair. She had -- she would dress very nice all the time, even when she wasn't working. Always all makeup, very well kept." Calcado testified that she went to hug CW and CW screamed. Although CW didn't talk about what had happened to her, Calcado was afraid for CW's life and told CW that she needed to leave, get on the plane, and get away from Wilson "as far and as fast as she could." Calcado related that CW got an airline ticket that day. Because CW needed some items from her house to go to Japan, Calcado arranged for a police escort to accompany CW and Calcado to CW's house to retrieve what CW needed. The next day, CW left for Japan. Calcado also related how she put CW in touch with Officer Paiva.

On cross-examination, Calcado admitted that she told CW not to call the police or go to the hospital, but just to go back to her family in Japan and see a doctor there. Calcado also admitted that although she called the police to escort CW to her home to get her belongings before returning to Japan, neither she nor CW told the police of the incidents involving Wilson.

6. Jennifer Kamei

Jennifer Kamei (Kamei), a hair stylist at Hair Schemes in Mānoa Marketplce, testified that she was working on August 8, 2005 when CW walked in to get her hair washed, styled, and blow

dried. It was the first time Kamei had seen CW. Kamei testified that the first thing she noticed when CW sat down and removed her sunglasses was that CW had a bruise on her face, around her eye. Additionally, Kamei explained, CW's hair "looked like somebody had cut pieces out. She had some hair missing in different areas." Kamei layered CW's hair where the chunks had been taken out so they "weren't so obvious." Kamei also recalled that CW was wearing a jacket, which she didn't want to take off, so "I remember having to work around it." CW did not want to talk about her injuries.

On cross-examination, Kamei admitted that she was paid for cutting CW's hair and that CW had visited her in January 2006 to ask Kamei if she would be a witness in the case.

B. Wilson's Motion for Acquittal

On December 1, 2006, after the State closed its case-in-chief, Wilson moved for acquittal as to all three counts of household abuse (Counts III, VI, and IX). The circuit court denied the motion and noted that "[m]erger issues would be reserved for post verdict, if there are any [sic]."

The circuit court also denied Wilson's attempts to introduce into evidence the report of CW's OBGYN doctor, deeming the evidence to be "cumulative." After reviewing the 252 police report *in camera* and finding it irrelevant, the circuit court denied Wilson's attempt to introduce the 252 police report into evidence.

C. The Defense Witnesses

1. Dr. Tricia Elaine Wright

Dr. Tricia Elaine Wright (Dr. Wright), an OBGYN specialist, testified that she is an assistant professor at the University of Hawai'i Medical School and supervises residents at Kapi'olani and other clinics. According to Dr. Wright, CW came into the resident clinic at Kapi'olani on August 23, 2005 and was examined by Dr. Roxanne Kawelo (Dr. Kawelo) under Dr. Wright's supervision. Dr. Wright reviewed and signed Dr. Kawelo's written report of CW's exam.

Dr. Wright testified that according to the report, CW "was specifically asked if she had chest pain, and it so says

that she said no chest pain." The report also indicated that CW had no recent acute illnesses, did not complain of any shortness of breath, was given a prescription for vitamin B-12, and had a history of anxiety and depression secondary to divorce and medical problems and the difficulty of obtaining medical insurance. Dr. Wright also explained what CW's medical exam had entailed and noted that a musculoskeletal exam of CW revealed "no joint deformities," and a neurologic exam revealed that CW's cranial nerves were intact. Additionally, Dr. Wright stated, the report indicated that CW had a new sexual partner with whom an episode had occurred where a condom had broken. CW also had a history of taking Acyclovir, a medication to prevent the recurrence of Type I or Type II herpes simplex and herpes zoster. Wilson moved to admit the medical report into evidence, but the motion was denied because the circuit court deemed the evidence to be "cumulative."

On cross-examination, Dr. Wright confirmed that her testimony was based on the notes of Dr. Kawelo, who had mainly examined CW. Dr. Wright confirmed that she had not seen any evidence that CW had herpes or any other sexually transmitted disease in her genital area and that CW reported the occurrence of herpes simplex on her right buttock. Dr. Wright also stated that the report indicated that CW appeared tired; was alert, oriented, cooperative, and coherent; and had a "flattened affect" during the exam. Dr. Wright also agreed that someone who was eager to give information would not have a flattened affect.

2. Professor Bennett

Professor Bennett testified that in July 2005, she met twice with CW to help CW draft a letter of complaint against CW's landlord, with whom CW and Wilson "had had problems . . . that seemed to be triggered by certain racial prejudices[.]" Professor Bennett testified that when she met with CW at the end of July 2005, CW was "her usual self" and did not show any type of black-and-blue mark on her or walk stiffly. Professor Bennett could not recall whether Wilson was present the first time she met with CW or whether Wilson helped draft the complaint.

However, Wilson was not present when she and CW met the second time.

On cross-examination, Professor Bennett admitted that she has known Wilson "for at least [fifteen] years" and met CW through Wilson. Professor Bennett also recalled remarking to CW in July 2005 that CW looked tired but did not recall advising CW to rent a hotel and rest.

3. Officer August Belden

HPD Officer August Belden (Officer Belden) testified that in July 2005, he took a phone call from CW, who wanted to talk to an officer about some problems she had with an ex-employer, who was also her landlord. Officer Belden stated that he met with CW at her house, left her a 252 police report form so she could write a statement, and returned to CW's house when CW had completed the form. However, after reading the statement, he informed CW that "there was nothing criminal here, but I would make a case for her, and I pulled a number and made a misc. pub. case."

4. Darrell Yusan and Ray Goodloe

Darrell Yusan and Ray Goodloe both testified that they practiced music with Wilson in the basement of the Kaimukī house in July and August 2005, did not see any black-and-blue marks on CW's face, and did not remember CW carrying herself as though she were injured.

On cross-examination, both witnesses admitted that they rarely encountered CW on their visits to the Kaimukī house, and when they did, the encounters were brief. Additionally, CW never complained that she was being beaten by Wilson. Both witnesses also admitted that they considered Wilson a good friend.

Wilson elected, after a colloquy, not to testify.

D. The Settling of Jury Instructions

On December 4, 2006, the circuit court settled jury instructions. Wilson requested that the jury be instructed that household abuse is a lesser-included offense of assault 2. The State objected, arguing that household abuse is not an included offense because "[i]t has a separate element of family or

household member." The circuit court gave the jury separate instructions regarding the household-abuse and assault 2 charges.

E. Wilson's Request to Submit Further Evidence

On December 5, 2006, Wilson moved to admit into evidence a letter that Professor Bennett had found in her office after testifying in court. The letter had been given to her by CW and included notations in the margin which had been written by CW. Wilson sought to introduce the letter "to show that contrary to [CW's] association [sic] that [Wilson] was the person telling her what to do and how to do it, that it is [CW] who is responding to the letter to the landlord." The circuit court sustained the State's objection to admission of the letter, finding that the evidence was "irrelevant and immaterial to any issue in this case."

F. The Jury Verdict and Post-Verdict Proceedings

Following closing arguments by the State and Wilson, the jury returned a verdict finding Wilson guilty on all nine counts.

On December 18, 2006, Wilson filed a motion for judgment of acquittal as to Counts IV and VIII, the TT1 charges. Wilson argued that the evidence was insufficient to convict him of both counts. Also on December 18, 2006, Wilson filed a "Renewal of Motion to Dismiss Counts III, IV [sic] and IX of the Complaint Pursuant to [HRS §] 701-709." Wilson argued that these household-abuse counts merged into the assault 2 counts that stemmed from incidents on the same date. The circuit court denied both motions.

The circuit court entered its judgment, convicting and sentencing Wilson on March 14, 2007. The circuit court sentenced Wilson to serve five years' incarceration for each of Counts I, II, IV, V, VII, and VIII and one year incarceration for each of Counts III, VI, and IX. The circuit court also ordered that the sentences for "Counts I, II, III, IV, V, VI, VIII and IX are to run concurrently with each other" and the sentence for "Count VII is to run consecutively to the other counts."

On March 28, 2007, Wilson filed a motion for reconsideration of his sentence. Wilson argued that the

imposition of consecutive sentences subjected him to "enhanced sentencing" which should have been decided by a jury. Wilson also argued that others with similar convictions had received lighter sentences, this was his first felony conviction, and the circuit court improperly considered his prior arrests and convictions in imposing sentence. The circuit court denied the motion, stating that its sentence of Wilson was not "enhanced" and was consistent with the severity of the offense and the need for deterrence.

DISCUSSION

A. Wilson's Motion to Sever

In denying Wilson's motion to sever the trial by the date of the offense, the circuit court held that

with respect to the three separate dates it is the same witnesses involved with respect to all three dates. So, for purposes of judicial economy the same witnesses being called the same issues. The question comes to whether the joining of the offenses is going to be unduly prejudicial to the defendant. And, the court does not find that it would be unduly prejudicial.

The court notes that there is going to be an issue in the case with respect to the alleged fracture of the ribs and because of that there will be strong possibility that even if the counts are severed there would be introduction of the evidence with respect to the separate injuries presented in all three cases the evidence not whether in this case separate incidents that unlikely evidence from one incident would not come in at all if the matters were separately [sic]. That's not the case in this case as there [were] allegations of stomping on the rib on both July 20th, August 30th [sic] and August 31st and evidence of healing rib fractures. The evidence will come in. So, the court does not find that [it's] unduly prejudicial to the defendant.

On appeal, Wilson argues that

[t]he joining of all these counts into one complaint had the prejudicial effect of cumulative evidence of assaulting behavior as described by [CW]. The jury therefore heard evidence of three separate dates of the offense involving multiple counts instead of one date of the offense. Multiple evidence of other bad acts by [Wilson] on separate dates tainted the entire jury trial.

The joinder of all of these counts and dates into the same trial violated the Fifth and Fourteenth Amendment and Article 1, Section 8 Hawaii Constitution right to a fair trial and Rule 14 [Hawaii Rules of Penal Procedure (HRPP)].

(Underscoring in original omitted.)

HRPP Rule 14 (2007) provides, as it did at the time of trial, as follows:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in a charge or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

In State v. Matias, 57 Haw. 96, 550 P.2d 900 (1976), the Hawai'i Supreme Court analyzed whether a defendant charged with five counts of rape involving five sisters on five separate dates was entitled to separate trials under Hawaii Rules of Criminal Procedure (HRCP) Rule 14.⁸ The supreme court explained that "[u]pon appropriate motion under Rule 14, the trial court is under a duty to balance possible prejudice to the defendant from joinder with the public interest in efficient use of judicial time through joint trial of defendants and offenses which are connected." Id. at 98, 550 P.2d at 902. The supreme court also stated that "a defendant has no right to a severance and . . . a motion to sever on grounds of prejudicial joinder is addressed to the sound discretion of the trial court." Id.

The supreme court later explained in State v. Miyazaki, 64 Haw. 611, 622, 645 P.2d 1340, 1349 (1982), that "[d]ecisions of trial courts involving Rule 14 motions will not be reversed absent a clear showing of abuse of discretion." (Internal quotation marks omitted.) The supreme court held that "there [was] no abuse of discretion" because the trial court "utilized the proper test and weighed the pertinent factors[.]" Id.

In this case, the circuit court duly balanced the possible prejudice to Wilson against the public's interest in judicial economy in denying Wilson's motion to sever. The circuit court's rationale for denial was not arbitrary or irrational.

Furthermore, in State v. Balanza, 93 Hawai'i 279, 1 P.3d 281 (2000), in which the defendant sought to sever count I from

⁸ The supreme court quoted the version of HRCP Rule 14 then in effect as providing for separate trials where "it appears that a defendant . . . is prejudiced . . . by such joinder for trial" Id. at 98, 550 P.2d at 902. Thus, the rule is substantially similar to the current HRPP Rule 14.

counts II and III because they were based upon different facts and the jury might convict him for one offense based upon his involvement in the other, the supreme court explained that because a jury is presumed to follow a judge's instructions, jury instructions which require the jury to consider all offenses separately "effectively dispel[s]" prejudice caused by joinder. Id. at 289, 1 P.3d at 291. The circuit court in this case presented the jury with instructions nearly identical to those in Balanza:

The defendant is charged with more than one offense under separate counts in the complaint.

Each count and the evidence that applies to that count is to be considered separately.

The fact that you may find the defendant not guilty or guilty of one of the counts charged does not mean that you must reach the same verdict with respect to any other count charged.

Therefore, any prejudice caused by joinder was minimized by the circuit court's instructions to the jury.

B. The Circuit Court's Failure to Dismiss Counts III, VI, and IX of the Complaint and Give the Jury a Merger Instruction

Prior to trial, at the end of the State's case-in-chief, and post-trial, Wilson moved to dismiss Counts III, VI, and IX, the misdemeanor-household-abuse counts, on grounds that they merged with Counts I, V, and VII, the assault 2, class C felony counts. Wilson argues on appeal that the circuit court erred in denying his motion to dismiss and in failing to give the jury a merger instruction because

the testimony establishes proximity in time, place, circumstances and common scheme [and] place. The underlying actions were one continuing course of conduct of domestic violence between [CW] and Appellant. Both the [household-abuse] and Assault [2 offenses] took place at the same time, place and date, i.e., July 20, August 3 and August 31, 2005. The conduct was not interrupted. Therefore the [circuit court] should have dismissed the [household-abuse] counts as merging with [the assault 2 counts]. Alternatively the [circuit court] should have instructed the jury [that] it could consider a merger of the [household-abuse counts] into the Assault [2 counts]. The Court did neither, and therefore erred.

HRS § 701-109(1)(e) (1993) reads, in relevant part, as follows:

Method of prosecution when conduct establishes an element of more than one offense. (1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:

. . . .

- (e) The offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of conduct constitute separate offenses.

. . . .

The Hawai'i Supreme Court has observed:

HRS § 701-109(1)(e) . . . interposes a constraint on multiple convictions arising from the same criminal conduct. The statute "reflects a policy to limit the possibility of multiple convictions and extended sentences when the defendant has basically engaged in only one course of criminal conduct directed at one criminal goal." See Commentary on HRS § 701-109.

Whether a course of conduct gives rise to more than one crime within the meaning of HRS § 701-109(1)(e) depends in part on the intent and objective of the defendant. The test to determine whether the defendant intended to commit more than one offense is whether the evidence discloses one general intent or discloses separate and distinct intents. Where there is one intention, one general impulse, and one plan, there is but one offense. *All factual issues involved in this determination must be determined by the trier of fact.*

HRS § 701-109(1)(e), however, does not apply where a defendant's actions constitute separate offenses under the law.

State v. Matias, 102 Hawai'i 300, 305, 75 P.3d 1191, 1196 (2003) (emphasis in original; citations and brackets omitted).

HRS § 701-109(1)(e) is implicated when the same conduct establishes an element of both offenses or both offenses arose out of the same factual circumstances. Id. at 306, 75 P.3d at 1197 (citing State v. Momoki, 98 Hawai'i 188, 194, 46 P.3d 1, 7 (App. 2002)). The question of whether a defendant's "conduct constituted separate and distinct culpable acts or an uninterrupted course of conduct [is] one of fact that should be submitted to the jury." State v. Matias, 102 Hawai'i at 306, 75 P.3d at 1197 (citations and internal quotation marks omitted). If there is a possibility that two counts of a complaint are

"grounded in the same conduct," HRS § 701-109(1) mandates, "at a minimum, that the circuit court instruct the jury regarding merger." State v. Frisbee, 114 Hawai'i 76, 80, 156 P.3d 1182, 1186 (2007).

In this case, Wilson's alleged conduct against CW on July 20, August 3, and August 31 to September 1, 2005, respectively, could have constituted an element of both the assault 2 and household-abuse offenses that Wilson was charged with committing on the stated days. Pursuant to HRS § 707-711(1) (1993):

(1) A person commits the offense of assault in the second degree if:

(a) The person intentionally or knowingly causes substantial bodily injury to another;

.

(d) The person intentionally or knowingly causes bodily injury to another with a dangerous instrument[.]

HRS § 709-906(1) (Supp. 2007) currently provides, as it did during the proceedings below, that "[i]t shall be unlawful for any person, singly or in concert, to physically abuse a family or household member[.]" Although the term "physical abuse" is not defined in HRS § 709-906, the Hawai'i Supreme Court has held that the statute is not void for vagueness because "[p]ersons of ordinary intelligence would have a reasonable opportunity to know that causing physical injury by punching someone in the face or shoving them so that they fall against a wall would constitute physical abuse." State v. Kameenui, 69 Haw. 620, 623, 753 P.2d 1250, 1252 (1988) (citing the holding in City of Cincinnati v. McIntosh, 251 N.E.2d 624 (Ohio Ct. App. 1969), that "as ordinarily used abuse means to maltreat and connotes such treatment as will injure, hurt or damage a person"). In State v. Nomura, 79 Hawai'i 413, 416, 903 P.2d 718, 721 (App. 1995), this court referred to legal and other well-accepted dictionaries to construe the ordinary meanings of the statutorily undefined "physical abuse" and observed:

Abuse which is "physical" would by definition pertain to abuse of a person's body. "Physical" means "relating or pertaining to the body." *Black's Law Dictionary* 1147 (6th

ed. 1990). Commonly, "physical" also means "concerned or preoccupied with the body." *Merriam Webster's Collegiate Dictionary* 877 (10th ed. 1993).

(Brackets omitted.) We then held that an instruction that informed the jury "that physical abuse meant causing bodily injury to another person" was "well within the scope of the construction given to the term 'physical abuse' [by the supreme court] in Kameenui." Id. We also concluded that "the further explanation of bodily injury as 'physical pain, illness or any impairment of physical conditions . . . did not exceed the definitional parameters of 'physical abuse' as 'treatment which will injure, hurt or damage a person'" as set forth in Kameenui. Id. (brackets omitted).

In this case, there is a possibility that the assault 2 and household-abuse charges against Wilson arising from each of the three incidents in 2005 were grounded on the same conduct that allegedly caused CW "substantial bodily injury" or "bodily injury with a dangerous instrument" for assault 2 purposes and caused "bodily injury" and "physical abuse" to CW for household-abuse purposes. Therefore, HRS § 701-109(1)(e) was clearly implicated in the instant case. There was also evidence adduced at trial that Wilson may have had but "one intention, one general impulse, and one plan" to "physically abuse" or "cause bodily injury" to CW on each of the nights in question.

Since factual issues existed as to whether the assault 2 and household-abuse charges stemming from each of the three incidents were grounded on the same conduct by Wilson or arose out of the same intent, impulse or scheme, the jury should have been instructed to consider whether the assault 2 and household-abuse charges merged. State v. Padilla, 114 Hawai'i 507, 517, 164 P.3d 765, 775 (App. 2007); Frisbee, 114 Hawai'i at 83, 156 P.3d at 1189; and Matias, 102 Hawai'i at 306, 75 P.3d at 1197.

The failure of the circuit court to give a merger instruction to the jury, however, does not necessitate a new trial on remand since HRS § 701-109(1)(e) "only prohibits *conviction* for two offenses if the offenses merge; it

specifically permits *prosecution* on both offenses." Padilla, 114 Hawai'i at 507, 164 P.3d at 775 (emphases in original).

Therefore, on remand, the State shall be afforded the option to either: (1) dismiss the household-abuse charges (Counts III, VI, and IX); or (2) retry Wilson with respect to the household-abuse and assault 2 charges with an appropriate merger instruction given to the jury. See id.

C. Admission of the Japanese X-Rays

Wilson argues that the Japanese x-rays were erroneously admitted into evidence because: (1) the x-rays were hearsay and no exception to the rule against hearsay applied; (2) the x-rays were inadequately authenticated; and (3) the admission of the x-rays violated his right to confrontation under the Sixth Amendment to the United States Constitution and article I, section 14 of the Hawai'i Constitution.

We disagree with Wilson.

1.

The term "[h]earsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." HRE Rule 801 (Supp. 2007).⁹ HRE Rule 801 defines "[s]tatement" as "an oral assertion, an assertion in writing, or nonverbal conduct of a person, if it is intended by the person as an assertion." Thus, for an item of evidence to be construed as "hearsay[,]" it must be an "assertion."

The word "assertion" is not defined in the HRE.

However, Black's Law Dictionary defines "assertion" as follows:

1. A declaration or allegation.
2. A person's speaking, writing, acting, or failing to act with the intent of expressing a fact or opinion; the act or an instance of engaging in communicative behavior.

Black's Law Dictionary 124 (8th ed. 2004).

"A photograph is usually passive, not assertive, in nature, and thus is not hearsay." David F. Binder, Hearsay Handbook § 1:6, at 1-7 (4th ed. 2001). See also United States v.

⁹ HRE Rule 801 was last amended in 2002 to clarify the definition of "statement" by substituting "assertion in a writing" for "written assertion." HRE Rule 801 Supplemental Commentary.

May, 622 F.2d 1000, 1007 (9th Cir. 1980) (holding that a photograph is not hearsay "because a photograph is not an assertion, oral, written, or non verbal, as required by Fed. R. Evid. 801(a) [,]" the federal rule parallel to HRE Rule 801); and United States v. Oaxaca, 569 F.2d 518, 525 (9th Cir. 1978) (holding that comparison photographs "were not hearsay. In order to constitute hearsay, evidence must be assertive or testimonial in character and must be introduced to prove the truth of the matter asserted. Fed. R. Ev. 801. A jury could have inferred, based on the comparison photographs, that the clothing depicted was the same as that shown in the bank surveillance photographs. The availability of that inference does not make the photographs assertions, however. If every piece of tangible evidence which was capable of supporting an inference could be said, on that basis, to be an assertion, it is difficult to imagine any piece of evidence that would not be an assertion.").

However, it is possible for a photograph, particularly one that is posed for purposes of litigation, to be hearsay. This is so if the photograph is assertive in nature, and is offered to prove the truth of the assertion depicted. For example, a man with a broken leg might be photographed, on crutches, pointing to a broken rung on a stepladder, or pretending to trip over a defect in a sidewalk. If such photograph, qualified perhaps by the photographer's testimony, is offered to show how the man broke his leg, it would be hearsay. A person posing for a photograph may make a behavioral assertion that is more potent than an oral assertion.

Hearsay Handbook § 1:6, at 1-7.

In our view, an x-ray photograph of internal bodily injuries is not an assertion by a person that expresses a fact or opinion and thus, does not constitute hearsay unless the x-ray photograph was generated for the purpose of asserting a "statement" and was offered to prove the truth of that "statement." Therefore, the circuit court did not err in allowing the Japanese x-rays to be admitted into evidence.

2.

We acknowledge that in State v. Torres, 60 Haw. 271, 589 P.2d 83 (1978), the Hawai'i Supreme Court observed:

It has been generally recognized that x-ray photographs, like ordinary photographs, are admissible in evidence when relevant and properly verified. 3 C. Scott, PHOTOGRAPHIC EVIDENCE § 1251 (2d ed. 1969). Whether or not an

x-ray photograph has been sufficiently verified so as to warrant its admission in evidence is a matter within the sound discretion of the trial judge. See, e.g., *Sim v. Weeks*, 7 Cal. App. 2d 28, 45 P.2d 350, 356-57 (1935); *Kramer v. Henely*, 227 Iowa 504, 288 N.W. 610, 611 (1939); *Clark v. Reising*, 341 Mo. 382, 107 S.W.2d 33, 35 (1937).

Hospital records, including x-rays made and kept in the regular course of the hospital's business, have been found to be admissible into evidence as business records where qualified in accordance with the applicable business records where qualified in accordance with the applicable business record statute. See *Rouse v. Fussell*, 106 Ga. App. 259, 126 S.E.2d 830 (1962); *Allen v. St. Louis Public Service Company*, 365 Mo. 677, 285 S.W.2d 663 (1956); *Dana v. Von Pichl*, 39 App. Div. 2d 744, 332 N.Y.S.2d 368 (1972). HRS § 662-5 (1976), the statute governing the use of business records as evidence, provides:

A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court or person having authority to hear, receive and examine evidence, the sources of information, method, and time of preparation were such as to justify its admission.

The term "business" includes every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

Id. at 275-76, 589 P.2d at 86-87. The supreme court then concluded:

The testimony of the chief x-ray technician sufficiently established that the photographs were of [the attempted-murder victim] and adequately described how they were taken. Moreover, it is evident that the x-rays in question were prepared in the ordinary course of the hospital's operations and near the time of the alleged shooting incident.

Under these circumstances, we see no reason to require, as appellant urges, that the prosecution call the x-ray technician who actually took the photographs to testify. To do so would seem to defeat the purpose of the business record statute.³ Absent a *bona fide* dispute as to the authenticity of the x-rays involved herein, we fail to see how the trial court abused its discretion in admitting them into evidence.⁴

³ HRS § 622-5 is a modified version of the Uniform Business Records as Evidence Act. One of the effects of this Act is to dispense with the common law requirement that one offering proof under the regularly kept records exception to the hearsay rule either call as witnesses all links in the organizational chain by which the record was made, or establish their unavailability. E. Cleary, et al., MCCORMACK'S [sic] HANDBOOK OF THE LAW OF EVIDENCE 729 (2d ed. 1972).

⁴ We may have reached a different result had the x-ray photographs in question been made during the course of preparing for trial or with an eye toward litigation rather than for purposes of treatment. *Palmer v. Hoffman*, 318 U.S. 109 (1943).

. . . . However, it has been held that the admission of a properly qualified hospital record does not violate the accused's right to confront the witnesses against him if the record meets the requirements of the applicable business record statute. See *State v. Larkins*, 518 S.W.2d 131, 363 (Mo. Ct. App. 1974).

Id. at 276-77, 589 P.2d at 87 (citation omitted).

State v. Torres was decided before the legislature enacted the HRE into law pursuant to Act 164, 1980 Haw. Sess. Laws 244. Pursuant to HRE Rule 803(b)(6),¹⁰ "[r]ecords of regularly conducted activity" are now admissible into evidence as a business-records exception to the rule against hearsay.

In this case, the Japanese x-rays were not admitted into evidence pursuant to the business-records exception set forth in HRE Rule 803(b)(6). Instead, the State established that the Japanese x-rays were those of CW through CW's testimony and the expert testimony of Dr. DiMauro, who related that he had examined the Kapi'olani and Japanese x-rays and determined that they were of the same person and showed the same rib fractures. Based on our review of the record, we conclude that the circuit

¹⁰ HRE Rule 803(b)(6) (1993 & Supp. 2007), which was last amended in 2002, provides:

Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(b) Other exceptions.

. . . .

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made in the course of a regularly conducted activity, at or near the time of the acts, events, conditions, opinions, or diagnoses, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with rule 902(11) or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

court did not err in admitting the Japanese x-rays into evidence and allowing Dr. DiMauro to testify about the Japanese x-rays.

CW's testimony was sufficient to establish that she had been x-rayed at a hospital in Japan, given the x-ray photographs immediately thereafter, and personally brought the x-ray photographs back to Hawai'i. CW testified¹¹ that the x-rays contained her name, date of birth, the name of the hospital where the x-rays were taken, and the date when the x-rays were taken.¹² In State v. DeSilva, 64 Haw. 40, 41-42, 636 P.2d 728, 730 (1981), the Hawai'i Supreme Court explained that

[i]n showing chain of custody, all possibilities of tampering with an exhibit need not be negated. Chain of custody is sufficiently established where it is reasonably certain that no tampering took place, with any doubt going to the weight of the evidence. An accounting of hand-to-hand custody of the evidence between the time it is obtained and the time admitted to trial is not required in establishing chain of custody. And despite the mere possibility that others may have had access to the exhibits, there exists a reasonable certainty that no tampering took place. Following these principles, the court in State v. Mayes, 286 N.W.2d 387, 391 (Iowa 1979), aptly stated:

In order to justify the admission of physical evidence it is not required that the chain of custody be shown with perfect precision. The trial court may admit the evidence when satisfied it is:

. . . reasonably probable that tampering, substitution or alteration of evidence did not occur. Absolute certainty is not required.

The judge determines the sufficiency of physical evidence identification in light of the article's nature, circumstances surrounding its custody and the likelihood of intermeddlers tampering with it. A more elaborate foundation is required to identify evidence that is easily substituted, such as marijuana, than is necessary to identify physical evidence with unusual characteristics, such as money, a gun, clothing and a body, or matches and glasses. Unless the decision to admit evidence over a chain-of-custody objection constitutes a clear abuse of discretion, it will not be overturned.

(Ellipsis in original; some citations and brackets omitted.)

¹¹ It would have been a better practice for a neutral interpreter to interpret the information on the Japanese x-rays.

¹² Our review of the Japanese x-rays indicates that this identification information, which was in Japanese, was imbedded in the x-rays and was not subject to tampering or removal. This information is arguably an assertion that the x-rays were of CW's ribs and thus may constitute hearsay, if offered to prove the truth of the information.

In this case, our review of the record indicates that the Japanese x-rays were those of CW, were not tampered with, and were given to CW for medical purposes. The circuit court did not abuse its discretion in allowing them into evidence.

3.

Even if the circuit court erred in admitting the Japanese x-rays into evidence, the error was harmless because HRE Rule 703 (1993) expressly permits opinion testimony by experts to be based on inadmissible evidence. HRE Rule 703 provides:

Bases of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

(Emphasis added.) The Commentary to HRE Rule 703 notes, in relevant part:

The first two sentences of this rule are identical with Fed. R. Evid. 703 in its entirety. The last sentence was added to clarify the court's discretion to exclude untrustworthy opinions.

The traditional view limits the facts or data upon which an expert may base an inference or an opinion to those obtained upon firsthand knowledge or to facts of record. McCormick § 14. Characteristic examples of expert testimony based upon firsthand knowledge are the testimony of a physician, based on his medical examination of an individual The expert may become conversant with facts of record either by being present during testimony or, more characteristically, through their submission to him in the form of a hypothetical question.

Hawaii decisions appear to adhere to the limitations of the traditional rule, see *State v. Davis*, 53 H. 582, 499 P.2d 663 (1972); *Cozine v. Hawaiian Catamaran, Ltd.*, 49 H. 77, 106, 412 P.2d 669, 687 (1966); *Kawamoto v. Yasutake*, 49 H. 42, 410 P.2d 976 (1966). In *State v. Dillingham Corp.*, 60 H. 393, 411, 591 P.2d 1049, 1060 (1979), however, the court said:

In this jurisdiction, we have taken a liberal view toward the admission of evidence used to support an expert's opinion as to fair market value [of realty]. . . . The factors considered and the extent of knowledge and reasoning of an otherwise qualified appraiser are matters which go to the weight rather than the competence of his testimony.

Rule 703 allows opinions based on data not admissible in evidence so long as "of a type reasonably relied upon by experts in the particular field." The Advisory Committee's

Note to Fed. R. Evid. 703 points out:

[T]he rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.

McCormick agrees: "It is reasonable to assume that an expert in a science is competent to judge the reliability of statements made to him by other investigators or technicians." McCormick § 15.

There are several safeguards against untrustworthy opinions. The facts or data must be established as reliable in the particular field. Therefore, concluded the Advisory Committee's Note to Fed. R. Evid. 703, a court would not be justified in "admitting in evidence the opinion of an 'accidentologist' as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied." Second, the present modification of the federal rules formulation provides expressly for exclusion at the discretion of the court. Finally, Rule 705 infra, allows the court at its discretion to require prior disclosure of facts or data upon which an opinion or inference is based.

A number of other jurisdictions have adopted a similar rule, see, e.g., Cal. Evid. Code § 801(b).

(Emphases added; brackets and some ellipses in original.)

It has been explained that several policies underlie Federal Rules of Evidence (FRE) Rule 703, upon which HRE Rule 703 is based:

To promote efficiency, the provision expands the permissible bases for expert testimony to include inadmissible facts or data. To ensure reliability, Rule 703 requires that, when an expert relies upon inadmissible facts or data, they must be "of a type reasonably relied upon by experts in the particular field." Pursuit of reliability raises an additional policy concern that Rule 703 be applied in a manner that preserves the jury's traditional powers to weigh evidence and determine witness credibility.

The central purpose of Rule 703 is to promote efficiency by expanding the acceptable bases for expert testimony to include inadmissible evidence such as hearsay. In prerules practice, many courts permitted expert opinion to be based only on the expert's firsthand knowledge or on other admissible evidence. Since relatively few experts had personal knowledge of all the facts or data pertinent to their courtroom opinions, this meant that most needed to

rely on evidence admitted through other witnesses. This created two serious problems of inefficiency. First, where experts relied upon data produced by others, substantial trial time was needed to produce and examine as witnesses each of those people to admit their data. Second, during the examination of the expert it was necessary to create a record of the facts or data on which the expert relied in order to demonstrate that all those matters had been admitted into evidence. This record usually was created by posing to the expert a hypothetical question that identified the facts or data on which the expert intended to base its opinion. The use of these hypothetical questions often ignited disputes over whether the question accurately reflected evidence in the record. In order to meet such objections, the examining attorney was commonly required to augment, qualify, and complicate the question to such a degree that the relationship between the ensuring expert testimony and the issues in the case became obscured. As a consequence, the use of hypothetical questions to elicit testimony was widely criticized by commentators, judges, lawyers, and the experts themselves.

The drafters of the Evidence Rules clearly intended to streamline trials by reducing the use of hypothetical questions. Since Rule 703 permits experts to rely on evidence that has not been admitted, there is no longer any need to pose a hypothetical question for the purpose of showing that the opinion is based on admitted evidence. In fact, Rule 705^[13] provides that experts may give their opinions without first giving any testimony as to the bases for that opinion. In the name of efficiency, Rules 703 and 705 shift the burden to the cross-examiner to reveal the bases of an expert's opinion and the deficiencies therein.

However, because Rule 703 permits expert testimony to be based on inadmissible evidence, the provision necessarily must concern itself with the reliability of that testimony. Many evidence rules are based on the conclusion that a certain type of evidence should be inadmissible because it is unreliable. The rule excluding hearsay is probably the most well known example. An expert opinion based on inadmissible evidence such as hearsay can pose the same sorts of reliability problems as the inadmissible evidence on which it is based.

¹³ FRE Rule 705 provides:

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

HRE Rule 705 (1993) differs slightly from FRE Rule 705:

Disclosure of facts or data underlying expert opinion. The expert may testify in terms of opinion or inference and give the expert's reasons therefor without disclosing the underlying facts or data if the underlying facts or data have been disclosed in discovery proceedings. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Accordingly, Rule 703 seeks to promote reliability by permitting expert testimony to be based on inadmissible evidence only where it is "of a type reasonably relied upon by experts in the particular field." The rationale for this provision is that experts in a given field can be presumed to know what sort of evidence is sufficiently trustworthy for them to use as a basis for their opinions. Thus, if experts in the relevant field use a particular type of evidence for their out-of-court opinions, that evidence usually is a sufficiently trustworthy basis for in-court opinions, regardless of the admissibility of that evidence.

Charles Alan Wright & Victor James Gold, 29 Federal Practice & Procedure § 6272, at 304-07 (1997) (emphasis and footnote added; footnotes in original omitted).

As discussed above, x-ray photographs are not hearsay. Even if they were, however, Dr. DiMauro testified that physicians in his general field of practice commonly rely on "supporting documents or items such as x-rays in rendering . . . expert opinions[.]" It is also fairly common knowledge that x-rays are typically used by physicians to diagnose medical conditions of their patients. Pursuant to HRE Rule 703, therefore, it was not error for the circuit court to allow Dr. DiMauro to testify about the Japanese x-rays.

4.

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" Article I, section 14 of the Hawai'i Constitution similarly provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against the accused[.]"

Wilson argues that his constitutional right to confrontation was violated because

[h]e was unable to cross-examine the person who took the x-rays to determine on what circumstances and date the x-rays were taken, unable to cross-examine any opinions as a result of the x-rays from the person who took it, question the appearance of the complaining witness who had the x-rays taken and other underlying circumstances in which the x-rays were taken.

We disagree with Wilson.

The United States Supreme Court has stated that the Sixth Amendment's Confrontation Clause may only be invoked when

"testimonial hearsay" is presented at trial against a criminal defendant. Davis v. Washington, 547 U.S. 813, 823-24 (2006). Since we have concluded that the Japanese x-rays were not hearsay, Wilson's right to confrontation was not implicated. We observe, moreover, that Wilson's counsel conducted a thorough examination of the State's expert witnesses who relied on the Japanese x-rays in opining on CW's injuries.

D. The Evidence of the Burn Mark on CW's Hand

During a November 27, 2006 hearing on various motions in limine, Wilson's counsel objected to the admission of a photograph of CW's hand with a burn mark, on grounds that CW did not testify about the burn at the preliminary hearing and therefore, the burn mark is "not part of this particular case. . . . [I]t's a prior bad act" and therefore inadmissible pursuant to HRE Rule 404(b).¹⁴

The record reflects, however, that at trial, CW testified that between August 31 and September 1, 2005, "Wilson pressed the lit cigarette on [her] right hand," although she could not remember "exactly when in chronological order" the cigarette-burning occurred in terms of other events that evening. The photograph of the cigarette burn was thus evidence of physical pain or injury sustained by CW between August 31 and September 1, 2005 that could support a jury determination that Wilson caused bodily injury to CW, an element of several of the

¹⁴ HRE Rule 404 (Supp. 2007) provides currently, as it did during the proceedings below, in relevant part, as follows:

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes. . . .

(b) Other crimes, wrongs, or acts. 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 another 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.

(Emphases added.)

offenses or lesser-included offenses that Wilson was accused of committing.¹⁵ The photograph was thus relevant and admissible.

E. The Evidence of Wilson's Use of an Ice Pick

Following the close of the presentation of evidence, the circuit court asked the State what "alleged dangerous instrument" the State was proceeding on for the terroristic-threatening charges in Counts IV and VIII. The deputy prosecutor appearing for the State replied: "They are the kitchen knife, that's in evidence and the blow torch or the butane torch that's in evidence." The following colloquy then ensued:

[WILSON'S COUNSEL]: . . . In view of the fact that the State has now indicated that it's the kitchen knife and blow torch instrumentalities of which [Wilson] is being charged, we would ask that the Court strike all testimony with regards to the ice pick, and so instruct the jury as it's irrelevant to these particular charges.

THE COURT: [Deputy Prosecutor]?

[DEPUTY PROSECUTOR]: Your Honor, State would object, as the jury has already received those evidence and allowed the State to make the argument that the ice pick was, among other things, the defendant's way of intimidating the complaining witness.

THE COURT: Motion to strike is denied.

Wilson argues on appeal that the evidence relating to his purported threatening of CW with an ice pick (the ice-pick incident) constituted evidence of "other bad acts" that was improperly admitted at trial, in violation of HRE Rule 404(b). We disagree.

In Counts IV and VIII of the amended complaint filed on January 9, 2006, the State charged that Wilson, on or about August 31 to and including September 1, 2005, "threatened by word or conduct to cause bodily injury to [CW], with the use of a dangerous instrument, in reckless disregard of the risk of terrorizing [CW], thereby committing the offense of [TT1] in

¹⁵ The record indicates that the circuit court gave the jury the following unanimity instruction: "The law allows the introduction of evidence for the purpose of showing that there is more than one act upon which proof of an element of an offense may be based. In order for the prosecution to prove an element, all twelve jurors must unanimously agree that the same act has been proved beyond a reasonable doubt."

violation of [HRS § 707-716(1)(d)]." The State's charges track the applicable statutes.

Although the State identified the dangerous instruments used by Wilson to support a conviction for the TT1 counts as the knife and blow torch and not the ice pick, Wilson's use of the ice pick was nevertheless relevant to the elements of TT1--e.g., whether Wilson's use of the ice pick constituted a "threat by conduct" to cause CW bodily injury or amounted to "a reckless disregard of the risk of terrorizing" CW. It was not error for the circuit court to allow evidence of the ice pick to be admitted into evidence. See State v. Fetelee, 117 Hawai'i 53, 83, 175 P.3d 709, 739 (2008) (holding that proof of the required intent to commit an offense "is admissible because it does not require an inference as to the character of the accused or as to his conduct").

F. Wilson's Claims of Erroneous Exclusion of Evidence

Wilson claims that the circuit court erroneously excluded relevant evidence that challenged CW's veracity, namely: (1) CW's application for crime-victim compensation; (2) the police report regarding CW's alleged commission of theft and forgery; (3) the police report regarding allegations by CW of sexual harassment by her former employer; (4) the OBGYN report of CW's visit to Kapi'olani; and (5) the letter that CW wrote to her former landlord complaining of civil-rights violations. Wilson claims that by excluding this evidence, the circuit court violated his right to impeach witnesses against him, as guaranteed by the Sixth Amendment's Confrontation Clause. We disagree.

1.

Wilson argues that the circuit court erroneously prevented him from reviewing CW's application for victim compensation in order to determine whether CW had made any inconsistent statements in her application and to establish a monetary motive for bringing the action against Wilson.

The custodian of records for victim-compensation claims filed a motion to quash Wilson's subpoena duces tecum to obtain CW's application, on grounds that the requested records and

documents "implicate a constitutionally protected right to privacy and/or contain highly personal and intimate information not appropriate for free dissemination and privileged materials." After a hearing on the motion, the circuit court granted the motion insofar as "any statements made by [CW] in the . . . records submitted to the court for in camera review are discoverable for impeachment purposes" but denied the motion in all other respects. The circuit court, after an *in camera* review of crime-victim-compensation records pertaining to CW, apparently found no "statements" made by CW that were discoverable for impeachment purposes. Our review of the sealed records confirms the circuit court's finding.

We reject Wilson's claim that he was entitled to review the victim-compensation records to establish that CW had "a monetary motive for bringing the action against [him]." A criminal action is brought by the State of Hawai'i, not a private citizen.

2.

Wilson's challenge to the circuit court's exclusion of a police report made by HPD Officer Alan Rivers pursuant to a complaint by Wilson that CW had stolen and forged his employment checks is also meritless. Wilson claims that the report should have been admitted because it bears upon CW's credibility, specifically, her "motive to lie." The circuit court excluded the report on the basis that it was not relevant because it was made after CW had filed her complaint against Wilson with HPD. Wilson has not denied that the report was prepared after CW had lodged her complaint against Wilson with HPD.

3.

The circuit court did not abuse its discretion in precluding Wilson from offering into evidence a formal police complaint that CW filed on July 1, 2005 against her former employer and neighbor and a letter that CW had written to a former landlord. Wilson sought to introduce the report and letter in order to demonstrate that CW was not controlled by him as her testimony suggested.

The Hawai'i Supreme Court has explained and held that

[t]he scope of cross-examination is generally within the sound discretion of the trial court. While the right of cross-examination protected by the Confrontation Clause of the Sixth Amendment may not be unduly restricted, it has never been held that this right is absolutely without restriction. However, the trial court's discretion in exercising control and excluding evidence of a witness's bias or motive to testify falsely becomes operative only after the constitutionally required threshold level of inquiry has been afforded the defendant. The Sixth Amendment is satisfied where sufficient information is elicited to allow the jury to gauge adequately a witness' [sic] credibility and to assess his [or her] motives or possible bias. When the trial court excludes evidence tending to impeach a witness, it has not abused its discretion as long as the jury has in its possession sufficient information to appraise the biases and motivations of the witness.

State v. Mars, 116 Hawai'i 125, 136, 170 P.3d 861, 872 (App. 2007) (quoting State v. Balisbisana, 83 Hawai'i 109, 114, 924 P.2d 1215, 1220 (1996)) (emphasis added).

The record on appeal shows that Wilson's counsel fully cross-examined CW, and CW admitted that she had filed the complaint with the police and written the letter of complaint to her former landlord. CW confirmed that she knew how to complain when something bothered her. The record clearly establishes that the jury was sufficiently informed of CW's biases and credibility, notwithstanding the circuit court's exclusion of the police report and letter from evidence. Moreover, the subject matter of the police complaint and the letter to CW's landlord was entirely collateral to the offenses charged against Wilson.

4.

Wilson avers that he should have been permitted to introduce the report of CW's August 23, 2005 OBGYN appointment at Kapi'olani, first, during his cross-examination of CW, and second, during his direct examination of Dr. Wright, the supervising physician at the time of CW's appointment. Wilson argues that the evidence was

extremely important as it established that a full physical exam given to [CW] on August 23, 2005, after she alleged she had her ribs broken twice by [Wilson] on July 30, and August 3, 2005. The records established there was no bruising, marks, scars or tenderness in the rib and chest area. The records will show there were no marks or scarring on [CW] which would indicate assault.

(Emphasis in original.)

Even if we assume that the medical records should have been admitted into evidence, we conclude that any error was harmless. Both CW and Dr. Wright testified at length regarding the contents of the OBGYN report, and there is no dispute that the report did not indicate that CW had any evidence of injuries at the time of her examination or that CW complained about any injuries.

G. The Circuit Court's Consecutive Sentence.

Wilson argues that the circuit court, by sentencing him to consecutive terms of imprisonment, unconstitutionally imposed an enhanced sentence, in violation of the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). Under Apprendi, facts essential to an enhanced sentence must be determined by a jury. This same argument was raised and rejected by the Hawai'i Supreme Court in State v. Kahapea, 111 Hawai'i 267, 141 P.3d 440 (2006). Accordingly, we conclude that there is no merit to Wilson's argument.

CONCLUSION

In light of the foregoing discussion, we vacate the judgment entered by the circuit court on March 14, 2007 and remand this case to the circuit court for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, January 7, 2009.

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