DISSENTING OPINION OF FUJISE, J.

I respectfully dissent.

While I agree that the more detailed statement made by the complaining witness (CW) to the police officer in this case did not qualify for the "excited utterance" exception to the hearsay rule, I would hold that CW's initial statement that "my boyfriend beat me up," made upon the officer's arrival, was admissible under this exception. See Hilyer v. Howat Concrete Co., 578 F.2d 422, 424 (D.C. Cir. 1978) (held bystander's statements, describing fatal accident in response to police officer's questions as he was "so excited" he could not remember the officer's questions, admissible as excited utterances); see also Bosin v. Oak Lodge Sanitary District No. 1, 447 P.2d 285, 290 (Or. 1968) (that statement was elicited by an inquiry is one factor to consider; "the trial judge must be given considerable lee-way of decision") (internal quotation marks and citation omitted) and United States v. Joy, 192 F.3d 761, 766 (7th Cir. 1999) ("[A] court need not find that the declarant was completely incapable of deliberative thought at the time he uttered the declaration.").

I would further hold that admission of this initial statement was not a violation of the confrontation clauses of either the Hawaiʻi or United States constitutions.[1] The complaining witness did appear at trial and Defendant-Appellant Kenneth Delos Santos (Delos Santos) had the opportunity to cross-examine her, notwithstanding her testimony that she could not remember the incident in question or her statements to police. See United States v. Owens, 484 U.S. 554, 559-60 (1988) (the opportunity to cross examine is not denied due to witness's bad memory); People v. Garcia-Cordova, 912 N.E.2d 280 (Ill. App. Ct. 2009) (child victim was available for cross-examination, despite her claimed loss of memory and lack of knowledge). See also State v. Fields, 115 Hawaiʻi 503, 523, 168 P.3d 955, 975

[1] Hawaiʻi Const., art I, § 14; U.S. Const. amend. V.

(2007) (quoting Owens with approval: "It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his [or her] lack of care and attentiveness, his [or her] poor eyesight, and even (what is often a prime objective of cross-examination, see 3A J. Wigmore, Evidence § 995, pp. 931-932 (J. Chadbourn rev. 1970)) the very fact that he [or she] has a bad memory.") (internal quotation marks and italics omitted).

Finally, in my view, even when the detailed statement given by the complaining witness is not considered, the remaining evidence, when taken in the light most favorable to the government, is sufficient to support the conviction. The complaining witness's statement that "my boyfriend beat me up," her testimony that she and Delos Santos were living together at the time and the police officer's observations of her swelling and marked chin, limp, and two-inch by two-inch circular red mark on her thigh were sufficient to support a conviction for Abuse of Family or Household Member. Hawaii Revised Statutes § 709-906 (Supp. 2007). However, as I cannot say that the introduction of CW's subsequent, detailed statement was harmless, I would remand this case for a new trial. See State v. Chun, 93 Hawaiʻi 389, 394, 4 P.3d 523, 528 (App. 2000) (where reasonable possibility that error contributed to conviction exists, conviction must be set aside).