*** NOT FOR PUBLICATION ***

NO. 24300

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

EDWARD DEAN, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 99-0602(1))

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant-appellant Edward Dean [hereinafter "Dean"] appeals from the April 25, 2001 judgment of the circuit court of the second circuit, the Honorable Artemio C. Baxa presiding, convicting him of and sentencing him for: (1) attempted murder in the first degree, in violation of Hawai'i Revised Statutes [hereinafter "HRS"] §§ 707-701(1)(a) (1993)[1] and 705-500 (1993);[2]

[1] HRS § 707-701(1)(a) provides that "[a] person commits the offense of murder in the first degree if the person intentionally or knowingly causes the death of . . . [m]ore than one person in the same or separate incident[.]"

[2] HRS § 705-500 provides:

> (1) A person is guilty of an attempt to commit a crime if the person:
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.
> (2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to

(continued...)

(2) carrying or use of a firearm in the commission of a separate felony, in violation of HRS § 134-6(a) (Supp. 2001);[3] and (3) prohibited possession of a firearm, in violation of HRS § 134-7(f) (Supp. 2001).[4]

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[2](...continued)
establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

[3] HRS § 134-6(a) (brackets in original) provides:

It shall be unlawful for a person to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not; provided that a person shall not be prosecuted under this subsection where the separate felony is:

(1) A felony offense otherwise defined by this chapter;

(2) The felony offense of reckless endangering in the first degree under section 707-713;

(3) The felony offense of terroristic threatening in the first degree under section [707-716(1)(a)], [707-716(1)(b)], and [707-716(1)(d)]; or

(4) The felony offenses of criminal property damage in the first degree under section 708-820 and criminal property damage in the second degree under section 708-821 and the firearm is the instrument or means by which the property damage is caused.

[4] HRS § 134-7(f) provides:

No person who has been restrained pursuant to an order of any court, including an ex parte order as provided in this subsection, from contacting, threatening, or physically abusing any person, shall possess or control any firearm or ammunition therefor, so long as the protective order or any extension is in effect, unless the order, for good cause shown, specifically permits the possession of a firearm and ammunition. The restraining order or order of protection

(continued...)

On appeal, Dean argues that: (1) the court erred by denying Dean's motion for a new trial because the jury must unanimously agree that Dean killed and/or attempted to kill the same two or more persons in order to find Dean guilty of attempted first degree murder, and therefore the jury instructions were prejudicially insufficient and erroneous so as

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[4](...continued)
shall specifically include a statement that possession or control of a firearm or ammunition by the person named in the order is prohibited. Such person shall relinquish possession and control of any firearm and ammunition owned by that person to the police department of the appropriate county for safekeeping for the duration of the order or extension thereof. In the case of an ex parte order, the affidavit or statement under oath that forms the basis for the order shall contain a statement of the facts that support a finding that the person to be restrained owns, intends to obtain, or possesses a firearm, and that the firearm may be used to threaten, injure, or abuse any person. The ex parte order shall be effective upon service pursuant to section 586-6. At the time of service of a restraining order involving firearms and ammunition issued by any court, the police officer may take custody of any and all firearms and ammunition in plain sight, those discovered pursuant to a consensual search, and those firearms surrendered by the person restrained. If the person restrained is the registered owner of a firearm and knows the location of the firearm but refuses to surrender the firearm or refuses to disclose the location of the firearm, the person restrained shall be guilty of misdemeanor. In any case, when a police officer is unable to locate the firearms and ammunition either registered under this chapter or known to the person granted protection by the court, the police officer shall apply to the court for a search warrant pursuant to chapter 803 for the limited purpose of seizing the firearm and ammunition.

For the purposes of this subsection, good cause shall not be based solely upon the consideration that the person subject to restraint pursuant to an order of any court, including an ex parte order as provided for in this subsection, is required to possess or carry firearms or ammunition during the course of their employment. Good cause consideration may include, but not be limited to, the protection and safety of the person to whom a restraining order is granted.

to violate Dean's right to a unanimous jury verdict; (2) the court abused its discretion by admitting evidence of Dean's possession of the shotgun, as well as the shotgun itself, because such evidence was irrelevant and unfairly prejudicial, thus denying Dean his right to a fair and impartial trial; (3) the court abused its discretion by allowing the deceased victim's father to testify during the prosecution's case-in-chief because the testimony was irrelevant and unfairly prejudicial; (4) the court abused its discretion by allowing the deceased victim's father to testify on rebuttal as to the deceased victim's reputation for peacefulness, because the father had not lived with the victim for the past six years; (5) the court abused its discretion by allowing into evidence photographs, taken at the scene of the crime, upon which the words "Murder 1" were prominently displayed, as well as full length photographs depicting Dean standing in front of jail cell bars; (6) the court abused its discretion by allowing Dr. Manoukian, an expert witness, to testify on rebuttal because his rebuttal testimony merely reiterated his previous testimony offered during the prosecution's case-in-chief; (7) the court abused its discretion when it denied Dean's motion for a mistrial based on prosecutorial misconduct calculated to inflame the jury by showing the deceased victim's father an autopsy photograph of the deceased victim; and (8) the court's errors both cumulatively and individually prejudiced Dean's constitutional right to a fair trial.

Dean's first point of error has merit because, on the record before it, the circuit court should have instructed the jury that it was required to unanimously agree as to which two or more persons formed the basis for Dean's conviction of the offense of attempted first degree murder.

Dean's second point of error has merit because the shotgun was irrelevant, inasmuch as the shotgun was not used during the events that formed the basis for the charged offenses.

Dean's third point of error is without merit inasmuch as the testimony of the deceased victim's father was relevant and not calculated to incite or inflame the jury.

Dean's fourth point of error has merit because the testimony of the deceased victim's father -- that he never witnessed the victim direct acts of violence towards family, friends, or anyone else from seventh grade until high school -- was not probative of whether the victim was the first aggressor in an altercation occurring approximately six years later.

With respect to Dean's fifth point of error, the circuit court did not abuse its discretion by allowing the "Murder 1" photographs and the jail cell photographs into evidence, inasmuch as the danger of unfair prejudice did not substantially outweigh the probative value of the photographs.

Dean's sixth point of error is without merit because Dr. Manoukian's testimony rebutted Dean's account of his altercation with the deceased victim. Such testimony is a classic example of the proper use of rebuttal testimony.

Dean's seventh point of error is without merit because, based upon the facts of the present case, showing the deceased victim's autopsy photograph to his father for purposes of identification does not rise to the level of prosecutorial misconduct.

Finally, inasmuch as Dean's first point of error is dispositive, we need not address Dean's final point of error claiming that all of the alleged errors both cumulatively and individually denied Dean his right to a fair trial.

Accordingly, we vacate Dean's conviction of the offense of first degree murder, in violation of HRS §§ 707-701 and 705-500, vacate Dean's conviction of the offense of use of a firearm in the commission of a felony, in violation of HRS § 134-6(a),[5] and remand the case for a new trial consistent with this opinion.

I. BACKGROUND

A. Factual History

From 1997 through 1999, Dean[6] and his twelve-year-old son lived in a "commune-like setting" in Kipahulu, Maui, on land owned by Helen Hoopai [hereinafter "Helen"].[7] Like the other residents, Dean worked to develop and improve the property in

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[5] Although Dean appeals from the April 25, 2001 judgment -- which includes Dean's conviction of the offense of possession of a prohibited firearm -- Dean entered a pretrial plea of no contest as to this specific offense, and Dean's points of error do not challenge his resulting conviction.

[6] Dean was known to the other residents as "Ilon."

[7] The parcel of land on which they lived consisted of approximately forty-three acres and was similar to a "hui" with multiple owners with various interests and acreages.

exchange for rent-free living accommodations. However, all residents were expected to contribute money to the community whenever possible. The residents regularly ate dinner together and attended occasional meetings. The residents also shared a communal kitchen, a water system, a hydroelectric system, outbuildings, and storage buildings. During the time that Dean and his son resided in the community, the other residents included Nani Hoopai [hereinafter "Nani"],[8] Seth Schimberg [hereinafter "Seth"],[9] Harry Perry, Jr. [hereinafter "Harry"], John Belna [hereinafter "John"], Randy Murillo [hereinafter "Randy"], Leslie Labang [hereinafter "Leslie"], Jim Cannon [hereinafter "Jim"], and Maile Cannon [hereinafter "Maile"].

In exchange for his living accommodations, Dean's primary responsibility was the construction and maintenance of a hydroelectric plant, which served all of the residents of the property. Dean made other improvements to the communal kitchen, including the installation of solar panels on the roof, deep cycle batteries, and 12-volt lights. Dean also installed a power line to Helen's shack, Nani and Seth's shack, and to the communal kitchen.

1. The Eagle Hardware confrontation

In October 1999, Eva Panta [hereinafter "Eva"], an acquaintance of Dean, offered Dean $1,000 in return for lodging.

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[8] Nani was Helen's daughter, and was also known as Verdell Nani Lei Berg.

[9] Seth was Nani's companion.

Eva expressed concern over the impending turn of the millennium and the related "Y2K" scare, and she therefore wanted to make sure that she would have a place to stay around that time. Eva and Dean subsequently executed a contract whereby Dean agreed to grant Eva the right to reside in a small shack, and in return Eva agreed to pay Dean $1,000 to be used to connect the hydroelectric plant to all of the buildings. There was, however, some dispute surrounding the $1,000 that Eva gave to Dean. Nani testified that she and Seth, as well as other residents, believed that the money was to be shared with the community. Nani further testified that Eva came to one of the communal meetings and told the residents that she would provide financial assistance for the entire community. Eva, however, testified that she made no such announcement and that the agreement was solely between her and Dean.

Dean testified that he subsequently used $500 of Eva's money, in addition to approximately $1,300 of his own money, to purchase the supplies needed to connect the hydroelectric plant to Helen's shack and also to various points along the way. Dean further testified that he pledged the remaining $500 to purchase building materials for the community. According to Dean, he met Nani and Seth in the Eagle Hardware parking lot eight days before Thanksgiving, for the purpose of purchasing the building materials. Dean testified that he then gave Nani and Seth $300, and that they were upset because he didn't give them all $500. Dean testified that Seth told him that he "better have the money

by Thanksgiving, or [he] was going to get it," and Nani said, "You better have the money or we are going to bury you on the land." Nani, on the other hand, testified that she and Seth did not receive any money from Dean at the Eagle Hardware parking lot.

2. The November 29, 1999 shooting

On the evening of November 29, 1999, Dean received a telephone call from Randy's sister asking Dean if he could give Randy a massage.[10] Dean thereafter headed to the community kitchen with his flashlight to look for Randy, but Randy was not there. Dean then went to Randy's tent, gave him a massage, and returned to the community kitchen.

Nani, Seth, John, Harry, and a man referred to as "Uncle Bueno" were in the community kitchen when Dean returned. Dean testified that after he sat down for a few seconds, Seth asked him for the $200. Dean again explained to Seth that he did not have the money because he used it to purchase car parts after his car broke down. According to Dean, an argument subsequently ensued and Seth, carrying a lomi lomi stick, yelled, "You remember what happened to that guy on Thanksgiving. If you don't have the money, you are going to get it ten times worse than that. That was nothing compared to what is going to happen to you." Dean also testified that, at one point in the argument, Nani grabbed Dean's flashlight and said, "I am going to bust your fucking head wide open. I am going to kill you."

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[10] Dean owned and operated his own massage therapy establishment.

Meanwhile, Dean's son, James, overheard the argument from Dean's building, grabbed a .32 caliber pistol from the shelf, hid the gun in his pants, and went to the community kitchen. James then gestured to Dean that he had a pistol in his pants by patting his pocket a few times and making a gun symbol with his fingers. The argument ended shortly thereafter and Dean and James left the community kitchen.

Once outside, James handed Dean the pistol and bullets. Dean realized that he left his flashlight in the community kitchen. Dean testified that he did not want another confrontation to take place, so he told James to retrieve the flashlight from Nani. When James returned to the community kitchen, Nani told him that Seth had the flashlight. Dean and James subsequently proceeded towards Nani and Seth's shack. However, prior to reaching Nani and Seth's shack, Dean and James encountered Seth walking towards them with the flashing light and lomi lomi stick. Dean then gave his version of the encounter as follows:

> [Dean:] What happened is we got over by the taro patches, and James was walking ahead of me, and Seth was walking toward us, and John was trailing behind, and James walked up to Seth and said, "Can I have the flashlight?" Seth just kept walking past James. So he got close to where he walked past James and was right in front of me, and I said, "Can I have the flashlight back?" He said, "It is not yours anymore."
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> And then he said, "It used to be Chris' and then it was yours, and now it is not," and he walked past me on the trail, and he was holding the flashlight up like this above his shoulder, walking along with it like that.
>
> [Defense Counsel:] At that time were you aware whether he was carrying anything else?
>
> [Dean:] He had that -- he had that stick with him, the guava stick.
>
> [Defense Counsel:] After he said that to you, was walking

past you, what happened?
[Dean:] He had the stick draped around his shoulder like that. He walked past me, and you know, it is clear he was --
[Defense Counsel:] Just say what happened?
[Dean:] I turned around and I took like a step and I snatched the flashlight out of his hand.
[Defense Counsel:] Did you say anything?
[Dean:] I said, "Give me my fucking flashlight back Seth," and I took my flashlight.
[Defense Counsel:] What happened then?
[Dean:] He yelled, "That's it," and he took the stick off from around his shoulder and whacked me with the stick and knocked me off the trail.
[Defense Counsel:] Where on you did the stick hit?
[Dean:] Well, I saw it coming a little bit, so I put my hand up and the stick hit my hand and my head at the same time and knocked me off the trail and down the hill because the trail is going horizontal to the hill, so that the hill goes down from the trail and the trail is pretty flat and level, but goes down into the taro patch and down into another taro patch, so he knocked me down the trail and downhill into the taro.
[Defense Counsel:] Then what happened?
[Dean:] I hit the ground pretty hard, and then he came off the trail coming down, and he was standing right over me, I guess ready to whack me again, and I shot him.

Dean testified that he subsequently stood up and started running, but that he tripped along the way and the gun fired, discharging a bullet into the ground. Dean further testified that as he approached the community kitchen he saw Nani emerge with what he thought was a piece of pine or a machete. Dean testified that he was afraid that Nani might attack him so he fired two shots in her direction, and one of the bullets struck her in the arm:

[Defense Counsel:] When you first saw Nani right outside the kitchen, could you see whether she was holding anything in her hands?
[Dean:] Yeah, she did.
[Defense Counsel:] What did you see?
[Dean:] It was either a piece of pine or machete. It was black. It was about maybe a little shorter than this pointer. I couldn't make it out clearly.
[Defense Counsel:] What did you do at that point right outside the kitchen?
[Dean:] She started yelling at me and cussing at me. Actually, she was even coming toward me. Like as far as I could tell, she didn't even realize I had a gun with me or anything.

She came at me with what she had in her hand and swung at me and said, "I am going to fuck you up," and she came at me with this thing.

[Defense Counsel:] How far away were you from her when she was doing that?

[Dean:] I guess the distance varied. Probably from six to ten feet. We were both moving.

[Defense Counsel:] And what did you do?

[Dean:] I started to shoot the gun past her like to scare her off. I thought James was right behind me. I thought somebody was going to get hurt there, so I shot the gun like to the side of her.

. . . .

[Dean:] Well, I fired two shots and not necessarily at her, but just close by where she was at to scare her off, and one of them got -- hit her in the arm.

. . . .

[Defense Counsel:] What happened after that?

[Dean:] I saw some movement coming from within the kitchen and a chair was flying at me. Harry Perry thrown a chair at me.

[Defense Counsel:] When you saw a chair coming toward you, did you see Harry?

[Dean:] Yeah, I saw him over there because I looked away. There was some movement. I looked over there that way and the chair was flying toward me. I put my hands up to block the chair and the chair missed me, and I ran.

[Defense Counsel:] Did you fire in the direction of where the chair came from?

[Dean:] No, I did not. I just ran out of there. I saw my chance to go, so I went.

Nani's account of the foregoing events significantly differed from Dean's version. Nani testified that she saw a commotion at the location where Dean and Seth were and that she ran over. Nani then gave the following testimony describing her encounter with Dean:

[Prosecution:] So what happened at that point when you observed the flashlights moving around?

[Nani:] I said to Harry, "Harry, Harry, there is something going on out there."

And me and Harry ran towards where Ilon and Seth were. So when we was running towards Seth, and I got to this point to the java [sic] tree, and I told him, "What you doing, Ilon?"

And all of a sudden I heard a gunshot go "pow," you

know, the gunshot. And he turned around and he said I was next, bitch.

. . . .

[Prosecution:] After you heard the words, "You are next, bitch," what happened then?

[Nani:] I ran back towards the kitchen. I was going to run down towards my house, but I thought about my mom. So I ran back into the kitchen.

. . . .

[Prosecution:] And when you got to the kitchen, was anybody else there?

[Nani:] Just Harry.

[Prosecution:] And did you see Ilon, Edward Dean, again?

[Nani:] He was standing right there.

[Prosecution:] Was he standing there when you got into the kitchen?

[Nani:] After. After I ran around the table.

[Prosecution:] And did he have anything in his possession?

[Nani:] Yes, he had.

[Prosecution:] What did he have?

[Nani:] He had a gun.

[Prosecution:] Did he have anything else?

[Nani:] All I seen is the gun facing towards me.

[Prosecution:] What happened at that point?

[Nani:] When I entered the kitchen, I ran around the table. I grabbed the Hibachi cover, the barbecue cover, to protect.

I ran around the table to go hide behind this post. And I used the Hibachi cover for one shield to protect my head.

And as soon as I brought -- when I went around the pole and brought up my hand around that pole with the barbecue cover, he shot me.

He go, "What you going to do now, bitch?" And he shot at me. And he shot at me again, twice.

[Prosecution:] Did any of those bullets hit you?

[Nani:] Yes it did.

[Prosecution:] Okay.

You said he shot at you twice. Which bullet hit you?

[Nani:] The first bullet.

[Prosecution:] And where did it hit you?

[Nani:] It hit me on my right arm. And the bullet got stuck in my elbow.

[Prosecution:] And after you were actually shot, what did you do?

[Nani:] When he shot me, I dropped to the ground because my arm started to be on fire.

. . . .

[Prosecution:] After you -- the second shot when you fell to the ground, what happened?

> [Nani:] He turned around and pointed the gun at Harry and shot at Harry, that direction. And Harry threw the chair.

After shooting Nani, Dean immediately ran towards his house. Meanwhile, James had returned home and called the police, informing the dispatcher that his father shot someone. When Dean returned home, he also called the police on his cellular phone. Dean subsequently told James to grab their tent and clothes because he was afraid that people were going to come and shoot them. Dean also grabbed an unloaded shotgun and they retreated to the woods. However, along the way, Dean dropped the shotgun. Dean and James hiked deep into the woods and stayed there overnight.

Meanwhile, the police arrived and found Seth's body. Nani was subsequently taken to Maui Memorial Hospital where the bullet was removed. Due to darkness, the police decided to secure the property and return the next day to recover Seth's body, search for Dean and James, and investigate the scene.

The following day, Dean and James attempted to return to their home to retrieve additional items, and Dean was subsequently arrested by police officers who were on the property. The police recovered the loaded pistol and bullets from Dean's pocket, as well as additional ammunition. During a search of the premises near Dean's home, the police also discovered the unloaded shotgun. At the police station, Dean informed the evidence specialist that he had sustained injuries and, subsequently, the injuries were photographed.

B. Procedural History

On December 6, 1999, the Maui Grand Jury returned a nine-count indictment against Dean, charging him with one count of attempted first degree murder, in violation of HRS §§ 705-500 and 707-701(1)(a) [hereinafter "Count I"], two counts of attempted second degree murder, in violation of HRS §§ 705-500 and 707-701.5 (1993) [hereinafter "Counts V and VII"], four counts of carrying or use of a firearm in the commission of a separate felony, in violation of HRS § 134-6(a) [hereinafter "Counts II, IV, VI, and VIII"], one count of second degree murder, in violation of HRS § 707-701.5 [hereinafter "Count III"], and one count of prohibited possession of a firearm, in violation of HRS § 134-7(f) [hereinafter "Count IX"].

1. Motion in Limine #1

On October 20, 2000, prior to the commencement of trial, Dean filed a "Motion in Limine #1" to exclude, inter alia, all testimony or documentary evidence relating to any prior bad acts, as well as the testimony of Seth's parents. Thereafter, on January 8, 2001, the circuit court held a hearing on Dean's motion.

a. Dean's request to exclude testimony regarding prior bad acts

At the hearing, defense counsel urged the circuit court to preclude the State of Hawai'i [hereinafter "the prosecution"] from inquiring about a prior restraining order that prohibited Dean from possessing firearms:

> . . . [C]ount nine is the only offense which is specifically

> related to illegal possession of the firearm, and the count nine charge is because Mr. Dean was under a restraining order and was not to possess firearms.
>
> Count nine charges him with violating the law in that regard. It is a misdemeanor offense, and Mr. Dean is prepared to enter a plea to it this morning, and therefore, it is our position that there's no reason for the jury to hear that he was under a restraining order, or that he was not to possess firearms.
>
> The State noted they believe they should be able to ask the question of whether Mr. Dean knew that he was not to possess firearms, and our position is that no, they can't ask that question because they charge a place to keep violation, or some other counts that alleged illegal possession of firearms, they could have, but the only counts they chose to charge that alleged illegal possession of the firearms had to do with the restraining order. He's pleading to that count.
>
> I don't believe it is relevant whether he illegally possessed the firearms in relation to whether he murdered or attempted to murder any of these individuals.
>
> I do think the State is allowed to inquire of him about his possession of the guns to establish that he had the firearm previous to the incidents, but it is our position that there should be no inquiry regarding the restraining order, or any illegal unlawful possession of firearms.

The prosecution, however, maintained that:

> [it was] not intending to bring in anyone to state on the record that [Dean] was prohibited from possessing firearms. However, if [Dean] takes the stand, the [prosecution] intends to ask him, unless the [c]ourt prohibits the [prosecution] from doing so, that he was aware he illegally possessed the firearms. I don't have to get into the restraining order unless he denies it, but by the same token, Judge, the [prosecution] would be in a position under that line of questioning, which I think is relevant since the firearm was used to commit murder in this particular case.

The circuit court subsequently ruled that the prosecution was prohibited from eliciting testimony about the restraining order.

Also at issue was whether the court would allow the prosecution to elicit testimony regarding Dean's awareness of the registration and permit requirements for firearms, and whether the court would allow testimony from the prosecution's witness, John McKillop, Jr., implying that Dean stole the .32 caliber pistol used to shoot Seth. The circuit court refused to permit

the testimony, and ruled as follows:

> I have carefully reviewed the submissions of the parties here. I have also reviewed the charges here. The [c]ourt is going to deny the request of the [prosecution] to have testimony adduced concerning prohibition from possession of firearms, as well as the request to have testimony concerning the defense awareness of registration and permit requirements for firearms. It is clear in the [c]ourt's mind that they have nothing to do with the charges here.
>
> As far as the testimony of John McKillop, Jr. is concerned, even if the [c]ourt is not going to consider the argument of the defense concerning the lack of prior notice, the concern that the [c]ourt has in this case, as well, is that the testimony in this regard will imply that [Dean] stole the gun.
>
> From what I read, Mr. McKillop was in previous possession of the gun, and about four to six months before the incident in question [Dean] was a visitor at the home during some time within that period. Certain implication would be another bad act. But, aside from that, to admit this type of evidence here, wherein the evidence would merely be speculative in nature, would be highly prejudicial. So the [c]ourt is not going to allow that, as well.

b. Request to exclude the testimony of Seth's parents

At the hearing on defense counsel's "Motion in Limine #1," defense counsel also urged the court to exclude the testimony of Seth's parents, arguing that such testimony was calculated to elicit sympathy from the jury. The prosecution, however, argued that it had the discretion to prove identity in any way it desired, and also that it had the discretion to provide the deceased victim's biological information to the jury. The court ruled that Seth's parents would be allowed to testify, but that the prosecution would be limited in its line of questioning:

> Let me rule then. You have indicated what kind of testimony they will give. I am not going to allow any testimony as to character, irrelevant, inflammatory matter. With what you have told the [c]ourt what he was doing, you know, where he was, you know, fiancé and so on with the other related person, I do not think character in nature, and I would allow those.
>
> . . . .

> Obviously . . . the [c]ourt should allow at least some testimony as to the identity of the victim. Whoever is going to give that identity testimony, whether it be parents or somebody else, so long as it pertains to testimony, I will listen to the question and I will rule accordingly.
>
> I will have to be very candid with both of you, and I feel strongly about bringing in Rule 11 inflammatory characterizations that are not opened up, and if you intentionally try to bring this to the jury, this will not look good upon you. You know what those are.

2. Evidence related to Dean's possession of a shotgun

On January, 29, 2001, the prosecution, during its opening statement, iterated a list of the items recovered on Dean's property after the shooting, including a "12 gauge shotgun." Defense counsel immediately objected:

> [Defense Counsel]: Your Honor, I object to any inference to shotgun, a gun. And I believe it is covered by the motion in limine.
>
> [Prosecution]: I don't believe it is covered by the motion in limine. You indicated that we can't get into asking him about prohibition against firearm.
>
> THE COURT: There is nothing there about the prohibition. He just mentioned about recovery of a gun.
>
> [Prosecution]: Correct, Judge.
>
> [Defense Counsel]: But he is talking about another gun now.
>
> [THE COURT]: What is that?
>
> [Defense Counsel]: He said that the police, pursuant to a search warrant, recovered a separate firearm, a shotgun, from [Dean's] residence. That firearm was not involved in this incident. It is irrelevant. It is prejudicial.

The court, however, overruled Dean's objection and allowed the prosecution's reference to the shotgun.

Subsequently, on February 5, 2001, Maui Police Department Lieutenant Milton Matsuoka [hereinafter "Lieutenant Matsuoka"] testified that, on the evening of November 29, 1999, he received a call from dispatch regarding a shooting that occurred in Kipahulu. Lieutenant Matsuoka further testified that, upon arriving at the scene, he recovered an unloaded

shotgun partially enclosed in a gun case located amongst a grove of scrub guava trees near Dean's house. At that point, the prosecution produced the shotgun. The court called a bench conference to make sure that the gun was cleared by security, and defense counsel made an early objection to the admission of the shotgun into evidence. The court, however, reiterated that it was going to allow the admission of the shotgun through the testimony of Lieutenant Matsuoka. The prosecution then presented the shotgun to Lieutenant Matsuoka as State's Exhibit Number S-1, and Lieutenant Matsuoka identified it as the shotgun he recovered in the early morning hours of November 30, 1999. The court subsequently admitted the shotgun into evidence.

On February 12, 2001, Dean testified in his defense. On cross-examination, the prosecution again mentioned the shotgun, inquiring as to how Dean acquired the gun and what he needed it for. Subsequently, when the prosecution showed Dean the shotgun, identifying it as State's Exhibit Number S-1, Dean identified it as the shotgun he dropped while retreating into the woods with his son.

On February 20, 2001, during the settling of jury instructions, defense counsel also objected to the definition of the term "firearm," which included "shotguns":

> [Defense Counsel]: . . . the [prosecution] has specifically included the phrase "rifle, shotguns and automatic firearms." That phrase does not go to an element of any offense that [Dean] is charged with.
>
> We had objected to any evidence of the shotgun that was not used in the offense, nor threatened, nor testified to by any of the witnesses that they had knowledge of, and at this point is only in evidence for, we think, for its prejudicial effect.

However, the court overruled the objection and gave the instruction as requested.

On February 21, 2001, during closing argument, the prosecution made one final remark about the shotgun:

> You saw the shotgun. You'll have a chance to look at it if you want to in the jury room. How likely is that? He's got -- you got so much stuff that he's not going to notice this huge shotgun falling to the ground. It just so happens that it's partially exposed in the case in his house. Almost like it's a back up gun if it gets heavy. Maybe he doesn't want to turn himself in.

However, defense counsel did not object to this final reference to the shotgun by the prosecution.

3. Admission of photographs

a. Photographs labeled "Murder 1"

On January 29, 2001, the prosecution set up a poster board with three photographs, marked as exhibits S-15, S-16, and S-17, which portrayed the scene of the alleged crime. The photographs were used by the Maui Police Department as part of their investigation, and the photographs were labeled with police report numbers. Defense counsel objected, arguing that the photographs were prejudicial because each photograph was prominently labeled "Murder 1" on the top left-hand corner. The prosecution argued that the jury was aware of the circumstances and the charges, and that a mere reference to the first degree murder investigation was not prejudicial. The court subsequently overruled defense counsel's objection. The prosecution then used the poster board during Nani's direct examination, showing her the photographs depicting the property at which the incident

occurred. After Nani confirmed that the photographs fairly and accurately portrayed the property at the end of November 1999, the prosecution sought to have the photographs admitted into evidence. The court thereafter admitted the photographs over defense counsel's objection.

b. Photographs of Dean standing next to a jail cell

On February 5, 2001, Maui Police Department Evidence Specialist Vincent Souki [hereinafter "Souki"] testified that he photographed Dean at the police station on the evening of November 30, 1999. When the prosecution sought to have the photographs admitted into evidence, defense counsel objected to four full length photographs, arguing that the photographs were prejudicial because they depicted Dean standing in front of a jail cell. The prosecution, however, contended that the photographs were relevant to show that Dean did not sustain the injuries he claimed. Defense counsel countered by stating that:

> it's absurd to suggest those four photographs have anything to do with showing injuries. At the [prosecution's] voluntariness hearing, the [prosecution] elicited from Mr. Souki, the witness now on the stand, that he photographed four claimed areas of injury on [Dean], one on his face, forearm, his elbow and his palms. All of those are depicted in the additional close-up, enlarged photographs.
>
> So, to the extend there are or are not injuries, the [prosecution] can use those photographs to depict it. What I would argue is that until the defendant gets on the stand and claims other injuries than what could be shown in S-22 through S-29, the full height photos of S-18 through think S-21 are not relevant, and would only be relevant if in rebuttal to suggest that they show no injury.
>
> There are injuries depicted on the close-up photos, clearly not visible on the full length photos. So it's not correct to say that those photos are relevant to show the lack of injury.
>
> And to the extent that they are in any marginally way, they are far out weighed by the prejudice of the photos in front of these bars.

Despite defense counsel's objection, the court allowed the four full length photographs into evidence.

4. Testimony of Leonard Schimberg

On February 6, 2001, the prosecution called Leonard Schimberg [hereinafter "Leonard"], Seth's father, to testify. Defense counsel immediately objected, contending that Leonard's testimony was irrelevant and calculated to evoke sympathy. Defense counsel also made a running objection to Leonard's entire testimony to avoid objecting to every statement made by Leonard. Defense counsel also offered to stipulate that Seth was the decedent so that the prosecution did not have to prove the identity of the victim. The prosecution maintained that Leonard's testimony was nonetheless relevant in order to establish background information such as "height, weight, age, etcetera. . . ." The court subsequently allowed Leonard's testimony, but admonished the prosecution not to go astray.

On direct examination, Leonard first testified about Seth's general physical characteristics, educational background, and whereabouts since graduating from the Culinary Institute of America in New York. The prosecution then showed Leonard two photographs of Seth inter vivos, and inquired whether the photographs were that of his son, to which Leonard responded in the affirmative. The prosecution also produced Seth's autopsy photographs, and Leonard acknowledged that these photographs were also of Seth. However, at that point, Leonard was unable to control his emotions and the court declared a short recess at

defense counsel's request. The court subsequently reconvened, and the prosecution concluded its direct examination by having Leonard identify Seth's clothing in a photograph, which was labeled State's Exhibit S-14.

At the end of the day, defense counsel moved for a mistrial based upon Leonard's reaction to the autopsy photographs:

> [Defense Counsel]: Your Honor, I understand that the [c]ourt ruled that Mr. Schimberg would be allowed to testify. However, I submit that virtually his entire testimony was irrelevant to the [prosecution's] burden of proof in this case, and was elicited from the witness for the sole purpose of evoking sympathy from the jury.
>
> I note that, you know, that he went to culinary school and wanted to go be an adventurer out west and work as a chef is all irrelevant.
>
> The only remotely relevant piece of evidence elicited from the witness which easily could have been elicited by people who new [sic] and lived with him was that he was right-handed. And I'm not even sure that's relevant evidence.
>
> But what we particularly object to and believe is a basis for mistrial was the showing of all of the photographs to Mr. Schimberg. He'd identified the person in the photographs S-8, 9 and 10 as his son.
>
> Witness has already identified that person as Seth Schimberg, the same person who was in S-6 and 7 which were pictures of Mr. Seth Schimberg deceased.
>
> And witnesses that have already been identified that as the same person who was depicted in S-13, which was a morgue photograph. But the [prosecution] went on to show all of the photographs, S-6 and 7 and S-13, to Mr. Schimberg.
>
> And as could easily be anticipated when he was shown the photograph of the morgue shot of his son, he did become emotional. He sort of gasped and obviously was trying to fight for control of himself. And through tears answered that it was his son.
>
> And that's when I asked for a recess. And apparently he was unable to get a hold of himself because, I guess, he was only asked one additional question about the clothing, which he was able to answer.
>
> But it is -- it's apparent that this witness was put on to elicit sympathy from the jury. On that basis and irrelevant testimony, we would move for mistrial.

There was, however, some dispute as to the degree of emotion

displayed by Schimberg. The prosecution argued that:

> [Prosecution]: . . . Finally in regards to some apparent lack of control, Judge, the man was in control. The [c]ourt asked for a recess but it wasn't necessary. I take it back, Judge. The defense asks asked [sic] for a recess, and [c]ourt didn't find it necessary to actually take a recess because the man was in control of himself, Judge, and he finished direct examination and was able to leave the courtroom.
>
> The [c]ourt has already seen emotion elicited in this particular case. Nani Hoopai, also -- there was a showing of emotion. Judge, this is to be expected. This is a capital case.
>
> THE COURT: . . . [Defense counsel] mentioned about tears. Although, the [c]ourt did not seem to have seen tears in this case --
>
> [Prosecution]: Judge, he certainly didn't ask for any Kleenex and didn't seem to need any -- he was trying to control himself.

The court subsequently denied the motion for mistrial. Defense counsel thereafter responded to the court's statement that it did not see any tears:

> [Defense Counsel]: Judge, I understand the [c]ourt's ruling, I just do want to note for the record that when Mr. Schimberg was showing emotion and tears, his back was to your Honor.
>
> So I understand if your Honor didn't see, and I understand the ruling, but I don't want there to indicate that -- I hope you're not saying there were no tears because I deliberately moved over to the side of the courtroom that the jury is on, and I saw the tears and heard them in his voice. I understand the [c]ourt's ruling. His back was to you.

The court acknowledged defense counsel's clarification and subsequently moved to another matter.

5. Rebuttal witnesses

a. Leonard's rebuttal testimony

On February 13, 2001, the prosecution informed the court that it intended to call Leonard as a rebuttal witness under Rule 404(a)(2) (Supp. 1999) of the Hawai'i Rules of Evidence [hereinafter "HRE"], which permits the prosecution to elicit a victim's character for peacefulness if the victim has

been accused of being the first aggressor. Defense counsel objected to Leonard's rebuttal testimony on the ground that the testimony failed to meet the evidentiary requirement that the witness must live in the community in which the victim lived. However, the court overruled defense counsel's objection and allowed Leonard's rebuttal testimony.

Accordingly, on February 14, 2001, the prosecution offered Leonard's rebuttal testimony in order to prove that Seth was a peaceful person. Leonard testified that he had never witnessed Seth display acts of violence towards his family, friends, or anyone else from the seventh grade throughout high school:

> [Prosecution:] While in school, I will be talking about both grammar school as well as high school, did Seth engage in any school activities with other students?
>
> [Leonard:] Yes. He was a member of the student council and in sports.
>
> [Prosecution:] Did you observe Seth interacting with other people under these circumstances?
>
> [Leonard:] Yes, I did.
>
> [Prosecution:] And those particular activities, student government and sports, did this occur in high school or grammar school or both?
>
> [Leonard:] High school.
>
> [Prosecution:] At any time during high school while you were observing Seth interacting socially with others, did you ever observe your son, Seth, to physically attack or physically assault another person?
>
> [Defense Counsel]: Your Honor, I have to object under Rule 405(b).
>
> THE COURT: Objection overruled.
>
> [Leonard:] No.

[Prosecution:] Did you ever see Seth initiate physical violence against another person while interacting with others?

[Leonard:] No. I have not.

[Defense Counsel]: Same objection.

THE COURT: Overruled.

[Prosecution:] At any time from say 7th grade, junior high until leaving home in 1993, did you ever observe Seth to initiate physical violence toward yourself?

[Leonard:] No.

[Defense Counsel]: Objection, your Honor, same.

THE COURT: Overruled.

[Prosecution:] Toward your wife?

[Leonard:] No.

[Prosecution:] Toward his older brother?

[Leonard:] No.

[Prosecution:] Toward his younger sister?

[Leonard:] No.

[Prosecution:] Towards anybody?

[Leonard:] No.

On cross-examination, defense counsel elicited testimony from Leonard that he had not lived with Seth for over six years prior to Seth's death.

At closing argument, the prosecution revisited Leonard's rebuttal testimony, emphasizing the fact that Leonard had never seen Seth behave violently.

b. Anthony Manoukian, M.D.'s rebuttal testimony

On February 13, 2001, the prosecution informed the court that it intended to call Anthony Manoukian, M.D.,

[hereinafter "Dr. Manoukian"] as a rebuttal witness for the purpose of clarifying his earlier testimony, given during the prosecution's case-in-chief, as to the actual path of the bullet as it traveled through Seth's body. Ultimately the prosecution hoped to rebut Dean's testimony that he shot Seth in self-defense. Defense counsel objected, arguing that it would be improper to let Dr. Manoukian reiterate his prior testimony. Defense counsel also argued that the prosecution had improper motives:

> Finally, Judge, as to Dr. Manoukian, it is our position this has been covered. I don't think the evidence is believable that the [prosecution] wouldn't be aware that's how the bullet entered Mr. Schimberg's body and where it ended up in Mr. Schimberg's body would not be very relevant to this case. It certainly is not correct in every homicide case or murder case the [prosecution] calls the doctor who did the autopsy, waits to see if the defendant testifies, and they recall the doctor to address the issues that the defendant raised.
>
> That would only be true if they could not have been anticipated, and trajectory of the wound clearly was anticipated, or should have been anticipated, and certainly after I asked about it on cross-examination, the [prosecution] would have been free on redirect examination to ask the doctor all the questions they wanted to about the trajectory of the bullet.
>
> . . . .
>
> And our position is Dr. Manoukian has already said what the trajectory of the bullet was, left to right front to back slightly upward. What the [prosecution] wants to argue based upon their representation when we were off the record in chambers is that the [prosecution's] re-creation of the events with [Dean] would call for a severe angle of trajectory and, therefore, disagrees with the slightly upward to have Dr. Manoukian find -- that information is before the jury and rebuttal is not supposed to be so the [prosecution] can recall a witness to make its point again. If has already made the point. The trajectory is slightly upward.
>
> . . . .
>
> Interestingly, it was not the defense that asked [Dean] to recreate this. It was the [prosecution], so again the [prosecution] making a strategic decision to do something to open the door to recalling a witness who has already testified to this

> information just not as fancifully as the [prosecution] would like to have him do now, and that is not proper rebuttal testimony, so we do object to Dr. Manoukian.

Nonetheless, the court overruled defense counsel's objection and permitted Dr. Manoukian to testify on rebuttal. Accordingly, Dr. Manoukian testified in detail about the path of the bullet, using a skeleton to demonstrate the trajectory.

6. Jury instructions

After the presentation of evidence, a hearing was held to settle jury instructions. The jury, in pertinent part, was instructed as to attempted murder in the first degree, the corresponding firearms offenses, the included offenses as to each victim, as well as to the general unanimity requirement. With respect to the charge of attempted murder in the first degree, the jury was instructed as follows:

> A person commits the offense of Attempted Murder in the First Degree if he intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime of Murder in the First Degree. A person commits the offense of Murder in the First Degree if he intentionally or knowingly causes the death of more than one person in the same incident.
>
> There are two material elements of the offense of Attempted Murder in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.
>
> These two elements are:
>
> 1. That on or about 29th day of November, 1999, in the County of Maui, State of Hawaii, the Defendant, EDWARD DEAN, engaged in conduct which, under the circumstances as the Defendant believed them to be, was a substantial step in a course of conduct intended by the Defendant to culminate in the commission of Murder in the First Degree, by intentionally or knowingly causing the death of Seth Schimberg, and intentionally or knowingly attempting to cause the death of Nani Hoopai, also known as Verdell Berg, and/or Harry Perry, Jr., in the same incident; and
>
> 2. That the Defendant engaged in such conduct intentionally.
>
> Conduct shall not be considered a substantial step unless it is strongly corroborative of the Defendant's intent to

commit Attempted Murder in the First Degree.

Defense counsel objected to the foregoing jury instructions because the instructions did not require the prosecution to disprove self-defense. However, the court gave the jury instructions over defense counsel's objection.

On February 26, 2001, the jury returned guilty verdicts as to Counts I and II.

7. Motion for a new trial

On March 2, 2001, Dean filed a motion for a new trial, alleging that his constitutional right to a unanimous verdict was violated because the jury was not given a specific unanimity instruction that advised them that all twelve members must agree as to which two or more persons formed the basis for his conviction of the offense of attempted murder in the first degree.[11]

At trial, the jury received the following instruction explaining the unanimity requirement:

> If and only if you unanimously find, beyond a reasonable doubt, that EDWARD DEAN intentionally or knowingly attempted to cause the death of more than one person in the same incident, to wit, by causing the death of Seth Schimberg, and attempting to cause the death of Nani Hoopai, also known as Verdell Berg, and/or Harry Perry, Jr., and you unanimously find that he was not justified in using deadly force as to two or more of those persons, then you must consider whether, at that time and as to each person, (Seth Schimberg, Nani Hoopai, also known as Verdell Berg, and Harry Perry, Jr.), EDWARD DEAN was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a person in the Defendant's situation under the circumstances of which the Defendant was aware or as the Defendant believed them to be.

---

[11] We note that defense counsel raised the issue for the first time in the motion for a new trial, after the jury returned an adverse verdict.

> The prosecution must prove beyond a reasonable doubt that EDWARD DEAN was not, at the time that he attempted to cause the death of more than one person in the same incident, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation.
>
> If you unanimously find that the prosecution has done so, as to two or more of the previously named persons, then you must return a verdict of guilty of Attempted Murder in the First Degree.
>
> If you unanimously find that the prosecution has not done so, as to two or more of the previously named persons, you must find the defendant not guilty of Attempted Murder in the First Degree, not guilty of Count 2: Carrying Or Use of Firearm in the Commission of a Separate Felony, and you are directed to move on to consideration of the remaining counts.
>
> If you are unable to reach a unanimous agreement as to whether the prosecution has proved, or failed to prove, that the Defendant was not under the influence of extreme mental or emotional disturbance as to two or more of the previously named persons, then your decision is not unanimous and a verdict may not be returned on this offense or on Count Two, Carrying or Use of Firearm in the Commission of a Separate Felony, and you are directed to consideration of the remaining counts.

The court ruled that "the instructions given in this case, considered as a whole, . . . were not prejudicially insufficient[,] . . . inconsistent or misleading[,]" and that no miscarriage of justice resulted. The court accordingly denied Dean's motion for a new trial.

On April 25, 2001, the court sentenced Dean to life imprisonment without the possibility of parole for Count I, twenty years' imprisonment for Count II, and one year's imprisonment for Count IX, all terms to run concurrently. Dean subsequently filed a timely notice of appeal on May 25, 2001.

II. STANDARDS OF REVIEW

A. Motion for a New Trial Based on Erroneous Jury Instructions

1. Jury instructions

Dean's first point of error alleges that the jury instructions were prejudicially insufficient and erroneous. In

State v. Hironaka, 99 Hawai'i 198, 204, 53 P.3d 806, 812 (2002) (brackets in original), we stated that:

> [w]e review the circuit court's jury instructions to determine whether, "when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent or misleading." State v. Valentine, 93 Hawai'i 199, 203, 998 P.2d 479, 483 (2000) (citations and internal quotations signals omitted).
>
> [E]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.
>
> [E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error may have contributed to conviction. If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.
>
> Id. (citations and internal quotation marks omitted).

2. Motion for a new trial

Dean's first point of error also contends that because the jury instructions were erroneous, the circuit court erred by denying Dean's motion for new trial. In State v. Furutani, 76 Hawai'i 172, 178-179, 873 P.2d 51, 57-58 (1994) (citations and internal quotations omitted), we explained that the appropriate standard of review with respect to a motion for new trial is whether the trial court abused its discretion:

> As a general matter, the granting or denial of a motion for new trial is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. The same principle is applied in the context of a motion for new trial premised on juror misconduct.
>
> The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.

B. Evidentiary Rulings

Dean's second, third, fourth, fifth, and sixth points of error essentially challenge the circuit court's various evidentiary rulings.

In State v. Staley, 91 Hawai'i 275, 281, 982 P.3d 904, 910 (1999), we stated that:

> [d]ifferent standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard.
>
> Where the evidentiary ruling at issue concerns admissibility based upon relevance, under [Hawai'i Rules of Evidence (HRE)] Rules 401 and 402, the proper standard of appellate review is the right/wrong standard.
>
> Evidentiary decisions based on HRE Rule 403, which require a "judgment call" on the part of the trial court, are reviewed for an abuse of discretion. The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.

(citations and internal quotation signals omitted.) (Some brackets added and some in original.)

Also, with respect to HRE Rule 404, a trial court's evidentiary ruling is reviewed for an abuse of discretion. State v. Cabrera, 90 Hawai'i 359, 366, 978 P.2d 797, 804 (1999) (stating that "HRE 404 represented a particularized application of the principle of HRE 403 (see Commentary to HRE 404), and we will employ the same abuse of discretion standard of review") (citations omitted).

C. Motion for a Mistrial Based on Prosecutorial Misconduct

Dean's seventh point of error alleges that the circuit court erred by denying his motion for a mistrial, based upon

prosecutorial misconduct.

1. Prosecutorial misconduct

In State v. Klinge, 92 Hawai'i 577, 584, 994 P.2d 509, 516 (2000) (citations omitted), we set forth the following parameters for reviewing allegations of prosecutorial misconduct:

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

2. Motion for a mistrial

With respect to a motion for a mistrial, we have stated that:

> [t]he denial of a motion for mistrial is within the sound discretion of the trial court and will not be upset absent a clear abuse of discretion. The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rule or principles of law or practice to the substantial detriment of a party litigant.

Id. (citations and internal quotations omitted).

D. Constitutional Law

Dean's final point of error asserts that each allegation of error both cumulatively and individually deprived Dean of his right to a fair trial.

In State v. Aplaca, 96 Hawai'i 17, 22, 25 P.3d 792, 797 (2001) (citations and internal quotations omitted), we stated that an appellate court reviews "questions of constitutional law by exercising [its] own independent judgment based on the facts of the case, and, thus, questions of constitutional law are

reviewed on appeal under the 'right/wrong' standard."

III. DISCUSSION

A. The Circuit Court Abused Its Discretion By Denying Dean's Motion for a New Trial Based On Erroneous Jury Instructions.

Dean's first point of error alleges that the circuit court failed to instruct the jury that it must unanimously agree on the same two or more persons in order to convict Dean of attempted first degree murder, thus violating his right to a unanimous jury verdict under article I, sections 5 and 14 of the Hawai'i Constitution. For the following reasons, we agree.

In State v. Arceo, this jurisdiction's seminal case with respect to specific jury unanimity instructions, we set forth the general rule, holding that a specific unanimity instruction is required where the prosecution incorporates separate and distinct culpable acts within a single count:

> [W]hen separate and distinct culpable acts are subsumed within a single count charging a sexual assault--any one of which could support a conviction thereunder--and the defendant is ultimately convicted by a jury of the charged offense, the defendant's constitutional right to a unanimous verdict is violated unless one or both of the following occurs: (1) at or before the close of its case-in-chief, the prosecution is required to elect the specific act upon which it is relying to establish the "conduct" element of the charged offense; or (2) the trial court gives the jury a specific unanimity instruction, i.e., an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt.

Arceo, 84 Hawai'i at 32-33, 928 P.2d at 874-875.

In the present case, the indictment alleged that Dean committed the offense of attempted first degree murder by "intentionally or knowingly attempting to cause the death of more than one person in the same or separate incident, to wit, by

causing the death of [Seth], and attempting to cause the death of [Nani], . . . and/or [Harry]." (Emphasis added.) Furthermore, the jury was instructed as follows:

> If and only if you unanimously find, beyond a reasonable doubt, that [Dean] intentionally or knowingly attempted to cause the death of more than one person in the same incident, to wit, by causing the death of [Seth], and attempting to cause the death of [Nani], . . . and/or [Harry], and you unanimously find that he was not justified in using deadly force as to two or more of those persons, then you must consider whether, at that time and as to each person, . . . [Dean] was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a person in [Dean's] situation under the circumstances of which [Dean] was aware or as [Dean] believed them to be.
>
> The prosecution must prove beyond a reasonable doubt that [Dean] was not, at the time that he attempted to cause the death of more than one person in the same incident, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation.
>
> If you unanimously find that prosecution has done so, as to two or more of the previously named persons, then you must return a verdict of guilty of Attempted Murder in the First Degree.
>
> If you unanimously find that the prosecution has not done so, as to two or more of the previously named persons, you must find the defendant not guilty of Attempted Murder in the First Degree, not guilty of Count 2: Carrying Or Use of Firearm in the Commission of a Separate Felony, and you are directed to move on to consideration of the remaining counts.

(Emphasis added.) The jury instructions created a prejudicial ambiguity because the jury was merely asked to pick at least two persons, from a pool of three persons, upon which to base its verdict, and the jury was not required to unanimously agree on the same two persons.

In this regard, our decision in State v. Cordeiro, 99 Hawai'i 390, 56 P.3d 692 (2002), a case decided during the pendency of this appeal, is controlling. In Cordeiro, the prosecution adduced evidence that the defendant shot Tim

Blaisdell and threatened Michael Freitas at gun point, in the course of committing a theft. Id. at 400, 56 P.3d at 702. The defendant was charged, inter alia, with first degree robbery. Id. at 407, 56 P.3d at 709. At trial, the prosecution argued before the jury that the defendant "used force against the person of anyone present . . . to overcome that person's physical resistance or physical power of resistance, the person of anyone present could be either Michael Freitas or it could be Tim Blaisdell himself." Id. (internal quotations omitted) (ellipses in original) (emphasis added). The jury was subsequently instructed as follows:

> A person commits the offense of robbery in the first degree if, in the course of committing theft, he is armed with a dangerous instrument and he uses force against the person of anyone present with intent to overcome the person's physical resistance or physical power of resistance.
> There are three material elements of the offense of robbery in the first degree, each of which the prosecution must prove beyond a reasonable doubt. These three elements are: one, that on or about the 11th day of August, 1994, in the County of Maui, State of Hawai'i, the Defendant was in the course of committing theft; and two, that while doing so, the Defendant was armed with a dangerous instrument; and three, that while doing so, the Defendant used force against the person of anyone present with intent to overcome that person's physical resistance or physical power of resistance.

Id. (emphases added). Referring to our previous decisions in Arceo, State v. Apao, 95 Hawai'i 440, 24 P.3d 32 (2001), and Valentine, we held that

> the circuit court's instructions were prejudicially insufficient and erroneous, inasmuch as the prosecution (1) adduced evidence of two separate and distinct culpable acts that arguably supported the requisite "use of force" by [the defendant] (i.e., shooting Blaisdell and threatening Freitas with a firearm)[,] (2) failed to make an election as to the particular act on the basis of which it was seeking conviction, and (3) represented to the jury that only a single offense was committed but that either act could support a guilty verdict as to first degree robbery.

Id. (citations omitted).

As in Cordeiro, the jury in the present case was presented with several separate and distinct culpable acts (i.e., shooting Seth, shooting Nani, and allegedly shooting at Harry), and the prosecution charged Dean with only one count of attempted first degree murder. Furthermore, the jury instructions represented to the jury that it could convict Dean of attempted first degree murder if it found that Dean "caus[ed] the death of [Seth], and attempt[ed] to cause the death of [Nani], . . . and/or [Harry]." As in Cordeiro, the erroneous jury instructions created the possibility that the ultimate verdict was not unanimous -- i.e., if some jurors believed that Dean intentionally or knowingly caused the death of Seth and intentionally or knowingly attempted to cause the death of Nani (but not Harry), and if other jurors believed that Dean intentionally or knowingly caused the death of Seth and intentionally or knowingly attempted to cause the death of Harry (but not Nani), then the jury was clearly not unanimous and Dean's conviction for attempted first degree murder cannot stand.[12]

To be thorough, we prudentially note that we have recognized an exception to Arceo's specific unanimity requirement. We have expressly held that:

---

[12] Dean provides a myriad of possible jury conclusions that would lead to a non-unanimous verdict. However, it is unnecessary for us to delve into all of them because the example provided sufficiently illustrates the instructions' insufficiency and prejudicial error.

> a specific unanimity requirement is not required if (1) the offense is not defined in such a manner as to preclude it from being proved as a continuous offense and (2) the prosecution alleges, adduces evidence of, and argues that the defendant's actions constituted a continuous course of conduct.

Apao, 95 Hawai'i at 447, 24 P.3d at 39. See also State v. Rapoza, 95 Hawai'i 321, 329-330, 22 P.3d 968, 976-977 (2001).

In the present case, it is clear that attempted first degree murder is a continuing offense. See Arceo, 84 Hawai'i at 18, 928 P.2d at 860 ("[e]xamples of continuing offenses, within the meaning of the [Hawai'i Penal Code], include . . . first degree murder, in violation of HRS § 707-701(1)(a) (1993)"). Nevertheless, the foregoing exception is inapplicable in the case at bar because the prosecution failed to sufficiently allege, adduce evidence of, and argue that the defendant's actions constituted a continuous course of conduct, especially in light of our previous statement that the purpose of the Arceo specific unanimity instruction requirement is to "eliminate any ambiguity that might infect the jury's deliberations respecting the particular conduct in which the defendant is accused of engaging and that allegedly constitutes the charged offense." Valentine, 95 Hawai'i at 208, 998 P.2d at 488. Although the prosecution, in its closing argument to the jury, made brief references to Dean's actions as constituting a continuing course of conduct, the prosecution's remarks were insufficient to remedy the ambiguity and potential jury confusion created by the indictment and the jury instructions, such ambiguity being the impetus that triggers the need for an Arceo specific unanimity instruction.

Accordingly, inasmuch as (1) the prosecution alleged

three separate and distinct culpable acts, any two of which could support a conviction of attempted first degree murder, (2) the prosecution failed to specify which two acts it relied on (or whether it relied on all three), and (3) the jury instructions did not require the jury to unanimously agree as to the same culpable acts, we hold that the jury instructions were prejudicially insufficient and erroneous, and that the circuit court abused its discretion when it denied Dean's motion for a new trial.

B. The Circuit Court Abused its Discretion by Admitting Evidence of the Shotgun.

Dean's second point of error alleges that the circuit court abused its discretion by admitting evidence of Dean's possession of a shotgun and by admitting the shotgun itself into evidence. Specifically, Dean contends that the admission of the evidence related to the shotgun, as well as the admission into evidence of the shotgun itself, was unduly prejudicial under HRE Rule 404(b) (Supp. 1999) and HRE Rule 403 (1993).

HRE Rule 404(b) states, in relevant part, that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible where such evidence is probative of any other fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

Furthermore, in State v. Castro, 69 Haw. 633, 756 P.2d 1033 (1988), we cautioned that

> [t]he framers of the rule recognized that "[c]haracter evidence is of slight probative value and may be very prejudicial." Haw.R.Evid. 404 Commentary (quoting Federal Rules of Evidence

> (Fed.R.Evid.) 404, Advisory Committee's Note). For "[i]t tends to distract the trier of fact from the main question of what actually happened on the particular occasion." Id. And "[i]t . . . permits the trier . . . to reward the good man and to punish the bad man because of their respective characters despite what the evidence of the case shows actually happened." Id. Haw.R.Evid. 404(b) thus reiterates the common law rule "that the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is introduced for some purpose other than to suggest that because the defendant is a person of criminal character, it is more probable that he committed the crime for which he is on trial."

Id. at 643, 756 P.2d at 1041 (some citations omitted).

Yet even where the evidence tends to establish a fact of consequence to the determination of the case, such evidence must nevertheless conform to the requirements of HRE Rule 403. Id. HRE Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Also, in State v. Uyesugi, 100 Hawai'i 442, 60 P.3d 843 (2002), a case decided during the pendency of this appeal, we extrapolated the following principles:

> "[T]he determination of the admissibility of relevant evidence under HRE 403 is eminently suited to the circuit court's exercise of its discretion because it requires a cost-benefit calculus and a delicate balance between probative value and prejudicial effect[.]" State v. Janto, 92 Hawai'i 19, 31, 986 P.2d 306, 318 (1999) (quoting State v. Loa, 83 Hawai'i 335, 348, 926 P.2d 1258, 1271 (1996)). This balance is predicated upon an assessment of "the need for evidence, the efficacy of alternative proof, and the degree to which the evidence will probably rouse the jury to overmastering hostility." State v. Bates, 84 Hawai'i 211, 228, 933 P.2d 48, 65 (1997) (quoting State v. Renon, 73 Haw. 23, 38, 828 P.2d 1266, 1273, reconsideration denied, 73 Haw. 625, 858 P.2d 734 (1992)).

Id. at 463, 60 P.3d at 863-864.

In the present case, the only argument that the prosecution makes to support the relevance of the shotgun is that

it is "background information on the crime." However, the record reveals that the shotgun was clearly not used in the incidents in question, and that the shotgun was only mentioned because, after the shooting, Dean packed up some belongings, including the shotgun, and fled the property, subsequently dropping the shotgun as he ran. Nevertheless, the prosecution listed the shotgun among the items recovered on Dean's property in its opening statement. Also, Lieutenant Matsuoka was permitted to testify that he recovered the unloaded shotgun. The circuit court admitted the shotgun into evidence, which means that it was before the jury while it deliberated. The prosecution was also permitted to inquire, in its cross-examination of Dean, how Dean acquired the gun and what he needed it for. Finally, the prosecution, in its closing statement, specifically told the jury:

> You saw the shotgun. You'll have a chance to look at it if you want to in the jury room. How likely is that? He's got -- you got so much stuff that he's not going to notice this huge shotgun falling to the ground. It just so happens that it's partially exposed in the case in his house. Almost like it's a back up gun if it gets heavy. Maybe he doesn't want to turn himself in.

Based upon the foregoing, we fail to conceive of any legitimate explanation as to how the shotgun is relevant to the charged offense.[13] Evidence of the shotgun may, however, have

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[13] Particularly disconcerting is the statement made by the prosecution while arguing to introduce evidence that Dean possessed the shotgun and the .32 caliber pistol in violation of a restraining order, which was an uncharged offense:

> I am not intending to bring in anyone to state on the record that he was prohibited from possessing firearms. However, if the defendant takes the stand, the [prosecution] intends to ask

(continued...)

unduly prejudiced the jury against Dean. See State v. Haili, 103 Hawai'i 89, 109, 79 P.3d 1263, 1283 (2003) ("The circuit court erred in admitting testimony that [defendant] possessed guns (two shotguns and a handgun found in [defendant's] bedroom) other than the gun he used to shoot [the victim]. Possession of these guns was not relevant, as there was no connection between the guns and the shooting of [the victim]"); People v. Archer, 82 Cal. App. 4th 1380, 1392-1393, (2000) ("Evidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons -- a fact of no relevant consequence to determination of the guilt or innocence of the defendant") (emphasis in original) (citing People v. Henderson 58 Cal. App. 3d 349, 360 (1976)).

Accordingly, we hold that the circuit court abused its discretion by admitting evidence of the shotgun, as well as admitting the shotgun itself.

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[13](...continued)

> him, unless the [c]ourt prohibits the [prosecution] from doing so, that he was aware he illegally possessed the firearms. I don't have to get into the restraining order unless he denies it, but by the same token, Judge, the [prosecution] would be in a position under that line of questioning, which I think is relevant since the firearm was used to commit murder in this particular case. He should not even have had guns, Judge, but I think it speaks volumes about his attitude toward the law. . . .

(Emphasis added.) We have made very clear that "the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is introduced for some purpose other than to suggest that because the defendant is a person of criminal character, it is more probable that he committed the crime for which he is on trial." Castro, 69 Haw. at 643, 756 P.2d at 1041.

C. The Circuit Court Did Not Abuse its Discretion By Permitting Leonard to Testify During the Prosecution's Case-In-Chief.

Dean's third point of error alleges that the circuit court abused its discretion by allowing Leonard, Seth's father, to testify during the prosecution's case in chief because his testimony was irrelevant and unduly prejudicial.

The record indicates that Leonard provided testimony with respect to the biological background information of his son. For example, Leonard testified that Seth attended the Culinary Institute of America. Leonard also testified as to where and when Seth traveled, prior to settling in Kipahulu, as well as to Seth's height, weight, and age. The prosecution subsequently showed Leonard a picture of Seth while Seth was alive. After Leonard's affirmative identification, the prosecution then showed Leonard a picture of Seth's body, prior to autopsy, as well as a picture of Seth's clothing. As a result, Leonard exhibited some degree of emotion, and the circuit court declared a short recess. Based on the foregoing, Dean contends that Leonard's testimony "'inappropriately intertwine(d) irrelevant emotional considerations with relevant evidence' resulting in unfair prejudice." We disagree.

Generally, the prosecution may not use relatives of a deceased victim for the purpose of inciting the emotions and hostility of the jury. See State v. Okura, 56 Haw. 455,456-459, 541 P.2d 9, 10-12 (1975) (holding that the trial court committed prejudicial error by allowing the testimony of the deceased's mother as to, inter alia, the final bedside moments of the

deceased, that the deceased left behind children, and that the deceased was on the way to buy Easter baskets for her children when she suffered her fatal injury); State v. Blue, 724 N.E.2d 920, 937 (Ill. 2000) (concluding that "the trial court abused its discretion by permitting the [prosecution] to argue that its verdict should be a vehicle to vindicate the [victim's] family"); People v. Hope, 508 N.E.2d 202, 206 (Ill. 1986) ("[W]here testimony in a murder case respecting the fact that the deceased has left a spouse and family is not elicited incidentally, but is presented in such a manner as to cause the jury to believe it is material, its admission is highly prejudicial and constitutes reversible error unless an objection thereto is sustained and the jury instructed to disregard such evidence.") (Citations omitted.) (Emphasis removed.) However, it is equally well-established that "[n]ot every mention of a deceased's familial relationships is ipso facto prejudicial error." Okura, 56 Haw. at 459, 541 P.2d at 12 (referring to People v. Brown, 196 N.E.2d 664, 667 (Ill. 1964)); see also Blue, 724 N.E.2d at 937 ("we agree that incidental evidence of a victim's family is not only permissible, but in most trials, unavoidable, since 'common sense tells us that murder victims do not live in a vacuum and that, in most cases, they leave behind family members'") (citing People v. Free, 447 N.E.2d 218, 236 (Ill. 1983)); Hope, 508 N.E.2d at 206-207 ("[E]very mention of a deceased's family does not per se entitle the defendant to a new trial. . . . In certain instances, depending upon how this evidence is introduced, such a

statement can be harmless; this is particularly true when the death penalty is not imposed.") (Citations omitted.) (Emphasis in original.); McQueen v. Commonwealth, 669 S.W.2d 519, 523 (Ky. 1984) (concluding that the testimony of the deceased victim's father was permissible and stating that "[i]t would, of course, behoove the appellant to be tried for the murder of a statistic, but we find no error in bringing to the attention of the jury that the victim was a living person, more than just a nameless void left somewhere on the face of the community").

In Uyesugi, 100 Hawai'i at 460, 60 P.3d at 861, we stated the following principle:

> Whether testimony of surviving family members inflames the jury to the extent that the jury is diverted from its objective considerations must be considered in light of the whole record. In particular, we focus attention on the purpose of the testimony, whether the family members expressed their opinions or characterizations of the crime and the effect of the crime on the family, the strength and weakness of the evidence against the defendant, whether the failure to object to such testimony was the result of trial strategy or ineffective assistance of counsel,[14] and whether and how the testimony was woven into the case.

Applying the foregoing analysis, we concluded that, reviewing the record as a whole:

> (1) the testimony of the family members comprise[d] 33 pages of approximately 1800 pages of transcripts; (2) the questions propounded to the decedents' relatives concerned the characteristics of the decedents; (3) the family members did not testify as to the effects of the crime on the families; (4) the evidence that [the defendant] murdered the decedents was overwhelming; (5) the expert testimony regarding [the defendant's] mental state at the time of the murders was extensive; and (6) . . . the evidence that [the defendant] lacked penal responsibility

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[14] In Uyesugi, defense counsel failed to object, and thus we reviewed the issue pursuant to a plain error analysis. Uyesugi, 100 Hawai'i at 459-460, 60 P.3d at 860-861. Although plain error analysis is substantively distinct from abuse of discretion analysis, the factors that we provided are nonetheless relevant to the case at bar.

> was thoroughly examined by the prosecution and defense counsel. . . . Combined, these factors support[ed] a conclusion that, while the circuit court's implied permission to the prosecution to elicit testimony from family members may have been error, it did not affect [the defendant's] substantial rights and therefore does not rise to the level of plain error.

Id. at 461, 60 P.3d at 862.

Similarly, we conclude that in the present case the circuit court did not abuse its discretion by permitting Leonard, Seth's father, to testify during the prosecution's case-in-chief, inasmuch as: (1) the prosecution's line of questioning adhered to Seth's physical characteristics and a short background of how Seth came to live in Hawai'i; (2) Leonard did not testify as to the effects of Seth's death on the family; (3) the prosecution introduced sufficient evidence such that it did not appear to rely on any potential prejudicial effect of Leonard's testimony to generate a conviction; and (4) Leonard's claim of self-defense was thoroughly examined by the prosecution and defense counsel.

Accordingly, we hold that the circuit court did not abuse its discretion by permitting Leonard, Seth's father, to testify during the prosecution's case-in-chief.

D. The Circuit Court Abused its Discretion By Allowing Leonard to Testify on Rebuttal as to Seth's Reputation for Peacefulness.

Dean's fourth point of error asserts that the circuit court abused its discretion by permitting Leonard, Seth's father, to testify on rebuttal as to Seth's reputation for peacefulness. Dean's attack is two-fold. First Dean contends that the prosecution utilized a line of questioning that essentially

elicited testimony as to specific instances of conduct, in violation of HRE Rules 404 and 405. Second, Dean contends that Leonard was not competent to testify because he had insufficient knowledge of Seth's reputation for peacefulness.

1. Specific instances of conduct

HRE Rule 404(a)(2) provides in pertinent part that:

> [e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except . . . evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

In addition, HRE Rule 405 (1993) provides the following:

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

According to the commentary to HRE Rule 405, "[t]his rule, which is identical with Fed. R. Evid. 405, establishes the methods by which character may be proved. Before this rule may be invoked, the question of substantive admissibility of character evidence must be decided according to [HRE Rule 404]." See also Addison M. Bowman, Hawaii Rules of Evidence Manual 178 (2d ed. 1998) ("[HRE] Rule 405 is the procedural counterpart of [HRE Rule] 404. . . . The effect [of HRE Rule 405] is to restrict the proof in [HRE Rule] 404(a)'s three exceptions to reputation or opinion evidence"). Consequently, HRE Rule 405 operates as an additional

filter, precluding specific instances of conduct unless the "character or trait of character is an essential element of a charge, claim, or defense."

In the present case, the prosecution elicited the following testimony:

> [Prosecution:] While in school, I will be talking about both grammar school as well as high school, did Seth engage in any school activities with other students?
>
> [Leonard:] Yes. He was a member of the student council and in sports.
>
> [Prosecution:] Did you observe Seth interacting with other people under these circumstances?
>
> [Leonard:] Yes, I did.
>
> [Prosecution:] And those particular activities, student government and sports, did this occur in high school or grammar school or both?
>
> [Leonard:] High school.
>
> [Prosecution:] At any time during high school while you were observing Seth interacting socially with others, did you ever observe your son, Seth, to physically attack or physically assault another person?
>
> [Defense Counsel]: Your Honor, I have to object under Rule 405(b).
>
> THE COURT: Objection overruled.
>
> [Leonard:] No.
>
> [Prosecution:] Did you ever see Seth initiate physical violence against another person while interacting with others?
>
> [Leonard:] No. I have not.
>
> [Defense Counsel]: Same objection.
>
> THE COURT: Overruled.
>
> [Prosecution:] At any time from say 7th grade, junior high until leaving home in 1993, did you ever observe Seth to initiate physical violence toward yourself?
>
> [Leonard:] No.

[Defense Counsel]: Objection, your Honor, same.

THE COURT: Overruled.

[Prosecution:] Toward your wife?

[Leonard:] No.

[Prosecution:] Toward his older brother?

[Leonard:] No.

[Prosecution:] Toward his younger sister?

[Leonard:] No.

[Prosecution:] Towards anybody?

[Leonard:] No.

Dean contends that HRE Rule 405 prohibits questions into specific instances of conduct unless inquired into on cross-examination. However, the prosecution attempts to classify the foregoing testimony as opinion testimony, arguing that it merely established a foundational basis for Leonard's opinion testimony that Seth was peaceful.

Despite the prosecution's attempt to classify the evidence as opinion testimony, such evidence is more accurately classified as negative evidence of specific instances of conduct. See State v. Clyde, 47 Haw. 345, 352, 388 P.2d 846, 850 (1964) (stating that "[r]ebuttal evidence is not limited to affirmative evidence . . . but can also take the form of negative evidence, e.g., 'I have not heard anything said to the detriment of the good character of the person'"). Rather than inquiring as to Seth's reputation for peacefulness, or attempting to elicit Leonard's opinion as to Seth's character for peacefulness, the prosecution asked Leonard if he could identify any instance from

Seth's grammar school through high school years during which Seth exhibited specific acts of violence -- to which Leonard responded in the negative. Notably, the prosecution does not point to, nor can we find, any indication in the record that the prosecution actually elicited Leonard's opinion as to Seth's character for peacefulness. Leonard's rebuttal testimony thus amounts to a factual statement before the jury that, between seventh grade and high school, he never witnessed Seth initiate any specific acts of violence against anyone.

Thus, inasmuch as HRE Rule 404(a)(2) clearly permits the prosecution's introduction of character evidence to rebut evidence that Seth was the first aggressor, the determinative issue is whether the prosecution may introduce character evidence of Seth's peaceful nature via specific instances of conduct. Based on the following analysis, we conclude that it may.

In State v. Basque, 66 Haw. 510, 515, 666 P.2d 599, 603 (1983), we spoke in general terms with respect to the admissibility of evidence pertaining to the character of a deceased victim. In Basque, the defendant got into an altercation with his former girlfriend's subsequent boyfriend, Pagharion. Id. at 511, 666 P.2d at 601. The defendant shot Pagharion in the chest, causing a fatal wound. Id. Claiming self-defense, the defendant sought to introduce evidence of Pagharion's prior criminal record to establish that Pagharion was the first aggressor. Id. at 511-512, 666 P.2d at 601. The trial court prohibited such evidence on the ground that the jurors

might place too much emphasis on the Pagharion's criminal record. Id. On appeal, the prosecution argued that the trial court's order was in accord with HRE Rule 404(b)[15] and should therefore be affirmed. Id. at 514, 666 P.2d at 602. Rejecting the prosecution's argument, we noted that:

> [i]n [State v. Lui, 61 Haw. 328, 603 P.2d 151 (1979)], . . . we treated general character evidence and specific prior acts (including those reflected in the victim's criminal record) the same for purposes of corroborating a defendant's self-defense claim as to who was the aggressor. A growing number of other courts are in accord. See, e.g., United States v. Greschner, 647 F.2d 740 (7th Cir. 1981); United States v. Burks, 470 F.2d 432 (D.C. Cir. 1972); State v. Miranda, . . . 402 A.2d 622 ([Conn.] 1978); Commonwealth v. Beck, . . . 402 A.2d 1371 ([Pa.] 1979); Jordan v. Commonwealth, . . . 252 S.E.2d 323 ([Va.] 1979). As Dean Wigmore has stated: "[T]here is no substantial reason against evidencing the character (of a deceased victim) by particular instances of violent or quarrelsome conduct. Such instances may be very significant; their number can be controlled by the trial court's discretion; and the prohibitory considerations applicable to an accused's character have here little or no force." 1 Wigmore on Evidence § 198 (3d ed. 1940) (emphasis in original).

Id. We thus concluded that the trial court "abused its discretion when it flatly prohibited [the defendant] from arguing to the jury, or otherwise eliciting evidence of, the criminal history of the deceased." Id. at 515, 666 P.2d at 603. We subsequently affirmed this line of reasoning in Meyer v. City and County of Honolulu, 69 Haw. 8, 10, 731 P.2d 149, 150 (1986), stating that "[t]he same considerations would apply in civil

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[15] HRE Rule 404(b) (Supp. 1999) provides that:

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible where such evidence is probative of any other fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

assault and battery cases. Such evidence may be admissible where the issue is the identity of the original aggressor." Therefore, where a defendant asserts that the deceased victim was the first aggressor, we have expressly permitted the defendant to introduce evidence of specific acts of violence on the part of the deceased victim, notwithstanding the prohibitory language of HRE Rule 404(b). We endorsed the proposition that "there is no substantial reason against evidencing the character (of a deceased victim) by particular instances of violent or quarrelsome conduct." Basque, 66 Haw. at 514, 666 P.2d at 602. That proposition applies with equal force to exempt evidence of a deceased victim's particular acts of peaceful conduct from the preclusive effects of HRE Rule 405, inasmuch as "[s]uch instances may be very significant; their number can be controlled by the trial court's discretion; and the prohibitory considerations applicable to an accused's character have here little or no force." Id. Consequently, in the present case, there is no substantial reason to preclude the prosecution from introducing negative evidence of specific instances of conduct.

We recognize, however, that there is substantial federal case law that can be interpreted so as to support the conclusion that the prosecution is limited to reputation or opinion evidence of a victim's character for peacefulness when rebutting evidence that the victim was the first aggressor. See United States v. Keiser, 57 F.3d 847, 855 (9th Cir. 1995) (concluding that "the language of the rule, the teaching of out-

of-Circuit authority, and the theory supporting admission of victim character evidence all lead to the conclusion that victim character evidence introduced to support a claim of self-defense . . . should be limited to reputation or opinion evidence"); United States v. Smith, 230 F.3d 300, 308 (7th Cir. 2000) (stating that inasmuch as the victim's violent character was not an essential element of the defendant's self-defense claim, and "[g]iven that the convictions would be circumstantial evidence, and given the power that specific instances of conduct may have, especially when the conduct is domestic battery, . . . the district court correctly precluded the introduction of these convictions"); United States v. Bautista, 145 F.3d 1140, 1152 (10th Cir. 1998), cert. denied, 525 U.S. 911 (1998) (stating that the testimony in question "show[ed] specific conduct of the victim rather than reputation or opinion concerning the character of the victim. As such, th[e] evidence was inadmissible pursuant to [Federal Rules of Evidence Rule] 405(a)"); United States v. Talamante, 981 F.2d 1153, 1156 (10th Cir. 1992), cert. denied, 507 U.S. 1041 (1993) (stating that "[s]ince [the defendant] offered testimony describing specific instances of the victim's conduct, as opposed to reputation or opinion evidence, this testimony was not admissible under [Federal Rules of Evidence] Rule 404(a)(2) to prove that the victim acted in conformity with the conduct").

Several state courts with analogous rules of evidence have also come to the same conclusion. See State v. Barnes, 759

N.E.2d 1240, 1245 (Ohio 2002) (concluding that "Evid.R. 405(B) precludes a defendant from introducing specific instances of the victim's conduct to prove that the victim was the initial aggressor"); State v. Custodio, 30 P.3d 975, 982 (Idaho Ct. App. 2001) (concluding that "[the defendant] has failed to show that the district court erred in excluding this evidence in the form of a specific instance of the victims' propensities for violence pursuant to Rule 405"); Allen v. State, 945 P.2d 1233, 1240-1241 (Alaska Ct. App. 1997) (concluding that "Evidence Rule 405 limits the parties to the use of reputation or opinion evidence when they seek to prove the victim's . . . character"); Brooks v. State, 683 N.E.2d 574, 576-577 (Ind. 1997) (holding that Indiana Evidence Rule 405 only permits reputation or opinion evidence and that therefore "the trial court did not err in excluding evidence of specific instances of conduct"); State v. Newell, 679 A.2d 1142, 1144-1145 (N.H. 1996) (stating that "[b]ecause the victim's aggressive character is not an essential element of the defense of self-defense, evidence of specific instances of the victim's conduct is not admissible under Rule 405(b)").

However, even though it is well-established that we may look to the Federal Rules of Evidence and related cases for guidance, see State v. Fukagawa, 100 Hawai'i 498, 511 n.9, 60 P.3d 899, 912 n.9 (2002) (referring to the Federal Rules of Evidence for guidance when construing HRE Rule 702 "because the HRE are patterned after those rules"); State v. Ito, 90 Hawai'i 225, 236 n.7, 978 P.2d 191, 202 n.7 (App. 1999) (stating that the

HRE covering "admission of scientific evidence are patterned after [Federal Rules of Evidence] Rules 702 and 703"), it is equally well-established that we are not confined to federal interpretations of the Federal Rules of Evidence where we have previously evidenced a divergence from such federal interpretations. See State v. Vliet, 95 Hawai'i 94, 105, 19 P.3d 42, 53 (2001) (stating that "because the HRE are patterned on the Federal Rules of Evidence (FRE), construction of the federal counterparts of the HRE by the federal courts is instructive, . . . but obviously not binding on our courts") (citations omitted) (emphasis added). Furthermore, although we may also refer to other state jurisdictions for guidance, the decisions of other courts are clearly not binding authority. See State v. Timoteo, 87 Hawai'i 108, 124, 952 P.2d 865, 881 (1997) (stating that "[a]lthough cases from other jurisdictions provide useful guidance, . . . our decision . . . should be consistent with our prior case law").

Accordingly, we hold that the prosecution may introduce evidence of the victim's character for peacefulness -- via specific instances of conduct -- to rebut evidence that the victim was the first aggressor.

2. Leonard's rebuttal testimony was irrelevant.

Having rejected Dean's initial contention, we nonetheless conclude that the circuit court abused its discretion by permitting Leonard to testify on rebuttal as to Seth's

peaceful nature because his testimony was irrelevant.

Initially, we note that Dean contends that Leonard had insufficient knowledge of Seth's reputation for peacefulness, and therefore his testimony violated the evidentiary rule that we set forth in State v. Faafiti, 54 Haw. 637, 513 P.2d 697 (1973), requiring that "[e]vidence of the defendant's reputation in the community in which he lives and works has long been recognized as admissible, but only where the witness is thoroughly familiar with the general consensus of the relevant community." Id. at 643, 513 P.2d at 701-702.

In Faafiti, the prevalent issue was the witness' competence to testify as to the defendant's character trait of peacefulness or as to the defendant's non-violent temperament. Faafiti, 54 Haw. at 642-643, 513 P.2d at 701-702 (stating that "[t]he competence of a witness, in this, as in other respects, is a matter to be decided by the trial judge") (emphasis added). We concluded that the trial court did not abuse its discretion by excluding the testimony of the defendant's character witness based on a lack of competence, stating that "since we can find no abuse of discretion in excluding the testimony of a witness who the judge apparently felt had had [sic] insufficient opportunity to form a meaningful opinion about defendant's character, there is no reversible error." Id. at 644, 513 P.2d at 702.

In the present case, however, a review of the record indicates that the prosecution did not elicit testimony as to Seth's reputation for peacefulness. Rather, the prosecution

elicited negative evidence of specific instances of conduct. See discussion supra. The distinction between testimony as to reputation versus testimony as to specific instances of conduct renders the Faafiti analysis inapposite. Specifically, the concern in Faafiti was whether or not the character witness was competent to testify as to the defendant's reputation -- that the character witness had contacts with the defendant and the defendant's community "sufficient to permit slow development of an accurate impression of character." Id. at 643, 513 P.2d at 702 (citing Michelson v. United States, 335 U.S. 469, 477-478 (1948)).[16] In the present case, competence is not an issue. Clearly Leonard was competent to testify that he did not ever witness Seth initiate acts of violence against anyone from seventh grade through highschool. Rather, the determinative issue is whether Leonard's testimony was relevant.

Although Dean does not argue that Leonard's testimony was irrelevant, we nevertheless address the issue for the purpose

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[16] The United States Supreme Court in Michelson also stated that:

> the witness must qualify to give an opinion by showing such acquaintance with the defendant, the community in which he has lived and the circles in which he has moved, as to speak with authority of the terms in which generally he is regarded. To require affirmative knowledge of the reputation may seem inconsistent with the latitude given to the witness to testify when all he can say of the reputation is that he has 'heard nothing against defendant.' This is permitted upon assumption that, if no ill is reported of one, his reputation must be good. But this answer is accepted only from a witness whose knowledge of defendant's habitat and surroundings is intimate enough so that his failure to hear of any relevant ill repute is an assurance that no ugly rumors were about.

Michelson, 335 U.S. at 478 (footnotes omitted).

of providing guidance for the circuit court on remand. Relevance is governed by HRE Rule 403. HRE Rule 403 states, in pertinent part, that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In the present case, Leonard's rebuttal testimony was clearly irrelevant. A father's statement that he never witnessed his son attack his own family, friends, or anyone else during the son's formative years is simply not probative of whether the son initiated an attack on another person approximately six years later. Even the prosecution, in its answering brief, admits that "character evidence from over six years ago may be outdated." Such evidence is too temporally remote. See State v. Allen, 7 Haw. App. 89, 94, 744 P.2d 789, 794 (1987), overruled on other grounds by Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 534 (1994) (discrediting character evidence because such "evidence involved matters extremely remote in time from the incident"); Michelson, 335 U.S. at 484 (stating that "[t]he inquiry [] concerned an arrest twenty-seven years before the trial. Events a generation old are likely to be lived down and dropped from the present thought and talk of the community and to be absent from the knowledge of younger or more recent acquaintances. The court in its discretion may well exclude inquiry about rumors of an event so remote, unless recent misconduct revived them").

Based on the foregoing, we hold that: (1) the circuit court did not abuse its discretion by permitting the prosecution to elicit negative evidence of specific instances of conduct to rebut evidence that Seth was the initial aggressor; but (2) that the circuit court abused its discretion by permitting Leonard to testify that he did not see Seth direct any acts of violence towards his family, friends, or anyone else from seventh grade through high school, inasmuch as such testimony was irrelevant as to whether Seth was the initial aggressor in an incident occurring approximately six years later.

E. The Circuit Court Did Not Abuse its Discretion by Permitting the "Murder 1" and Jail Cell Photographs.

Dean also contends that the circuit court abused its discretion by permitting the introduction into evidence of photographs labeled "Murder 1," as well as photographs that depicted Dean standing in front of jail cell bars.

1. Photographs labeled "Murder 1"

With respect to the "Murder 1" photographs, Dean argues that the photographs implied that the police considered this to be a "Murder 1" case, thus lending credence to the prosecution's position. For support, Dean refers to our decision in State v. Reiger, 64 Haw. 510, 512-513, 644 P.2d 959, 962 (1982), in which we adopted the tripartite test established by the ICA in State v. Kutzen, 1 Haw. App. 406, 412-413, 620 P.2d 258, 262-263 (1980). The ICA set forth the tripartite test as follows:

> 1. The Government must have a demonstrable need to introduce the photographs; and
> 2. The photographs themselves, if shown to the jury, must not

> imply that the defendant has a prior criminal record; and
> 3. The manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.

Id. However, Dean's reliance on Reiger and Kutzen is misplaced. In Kutzen, the primary reason for concern was that the photographs suggested to the jury that the defendant engaged in prior criminal activity. See Kutzen, 1 Haw. App. at 412, 620 P.2d at 262 (stating that the reason for adopting the tripartite test is "to prevent the prejudicial inference of prior criminal activity"). Cf. Reiger, 64 Haw. at 512, 644 P.2d at 962 (stating that "the photographs themselves, if shown to the jury, must not imply that the defendant had a prior criminal record"). In the present case, as the prosecution aptly points out, the jury was well aware of the fact that Dean was charged with attempted first degree murder. Thus, Reiger and Kutzen are inapposite, inasmuch as there is no indicia of prior criminal activity.[17]

Rather, the appropriate inquiry is whether the "probative value is substantially outweighed by the danger of unfair prejudice," as set forth in HRE Rule 403. See State v. Brantley, 84 Hawai'i 112, 118, 929 P.2d 1362, 1368 (1996) (stating that "[t]he test [for] determining whether photographs may be shown to the jury is not whether they are necessary, but whether their probative value outweighs their possible prejudicial effect") (citations omitted). In this regard, it is well established that the trial court enjoys broad discretion.

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[17] Also, Dean does not argue that the prominent display of the words "Murder 1" implies any prior criminal activity.

See State v. Edwards, 81 Hawai'i 293, 297, 916 P.2d 703, 707 (1996) (stating that "[t]he admission or rejection of photographs is a matter within the discretion of the trial court"); State v. Iaukea, 56 Haw. 343, 349, 539 P.2d 724, 729 (1975) (stating that the "[t]he responsibility for maintaining the delicate balance between probative value and prejudicial effect lies largely within the discretion of the trial court").

In the present case, the "Murder 1" photographs portray the property at which the alleged confrontations took place, and the prosecution used the photographs in conjunction with Nani's testimony. The photographs identified the locations of the various buildings, the path along which Nani ran during the incident in question, as well as approximate distances. Such photographic evidence has clear probative value as a demonstrative supplement to aid the jury in its comprehension of the facts.

On the other hand, Dean essentially claims that the prominent display of the words "Murder 1" engenders a potential conscious or subliminal deference to the prosecution's charge of attempted first degree murder. Although we have not specifically addressed this particular factual situation, other jurisdictions have found that such inscriptions are not unfairly prejudicial. For example, in State v. Reese, 259 N.W.2d 771 (Iowa 1977), the Iowa Supreme Court held that the trial court did not abuse its discretion by admitting photographs of physical evidence, with identification tags containing the following inscription:

"RE: D.I. 76/1 (initials)
HOMICIDE: [name of police officer]
Taken: 1/18/76[.]"

Id. at 776-777. The court reasoned that "[t]he legends and notations were descriptive of the evidence only, and did not in any manner emphasize or summarize the State's case to the defendant's prejudice." Id. at 777. Cf. Commonwealth v. Gaulden, 420 N.E.2d 905, 908 n.3 (Mass. 1981) (stating that "[t]he defendant has not made a showing that she was prejudiced by the failure of the clerk to cover up the back of certain photographs, shown to the jury, on which the word 'murder' was written. The photographs did not go to the jury room in that form, but they were passed around in that form by the jury during a portion of the trial"). Accordingly, whatever effect the words "Murder 1" may have had on the jury, it did not unfairly prejudice Dean. See Edwards, 81 Hawai'i at 299, 916 P.2d at 708 (emphasizing that it is the danger of unfair prejudice sought to be avoided).

Although the circuit court's refusal to redact the words "Murder 1" is cause for concern -- especially in light of the fact that such redaction could have been easily accomplished with white out, scratch paper, or a black pen -- we similarly find no abuse of discretion. Accordingly, we hold that the circuit court did not abuse its discretion by admitting the "Murder 1" photographs.

2. Photographs of Dean standing next to a jail cell

Dean also argues that the trial court abused its

discretion by receiving into evidence photographs of Dean standing next to a jail cell. Dean contends that the prosecution had no need for the photographs and that the photographs were extremely prejudicial in that they may have "subliminally influenced the jury into believing that [Dean] was a violent person and belonged . . . behind bars." We disagree.

Reiger and Kutzen are again inapposite, inasmuch as there are no indicia of prior criminal activity. Although the photographs depict Dean standing in front of a jail cell, the prosecution's witness, evidence specialist Vincent Souki, testified before the jury that he took the photographs of Dean after Dean complained of injuries. Thus, the jury was well aware of when, where, how, and why the photographs were taken. Rather, Dean's argument essentially amounts to a bald assertion that the jail cell photographs enshroud Dean with an imprimatur of criminality. Here, again, the relevant inquiry is whether the "probative value is substantially outweighed by the danger of unfair prejudice," as set forth in HRE Rule 403. See discussion supra.

In the present case, the jail cell photographs have clear probative value. The prosecution needed to rebut Dean's self-defense argument beyond a reasonable doubt in order to get a sustainable conviction of the offense of attempted first degree murder, see HRS § 701-114(1)(a) (1993) and HRS § 702-205(b) (1993), and the prosecution thus submitted the jail cell photographs to show that Dean did not sustain the injuries he

claimed:

> [Prosecution]: Judge, although he is clothed, they clearly show that this individual has not been injured. Even in those instances where he has sustained some injuries, I think there's been explanation other than his being attacked by anybody.
>
> As the Court has already pointed out, this case is a matter of self-defense. So I think in order to be explicit as far as the [prosecution's] obligation to rebut that particular theory beyond a reasonable doubt, I think it's important for the jury not simply to see close-ups of certain positions, of this individual's person, but to see full side views, front views and back views.
>
> This isn't being cumulative, Judge. Each of these photographs at the top of this display has a different view of the defendant.

Neither does admission of the jail cell photographs create the danger of unfair prejudice. As previously mentioned, the photographs were taken in response to Dean's claim that he suffered injuries, and the jury was well aware of the circumstances under which the photographs were taken. Thus, we cannot conclude that the circuit court's admission of the jail cell photographs "exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." Furutani, 76 Hawai'i at 178-179, 873 P.2d at 57-58. Accordingly, considering the probative value of the jail cell photographs and the circuit court's broad discretion in these matters, we hold that the circuit court did not abuse its discretion by admitting the jail cell photographs.

F. The Circuit Court Did Not Abuse its Discretion By Allowing Dr. Manoukian to Testify on Rebuttal.

Dean's next point of error asserts that the circuit court abused its discretion by allowing Dr. Manoukian to testify on rebuttal inasmuch as his rebuttal testimony did not rebut any evidence in the defense's case and did not add "any new evidence

whatsoever." The prosecution, on the other hand, contends that although it anticipated Dean's self-defense argument, it did not and could not have anticipated the specific details alleged by Dean. Accordingly, the prosecution argues that when Dean reenacted his encounter with Seth, it had every right to subsequently rebut this new piece of information with Dr. Manoukian's detailed testimony as to the specific trajectory of the bullet.

The present situation is a classic example of the proper use of rebuttal testimony. Generally, a party is not permitted to withhold evidence supportive of its case-in-chief and subsequently offer it in rebuttal, but a party may nevertheless offer evidence in rebuttal that negatives a potential defense. See Nelson v. University of Hawai'i, 97 Hawai'i 376, 384-385, 38 P.3d 95, 103-104 (2001) (stating that "[f]irst, as a general rule, a party is bound to give all available evidence in support of an issue in the first instance it is raised at trial and will not be permitted to hold back evidence confirmatory of his or her case and then offer it on rebuttal. Second, this general rule does not necessarily apply where the evidence sought to be presented on rebuttal is negative of a potential defense, even if the evidence is also confirmatory of an affirmative position upon which the party seeking to present the evidence bears the burden of proof"). Although Dr. Manoukian previously testified during the prosecutor's case in chief, he only briefly mentioned the trajectory of the bullet.

The prosecution contends that it became aware of the factual inconsistency -- that the actual trajectory of the bullet differed greatly from the path the bullet would have traveled if Dean's story was accurate -- after Dean reenacted his version of the encounter with Seth. Thus, the prosecution sought to have Dr. Manoukian testify again on rebuttal as to the specific trajectory of the bullet. Although Dean contends that the prosecution should have been aware that the trajectory of the bullet was in dispute,[18] the prosecution cannot be expected to anticipate every possible scenario which the defendant may invoke

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[18] In his opening brief, Dean cites the following passage from the record:

> It certainly is not correct in every homicide case the [prosecution] calls the doctor who did the autopsy, waits to see if the defendant testifies, and they recall the doctor to address the issues that the defendant raised.
>
> That would be true if they could not have been anticipated, and trajectory of the wound clearly was anticipated, or should have been anticipated, and certainly after I asked about it on cross-examination, the [prosecution] would have been free on redirect examination to ask the doctor all the questions they wanted to about the trajectory of the bullet.

Also, at a conference outside the presence of the jury, defense counsel made the following argument:

> [R]egarding Dr. Manoukian, I want to take very direct issue with the [prosecution's] argument that it had no knowledge of what [Dean] was going to claim when it was examining Dr. Manoukian. That is absolutely not correct because in the defense opening statements, I told the jury that the evidence would show that Seth Schimberg hit [Dean] with the guava limb, that [Dean] flew back on the ground, that Seth was coming toward him and above him, and that [Dean] fired, and the bullet struck Seth. That's exactly what I told the jury.
>
> So the [prosecution] had every reason to know that that was the defense's claim in terms of [Dean] being below and Seth being above, and they could have examined Dr. Manoukian all they wanted about that on direct examination. They chose not to. They chose not to on redirect so they could try to bring him back.

in support of his self-defense claim. See Ditto v. McCurdy, 86 Hawai'i 84, 89, 947 P.2d 952, 957 (1997) (expressly rejecting the ICA's interpretation that "where evidence could have come in during a plaintiff's case-in-chief, it is necessarily an abuse of discretion to allow it in rebuttal," and stating that such an interpretation "would require plaintiffs to anticipate and present evidence countering each potential defense during their case-in-chief"). Accordingly, we cannot conclude that the trial court abused its discretion by permitting the prosecution to call Dr. Manoukian to testify on rebuttal for the purpose of rebutting Dean's explanation of the altercation with Seth.

Inasmuch as the record tends to corroborate the prosecution's claim of initial ignorance, we conclude that the circuit court did not abuse its discretion by permitting Dr. Manoukian's rebuttal testimony. Consequently, we hold that the circuit court did not abuse its discretion by allowing Dr. Manoukian's rebuttal testimony.

G. The Circuit Court Did Not Abuse its Discretion When it Denied Dean's Motion for a Mistrial Based on Prosecutorial Misconduct.

Dean's next point of error contends that the prosecution engaged in misconduct when it showed Seth's autopsy photograph to Leonard and that, therefore, the trial court erred by denying Dean's motion for a mistrial. Based upon the following, we disagree.

In State v. Maluia, 107 Hawai'i 20, 26, 108 P.3d 974, 980 (2005), a case decided during the pendency of this appeal, we

provided the following framework to address allegations of prosecutorial misconduct, stating that "whenever a defendant alleges prosecutorial misconduct, this court must decide: (1) whether the conduct was improper; (2) if the conduct was improper, whether the misconduct was harmless beyond a reasonable doubt; and (3) if the misconduct was not harmless, whether the misconduct was so egregious as to bar reprosecution." Furthermore, we have repeatedly emphasized that "[t]he prosecution has a duty to seek justice, to exercise the highest good faith in the interest of the public and to avoid even the appearance of unfair advantage over the accused." State v. Rogan, 91 Hawai'i 405, 412, 984 P.2d 1238 (1999) (citing State v. Quitog, 85 Hawai'i 128, 136 n.19, 938 P.2d 559, 567 n.19 (1997); State v. Moriwaki, 71 Haw. 347, 354, 791 P.2d 392, 396 (1990); State v. Pemberton, 71 Haw. 466, 476, 796 P.2d 80, 85 (1990)).

With the foregoing principles in mind, we conclude that the prosecution's conduct did not rise to a level sufficient to support a finding of impropriety. Cf. Rogan, 91 Hawai'i at 412, 984 P.2d at 1238 (holding that the deputy prosecutor's statement that it is "every mother's nightmare [to find] . . . some black, military guy on top of your daughter" constituted an improper appeal to racial prejudice); State v. Pacheco, 96 Hawai'i 83, 97, 26 P.3d 572, 586 (2001) (holding that the deputy prosecutor's personal disparagement of, and vigorous and improper attacks on, the defendant constituted prosecutorial misconduct); Moriwaki, 71 Haw. at 355, 791 P.2d at 396-397 (concluding that the

prosecutor's deliberate suppression of the fact that the victim got into a fight one week before trial, after offering rebuttal evidence as to the victim's peacefulness, constituted prosecutorial misconduct). In the present case, the prosecution's stated purpose for showing Leonard photographs of Seth was for identification. Consistent with that purpose, the prosecution elected to elicit an identification of Seth's body post mortem by showing Leonard the photograph in question. Accordingly, we cannot say that such action by the prosecution was calculated to confuse or inflame the jury, as Dean contends.

Even assuming, arguendo, that the prosecution's conduct was improper, the trial court did not abuse its discretion by refusing to grant Dean's motion for a mistrial. Dean essentially contends that the basis for the mistrial is Leonard's display of emotion when shown the autopsy photograph of his son. However, we have previously held that a display of emotion does not in and of itself warrant a mistrial. For example, in State v. Lagat, 97 Hawai'i 492, 497, 40 P.3d 894, 899 (2002), the record indicated that "[the complaining witness] cried initially when she took the witness stand, that she continued crying after a recess was called, and that the judge felt it necessary to call a second recess when it became obvious that she was not in control of her emotions." Nevertheless, we held that the trial court did not abuse its discretion when it denied the defendant's motion for a mistrial based upon the defendant's contention that the complaining witness "cried hysterically throughout the

presentation of her testimony." Id.

In the present case, the record indicates that Leonard's display of emotion was controlled and relatively brief. Even if we accept Dean's account of the incident -- that "[Leonard] sort of gasped and obviously was trying to fight for control of himself. And through tears answered that it was his son" -- the display of emotion does not prejudice Dean such that it interfered with his right to a fair trial. See State v. Sugimoto, 62 Haw. 259, 267, 614 P.2d 386, 392 (1980) (prosecutorial misconduct is not grounds for reversal unless it prejudices the defendant so as to deny him a fair trial); People v. Ned, 923 P.2d 271, 276 (Colo. Ct. App. 1996), cert. denied, 923 P.2d 271 (Colo. 1996) (noting that the mother of the victim was asked questions requiring her to testify as to the actual killing of her child and concluding that, although she began "crying, thrashing about in the witness stand, shaking herself back and forth, screeching, screaming, and stamping her feet," such display "was not 'necessarily out of place' or provoked by anything except the circumstances surrounding the death of [the witness's] son"); Venable v. State, 538 S.W.2d 286, 295 (Ark. 1976) (finding no abuse of discretion in denying a motion for a mistrial where the victim's stepmother broke down on the witness stand and asked why anyone would want to kill the victim); Duncan v. State, 349 S.E.2d 699, 700 (Ga. 1986) (finding no abuse of discretion in denying a motion for a mistrial following an outburst by the victim's mother while she was on the stand);

Commonwealth v. Andrews, 530 N.E.2d 1222, 1227 (Mass. 1988) (finding no abuse of discretion in denying a motion for a mistrial in a murder case based upon the spontaneous outburst by the victim's mother while identifying a photograph of the victim).

Accordingly we hold that the trial court did not abuse its discretion by denying Dean's motion for a mistrial, inasmuch as: (1) the prosecution was motivated by the proper purpose of identifying the victim when it showed Leonard the autopsy photograph of his son; and (2) even assuming that such action constitutes prosecutorial misconduct, such action did not prejudice Dean such that it interfered with his right to a fair trial.

H. Whether the Circuit Court's Errors Cumulatively and Individually Deprived Dean of a Fair Trial

Dean, in his final point of error, contends that the circuit court's alleged errors both cumulatively and individually prejudiced Dean's constitutional right to a fair trial. However, inasmuch as the circuit court's failure to give a specific unanimity instruction compels us to vacate Dean's convictions as to Counts I and II, and remand the case for a new trial, we need not address this issue.

IV. CONCLUSION

Based on the foregoing analysis, we hold that: (1) the circuit court abused its discretion by denying Dean's motion for a new trial inasmuch as the jury instructions failed to require

that the jury unanimously agree as to which two or more persons formed the basis for Dean's conviction of the offense of attempted first degree murder; (2) the circuit court abused its discretion by permitting the evidence related to the shotgun as well as the shotgun itself; (3) the circuit court did not abuse its discretion by allowing Leonard to provide identification testimony during the prosecution's case-in-chief; (4) the circuit court abused its discretion by permitting Leonard to provide rebuttal testimony that he had never witnessed Seth direct acts of violence against family, friends, or anyone else from seventh grade through high school, inasmuch as such testimony was irrelevant; (5) the circuit court did not abuse its discretion by permitting the "Murder 1" or jail cell photographs; (6) the circuit court did not abuse its discretion by permitting Dr. Manoukian to testify in rebuttal as to the specific trajectory of the bullet that fatally wounded Seth; and (7) the circuit court did not abuse its discretion by denying Dean's motion for a mistrial based on the alleged prosecutorial misconduct. Finally, we do not reach Dean's last point of error, alleging that the circuit court's errors both cumulatively and individually denied Dean his right to a fair trial, inasmuch as Dean's first point of error is dispositive.

Accordingly, we vacate Dean's conviction of the offense of first degree murder, in violation of HRS §§ 707-701 and 705-500, vacate Dean's conviction of the offense of use of a firearm

in the commission of a felony, in violation of HRS § 134-6(a), and remand the case for a new trial consistent with this opinion.

DATED: Honolulu, Hawai'i, November 28, 2005.

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