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CONCURRING OPINION BY LEVINSON, J., WITH WHOM MOON, C.J., JOINS

I join in the opinion of the court and agree with its reasoning and analysis. I write additionally, however, to respond to Justice Acoba's reliance, which I believe is misguided, upon three sentences appearing in State v. Aganon, 97 Hawai'i 299, 36 P.3d 1269 (2001), as support for his position that "[t]he term person . . . should not be excised from the result of conduct element [of the offense of manslaughter, in violation of Hawai'i Revised Statutes (HRS) § 707-702(1) (1993),] and denominated as a separate attendant circumstance as the majority proposes." Justice Acoba's concurring opinion, slip op. at 1, 3-4.

The defendant in Aganon was a licensed child care provider, who was charged with and convicted of the second degree murder of a six-month-old child, whom the defendant had been hired by the child's parents to care for during the weekdays. Aganon, 97 Hawai'i at 300, 36 P.3d at 1270. To put the Aganon decision in proper perspective for present purposes, I quote it at length but nevertheless in relevant part:

After closing arguments, the circuit court instructed the jury on murder in the second degree:

The defendant is charged with the offense of Murder in the Second Degree. A person commits the offense of Murder in the Second Degree if she intentionally or knowingly causes the death of another person. There are two material elements of the offense of Murder in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt.

These two elements are[:] (1), that on or about the 21<sup>st</sup> day of October, 1997, to and including the 24<sup>th</sup> day of October, 1997, on the island of Oahu, in the City and County of Honolulu, State of Hawaii, [Aganon] caused the death of Karie Canencia. And, (2), that [Aganon] did so intentionally or knowingly.

. . . .  
A person acts intentionally with respect to her conduct when it is her conscious object to engage in

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such conduct.

A person acts intentionally with respect to attendant circumstances when she is aware of the existence of such circumstances or believes or hopes that they exist.

A person acts intentionally with respect to a result of her conduct when it is her conscious object to cause such a result.

A person acts knowingly with respect to her conduct when she is aware that her conduct is of that nature.

A person acts knowingly with respect to attendant circumstances when she is aware that such circumstances exist.

A person acts knowingly with respect to a result of her conduct when she is aware that it is practically certain that her conduct will cause such a result.

. . . . .  
During jury deliberations, the jury sent the following communication to the judge:

Regarding definitions of intentionally and knowingly in the instructions, three conditions/definitions are present for each word. Must all three be true, or is agreement with one of the three sufficient to be so defined?

With no objection from Aganon, the judge responded, "Unanimous agreement with one of the three is sufficient."

The jury found Aganon guilty as charged.

. . . . .  
Aganon argues that the circuit court failed to properly instruct the jury that, in order to find her guilty of second degree murder, it must unanimously find the requisite state of mind was present with respect to (1) her conduct, (2) the attendant circumstances, and (3) the result of her conduct. Instead, the court erred by informing the jury that it need only have "unanimous agreement with one of the three."

HRS § 701-114 (1993) specifies that "no person may be convicted of an offense unless . . . [t]he state of mind required to establish each element of the offense" is proven beyond a reasonable doubt. (Emphasis added.) Similarly, HRS § 702-204 (1993) provides that "a person is not guilty of an offense unless the person acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense." (Emphasis added.) In turn, HRS § 702-205 (1993) identifies the elements of an offense to be:

such (1) conduct, (2) attendant circumstances, and (3) results of conduct as:

(a) Are specified by the definition of the offense, and

(b) Negative a defense (other than a defense based on the statute of limitations, lack of venue, or lack of jurisdiction).

(Emphasis added.) . . . [T]he totality of these various

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items -- the proscribed conduct, attendant circumstances, and the specified result of conduct, when specified by the definition of the offense, constitute the "elements" of an offense. HRS § 702-205.

Pursuant to HRS § 707-701.5, a person commits the offense of murder in the second degree when the "person intentionally or knowingly causes the death of another person." Any voluntary act (e.g., physical abuse) or omission may satisfy the conduct element of the offense. The death of another person, as the intentional or knowing result of the conduct, constitutes the result element of the offense.

The circuit court's response to the jury's communication was erroneous. The jury, for example, could have found that Aganon possessed the requisite state of mind with respect to her conduct (physical abuse of Karie), but not with respect to the death that resulted. By virtue of the circuit court's erroneous response to the jury's question, the jury could have found Aganon guilty of second degree murder, even though it did not find the requisite state of mind with respect to "each element of the offense." HRS § 702-204. Thus, the court's error adversely affected Aganon's substantial rights and, as such, constituted plain error. Accordingly, we vacate Aganon's conviction and sentence and remand for a new trial consistent with this opinion.

In order to provide guidance to the circuit court on remand, we examine Aganon's remaining arguments on appeal.

. . . [T]he two elements of second degree murder in this case are "conduct" (Aganon intentionally or knowingly abused Karie) and "result" (Aganon intended or know that death would result). . . .

Aganon's third and fourth arguments relate to the circuit court's allowing the jury to find Aganon guilty based on only one element of the offense so long as it was accompanied by the requisite state of mind. Given the jury's communication regarding the necessity of finding the state of mind with respect to all elements, we cannot say that the jury instructions did not adversely affect Aganon.

. . . Thus, the court's jury instructions were plainly erroneous.

97 Hawai'i at 301-04, 36 P.3d at 1271-74 (footnote and citations omitted) (some emphases added and some in original) (some brackets and ellipsis points added and some in original).

Read in context, the holding of Aganon is unmistakable: HRS §§ 701-114 and 702-204 mean exactly what they say. No person may be convicted of an offense unless the state of mind required to establish each element of the offense is proved beyond a

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reasonable doubt, and, conversely, a person is not guilty of an offense unless the person possessed the prescribed requisite state of mind with respect to each element of the offense. That being so, it is harmful error for the trial court to instruct the jury that it may convict based upon a finding of the requisite state of mind as to a single, but less than all, elements of the offense in question. As it pertains to the present matter, Aganon stands for no more and no less.

I note that, in instructing the jury regarding the elements of second degree murder in Aganon, the circuit court expressly enumerated the requisite states of mind with respect to conduct, attendant circumstances, and result of conduct, tracking the language of HRS § 702-206(1) and (2) (1993), and thereby clearly implying that the elements of second degree murder encompassed all three. 97 Hawai'i at 301-02, 36 P.3d at 1271-02. A close reading of the language from Aganon quoted above, however, reveals a curious cognitive dissonance, elementally speaking, on this court's part, about the personhood component of the second degree murder statute. In retrospect, and stated baldly, the Aganon court was unsure precisely where to place Karie Canencia, the young "person" whose death the defendant intentionally or knowingly caused, within the schematic diagram of the offense's statutory elements. I suggest that in the hierarchy of analytical sins, ours was a forgivable one, considering that no party disputed that Karie was a "person," within the meaning of HRS § 707-700 (1993), at all times relevant to the defendant's prosecution. Accordingly, as I will demonstrate that the language of the Aganon decision plainly

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reflects, we were not focusing specifically on the elemental status of "personhood" because that issue was not terribly germane to our analysis. Nevertheless, had we been more careful and precise in our thinking, there would be no need for me to write this concurring opinion.

At one point, as Justice Acoba notes at 4 of his concurring opinion, we identified "physical abuse" as the voluntary act constituting the conduct element of the second degree murder statute and "[t]he death of another person" (emphasis added) as the result of conduct of the offense, thereby placing Karie within the result of conduct element. Aganon, 97 Hawai`i at 303, 36 P.3d at 1273. But in the very next paragraph, we described the defendant's conduct as "physical abuse of Karie" and the result of conduct as "the death," thereby placing Karie squarely within the conduct element. Id. Then, three paragraphs later, we did the same thing, referring to the defendant's conduct as "intentionally or knowingly abus[ing] Karie" and the result of her conduct as "intend[ing] or kn[owing] that death would result[]," thereby placing Karie once again within the conduct element of second degree murder. Id.

As the opinion of the court ably demonstrates, Treyson Aiwahi, for purposes of "personhood" analysis, belongs in neither the conduct or result of conduct element, but falls most satisfactorily within the realm of an attendant circumstance. It is in this connection that State v. Jenkins, 93 Hawai`i 87, 112-13, 997 P.2d 13, 38-39 (2000), and State v. Valentine, 93 Hawai`i 199, 207, 998 P.2d 479, 487 (2000), are particularly helpful. Just as the attribute of being a firearm -- an attendant

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circumstance -- rendered the conduct of "carrying" or "possessing" an object criminal offenses in those cases, so the attribute of "personhood" -- an attendant circumstance -- renders "death" -- the result of the relevant conduct (any voluntary act or omission) criminally culpable for purposes of reckless manslaughter and the other homicide statutes enumerated in the Hawai'i Penal Code. Opinion of the court, slip op. at 31-32. Our mistake in Aganon was in failing to detach the "personhood" ion, as an attendant circumstance element, from the conduct and result of conduct ions of the second degree murder statute.

