CONCURRING AND DISSENTING OPINION BY ACOBA, J.

On appeal, Defendant-Appellant Derrick Smith (Smith) contends that (1) Smith's statement, which was uttered seven weeks prior to the death of his eight-week-old son, Kelbey Bridenstine (Kelbey), was irrelevant and unduly prejudicial; (2) the photograph of Smith used by Plaintiff-Appellee State of Hawai'i (the prosecution) was irrelevant and unduly prejudicial; and (3) the prosecution's use of PowerPoint[1] slides (some of which contained text) of photographs of Kelbey wrapped in a blanket, of autopsy photographs of Kelbey, and of photographs of Smith deprived Smith of his due process right to a fair trial.

I respectfully disagree with the majority's conclusion that Smith "failed to meet his burden of establishing that the circuit court [of the first circuit (the court)] abused its discretion by permitting testimony as to Smith's [alleged] statement, 'Do you want me to drop that baby off the balcony,'" majority opinion at 2, inasmuch as the probative value of the alleged statement, made six or seven weeks prior to the incident, was substantially outweighed by the danger of unfair prejudice. However, I believe there was no error with respect to the admission of the photographs and the use of PowerPoint slides except for the slides containing the text, "I <u>should</u> drop the baby off the balcony!" (Emphasis added.)

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[1] "PowerPoint" is a registered trademark of the Microsoft Corporation for its graphics presentation software program.

I.

Whether a statement is relevant under Hawai'i Rules of Evidence (HRE) Rule 402 (1993)[2] or admissible under HRE Rule 404(b) (1993),[3] the trial court must determine whether the statement's probative value outweighs it prejudicial effect under HRE Rule 403 (1993).[4] In deciding whether the probative value is outweighed by the danger of unfair prejudice and the like, this court has held that a variety of factors must be considered, including

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[2] Under Hawai'i Rules of Evidence (HRE) Rule 402 (1993), "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible." (Emphasis added.)

[3] HRE Rule 404(b) (1993) governs the admissibility of "other crimes, wrongs, or acts" and adopts a general rule of inadmissibility except for certain enumerated exceptions. It states in relevant part:

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

(Emphases added.)

[4] HRE Rule 403 (1993) provides for the exclusion of HRE Rule 402 and Rule 404(b) evidence under certain conditions. It states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Emphasis added.) This court has determined that "the use of the word 'may' in [HRE Rule] 404(b) was not intended to confer any arbitrary discretion on the trial judge but was rather designed to trigger the [HRE] Rule 403 balance." State v. Castro, 69 Haw. 633, 643, 756 P.2d 1033, 1041 (1988) (internal quotation marks and citation omitted).

> the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

State v. Castro, 69 Haw. 633, 644, 756 P.2d 1033, 1041 (1988) (quoting E.W. Cleary, McCormick on Evidence § 190 (3d ed. 1984)). Applying these factors to the statement, I would hold that the court abused its discretion in admitting it.

First, as to the strength of the evidence as to the making of the prior statement, Smith denied having made the statement. According to Smith, he told Erika Bridenstine (Bridenstine) "that I was going to take Kelbey from her and I would drop him off in Brooklyn if she couldn't handle it[,]" where his mother resided. Smith's recollection is consistent with his testimony that he realized Bridenstine was having a difficult time in her pregnancy and in caring for Kelbey. Bridenstine asserted that Smith said, "Do you want me to drop the baby over the balcony?" during an argument six or seven weeks before the incident charged. The argument had started after Bridenstine picked Smith up from the skate park at a time earlier than agreed to. Hence, the testimony conflicted as to what was actually said at the time.

Second, the circumstances surrounding the making of the alleged statement and the crime charged were dissimilar. Smith testified that, on the day of the alleged statement, he was looking forward to seeing Kelbey, but Bridenstine arrived earlier than scheduled. Bridenstine became upset that Smith wanted to

return to the park and the topic of Smith seeing a Mary Ann, Smith's former girlfriend, was discussed. In contrast, on the day of the alleged crime, Smith was willing to take care of Kelbey when Bridenstine asked him to do so while she went for a friend at the airport. She asked Smith to babysit and Smith apparently agreed without condition. There is no evidence Bridenstine and Smith were arguing when Bridenstine left for the airport. There was no indication that Smith harbored any resentment toward Bridenstine or at Kelbey before the alleged crime. Hence, the circumstances do not appear to be similar.

Third, a six or seven week interval between the alleged statement and the time of the incident had elapsed. Both Smith and Bridenstine testified that they had spoken of marriage on more than one occasion. Bridenstine related that Smith would hold and soothe Kelbey during Kelbey's crying episodes and that she never was concerned about leaving Kelbey alone with Smith, even after the alleged statement. The evidence suggested that any tension between Smith and Bridenstine lessened in magnitude during the period elapsing.

Fourth, although the court stated that there was a need for the statement because there was "not a plethora of evidence going to [Smith's] state of mind[,]" in fact the prosecution did present evidence with respect to Smith's intent. The prosecution adduced evidence that Smith was unhappy about the pregnancy and asked Bridenstine to have an abortion, and that Smith gave inconsistent statements to Derek Yonezawa (Yonezawa), a paramedic

with the City and County of Honolulu, and at various stages in the investigation. The prosecution presented evidence of Kelbey's multiple injuries, and the opinion of Dr. Kanthi Von Guenthner (Dr. Von Guenthner), the medical examiner who performed the autopsy, stating that Kelbey's injuries were the result of abusive trauma and was non-accidental. Thus, there was not the need for the statement that the court indicated.

Fifth, the efficacy of alternative evidence was substantial in this case. Smith's suggestion that Bridenstine undergo an abortion was not refuted and was relevant to show that he had reservations about the birth of Kelbey. The inconsistencies between Smith's statements to Yonezawa and at later stages of the investigation went to his credibility as to the circumstances of the incident. Dr. Von Guenthner's testimony regarding the nature of the injuries was probative of the fact that an accident could be ruled out. Taken together, the efficacy of alternative proof by the prosecution was sufficient for a jury to dispel Smith's claim that Kelby's death was the result of an accident.

Sixth, with respect to rousing the jury to hostility, the potential for prejudice was great. The court reasoned that because a statement, rather than an act, was admitted, "propensity would seem to be much less of a problem in the sense that there will be no evidence that Smith ever did anything to hurt Kelbey prior to the night in question" and that the

statement would not rouse the jury to overmastering hostility, particularly if a limiting instruction was provided.

But the introduction of Smith's statement was likely to suggest to the jury that Smith was a callous person who would fatally harm Kelbey. The nature of the alleged statement was inflammatory in nature rendering it susceptible to misuse by the jury in the course of its deliberations. See United States v. Gilbert, 229 F.3d 15, 25 (1st Cir. 2000) (stating that "there is always some danger that the jury will use [Rule 404(b) other act] evidence not on the narrow point for which it is offered but rather to infer that the defendant has a propensity towards criminal behavior").

Even when faced with the most thorough and forceful instruction, a reasonable juror would be hard-pressed to avoid concluding that if Smith was able to make the alleged statement, then he was the kind of person who could kill. See id. at 22 (holding that, even with a "thorough and most forceful instruction," a reasonable juror could not avoid the temptation to conclude that the defendant is the kind of person who could kill when presented with evidence of an uncharged attempted murder made in the same manner as the charged crime); Ayala v. Hernandez, 712 F. Supp. 1069, 1076 (E.D.N.Y. 1989) (recognizing that the cross-examination of the defendant with respect to "crimes or conduct similar to that of which the defendant [was] charged may be highly prejudicial, . . . despite the most clear and forceful limiting instructions to the contrary, . . . the

evidence will be taken as some proof of the commission of the crime charged" (emphasis added)).

The risk of inferring propensity is what HRE Rule 404(b) was designed to shield against--the tendency to distract the trier of fact from the primary question of what actually occurred during the charged incident. Commentary to HRE Rule 404(b). Based on the foregoing considerations, I must disagree with the majority that Smith failed to meet this burden.

II.

I believe there was no error in the admission of the challenged exhibits except for the prosecution's use of slides containing the text, "I should drop the baby off the balcony!" Although Smith objected to the use of slides containing a photograph of Kelbey wrapped in a blanket (Exhibit 40)[5] during the proceedings before the court, Smith now objects on appeal the use of slides containing the autopsy photograph of Kelbey (Exhibit 28),[6] as well as slides with his full-length photograph (Exhibit 25).[7] This court has held that it may recognize prosecutorial misconduct under the plain error rule. See State v. Wakisaka, 102 Hawai'i 504, 513, 70 P.3d 317, 326 (2003)

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[5] The photograph of Kelbey wrapped in a blanket, Exhibit 40, was used in slides 2, 4, 5, 7, 13, and 20 of the prosecution's opening argument, as well as slide 2 during its closing arguments.

[6] Exhibit 28, a photograph of Kelbey's autopsy, was utilized in the prosecution's opening arguments in slides 32 and 36, as well as in slides 3, 10, and 34 of its closing arguments.

[7] Smith's full-length photograph, Exhibit 25, were in slides 9, 14, 25, 26, 28, and 30 of the prosecution's opening arguments, and in slides 6, 7, 8, 9, 26, 29, 30, and 31 of its closing arguments.

(holding that "[w]e may recognize plain error when the error committed affects substantial rights of the defendant").

As to Smith's second point on appeal, no specific grounds were offered by the defense in objecting to the prosecution's use of Smith's full-length photograph, and, therefore, the objection was insufficient to preserve the issue for appeal. HRE Rule 103 (1993); State v. Long, 98 Hawai'i 348, 353, 48 P.3d 595, 600 (2002).

III.

As to Smith's third point on appeal, the prosecution's use during opening and closing arguments of the slides showing a photograph of newborn Kelbey wrapped in a blanket (Exhibit 40), the slides containing an autopsy photograph of Kelbey (Exhibit 28), and the slides containing the full length photograph of Smith (Exhibit 25) did not constitute improper argument.

An attorney's opening statement "is not an occasion for argument." State v. Valdivia, 95 Hawai'i 465, 480, 24 P.3d 661, 676 (2001) (quoting State v. Sanchez, 82 Hawai'i 517, 528, 923 P.2d 934, 945 (App.) (citation omitted)), cert denied, 84 Hawai'i 127, 930 P.2d 1015 (1996). Here, the photographs accompanied by text communicated basic information such as Kelbey's date of birth, vital information, and the time when Bridenstine last saw Kelbey alive. Hence, the use of these slides did not constitute improper argument. Moreover, even if the cumulative effect of the slides was to invoke some sympathy for Kelbey and

Bridenstine, Smith's right to a fair trial was not substantially prejudiced as to this matter.

IV.

Similarly, in my opinion, the court did not err in permitting the use of a PowerPoint presentation containing the photograph of Kelbey wrapped in a blanket with the words, "My father killed me" during closing arguments, the autopsy photograph accompanied by the words "No accident" and a list of Kelbey's injuries during closing arguments, and repeated display of the full-length photograph of Smith during closing arguments.

This court has observed that "a prosecutor, during closing argument, is permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence." State v. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209, reconsideration denied, 83 Hawai'i 545, 928 P.2d 39 (1996). As to the photograph of Kelbey with the words, "My father killed me," plainly, Kelbey did not make such a statement. However, the prosecutor's remarks when the photograph was shown made clear that the slide was meant to illustrate the prosecution's theory of the case, i.e., that Smith intentionally or knowingly caused the death of Kelbey. Although this slide undoubtedly stirred the emotions of the jurors, use of the slide was not reversible error. All three photographs used in the slides during closing argument had been received previously into evidence and the captions accompanying the photographs were limited to reasonable

inferences from the evidence that would otherwise fall within the scope of proper argument.

V.

The cumulative effect of the slides in opening and closing arguments did not make their use improper. The cases cited by Smith can be readily distinguished from the case at hand.[8] On the other hand, the prosecution's PowerPoint slides neither took the photographs far beyond their evidentiary value nor unfairly memorialized facts in evidence. As a rule, "[t]he trial court has full discretion in the conduct of the trial, and that discretion will not be overturned on appeal absent a clear showing of an abuse of discretion." State v. Sucharew, 66 P.3d 59, 64 (Ariz. Ct. App. 2003) (quoting State v. Just, 675 P.2d 1353, 1369 (Ariz. Ct. App. 1983)).[9]

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[8] For example, in State v. Stringer, 500 So. 2d 928, 935 (Miss. 1986), the Supreme Court of Mississippi held that the defendant had been denied a fair trial in the sentencing phase because, during closing arguments, the prosecution had shown color slides of the body of another victim (in whose murder the defendant had already been tried), emphasized that the defendant received a life sentence for the murder of that other victim, and remarked that it was the State of Mississippi's last chance to impose the death penalty. According to the Mississippi court, by displaying the photographs of the other victim as part of a slide show during closing argument, the prosecution had taken the photographs "far beyond their evidentiary value and use[d] them as a tool to inflame the jury." Id.

Smith also cites to People v. Williams, 641 N.E.2d 296, 325 (Ill. 1994), in which the Supreme Court of Illinois held that the prosecution's use of an eight-foot-high chart of the defendant's criminal background during the sentencing hearing was prejudicial error. That court noted that evidence of the defendant's criminal history had been presented through certified copies of convictions and through several witnesses and found the chart "unfairly memorialized and unduly emphasized" this evidence. Id.

[9] In State v. Sucharew, 66 P.3d 59, 64 (Ariz. Ct. App. 2003), a second-degree murder case, the defendant argued that the trial court abused its discretion by allowing the prosecution to use a PowerPoint presentation because the presentation involved a "computer-generated exhibit." That court addressed the propriety of the use of the PowerPoint presentation as follows:

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VI.

Although Smith does not challenge the prosecution's use of the slide containing the text, "I should drop the baby off the balcony!", it was error for the court to permit the slide's use during opening and closing arguments. See State v. Solomon, 107 Hawai'i 117, 125-26, 111 P.3d 12, 20-21 (2005) (stating that the supreme court "may recognize plain error when the error committed affects substantial rights of the defendant").

Contrary to the majority's assertion, that the slide "merely communicated the rudimentary facts of the prosecution's case[,]" majority opinion at 4 n.7, the slide's caption clearly misstates the evidence, inasmuch as Smith's statement, as testified to by Bridenstine was, "Do you want me to drop the baby off the balcony?" rather than the assertive statement proffered by the prosecution. There was no evidence that Smith dropped Kelbey over a balcony or that he related any such statement to anyone. Such use of the slide by the prosecution misleads the

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[9](...continued)

> Although a computer was used in the presentation, the actual presentation did not include any computer simulation or other similar evidence; rather, it was essentially a slide show of photographic exhibits. The photographs included in the presentation were the same ones disclosed to defendant during pretrial discovery and later admitted into evidence at trial. Moreover, even though the photographs included superimposed descriptive words and labels, the words and labels simply tracked the subject matter of the prosecutor's opening statement to the jury, and defendant made no objection to any of the content or substance of the actual opening statement. We conclude, therefore, that there was no abuse of discretion by the trial court in permitting the State's use of the [PowerPoint] presentation.

Id.

jury as to what was actually stated and magnifies the "significant persuasive force," State v. Rogan, 91 Hawai'i 405, 413, 984 P.2d 1231, 1239 (1999), of the prosecution. In my view, the prosecution took this slide "far beyond [its] evidentiary value[.]" State v. Stringer, 500 So. 2d 928, 935 (Miss. 1986).

VII.

Inasmuch as the admission of the alleged statement and the use of the slide containing the misstatement referred to above affected Smith's substantial right to a fair trial, I believe that a remand is necessary.