*** NOT FOR PUBLICATION ***

NO. 26829

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

DERRICK SMITH, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 03-1-0027)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ. and Acoba, J., concurring and dissenting)

Defendant-appellant, Derrick Smith [hereinafter "Smith"], appeals from the first circuit court's August 23, 2004 judgment convicting Smith of the offense of second degree murder, in violation of Hawai'i Revised Statutes [hereinafter "HRS"] § 707-701.5 (1993).[1] On appeal, Smith argues that: (1) the circuit court erred by admitting his statement, "Do you want me to drop that baby over the balcony," which was uttered seven weeks prior to the death of the baby; (2) the circuit court erred by admitting a full-length photograph of Smith into evidence; and (3) the circuit court committed plain error by allowing the

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[1] HRS § 707-701.5 provides as follows:

> **[§707-701.5] Murder in the second degree.** (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.
>
> (2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656.

deputy prosecuting attorney to engage in prosecutorial misconduct by using, during his opening statements and closing arguments, PowerPoint slides displaying photographs of Smith and the baby and containing inappropriate and prejudicial text.

However, having carefully reviewed the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold: (1) Smith failed to meet his burden of establishing that the circuit court abused its discretion[2] by permitting testimony as to Smith's statement, "Do you want me to drop that baby over the balcony," inasmuch as the record indicates that the circuit court expressly balanced the probative value of the statement against its prejudicial effect[3] and provided limiting instructions to the jury on several occasions;[4] (2) the record

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[2] See State v. Estencion, 63 Haw. 264, 267, 625 P.2d 1040, 1043 (1981) ("The burden of establishing abuse of discretion is on appellant, State v. Vincent, 51 Haw. 40, 450 P.2d 996 (1969), and a strong showing is required to establish it.").

[3] See Hawai'i Rules of Evidence [hereinafter HRE] Rule 403 (1993) (stating that the circuit court should nevertheless exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice"); Commentary to HRE Rule 404 (1993) ("When offered for the specified purposes other than mere character and propensity, however, 'other crimes, wrongs, or acts' evidence may be admissible provided the Rule 403 test is met.").

[4] It is well settled that juries are presumed to follow the instructions provided by the circuit court. See State v. Knight, 80 Hawai'i 318, 327, 909 P.2d 1133, 1142 (1996) (stating that "'[a]s a rule, juries are presumed to . . . follow all of the trial court's instructions.'") (Citing Sato v. Tawata, 79 Hawai'i 14, 21, 897 P.2d 941, 948 (1995).) (Brackets in original.) (Ellipses in original.)

indicates that Smith did not make a specific objection to the admission of the full-length photograph, and he therefore failed to preserve the argument for appeal;[5] and (3) the circuit court did not commit plain error[6] by permitting the prosecution to utilize PowerPoint presentations during its opening statements[7]

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[5] It is axiomatic that a party must make a specific objection in order to preserve a point of error on appeal. See State v. Long, 98 Hawai'i 348, 353, 48 P.3d 595, 600 (2002) (stating that "the purpose of requiring a specific objection is to inform the trial court of the error."); see also State v. Fox, 70 Haw. 46, 55, 760 P.2d 670, 675 (1988) ("Fairness to the trial court impels a recitation in full of the grounds supporting an objection to the introduction of inadmissible matters.") (Citing S & W Crane Serv., Inc. v. Berard, 53 Haw. 161, 164, 489 P.2d 419, 421 (1971) (citations omitted).).

[6] Although Smith only specifically objected to the prosecution's use of the baby's photograph in its opening PowerPoint presentation, he now challenges the prosecution's ninth, fourteenth, twenty-first, twenty-fifth, twenty-sixth, twenty-eighth, thirtieth, thirty-second, thirty-sixth, and thirty-seventh slides. Despite Smith's failure to object, we may nevertheless review his allegations of prosecutorial misconduct under the doctrine of plain error. See State v. Wakisaka, 102 Hawai'i 504, 513, 78 P.3d 317, 326 (2003) ("If defense counsel does not object at trial to prosecutorial misconduct, this court may nevertheless recognized such misconduct if plainly erroneous.").

[7] In State v. Valdivia, 95 Hawai'i 465, 24 P.3d 661 (2001), we stated as follows:

> Generally, "[a]n opening statement merely provides an opportunity for counsel to advise an[d] outline for the jury, the facts and questions in the matter before them." State v. Sanchez, 82 Hawai'i 517, 528, 923 P.2d 934, 945 (App.), cert. denied, 84 Hawai'i 127, 930 P.2d 1015 (1996) (quoting State v. Simpson, 64 Haw. 363, 369, 641 P.2d 320, 324 (1982) (citations omitted)). Thus, an attorney's opening statement "is not an occasion for argument." Id. (citation omitted). As the Intermediate Court of Appeals has explained:
>
> > Ordinarily, "the scope and extent of the opening statement is left to the sound discretion of the trial judge." . . . However, the trial court should "exclude irrelevant facts and stop argument if it occurs." . . . The [prosecution] should only refer in the opening statement to evidence that it has "a genuine good-faith belief" will be produced at trial.
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> Id. (citations omitted). Moreover, "[w]here the nature of the prosecutorial misconduct alleged is the failure of the prosecutor to prove or attempt to prove matters referred to in opening

and closing arguments,[8] and such use did not constitute prosecutorial misconduct.[9] Therefore,

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> statements, . . . the burden [is] on the defendant to show bad faith on the part of the prosecutor, unless the fundamental rights of the defendant were substantially prejudiced." State v. Moore, 82 Hawai'i 202, 213, 921 P.2d 122, 133 (1996) (adopting the "majority" approach).

Id. at 480-81, 24 P.3d at 676-77 (brackets in original) (ellipses in original).

Considering the aforementioned principles, the prosecution's use of the PowerPoint slides did not constitute improper argument, inasmuch as: (1) the photographs that served as background illustrations for the prosecution's PowerPoint slides were previously admitted into evidence by the circuit court; and (2) the text accompanying each slide merely communicated the rudimentary facts of the prosecution's case. Cf. Valvidia, 95 Hawai'i at 481 n.8, 24 P.3d at 677 n.8 (concluding that "the circuit court erred in overruling Valvidia's objection to the [deputy prosecuting attorney's] 'rampage of terror' and 'almost killed a 100 people' remarks."); State v. Sanchez, 82 Hawai'i 517, 528, 923 P.2d 934, 945 (App. 1996) ("The prosecutor's remark in his opening statement that 'Defendant will do anything to stay out of trouble with the law except follow it' was improper argument.").

[8] See State v. Iuli, 101 Hawai'i 196, 208, 65 P.3d 143, 155 (2003) (stating that "[t]he prosecution is permitted to draw reasonable inferences from the evidence, and wide latitude is allowed in discussing the evidence."); State v. Rogan, 91 Hawai'i 405, 413, 984 P.2d 1231, 1239 (1999) (stating that "closing argument affords the prosecution . . . the opportunity to persuade the jury that its theory of the case is valid, based upon the evidence adduced and all reasonable inferences that can be drawn therefrom.").

[9] In State v. Sucharew, 66 P.3d 59 (Ariz. Ct. App. 2003), review denied, 66 P.3d 59 (2003), the Arizona Court of Appeals concluded that the trial court did not abuse its discretion when it permitted the prosecution to use a PowerPoint presentation during its opening statements, stating as follows:

> 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.

*** NOT FOR PUBLICATION ***

IT IS HEREBY ORDERED that the circuit court's August 23, 2004 judgment is affirmed.

DATED: Honolulu, Hawai'i, March 28, 2006.

On the briefs:

James S. Tabe, Deputy
Public Defender, for
for defendant-appellant
Derrick Smith

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Id. at 64. See also Miller v. Mullin, 354 F.3d 1288, 1295 (10th Cir. 2004) ("[W]e acknowledge that the decision to allow the use of visual aids, including pedagogical devices, rests squarely with the trial court."); United States v. Crockett, 49 F.3d 1357, 1360 (8th Cir. 1995) ("The use of summary charts, diagrams, and other visual aids is generally permissible in the sound discretion of the trial court.").