***NOT FOR PUBLICATION***

NO. 26943

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

GENESIS KAUHI, Defendant-Appellant



APPEAL FROM THE THIRD CIRCUIT COURT
(CR. NO. 01-1-333)

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

In this appeal, Defendant-Appellant Genesis Kauhi (Genesis) appeals from the September 16, 2004 Judgment, Guilty Conviction and Sentence (judgment) of the circuit court of the third circuit (the court)[1] convicting Genesis of Murder in the Second Degree under Hawai'i Revised Statutes (HRS) § 707-701.5(1) (1993)[2] (Count I) and Place to Keep Firearms under HRS § 134-6(a)

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[1] The Honorable Greg K. Nakamura presided over this matter.

[2] Hawai'i Revised Statutes (HRS) § 707-701.5(1) (1993), entitled "Murder in the second degree," provides that "[e]xcept as provided in [HRS §] 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." (Emphasis added.) HRS § 707-701(1) (Supp. 2005) pertains to murder in the first degree and penalizes a person who "intentionally or knowingly causes the death" of the following:

(a) More than one person in the same or separate incident;
(b) A law enforcement officer, judge, or prosecutor arising out of the performance of official duties;
(c) A person known by the defendant to be a witness in a criminal prosecution;

(continued...)

(Supp. 2005),[3] and sentencing her to life imprisonment with the possibility of parole with a mandatory minimum term of imprisonment of fifteen (15) years for Count I, and twenty (20) years for Count II, to be served concurrently. For the reasons stated herein, the court's judgment is affirmed.

I.

A.

The facts following were adduced at trial. Genesis and the victim, Gaylon Baldado (Gaylon) were married for approximately twenty-two years, and divorced in 1995. Despite their divorce, the couple continued a relationship wherein Gaylon

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[2](...continued)

(d) A person by a hired killer, in which event both the person hired and the person responsible for hiring the killer shall be punished under this section; or

(e) A person while the defendant was imprisoned.

[3] HRS § 134-6(a) (Supp. 2005), entitled "Carrying or use of firearm in the commission of a separate felony; place to keep firearms; penalty," states, in pertinent part, as follows:

> (a) 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:
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> (1) A felony offense otherwise defined by this chapter;
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> (2) The felony offense of reckless endangering in the first degree under section 707-713;
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> (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
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> (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.

would live with Genesis on a periodic basis at Genesis' residence in Hilo, Island of Hawai'i. Sometime in February 2000, Gaylon moved to Johnston Island[4] in order to work.

Genesis and Gaylon continued to keep in contact by telephone and through letters. According to Genesis, during the period between May 2000 and October 2001, Genesis made over 1200 phone calls to Gaylon while he was on Johnston Island and they continued to refer to each other as husband and wife. Between June 1, 2001 and September 15, 2001, Gaylon transferred money amounting to $16,100 from his Hawai'i Federal and State Employees Credit Union (HFSECU) account to Genesis' account. The record also indicates that Gaylon assisted Genesis in repaying her $9000 truck loan. From March 2001 to October 18, 2001, Gaylon had $150 of his paycheck, which was deposited directly to his credit union account, transferred to pay for Genesis' truck, amounting to $2400.

The HFSECU records also revealed that from January 2001 to October 18, 2001, a total of $26,715.94 was deposited into Genesis' account. During the same period, Genesis' monthly expenses totaled $28,375.91. Genesis was also a named beneficiary on Gaylon's HFSECU account, as well as his account with Onomea Federal Credit Union. According to Genesis, she only found out that she was a beneficiary of these credit union accounts after Gaylon's death.

[4] Johnston Island is located southwest of Honolulu.

When Gaylon made visits to Hilo in April, June, and November 2000, he stayed with Genesis. Sometime in March 2001, Gaylon and his then-girlfriend, Jennifer Sheldon (Sheldon), who worked with Gaylon on Johnston Island, took a trip to Honolulu, apparently without the knowledge of Genesis. On the second day after checking into the Hobron Hotel, Sheldon answered a telephone call from a woman asking for Gaylon. According to Sheldon, Gaylon appeared upset and asked the woman, "How did you get this number?" After their conversation, Gaylon allegedly stated that he would call Genesis "when I get back on the island." After their conversation ended, Gaylon and Sheldon checked out of the Hobron Hotel and transferred to the Pagoda Hotel. Despite this, Genesis called the Hobron Hotel three more times the next day.

Sheldon related that sometime in June 2001, Gaylon asked her to marry him and told her that he would inform Genesis in person about their relationship. According to Sheldon in September 2001, Sheldon accepted the marriage proposal but no date was set. On October 10, 2001, Gaylon returned to Hilo for the fourth time for a dental appointment, and to negotiate and arrange for the purchase of real property, again staying with Genesis. Prior to his departure from Johnston Island, Sheldon gave Gaylon a rose quartz heart medallion and a letter. According to Sheldon, she and Gaylon were supposed to meet in Honolulu on October 18, 2001, and they would proceed to Las Vegas

after his trip to Hilo. Sheldon testified that Gaylon called her on October 15, 2001, wherein he allegedly denied that he was staying with Genesis.

B.

On October 18, 2001, at approximately 5:12 a.m., the first call to 9-1-1 regarding the incident was made by Genesis. Officers John Stewart (Stewart) and James Correa (Correa) responded to reports of a domestic incident with possible gunshots, and shortly thereafter, arrived at the residence of Elizabeth Lee (Lee), Genesis' neighbor. Stewart found Gaylon lying naked on the porch of Lee's residence with a towel draped over him. Stewart pulled back the towel and saw a gunshot wound and bloodstains on the towel. Stewart then asked Gaylon what had happened, and Gaylon responded that Genesis had shot him. Stewart inquired of Gaylon about the whereabouts of the gun, and Gaylon responded by pointing his feet towards a nearby bush. The police subsequently recovered a semi-automatic handgun in the bush, two feet away from Gaylon.

Stewart and Correa proceeded to Genesis' residence. As they approached the front porch area of Genesis' residence, Stewart called out, "Genesis." Correa testified that Genesis responded, "Yes. It's okay. Come inside." On the other hand, according to Stewart, Genesis only stated, "Yes." As the officers approached the front porch area, they saw Genesis sitting on a chair in the living room through the open front

door. As they walked up the stairway leading to the front door, they observed blood splattered on the stairway and on the front porch. Once inside Genesis' residence, Stewart found Genesis sitting with her hands on her lap. According to Stewart, Genesis appeared calm but her hands were shaking.

Stewart then asked Genesis, "Are you okay? Are you hurt? Is there anybody in the house?" Genesis informed Stewart that she was not hurt and that no one was in her residence. Genesis then asked how Gaylon was and stated that she was going to take him to the hospital and that Gaylon was her ex-husband. Stewart then told Genesis that Gaylon was being taken to the hospital. Stewart informed Genesis that Gaylon stated that she shot him, to which Genesis responded, "Yeah, I shot him. Grabbed the gun. The gun went off." Stewart then instructed Genesis not to tell him anything more.

After being placed under arrest, Genesis complained that the back of her neck was swollen. Although Stewart did not notice any swelling, he noticed that Genesis had two reddish marks or lines on the back of her neck. Genesis told Stewart that Gaylon bashed her twice and that she may have blacked out. When Correa left Genesis' residence to retrieve paper bags, in order to cover Genesis' hands for possible evidence of gunpowder residue, he observed an L-shaped stick on the porch. When he stopped to examine the stick, Genesis stated, "I used that to hit him and push him out."

After covering Genesis' hands with the paper bags and arresting her, Correa escorted her to the police vehicle. When they passed a white Ford pickup truck parked outside Genesis' residence, Correa noticed blood on the rocker panel underneath the passenger door. As he looked into the passenger side window and observed blood on the seat and console area, Genesis said, "It's like that because I tried to take him to the hospital."

After Genesis was placed in custody, a search of Genesis' residence and truck revealed that there was blood in the hallway fronting the entry to the bathroom and on the bathroom floor. An examination of the shower curtain revealed that there was a hole in the curtain about one-and-one-half to two inches in diameter and gray colored residue around the hole. According to measurements made by the police, the distance between the left edge of the hole and the floor was forty-seven inches. When the police opened the curtain, they found a small piece of the curtain and blood on the shower stall floor. They also observed a small piece of the curtain on the shower stall floor and coagulated blood in the corner of the stall. They discovered a bullet hole and a small piece of flesh on the rear shower stall wall.

C.

On October 18, 2001, at approximately 8:40 a.m., following the incident at issue, Genesis was read her rights

under Miranda v. Arizona, 384 U.S. 436 (1966),[5] and interviewed by Detective Greg Esteban (Esteban). Genesis gave the following rendition of the facts in that interview, which was recorded on videotape.

At approximately 3:00 a.m., she and Gaylon woke up so that Gaylon could be at the airport by 5:15 a.m. After they engaged in sexual intercourse, they took a shower together at about 4:00 a.m. Both exited the shower. Gaylon left the bathroom and returned with a gun. Genesis initially stated that she grabbed the gun and shot him or that he may have shot himself. However, Genesis later stated that when she saw the gun in Gaylon's hand, she ducked into Gaylon, and he went on top of her. When the gun had fallen to the ground following the struggle, Genesis grabbed the gun and shot Gaylon. Genesis dropped the gun, and Gaylon picked it up and pointed it at her.

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[5] In Miranda v. Arizona, 384 U.S. 436, 444-45 (1966) , the United States Supreme Court summarized a criminal defendant's rights prior to custodial questioning by law enforcement officers in the following manner:

> Prior to any [custodial] questioning, the [criminal defendant] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly[,] and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking[,] there can be no questioning.... The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

(Emphasis added.)

Genesis wanted to call the police, but Gaylon instructed her to call an ambulance and take him to the hospital. Genesis related that, as they were leaving Genesis' residence, Gaylon had hit her with a stick, and, as a result, she had "blanked" out. Genesis also recalled that she had hit Gaylon with a chair. They went outside and Gaylon got into Genesis' truck. Genesis returned to her residence to call the police, at which time, Gaylon went across the street to Lee's residence. Genesis then went across the street to Lee's residence. Genesis told Lee and her grandson, Nano, not to help Gaylon because he had a gun. When Genesis returned to her residence, the police called back. The police subsequently arrived.

According to Genesis, she did not have an argument with Gaylon the night before the shooting. The last argument they had was three days prior, allegedly because Gaylon was unhappy that Genesis had been living "a life of leisure" because the money he deposited into Genesis' account was spent on new furniture, a computer, and on repairs of her residence.

At about 10:02 a.m, after Esteban was notified that an attorney, Andrew Wilson (Wilson), had been hired on Genesis' behalf, the interview was stopped. Later that day, at approximately 7:00 p.m., Esteban visited Genesis in her cellblock to inform her that Gaylon had died and she was now under investigation for murder. In shock, Genesis sat up and asked, "Gaylon died?" On October 19, 2001, at approximately 8:55 p.m,

Esteban again made contact with Genesis at her cellblock to notify her that she was going to be charged with Gaylon's murder. Genesis responded quietly by saying, "I don't wanna live, bruddah . . . . You can give me the lethal injection." Esteban then told Genesis that he was going to have her placed on suicide watch to which she responded, "I'm a murderer, Bruh."

II.

On December 9, 2002, prior to trial, Genesis filed her Motion to Suppress Defendant's Statements and Evidence (motion to suppress) alleging, inter alia, that Genesis (1) "was not advised of her constitutional rights to silence or to counsel at that time, nor did [Stewart and Correa] adhere to the procedural [Miranda] requirements prior to the questioning[,]" (2) following her arrest and being placed in custody, "[Genesis] was contacted by [Esteban] . . . to expressly question [Genesis] about the shooting[,]" (3) "sometime during the questioning Esteban advised [Genesis] of her [Miranda] rights - he had not done so prior to the start of any questioning[,]" (4) "[Genesis] eventually allegedly waived her rights to silence and to counsel[,]" (5) "interrogation was interrupted when [Wilson] arrived at the Hilo police station to assist [Genesis,]" (6) "[Genesis] was allowed to confer with [initial counsel,]" (7) "[Wilson] told Esteban that [Genesis was] not [to] be questioned further[,] (8) "Esteban was contacted by Deputy Public Defender [Melody Parker (Parker)], and was told that [she] was representing

[Genesis] and that the police were not to interview or interrogation [sic] in the future[,]" (9) "Esteban contacted [Genesis] and told [her] of [Gaylon's] death, eliciting from [Genesis] a physical reaction and verbal statement[,]" (10) "while at the . . . cellblock, [Genesis] was charged by [the Hawai'i County Police Department (HCPD)] with the instant offenses[,]" and (11) "[i]n response to being told of the charges, [Genesis] made several additional statements to the officers of the HCPD." On the same day, Plaintiff-Appellee State of Hawai'i (the prosecution) filed its Motion to Determine Voluntariness of Defendant's Statements.

On November 5, 2003, after hearing arguments on Genesis' and the prosecution's motions, the court concluded, inter alia, that (1) Genesis's statement, "Yeah, I shot him. He was going to shoot me. Grab gun, went off[,]" (2) Genesis' response to Esteban on October 18, 2001 at 7:00 p.m., "Gaylon died?" and (3) Genesis' responses to Esteban on October 19, 2001 at 8:55 p.m., "I no like live, braddah. Uh, give me the lethal injection" and "I'm a murderer," were not the product of police interrogation and were voluntarily made.

With respect to the statements made to Stewart and Correa, the court found that the officers' purpose for going to Genesis' residence was to contact Genesis, who they assumed shot Gaylon, that Stewart also wanted to see if there were people other than Genesis in her residence, as well as to check on

Genesis' physical condition. The court adopted Correa's version of the facts that Genesis stated "Yes. It's okay, Come inside." The court found that Stewart's purpose for making the statement, "[H]e stated that you had shot him," was to advise her of the allegations and statements made by Gaylon and that it was not made in a custodial interrogation setting.

According to the court, despite the fact that Genesis was a suspect, she was not yet arrested and the officers "were merely making sure that the area was safe." The court noted, however, that Stewart conceded it was possible that, in response to his statement about Gaylon's allegations, Genesis could have made an incriminating statement. Nevertheless, the court concluded that Stewart's statement "was proffered in such a way that he did not know nor should he reasonably have known that it was probable that [Genesis] would respond with an incriminating response" and that Stewart's statement "did not constitute sustained questioning and [was] not designed to overcome the will of [Genesis]." The court also noted that, "[i]n fact, [Stewart] attempted to protect [Genesis'] interests by advising her not to make any further statements."

As to statements made to Esteban during the videotaped interview, the court ruled that the statements in that interview were made voluntarily. The court also concluded that Genesis' statements to Esteban while she was in her cellblock "were not the result of police interrogation and were voluntarily made."

III.

A.

During trial, Genesis elected to take the witness stand. Genesis testified that she and Gaylon were in the shower and that Gaylon left the shower first. According to Genesis, Gaylon returned to the bathroom with a gun in his right hand and with an "evil look" on his face. Genesis then "rushed out of the shower and went straight for his legs." Genesis maintained that a struggle ensued and that "the next thing [she knew], Gaylon went into the shower stall . . . [with his] left shoulder." Genesis then related that, as Gaylon was in the shower, she "saw the gun on the floor, . . . picked it up, . . . and shot." Genesis admitted that she stood outside the shower, pointed a gun in Gaylon's direction, and pulled the trigger. Her purpose in shooting Gaylon, Genesis asserted, was to "stop him from getting the gun and shooting [her]." Genesis recounted that after the shooting, she went back into her residence to get the keys of her truck so that she could take Gaylon to the hospital, but that she "blacked out."

Genesis also testified that the first time she learned about Gaylon having a girlfriend on Johnston Island was on the night of Gaylon's wake service, when her sister-in-law, Shirley Baldado (Baldado), informed her of this fact. Baldado testified that when she told Genesis about Gaylon having a girlfriend, Genesis appeared to be in shock as though she did not know of

this. Genesis admitted to calling Gaylon at the Hobron Hotel in March 2001, after receiving an anonymous phone call informing her that Gaylon was in Honolulu. However, she denied that she thought Gaylon was in Honolulu with a girlfriend or that she suspected it was Gaylon's girlfriend, Sheldon, who answered the phone. Instead, Genesis believed that Gaylon was in the company of three or four other individuals and that the woman who answered the phone was the wife of Gaylon's friend. Genesis disagreed that she looked inside Gaylon's attache case or that she found a quartz medallion therein.

Genesis acknowledged Gaylon's injuries but denied knowing how Gaylon received them. According to Genesis, she did not hit Gaylon with a stick. Gaylon also denied making the statement, "No help that fuckah," to her neighbors, denied that she tried to clean up the "scene," and denied that she tried to shoot Gaylon a second time but failed because the handgun jammed. Gaylon related that she never saw the gun prior to the incident and that she did not know from where the gun had come.

Genesis further denied that she was financially dependent on Gaylon, worried about losing financial support if Gaylon had "another woman," considered the consequences of Gaylon leaving her, and thought about Gaylon not providing her money. However, Genesis admitted to "spending a lot of money" amounting to more than the income she earned. At trial, Genesis explained that her testimony might have differed from the statement she

provided to Esteban because she was tired, cold, dizzy, scared, traumatized, and confused and that her condition affected her ability to recall the events of that morning.

The prosecution called Jeffrey Wheeler (Wheeler), a forensic biomechanic who recreated a scale model of Genesis' shower, and used the model to conduct a trajectory analysis. Wheeler's opinion was consistent with Genesis' admission at trial that she shot Gaylon while he was in the shower. According to Wheeler, the only way the shooting occurred would be with Gaylon standing in the shower upright. Wheeler further opined that a shooter with the height consistent with that of Genesis approached the shower holding a gun out in front of her approximately forty-three-and-one-half inches above the floor, stood close to the shower curtain, pointed the gun toward Gaylon, and shot him while he stood upright inside the shower with his back to the faucet. Wheeler also testified that, based on the measurements he made of the width of the shower stall, which was thirty-five inches, Gaylon would "basically fill this space."

The prosecution called Raphael Kaupu, a neighbor of Genesis, who heard pounding on Lee's front door and Gaylon yelling for help. He testified that he also heard Genesis from her house saying, "Mrs. Lee, no help that fuckah."

The prosecution called Dr. Alvin Omori (Omori), a forensic pathologist, who testified that in addition to the gunshot wound, Gaylon also received numerous injuries. According

to Omori, Gaylon suffered scalp injuries consistent with being hit by the stick recovered from Genesis' residence. Omori related that Gaylon had an injury to the web area between the left thumb and left second finger caused by blunt force trauma, and that this injury was possibly a defensive wound.

B.

On July 21, 2004, at the close of trial, the court ruled, over defense counsel's objection, that it would be instructing the jury on the lesser included offense of reckless manslaughter.[6] Genesis' counsel argued that if the court gave the reckless manslaughter instruction,[7] the defense was also entitled to an extreme mental and emotional disturbance (EMED) instruction as well.[8] The court denied defense counsel's request

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[6] HRS § 707-702(1) (1993), entitled "Manslaughter," provides in pertinent part that "[a] person commits the offense of manslaughter if . . . [h]e recklessly causes the death of another person."

[7] On appeal, Genesis does not object to the court's instruction on reckless manslaughter.

[8] Counsel for Defendant-Appellant Genesis Kauhi (Genesis) proffered the following instruction concerning extreme mental or emotional disturbance (EMED) manslaughter:

> If and only if you unanimously find that all the elements of [m]urder in the [s]econd [d]egree have been proven by the prosecution beyond a reasonable doubt [and you unanimously find that [Genesis] was not justified in using deadly force], then you must consider whether, at the time [Genesis] caused the death, she 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 [Genesis'] situation under the circumstances of which [Genesis] was aware or as [Genesis] believed them to be.

(Some brackets in original and some added.)

for an EMED instruction.[9] After about a day-and-a-half of jury deliberations, the jury returned a verdict of guilty as charged.

IV.

On appeal, Genesis contends that (1) her statements (a) to Stewart at her residence, "Yeah, I shot him. He was gonna shoot me. Grab gun, went off," (b) to Esteban while in custody on October 18, 2001, "Gaylon died?" and (c) to Esteban on October 19, 2001, "I no like live, braddah. Uh, give me the lethal injection[,]" and "I'm a murderer," were procured in violation of her constitutional right against self-incrimination; and (2) she was entitled to have the jury instructed on the mitigating defense of EMED manslaughter.[10] Accordingly, Genesis urges this court to "reverse" the court's judgment because her statements were used against her in violation of her rights under

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[9] In rejecting defense counsel's request for an instruction on EMED manslaughter, the court stated as follows:

> In this case, [Genesis] has not testified that she acted under extreme mental [or] emotional disturbance. She testified that she was responding to a perceived threat from Gaylon Baldado in the form of him holding a firearm and having a threatening demeanor.
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> She did not testify as to the existence of any other event which resulted in extremely unusual or overwhelming stress, which as a result self control and reasonable was [sic] overborne by intensity such as passion, anger, distress, grief, excessive agitation or other similar emotion.
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> In other words, there's no evidence supporting the subjective prong of the objective test, and therefore the [c]ourt is not going to give the EMED instruction.

(Emphasis added.)

[10] Genesis does not raise any arguments regarding the defense of self defense although an instruction as to that was apparently given.

the Fifth[11] and Fourteenth Amendments[12] to the United States Constitution and under article I, section 10 of the Hawai'i Constitution.[13] Moreover, Genesis contends that the court's refusal to instruct the jury on EMED manslaughter deprived her of

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[11] The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(Emphasis added.)

[12] Section 1 of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(Emphasis added.)

[13] Article I, section 10 of the Hawai'i Constitution states as follows:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law or upon information in writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide, except in cases arising in the armed forces when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy; nor shall any person be compelled in any criminal case to be a witness against oneself.

(Emphasis added.)

her substantial rights, and the error requires that she be given a new trial.

In its answering brief, the prosecution maintains that (1) the statements to Stewart and Esteban were not in violation of Genesis' Fifth Amendment right against self-incrimination inasmuch as (a) Genesis' statements to Stewart were spontaneously made and Genesis was not subjected to custodial interrogation, (b) Genesis' statements to Esteban were unsolicited and not the result of custodial interrogation; (2) even if Genesis' statements to Stewart and Correa should have been suppressed, this court should rule that the admission was "harmless beyond a reasonable doubt"; and (3) Genesis did not satisfy the subjective/objective test by proferring a "reasonable explanation" for the EMED instruction.

In her reply brief Genesis contends as to (3) of the prosecution's argument that "because the record reflected the circumstances as [she] believed them to be [which] supported a reasonable explanation or excuse for her disturbance, [she] satisfied the 'subjective/objective' test." Genesis did not respond to items (1) and (2) of the prosecution's argument on the grounds they were "fully addressed by the opening brief."

V.

On appeal, a trial court's ruling on a motion to suppress is reviewed de novo "to determine whether the ruling was 'right' or 'wrong.'" State v. Maldonado, 108 Hawai'i 436, 442,

121 P.3d 901, 907 (2005) (quoting State v. Kauhi, 86 Hawai'i 195, 197, 948 P.2d 1036, 1038 (1997)). The proponent of a motion to suppress has the burden of establishing "not only that the evidence sought to be excluded was unlawfully secured, but also, that his or her own . . . rights were violated." State v. Edwards, 96 Hawai'i 224, 232, 30 P.3d 238, 246 (2001) (brackets omitted) (quoting State v. Augafa, 92 Hawai'i 454, 464, 992 P.2d 723, 733 (App. 1999). "The proponent of the motion to suppress must satisfy this burden of proof by a preponderance of the evidence[.]" Id. (quoting State v. Wilson, 92 Hawai'i 45, 48, 987 P.2d 268, 271 (1999)).

This court has stated that "factual determinations made by the trial court deciding pretrial motions in a criminal case is governed by the clearly erroneous standard" and that "a finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." Edwards, 96 Hawai'i at 231, 30 P.3d at 245. A circuit court's conclusions of law are reviewed under the right or wrong standard. Id. at 231-32, 30 P.3d at 245-46 (citing State v. Eleneki, 92 Hawai'i 562, 564, 993 P.2d 1191, 1193 (2000)). Therefore, "[a] conclusion of law is not binding upon an appellate court and is freely reviewable for its correctness." State v. Keliiheleua, 105 Hawai'i 174, 178-79, 95

P.3d 605, 609-10 (2004) (quoting State v. Furutani, 76 Hawai'i 172, 180, 873 P.2d 51, 59 (1994)). This "court examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answer to it." Id. at 179, 95 P.3d at 610 (quoting Island Ins. Co. v. Perry, 94 Hawai'i 498, 501, 17 P.3d 847, 850 (App.2000)).

With respect to jury instructions, it has been said that "[w]hen jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Hatori, 92 Hawai'i 217, 221, 990 P.2d 115, 119 (App. 1999) (quoting State v. Kinnane, 79 Hawai'i 46, 49, 897 P.2d 973, 976 (1995)). Erroneous jury instructions are "'presumptively harmful and are a ground for reversal unless it appears from the record as a whole that the error was not prejudicial.'" State v. Jones, 97 Hawai'i 23, 30, 32 P.3d 1097, 1104 (App. 1998) (quoting State v. Pinero, 70 Haw. 509, 527, 778 P.2d 704, 715 (1989)). Moreover, with respect to erroneous jury instructions, this court has stated as follows:

> Error 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 might have contributed to conviction.

State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997) (emphasis added) (quoting State v. Heard, 64 Haw. 193, 194, 638 P.2d 307, 308 (1981)).

VI.

It should be noted "that the protections enumerated in [Miranda]" are also "independently grounded in the privilege against self-incrimination contained in the Hawai'i Constitution." State v. Joseph, 109 Hawai'i 482, 493, 128 P.3d 795, 806 (2006) (quoting State v. Santiago, 53 Haw. 254, 265-66, 492 P.2d 657, 664 (1971)). This court has held that a criminal defendant's rights under Miranda is triggered by two criteria: "(1) the defendant must be under interrogation; and (2) the defendant must be in custody." State v. Ah Loo, 94 Hawai'i 207, 210, 10 P.3d 728, 731 (2000) (quoting Kauhi, 86 Hawai'i at 204, 948 P.2d at 1045). Interrogation has been construed by this court as "express questioning or its functional equivalent." State v. Melemai, 64 Haw. 479, 481 n.3 643 P.2d 541, 544 n.3 (1982) (quoting Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980)). The Supreme Court in Innis also explained that interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id. at 301. According to the Innis court, "[t]he latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." Id.

The Supreme Court said in Miranda that custodial interrogation concerns "questioning initiated by law enforcement

officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way." 384 U.S. at 444. In order to determine whether "interrogation" is "custodial" in nature, this court has said "the totality of circumstances at the time of questioning" must be examined. State v. Sugimoto, 62 Haw. 259, 265, 614 P.2d 386, 391 (1980) (quoting State v. Patterson, 59 Haw. 357, 361, 581 P.2d 752, 755 (1978)). In examining the totality of the circumstances, the relevant factors include "time, place and length of the interrogation, the nature of the questions asked, the conduct of the police at the time of interrogation, and any other pertinent factors." Kauhi, 86 Hawai'i at 204, 948 P.2d at 1045 (quoting State v. Blanding, 69 Haw. 583, 586, 752 P.2d 99, 100 (1988)).

Among the factors to be considered in deciding whether custodial interrogation took place are whether or not an investigation's "focus" had fixed on a defendant, and when, where, and in what surroundings the making of the statement took place. Patterson, 59 Haw. at 359-61, 581 P.2d at 754-55. While focus of the investigation is not a determinative factor, "it nevertheless continues to be an important factor in the determination of whether the defendant was subjected to custodial interrogation." Id. at 361, 581 P.2d at 755. In State v. Ketchum, 97 Hawai'i 107, 126, 34 P.3d 1006, 1025 (2001), the following test to determine custody was adopted:

> [W]e hold that a person is "in custody" for purposes of article I, section 10 of the Hawaii Constitution if an objective assessment of the totality of the circumstances reflects either (1) that the person has become impliedly accused of committing a crime because the questions of the police have become sustained and coercive, such that they are no longer reasonably designed briefly to confirm or dispel their reasonable suspicion or (2) that the point of arrest has arrived because either (a) probable cause to arrest has developed or (b) the police have subjected the person to an unlawful "de facto" arrest without probable cause to do so.

Where statements made by a defendant are not the product of custodial interrogation, it need not be shown that a defendant was advised of his or her rights in order for the statements to be admitted. State v. Pahio, 58 Haw. 323, 327, 568 P.2d 1200, 1204 (1977). It has also been held that "unsolicited, spontaneous, and voluntary" statements are admissible. State v. Medeiros, 4 Haw. App. 248, 253, 665 P.2d 181, 185 (1983) (citing State v. Lincoln, 3 Haw. App. 107, 116, 643 P.2d 807, 814-15 (1982), superseded in part by statute as stated in Briones v. State, 74 Haw. 442, 456 n.7, 848 P.2d 966, 974 n.7 (1993).

With respect to temporary investigative detentions, this court in Ah Loo stated that a person "is not subjected to custodial interrogation when the officer poses noncoercive questions to the detained person that are designed to confirm or dispel the officer's reasonable suspicion." 94 Hawai'i at 211, 10 P.3d at 732 (internal quotation marks omitted). The Supreme Court has also stated that in an investigatory stop, "[an] officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions," Berkemer v.

McCarty, 468 U.S. 420, 439 (1984), "that a particular person has committed, is committing, or is about to commit a crime," id.

VII.

With respect to Genesis' contention 1(a) concerning her statement to Stewart, Genesis challenges the court's finding of fact (FOF) no. 20, in denying Genesis' motion to suppress and granting the prosecution's motion to determine voluntariness of Genesis' statements, that stated as follows:

> According to [Stewart], after entering the residence and determining that it was safe, he asked [Genesis] if she was okay. She said, "Yes." He then asked [Genesis] if there was anyone else in the house. She said, "No." [Genesis] then asked, "How is he?" and stated that she was going to take him to the hospital. Officer Stewart said that the paramedics were taking care of him and were going to take him to the hospital. Further, in the next breath, [Stewart] told [Genesis] that "[Gaylon] stated that you had shot him." The purpose for making the statement was to advise her of the allegations and statements that were made by [Gaylon]. [Genesis] stated, "Yeah, I shot him. He was gonna shoot me. Grabbed the gun, went off."

Genesis also challenges the court's conclusion of law (COL) No. 13, which was entered in the following manner:

> Based upon the totality of the circumstances, [Genesis'] statements set forth in FOF 20, were not the product of police interrogation. This is based upon the following circumstances: At the time the statements were made, [Genesis] was a suspect. However, [Genesis] was not yet arrested. The police officers were merely making sure that the area was safe. The specific question asked by [Stewart] of [Genesis] was designed to make sure that she was not hurt and was safe. [Stewart's] statement advising [Genesis] that [Gaylon] stated that [Genesis] shot him was not a question. The purpose of the statement was to advise her of the allegation made by [Gaylon]. However [Stewart] concedes that it was possible that, in response to his statement, [Genesis] could make an incriminating response. Nevertheless, [Stewart's] statement was proffered in such a way that he did not know nor should he reasonable have known that it was probable that [Genesis] would respond with an incriminating response. In any case, [Stewart's] question and statement did not constitute sustained questioning and were not designed to overcome the will of [Genesis]. In fact, [Stewart] attempted to protect [Genesis'] interest by advising her not to make any further statements. The statements were also voluntarily made.

(Emphasis added.) Genesis argues that Stewart's remark, "Gaylon stated that you had shot him," was the "functional equivalent of express questioning" because Stewart "reasonably should have known that his words would likely elicit an incriminating response." According to Genesis, "there was clearly no legitimate purpose to inform [her] of Gaylon's accusation." Genesis explains that "[i]t is unreasonable to suggest that a suspect, who was not informed of her Miranda rights, would simply remain silent" but that "it is reasonable and highly likely that a suspect, who was not given her Miranda rights, would respond to Stewart's remark, by either admitting, denying or explaining the circumstances of the shooting[.]" Genesis states that she and Stewart "were engaged in conversation" and that Stewart conceded that "it was possible that such a statement would invite a response." Genesis concludes that "when one considers the totality of the circumstances, it is clear that Stewart's remarks constituted interrogation."

The circumstances lead to the conclusion that the first of the Ah Loo factors, namely that "the defendant must be under interrogation," 94 Hawai'i at 210, 10 P.3d at 731, is met. Stewart's remark constitutes "express questioning or its functional equivalent," Melemai, 64 Haw. at 481 n.3, 643 P.2d at 544 n.3, which "was . . . reasonably likely to evoke an incriminating response," State v. Roman, 70 Haw. 351, 357, 772 P.2d 113, 116 (1989), from Genesis. However, it cannot be said that such interrogation was made while Genesis was in custody.

Genesis contends that she "was clearly in custody as the point of arrest ha[d] arrived," inasmuch as Stewart had probable cause to arrest her. Genesis argues that "[t]he police had already observed that Gaylon had been shot, and Gaylon had told them that [Genesis] had shot him." However, a determination of whether Genesis was in custody at the time of Stewart's remark requires more than assertions that there was a reasonable suspicion of criminal activity on the part of law enforcement officers.

A review of the circumstances surrounding the making of Stewart's remark and Genesis' response to that remark reveals that after Gaylon told Stewart that Genesis shot him, Stewart and Correa proceeded to Genesis' residence and noticed that the door was open. The court found credible Correa's recollection that after Stewart called out Genesis' name, she replied, "Yes. It's okay, come inside." Genesis appeared calm to Stewart and Correa. When asked by Stewart if she was hurt and if anyone else was in her residence, Genesis informed him that she was not, and that no one else was in the residence. Genesis asked how Gaylon was, and stated that she was going to take him to the hospital and that Gaylon was her ex-husband. Stewart told Genesis that Gaylon was being taken to the hospital. Stewart informed Genesis that Gaylon stated that she shot him, to which Genesis responded, "Yeah, I shot him. Grabbed the gun. The gun went off." Genesis was then instructed by Stewart not to say anything further.

The evidence indicates that, in the course of their investigation, Stewart and Correa may have had a reasonable suspicion to believe that criminal activity had taken place. However, the circumstances do not indicate that Genesis was "impliedly accused of committing a crime because the questions of the police [had] become sustained and coercive," Ketchum, 97 Hawai'i at 126, 34 P.3d at 1025. Also, it cannot be concluded that "probable cause to arrest has developed or . . .[that Stewart and Correa had] subjected [Genesis] to an unlawful "de facto" arrest without probable cause to do so[,]" id., inasmuch as the circumstances of the shooting were unknown to them at the time. Stewart and Correa responded to reports of a domestic dispute. Beyond the fact of shooting, Stewart and Correa were unaware of how or why Genesis shot Gaylon. Immediately after Genesis made her statement, "Yeah, I shot him . . . [g]rabbed the gun . . . [t]he gun went off," Stewart admonished Genesis not to say anything more. Genesis neither argues that Stewart's questioning was coercive in nature nor that she felt that she was not free to leave. Hence, Genesis was not the subject of custodial interrogation when Stewart posed noncoercive questions to Genesis. Ah Loo, 94 Hawai'i at 211, 10 P.3d at 732.

Under Miranda, it cannot be said that Genesis was "deprived of freedom of action in a significant way." 384 U.S. at 444. As the prosecution maintains, there is no indication in the record that Stewart and Correa informed Genesis or impressed upon her that she was not free to go. The record is also devoid

of any suggestion that Genesis was subjected to sustained questioning. Accordingly, inasmuch as the court's finding with regard to Genesis' statement to Stewart was supported by "substantial evidence," Edwards, 96 Hawai'i at 231, 30 P.3d at 245, and it cannot be said that this court is "left with a definite and firm conviction that a mistake has been made," no error arises from FOF no. 20 with regard to Genesis' statement.

As to the court's conclusion in COL no. 13, it appears that the court placed undue emphasis on Stewart's purpose and intent in informing Genesis of what Gaylon had told him. See Innis, 446 U.S. at 301 (stating that custodial interrogation "focuses primarily upon the perceptions of the suspect, rather than the intent of the police"). However, the court's decision that Genesis' statement "was not a product of police interrogation" was ultimately right but on the ground, as earlier stated, that Genesis was not in custody at the time of her statement.[14]

VIII.

As to Genesis' contentions (1)(b) and (c), her statements to Esteban, namely, (1) "Gaylon died?", made on October 18, 2001 after Esteban informed her that Gaylon had died and that Genesis was now being investigated for murder, (2) "I don't wanna live, bruddah . . . . You can give me the lethal

[14] We express no opinion as to the court's other reasons in concluding that the statements made by Genesis to Stewart were not a product of police interrogation.

injection[,]" made on October 19, 2001, and (3) "I'm a murderer, Bruh," made on October 19, 2001, should have been suppressed. Genesis challenges COL No. 16, which concluded that these statements "were not the result of police interrogation and were voluntarily made."

Contrary to the court's conclusion, assuming that the three statements to Esteban were either inculpatory or exculpatory, the challenged statements constituted custodial interrogation. There is no dispute that Genesis was in custody. Esteban was the detective who had conducted the initial interrogation of Genesis. In this context Esteban "should have known that his . . . words or conduct [in his subsequent contacts] were reasonably likely to evoke an incriminating response." Roman, 70 Haw. at 357, 772 P.2d at 116.

Additionally, this court has held that "once an accused has expressed his desire to deal with police interrogators only through counsel, he cannot be further questioned until counsel has been made available to him, unless the accused initiates further communication, exchanges, or conversations with the police." State v. Mailo, 69 Haw. 51, 53, 731 P.2d 1264, 1266 (1987) (citing Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)). Thus there is "a 'bright-line' rule that once the right to counsel has been invoked[,] all questions must cease." Mailo, 69 Haw. at 53, 731 P.2d at 1266 (quoting Smith v. Illinois, 469 U.S. 91.98 (1984); see also Miranda, 384 U.S. at 473-74 (stating that

"[i]f the individual indicates in any manner, at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease" (emphasis added)).

As Genesis argues in her opening brief, Esteban knew that when he approached Genesis in her cellblock, Genesis had previously asserted her Miranda rights through her initial counsel, Wilson. This terminated the earlier interview on videotape. Further, Genesis' second counsel, Parker, advised the police that they were not to interview or interrogate Genesis in the future. The record does not indicate that Genesis initiated a conversation with Esteban. Despite this, Esteban proceeded to reinitiate contact with Genesis on two separate occasions.

Speaking to Genesis on these occasions amounted to the "functional equivalent," Melemai, 64 Haw. at 481 n.3, 643 P.2d at 544 n.3, of express questioning by the police and violated Genesis' privilege against self-incrimination and her rights under Mailo. Accordingly, it was error for the court to rule in its COL no. 16 that Genesis' statements to Esteban were voluntary and not a product of custodial interrogation.

IX.

Despite the court's admission of Genesis' statements to Esteban, the prosecution contends in its second argument that reversal or vacatur of the court's judgment is not warranted. With respect to the erroneous admission of statements, this court has stated that "[w]here there exists a reasonable possibility

that a constitutional error of the trial court contributed to the conviction of the defendant, the error necessitates reversal." State v. Amorin, 61 Haw. 356, 363, 604 P.2d 45, 50 (1979). If no "reasonable possibility" exists that the erroneous admission contributed to the conviction, such error is deemed "harmless beyond a reasonable doubt." Id.

In light of the substantial evidence against Genesis, as pointed out by the prosecution, it cannot be said that Genesis' statements to Esteban raised a "reasonable possibility . . . that the erroneous admission [of those statements] contributed to [her] conviction[.]" Id. Based on the evidence, it appears that the prosecution's position is correct. First, Gaylon indicated to Stewart that Genesis had shot him. Second, Genesis admitted to Stewart that she did shoot Gaylon, a statement that was admissible in evidence. See supra. Third, the prosecution's expert witness, Wheeler, opined, based on the trajectory of the bullet, that a person of Genesis' stature had shot Gaylon while he was in the shower stall and with the shower curtain closed. Fourth, Genesis admitted to Esteban, during the videotaped interview, that she grabbed the gun and fired in Gaylon's direction. Fifth, Genesis reiterated her assertion that she shot Gaylon from outside the shower stall. Finally, evidence was adduced at trial that Gaylon possibly suffered a defensive wound from the recovered stick. Genesis does not specifically address the prosecution's harmless beyond a reasonable doubt

argument. In sum, as the prosecution contends, Genesis' conviction was supported by substantial evidence and admission of her statements to Esteban, although in error, was "harmless beyond a reasonable doubt." Amorin, 61 Haw. at 363, 604 P.2d at 50.

X.

With respect to Genesis' challenge (2) to the court's failure to instruct the jury on EMED manslaughter, the court did not err. As described in HRS § 707-702(2) (Supp. 2005), in a prosecution for murder or attempted murder, "it is an affirmative defense, which reduces the offense to manslaughter or attempted manslaughter, that the defendant was, at the time the defendant caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation."

A.

Genesis makes the following arguments in her opening brief. Genesis contends that the EMED instruction should have been given because evidence showed that Genesis "had an emotional reaction to Gaylon's romantic affair with another woman, as a result of which there was a loss of self-control and reason was overborne by intense feelings of passion, anger, and jealousy." According to Genesis, she had "very intense romantic and passionate feelings for Gaylon even though they divorced in 1995." In addition, Genesis states that "there was evidence that

Gaylon's feelings toward [her] was mutual, or at least Gaylon led [her] to believe that, he too, had the same feelings for her." Genesis maintains that Gaylon continued to support her financially, Gaylon stayed with her whenever he visited Hilo, and they spent significant time together. Genesis contends that because Gaylon, who she was financially dependent on, was having a romantic and sexual affair with another woman, a reasonable explanation or excuse exists for her to "lose self-control and . . . be overborne by intense feelings of passion, anger, and jealousy." Genesis states that even if she asserted that she only killed Gaylon in self-defense, "she had the right to not only argue inconsistent defenses of self-defense and EMED manslaughter but also was entitled to have the jury instructed on EMED manslaughter."

On the other hand, the prosecution maintains that the refusal by the court to give an EMED instruction was proper because Genesis was "unable to provide evidence that supports a defense of EMED" and that, therefore, Genesis was not entitled to an EMED instruction.

B.

Both Genesis and the prosecution rely on this court's decision in State v. Sawyer, 88 Hawai'i 325, 966 P.2d 637 (1998). According to Genesis, "[i]f the record reflects any evidence of a subjective nature that the defendant acted under the influence of EMED, the instruction must be given and the jury decides whether

the State disproved the defense beyond a reasonable doubt." The prosecution declares that under Sawyer, this court held that a defendant must meet a "subjective/objective" test, explained in that case as follows:

> First, in the subjective portion, the record must reflect the circumstances as [the defendant] believed them to be. Second, in satisfying the objective portion, the record must support "a reasonable explanation or excuse for the actor's disturbance."
>
> Much confusion has arisen over whether the court or the jury determines the reasonableness of the defendant's explanation or excuse. We hold that the trial court determines whether or not the record reflects any evidence of a subjective nature that the defendant acted under a loss of self-control resulting from extreme mental or emotional disturbance. If the record does not reflect any such evidence, then the trial court shall properly refuse to instruct the jury on EMED manslaughter. However, if the record reflects any evidence of a subjective nature that the defendant acted under the influence of extreme mental or emotional disturbance, then the issue must be submitted to the jury, and the trial court should instruct the jury on EMED manslaughter. The jury then decides whether or not the prosecution has disproved the mitigating EMED manslaughter defense beyond a reasonable doubt.

Id. at 333, 966 P.2d at 645 (emphases added). The prosecution maintains that Genesis fails to meet the "subjective/objective" test under Sawyer.

Genesis argues in her opening and reply briefs that there was evidence in the record to support the subjective portion of the "subjective/objective" test under Sawyer. She contends this evidence was (1) that she was aware that Gaylon was having an affair with another woman because (a) a woman answered the telephone when she called the Hobron Hotel sometime in March 2001 and (b) the quartz heart medallion was found in Gaylon's attache case on the morning of October 18, 2001; (2) that her conduct at the time of the offense "was indicative of someone who was acting under the influence of EMED" for a witness, Sandra

Cox, testified that "she heard muffled voices, which sounded as someone fighting, coming from Genesis' house"; (3) that she had tried to fire more than one shot but the handgun jammed; (4) that after shooting Gaylon, she continued to attack him with a stick; and (5) that when Gaylon went across the street to seek help, Genesis told her neighbors not to help Gaylon, who she referred to at that time as "that fuckah."

However, with respect to the subjective prong, the following is pointed out in the prosecution's answering brief. Genesis repeatedly testified that she did not know Gaylon had a girlfriend until the time Gaylon's sister-in-law, Baldado, informed her about Sheldon on the night of Gaylon's wake. Genesis stated that she did not even consider the possibility that Gaylon may have had a girlfriend. Also, Genesis related that her call to the Hobron Hotel in March 2001 did not raise a question in her mind that Gaylon was possibly having an affair and that she believed that the female who answered the phone was the wife of Gaylon's friend. According to Baldado, Genesis appeared to be in shock when she informed Genesis about Gaylon's relationship with Sheldon. Genesis indicated that she did not know that the quartz heart medallion was in Gaylon's attache case. Moreover, Genesis denied that she was financially dependent on Gaylon and that even if he had not deposited money into her account, she would not have any problem financially without his assistance.

Based on the above, the record "reflect[s that] the circumstances as [Genesis] believed them to be[,]" id., were that Gaylon was not involved with Sheldon and that Genesis adamantly denied being financially dependent on Gaylon. Hence, the record does not show "any evidence of a subjective nature that [Genesis] acted under a loss of self-control resulting from extreme mental or emotional disturbance," id., due to Gaylon's relationship with Sheldon. On the contrary, the evidence supports the prosecution's assertion that Genesis was unaware of a relationship between Genesis and another person.[15] Because Genesis fails to satisfy the subjective prong of the two-part "subjective/objective" test under Sawyer, the court did not err in refusing to instruct the jury on EMED. See also State v. Aganon, 97 Hawai'i 299, 304, 36 P.3d 1269, 1274 (2001) (stating that "[i]f the record does not reflect [evidence of a subjective nature that the defendant acted under a loss of self-control resulting from extreme mental or emotional disturbance], then the trial court shall properly refuse to instruct the jury on EMED manslaughter"); State v. Moore, 82 Hawai'i 202, 210, 921 P.2d 122, 130 (1996) (stating that "[w]here evidentiary support for the asserted defense, or for any of its essential components, is clearly lacking, it would not be error for the trial court either

[15] Also, contrary to the EMED arguments in her briefs enumerated supra, in her testimony Genesis denied that she tried to shoot Gaylon a second time, that she attacked him with a stick, and that she referred to Gaylon as "that fuckah."

to refuse to charge on the issue or to instruct the jury not to consider it" (citation omitted)).

XI.

Accordingly, the court's September 16, 2004 judgment is affirmed.

DATED: Honolulu, Hawai'i, May 31, 2006.

On the briefs:

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