CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I concur, except as to the conviction of Defendant-Appellant Colonel Robert Taylor for murder. There being contending evidence of an "accident," the offense of manslaughter in its reckless form was plainly indicated. The circuit court of the first circuit (the court) apparently recognized this but upon query of the parties, determined that neither side requested a manslaughter instruction and did not instruct the jury as to the lesser included offense of manslaughter.[1] Our holding in State v. Haanio, 94 Hawai'i 405, 415, 16 P.3d 246, 256 (2001), stated that "the trial courts, not the parties, have the duty and ultimate responsibility to insure that juries are properly instructed on issues of criminal liability." (Citations omitted.) Because in this case it was left to the parties to determine whether the manslaughter instruction should be given or not, Haanio applied.

> A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function. Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged. To permit this would force the jury to make an "all or nothing" choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence.

Id. (citation omitted) (emphasis added).

Recently in State v. Nichols, 111 Hawai'i 327, 141 P.3d 974 (2006), we addressed a trial court's failure to instruct a

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[1] However, I believe the trial court acted conscientiously in this case.

jury of a lesser included offense. The defendant in Nichols argued that "the trial court erred by failing to instruct the jury on the lesser included offense of terroristic threatening in the second degree." Id. at 342, 141 P.3d at 989. In resolving this issue, we again reaffirmed our holding in Haanio that "a trial court is obligated to give a lesser included offense instruction when there is a rational basis for it in the evidence, even if, as in this case, no request or objection is made by the parties." Id. (citing Haanio, 94 Hawai'i at 415, 16 P.3d at 256). We held in Nichols that "the sole question is, assuming the same evidence is presented at a subsequent trial, whether there is a rational basis in the evidence for a jury to conclude that [the defendant committed the lesser included offense]." Id. (emphases added). Indeed we did not need to consider the fact that the defendant had been convicted of the greater offense of terroristic threatening in the first degree. Id. at 328-29, 342, 141 P.3d at 975-76, 989.

Here, the majority agrees that "the record appears to contain a rational basis for a manslaughter instruction[.]" SDO at 10 n.25. Because, as noted above, "the sole question is . . . whether there is a rational basis in the evidence for a jury to conclude that [the defendant committed the lesser included offense,]" Nichols, 111 Hawai'i at 342, 141 P.3d at 989, it is of no consequence that Taylor was convicted of the charged offense

of second degree murder.[2] Inasmuch as the record reflects a rational basis for a manslaughter instruction, as the majority recognizes, "the . . . court's failure to provide the jury with a manslaughter instruction was error." SDO at 10 n.25.

In that regard, "[e]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial." State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998) (citation omitted). Under the circumstances in this case, there is nothing to indicate the presumption of harmfulness has been rebutted. Error, then, was prejudicial. Thus, the failure to give a manslaughter instruction was not harmless beyond a reasonable doubt. See Nichols, 111 Hawai'i at 334, 141 P.3d at 981 ("If there is such a reasonable possibility in a criminal case [that error might have contributed to conviction], then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside." (Quoting State v. Gonsalves, 108 Hawai'i 289, 293, 119 P.3d 597, 601 (2005). (Citations omitted.))). We may recognize plain error if substantial rights

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[2] Indeed Nichols comports with Hawai'i Revised Statutes (HRS) § 701-109(5) (1993), entitled "Method of prosecution when conduct establishes an element of more than one offense," which states that "[t]he court is not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense." (Emphasis added.) It logically follows that pursuant to HRS § 701-109(5), a court is obligated to charge the jury with respect to an included offense if, as in this case, there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense.

are affected. See id. ("If the substantial rights of the defendant have been affected adversely, the error will be deemed plain error." (Citing State v. Pinero, 75 Haw. 282, 292, 859 P.2d 1369, 1374 (1993).)).

The majority's contention that "error 'is harmless when the jury convicts the defendant of the charged offense or of an included offense greater than the included offense erroneously omitted from the instructions,'" SDO at 10 n.25 (quoting Haanio, 94 Hawai'i at 415, 16 P.3d at 256) (emphasis added), must be placed in context. Logically construed, our case law is that such an error may be harmless only in cases where the jury has been made aware of and provided with at least some instruction with respect to the various lesser included offenses. See Haanio, 94 Hawai'i at 416-17, 16 P.3d at 257-58 ("We believe the imprimatur of the trial court's instructions, as reinforced by counsel in closing argument (if counsel is so inclined), will guide the jury in an orderly consideration of the alternative included offenses presented to it." (Emphasis added.))

In Haanio, for example, "the trial court instructed the jury that 'if and only if' it found the defendant not guilty of the offense designated or was 'unable to reach a unanimous verdict as to that offense, then' it must consider the particular included offense at issue." Id. at 416, 16 P.3d at 257. Similarly, in State v. Holbron, 80 Hawai'i 27, 46, 904 P.2d 912, 931 (1995), referred to in Haanio, "[t]he [circuit] court instructed the jury that if it was 'unable to agree that the

[prosecution] has proven beyond a reasonable doubt' that [Holbron] had committed the offense of Attempted Murder, the jury could then go on to consider the lesser included offense of 'Attempted Manslaughter (Reckless Conduct).'" (Citation omitted.)

The jury instructions in Haanio and Holbron "guide[d] the jury in an orderly consideration of the alternative included offenses presented to it." Haanio, 94 Hawai'i at 417, 16 P.3d at 258. However, the court's failure to provide the jury with any instruction pertaining to a lesser included offense, as in this case with respect to the manslaughter charge, forces "the jury to make an 'all or nothing' choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence." Id. at 415, 16 P.3d at 256 (citation omitted). This "is unfair and inconsistent with the precept that jurors are at liberty to believe all, none, or part of the evidence as they see fit." Id. (quoting State v. Bullard, 389 S.E.2d 123, 124 (N.C. Ct. App. 1990)). We have clearly stated that "an all or nothing approach impairs the truth seeking function of the judicial system." Id.

Furthermore, it is important to note that the defendant in Haanio was challenging his conviction of the lesser included offense, and not the charged offense. Haanio, 94 Hawai'i at 407, 16 P.3d at 248. Thus, the language in Haanio that "the trial court's failure to give appropriate included offense instructions

. . . is harmless when the jury convicts the defendant of the charged offense[,]" id. at 415, 16 P.3d at 256, cited to by the majority, SDO at 10-11 n.25, was dicta because (1) it was not necessary to the holding of that case, and (2) it conflicted with the requirements that trial judges must sua sponte instruct juries on all lesser included offenses having a rational basis in the evidence. Accordingly, such language is of limited precedential value.

The majority asserts that its "present application of Haanio is consistent with prior decisions of this court and the Intermediate Court of Appeals [(ICA)]." SDO at 11 n.25. However, the cases cited by the majority have applied the dicta of Haanio in a manner that clashes with Haanio's underlying rationale. Based on the facts in Haanio, Haanio could not stand for the proposition that the failure of the trial court to instruct the jury on a lesser included offense was harmless error.

Construing the case otherwise would violate Haanio's mandate. For example, if a defendant is convicted of the charged offense, any error in failing to give an included instruction would be effectively unreviewable. As such, this court would have no means of enforcing Haanio. Therefore, the failure to give a lesser included instruction that has a rational basis in the evidence must be viewed as plain error, subject to our discretion to forego applying the rule under the circumstances of a particular case.

Additionally, two of the cases to which the majority cites, SDO at 11 n.25, are inapposite for additional reasons. In State v. Pauline, 100 Hawai'i 356, 381, 60 P.3d 306, 331 (2002), we held that "there [was] no rational basis to support the contention that the jury could have rationally acquitted [the defendant] of second degree murder and convicted him of manslaughter or assault." (Emphasis added.) The ICA similarly concluded in State v. French, 104 Hawai'i 89, 93, 85 P.3d 196, 200 (App. 2004), that "[t]here was no rational basis in the evidence for a verdict convicting" the defendant of the lesser included offense of theft in the third degree. (Emphasis added.) Thus, "in the absence of such a rational basis in the evidence, the trial court should not instruct the jury as to included offenses[,]" Pauline, 100 Hawai'i at 381, 60 P.3d at 331 (emphasis in original) (internal quotation marks and citation omitted), and the inquiry ends, see supra.[3] As would appear obvious, such holdings do not involve Haanio but are compatible with it inasmuch as Haanio only requires a lesser offense instruction if a rational basis exists for a finding of guilt as to that offense.

[3] Pauline and French went on to hypothetically pose the question of the absence of a lesser included offense. See Pauline, 100 Hawai'i at 381, 60 P.3d at 331 (stating that "if there had been a rational basis to instruct the jury with respect to an offense included within second degree murder" (emphasis added)); French, 104 Hawai'i at 93, 85 P.3d at 200 (noting that "assuming arguendo that the failure to give a jury instruction of [the lesser included offense] was error" (emphasis added)). But as Nichols indicates, the inquiry must end on the rational basis determination. See Nichols, 111 Hawai'i at 342, 141 P.3d at 989 (stating that "the sole question is . . . whether there is a rational basis in the evidence for a jury to conclude that [the defendant committed the lesser included offense]" (emphases added)).

In the final case to which the majority cites, State v. Gunson, 101 Hawai'i 161, 64 P.3d 290 (App. 2003), while I believe it acted thoughtfully, the ICA gave Haanio retroactive application, in violation of the express holding that Haanio should only apply "in jury trials beginning after the filing date of [the] opinion[,]"[4] 94 Hawai'i at 407, 16 P.3d at 248. It is also arguable that the ICA in Gunson erred in reaching the question of whether the trial court erred in failing to give an indecent exposure instruction without first determining whether indecent exposure, in fact, is a lesser included offense of sexual assault in the fourth degree. See Gunson, 101 Hawai'i 161, 64 P.3d 290. If the ICA had done so, the ICA should have simply affirmed the judgment of conviction. But the ICA went on to "conclude that the absence of an included offense instruction in this case, if error, was harmless beyond a reasonable doubt[,]" id. at 165, 64 P.3d at 294 (emphasis added) (citation omitted), in contravention of this court's express instruction that Haanio applied prospectively only. Hence, none of the cases relied on by the majority can be said to conflict, in principle, with the propositions stated herein.

With all due respect, the majority's position again turns our trial courts into gambling halls. See Haanio, 94 Hawai'i at 415, 16 P.3d at 256 (stating that "[o]ur courts are not gambling halls but forums for the discovery of truth"

[4] The filing date of Haanio was January 31, 2001. The jury trial in Gunson began on January 10, 2001.

(citation omitted)). The resulting injury to the public interest cannot be overly exaggerated.

Without instructions on lesser included offenses, a defendant may be freed for crimes for which he or she should have been convicted of -- the jury not being informed of conduct not charged but for which the defendant was nevertheless culpable. "Acceding to an 'all or nothing' strategy, albeit in limited circumstances, forecloses the determination of criminal liability where it may in fact exist." Haanio, 94 Hawai'i at 414, 16 P.3d at 255.

At the other end of the spectrum, while as a general rule it is presumed juries follow instructions, it may be that in certain circumstances a jury will be unable to do so. The reality is that without instructions on a lesser included offense, a defendant may be convicted for a crime he or she is not guilty of -- the jury believing guilt of some nature exists. As the United States Supreme Court has recognized,

> [j]urors are not expected to come into the jury box and leave behind all that their human experience has taught them. The increasing crime rate in this country is a source of concern to all Americans. To expect a jury to ignore this reality and to find a defendant innocent and thereby set him free when the evidence establishes beyond doubt that he is guilty of some violent crime requires of our juries clinical detachment from the reality of human experience.

Beck v. Alabama, 447 U.S. 625, 642 (1980) (citation omitted); see id. at 627 (holding that "a sentence of death [may not] constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and

when the evidence would have supported such a verdict"). This, however, should not be "disheartening," SDO at 11 n.25, inasmuch as in the division of functions in our legal system it is for the appellate court to correct prejudicial error that occurs at the trial level.

If the failure to protect the public interest is incorrectly held harmless on appeal, it still remains the obligation of trial judges in the first instance to vindicate and to protect the public interest in just results in our jury trials. Irrespective of whether the error at the trial level is deemed non-reversible at the appellate level, "the rational resolution of criminal liability issues in the criminal justice system and the proper administration of such issues at the trial judge and jury level require the giving of lesser included offense instructions." Haanio, 94 Hawai'i at 415, 16 P.3d at 256. Haanio leaves no room for argument that the trial courts are duty bound to give instructions on lesser included offenses if a rational basis exists, even if no party requests it. Id. ("We hold . . . that trial courts are duty bound to instruct juries 'sua sponte . . . regarding lesser included offenses,' having a rational basis in the evidence." (Internal citation omitted.)); see also HRS § 701-109(5).

For the foregoing reasons, I would vacate the judgment as to the murder conviction and remand to the court for a new trial.