NO. 27133

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

COLONEL ROBERT TAYLOR, aka Robert Colonel Mathes, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 03-1-1558)

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

Defendant-Appellant, Colonel Robert Taylor [hereinafter "Taylor"],[1] appeals from the first circuit court's[2] February 9, 2005 judgment convicting him of the following offenses: (1) second degree murder, in violation of Hawai'i Revised Statutes [hereinafter "HRS"] § 707-701.5 (1993);[3] (2) carrying a firearm in the commission of a felony, in violation of HRS § 134-6(a) (Supp. 2003);[4] (3) felon in possession of a firearm, in violation

[1] Taylor did not serve in the military and "Colonel" was a family name, rather than a military rank.

[2] The Honorable Michael D. Wilson presided.

[3] HRS § 707-701.5 provides that "a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person."

[4] HRS § 134-6(a) provides as follows:

> **§134-6 Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty.** (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

of HRS § 134-7(b) (Supp. 2003);[5] (4) place to keep firearm, in violation of HRS § 134-6(c) (Supp. 2003);[6] and (5) commercial promotion of marijuana in the first degree, in violation of HRS §

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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:

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

(Brackets in original.)

[5] HRS § 134-7(b) sets forth the following:

(b) No person who is under indictment for, or has waived indictment for, or has been bound over to the circuit court for, or has been convicted in this State or elsewhere of having committed a felony, or any crime of violence, or an illegal sale of any drug shall own, possess, or control any firearm or ammunition therefor.

[6] HRS § 134-6(c) provides as follows:

(c) Except as provided in sections 134-5 and 134-9, all firearms and ammunition shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms or ammunition or both in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following: a place of repair; a target range; a licensed dealer's place of business; an organized, scheduled firearms show or exhibit; a place of formal hunter or firearm use training or instruction; or a police station. "Enclosed container" means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.

712-1249.4 (1993).[7]

On appeal, Taylor argues that: (1) the court abused its discretion by denying his motion to suppress evidence and

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[7] HRS § 712-1249.4 provides the following:

> **[§712-1249.4] Commercial promotion of marijuana in the first degree.** (1) A person commits the offense of commercial promotion of marijuana in the first degree if the person knowingly:
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> (a) Possesses marijuana having an aggregate weight of twenty-five pounds or more; or
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> (b) Distributes marijuana having an aggregate weight of five pounds or more; or
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> (c) Possesses, cultivates, or has under the person's control one hundred or more marijuana plants; or
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> (d) Cultivates on land owned by another person, including land owned by the government or other legal entity, twenty-five or more marijuana plants, unless the person has the express permission from the owner of the land to cultivate the marijuana or the person has a legal or an equitable ownership interest in the land or the person has a legal right to occupy the land; or
>
> (e) Uses, or causes to be used, any firearm or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner used is capable of causing death, serious bodily injury, substantial bodily injury, or other bodily injury, as defined in chapter 707 in order to prevent the theft, removal, search and seizure, or destruction of marijuana.
>
> (2) Commercial promotion of marijuana in the first degree is a class A felony.
>
> (3) Any marijuana seized as evidence in violation of this section in excess of an aggregate weight of twenty-five pounds as stated in subsection (1)(a), or in excess of an aggregate weight of five pounds as stated in subsection (1)(b), or in excess of one hundred marijuana plants as stated in subsection (1)(c), or in excess of twenty-five marijuana plants as stated in subsection (1)(d) may be destroyed after the excess amount has been photographed and the number of plants and the weight thereof has been recorded. The required minimum amount of marijuana needed to constitute the elements of this offense shall remain in the custody of the police until the termination of any criminal action brought as a result of the seizure of the marijuana. Photographs duly identified as accurately representing the marijuana shall be deemed competent evidence of the marijuana involved and shall be admissible in any proceeding, hearing, or trial to the same extent as the marijuana itself; provided that nothing in this subsection shall be construed to limit or restrict the application of Rule 901 of the Hawaii Rules of Evidence.

statements on the grounds that Miranda warnings were required following his spontaneous utterance, "Aww, Junior, I just shot my friend," and that there was sufficient evidence of his reasonable expectation of privacy in the barn searched; (2) the prosecutor engaged in misconduct by taking advantage of a pro se defendant's ignorance of the rules of evidence by asking improper questions that had the cumulative effect of denying him a fair trial; (3) the trial court erred by failing to warn him that his statements made during his cross-examination of witnesses and closing arguments were not evidence; and (4) standby counsel rendered ineffective assistance by failing to subpoena a key witness because standby counsel erroneously believed that the witness could only offer testimony constituting inadmissible hearsay.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that:

(1) Based upon an objective view[8] of the facts and circumstances, the responding police officer had knowledge of

[8] See Ohio v. Robinette, 519 U.S. 33, 38 (1996) ("As we made clear in Whren[v. United States, 517 U.S. 806 (1996)], the fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify the action. . . . Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.") (Some brackets added and some in original.) (Ellipses in original.) (Quotation marks omitted.) (Citations omitted.).

probable cause[9] that an offense had been committed, and thus Taylor's statements -- that (a) the gun was located in his truck, and (b) the shooting occurred, "Up at the ranch" -- were made in response to custodial[10] interrogation[11] and Miranda warnings were required;[12]

(2) The circuit court nevertheless did not err by failing to suppress the gun insofar as (a) its status as a "fruit

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[9] We have recently described probable cause as follows:

> "Probable cause exists when the facts and circumstances within one's knowledge and of which one has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been committed. This requires more than a mere suspicion but less than a certainty." Carlisle ex rel. State v. Ten Thousand Four Hundred Forty-Seven Dollars in U.S. Currency ($10,447.00), 104 Hawai'i 323, 331, 89 P.3d 823, 831 (2004) (quoting State v. Detroy, 102 Hawai'i 13, 18, 72 P.3d 485, 490 (2003)) (emphasis added). This standard has two components. The first sentence describes the standard for determining the presence of probable cause. The second sentence describes the quantum of proof necessary to satisfy the standard.

State v. Maganis, 109 Hawai'i 84, 86, 123 P.3d 679, 681 (2005) (emphasis in original) (footnote omitted).

[10] See State v. Wallace, 105 Hawai'i 131, 140, 94 P.3d 1275, 1284 (2004) ("[A] person is 'in custody' for purposes of article I, section 10 of the Hawai'i Constitution if an objective assessment of the totality of the circumstances reflects . . . 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.").

[11] The parties do not challenge the circuit court's finding of fact, which stated that, "Tehada's 'express questioning' concerning the location of the gun and the location of the shooting was 'interrogation.'"

[12] See Wallace, 105 Hawai'i at 137, 94 P.3d at 1281 ("It is a fundamental tenet of criminal law that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.") (Quotation marks omitted.) (Emphases removed.) (Footnote omitted.) (Citations omitted.).

of the poisonous tree" was cured by the prosecution's demonstration, by clear and convincing evidence, that the gun would have been inevitably discovered,[13] and (b) it was not the product of an illegal search and seizure because it was observed in open view[14] and its seizure was justified by both probable cause and exigent circumstances;[15]

(3) The circuit court erred by failing to suppress evidence obtained from the barn -- as "fruits of the poisonous tree" -- insofar as the prosecution failed to demonstrate, by clear and convincing evidence, that such evidence would have been inevitably discovered;

(4) Taylor waived the right to argue that the

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[13] See State v. Lopez, 78 Hawai'i 433, 451, 896 P.2d 889, 907 (1995) ("[W]e require the prosecution to present clear and convincing evidence that any evidence obtained in violation of article I, section 7, would inevitably have been discovered by lawful means before such evidence may be admitted under the inevitable discovery exception to the exclusionary rule.") (Footnote omitted.).

[14] See State v. Bonnell, 75 Haw. 124, 144, 856 P.2d 1265, 1276 (1993) ("[W]here the object observed by the police is in 'open view,' it 'is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution.'") (Emphasis added.) (Citing State v. Kapoi, 64 Haw. 130, 140, 637 P.2d 1105, 1113 (1981) (quoting State v. Kaaheena, 59 Haw. 23, 29, 575 P.2d 462, 467 (1978)).).

[15] This court has emphasized that "even the 'open view' of possible contraband, without more, furnishe[s] no basis for its seizure without a warrant." Kapoi, 64 Haw. at 141, 637 P.2d at 1114. Such an intrusion is justified only if preceded by both probable cause and exigent circumstances. See id. ("For 'no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'"') (Citing Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971).); State v. Meyer, 78 Hawai'i 308, 313, 893 P.2d 159, 164 (1995) ("However, if the evidence in question is in open view in an area in which the evidence retains its constitutional protection, a warrant is required or exigent circumstances must exist before the object may be seized.").

prosecution engaged in an improper line of questioning, inasmuch as (a) Taylor failed to indicate where in the record he objected,[16] and (b) our review of the record does not reveal any such objection;[17]

(5) Taylor was provided with the standard colloquy required by our prior decision in Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995),[18] and he has failed to prove, by a preponderance of the evidence, that his subsequent waiver of his

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[16] See Hawai'i Rules of Appellate Procedure Rule 28(b)(4) (2005) ("Each point shall state . . . where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. . . . Points not presented in accordance with this section will be disregarded[.]").

[17] See Price v. AIG Hawai'i Ins. Co., Inc., 107 Hawai'i 106, 111, 111 P.3d 1, 6 (2005) ("'[T]he rule in this jurisdiction . . . prohibits an appellant from complaining for the first time on appeal of error to which he has acquiesced or to which he failed to object.'") (Brackets in original.) (Ellipses in original.) (Quoting Okuhara v. Broida, 51 Haw. 253, 255, 456 P.2d 228, 230 (1969).).

[18] In Tachibana, this court held that, "in order to protect the right to testify under the Hawai'i Constitution, trial courts must advise criminal defendants of their right to testify and must obtain an on-the-record waiver of that right in every case in which the defendant does not testify." Id. at 236, 900 P.2d at 1303 (footnotes omitted). We suggested that a colloquy between the court and the defendant would suffice, if it advised the defendant

> that he [or she] has a right to testify, that if he [or she] wants to testify that no one can prevent him [or her] from doing so, [and] that if he [or she] testifies the prosecution will be allowed to cross-examine him [or her]. In connection with the privilege against self-incrimination, the defendant should also be advised that he [or she] has a right not to testify and that if he [or she] does not testify then the jury can be instructed about that right.

Id. at 236 n.7, 900 P.2d at 1303 n.7 (brackets in original) (citations omitted).

right to testify was not knowing, intelligent, and voluntary;[19] and

(6) Assuming that Taylor may assert that his standby counsel rendered ineffective assistance by failing to subpoena Dr. Richard Price, M.D. [hereinafter "Dr. Price"],[20] he has

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[19] See id. at 237, 900 P.2d at 1304 ("If a colloquy is . . . conducted and the defendant's waiver of his or her right to testify appears on the record, such waiver will be deemed valid unless the defendant can prove otherwise by a preponderance of the evidence.").

[20] Some jurisdictions have flatly refused to entertain claims of ineffective assistance of standby counsel. See, e.g., Simpson v. Battaglia, __ F.3d __, __ (7th Cir. 2006) ("Therefore, the inadequacy of standby counsel's performance, without the defendant's relinquishment of his [right to self-representation], cannot give rise to an ineffective assistance of counsel claim under the Sixth Amendment."); Scarbough v. State, 893 So.2d 265, 273 (Miss. Ct. App. 2004) ("It has been established by the Mississippi Supreme Court that as stand-by counsel, a defense attorney is 'without authority, discretion or control and the charge that he rendered constitutionally ineffective assistance is without merit.'") (Citation omitted.); United States v. Morrison, 153 F.3d 34, 55 (2d Cir. 1998) ("[W]ithout a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel."); State v. Oliphant, 702 A.2d 1206, 1212 (Conn. Ct. App. 1997) ("The defendant's claim that he was denied the effective assistance of counsel is without merit because, after deciding to proceed pro se, he had no constitutional right to the effective assistance of counsel in any capacity."); Commonwealth v. Appel, 689 A.2d 891, 905 (Pa. 1997) ("The law is therefore clear that Appel is not entitled to relief based on his claims of ineffectiveness of stand-by counsel.").

However, other jurisdictions permit a criminal defendant to assert ineffective assistance of standby counsel claims under limited circumstances. See, e.g., Jelinek v. Costello, 247 F.Supp.2d 212, 265 (E.D.N.Y. 2003) ("[W]here standby or advisory counsel assumes an advisory role or exercises a degree of control over a defendant's case, 'his or her potential for ineffectiveness, though diminished by the defendant's primary role, is not completely eliminated.'") (Citation omitted.); State v. McDonald, 22 P.3d 791, 794-95 (Wash. 2001) ("Generally, defendants who are afforded the right to self-representation cannot claim ineffective assistance of counsel for the obvious reason they become their own counsel and assume complete responsibility for their own representation. However, this does not mean standby counsel has no obligations or duties to the defendant when standby counsel has been appointed by the court. A defendant possesses a right to have conflict-free standby counsel because standby counsel must be (1) candid and forthcoming in providing technical information/advice, (2) able to fully represent the accused on a moment's notice, in the event termination of the defendant's self-representation is necessary, and (3) able to maintain attorney-client privilege."); Armor v. Lantz, 535 S.E.2d 737, 748 (W.Va. 2000) ("To prevail on a claim that counsel acting in an advisory or other limited

nevertheless failed to demonstrate that any specific errors or omissions reflecting standby counsel's lack of skill judgment or diligence resulted in either the withdrawal or substantial impairment of a potentially meritorious defense,[21] inasmuch as (a) Taylor's description of the shooting to Dr. Price does not fall within the ambit of the hearsay exception codified as Hawai'i Rules of Evidence [hereinafter "HRE"] Rule 803(a)(1),[22] (b) Taylor's description of the shooting to Dr. Price may constitute admissible non-hearsay if offered for the limited purpose of discrediting Officer Elario Tehada, Jr.'s testimony,[23]

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capacity has rendered ineffective assistance, a self-represented defendant must show that counsel failed to perform competently within the limited scope of the duties assigned to or assumed by counsel.") (Quotation marks omitted.) (Citations omitted.) (Emphasis in original.).

[21] In order to prevail on his ineffective assistance of counsel claim, Taylor must demonstrate (1) "specific errors or omissions of defense counsel reflecting counsel's lack of skill, judgment or diligence[,]" and (2) that such errors or omissions "resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Antone, 62 Haw. 346, 348-49, 615 P.2d 101, 104 (1980) (footnote omitted).

[22] HRE Rule 803(a)(1) (1993) provides that a statement is admissible, notwithstanding its status as hearsay, if it is "[a] statement that is offered against a party and is (A) the party's own statement, in either the party's individual or a representative capacity, or (B) a statement of which the party has manifested the party's adoption or belief in its truth." Here, however, Taylor's statement -- through Dr. Price -- was being offered for him and not against him, and it thus does not fall within the ambit of HRE Rule 803(a)(1).

[23] See United States v. Vasquez-Rivera, 407 F.3d 476, 483 (1st Cir. 2005) ("Here, as the statement was not offered for its truth, it is not hearsay. . . . . Where, as here, a statement is introduced to impeach a statement that a witness provided on direct examination, the statement is admissible for that purpose."); Ostad v. Oregon Health Scis. Univ., 327 F.3d 876, 886 (9th Cir. 2003) ("During her own testimony, Cline denied that she had ever expressed concerns about Seyfer's billing to any of the staff physicians. Wheatley testified that Cline in fact had spoken to him about her concerns regarding Seyfer's billing. These statements were not offered to prove that Seyfer did, in fact, bill improperly. Instead, they were offered to impeach

but Taylor failed to assert how, and we do not find that, standby counsel's failure to subpoena Dr. Price for that limited purpose resulted in either the withdrawal or substantial impairment of a potentially meritorious defense, and (c) even assuming that standby counsel erred by failing to subpoena Dr. Price to testify as to any statements made by the victim, the record is devoid of any indication as to what the victim said to Dr. Price and it is impossible to determine what impact the victim's statements may have had on a potentially meritorious defense.[24] Therefore,

IT IS HEREBY ORDERED that (1) Taylor's conviction of the offense of commercial promotion of marijuana in the first degree, in violation of HRS § 712-1249.4, is reversed, and (2) the judgment from which the appeal is taken is affirmed in all other respects.[25]

Cline's testimony. Thus, they were not hearsay."); Foster v. Gen. Motors Corp., 20 F.3d 838, 839 (8th Cir. 1994) (holding that the admission of a report was not hearsay because it was not offered to prove its truth, but to impeach the veracity of the witness's direct testimony).

[24] Indeed, Dr. Price indicated during his interview with Detective Clifford Rubio that he could not recall which details were conveyed by Taylor, and which details were conveyed by the victim.

[25] The dissent asserts that the circuit court's failure to instruct the jury as to the offense of manslaughter contravenes our prior decision in State v. Haanio, 94 Hawai'i 405, 16 P.3d 246 (2001) and warrants reversal of Taylor's conviction of second degree murder. See concurrence and dissent, slip op. at 1-2. We agree with the dissent that the record appears to contain a rational basis for a manslaughter instruction and that the circuit court's failure to provide the jury with a manslaughter instruction was error. Nevertheless, Haanio makes clear that such 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. The error is

DATED: Honolulu, Hawai'i, October 26, 2006.

On the briefs:

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> harmless because jurors are presumed to follow the court's instructions, and, under the standard jury instructions, the jury, in reaching a unanimous verdict as to the charged offense [or as to the greater included offense, would] not have reached, much less considered, the absent lesser offense on which it should have been instructed.

Haanio, 94 Hawai'i at 415-16, 16 P.3d at 256-57 (emphasis added) (some brackets added, some in original) (footnote omitted) (internal quotation marks and citations omitted). Here, although the jury was not provided with a manslaughter instruction, the jury's finding that Taylor committed the offense of second degree murder (the charged offense) sterilized any resulting prejudice. Per Haanio, there is no reasonable possibility that the error might have contributed to conviction, and a criminal defendant's substantial rights have not been affected, where the criminal defendant is convicted of the charged offense.

The dissent nevertheless contends that, "[l]ogically 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." Concurrence and dissent, slip op. at 4. To the contrary, our present application of Haanio is consistent with prior decisions of this court and the Intermediate Court of Appeals. See State v. Pauline, 100 Hawai'i 356, 381, 60 P.3d 306, 331 (2002) ("Even if there had been a rational basis to instruct the jury with respect to an offense included within second degree murder, the circuit court's erroneous failure to do so would nevertheless have been harmless because the jury found Pauline guilty of murder beyond a reasonable doubt."); State v. French, 104 Hawai'i 89, 93-94, 85 P.3d 196, 200-01 (App. 2004) ("Assuming arguendo that the failure to give a jury instruction of Theft in the Third Degree was error, it was harmless error because French was convicted of the greater offense of Robbery in the Second Degree."); State v. Gunson, 101 Hawai'i 161, 161-62, 64 P.3d 290, 290-91 (App. 2003) ("We conclude that the absence of an included offense jury instruction in this case, if error, was harmless beyond a reasonable doubt.") (Emphasis added.).

The dissent's lack of faith in the jury's ability to return a proper verdict and its statement that the jury will convict a defendant of the wrong offense just because "guilt of some nature exists," concurrence and dissent, slip op. at 9, is disheartening.