IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Respondent/Plaintiff-Appellee,

vs.

KEVIN POND, Petitioner/Defendant-Appellant.

NO. 27847

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(FC-CR. NO. 05-1-0627(4))

SEPTEMBER 29, 2008

MOON, C.J., LEVINSON, AND NAKAYAMA, JJ.
ACOBA, J., CONCURRING AND DISSENTING, AND
DUFFY, J., CONCURRING AND DISSENTING



OPINION OF THE COURT BY NAKAYAMA, J.

Petitioner/Defendant-Appellant Kevin Pond ("Pond") seeks review of the Intermediate Court of Appeals' ("ICA's") October 30, 2007 judgment on appeal, issued pursuant to its October 11, 2007 opinion,[1] see State v. Pond, 117 Hawai'i 336, 181 P.3d 415 (App. 2007), affirming the second circuit family court's[2] ("circuit court") March 2, 2006 judgment convicting him of the offense of abuse of family or household member, in violation of Hawai'i Revised Statutes ("HRS") § 709-906 (1993 & Supp. 2004)[3] and interference with reporting an emergency or

[1] The published opinion was authored by Associate Judge Corinne K.A. Watanabe and joined by Associate Judges Daniel R. Foley and Alexa D.M. Fujise.

[2] The Honorable Richard T. Bissen presided.

[3] HRS § 709-906, entitled "Abuse of family or household members; penalty," states:

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crime ("Interference offense") in violation of HRS § 710-1010.5 (1993 & Supp. 2004).[4] We accepted Pond's application for a writ of certiorari, and oral argument was held on June 5, 2008.

Pond asserts that the ICA gravely erred by concluding that the Hawai'i Rules of Evidence ("HRE") Rule 404(b)[5] notice

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[3]...continue

> (1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member or to refuse compliance with the lawful order of a police officer under subsection (4). The police, in investigating any complaint of abuse of a family or household member, upon request, may transport the abused person to a hospital or safe shelter.
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> For the purposes of this section, "family or household member" means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.
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> (2) Any police officer, with or without a warrant, may arrest a person if the officer has reasonable grounds to believe that the person is physically abusing, or has physically abused, a family or household member and that the person arrested is guilty thereof.

. . . .

(5) Abuse of a family or household member and refusal to comply with the lawful order of a police officer under subsection (4) are misdemeanors and the person shall be sentenced as follows:

(a) For the first offense the person shall serve a minimum jail sentence of forty-eight hours; and

(b) For a second offense that occurs within one year of the first conviction, the person shall be termed a "repeat offender" and serve a minimum jail sentence of thirty days.

[4] HRS § 710-1010.5, entitled "Interference with reporting an emergency or crime," provided as follows:

> (1) A person commits the offense of interference with reporting an emergency or crime if the person intentionally or knowingly prevents a victim or witness to a criminal act from calling a 911-emergency telephone system, obtaining medical assistance, or making a report to a law enforcement officer.
>
> (2) Interference with the reporting of an emergency or crime is a petty misdemeanor.

[5] HRE Rule 404(b) provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs,

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requirement was a "condition precedent" to (a) admitting "critical evidence of the complainant's prior attack offered to establish [Pond's] justification of self defense and to establish the complainant as the 'first aggressor,'" and (b) cross examining the complainant about her marijuana use on the night of the incident, because it violated Pond's constitutional rights to present a defense and confront adverse witnesses. Pond also asserts that the ICA gravely erred by affirming the conviction where "(a) the self-defense jury instructions were incomplete and misleading and (b) the instructions defining the Interference offense failed to specify that the state of mind requirement applied to each of these elements."

Because the circuit court precluded Pond from cross-examining the complaining witness about whether she used marijuana on December 12, 2005 to show that her perception was inaccurate, it committed reversible error. Accordingly, we vacate Pond's conviction of abuse of family or household member and Interference offense, and remand for a new trial consistent with this opinion.

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> or acts is not admissible to prove the character of a person in order to prove the character of a person in order to show conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

## I. BACKGROUND

### A. Factual Background

The complaining witness, Miae Russell ("Ms. Russell"), met Pond in the summer of 2005, began dating him, and moved into Pond's house in October 2005. Pond, 117 Hawai'i at 339, 181 P.3d at 418. Ms. Russell and Pond presented conflicting testimony regarding an incident that occurred on December 12, 2005.

1. Ms. Russell's account of December 12, 2005

The ICA's published opinion set forth Ms. Russell's account that Pond physically abused her on December 12, 2005, as follows:

> On the evening of December 12, 2005, [Ms. Russell] was alone in Pond's residence. At about 5:30 p.m., she had spoken by telephone with Pond, who was then at the Outback Steakhouse.
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> When Pond arrived home at around 10:30 p.m., she was already asleep. She woke up when she heard noises from the sliding glass door in the living room, which she had locked. [Ms. Russell] testified that she got up and walked to the living room to see who was outside and Pond "walked in through the bedroom screen door." She then got back in bed and Pond "was jumping on [her] and climbing on [her], and was kind of like-he was drunk." [Ms. Russell] testified that she knew Pond was drunk because "[h]e smelled really bad" and "when [she] spoke to him at five-thirty he also told [her] he was drinking."
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> [Ms. Russell] testified that after she told Pond to get off her, he responded by jumping on her more. Pond "was piling the blankets on top of [her], and [she] was trying to kick them off. And then [Pond] went into the bathroom, and [Ms. Russell] was trying to fix the blankets." [Ms. Russell] then "asked [Pond] what that smell was." In response, Pond "came walking towards [her] and then he slammed [her] face into the bed" with one arm and "had his knee or something behind . . . [her] arm," so that her arm and face were in a "weird position" and she "was just buried into the bed and [she] couldn't move." [Ms. Russell] testified that she "hurt a lot," "could not breathe[,]" and thought her jaw and arm were going to break. She also explained that while Pond was holding her down, he told her that "the reason why [she] was being punished was because [she] didn't know how to be obedient. And that's the last thing that he wanted to do, was to hurt [her], but that [she] needed to learn how to respect him." [Ms. Russell] related that "[e]ventually, [Pond] let go[,]" and after he got off of her, he was "just ranting." She was crying, still on her knees on her bed, and "screaming for help."

> Pond approached her again, "grabbed the back of [her] head[,]" told her "to shut up, and he bit down on [Ms. Russell's] mouth and . . . punctured the bottom part of [Ms. Russell's] mouth" so hard that it "went all the way through. And the other side, it was just very swollen and hard . . . . and there was blood." She received a scar from Pond's bite.

Pond, 117 Hawai'i at 339, 181 P.3d at 418. Ms. Russell then explained that she tried to call the police, but Pond fought her for her phone:

> [Ms. Russell] was then asked how she got loose after Pond bit her. She responded, "I think he just let go, and I got up and I was reaching for my purse and phone, and I tried to call the police." Thereafter, [Ms. Russell] testified as follows: [Pond] came over and grabbed the phone from me and knocked it out of my hand, because we were fighting for it, and everything got knocked on to the floor, the phone came apart, the battery came out. And by that time I was on my hands and knees on the floor and trying to pick everything up. And I -- my stuff was right to the left of me, and I was also grabbing my things so that I could just get my things and leave.
>
> According to [Ms. Russell], she told Pond she was calling the police and dialed 911 on her phone. She wasn't sure if she pushed the enter button, "but [she] think[s she] did, because when [she] went to the police station, [she] looked at the phone [and] it was on there." She further testified that as she was gathering her things and crying, Pond "said that he would help [her] carry it out or something. He was telling [her] to be quiet and shut up the whole time." Pond then "took [her] arm and put it behind her, and shoved [her] face into the closet door, and sort of pushed [her] along the door[,]" causing her face and mouth to bleed.
>
> [Ms. Russell] expressed that she felt scared and she hurt "[e]verywhere." She also had bruises, welts, cuts, and fingernail marks, some of which lasted "at least a week" and "were still visible like ten days later." Her "hair was [also] falling out." [Ms. Russell] related that she then gathered some of her things, left the apartment, and drove to the Maui police station in Lāhainā.
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> . . . . [Ms. Russell] also related that after the incident, she discontinued living with Pond and stopped dating him.
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> . . . .
>
> [Ms. Russell] testified that she informed Maui Police Department (MPD) Officer Jonathan Kaneshiro (Officer Kaneshiro) that she had told Pond she was calling 911. . . . . [When Ms. Russell] was then presented with the statement written by Officer Kaneshiro to "refresh [her] memory[,]" [t]he statement did not mention [her] claim that she had told Pond she was calling 911.

Id. at 339-40, 181 P.3d at 418-19. Ms. Russell denied that she was drinking on December 12, 2005. Ms. Russell also denied

biting Pond but admitted that she "strike[d] him in self-defense" when Pond "was climbing all over [her], when he came to the bed."

2. Pond's testimony

Pond testified that on December 12, 2005, after running some errands, he had dinner with a female friend at Outback Steakhouse. He arrived home between ten to ten-thirty p.m., and he entered through the bedroom door because his normal office room entrance was locked. He saw Ms. Russell in the office room, smelled marijuana, and observed a half full bottle of vodka. He assumed that Ms. Russell bought the alcohol earlier that day and drank half the bottle because they do not normally keep alcohol in the house and she was the only person home.

Pond testified that when he walked into the office, he and Ms. Russell smirked at each other, "kissed for a few seconds," and then Ms. Russell bit on his upper left lip, which resulted in a permanent scar. In response, Pond "bit down on her to release -- to have her release."

Pond testified that Ms. Russell attacked him, and he defended himself:

> A. At that point, [Ms. Russell] backed up, she said, "Where the F' have you been? Who have you been with?" And at that point, on the second phrase that she said that, she punched me in the face.
>
> Q. And what do you mean punch you in the face? Where is this?
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> A. Well, the first punch was on my left side-the first punch, as she was punching me, she says, "Where were you?" And then I said, I told her, "You know that I was out," and it was none of her business at this point. She punched me and continued, you know, raising her voice, starting to scream, "Where the F' have you been?" Punched me again. And I told her, "Stop it, you can't punch me, you're -- I don't think because you're a woman you can sit here and beat me because I'm bigger than you -- you can beat me."
>
> Q. Were you trying to-

> A. Not at that point, I verbally told her to stop at that point. She did it again, and then -- as she started to do it, I started to defend, and try to protect myself from those punches.
> Q. Can you demonstrate for the jury how you're defending yourself?
> A. Well, she's swinging and I'm trying to block and throwing her arms off like this for the first few. She kept swinging and she kept swinging, and I kept trying to block them. And I blocked a lot of them and a lot of them. I blocked myself. I mean they were just coming -- she was frantic and hysterical.
> So at that point, I grabbed her -- tried to grab and take her arm so she couldn't continue swinging at me and hitting me in the face.
> . . . .
> A. . . . I pushed her back, and she came back towards me again. And then at that point, I took her and I pushed her back even further.
> . . . .
> A. . . . . And as I pushed her, she went falling into, you know, into the corner of the bed.
> . . . .
> A. She fell backwards. I pushed her off of me, she was facing me, and she went backwards with her back into the bed.

According to Pond, after [Ms. Russell] hit the bed, she sat on the bed, sobbed for a few seconds, "jumped back up," ran around the office room and threw a candle. Thereafter, when Ms. Russell was making a phone call, he took the phone and "dropped it on the bed":

> [S]he picked up her telephone, and was making a phone call. I didn't know what the phone call was. We had argued before, and she had made a phone call, and it was to a friend to go over an stay with her friend.
> And I took the phone, and I was -- you know, we were rummaging to grab the phone. I took the phone and just dropped it on the bed. I said, "You know what, you just need to get all your stuff, and you need to get out of here. Let's just get your things and let's just end this."

Pond testified that "as [Ms. Russell] was picking up and gathering herself, her stuff, she was kind of throwing her things around," and theorized that during this time, she may have thrown her phone and broken it.

Ms. Russell then went into the bathroom and started to

cry. Pond joined her in the bathroom to try to clean her lip. Id. "And then at that point, it was just kind of -- it was obvious that she wanted to leave." Pond testified that he did not prevent her from leaving and that Ms. Russell did not tell him that she was going to the hospital or the police.

3. Other accounts produced at trial

Officer Jonathan Kaneshiro ("Officer Kaneshiro") testified that he was working in the Lāhainā district on the night of December 12, 2005 at approximately 11:30 p.m. when Ms. Russell arrived at the police station. Ms. Russell had a difficult time relating to him what had occurred because she "was still crying and she would break down from time to time."[6] Officer Kaneshiro observed that Ms. Russell "had an injury to her mouth, [and] a little bruise around her . . . right eye" and did not appear to be intoxicated. Officer Kaneshiro testified that he also noticed that "there was bruising on [Ms. Russell's] left arm, . . . from her wrist to her elbow, and from her entire right arm from the wrist all the way to the shoulder[,]" and that she also sustained an injury to her lip that "wasn't dripping [blood] or anything, but it looked fresh."

After officers arrested Pond at his home, he was transported to the police station to be processed.

Officer Kaneshiro testified that he did not notice any

[6] When Officer Kaneshiro asked Ms. Russell to explain what happened, she stated that after Pond came home, "[they] got into a verbal argument; he began pushing her, and . . . at one point pushed her against the wall. She stated that he hit her in the head, and threw her cell [phone] against the wall while she was trying to call 911. And he bit her in the lip or on the mouth, something like that."

> injuries on Pond's body when the officers first arrived at Pond's residence. . . . Officer Kaneshiro acknowledged that it was possible that Pond could have bitten his tongue or lips when he was on the ground lying face down. Officer Kaneshiro recalled that he had asked Pond at the police station whether Pond had any injuries and Pond responded that he had none. Pond also denied "having any kind of physical altercation with [Ms. Russell]" or that he "picked up [Ms. Russell's] phone and threw it."

Pond, 117 Hawai'i at 341, 181 P.3d at 420.

Quetzal Chacon, Pond's brother, testified that he picked Pond up on the street on December 13, 2005, and that he took a picture of Pond's lip because Pond told him that he wanted evidence that Ms. Russell bit him. He further stated that the picture admitted into evidence fairly and accurately depicted Pond's lip on December 13, 2005.

**B. Procedural History**

1. Pond's motion for HRE Rule 404(b) evidence and continuance denied

On February 27, 2006, minutes before Pond's jury trial was scheduled to begin, Pond orally moved for a continuance of trial in order to submit HRE Rule 404(b) evidence that Ms. Russell previously assaulted Pond. Pond's counsel explained that he only pinpointed the date of the alleged attack that morning and could not have earlier filed a notice of intent to introduce such evidence. He also argued that the evidence "goes to the heart of our self-defense."

The prosecution argued that defense counsel had the opportunity to present his defense "weeks ago" and that "he's supposed to provide discovery way before trial and not ask for continuance." Although the circuit court acknowledged that HRE Rule 404(b) allows notice of the intent to introduce evidence of

bad acts to be given during trial, it ruled against Pond's motion for a continuance and observed, "I got more than sixty jurors outside. This is the only trial left." The circuit court also denied the HRE Rule 404(b) motion "for failure to provide notice," opining that "[i]f [the evidence] goes to the heart of the defense, then it should have been something given more prominence earlier. I can't believe that it's that much to the heart of it based on the way it's dribbling in. I think that's how your client felt." The case immediately proceeded to trial.

During direct examination, Pond described an argument he had with Ms. Russell "a couple weeks prior" to December 12, 2005. Pond explained that when he came home from work, he saw Ms. Russell lounging on his bed with her dog, even though he had previously told her that he was allergic to pets and that she could not bring any animals into his house. Pond testified as to the final outcome of the argument:

> I asked her to take the dog off the bed and she just continued to try and argue with me about the dog. So I walked over to pick up the dog and take it off the bed, and as I walked over to move it, the dog ran and jumped off and went over -- went to another part of the house. And she came over to me and started swearing at me because, you know, of my stance on it, and you know, proceeded to smack me.

(Emphasis added.) The prosecution objected and the court reminded Pond's counsel of its HRE Rule 404(b) ruling and ordered the jury to disregard Pond's last response.

2. Evidence that Ms. Russell was smoking marijuana on December 12, 2005

During Ms. Russell's cross-examination, defense counsel asked whether she was smoking marijuana when Pond came home on

December 12, 2005. The prosecution objected and the parties approached the bench. Pond's counsel argued that this evidence is "impeachable" and "goes to her credibility." However, the court ruled "[i]t's a prior bad act" because the question asks whether "she committed a crime that evening before he came home," and thus, required that Pond's counsel give the prosecution HRE Rule 404(b) reasonable notice. The court thereafter struck the last question and ordered the jury to disregard it.

3. Jury instructions

After the close of evidence, the circuit court instructed the jury, inter alia, as to when a person acts with intentional (instruction 18), knowing (instruction 19), and reckless (instruction 20) states of mind. Then, it instructed the jury regarding the Interference offense:

> Instruction 21. In Count II of the complaint, the Defendant, Kevin Pond, is charged with the offense of interference with reporting an emergency or crime. A person commits the offense of interference with reporting [sic] of an emergency or crime if that person intentionally or knowingly prevents a victim or witness to a criminal act from calling a 911-emergency telephone system, obtaining medical assistance, or making a report to a law enforcement officer. There are two material elements of the offense of interference with reporting an emergency or crime, each of which the [p]rosecution must prove beyond a reasonable doubt.
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> These elements, these two elements are that on or about December 12, 2005 in the County of Maui, State of Hawai'i, the Defendant, Kevin Pond intentionally or knowingly engaged in conduct; and that said conduct resulted in preventing a victim or witness to a criminal act from calling a 911-emergency telephone system, obtaining medical assistance, or making a report to a law enforcement officer. The intentional or knowingly [sic] state of mind applies to each element of the offense.

The circuit court also provided the following self-defense jury instruction:

> The use of force upon or towards another person is justified when

> a person reasonably believes that such force is immediately necessary to protect himself on the present occasion against the use of unlawful force by the other person. A person employing protective force may estimate the necessity thereof under the circumstances as he reasonably believes them to be when the force is used without retreating. If, and only if, you find that the [d]efendant was reckless in having a belief that he was justified in using self-protective force against another person, or that the [d]efendant was reckless in acquiring or failing to acquire any knowledge or belief which was material to the justifiability of his use of force against the other person, then the use of such protective force is unavailable as a defense to the offense of abuse of family or household member.

4. Pond appealed his conviction

On March 1, 2006, the jury found Pond guilty of his charged offenses, and the circuit court filed a judgment convicting Pond on March 2, 2006. Pond filed a notice of appeal on March 28, 2006.

On October 11, 2007, the ICA affirmed the circuit court's judgment in a published opinion and filed a judgment on appeal on October 30, 2007. The ICA held that the circuit court did not abuse its discretion by precluding evidence that Ms. Russell allegedly struck Pond on a prior occasion and that Ms. Russell had smoked marijuana on December 12, 2005 because "the notice requirement is a condition precedent to the admissibility of HRE Rule 404(b) evidence." Pond, 117 Hawai'i at 350, 181 P.3d at 429. It also concluded that the circuit court's jury instruction about the self-protection defense is consistent with the language of the statute regarding the self-protection defense. Id. at 351, 181 P.3d at 429. Finally, it observed that the jury instructions erroneously combined two elements of the Interference offense, but that the error was harmless. Id.

## II. STANDARDS OF REVIEW

### A. Certiorari

This court considers whether the ICA's decision reflects "(1) [g]rave errors of law or of fact[ ] or (2) [o]bvious inconsistencies . . . with [decisions] of th[is] court, federal decisions, or [the ICA's] own decision[s]" and whether "the magnitude of those errors or inconsistencies dictat[es] the need for further appeal." HRS § 602-59 (Supp. 2007).

### B. Admissibility of Bad Act Evidence

> The admissibility of evidence requires different standards of review depending on the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard. [T]he traditional abuse of discretion standard should be applied in the case of those rules of evidence that require a "judgment call" on the part of the trial court.

State v. St. Clair, 101 Hawai'i 280, 286, 67 P.3d 779, 785 (2003) (citing State v. Pulse, 83 Hawai'i 229, 246-47, 925 P.2d 797, 814-15 (1996)).

Under HRE Rule 404(b), the proponent of "bad act" evidence "shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial." HRE Rule 404(b). Because the trial court's determination of reasonable notice involves making a "judgment call," the admission of this evidence is reviewed for abuse of discretion. See State v. Richie, 88 Hawai'i 19, 37, 960 P.2d 1227, 1245 (1998).

An abuse of discretion occurs when the court "clearly

exceeds the bounds of reason or disregards rules or principles of law to the substantial detriment of a party litigant." St. Clair, 101 Hawai'i at 286, 67 P.3d at 785 (citing State v. Furutani, 76 Hawai'i 172, 179, 873 P.2d 51, 58 (1994)).

**C. Cross-Examination**

> Violation of the constitutional right to confront adverse witnesses is subject to the harmless beyond a reasonable doubt standard. In applying the harmless beyond a reasonable doubt standard the court is required to examine the record and determine whether there is a reasonable possibility that the error complained of might have contributed to the conviction.

State v. Balisbisana, 83 Hawai'i 109, 113-14, 924 P.2d 1215, 1219-20 (1996) (citations and internal quotation marks omitted).

**D. Jury Instructions**

> When 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. Erroneous 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. [However, e]rror 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. If there is such a reasonable possibility in a criminal case, 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.
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> . . . . [O]nce instructional error is demonstrated, we will vacate, without regard to whether timely objection was made, if there is a reasonable possibility that the error contributed to the defendant's conviction, i.e., that the erroneous jury instruction was not harmless beyond a reasonable doubt.

State v. Nichols, 111 Hawai'i 327, 335, 337, 141 P.3d 974, 982, 984 (2006).

## III. DISCUSSION

### A. The ICA Did Not Gravely Err By Concluding That (1) "The Notice Requirement Is A Condition Precedent To The Admissibility Of HRE Rule 404(b) Evidence" And (2) The Circuit Court Did Not Abuse Its Discretion By Precluding Pond's HRE Rule 404(b) Evidence That Ms. Russell Struck Him Two Weeks Prior To The Incident.

Pond argues that the ICA gravely erred by concluding that under HRE Rule 404(b), he was required to give the prosecution reasonable notice prior to introducing HRE Rule 404(b) evidence because it violates his constitutional right to present a defense and examine witnesses. Pond contends that the purpose of the notice requirement does not "'trump' [his] constitutional rights, particularly where . . . there was no prejudice to the prosecution." Specifically, he asserts that he should have been permitted to introduce evidence that Ms. Russell attacked him two weeks prior to December 12, 2005. We disagree.

#### 1. HRE Rule 404(b)'s notice requirement is not unconstitutional.

HRE Rule 404(b) was amended in 1994 to provide in pertinent part,

> In criminal cases, the proponent [offering] evidence [of other crimes, wrongs, or acts] shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

(Emphasis added.) Legislative history of HRE Rule 404(b) provides that the notice requirement "was modeled after a change recently made to the FRE." Hse. Stand. Comm. Rep. No. 567-94, in 1994 House Journal, at 1088.

The Advisory Committee Note to the 1991 Amendments to

FRE Rule 404(b), the federal counterpart to HRE Rule 404(b), explains that the notice requirement "is intended to reduce surprise and promote early resolution on the issue of admissibility."[7] "Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met." FRE Rule 404(b) Advisory Committee's Note (emphases added).

As the ICA pointed out in Pond, HRE Rule 404(b)'s notice requirement differs from its federal counterpart in three ways. Pond, 117 Hawai'i at 348, 181 P.3d at 427. Pond claims that one distinction is critical to the instant case[8] -- whereas FRE 404(b) requires the prosecution to provide notice, HRE Rule 404(b) also requires a defendant to give reasonable notice of its

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[7] The Advisory Committee Note to the 1991 Amendments to FRE Rule 404(b) further explains:

> Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case.
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> . . . .
>
> The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness.

[8] HRE Rule 404(b) and the FRE Rule 404(b) also differ because HRE Rule 404(b) requires a more detailed form of notice ("date, location, and general nature of any such evidence") whereas FRE 404(b) merely requires "reasonable notice . . . of the general nature of any such evidence." Pond, 117 Hawai'i at 348, 181 P.3d at 427. Further, HRE Rule 404(b), unlike FRE 404(b), does not require that the other party request that it give prior notice of the evidence. Id.

intent to use evidence of other crimes, wrongs, or acts. Pond contends that where the lack of pretrial notice did not prejudice the prosecution, "there is no basis for applying the requirement with equal force to defendants without considering the extent to which exclusion of evidence impinges on the rights to fair trial, to present a defense and of cross-examination."

"The sixth amendment to the United States Constitution and article I, section 14 of the Hawai'i Constitution guarantee a criminal defendant's right to confront adverse witnesses . . . . '[C]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.'" State v. Sabog, 108 Hawai'i 102, 107, 117 P.3d 834, 839 (App. 2005) (quoting Davis v. Alaska, 415 U.S. 308, 316 (1974)). Because of the policy favoring cross-examination, "[r]estrictions on a criminal defendant's rights to confront adverse witnesses and to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.'"[9] Michigan v. Lucas, 500 U.S. 145, 151 (1991) (quoting Rock v. Arkansas, 483 U.S. 44, 55-56 (1987) (holding that a state rule excluding all posthypnosis testimony impermissibly infringes

[9] Cf. Holmes v. South Carolina, 547 U.S. 319, 328-31 (2006) (ruling that precluding evidence of third-party guilt where the prosecution has introduced evidence that, if believed, strongly supports a guilty verdict, is unconstitutional); Crane v. Kentucky, 476 U.S. 683 (1986) (holding that excluding evidence of the circumstances of defendant's confession is unconstitutional); Washington v. Texas, 388 U.S. 14, 22-23 (1976) (holding that a state statute that prohibited the defendant from calling a witness who had been charged and previously convicted of committing the same murder is unconstitutional); Chambers v. Mississippi, 410 U.S. 284, 295-96 (1973) (ruling that precluding the defendant from impeaching his own witness under the "voucher rule" deprived defendant of his confrontation right).

on a defendant's right to testify)); see Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (holding that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice").

At the same time, the United States Supreme Court has ruled that "[t]he right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" Rock, 483 U.S. at 55 (citation omitted); see State v. Faria, 100 Hawai'i 383, 391, 60 P.3d 333, 341 (2002) (noting that despite a defendant's constitutional right to confront a witness, "relevant evidence 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence'" (quoting HRE Rule 403 (2000))).

Thus, "[i]n applying its evidentiary rules a [s]tate must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." Rock, 483 U.S. at 56; see also State v. Nizam, 7 Haw. App. 402, 411-12, 771 P.2d 899, 904-05 (1989) (holding that the defendant's constitutional right was not violated where the witness's testimony was stricken because the defendant refused to release his interviews upon which his expert witness based his opinion, and that there is a legitimate interest in "ensuring

that a jury is provided with the relevant evidence on both sides of an issue in order to assist it in determining the truth and arriving at a just decision") cert. denied, 70 Haw. 666, 796 P.2d 502 (1989).

The Supreme Court applied the "legitimate interest" rule in Lucas. 500 U.S. at 146. Lucas considered whether the trial court violated defendant Lucas' right to confrontation when it precluded his proferred evidence for failure to comply with the rape shield statute's notice requirements. Id. The rape shield statute, designed to protect victims of rape from being subjected to harassing or irrelevant questions concerning their past sexual behavior, permits a defendant to introduce evidence of his or her own past sexual conduct with the victim if the defendant files a written motion and an offer of proof within ten days after he is arraigned. Id. at 146-47. The trial court may also hold "an in camera hearing to determine whether the proposed evidence is admissible." Id. Lucas was found guilty of criminal sexual conduct, and on appeal, the Michigan Court of Appeals reversed, holding that the statute's notice requirement is per se unconstitutional "even where a defendant's failure to comply with the notice-and-hearing requirement is a deliberate ploy to delay the trial, surprise the prosecution, or harass the victim." Id. at 149. The Supreme Court granted certiorari. Id.

The Supreme Court recognized that the rape shield statute implicates the sixth amendment and that, "[t]o the extent that it operates to prevent a criminal defendant from presenting relevant evidence, the defendant's ability to confront adverse

witnesses and present a defense is diminished. This does not necessarily render the statute unconstitutional." Id. at 149 (internal quotation marks and brackets omitted and emphasis added). Lucas observed that the defendant's right to present relevant evidence "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Id. (quoting Rock, 483 U.S. at 55).

Pursuant to this rule, the Supreme Court recognized the state's interest in the policy underlying the rape shield statute's procedural prerequisites -- to protect rape victims from surprise, harassment, and invasions of privacy, and permit the prosecution to investigate the evidence. Id. at 149-50. Next, the Court pointed to its previous rulings upholding evidentiary notice requirements even where such requirements limited a defendant's right to confrontation. Id. at 150-52 (citing Taylor v. Illinois, 484 U.S. 400, 414 (1988) (rejecting defendant's argument that "preclusion is never a permissible sanction for a discovery violation" and holding that the circuit court did not err by refusing to permit defendant's undisclosed witness to testify after violating a state procedural rule); United States v. Nobles, 422 U.S. 225 (1975) (affirming the trial court's refusal to permit defendant to call a witness where the defendant refused to comply with the District Court's order to submit a copy of the witness's report to the prosecution and declaring that "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system"); Wardius v. Oregon, 412 U.S. 470, 474 (1973)

("The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system. . . . [N]othing in the Due Process Clause precludes States from experimenting with systems of broad discovery designed to achieve these goals."). It further analogized the notice requirement to the notice of alibi rule that it upheld in Williams v. Florida, 399 U.S. 78 (1970), as follows:

> The [Supreme] Court observed that the notice requirement 'by itself in no way affected [the defendant's] crucial decision to call alibi witnesses . . . . At most, the rule only compelled [the defendant] to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that [he] planned to divulge at trial.' [Williams, 399 U.S. at 85.] Accelerating the disclosure of this evidence did not violate the Constitution, the [Supreme] Court explained, because a criminal trial is not 'a poker game in which players enjoy an absolute right always to conceal their cards until played.' [Id. at 82.]

Id. at 149. Based on its prior rulings and the state's interest in the rape shield statute, Lucas ruled that precluding evidence based on the rape shield statute's notice requirement is not per se unconstitutional. Id. at 150, 152-53. However, it remanded the case to determine whether the trial court abused its discretion by precluding Lucas' evidence. Id. at 152-53.

In determining whether HRE Rule 404(b)'s notice requirement is also not per se unconstitutional, we next consider the policy governing the rule's notice requirement. As stated above, the Lucas court described sound reasons for requiring pre-trial notice. See Lucas, 500 U.S. at 150-52; cf. Wardius, 412 U.S. at 473 ("Notice-of-alibi rules . . . are based on the proposition that the ends of justice will best be served by a

system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial."). The notice requirement pertaining to HRE Rule 404(b) evidence is likewise designed to reduce surprise and promote early resolution of admissibility questions. See Pond, 117 Hawai'i at 350, 181 P.3d at 429; FRE Rule 404(b) Advisory Committee's Note.

Moreover, HRE Rule 404(b) is not unconstitutional merely because it implicates a defendant's constitutional right to confront witnesses and its federal counterpart does not. As the Advisory Committee's Note to FRE Rule 404(b) observed, the notice requirement is "in the mainstream with notice and disclosure provisions in other rules of evidence," such as FRE Rules 412 (written motion of intent to offer evidence under rule), 609 (written notice of intent to offer conviction older than 10 years), 803(24) and 804(b)(5) (notice of intent to rely on residual hearsay exceptions). Advisory Committee's Note to FRE Rule 404(b). These federal rules of evidence, by their plain language, apply equally to the prosecution and the defense. Like these rules and other Hawai'i rules of evidence,[10] HRE Rule 404(b) is not per se unconstitutional even though it may restrict a defendant's constitutional right to confront an adverse witness. "The Sixth Amendment is not so rigid" that the HRE Rule 404(b)

[10] HRE Rule 412 requires a defendant accused of committing sexual assault intending to submit evidence of an alleged victim's past sexual behavior to submit written notice fifteen days prior to the introduction of evidence unless the court determines that the evidence or an issue is newly discovered, and HRE Rule 803(24) requires a notice of intent to admit hearsay evidence that has circumstantial guarantees of trustworthiness.

notice requirement violates the sixth amendment in all cases where it is used to preclude HRE Rule 404(b) evidence. See Lucas, 50 U.S. at 151. Accordingly, we conclude that HRE Rule 404(b)'s policy of "reduc[ing] surprise and promot[ing] early resolution on the issue of admissibility" "justify the limitation imposed on the defendant's constitutional right to testify."

The Dissent compares the HRE Rule 404(b) notice requirement to statutory privileges that "preclude the admission at trial of certain classes of confidential communications" and that may "interfere[] with a defendant's constitutional right to cross-examine." State v. Peseti, 101 Hawai'i 172, 181, 65 P.3d 119, 128 (2003); see Concurring and dissenting opinion ("Dissent") at 16-17. The Dissent argues that the defendant's constitutional right to confrontation trumps HRE Rule 404(b) in certain circumstances in the same way that it prevails over statutory privileges "upon a sufficient showing by the defendant." See Dissent at 16-17 (citing Peseti, 101 Hawai'i at 181-82, 65 P.3d at 128-29. The Peseti rule is not outcome dispositive of the instant issue, however, because HRE Rule 404(b) serves a different purpose than a statutory privilege and does not per se exclude evidence.

In Peseti, this court considered whether the statutory victim-counselor privilege violated defendant Peseti's constitutional right to confront adverse witnesses as guaranteed by the sixth amendment to the United States Constitution and article I, section 14 of the Hawai'i Constitution. 101 Hawai'i at 174, 65 P.3d at 121. This court recognized the worthy goal of

this statute: protecting victim-counselor communications assures victims that "their thoughts and feelings will remain confidential" and thereby promotes successful counseling. Id. at 180, 65 P.3d at 127. Yet, we also recognized that "[t]he scope of a statutory privilege . . . is tempered by the principle that 'privileges preventing disclosure of relevant evidence are not favored and may often give way to a strong public interest.'" Id. (citation and internal quotation marks omitted). Citing to Davis, 415 U.S. at 319-20, which held that a defendant's constitutional right to confront adverse witnesses trumps the confidentiality of a juvenile's record, and other courts' rulings that statutory privileges may give way to a defendants' constitutional right, we held that "when a statutory privilege interferes with a defendant's constitutional right to cross-examine, then, upon a sufficient showing by the defendant, the witness' statutory privilege must, in the interest of the truth-seeking process, bow to the defendant's constitutional rights." Id. at 181-82, 128-29 (emphasis added).

The Dissent contends that defendants should be permitted to bring forth HRE Rule 404(b) evidence if they satisfy the statutory privilege test laid out in Peseti because it "'operate[s] to preclude the admission at trial of certain' information,"[11] see Dissent at 16-17, but the Peseti rule was not

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[11] Peseti declared that a defendant's constitutional right of confrontation trumps a statutory privilege

> when the defendant demonstrates that: "(1) there is a legitimate need to disclose the protected information; (2) the information is
>
> continue...

designed or intended to address evidentiary notice requirements. The adoption of this rule was based on the purposes of statutory privileges and, accordingly, only applies to "evidence of a statutorily privileged confidential communication." Peseti, 101 Hawai'i at 180-82, 65 P.3d at 127-29. Moreover, unlike a statutory privilege, HRE Rule 404(b) does not automatically render evidence inadmissible. Rather, HRE Rule 404(b) evidence may be admitted where the proponent provided reasonable notice or had good cause for lack of pretrial notice. See HRE Rule 404(b) (requiring "reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown" (emphasis added)); Pond, 117 Hawai'i at 350, 181 P.3d at 429 (declaring that "the notice requirement is a condition precedent to the admissibility of HRE Rule 404(b) evidence").

Although the Dissent indicates that it is not claiming that a "rule that impinges on a defendant's constitutional right . . . is unconstitutional per se," see Dissent at 32, applying the Peseti test to otherwise admissible HRE Rule 404(b) evidence invariably renders the rule's notice requirements unconstitutional as applied to criminal defendants. The application of the Peseti test to HRE Rule 404(b) would always allow defendants to present HRE Rule 404(b) evidence that did not

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[11]...continue
relevant and material to the issue before the court; and (3) the party seeking to pierce the privilege shows by a preponderance of the evidence that no less intrusive source for that information exists."

Peseti, 101 Hawai'i at 182, 65 P.3d at 129 (quoting State v. L.J.P., 270 N.J.Super. 429, 637 A.2d 532, 537 (1994)).

comport with the HRE Rule 404(b) notice requirement. In other words, it appears that relevant HRE Rule 404(b) evidence would always satisfy the Peseti test and therefore, be rendered admissible. See Peseti, 101 Hawai'i at 182, 65 P.3d at 129 (requiring that "(1) there is a legitimate need to disclose the protected information[,] (2) the information is relevant and material to the issue before the court[,] and (3) the party seeking to pierce the privilege shows by a preponderance of the evidence that no less intrusive source for that information exists"). Therefore, to hold that the Peseti rule applies to the admission of defendants' HRE Rule 404(b) evidence, on the basis of protecting defendants' constitutional rights, would effectively rewrite HRE Rule 404(b) and render the notice requirement per se unconstitutional.

As explained above, HRE Rule 404(b), like many discovery rules, is designed to reduce surprise during the criminal trial and maintain fairness for both parties. Similar to the notice of alibi rule, the HRE Rule 404(b) notice requirement "'[a]t most, . . . only compelled [the defendant] to accelerate at an earlier date information that [he] planned to divulge at trial.'" Williams, 399 U.S. at 85. By precluding parties from introducing HRE Rule 404(b) evidence during trial and surprising the opposing party without good cause, this notice requirement protects parties and the jury trial system from falling prey to opposing counsel's trial tactics and strategies that do not promote a fair trial. Cf. Williams, 399 U.S. at 82 ("The adversary system of trial . . . is not a poker game in

which players enjoy an absolute right to conceal their cards until played."). The HRE Rule 404(b) notice requirement comports with this court's interest in promoting the orderly administration of justice and does not interfere with the defendant's constitutional rights. Cf. Baxter v. State, 522 N.E.2d 362, 369 (Ind. 1988) ("[N]otice rules promote the orderly administration of justice by preventing unnecessary continuances and by eliminating trials in those instances where post-notice investigation reveals an alibi's merits." (quoting Alicea v. Gagnon, 675 F.2d 913, 917 (7th Cir. 1982))).

Having concluded that HRE Rule 404(b) is not per se unconstitutional, we next consider whether the circuit court abused its discretion by excluding Pond's HRE Rule 404(b) evidence in the present case. See Wood v. Alaska, 957 F.2d 1544, 1550 (1992) ("Because trial judges have broad discretion both to determine relevance and to determine whether prejudicial effect or other concerns outweigh the probative value of the evidence, we will find a Sixth Amendment violation only if we conclude that the trial court abused its discretion." (Citations omitted.)).

2. The circuit court did not abuse its discretion by precluding evidence that Ms. Russell previously "smacked" Pond under HRE Rule 404(b).

As discussed above, Pond attempted to introduce "HRE Rule 404(b) evidence" on the first day of trial by arguing that it is "highly relevant to the issue of 'first aggressor,'" but the circuit court ruled that Pond gave unreasonable notice of this evidence. The circuit court excluded this HRE Rule 404(b) evidence, opining, "If it goes to the heart of the defense, then

it should have been something given more prominence earlier. I can't believe that it's that much to the heart of it based on the way it's dribbling in."

As the Dissent points out, Pond's proferred evidence may implicate HRE Rule 404(a)(2). See Dissent at 18 (citing HRE Rule 404(a)(2)(providing that victims' character traits offered by an accused may be admitted "to prov[e] action in conformity therewith on a particular occasion")). Based on its plain language, HRE Rule 404(a)(2) evidence is not subject to the reasonable notice provision of HRE Rule 404(b). Nevertheless, Pond identified the alleged attack of Pond by Ms. Russell as "404(b) evidence" in his opening brief's points of error section and argued that the court erred in excluding the HRE Rule 404(b) evidence. Thus, the issue of the admissibility of this evidence under HRE Rule 404(a) was not asserted by defendant and is therefore deemed waived. See Hawai'i Rules of Appellate Procedure ("HRAP") Rule 28(b)(4) ("Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented."); HRAP Rule 28(b)(7) (providing that the opening brief must contain an argument section "containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. . . . Points not argued may be deemed waived").

The record indicates that the circuit court did not abuse its discretion by denying Pond's request to introduce Ms.

Russell's prior acts under HRE Rule 404(b). On the first day of trial, defense counsel explained to the court that he was previously aware of the "[HRE Rule] 404(b) event," but did not give the prosecution notice because he "wasn't able to pinpoint the day until [that] morning." This argument was disingenuous at best. When Pond's counsel attempted to introduce the alleged HRE Rule 404(b) evidence at trial, both Pond and his counsel merely approximated the date of the event. On direct examination, the following colloquy took place between Pond and his counsel:

> Q. The reason you're here today is because of the event that happened on late December 12, do you remember an incident that happened about a week and a half prior?
> A. I do.
> . . . .
> A. . . . . [T]hat day, a couple weeks prior to what, the 12th, she had -- I had come home from work and she had the dog and it was laying up on my bed, and just lounging on the bed.

(Emphases added.) Pond's argument for excusing pretrial notice is inconsistent with his testimony, which clearly did not "pinpoint" the date of the prior incidents. Accordingly, Pond did not establish good cause for delaying the notification of the HRE Rule 404(b) evidence until the day of trial.

We further note that defense counsel could have given the prosecution general notice prior to trial to eliminate undue surprise and allow the prosecution the opportunity to prepare for this matter. See Pond, 117 Hawai'i at 350, 181 P.3d at 429 (observing that Pond never explained "why he could not have provided earlier notice of the approximate time period of the alleged bad act, as well as the location and the general nature of the evidence"). Accordingly, we conclude that the circuit court did not abuse its discretion by declining to excuse

pretrial notice on good cause shown and precluding Pond's HRE Rule 404(b) evidence.

**B. The Circuit Court Committed Reversible Error By Precluding Pond From Cross-Examining Ms. Russell About Whether She Smoked Marijuana on December 12, 2005.**

Pond next argues that the ICA gravely erred by concluding that he was required to provide reasonable notice of his intent to cross-examine Ms. Russell about using marijuana on December 12, 2005 to attack her perception and recollection. It is well recognized that a defendant may cross-examine the witness "as to her drug use and addiction at or near the time of the incident to the extent that it affected her perception or recollection of the alleged event."[12] Saboq, 108 Hawai'i at 111, 117 P.3d at 843 (citing Wilson v. United States, 232 U.S. 563 (1914) (concluding that witness's drug use was admissible to discredit the witness's reliability); Blumhagen v. State, 11 P.3d 889 (Wyo. 2000) ("A witness' [sic] use of drugs while she is testifying or during the events about which she is testifying may, of course, be presented to the jury because the drug use could have affected the witness' [sic] observations or statements.")). "Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve

[12] In Pond, the ICA explained that FRE Rule 404(b) "does not extend to evidence of acts which are 'intrinsic to the charged offense.'" Pond, 117 Hawai'i at 348, 181 P.3d at 427 (quoting FRE Rule 404(b) Advisory Committee's Note). However, we have recently rejected the extrinsic/intrinsic evidence distinction because it "essentially nullif[ies] Rule 404(b)'s restrictions on "bad act" evidence." State v. Fetelee, 117 Hawai'i 53, 81, 175 P.3d 709, 737 (2008).

into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." Davis, 415 U.S. at 316 (emphasis added). As further discussed below, evidence introduced to impeach a witness's sensory or mental defect does not fall under the purview of HRE Rule 404(b).

The application of HRE Rule 404(b) is limited to other crimes, wrongs, or acts "[that] is probative of another fact that is of consequence to the determination of the action." HRE Rule 404(b). United States v. Tomblin, 46 F.3d 1369 (5th Cir. 1995) is instructive on this point. In Tomblin, the 5th Circuit discussed whether the prosecution was required to give advance notice of its intent to impeach the defendant through cross-examining him about other acts. Thomblin, 46 F.3d at 1388. The prosecution contended that its cross-examination questions were probative of Tomblin's character for truthfulness and is admissible under FRE Rule 608(b)[13] -- evidence offered to impeach a witness. Tomblin, 46 F.3d at 1388. The 5th Circuit agreed that the admissibility of other acts evidence depends on the

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[13] FRE 608(b) provides,

> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

purpose for the proffered evidence and noted that FRE Rule 404(b) applies "when other-acts evidence is offered as relevant to an issue in the case, such as identity or intent." Id. Tomblin determined that the prosecution intended to question the defendant about his alleged prior acts to probe his character for truthfulness. Id. at 1389. Therefore, FRE Rule 608(b), not FRE Rule 404(b), applied, and "reasonable notice" of this evidence was not required. Id.

Here, contrary to the conclusion of the ICA and the ruling of the circuit court, Pond was not required to provide the prosecution HRE Rule 404(b) "reasonable notice" prior to cross-examining Ms. Russell about whether she used marijuana on December 12, 2005 because he intended to show the jury that her perception and testimony about the incident were not credible. See United States v. Baskes, 649 F.2d 471, 477 (7th Cir.1980) ("No rule or rationale guarantees the defense advance knowledge of legitimate impeachment before it calls a witness."), cert. denied, 450 U.S. 1000 (1981). Hence, the ICA erred in affirming the circuit court's ruling that precluded Pond from cross-examining Ms. Russell about her alleged marijuana use on December 12, 2005 based on HRE Rule 404(b).

The circuit court committed reversible error in limiting the cross-examination of Ms. Russell as to her marijuana use.[14] Pond was deprived of showing that Ms. Russell's

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[14] As the Supreme Court explained in Delaware v. Van Arsdall, 475 U.S. 673 (1986):

continue...

perception of the events was altered through her alleged use of marijuana. Pond's testimony that he smelled marijuana upon entering the house was insufficient to prove that Ms. Russell's perception on December 12, 2005 was inaccurate. If the court permitted Pond's counsel to question Ms. Russell on this issue directly, the jury could have observed Ms. Russell's response and judged her credibility. See Lyba v. State, 321 Md. 564, 583 A.2d 1033 (1991) ("[T]he defense could follow up the admission [that the victim took narcotics on the day in question] by delving the degree of drug influence or alcohol intoxication so that the jury could decide the credibility of the victim and how much weight to give her testimony.").

In convicting Pond of the two offenses, the jury found Ms. Russell credible and believed Ms. Russell's testimony about December 12, 2005 over Pond's testimony. There was a reasonable possibility that the errors complained of contributed to Pond's conviction. Therefore, we conclude that the circuit court's error was not harmless beyond a reasonable doubt, and we vacate

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[14]...continue

> The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

Van Arsdall, 475 U.S. at 681. The Supreme Court deemed the following factors important in determining whether the constitutional error was harmless: the "importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Id. at 684.

Pond's convictions.

### C. The ICA Did Not Gravely Err By Concluding That The Circuit Court Properly Instructed the Jury On Self-Defense Inasmuch As It Adequately Tracked the Self-Protection Defense Statute.

Next, Pond contends that the ICA gravely erred by concluding that the circuit court did not err in instructing the jury about the self-protection defense even though it did not "define for the jury that the reasonableness of [Pond's] belief must be viewed from his perspective."

Under HRS § 703-304(3) (1993 & Supp. 2006), the statute regarding the use of force in self-protection as a defense, "a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used without retreating, surrendering, possession, doing any other act which he has no legal duty to do, or abstaining from any lawful action." (Emphasis added.) See State v. Pemberton, 71 Haw. 466, 477, 796 P.2d 80, 85 (1990) ("[T]he standard for judging the reasonableness of a defendant's belief for the need to use deadly force is determined from the point of view of a reasonable person in the defendant's position under the circumstances as he believed them to be. The jury, therefore, must consider the circumstances as the Defendant subjectively believed them to be at the time he tried to defend himself." (citation omitted)).

The self-defense jury instruction provided:

> The use of force upon or towards another person is justified when a person reasonably believes that such force is immediately necessary to protect himself on the present occasion against the

> use of unlawful force by the other person. A person employing protective force may estimate the necessity thereof under the circumstances as he reasonably believes them to be when the force is used without retreating. If, and only if, you find that the [d]efendant was reckless in having a belief that he was justified in using self-protective force against another person, or that the [d]efendant was reckless in acquiring or failing to acquire any knowledge or belief which was material to the justifiability of his use of force against the other person, then the use of such protective force is unavailable as a defense to the offense of abuse of family or household member.

This instruction sufficiently tracks HRS § 703-304(3) inasmuch as it informs the jury that the reasonableness of Pond's belief must be viewed from his perspective. Because the jury must consider whether the defendant's belief was reasonable "under the circumstances as he reasonably believes them to be," it necessarily evaluates the situation from the defendant's perspective. Therefore, the ICA properly determined that the circuit court's jury instruction was consistent with the language of the self-protection defense statute.

### D. We Clarify that There Are Two Attendant Circumstances: (1) Ms. Russell Was a Victim of a Crime and (2) The Call Was Made to 911-Emergency Telephone System.

Finally, Pond argues that the ICA gravely erred by ruling that the circuit court erred by combining the elements of the Interference offense but ruling that this error was harmless. The ICA, in agreement with the prosecution and Pond, ruled that the jury's instructions as to the Interference offense consisted of two elements, results of conduct and attendant circumstances. Pond, 117 Hawai'i at 352, 181 P.3d at 431. We take this opportunity to clarify the ICA's analysis of the Interference offense's attendant circumstance element.

Under HRS §§ 702-204 and 702-205 (1993), "[A] person is not guilty of an offense unless the person acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense," (1) conduct, (2) attendant circumstances, and (3) results of conduct." In State v. Aiwohi, 109 Hawai'i 115, 123 P.3d 1210 (2005), this court observed that the Model Penal Code does not define an attendant circumstance, and we adopted the ICA's definition of an "attendant circumstance" as stated in State v. Moser, 107 Hawai'i 159, 172, 111 P.3d 54, 67 (App. 2005): [a]ny circumstances defined in an offense that are neither conduct nor the results of conduct would, by default, constitute attendant circumstances elements of the offense." Aiwohi, 109 Hawai'i at 127, 123 P.3d at 1222. In applying this definition of an attendant circumstance, we distilled the three elements of the offense of manslaughter ("recklessly causes the death of another person"). "The conduct is, any voluntary act or omission, the result is death, and the attendant circumstance is 'of another person.'" Id.

In the instant case, Pond is guilty of the Interference offense if he "intentionally or knowingly prevents a victim or witness to a criminal act from calling a 911-emergency telephone system, obtaining medical assistance, or making a report to a law enforcement officer." HRS § 709-906. Applying this court's definition of attendant circumstances, the conduct is any voluntary act or omission, the result is preventing Ms. Russell from making a telephone call, and the attendant circumstances are

that (1) Ms. Russell was a victim of a crime and (2) the call was to 911-emergency. As previously quoted, and worth repeating here, the jury instruction on the Interference offense mistakenly stated in pertinent part that the intentional or knowing state of mind is required for two elements: (1) that Pond "engaged in conduct" and (2) "that said conduct resulted in preventing a victim or witness to a criminal act from calling a 911-emergency telephone system, obtaining medical assistance, or making a report to a law enforcement officer."

Thus, on remand, the elements of "results-of-conduct" (that Pond successfully prevented Ms. Russell from making a telephone call) and "attendant circumstances" -- (1) that Ms. Russell was a victim of a criminal act and (2) that the call was made to 911-emergency telephone system -- should be separately listed.

## IV. CONCLUSION

Based upon the foregoing analysis, we vacate Pond's conviction of abuse of family or household member and Interference, and remand for further proceedings consistent with this opinion.

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