NO. 22382

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
WAYNE RAPOZA, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-0524)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Wayne Rapoza (Defendant) appeals the circuit court's March 8, 1999 judgment.

Prior to the start of the jury trial, Defendant pled guilty to Count VI, Possession of Firearm or Ammunition by a Person Convicted of Certain Crimes, Hawaiʻi Revised Statutes (HRS) §§ 134-7(b) and (h) (1993).

A jury decided, in relevant part, as follows:

Count I: Not guilty of Attempted Murder in the First Degree (of Manuel Galarza (Manuel), Louise Galarza (Louise), and Brandon Galarza (Brandon) (collectively Galarzas));[1]

[1] The court instructed the jury, in relevant part, as follows:

> If, and only if you find the defendant Wayne Rapoza not guilty in Count I of the offense of Attempted Murder in the First Degree; or if you are unable to reach a unanimous verdict as to this offense, then you must consider whether the defendant is guilty or not guilty in Counts II, III, IV, and V of the offense of Attempted Murder in the Second Degree.

Count II: Not guilty of Attempted Murder in the Second Degree and guilty of the included offense of Attempted Assault in the First Degree (of Manuel), HRS § 707-710 (1993).

Count III: Not guilty of Attempted Murder in the Second Degree and guilty of the included offense of Reckless Endangering in the First Degree (of Louise), HRS § 707-713 (1993).

Count IV: Not guilty of Attempted Murder in the Second Degree and guilty of the included offense of Attempted Assault in the First Degree (of Brandon), HRS § 707-710 (1993).

Count V: Not guilty of Attempted Murder in the Second Degree (of Manuel).

Count VII: Guilty of Place to Keep Pistol or Revolver, HRS §§ 134-6(c) and (e) (1993).

The court sentenced Defendant to extended indeterminate terms of incarceration of twenty years each for Counts II, IV, VI, and VII and an extended indeterminate term of incarceration of ten years for Count III, said sentences "to be served concurrently with each other and any other term imposed upon Defendant, and with credit to be given for time already served." This appeal followed.

We affirm the convictions of Counts II, III, VI, and

VII. We vacate the conviction of Count IV and remand Count IV for a new trial.

BACKGROUND

A.

Event History

According to the evidence presented by Plaintiff-Appellee State of Hawai‘i (the State), Louise and her husband, Manuel, owned a duplex and lived in its upper unit with their son Brandon.[2] They rented the lower unit to Chydelle Mokuahi (Chydelle).

Defendant was "starting to go out with [Chydelle]." On February 16, 1998, Defendant went to the Galarzas' duplex to visit Chydelle. According to Louise, she "heard voices talking. Somebody was upset, and they were beeping the horn, making lots of loud noise." When she looked out the window and saw Defendant, she said to him, "Hey, Buddy, it's kind of early in the morning, and I'm not feeling too good, and I'd like to know if you could be a little bit quiet so I could get back to sleep." Defendant responded, "Oh, oh. Okay. Okay. Sorry." When Louise went back to her bed, she heard Defendant say, "Fucking bitch, my

[2] At the trial in October 1998, Brandon Galarza was age 20.

name is Wayne, not Buddy."

During the 6:00 p.m. hour on the evening of February 20, 1998, Louise heard Defendant "doing the same thing that had happened" on February 16, 1998. When she went to the window and apologized for calling him "Buddy," Defendant responded by calling her names. Manuel and Brandon then came to the window. Brandon told Defendant, "You disrespected my mom." Brandon hit the glass pane window with his fist and cracked it. Louise called the police and talked to them. When Manuel went outside, Louise hung up the phone and followed him.

Defendant then got into his car and drove up the driveway. Manuel testified that as Defendant came up the driveway in Defendant's car, Manuel had to "[jump] over the car" to avoid being hit. Defendant then got out of the car holding a gun. He fired several shots in the general direction of the Galarzas before returning to his car and driving away.

In contrast, Defendant's sister, Danielle G. Rapoza (Danielle), testified that on the evening in question, she and Defendant were visiting Chydelle, and Defendant was telling her about his prior incident with Louise. Defendant told her that his car got stuck down the hill because the cement was wet and slippery and this lady yelled at him and called him "Buddy."

While Defendant was telling her this story, "a lady came from upstairs, came to her window and yelled at [Defendant], . . . you don't have to fucking tell everybody that story." Then Brandon came to the window and told Defendant to show some respect to Louise. Manuel also came to the window. Brandon punched the window and told Defendant that "he was going to come down and bust a cap in [Defendant's] ass[,]" which she and Defendant interpreted to mean that Brandon was going to shoot Defendant. Defendant entered his car. Danielle entered her car with her children. Brandon moved toward the departing vehicles and fired a handgun in the direction of Defendant. Defendant responded by exiting his vehicle and shooting a gun, but not at anyone in particular. Defendant then reentered his vehicle and both vehicles left the area.

Defendant's testimony essentially corroborated Danielle's testimony. Defendant denied any intent to harm Manuel, Louise, or Brandon.

B.

Difference Between Counts II and V

With respect to Manuel, the State separated Defendant's firing of the gun (Count II) from Defendant's driving of the car

allegedly at Manuel (Count V).

C.

Motions for Judgment of Acquittal

At the conclusion of the State's case, Defendant moved for judgment of acquittal as to Counts I through V. The court denied the motion. After presenting a number of witnesses, Defendant testified. At the conclusion of the trial, Defendant renewed his motion for judgment of acquittal. The court again denied the motion.

D.

Included Offenses

For Counts II, III, IV, and V, the trial court gave basically the same jury instructions. As to each of these four counts, the trial court instructed (1) on the charged offense of Attempted Murder in the Second Degree; and (2) on the included offenses of Attempted Assault in the First Degree, Attempted Assault in the Second Degree, and Reckless Endangering in the First Degree.

ISSUES ON APPEAL

1. Did the trial court plainly err in failing to instruct the jury that the defense of self-defense should be considered when deciding the Count IV included offense of Assault in the First Degree of Brandon?

2. Did the trial court err or plainly err in instructing the jury on the law of "attempt"?

3. Did the trial court abuse its discretion in denying Defendant's bill of particulars? Alternatively, did it err in failing to instruct the jury that it must unanimously agree on which act constituted the conduct element in Counts II, III, and IV?

4. Were the verdicts of guilty of Assault in the First

Degree of complainants Manuel and Brandon inconsistent with the verdict of guilty of Reckless Endangering in the First Degree of complainant Louise and, if so, did the trial court plainly err in failing to *sua sponte* declare a mistrial?

5. Was a part of the State's rebuttal argument prosecutorial misconduct?

STANDARDS OF REVIEW

A.

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." State v. Ortiz, 91 Hawai‘i 181, 190, 981 P.2d 1127, 1136 (1999) (quoting State v. Kinnane, 79 Hawai‘i 46, 49, 897 P.2d 973, 976 (1995) (quoting State v. Kelekolio, 74 Haw. 479, 514-15, 849 P.2d 58, 74 (1993) (citations omitted))) (internal quotation marks omitted). *See also* State v. Hoey, 77 Hawai‘i 17, 38, 881 P.2d 504, 525 (1994). "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." State

v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998) (citing State v. Robinson, 82 Hawai'i 304, 310, 922 P.2d 358, 364 (1996)).

> [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 may have contributed to the conviction.

State v. Tabigne, 88 Hawai'i 296, 302, 966 P.2d 608, 614 (1998) (citation omitted). If there is a reasonable possibility that error might have contributed to a conviction in a criminal case, then the error cannot be harmless beyond a reasonable doubt and the conviction must be set aside. State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997) (citation omitted).

> Nevertheless, the "trial court is not required to instruct the jury in the exact words of the applicable statute but to present the jury with an understandable instruction that aids the jury in applying that law to the facts of the case." State v. Apao, 59 Haw. 625, 645, 586 P.2d 250, 263 (1978), subsequent resolution, 66 Haw. 682, 693 P.2d 405 (1984). 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. State v. Robinson, 82 Hawai'i 304, 310, 922 P.2d 358, 364 (1996). If that standard is met, however, "the fact that a particular instruction or isolated paragraph may be objectionable, as inaccurate or misleading, will not constitute grounds for reversal." [State v.] Pinero, 75 Haw. [282,] 292, 859 P.2d [1369,] 1374 [(19893)]. Whether a jury instruction accurately sets forth the relevant law is a question that this court reviews de novo. Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai'i 494, 504, 880 P.2d 169, 179 (1994).

State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998).

B.

Bill of Particulars

The decision as to whether to grant a motion for a bill of particulars is within the sound discretion of the trial court. State v. Hwa Cha Kim, 71 Haw. 134, 785 P.2d 941 (1990). Upon

review, the appellate court will not find that the trial court abused its discretion unless it is established that the trial court clearly exceeded bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party. Gakiya v. Hallmark Properties, Inc., 68 Haw. 550, 722 P.2d 460 (1986).

C.

Prosecutorial Misconduct

For remarks by the prosecutor to be misconduct, "the remarks must be improper[.]" United States v. Gonzalez, 122 F.3d 1383, 1389 (11th Cir. 1997). The question whether a prosecutor's misconduct is "prosecutorial misconduct" is "reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of 'whether there is a reasonable possibility that the error complained of might have contributed to the conviction.'" State v. Rogan, 91 Hawai‘i 405, 412, 984 P.2d 1231, 1238 (1999) (quoting State v. Balisbisana, 83 Hawai‘i 109, 114, 924 P.2d 1215, 1220 (1996) (quoting State v. Holbron, 80 Hawai‘i 27, 32, 904 P.2d 912, 917, reconsideration denied, 80 Hawai‘i 187, 907 P.2d 773 (1995)) (citations and internal quotation marks omitted)). "Factors to consider are: (1) the nature of the conduct; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant." Id. (quoting State v.

Samuel, 74 Haw. 141, 148, 838 P.2d 1374, 1378 (1992) (citation omitted)).

D.

Plain Error

> "We may recognize plain error when the error committed affects substantial rights of the defendant." State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997) (citations and internal quotation signals omitted). See also Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) (1993) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.")

State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999) (citations omitted).

> In our view, the decision to take notice of plain error must turn on the facts of the particular case to correct errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings." United States v. Atkinson, 297 U.S. 157, 160 (1936)].

State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 676 (1988).

DISCUSSION

A.

Defendant contends, the State admits, and we agree, that the trial court plainly erred in not instructing the jury to consider Defendant's defense of justifiable use of force when considering Count IV (Brandon).

"[A] defendant is entitled to an instruction on every defense or theory of defense having *any* support in the evidence, provided such evidence would support the consideration of that issue by the jury, *no matter how weak, inconclusive, or unsatisfactory the evidence may be*." State v. Maelega, 80

Hawai‘i 172, 178-79, 907 P.2d 758, 764-65 (1995) (emphasis in original); *see also* State v. Pinero, 75 Haw. 282, 304, 859 P.2d 1369, 1379 (1993).

With respect to the defenses available to Defendant, the court gave only the following instruction: "Okay. Justifiable use of force, commonly known as self-defense, is a defense to the charge of Attempted Murder in the First Degree." The court did not instruct the jury that self-defense was a defense to any of the three included offenses.

Defendant argues that the

> evidence at trial supports a defense theory that [Defendant] was acting in self-defense, i.e., to protect himself from Brandon's gunfire aimed at him, a theory emphasized by defense counsel in summation. The court herein incorrectly instructed the jury that self-defense only applied to the offense of Attempted Murder in the First Degree. If the court reasoned that the trial evidence supported [Defendant's] use of deadly force in self-defense against more than one complainant during the same incident (see HRS § 707-701, Murder in the First Degree), then logically, the evidence also supported self-defense at least against Brandon Galarza who was, according to Danielle, shooting directly at [Defendant]. The jury should have been instructed that self-defense also applied to the offense of Assault in the First Degree as to complainant Brandon Galarza.

(Emphasis in original.)

The State agrees and admits that "[s]ince there was evidence adduced by Defendant's witnesses that Brandon allegedly had a gun and was shooting at Defendant, there was a rational basis in the evidence to give the self-defense instruction for the Assault in the First Degree for Brandon. Therefore, Defendant was entitled to this instruction." We agree.

Therefore, Count IV, Attempted Assault in the First Degree (of Brandon) is vacated and remanded for retrial.

B.

The jury instructions were not prejudicially insufficient, erroneous, inconsistent or misleading.

1. The term "strongly corroborative" was applied to all applicable charges.

In the second paragraph of its instructions to the jury, the trial court instructed the jury that

> [y]ou must consider all of the instructions as a whole and consider each instruction in the light of all of the others. Do not single out any word, phrase, sentence or instruction and ignore the others. Do not give greater emphasis to any word, phrase, sentence or instruction simply because it is repeated in these instructions.

Immediately prior to instructing the jury specifically as to any count or its included offenses, the court instructed the jury that

> [a] person is guilty of an attempt to commit a crime if he intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.
>
> When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with a state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.
>
> Conduct shall not be considered a substantial step under these -- under this section unless it is strongly corroborative of the defendant's criminal intent.

The trial court again instructed the jury regarding the "strongly corroborative" paragraph quoted above in the following three instances: (1) after it instructed the jury as to Count I but immediately prior to instructing the jury as to Counts II, III, IV, and V; (2) when it instructed the jury as to the Attempted Assault in the First Degree included in Count II; and (3) when it instructed the jury as to the Attempted Assault in the Second Degree included in Count II.

The trial court did not instruct the jury regarding the "strongly corroborative" paragraph above when it instructed the jury regarding the included offenses of Attempted Assault in the First Degree and Attempted Assault in the Second Degree in Counts III, IV, and V.

During its deliberations, the jury asked, "What is the definition of 'strongly corroborative'?" In response, the court advised the jury to "[p]lease refer to the court's (written) instructions which have been provided to you."

Defendant argues that because this "strongly corroborative" paragraph was not part of the instructions as to Counts III and IV, the instructions for these Counts were prejudicially confusing. In light of all of the other "strongly corroborative" paragraphs noted above, we disagree. We do not, however, recommend doing it the way the trial court did it in this case.

2. It was not highly prejudicial for the "strongly corroborative" language to be stated separately from the elements of the charge.

The following is an example of the "strongly corroborative" instruction given immediately after the material elements instruction:

> There are two material elements of the offense of Attempted Murder in the First Degree, each of which the prosecution must prove beyond a reasonable doubt. These two elements are:
>
> . . . .
>
> 2. That the conduct was a substantial step in a course of conduct intended or known to cause the deaths of more than one person in the same incident.
>
> Conduct shall not be considered a substantial step unless it is strongly corroborative of the defendant's intent to commit Murder in the First Degree.

Defendant contends that

this last paragraph, separated from the elements of the offense, does not make clear that the jury must find beyond a reasonable doubt that the conduct is a substantial step only where it is strongly corroborative of the defendant's intent. Additionally, even though the jury was instructed that the State must prove each element of each offense beyond a reasonable doubt, the instruction, given immediately after the conduct element for each attempt offense, invited the jurors to find that the State had met its burden of establishing substantial step, i.e., conduct, where the evidence was merely strongly corroborative. It is certainly possible to find strong corroboration, yet still retain a reasonable doubt.

> . . . .
>
> The "strongly corroborative" language had the highly prejudicial effect of diminishing the responsibility of applying

> the proper standard of proof beyond a reasonable doubt to the conduct element.

We disagree.

3. The omission by the trial court of the words "under the circumstances as he believes them to be" from certain instructions is not a reversible error.

As noted above, immediately prior to instructing the jury specifically as to any count or its included offenses, the court instructed the jury that "[a] person is guilty of an attempt to commit a crime if he intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime." (Emphasis added.) The trial court omitted the underlined part of the instruction when it instructed the jury as to the offense of Attempted Murder in the First Degree, Attempted Murder in the Second Degree, Attempted Assault in the First Degree, and Attempted Assault in the Second Degree.

For example, with respect to Count II, the trial court instructed the jury that "[a] person commits the offense of Attempted Murder in the Second Degree if he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause the death of another person."

In contrast, Defendant's proposed jury instruction read as follows: "A person commits the offense of Attempted Murder in the Second Degree if he intentionally engaged in conduct which,

under the circumstances as he believes them to be is a substantial step in a course of conduct intended or known to cause death of another person."

Defendant argues that the result of the omission by the court of the phrase "under the circumstances as he believes them to be" from the specific instructions was that they then "did not correctly specify the state of mind element required for conviction[.]" We disagree. The Hawai‘i Supreme Court's opinion in State v. Sawyer, 88 Hawai‘i 325, 335, 966 P.2d 637, 647 (1998) is directly on point. In reviewing a similar set of jury instructions, the Hawai‘i Supreme Court concluded that "[a]s a whole, the trial court's instructions on attempted murder in the second degree were not 'prejudicially insufficient, erroneous, inconsistent, or misleading.'" Id.

C.

The trial court did not err in denying Defendant's request for a bill of particulars and did not plainly err when it did not give a unanimity instruction.

Defendant argues that the trial court erred when it denied his request for a bill of particulars because he "was not provided with sufficient notice as to what specific conduct during the shooting incident formed the basis for the allegations in Counts II, III, and IV of the Complaint herein and thereby deprived Defendant of his constitutional right to be informed of the nature and cause of the accusation."

A bill of particulars[3] is "designed 'to enable the defendant to prepare for trial and prevent surprise[.]'" State v. Reed, 77 Hawai‘i 72, 78, 881 P.2d 1218, 1224 (1994) (quoting State v. Harper, 1 Haw. App. 481, 486, 620 P.2d 1087, 1091 (1980)). The condition precedent for the issuance of a bill of particulars is a "defect, imperfection, or omission in the indictment, insufficient to warrant the quashing of the indictment" or "variance, not fatal, between the allegations and the proof." HRS § 806-47 (1993). Defendant does not assert that he failed to receive adequate notice of the specific charges. He does not allege prejudicial surprise or an inability to prepare to meet the charges by virtue of insufficient notice. Therefore, the trial court did not abuse its discretion in denying Defendant's request for a bill of particulars.

Alternatively, Defendant argues that the trial

court erred or committed plain error[4] by failing to instruct the

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[3] Hawai‘i Revised Statutes § 806-47 (1993) reads, in relevant part, as follows:

> **Bill of particulars.** If the court is of the opinion that the accused in any criminal case has been actually misled and prejudiced in the accused's defense upon the merits of any defect, imperfection, or omission in the indictment, insufficient to warrant the quashing of the indictment, or by any variance, not fatal, between the allegations and the proof, the prosecuting officer shall, when so ordered by the court, acting upon its own motion or upon motion of the prosecution or defendant, file in court and serve upon the defendant, upon such terms as the court imposes, a bill of particulars of the matters in regard to which the court finds that the defendant should be informed.

[4] Hawai‘i Rules of Civil Procedure Rule 51 contemplates a clear record of defense counsel's objections. That clear record does not exist in

> jury that it must unanimously agree on which act constituted the conduct element in each of the two counts of Attempted Assault in the First Degree (Count II against Manuel and Count IV against Brandon Galarza) and Reckless Endangering in the First Degree (Count III against Louise Galarza).

(Footnote added.)

It is the law of other states that "[w]here an act of violence injures multiple victims, there are as many punishable offenses as there are victims." State v. Dunlop, 721 P.2d 604, 609 (Alaska 1986); *see also* People v. Alvarez, 9 Cal. App, 4th 121, 11 Cal. Rptr. 2d 463 (1992); Idaho v. Lee, 116 Idaho 515, 777 P.2d 737 (1989).

In descending order from the charged offense through the included offenses, the disputed material elements of Counts II, III, IV, and V were the following: (a) "intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause the death of another person"; (b) "intentionally engaged in conduct which is a substantial step in a course of conduct intended or known to cause serious bodily injury to another person"; (c) "intentionally engaged in conduct which is a substantial step in a course of conduct intended or known to cause bodily injury t another person with a dangerous instrument"; and (d) "intentionally fires a firearm in a manner which recklessly places another person in danger of death or serious bodily injury."

State v. Arceo, 84 Hawai‘i 1, 928 P.2d 843 (1996),

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this case.

requires that "where evidence of multiple culpable acts is adduced to prove a single charged offense, the defendant is entitled either to an election by the prosecution of the single act upon which it is relying for a conviction or a specific unanimity instruction." Id. at 30-1, 928 P.2d at 872-3. In other words, Arceo requires that when separate and distinct culpable acts, any one of which could support a conviction, are subsumed within a single count, one of the following two events must occur: (1) at or before the close of its case-in-chief, the prosecution must elect the specific act upon which it is relying to establish the conduct element of the charged offense; or (2) the trial court must instruct the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt. Id. at 32-3, 928 P.2d at 874-5.

In Defendant's case, the State avoided a part of the impact of the Arceo rule when it separated Count II from Count V. In light of the evidence showing that Defendant fired multiple gunshots at or toward each of three victims, the State avoided another part of the impact of the Arceo rule when it charged only one offense per alleged victim in Counts II, III, and IV. The part of the Arceo rule not avoided pertained to the fact that each gunshot was a separate attempted Assault in the First Degree or Reckless Endangering in the First Degree. The Arceo rule required the trial court to instruct the jury that if the jury decided beyond a reasonable doubt that Defendant fired one or

more shots at or toward a specified victim, all twelve of its members must agree on the same shot(s) that were fired. In Defendant's case, the trial court failed to comply with the Arceo rule in this respect.

However, Defendant did not dispute that he shot in the general direction of the three alleged victims. He disputed other material elements. For example, Defendant argued that he was acting in self-defense or that he was not acting intentionally or knowingly. In the words of defense counsel in closing argument,

> Is it strongly corroborative that [Defendant] was shooting above people's heads, not aiming, that he was trying to kill Louise or Manuel or trying to kill Brandon? No.
>
> Is it strongly corroborative that he was trying to commit an Assault in the First Degree or inflict serious bodily injury on them by shooting over their heads? No.
>
> Is it strongly corroborative that he was trying to commit Assault in the Second Degree causing substantial bodily injury with a dangerous instrument? No.
>
> . . . .
>
> Okay. [Defendant] was a shooting gun. He knew - he was aware that his conduct was pulling the trigger. Yeah, that's satisfied to have attendant circumstances, aware circumstances exist. He was aware that he was shooting a gun.

Thus, in contrast to the situation in Arceo, the trial court's errors in Defendant's case were not plain errors. They did not affect his substantial rights. They were harmless beyond a reasonable doubt. There was no reasonable possibility that the

court's errors contributed to the convictions.

D.

Based on the testimony presented, the jury's verdicts are not inconsistent.

Defendant argues that "the verdicts of guilt on assault in the first degree as to complainants Manuel and Brandon Galarza were inconsistent with the verdict of guilt for Reckless Endangering in the First Degree as to complainant Louise Galarza." Citing the evidence that he was firing at all three complainants at the same time, he argues that he could not have "had the specific intent to attempt to cause death or serious bodily injury to Manuel and Brandon, yet possess the reckless state of mind to place Louise in danger of death or serious bodily injury."

Where "the verdicts are compatible with the relevant statutory language, and are consistent with the evidence presented at trial, they are not inconsistent." State v. Senteno, 69 Haw. 363, 368, 742 P.2d 369, 372-73 (1987). Louise testified that she ducked down behind the Subaru when Manuel told her Defendant was shooting. Hence, she was down on the ground behind the Subaru during the incident and did not see Defendant shooting. In contrast, Manuel testified that he saw the gun in Defendant's hand, saw that the gun was pointed at himself, and saw at least the first shot out of the gun. Brandon also testified that he witnessed Defendant fire off the first couple

of rounds before ducking down behind the Subaru. In summary, while Louise was down behind the Subaru and did not see Defendant firing in her direction, Brandon and Manuel witnessed Defendant's actions and both testified that the gun was pointed in their general direction. In viewing the facts of this case in light most favorable to the State, we conclude there is evidence to support the jury's differing verdict as to Louise.

E.

The statements made by the prosecutor during his rebuttal argument were not misconduct.

Defendant asserts that the prosecutor's "comments during rebuttal argument amounted to prosecutorial misconduct which deprived Defendant of his due process right to a fair trial[.]"

During closing rebuttal argument, the State argued, in relevant part, as follows:

> What about Wayne Rapoza? What about the fact that he's carrying around with him in his car, supposedly in his car, a .9 millimeter gun with either a clip in it or a clip handy nearby, meaning a clip with bullets, all right.
>
> It's unregistered. He knows it. We've got it laying right under his seat, laying right there. He says he went to the shooting range, okay. He says that's what he did, but I would submit to you that he probably has that gun with him all the time. He's somebody that goes around --
>
> [DEFENSE COUNSEL]: Objection Your Honor, calls for speculation.

THE COURT: Okay. This is argument, overruled.

[DPA]: He's somebody that goes around making trouble, all right. And he's got to have that to protect him.

Later in the rebuttal, the State argued:

Now, as far as the State's witnesses, the three Galarzas, you saw them all testify. You heard them all testify. I'm not going to really get into what they said 'cause I've been talking about it as we go along.

You know, yeah, they were a little bit defensive when they were cross-examined by [defense counsel], but they feel like they're victims. They're the victims in all of this.

[DEFENSE COUNSEL]: Objection, Your Honor, it's a call to sympathy.

THE COURT: Well, we're going to move on.

The alleged misconduct is an allegedly improper statement made by the deputy prosecutor at trial. In this regard, ABA Prosecution Function Standard 3-5.8(a) (1993) states: "In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw."

In his appellate brief, Defendant cites to two specific comments by the prosecutor which he contends rise to the level of misconduct warranting a mistrial. First, is the prosecutor's references to Defendant as someone who "probably has that gun with him all the time" and as "somebody that goes around making

trouble[.]" The trial court decided that this statement was permissible argument. Considering these statements and the context in which it was made, we agree. Even assuming this statement rises to the level of misconduct, based on a review of the evidence, there was no "reasonable possibility that the error complained of might have contributed to the conviction." Rogan at 412, 984 P.2d at 1238.

The other statement Defendant alleges was misconduct pertained to the prosecutor's following statement regarding the Galarzas: "You know, yeah, they were a little bit defensive when they were cross-examined by [defense counsel], but they feel like they're victims in all of this." Defendant argues on appeal that this statement referring to the complainant-witnesses as "victims" was "an improper appeal to juror sympathy and improper comment upon the complainants' demeanor, facts which were not introduced in evidence." This comment, however, was in response to the following comments made by Defendant's counsel during her closing argument.

> Mrs. Galarza herself when she testified. Let's talk about credibility a little bit here. What was her attitude? Oh, she was full of attitude. This woman was full of attitude. When she testified, not only was she rude, the State had to stipulate twice.
>
> They had to agree. You know what, we agreed that Mrs. Galarza didn't say that in her statement because she wouldn't cooperate about that. And she wouldn't because she knew she was caught in a lie. Look at her demeanor, is that a believable person?

In addition, Defendant's counsel also stated in closing argument: "Members of the jury, the State's witnesses, Mrs. Galarza, Mr. Galarza, and Brandon, their demeanor is all quite similar. It's very uncooperative, a lot of attitude. They were not credible." Id. at 85.

The controlling case is State v. Lincoln, 3 Haw. App. 107, 125, 643 P.2d 807, 819 (1982), which held that "a comment is not improper if it is directed to and made in response to a subject which the defense raised in its closing argument to the jury." Id. (citations omitted). Here, the comments were made during rebuttal argument in response to Defendant's counsel's remarks. The State's comments did not rise to the level of prosecutorial misconduct requiring the declaration of mistrial.

CONCLUSION

Accordingly, we affirm the March 8, 1999 judgment convicting Defendant-Appellant Wayne Rapoza of Count II, Attempted Assault in the First Degree of Manuel Galarza, Count III, Reckless Endangering in the First Degree of Louise Galarza, Count VI, Possession of Firearm or Ammunition by a Person Convicted of Certain Crimes; and Count VII, Place to Keep Pistol or Revolver. We vacate that part of the March 8, 1999 judgment convicting Defendant of Count IV, Attempted Assault in

the First Degree of Brandon Galarza, and remand Count IV for a new trial.

DATED: Honolulu, Hawai‘i, March 7, 2001.

On the briefs:

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Chief Judge

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