

**NOT FOR PUBLICATION**

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NO. 25689

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, Cross-Appellant, v.  
SAPATUMOESE MALUIA, Defendant-Appellant, Cross-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 00-1-2154)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Lim and Nakamura, JJ.)

Sapatumoeese Maluia (Maluia) appeals the February 12, 2003 judgment of the circuit court of the first circuit<sup>1</sup> that convicted him of murder in the second degree. The State cross-appeals on an evidentiary issue.

After a meticulous review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we resolve Maluia's points of error as follows:

1. Maluia contends the court's jury instruction on his mitigating defense of extreme mental or emotional disturbance (EMED) contained an improper comment on the evidence: "To highlight to the jury that [the emotions specified in the EMED instruction] are illustrative of how one behaves or feels when one loses self-control is prejudicially misleading." Opening

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<sup>1</sup> The Honorable Richard K. Perkins, judge presiding.

Brief at 32-33. We disagree. The court's EMED instruction accurately stated well-pedigreed law in this jurisdiction. See e.g., State v. Dumlao, 6 Haw. App. 173, 181-82, 715 P.2d 822, 829 (1986); State v. Perez, 90 Hawai'i 65, 73, 976 P.2d 379, 387 (1999) (citing Dumlao, supra, and State v. Seguritan, 70 Haw. 173, 174, 766 P.2d 128, 128-29 (1988)); State v. Haili, 103 Hawai'i 89, 107-9, 79 P.3d 1263, 1281-83 (2003). Moreover, while we agree that, "under some circumstances, persons experiencing a loss of self-control, resulting from being under the influence of an extreme mental or emotional disturbance, may behave in an outwardly calm or even semi-catatonic state[,]" Maluia was nonetheless perfectly "free to adduce expert testimony or other evidence pertaining to his . . . state of mind offense [sic] in order to rebut the prosecution's contention that outward calm was evidence of self-control." Perez, 90 Hawai'i at 75, 976 P.2d at 389. That he chose not to "does not constitute reversible error." Id. (citation omitted). When "read and considered as a whole, the instructions given [by the court were not] prejudicially insufficient, erroneous, inconsistent, or misleading." Id. at 71, 976 P.2d at 385 (citations and internal quotation marks omitted).

2. Maluia cites several instances of alleged prosecutorial misconduct during the trial proceedings, and argues that those instances, either singly or in combination, warrant a new trial. This point lacks merit. In each instance, either

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(1) the prosecutor did not express or imply what Maluia charges the prosecutor expressed or implied; or (2) the prosecutor did not commit prosecutorial misconduct, State v. Meyer, 99 Hawai'i 168, 171, 53 P.3d 307, 310 (App. 2002) (as a "threshold matter, we question whether the rebuttal argument *sub judice* indeed constituted prosecutorial misconduct" (citations omitted)); or (3) the utterances were harmless beyond a reasonable doubt, Hawai'i Rules of Penal Procedure (HRPP) Rule 52(a) (2002) (an "error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"); State v. Sanchez, 82 Hawai'i 517, 528, 923 P.2d 934, 945 (App. 1996) (in deciding whether HRPP Rule 52(a) requires reversal for prosecutorial misconduct, "we apply the harmless beyond a reasonable doubt standard of review" (citations omitted)), given "the nature of the alleged misconduct, the promptness or lack of a curative instruction, and the strength or weakness of the evidence against [Maluia]," Sanchez, 82 Hawai'i at 528, 923 P.2d at 945 (quoting State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992)); or (4) a combination thereof. Furthermore, the jury was instructed on its exclusive prerogative to assess the credibility of witnesses and the weight of evidence, and was given to understand, repeatedly, that statements by counsel are not evidence. Meyer, 99 Hawai'i at 172-73, 53 P.3d at 311-12 ("generally relevant jury instructions

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can cure improper arguments by a prosecutor; especially where, as here, such instructions were given repeatedly" (citations omitted)). We presume the jury followed the court's instructions. State v. Klinge, 92 Hawai'i 577, 592, 994 P.2d 509, 524 (2000).

Therefore,

IT IS HEREBY ORDERED that the February 12, 2003 judgment of the court is affirmed. The State's cross-appeal is therefore dismissed as moot.

DATED: Honolulu, Hawai'i, November 29, 2004.

On the briefs:

Joyce K. Matsumori-Hoshijo,  
Deputy Public Defender,  
State of Hawai'i,  
for defendant-appellant,  
cross-appellee.

Chief Judge

Associate Judge

Donn Fudo,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for plaintiff-appellee,  
cross-appellant.

Associate Judge