

NOT FOR PUBLICATION

NO. 26326

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

STATE OF HAWAI'I, Plaintiff-Appellee,  
v.  
DELANEO K. PUHA, Defendant-Appellant,  
and

JASON K. PERRY; RYAN H. ONUMA; ANDREY E. LAKE;  
JAMISON MITCHELL; MARVIN T. CADIZ; VAUGHN N. KAAUMOANA  
and DAVID V.C. MAGALEI, Defendants

E.M. RIMANDO  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 02-1-0796)

MEMORANDUM OPINION

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

Delaneo Kawika Puha (Defendant or Puha) appeals the November 12, 2003 judgment of the Circuit Court of the First Circuit (circuit court),<sup>1</sup> as amended on November 17, 2003 and again on February 18, 2004. The judgment convicted him, upon a jury's verdicts and as charged, of criminal conspiracy to commit kidnapping (count 3),<sup>2</sup> attempted assault in the second degree (count 6)<sup>3</sup> and hindering prosecution in the first degree (count

<sup>1</sup> The Honorable Karen S.S. Ahn presided.

<sup>2</sup> Hawaii Revised Statutes (HRS) § 705-520 (1993) provides: "A person is guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a crime: (1) He agrees with one or more persons that they or one or more of them will engage in or solicit the conduct or will cause or solicit the result specified by the definition of the offense; and (2) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy." (Format modified.) HRS § 707-720(1)(d) (1993) provides: "A person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to: . . . . Inflict bodily injury upon that person or subject that person to a sexual offense[.]" (Enumeration omitted; format modified.)

<sup>3</sup> HRS § 705-500(2) (1993) provides: "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 the state of mind required to establish liability

(continued...)

7).<sup>4</sup>

Defendant contends the circuit court erred in denying his motions for a mistrial and for a new trial, because the deputy prosecuting attorney (DPA) committed prosecutorial misconduct when he (1) said in his opening statement that Defendant had been supplying drugs for sale for several months before the murder in question, and (2) allowed a State's witness to testify that Defendant was the "boss man" during the murder. We disagree, and affirm.

**I. Background.**

A.

On April 23, 2002, an indictment was filed against the following men: Jason K. Perry (Perry), Ryan H. Onuma (Onuma), Defendant, Andrey E. Lake (Lake), Jamison Mitchell (Mitchell), Marvin T. Cadiz (Cadiz), Vaughn N. Kaaumoana (Kaaumoana) and David V.C. Magalei (Magalei).

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<sup>3</sup>(...continued)

with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result." HRS § 707-711(1)(a) (1993) provides: "A person commits the offense of assault in the second degree if: The person intentionally or knowingly causes substantial bodily injury to another[.]" (Enumeration omitted, format modified.)

<sup>4</sup> HRS § 710-1029(1) (Supp. 2004) provides: "A person commits the offense of hindering prosecution in the first degree if, with the intent to hinder the apprehension, prosecution, conviction, or punishment of another for a class A, B, or C felony or murder in any degree, the person renders assistance to the other person." (Enumeration omitted.) HRS § 710-1028(5) (1993) provides: "For the purposes of sections [710-1029 and 710-1030], a person renders assistance to another if he: . . . . Suppresses by an act of concealment, alteration, or destruction any physical evidence that might aid in the discovery, apprehension, prosecution, or conviction of such person." (Enumeration omitted, format modified, brackets in the original.)

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The indictment alleged the following crimes: murder of Tracey Tominaga (Tominaga) in the second degree by Perry (Count 1); murder of Edward Fuller (Fuller) in the second degree by Perry (Count 2); criminal conspiracy amongst Perry, Onuma, Defendant, Lake, Mitchell and unindicted co-conspirators Cadiz and Kaaumoana to kidnap Tominaga (Count 3); attempted assault of Tominaga in the first degree by Onuma (Count 4); hindering prosecution of Perry in the first degree by Onuma (Count 5); attempted assault of Tominaga in the second degree by Defendant (Count 6); hindering prosecution of Perry in the first degree by Defendant (Count 7); assault of Tominaga in the second degree by Lake (Count 8); hindering prosecution of Perry in the first degree by Lake (Count 9); attempted assault of Tominaga in the second degree by Mitchell (Count 10); hindering prosecution of Perry in the first degree by Mitchell (Count 11); attempted assault of Tominaga in the second degree by Cadiz (Count 12); hindering prosecution of Perry in the first degree by Cadiz (Count 13); hindering prosecution of Perry in the first degree by Kaaumoana (Count 14); and hindering prosecution of Perry in the first degree by Magalei (Count 15).

Defendant was granted a severance on March 24, 2003, and his jury trial on Counts 3, 6, and 7 started on April 9, 2003. Because of the severance, Defendant's trial concerned only

the murder of Tominaga.<sup>5</sup>

B.

The January 21, 2002 murder of Tominaga was a revenge killing. Perry was Tominaga's ice (methamphetamine) connection. A couple of days before the killing, Tominaga called Perry and told him she wanted to buy a half ounce of ice, an unusually large order for her. Perry had about an ounce of ice that Defendant had supplied to him. Onuma dropped Perry off at Tominaga's Kapahulu house. There, Tominaga's close friend, Kaimi Seu (Seu), threatened Perry with a shotgun. The threat was a warning to Perry to stop his unwanted and aggressive sexual advances towards Tominaga. During one such encounter, Perry had exposed himself to her. To teach Perry a lesson, Tominaga and Seu also took the cash Perry had on him, along with two eight balls<sup>6</sup> of ice.

Tominaga was reported missing on January 25, 2002. Her case remained a missing person case with no leads and no evidence of foul play until April 2, 2002, when Onuma walked into the police station and told the police about the Tominaga and Fuller killings. Onuma led homicide detectives to a remote cabin high in the Wai'anae range above Makakilo. It was there that

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<sup>5</sup> Edward Fuller (Fuller) was fatally shot by Jason K. Perry (Perry) on Jack Lane in Nu'uuanu five days after the murder of Tracey Tominaga (Tominaga). Perry feared that Fuller, who had been told about the murder, might talk to the police.

<sup>6</sup> An eight ball of methamphetamine weighs one-eighth of an ounce, and was worth about \$300 at the time of the Tominaga murder.

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Tominaga had been killed and her body buried. Soon after, Cadiz and Mitchell also agreed to cooperate in the police investigation. Eventually, Onuma, Cadiz and Mitchell changed their pleas under cooperation agreements with the prosecuting attorney and testified against Defendant.

Their testimonies roughly conjoined, and revealed that, after Perry was robbed, he was irate and intent on retribution. Defendant was also infuriated, because his drugs had been stolen and Perry humiliated. Perry and Onuma met Defendant that night at a downtown strip club. Onuma recalled that Cadiz, Lake and Mitchell, Defendant's cousin, were also there, among others. Cadiz remembered that Magalei was present, too, but that Lake was not. Mitchell testified that Kaaumoana rode to the nightclub with Defendant after they had picked up a number of firearms. After venting about what had happened to Perry, the men swore revenge and left the nightclub on a feckless hunt for Tominaga and Seu.

Two days later, Perry found Tominaga and conned her into going with him and Onuma to the cabin above Makakilo. Onuma alerted Defendant to the ruse and Defendant agreed to meet them at the Food Pantry store in lower Makakilo. Defendant brought Lake, Mitchell, Cadiz and Kaaumoana with him. The two groups drove up to the cabin. Cadiz remembered that during the drive up, Defendant said "we might have to kill this fucking bitch. . . . He said, we were going to fuck this bitch up."

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Tominaga and most of the men ended up in the backyard of the cabin. There, Perry revealed to Tominaga the real reason he had lured her -- retribution for the robbery -- and demanded the identity of the man who had wielded the shotgun. Mitchell testified that Perry began pistol-whipping Tominaga with Defendant's gun. Tominaga attempted to apologize, but at that point, Defendant approached and slapped her twice in the head, knocking her to the ground. Cadiz recalled that Defendant had a pipe in his other hand. Mitchell remembered that pipe, too, but said that Defendant merely threatened her with it. When Tominaga got up, Onuma slapped her a couple of times, knocking her down again. Then, all of a sudden, Lake struck her a ferocious blow to the head with a branch the size of a bat, splitting her scalp open. Tominaga was scared, crying and bleeding profusely. She repeatedly apologized to Perry and gave up a fake name for the gunman, but the group proceeded to rain kicks, punches, stomps and pistol blows upon her, swearing at her and laughing all the while. Perry and Onuma also took turns pointing the gun at her, asking "how does it feel to have a gun stuck in your face." Cadiz, who thus far had been uninvolved, ran up and kicked Tominaga hard in the stomach. Cadiz testified that he felt compelled to be complicit by mob pressure.

After ten or fifteen minutes, Defendant left the group and went into the cabin. Mitchell related that Defendant "was laughing out the window. He was sitting in the window and he was

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laughing about everything that was taking place." Mitchell also remembered that Defendant was exposing his genitals to the group in the backyard.

Because Tominaga was making so much noise, Onuma wrapped duct tape around her head over her mouth and her eyes. Then he helped Perry handcuff her hands behind her back. As Tominaga lay thus bound, Mitchell walked up and cut her nose with a knife. Mitchell testified that he, too, had not been involved up to that point, but like Cadiz, felt compelled by gang frenzy. Mitchell then walked away. That left Perry and Onuma in the backyard with Tominaga, along with Defendant, who had returned from the cabin. Perry straddled Tominaga and started choking her -- in Onuma's words, "choking her to kill her." Onuma saw that Defendant was not idle while Tominaga was being strangled. "She's like flopping around, and he's grabbing her crotch." Defendant was laughing, "going yeah, yeah, yeah, how does that feel." Mitchell, on the other hand, remembered that Defendant's sexual humiliation of Tominaga occurred just before Perry started choking her. While Perry was strangling Tominaga, Onuma took a shovel and hit Tominaga hard in the stomach a couple of times. After Perry had choked her for about three or four minutes, Tominaga stopped moving.<sup>7</sup>

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<sup>7</sup> Kanthi Von Guentner, chief medical examiner for the City and County of Honolulu (Dr. Von Guentner), performed the autopsy on Tominaga's body. Dr. Von Guentner opined that "she died as a result of asphyxia, which means lack of oxygen to her brain, caused by strangulation -- manual

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Perry and Onuma wrapped Tominaga's body in a tarp and secured the tarp with rope. Onuma testified that it was at this point that Defendant was standing in the picture window of the cabin looking at them, with his penis exposed, simulating masturbation. At first, no one wanted to help Perry and Onuma dispose of the body. Perry exhorted the group to help, but failed to enlist everyone. Defendant, preaching unity, ordered everyone to help, and everyone did. Onuma remembered that he, Perry, and Lake carried the body down the side of the mountain while Cadiz, Mitchell and Kaaumoana followed carrying picks and shovels. Cadiz recalled that he, too, helped carry the body down. Kaaumoana pointed out a suitable spot, then the others took turns digging a shallow hole, into which Tominaga's body was unceremoniously dumped. After the corpse was covered up, the men climbed back up to the cabin. Cadiz remembered that Defendant held a little meeting there. "He said whatever was seen here, whatever was done here, stays here. It never leaves." As for Perry, "He said that he would kill anybody for any of us." After that, everyone left. Defendant took the tarp and Tominaga's purse and miscellaneous other of her belongings with him in his car. He took them to Waimanalo and burned them.

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<sup>7</sup>(...continued)

strangulation means pressure to the neck -- also complicated by the fact that [her face] was covered with tape."



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Defendant did not present any witnesses at trial. However, in his cross-examination of the State's witnesses -- especially those testifying under cooperation agreements with the prosecuting attorney -- and in his opening and closing remarks, Defendant revealed his defense of reasonable doubt. Defendant also averred that, although he knew there was going to be some kind of lesson taught to Tominaga on account of the robbery, he had no idea anyone was going to hurt her.

C.

Pretrial, Defendant moved *in limine* to exclude the following evidence:

[2]a. . . . certain testimony and scientific evidence relating to Defendant Puha's prosecution under Cr. No. 01-1-1977, wherein the State has charged Defendant Puha with reckless endangering and firearms violations;

[2]b. . . . evidence that Defendant Puha was, at the time of the alleged incidents in this case, a large-scale narcotics trafficker who was distributing drugs through certain co-defendants in this case;

[2]c. . . . evidence that during the time that victim . . . Tominaga was being beaten by several of the defendants herein, Defendant Puha was allegedly viewing this beating and masturbating, and that Puha at some point approached Tominaga and grabbed her crotch area;

[2]d. Defendant Puha['s] . . . prior conviction for Promoting a Dangerous Drug in the Third Degree and other arrests[.]

At the March 17, 2003 hearing on motions *in limine*, held before severance was granted, the relevant colloquy unfolded as follows:

THE COURT: We've been discussing No. -- let's see. I guess it's 1(b) in Mr. Puha's motion in limine. 2(b). And that I think would have to be reserved for ruling when we know who's going to trial with whom. ©). [Defense counsel], anything further?

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[DEFENSE COUNSEL]: No. But I don't believe -- I don't believe these items -- you know, Mr. Puha's not charged with any kind of sex assault in this case. I think I used the word "masturbating" there. I was looking at the evidence again this weekend. I believe the statement from one of the witnesses was he had dropped his pants at one point but he was standing off to the side. And I would submit that that is highly prejudicial. It might inflame the jury unnecessarily.

. . . . .

[DPA]: We're definitely objecting to this because multiple witnesses talk about how he exposed himself while she was being beaten and then was rubbing her crotch area as she was being strangled. And it's kind of hard to believe that he's under this great duress from Perry when he's engaging in deviant sexual behavior. And of course, this isn't even a prior bad act. This is something that's all occurring at the scene during the incident, which is an ongoing beating basically that takes place over the course of 30 minutes to an hour.

So it's just I think specious to argue that this is not relevant to refute duress, choice of evils, lack of intent, lack of joining in the conspiracy, et cetera, that somehow he was an unwilling participant and yet he's doing this. That's kind of hard to believe. But that will be a factual issue for the jury, and I know that [defense counsel] is going to argue that the witnesses who say this are not credible. And the jury will decide.

THE COURT: Okay. I would have to deny that. I don't think there's enough -- I don't think the unfair prejudice substantially outweighs the probative value with regards to refuting duress.

[DEFENSE COUNSEL]: Well, Your Honor, I withdraw our duress defense then at this time. I don't need the duress.

. . . . .

THE COURT: What are your defenses?

[DEFENSE COUNSEL]: Reasonable doubt, Your Honor. Mr. Puha's only charged with Conspiracy to Commit Kidnapping and Attempted Assault in the Second Degree and Hindering Prosecution. So -- I don't need to have duress as a defense. I'll tell the Court no, I won't argue it.

. . . . .

[DPA]: I think the evidence is going to be clear from our witnesses who they were afraid of. This was the person with the gun. The fact that he wasn't charged with sexual offenses is really not relevant. It's like saying we can't bring up the fact that Perry said there was a gun because we didn't charge him with [terroristic threatening]. That's not significant. So the Court should deny that. As far as (d) goes, we have no intention of bringing that in.

THE COURT: Yes. (D) is granted.

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[DEFENSE COUNSEL]: Your Honor, I think when you balance on ©), that's a very inflammatory piece of information that really doesn't relate directly to what occurred out there. It's really kind of a side issue --

[DPA]: Well --

[DEFENSE COUNSEL]: -- they're claiming happened. And he simply wants to get the jury inflamed. That's the only purpose for putting that information in. And I believe the Court's correct. If there's a duress argument, it would go to refute that. This person was not sitting there terrified about what was going on. Fine. I don't need to argue that.

[DPA]: But Your Honor, it also goes to his intent. That evidence is indicative of his feelings, his attitude toward the victim as she's bound with tape, handcuffed, being beaten. And of course, part of the conspiracy is restraint with the intent to inflict injury. So him doing this is certainly indicative of his state of mind and his feelings toward this woman. And to suggest otherwise -- I just don't think that's a very persuasive argument.

THE COURT: All right. ©) is denied.

At a hearing held on April 1, 2003, after severance was granted, the circuit court continued its conversations with counsel:

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THE COURT: I'm going to allow in the fact that the drugs that were supposedly stolen by Ms. Tominaga were obtained from Mr. Puha, because that's -- again, that's the reason the -- that Mr. Puha is at the house at all in my mind, that's a big part of his motive, his opportunity, his plan, his involvement. So I think that comes in, because if you didn't have that, question is why is Mr. Puha even there? He has no stake in what's happening.

[DEFENSE COUNSEL]: He's the boss, Your Honor, he's gotta be, you gotta call the boss.

THE COURT: No, no, no, I don't like that "boss" thing. I mean, I can't see letting that in unless it has some relevance to the offenses charged in this case. So I've got no problem with that.

Now then the question goes is how far back do we go? I didn't think of really going too far back.

[DEFENSE COUNSEL]: Well, I mean, I will object then. I'll make it easy for the Court, I'll object to anything beyond what the Court just indicated, which is that the narcotics which were allegedly stolen by Ms. Tominaga, the ultimate source was Mr. Puha.

THE COURT: Okay, [DPA], I have that in mind. I was also

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thinking of letting in, however, your No. 2 under your Notice of Intent to Use, which states that Mr. Perry and Mr. Onuma sold methamphetamine to Tominaga on several occasions from October 2001 to January 2002 without needing a reference to Mr. Puha.

[DPA]: Well, here's -- here's what our evidence is going to show, Your Honor: As the Court indicated, the drugs that were stolen from Perry were originally received by Perry from Puha, and our evidence is going to show that Perry and Onuma would pick up drugs from Puha every other day. Now, it's not just that his drugs were taken, but to a layperson, that -- that doesn't mean anything unless you give it some context. In other words, why would he have a motive to hurt her if it's something that's maybe like a little residue, something that's worth maybe 5 bucks? What was stolen were two 8 Balls, which our witnesses will indicate they were selling for \$1,000.

THE COURT: And that's not a problem.

[DPA]: Yeah. So it's -- and the jury needs to understand it was that type of amount that upset him so much that he would participate, in fact be there in the first place. So my evidence is going to be limited just pretty much to given that context and for that period of time. I'm not going to spend a great deal of time on that, because I don't think it's important other than to show his motive, his intention negating -- I'm not sure what the defense is, I guess it's reasonable doubt now, but -- or choice of evils, whatever they're going to eventually pursue, but relevant for those purposes.

THE COURT: Okay. So what I'm hearing from you is that my recollection of the transcripts is that the two 8 Balls were mentioned in the context of that alleged theft by Ms. Tominaga, that's fine, and that that stuff came from Mr. Puha, but it sounds like you don't -- you are not strongly inclined to argue that we need to go all the way back to September or October in terms of Mr. Puha being the source of drugs. We could go with the drugs that were involved in the theft, that's fine. We can go with the fact that Perry and Onuma sold methamphetamine to Tominaga on several occasions before the January date, if you think that's relevant, but I don't see a need to -- to bring in the fact that all that stuff came from Mr. Puha. I don't see any relevance to that. Okay? So --

[DPA]: Well, but the -- I mean, the jury would still get the message through other answers that -- I mean, at least they would -- they would automatically assume, I think, that -- that the drugs stolen from Perry came from Puha, and from that they're going to assume, well, the other drugs they were selling probably also came from Puha.

[THE COURT]: Maybe, maybe not. Do you need -- do you feel you need to bring in the fact that Perry and Onuma sold methamphetamine to Tominaga on prior occasions? I mean, honestly.

[DPA]: I do. It's a bad act on Onuma and Perry, so it wouldn't create any hostility in the minds of the juror [sic] towards this defendant, that Perry and Onuma are out there doing this, so I want to do that because I want to give the jury the

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background, you know, the events that led up to this.

THE COURT: Okay. Well, then the jury may or may not infer that some or all of the drugs on the prior occasions came from Mr. Puha, but so be it. I don't think there's a need to actually specifically mention that fact.

\* \* \*

THE COURT: Now, you're saying these guys are trafficking, what do you mean?

[DEFENSE COUNSEL]: They're selling drugs, they're selling ice.

[DPA]: For Puha.

[DEFENSE COUNSEL]: Suppose the boss and you guys all sell for him, you know. That's what they're going to say, I think.

THE COURT: Well, no, no, wait a minute. I don't really care to hear the word "boss" in this case.

[DEFENSE COUNSEL]: Well, I hope you never hear it either.

THE COURT: Why is that relevant?

[DEFENSE COUNSEL]: I'm going to say it so often, Your Honor I hope you never hear it again.

THE COURT: Well, no, I'm not going to permit it, but --

[DPA]: Well, Judge, our -- our witnesses actually used that phrase in describing Puha's behavior right after the murder when they're having this little meeting by the patio. So I don't think we should just say no use of the word "boss." I mean, the fact of the matter is he was the supplier of all these defendants pretty much. They were all in -- with him and associated with him because of his drug activity.

[DEFENSE COUNSEL]: And that's why \$1,000 is peanuts, that's loose change, that's like a nickel in your pocket. Somebody sold a nickel --

THE COURT: Well, [defense counsel], you can't have it coming and going, you gotta make a decision.

[DPA]: Judge, that's why I say, if he wants to get into stuff with Cadiz and Mitchell, fine. You know, I don't want to hide the fact that these guys were all involved in that, it's true, and they were doing it on Puha's behalf and, you know, they got a cut of it too, but, you know, I think this comes in, and --

THE COURT: Explain to me a little bit more about this so-called "boss" business in -- in the patio. Why do we need that word again, Mr. --

[DEFENSE COUNSEL]: That word is --

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[DPA]: But, Judge, let me ask you --

THE COURT: How do you expect the evidence to come out with regards to Puha's role in the patio?

[DPA]: Well, for example, right after the murder, a lot of ~~the people who didn't actually contribute to the death were around~~ and didn't want to participate in the burial of the body, and they made that intention clear to Puha and Perry and Onuma, and at least two of them said repeatedly in their statement that it was Puha who was basically ordering them to do it, and they said the only reason they listened was because he's the boss. And he was saying it in an intimidating and threatening way that no one's leaving until they help Perry and Onuma do it, so they listened to him because he's the boss.

THE COURT: Okay.

[DPA]: And that's -- that explains why they did what they did, which of course they're going to try to impeach their -- their testimony, but nevertheless that's the reality and the explanation for their behavior. And, you know, I'm sorry they don't like the word "boss," but the fact is that's how the witnesses characterized his behavior and the reason why they obeyed his orders. They would never have touched that body, Judge. You saw Mitchell's statement, he didn't even want to touch that tarp, he didn't even want to go down there. In fact, they started to go halfway down the hill and he said I'm not doing this.

THE COURT: Well, that's what he said.

[DPA]: Yeah, that -- that's what his testimony said.

THE COURT: I don't know what happened.

[DPA]: Well, but then he says in his statement that he was ordered by Puha to do it, and he said what are you going to do, he's the boss, you know, if I don't do it, what are we going to do, and Cadiz said the same thing.

THE COURT: [Defense counsel], if you want to bring in the fact with regards to Onuma, Cadiz and Mitchell, that they're not being charged with drug trafficking, I think you may just be opening the door to everything coming out.

[DEFENSE COUNSEL]: Well, Your Honor --

THE COURT: The trafficking is for Mr. Puha's stuff.

[DEFENSE COUNSEL]: Well, my recollection of this thing about "boss" only comes up at the tail end of the incident where supposedly Mr. Puha gathers them around and says -- he gives them the natural born killers speech, you know, you guys are not natural born killers just 'cause this happened today, and we gotta hang together and everybody gotta be solid. My recollection of those statements is that people said we went down there to bury the body because were scared of [Perry], [Perry] was telling us, you pussies, you guys get down there and help me bury the body.

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They were afraid of [Perry] because of what had just happened. They just saw him strangle someone, they thought he had a gun. Not Mr. Puha, Mr. Puha never went down the hill neither, if you remembered. He stayed up. He's the only one who didn't go down.

THE COURT: Okay. Then my question is you want to bring out drug use by these -- Cadiz and Mitchell just around the time of these events for perception, that's fine.

[DEFENSE COUNSEL]: Right.

THE COURT: Then you want to bring out the fact that these three fellows, including Onuma now, will not be charged with drug trafficking under the arrangements with the prosecutor's office.

[DEFENSE COUNSEL]: I don't know if that's explicit in the deal, I don't think it is. But I believe it's implicit, and I believe in their minds, they think they're going to get -- go scott free [sic] --

THE COURT: Right.

[DEFENSE COUNSEL]: -- on any drug trafficking because they're testifying in this case. I don't think that opens the door to Mr. Puha being the boss, giving 'em the drugs.

[DPA]: That's a huge red herring, Judge.

THE COURT: Well, it opens the door to, it seems to me --

[DEFENSE COUNSEL]: He's going to look like the boss 'cause he gathered them together and gave 'em the natural born killer speech after -- after the burial.

[DPA]: Judge, the whole thing is a red herring, you know. I mean, we could sit here, you know, for probably an hour and talk about all the potential crimes that come out of these facts, this set of discovery, and you can literally identify a whole laundry list of crimes that say, well, he wasn't charged with that so maybe that has some bearing on the state of mind. It's a red herring. And, you know, if they want to get into the fact that they had drugs, they possessed drugs, they were selling drugs, I say, fine, let 'em do it. You know, they're not going to deny that they were involved in drug activity on Puha's behalf. In fact, when they met Cadiz, as the Court probably remembers in the statement, when they picked him up at the Waikele swimming pool, Cadiz had a \$6,000 payment that he gave to Puha. It's just part of the facts of the case.

THE COURT: All right. Well, [defense counsel] has -- has told us what he wants to bring out with regard to their drug use.

[DPA]: And I have no objection to it.

THE COURT: All right.

[DPA]: So I think we should just move on to the next part of the motion in limine.

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THE COURT: And the -- the cross about the drug trafficking seems to me fair cross, even though it may be simply --

[DPA]: That's fine. If the Court knows there has to be a corpus delicti to prosecute. You know, what corpus delicti is there in this case of drug possession or drug sales? There's zero. We couldn't bring a case if we wanted to, so that's why I say it's a red herring to say, oh, they weren't charged or they're not being prosecuted for Crime A when everyone knows who's read the discovery there's no corpus delicti for that crime.

THE COURT: Well, I --

[DPA]: I mean, if the argument is, well, maybe that's some bearing on their state of mind. If they want to ask him, hey, and isn't it true, you know, you sold drugs for Puha and you're not being charged or prosecuted, I say fine, let 'em do it. That's fine, I have no objection to that, so that's why I say let's move on to the next one.

THE COURT: Well the corpus delicti, I don't know if it's all that clear. But anyway, yes, let's move on.

\* \* \*

THE COURT: Okay. [DPA], you want to use the word "boss," is that what I'm hearing from you as to the patio conversation?

[DPA]: Well, Judge, I mean, after all --

THE COURT: Okay. No, I just wanted to make sure.

[DEFENSE COUNSEL]: Is that with a capital B, Your Honor, Boss?

[DPA]: But I'm not using it in the context that he's -- well, only that our witnesses will listen to him --

THE COURT: I understand.

[DPA]: -- because of the relationship. It's more of a boss-subordinate relationship, that's the context, not that he's like this humongous international drug trafficker. You know, I'm not even going to use that phrase if I can avoid it. I don't think that's the main focus of this case, it's really the other issues, but . . .

THE COURT: I understand. And I started working on the jury instructions, and, yes, I can see how your case basically is going to be the case that would've been put forth that everybody had been trying to gather on everything, I think.

(Point and star ellipses in the original.)

After jury selection, and just before giving the jury its preliminary instructions, the circuit court denied



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Defendant's request to reconsider its denial of item 2(c) of his motion *in limine* (concerning Defendant's sexual conduct during the murder). The circuit court also allowed Defendant to raise the "boss man" matter, again:

[THE COURT]: Now with regard to "the boss," [DPA], you want to bring out in the patio, after the girl is apparently dead, that Mr. Puha said we're in this together, and I take it you want one person who is turning State's witness to testify that "he had influence with me because he supplied me with drugs that I sold and used." [I]s that basically what you're trying to get out?

[DPA]: No, the context in which that phrase was used was this. After she was killed, they were in the process of taking her down the hill. And I say "they," meaning Perry, Onuma and possibly Lake. But Mitchell and Cadiz were objecting, they didn't want to touch it, they didn't want to carry it, they didn't want to go down there and dig, they didn't want to be involved in that, and they expressed their feelings numerous times to everyone who was there including Defendant Puha, but primarily to Perry. They told Perry repeatedly, look, we're not going to touch her, we're not going to help you guys.

THE COURT: Because Mr. Puha did not go down there.

[DPA]: No, I know, but there are homes right around there on the side and the back yard area, and that's when, according to Mitchell, Perry calls out to Puha and he says, hey, your cousin and them are not helping, they're not going to help us go down there and do it. And that's when, according to Mitchell, Puha came over there and with authority -- that was the way he characterized it in his statement, with authority he started basically ordering them to help Perry and help Onuma carry the body down, the shovels, et cetera, and get down there and help them bury her, otherwise none of us are going anywhere.

And so the police naturally asked Mitchell, well, why did you do it? I mean, obviously this is another crime, hindering. And so he's explaining why he listened. He wasn't going to listen to Perry, but he said he listened to Puha, because Puha is the boss man. That's the phrase he used. He said, what are you going to do, you know? He's yelling at us with authority, what are we going to do? Not listen to him? So he's explaining his state of mind why he did what he eventually did, because it was right after Puha ordered him to do it that him and Cadiz join in the trail of guys down the hill and go down there and take turns digging.

So he said he would have never have been involved in that, he thought they were just going to beat her up. Next thing you know, she's dead and he's being ordered to take her down, and he's explaining why he's doing that. That's in the context of the phrase, it's not in the context of he's a drug kingpin or drug trafficker like [defense counsel] was using.

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THE COURT: No, I don't want those terms used.

[DPA]: Yeah, and I'm not going to be using those sorts of phrases. The "boss man" only explains why he listened and why he would commit this additional crime that we ended up charging him with.

THE COURT: Are you going to ask him what he means by "boss"?

[DPA]: No, because I think he'll explain it just like I explained it right here and how he explained it in his statement, you know. He's a person that he is going to listen to. In fact, he told Perry I'm not going to do it, and Perry ordered him to do it. Perry that had a gun, and he said, hey, you can't tell me what to do, I'm not going to do it.

THE COURT: Why does he consider him the boss? Please enlighten me.

[DEFENSE COUNSEL]: Because of the drugs, Your Honor.

THE COURT: All right, okay. I just want it on the record all right?

He supplies Lake and -- this man is [Mitchell], right, you're talking about?

[DEFENSE COUNSEL]: Correct.

THE COURT: -- Mitchell with drugs that he used and he sold?

[DPA]: Well, I wasn't going to get into that, but if [defense counsel] wants to, that's fine.

THE COURT: But is that the factual scenario?

[DPA]: I don't know if Puha supplied drugs to Mitchell or not. You know, if he did, it wouldn't surprise me, but it wasn't something I was going to get into.

THE COURT: Yeah.

[DPA]: It was only to the extent that, hey, it was Puha's drugs that were stolen by this girl and then her friend, and you know, what's he supposed to do. He's supposed to just flat out ignore him?

THE COURT: Well, [defense counsel], did you want to put something on the record?

[DEFENSE COUNSEL]: Well, Your Honor, the question is going to become he's the boss of what?

THE COURT: Yeah.

[DEFENSE COUNSEL]: If he's not the boss of drug dealing, then was he the boss of Murder Incorporated? What boss are we talking about? These guy don't have jobs, so --

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[DPA]: I'm talking about the boss of this event that took place up at the house, not of past prior drug dealings.

THE COURT: Okay.

[DPA]: Because he wouldn't listen to Perry or Onuma, but he would listen to Puha. On top of that, Judge, you have to remember that this explains his state of mind. It goes to his credibility, because, you know, the jury is going to want to know, well, if you only went up there and maybe hurt her a little bit, why are you participating in all this cover up? That's number one.

Number two, "boss man" is not a phrase that I'm coming up with. It was his terminology when the police asked him, well, why did you do it. That's number two.

Number three, it's not a prior bad act, because we're going to be talking strictly about what happened up there that day and the fact that his drugs were taken a couple days earlier by the girl. I'm not getting into drug trafficking and all of that.

THE COURT: I think the problem is that the term "boss" is pretty vague, though.

[DEFENSE COUNSEL]: Your Honor, the context of his saying "boss" in his statement is, you know, he's the boss and we run around with him, we pick up money and we drop off dope -- you know what I mean? That's what he tells the detective.

[DPA]: I'm not going to get into that.

[DEFENSE COUNSEL]: And that's what he means when he says "boss." He's the boss, because there's this history of them doing these deals, and he's a flunky and he's the boss. So that's what the statement means, and what else can it mean in that context of what's going on up there? Not that he's the boss of what happened that day.

[DPA]: That's exactly what it means, Judge, because it was his drugs that were stolen, and that's why they were there that day.

.....

[DEFENSE COUNSEL]: That's the evidence he needs, that's all he needs.

THE COURT: Well, okay, and certainly that argument could be made. Ironically, I was thinking about it, and, obviously, if Mr. Puha inferentially knows that he has influence over whomever, the co-conspirators -- not the co-conspirators, but the others who were there, then the fact that they considered him as a person of influence with them is relevant to Puha's state of mind on the hindering count. But I think as it's come out, as you folks have explained it, "boss" is a very general term.

So if "Mr. Puha is supplying me with drugs that I use and sell, he tells me to do something," I think it's reasonably -- you can reasonably infer that I would tend to listen to him because I

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depend on him, he supplies me money and drugs. Now, in that sense, I would probably have to let it in, because it would be relevant as to Mr. Puha's state of mind as to the hindering count. But if "boss" is going to be a very general term, I'm much more reluctant to let it in, although I can see it's relevant to Mitchell's credibility, at least so far as it goes. But it sure ~~as heck invites, I think as you place it, speculation by the jury.~~

[DPA]: Judge, I'm not even going to use it in my opening statement. As I mentioned, it's only relevant to explain state of mind, credibility.

THE COURT: Mitchell's state of mind.

[DPA]: Well, right. Because, you know, Mitchell commits a crime, and, you know, why is he going to do this. And not because of Perry, he's not afraid of Perry.

THE COURT: Okay, why don't we do this.

[DPA]: But I'm not going to be labeling "boss man" up on some Power Point slide. I'm not trying to accomplish that purpose, if [defense counsel] seems to think I am. I don't really care about drug trafficking and all of that stuff, you know. The only thing that's relevant is that his drugs were stolen by the girl, and that that goes to explain his motive and participation, et cetera, so I thought I was being pretty reasonable.

THE COURT: Okay, all right. I'd like to hear a little bit more of the evidence. We'll see how it comes out, and we'll give you a ruling -- since you're not going to be using it in opening, anyway -- when we come to Mitchell's testimony, because that's the only point I understand that you're going to want to elicit, that one statement.

Okay, anything else before we bring the jury in?

The circuit court's preliminary instructions to the jury included a standard advisement:

The attorneys now are going to make opening statements. Now, the purpose of an opening statement is to allow the attorney [sic] to give an outline of the evidence they expect to be presented to you. Essentially, it's a preview of the trial. It is not evidence, but merely intended to help you in considering evidence.

During the DPA's opening statement, the following dispute occurred:

Tracy [sic] Tominaga was killed because of what she did to one of the defendants, Jason Perry. What did she do? She stole drugs from Jason Perry. Who did the drugs belong to? The drugs belonged to this defendant, Delaneo Puha. They were his drugs that were stolen, and on January 21st, 2002, she was kidnapped, assaulted and eventually murdered in retaliation for what she had

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done.

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So what happened was a couple of days before she was killed, she called up Jason Perry and she asked him to come over to her house on Brokaw Street in Kapahulu, and the reason she said she wanted him to come over was because she wanted to buy drugs from him. You'll learn that for about two or three months before her death, these two people, Perry and Onuma, had been selling to Tracy [sic] maybe once a week -- maybe not even that, may be once every two weeks.

So it went on for a couple of months. Perry and Onuma would get their drugs from Puha, he would front them the drugs, they would sell the drugs for cash they would return the money back to Puha. So what happens is she calls up Perry and says come over, I want to get some drugs. So he goes over there, and when he goes over there, Perry --

[DEFENSE COUNSEL]: Your Honor, may I approach the bench?

.....

(At the bench.)

[DEFENSE COUNSEL]: Your Honor, I believe there was a clear violation of what the Court had asked with respect to Mr. Puha's drug dealing. I think what [the DPA] did basically was told the jurors that these guys were picking up drugs on a regular basis from Mr. Puha and selling it to Ms. Tominaga, and I'm moving for a mistrial.

[DPA]: Judge, the Court specifically said this was allowed, because otherwise there would be no context for the jury to understand or appreciate --

THE COURT: That is not so.

[DPA]: I'm sorry, but if I could finish, Judge. We specifically --

THE COURT: Keep your voice down.

[DPA]: We specifically talked about the fact that the jury will not have any context in which to appreciate or to understand what two eight balls of methamphetamine is worth and why that would provide the motivation to Puha to be involved in the kidnapping in the subsequent beating, so this was specifically excluded. So I don't think there's any basis for the objection.

THE COURT: [DPA], I can't believe you missed what the Court said. I don't want to say you did anything intentionally, but the Court said that you could bring in the fact that Mr. Puha provided the eight balls that Ms. Tominaga supposedly stole through Jason Perry. But I specifically said I don't see any purpose for the fact that Mr. Puha had been supplying the drugs in any other capacity before the day that he -- or the two, three days before. I specifically said there was no relevant value to that.

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[DPA]: Well, Your Honor, I don't think the Court --

THE COURT: And it's out.

[DPA]: I don't believe the Court did, because we talked about the jury having some context in which to use this evidence.

THE COURT: What would her buying every two weeks have to do with giving them some context to know what an eight ball is worth? I don't even see the relevance. What are you talking about?

[DPA]: Because, Judge, you ruled everytime that they sold her, those were drugs that came from Puha.

THE COURT: But that's irrelevant. What does it have to do with anything?

[DPA]: It's not irrelevant, Judge. How does the jury understand or use that evidence?

THE COURT: What is relevant is that Mr. Puha provided the two eight balls that Ms. Tominaga supposedly stole from Perry, and that gives Mr. Puha the motive to be at this incident at Makakilo.

[DPA]: That's exactly what I said, Judge, that Puha supplied the drugs that they used to sell to her. I said that they did sell to her over a two to three month period.

THE COURT: And that's the part that I said you can't bring in.

[DPA]: I did not say that Puha supplied those specific --

THE COURT: Yes, you did.

[DPA]: No, I didn't, Judge.

[DEFENSE COUNSEL]: I certainly think that was the inference, the way I heard it. In the context in which it was presented, I think clearly the impression was left -- he didn't say it expressly -- was that Mr. Puha was supplying the drugs to them which they supplied to her on a regular basis, which is specifically what we were supposed to avoid.

[DPA]: Your Honor, at no time did the Court say that I could not bring out the fact that Perry and Onuma had sold drugs to her. It's not a prior bad act of Puha, okay, it's a prior bad act of Perry and Onuma, selling to her.

THE COURT: Well, that's not the problem.

[DPA]: I only said that on that day when they went over there, it was the drugs that Puha had given to Perry. I never said on all these prior occasions --

THE COURT: That's not what I heard. I heard Puha was a supplier of the drugs being sold over a two to three-month period.

[DPA]: Yeah, I said that Perry and Onuma had been selling

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over that period, maybe once a week, maybe less than once a week is what I said. And I said that she called him on that day and asked him to come over, and when he came over, he had the drugs that he got from Puha. That's what I said.

THE COURT: That's not the way I heard it. All right.

[DPA]: Judge, if I had explicitly said that Puha, by providing drugs to these guys for each and every one of these sales over the two-month period, that would be different. I never said that.

THE COURT: Well --

[DPA]: So I'd have to --

THE COURT: That was clearly the implication.

[DPA]: I respectfully disagree, Judge.

THE COURT: I don't want to declare a mistrial. We've just gone through so much trouble picking this jury.

[DPA]: Well, Judge, I'm moving on to a new area already. I was talking about the bad acts of Perry and Onuma selling to her immediately. I don't see how that can be used against --

THE COURT: It's not that Perry and Onuma. It's not a problem as to what Perry and Onuma did. The problem is any implication that Puha was supplying all the drugs.

[DPA]: I never left them with that implication.

THE COURT: [DPA], I hate to tell you this, but that was clearly the implication. Okay, I'm going to strike -- I don't know where we start striking from, now.

[DPA]: See, Judge, that's the thing. We can't even identify what I said, because I didn't leave the jury with that inference. I was very careful to say that it was the others and that they went over there that day with drugs that they got from Puha, that is all I said. And [defense counsel] objected saying, well, he must have been doing all these other days, but I never said that.

THE COURT: I got that clear implication also.

[DPA]: I mean, they could have easily been thinking of other people, Judge.

THE COURT: [DPA], it seems like a good case for you, I don't know why we are getting into these murky areas. You don't need it.

[DPA]: Okay.

THE COURT: I'm going to strike all of the opening dealing with alleged drugs. You may start over again as to those matters. I just don't know where else to strike.

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[DPA]: What is the specific comments that he wants struck?

[DEFENSE COUNSEL]: Well, Your Honor, there was a series of remarks he made that I believe made it clear that Perry and Onuma were selling drugs on a continuing basis to Tracy [sic] Tominaga and that the source of those drugs was Mr. Puha, and short of a mistrial, if the Court were to just have [the DPA] start over again, and pick a point and have him start over again, I guess we can do that, is start back where he was talking about the source of the eight ball was Mr. Puha, and I guess go from there.

[DPA]: Well, Your Honor, I would suggest that I just start from the day that Perry goes over there and we don't retread over this same area again. Because that way, [defense counsel] will not have to worry about us giving the jury that specific inference.

THE COURT: All right. I think you were talking about -- you started off with Tominaga met with Mr. Seu, okay, and then she was talking about a scenario with Mr. Perry. I think that's about when it started.

[Defense counsel], I am thinking of striking everything after that. I'll let [the DPA] start again.

[DPA]: Judge, how can you strike it if, number one, it's not in evidence? The jury's been told it's not in evidence, and, Judge, to strike everything after a particular point is going to just cause more confusion for the jury.

I think [defense counsel], as the movant, has the burden of saying what specific sentence or sentences that he's objecting to, and he's never done that.

THE COURT: I could sanction you for violating a ruling on a motion in limine, [DPA].

Okay, I'm going to deny your motion for a mistrial. I think that -- all right. [Defense Counsel] doesn't have an objection to the Court striking everything after the portion of opening where [the DPA] talks about Ms. Tominaga meeting with a Mr. Seu regarding Mr. Perry and -- how can I put it -- a perceived and alleged concern which she perceived to be a problem with Mr. Perry, or something to that effect. I'm going to strike everything after that.

I will not sanction [the DPA] for violating the Court's ruling on a motion in limine, but please be careful, and I will deny the motion for mistrial.

[DEFENSE COUNSEL]: Are you going to tell the jurors it's stricken and just disregard those remarks?

THE COURT: Right, right. And [the DPA] will start again.

THE COURT: I think the cleaner way is to strike everything after Ms. Tominaga telling Mr. Seu about her perception of a



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problem with Mr. Perry, because that sort of -- I think [the DPA] was sort of starting into a new area, and then you can pick it up after that, it's clearer.

Okay, I'll deny the motion for mistrial. I still think that Mr. Puha can get a fair trial.

[DPA]: So, Judge, I'm starting from that point again.

THE COURT: That's fine.

(Before the jury.)

THE COURT: Ladies and gentlemen, I'm going to strike from the record [the DPA's] opening after the point where he started talking about Ms. Tominaga allegedly meeting with a Kaimi Seu and explaining to Mr. Seu her perception of a supposed problem with Mr. Perry.

Everything after that, I am striking from the record. You are to completely disregard what I am striking from the record.

I'm sorry, [DPA], please proceed.

[DPA]: Thank you.

Let me just start right at that same spot and we'll pick up at that point.

A couple of days before she was killed, Tracy [sic] Tominaga called up her friend Kaimi and asked to meet with him. They met at her house, and she told Kaimi about this problem she was having with Perry, and the problem was that Perry was basically pursuing her in a sexual way, trying to start up a relationship basically, and the behavior started to get strange.

In fact, he started to engage in lewd behavior such as exposing himself in front of her and trying to basically have sex with her. That's what he wanted, and she didn't want that, she had a boyfriend, she was about 12 years older than him and she was not interested in him.

So she talked to her friend Kaimi, and she asked Kaimi to talk to Perry. And Kaimi didn't know Perry, but he had heard of Perry, and he had heard that Perry was known to carry a gun, and so Kaimi said, okay, I'll do it. I don't want to do it, but I don't want him doing this to you. If you're scared and you're afraid, I'll do it.

So what they did is that they met at her house, and when they met at her house, Tracy called up Perry. Perry came over, had two eight balls of methamphetamine on him. The drugs that he had on him belonged to the defendant. They were the defendant's drugs. Perry was going over there to sell the drugs to Tracy.

Midway through the trial, after Onuma had testified but before Cadiz and Mitchell testified, the following transpired at

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the bench:

THE COURT: I was going to read a limiting instruction about those drugs given supposedly by Puha to Perry in the Tominaga dealing.

[DPA]: I don't know what it's worth.

THE COURT: Do you want me to still read that limiting instruction?

[DEFENSE COUNSEL]: No, I don't think so, Your Honor. What I need to do I think is I may have to -- I renew my mistrial motion. I renew my mistrial motion as to the testimony of Onuma about Puha exposing himself and masturbating and grabbing her crotch, and I'm making a mistrial motion at this point.

THE COURT: On what basis?

[DEFENSE COUNSEL]: On the basis that that should be kept out of the case, or whether it should have been.

THE COURT: Well, I must tell you, I was surprised to learn that that exposing himself wasn't after everything was done. My understanding, talking to the law clerk about this and the two of you, was that it occurred during the beating of the girl. Now, whether that makes any difference, I haven't really thought it through, but I must say I was surprised about that.

[DEFENSE COUNSEL]: Your Honor, I think that the way Mitchell described it, it was during the beating. I could be wrong. So maybe [the DPA] knows, but I believe when I spoke about it, I understood that Mitchell was going to testify that that occurred during the beating.

THE COURT: At least the way I had initially thought about it, that cut toward using it or its use for this, it's [sic] relevance, you know, Mr. Puha's intention with regard to the criminal conspiracy, which still would have been dealing.

.....

[DEFENSE COUNSEL]: Well, Your Honor, I had made the motion in limine to exclude the evidence of Mr. Puha, the evidence relating to the alleged sexual misconduct, if you want to call it that, of Mr. Puha when he purportedly grabbed the crotch area of the victim, and also this evidence that he purportedly exposed himself. And the Court noted at the bench, I believe when I made that motion, it was my understanding that both those acts had occurred during the course of the time when she was being beaten, and apparently today -- well, at least based on this witness's testimony, he indicated that the latter act occurred after she had already expired. But I am moving for a mistrial on the basis that those highly inflammatory pieces of evidence should not be before the jury in this case.

THE COURT: [DPA], anything?

[DPA]: Well, Your Honor, we're objecting to that motion. I

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don't -- I think he's had his statement the whole time in his grand jury testimony, it's in there. As far as the sequence, Mr. Onuma, you know, he has his recollection. Our other witnesses have their recollection. For example, we expect Mr. Mitchell to say that it all happened during the beating, and I'm just looking at, you know, my questions that I'll be asking of him, and he says to the police that it all happened during the beating.

So Mr. Onuma may have been mistaken that it was after, that's his recollection, so there's an inconsistency the jury will have to deal with, but we've already dealt with the motion in limine, so I would ask the Court to deny it. It's an inconsistency at best, and that's something the jury will deal with.

THE COURT: [Defense counsel], anything further?

[DEFENSE COUNSEL]: No.

THE COURT: Okay, I'm going take it under advisement. We'll see you Tuesday, all right.

Midway through the direct examination of Mitchell, yet another brouhaha occurred:

Q. All right. So at some point she's no longer moving?

A. No, sir.

Q. Okay. What happens after that?

A. Everyone's quiet. I'm quiet. For a minute, I walk off, me and Cadiz walk off all the way to the side of house, all the way towards the front. We're really scared now. This woman just died. They just killed her. Perry just killed her. Onuma just killed her, jumping on her, choking her.

Nothing we ever thought was going to happen, and everyone's standing around, standing around her, and I believe [Defendant] went in the house. He sat, was talking to the elder man [who had arranged for them to use the cabin], and they were just talking.

And at this time, I guess, Perry feels he's powerful or what not. He begins saying, We got to find a place to bury this girl. He's telling all of us, and he's telling me, he's telling Cadiz, he's telling everybody, We got to bury this girl. And I'm like, I'm not burying anything. I didn't even come up here for this.

Cadiz is saying the same thing. We're not burying her. You're crazy. At the same time, he's got the gun in his hand, so at this time he's unpredictable, so we listen to him for a second. We're just listening to him.

We -- we walked around. They begin looking for a place to bury her, but when everyone walks off to look for a place to bury her, I ran off to the front of the house to the vehicle and hid over there, because I didn't want to do that. I didn't want to have nothing to do with anything else. I just wanted to leave,

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but I tried to hide. Cadiz did the same thing.

And so while Perry, Onuma and [Kaaumoana] and [Lake] are looking -- [Lake] didn't want to look neither, but because he was still standing around 'cause Cadiz and myself, we walked off, tried to get away from the present circumstances, so they couldn't make us do that, but [Lake] ended up stuck with them, had to walk around to look for a place to bury this woman.

And while they were gone, we come back out and around. They seen us, and they start yelling, you know, what the f--- are you doing? Why don't you go find a place to bury the girl? And I tell them, I'm not going to find a place to bury this lady. I don't want to do that. I just want to leave, and Cadiz is the same way, too.

But at the same time, they're hostile. They just -- this woman's just died. So at the same time, we're thinking of ourselves, Hey, he's got the gun in his hand, as far as I know, he may have enough bullets to kill everyone up there, you know. He's on drugs. He's high on drugs, you know. He's capable of anything.

Q. All right. Do you see what happens to the girl's body after she dies?

A. Well, during the time when they're looking for a place to bury her, they're also -- they also went back to her body, and I don't know where they get the big old tarp, black tarp. I believe the older man owns it. They put her in the tarp, and they rolled her up in it.

They took the tape, started taping it. There's some rope up there also from the elder man's house that they were wrapping rope around the tarp that they put her body in. They wrapped that around her, putting tape on there also, that was Perry and Onuma.

They want everyone else to help them, but we don't want to do anything else no more, so they're doing it on their own. The body's laying there now, and we're telling them, you know, we want to leave. Perry's like, No one's fucking going nowhere until we bury the body. The longer you guys take, the longer it will take us to go.

We want to leave. We didn't want to listen. So Perry's calling [Defendant] 'cause [Defendant's] the man of authority toward us. He's basically boss man, so he goes, and he tells them, they're not cooperating. They don't want to cooperate.

Q. What does [Defendant] say?

A. [Defendant] goes, you fuckers come out --

[Defense Counsel]: May we approach.

THE COURT: Yes, yes.

(Bench conference.)

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[Defense Counsel]: I think he said boss man with a capital B.

[DPA]: I can't hear you.

[Defense Counsel]: I thought he said boss man with a capital B, and I thought there was a motion in limine.

THE COURT: I expressed disinclination to let that in. There's really no tie to anything, other than just a general boss man. I'm going to strike --

[DPA]: Wait, the Court never excluded that. We never -- we never -- we never put that on the record one way or another. In fact, I specifically said that the only reason that came up in his statement to the police is to explain why he did eventually agree to participate in the crime of hindering prosecution.

It wasn't because he was afraid of Perry. It was because of Puha and his respect for Puha that he would commit this felony crime. So it goes directly to his credibility.

THE COURT: I don't remember that part. I think --

[Defense Counsel]: Your Honor, I thought what we discussed on the record is that he could testify that he went and did those things because he was ordered by Puha to do it without using the B word.

THE COURT: I think that's where the Court had put itself, and I agree with [the DPA]. We did not actually rule on the motion. We were going to take it up before this material came out. And the Court had expressed disinclination to just let it in general, the boss.

I think the Court had given a scenario where it might be relevant, but that scenario was not one what [sic] that was going to apply here. I'm going to strike everything in the testimony, starting when this witness last starts talking about Mr. Puha.

[Defense Counsel]: Your Honor, moving for --

[DPA]: Why, Judge? [Defense counsel]'s whole objection was to the use of the word boss man. That's as if that really means anything to the lay people.

But I could see if the Court strikes it, but, again, I think it's highly unfair for my witness to be denied the opportunity to explain why he committed a crime that I have to end up giving him a deal for.

It's not fair, because he never gets to explain the reason for committing a crime, which I think the jury has a right to know, why didn't you just leave?

THE COURT: I think you can tell -- I mean, he can testify that Puha told him to do it, so he did it. That's it.

[DPA]: Well --

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THE COURT: That's the reason.

[DPA]: Why can't the Court just strike the word boss man? I mean, the fact of the matter is, he committed a crime because he feared and respected Puha. That's why he did it.

THE COURT: You want the term repeated?

[DEFENSE COUNSEL]: Well, Your Honor, I'm moving for a mistrial based on his talking about defendant as being the boss man, and I'm also moving for a mistrial, renewing my motion for a mistrial relative to the testimony of Puha grabbing her private parts and exposing his private parts.

As far as the Court, I guess, short of the mistrial, I would ask the Court to strike the testimony as the Court indicated.

THE COURT: That's fine. You have a right to ask him why did he do these things, because Puha told him to do that. But I don't think he needs to go into, he's the boss and that sort of thing, because it has no real meaning, except something negative.

[DPA]: It's also, Judge, highly relevant to his intent to join in this conspiracy to hurt her, and I just think we're bringing out his state of mind that he's not there as a mere spectator, he's joining in and participating as an equal.

THE COURT: But I don't know if he's actually said that. He's sort of suggested that he did this because he was afraid of particularly Perry and Onuma. Perry with the gun, being high on drugs, and Onuma in a general sense.

So I'm going to do that, and your motion for mistrial is going to be denied. I think based on the Court's instructions and the totality of the circumstances, defendant can get a fair trial.

There's a question of fact as to whether the exposure of his genitals and his touching the girl, if the jury believed that occurred before the conspiracy ended or after. And I think it occurred before the conspiracy ended. It is relevant to Mr. Puha's state of mind as to the conspiracy count and his intentions within the context of the conspiracy counts.

And I don't think [Hawaii Rules of Evidence (HRE) Rule 403 (1993)],<sup>8</sup> under the circumstances can -- comes into play, which I don't think unfair prejudice substantially outweighs probative value of that material.

(Bench conference concluded.)

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<sup>8</sup> Hawaii Rules of Evidence (HRE) Rule 403 (1993) provides: "Although 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."

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THE COURT: All right. Ladies and gentlemen, I am going to strike the part of this witness's testimony beginning where he last made reference to Puha, okay. Just that portion where he last made reference to the defendant. I'm striking that portion of the testimony from the record. You are to completely disregard that portion of the testimony and that portion of the testimony only.

All right. [Mr. DPA].

[DPA]: Thank you.

BY [THE DPA]:

Q. Mr. Mitchell, let me just back up a little bit. You indicated that initially Perry was making comments to the effect that you guys would have to help bury the body; right?

A. Right.

Q. Nobody's leaving until the body's buried, those sort of comments?

A. Correct.

Q. And you then told us that you didn't want to do that --

A. None of us wanted to.

Q. None of you did, but he had the gun, you said?

A. That's right. We're not going anywhere until the girl's buried.

Q. Right, okay. And then I was asking you, then what did [Defendant] say, so let me ask you just about that. Did he tell you and the others that you would have to help [Perry] and [Onuma] bury the body?

A. Yeah, yeah. He told us verbally, told us to go help them bury the girl, or we ain't leaving.

Q. Okay. And when he told you that, did you listen to him?

A. No.

Q. Okay. At some point did you listen when he told you to get down there and help them?

A. At some point.

. . . .

Q. Okay.

A. They said, we're not carrying her no more because we want you all to help. So they already have [Lake] helping. Perry and Onuma and Cadiz followed behind them. So they force him, you know.

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They're yelling at him. They're cussing at him, telling him, you fucker, pick up the body and help us carry her. He's scared. He just wants to hurry up. He's scared, wants to get this over with, picks up the body. All four of them carrying her down.

~~Cadiz briefly carries her just a little, and I'm already at the bottom sitting there waiting. They go down to the bottom --~~

Q. Let me stop you there, though. Why do you decide to go down there after initially saying, you're not -- you don't want to be involved in this?

A. That's right.

Q. Who told you to go down there and help?

A. [Defendant].

Q. Okay.

A. Perry.

Q. Okay. Well, when [Defendant] told you --

A. Correct.

Q. -- to go help?

A. Right.

Q. You decide to go down?

A. I decided to go.

.....

THE COURT: Excuse me, we've been going for quite a while, and we need to take 10 minutes.

Please remember keep an open mind and don't talk about this case.

(Recess taken at 10:40 a.m.)

(Reconvened at 11:01 a.m.)

THE COURT: Counsel's present together with the defendant, but not the jury. [Defense counsel].

[DEFENSE COUNSEL]: Your Honor, my concern was that the Court's curative instruction to the jury regarding the boss man testimony was not clear enough. I'm not sure the jury understood exactly what was being stricken from the record.

THE COURT: Okay.

[DEFENSE COUNSEL]: While I hate to have the Court talk about the boss man, I think the Court may have to do that, in



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reference to those statements, beginning with Mr. Puha being a man of authority and whatever, being the boss man. I think we need to make it clear what is being stricken and what they cannot consider.'

THE COURT: All right. So this witness's testimony alleging that Mr. Puha or the defendant was a man of authority and a claimed boss man is stricken, if that's what you want stricken.

[DEFENSE COUNSEL]: And, Your Honor, you know, I -- I thought at one point, we had a lot of discussions pretrial, obviously, about what was coming in and about what was not coming in, but I thought pretty clearly that was not coming in.

I can remember telling the Court at one point, I'm willing to trade boss man for all this sexual perversion. I thought it was clear, Court was saying boss man was not going to come in, even though the sexual conduct was going to come in.

THE COURT: Yeah. The discussion from my recollection is that I was saying that if this witness bought his drugs, used drugs from Mr. Puha, I could see an authoritative link, but [the DPA] said, no, no, no, this man doesn't use drugs, and so then I said, absent that, I'm disinclined to let it in.

[DEFENSE COUNSEL]: Your Honor, my understanding is it came up in the context of Puha's drug dealing outside of this eight ball that Perry and Onuma dropped to them, and what we talked about. I think what I told the Court was, what these guys would say is he's the boss of all the drug dealing.

THE COURT: Right.

[DEFENSE COUNSEL]: That's where boss man comes from, and I thought from there, the Court indicated the Court didn't want to hear about this boss man stuff because it flows into all of this other drug dealing that the Court was clearly keeping out.

THE COURT: Definitely.

[DEFENSE COUNSEL]: That's my understanding that was not coming in. That's why I was saying, I would gladly trade the boss man for dropping his drawers.

THE COURT: In all candor, though, I think the strongest statement I made was that I am not inclined to let this in, and I can't remember why we put the decision off.

I think [the DPA] may have asked that we wait, but it's not clear in my memory. [Mr. DPA]?

[DPA]: I do remember when [defense counsel] made this, you know, offer, that I said that that's not the way the rules of evidence work.

THE COURT: He was joking.

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[DPA]: We don't trade off one thing for another.

THE COURT: That wasn't serious.

[DPA]: And my argument has always been that Mitchell is going to admit that he committed the crime of hindering, and there has to be some explanation for it. I mean, he committed a crime. He only did it not because of what Perry was saying to him, but because of what Puha said to him, and that's legitimate testimony bearing upon his credibility.

And it also goes to the defendant's state of mind, his intent to promote or facilitate a kidnapping. That he's not a mere spectator, as is being suggested, but he is, in fact, a principal participant with the state of mind that goes along with it. That's what I've always said.

THE COURT: And you're not wrong, I think just that if boss man is suggestive of -- of the person who -- who supplies drugs to these people in a general sense, then I think there's a [HRE Rule] 403 problem, and that would be certainly something the Court would keep out.

[DPA]: And there's been no evidence of that.

THE COURT: That's why. The problem is boss man, that's just sort of out there. What does it mean? Nothing good, I can tell you that.

[DPA]: That's what I mean. We're assuming because, in fact, he is a drug dealer that that's what the jury will assume. We can't assume the jury is going to assume that he's the leader of some vast organized drug program.

[DEFENSE COUNSEL]: Your Honor, they're going to assume that because [the DPA] told them that in his opening statement, and the Court had to strike that, too. This is the second time they've heard it now, he was giving drugs to Onuma and Perry, and now he's the boss man for his cousin, too.

THE COURT: That violation during opening was a clear violation of the Court's ruling. I mean, [DPA], I was surprised you did that.

[DPA]: Judge.

THE COURT: I don't think you do things like that.

[DPA]: I did not believe that was a violation, and even to this day, I don't believe that I violated.

THE COURT: It was so clear, [DPA]. The Court made it clear that the only drug supplying by this man that was going to come in was with regard to the Tominaga drugs, you know, what she supposedly stole, and that was one of the reasons we severed Mr. Puha from Mr. Perry, so that this kind of stuff would be limited.

I don't see how it's relevant.

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[DPA]: Well, I think it's highly relevant when someone in the community steals drugs from a drug dealer. It's bad business for a drug dealer to have their drugs stolen. They're not going to put up with it. It's not irrelevant. No drug dealer can remain in business if people are stealing their drugs, and they retaliate.

THE COURT: You got that part in.

[DPA]: You recall I didn't. I only got in evidence that the drugs that Perry had that he was selling to the girl were Puha's drugs. That's all the jury has in terms of evidence.

My comment in opening's been struck and they're presumed to follow that instruction and not use that. In fact, opening's not evidence anyway, but it's a whole other issue.

THE COURT: Let's bring the jury in.

(Proceedings held in the presence of the jury:)

THE COURT: Let the record reflect the presence of Counsel, defendant, jury.

Ladies and gentlemen, remember that limiting instruction I gave you just before the recess? I want to make it even clearer.

I am striking from the record this witness's allegations to the effect that the defendant was a man of authority, a claimed boss man. All that is stricken from the record, and you are not to consider that in any way in your decision making in your deliberations of this case.

[Mr. DPA].

[DPA]: Thank you.

(Footnote supplied.)

At the close of all evidence, and in the course of moving for a judgment of acquittal, Defendant renewed his previous oral motions for a mistrial:

[DEFENSE COUNSEL]: Your Honor, we would move for judgment of acquittal on the conspiracy count, and the assault in the second degree -- attempted assault in the second degree count.

[DEFENSE COUNSEL]: I am also renewing my motions for mistrial, as they relate to [the DPA's] statements during his opening, as well as the testimony, I guess, his remarks -- the remarks in the opening would go to his statements about Mr. Puha's drug dealing outside of that eight ball that was given to Ms.

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Tominaga, and also the remarks in his opening relating to the sexual misconduct, if you want to call it that, and, of course, the testimony that followed relating to the sexual misconduct.

THE COURT: Okay. With regard to the motion for mistrial, I, of course, wish [the DPA] had not said that, but I think that

[DEFENSE COUNSEL]: Your Honor, I'm sorry, I also need to renew the mistrial motion to the boss man.

THE COURT: Go ahead, yes, all right.

His opening statements were -- during opening, it's clear that the opening is not evidence, and there was quick curative instruction that's, No. 1.

No. 2, with regard to the boss man, yes, it -- should not have come out before we litigated the matter, and you know, finally, but the Court quickly struck the material and gave a curative instruction, and the jury certainly looked like they fully understood the Court's curative instruction.

With regard to the sexual conduct, again, those activities, if the jury believes they were part and parcel of what happened in that backyard, if they believe Mr. Mitchell during the conspiracy, and the Court really believes that the -- the statements go to show -- I mean, the conduct goes to show Mr. Puha's state of mind and his intentions within the context of the conspiracy count, he was there, they tend to show that he was there voluntarily. He was not surprised.

He -- it just goes to his state of mind and his intentions with regard to this agreement, and the intention during the agreement. So I think the Court's ruling is correct. I don't think unfair prejudice substantially outweighs the probative value of that material.

Now, on the other hand, the Court has been trying to keep out any supposed drug sales by this defendant at any time other than on the date of the offense, and [the DPA] has argued and, rightfully, that there is probative value to that, to show that this man was somebody -- somebody people listened to.

But with regard to Mr. Mitchell, Mr. Mitchell, apparently is not a drug user, and so the probative value goes way down on that count. And I think the unfair prejudice as to that, does substantially outweigh the probative value, that probative value being, you know, that Mr. Puha's somebody these people would listen to and follow.

So that's the court's rationale, and the motion's, therefore, I think, based on what I've said, are denied, motions for mistrial, because I believe that under the totality of the relevant circumstances, the defendant can still get a fair trial.

With regard to the motion for judgment of acquittal, I look at the evidence in the light most favorable to the Government, weighing the jury's right to weigh credibility, weigh the evidence

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and draw all reasonable inferences of fact, and find that as to all three counts, a reasonable juror could conclude guilt beyond a reasonable doubt, and so I must deny those motions.

The circuit court then formally instructed the jury on the law applicable to the case. The instructions included the following:

You must consider only the evidence which has been presented to you in this case and such inferences therefrom as may be justified by reason and common sense.

. . . . .

Statements or remarks made by counsel are not evidence. You should consider their arguments to you, but you are not bound by their recollections or interpretations of the evidence.

. . . . .

You must disregard entirely any matter which the Court has ordered stricken.

. . . . .

You have heard evidence that the defendant at another time may have committed other crimes, wrongs or acts. You must not use this evidence to determine that the defendant is a person of bad character, and therefore, must have committed the offenses charged in this case.

Such evidence may be considered by you, only on the issues of the defendant's motive and intent, and for no other purpose.

The case went to the jury on April 17, 2003. On April 21, 2003, the jury returned verdicts of guilty as charged on all three counts against Defendant, and the circuit court adjudged him guilty accordingly.

On April 22, 2003, the circuit court convened a hearing, apparently *sua sponte*, because, "I am considering sanctioning [the DPA] for permitting Mr. Mitchell to just come out with the boss business." For his part, Defendant was actually opposed to the imposition of sanctions, preferring the

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alternative remedy of a new trial:

[DEFENSE COUNSEL]: . . . . Now, the bossman issue, as I -- I quickly glanced at these transcripts, it's also not that clear cut either. There's not a clear cut in limine ruling that that term could not be used, but certainly it was discussed enough so that [the DPA] at least had some understanding that that was a touchy issue.

. . . .

THE COURT: Well, with regard to the bossman, I think it's abundantly clear that the Court did not really -- was not inclined to let it in, and the Court was having a real problem with it. We went round and round because at one point, [defense counsel], you held out the possibility that you might bring out Mr. Mitchell's drug use, which may have changed the complexion of the equation.

But I don't -- I think it's inescapable that the Court was not crazy about the word bossman unless there was a real reason to let it in. And I agree with you [that the DPA] certainly arguably should have raised it out of the presence of the jury to say I'm going to bring it out. You know. So --

. . . .

[DPA]: On the -- the -- the bossman quote, Your Honor, I did look at the transcripts and, I mean, the way I look at it is this. There's a couple of questions.

Number one, what was the Court's ruling? Number two, was the ruling violated? And, number three, was it done intentionally?

And if the Court finds all of that, then the Court should do something. I agree.

But I -- I -- I agree with [defense counsel], it's not clear that the Court ruled that it was not allowed. The way I look at this is the Court is basically saying, don't mention it until you bring it up with the Court first.

THE COURT: Right.

. . . .

[DPA]: I don't think the Court ruled, you know, this -- this oral motion to in limine it out is granted period, end of story.

And to be honest, Your Honor, I do not re-- when I did my direct of Mitchell, I did not remember that this was the only way in which this could come out, that I would have to first approach the Court. I was expecting [defense counsel] to bring it up before Mitchell testified or at some point during the course of the testimony as we got closer to the -- that point of the story, and it didn't get brought out.

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He did use alternative phrases like he's a man of authority, which I don't think would have been a problem for anyone. But then he threw in this extra quote, you know, kinda like the bossman, and I didn't know he was going to say that.

THE COURT: Well --

[DPA]: But, you know, the -- Your Honor, I'm not going to make excuses. The Court's ruling is I should have got permission first. I didn't. And he said it. It was struck. And I can tell the Court I certainly did not intentionally violate the Court's order to first bring it up with the Court. I did not remember.

I mean, one of the whole things about this trial is I wanted motions in limine in writing early on. Orders reduced to -- written orders. Early on. So there wouldn't be this sort of confusion.

And, unfortunately, there were many in limine requests all the way through the trial, and -- and I did not remember that I should have first brought it up with the Court. I was expecting it to be objected to as we got closer to that point in the testimony. So I did not intentionally violate the Court's order. I would never do that.

[DEFENSE COUNSEL]: Well, Your Honor, only to say this again, emphasize again, that I don't think you can separate out what happened in opening statement with the bossman comment because those are the two things that the jury heard. Those were the two bells that were rung that are difficult to unring, and they both go to the same point. He's the bossman, where he's the bossman of what -- he's the bossman of drug dealing because he was -- he was dealing systematically through Perry and Onuma to this woman at the very least.

You know, and that's what -- he couldn't say that in his closing, but certainly by talking about him being the owner, the ultimate owner, of those drugs, that's what was left with the jurors. And that's what the damage was to Mr. Puha.

And, you know, we are going to file a motion. And again, as far as sanctions go, that's to me the more appropriate punishment that would fit the crime in this case.

THE COURT: What's the more appropriate punishment?

[DEFENSE COUNSEL]: Make [the DPA] do the trial again, which would also punish the Court and punish myself too, but we have to have some self sacrifice in our work, Your Honor. Sometimes we have to give up a little bit so we can have the appropriate punishment for [the DPA].

THE COURT: Okay. Well, the Court considers the warning that was given with regard to the opening in -- in one sense only, and that was that a warning was given, and I am going to sanction [the DPA] a hundred dollars and ask that it be paid by the end of this week, end of business Friday.

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True to his word, Defendant filed a motion for new trial on May 2, 2003. Defendant based his motion upon prosecutorial misconduct. As to matters relevant to this appeal, Defendant complained, first, about the DPA's reference in opening statement to

the distribution of drugs by Defendant Puha to Ryan Onuma and Jason Perry, apart from the amount of narcotics stolen from Jason Perry by Tracey Tominaga on or about January 18, 2002, in direct contravention of the Court's previous order that evidence of Defendant's narcotics trafficking would be limited to the narcotics involved in the January 18, 2002 incident.

Defendant did not identify the purported "previous order" excluding the reference. Defendant also complained about "the testimony of witness Jamison Mitchell . . . that Defendant Puha was the 'boss man', in contravention of the Court's prior indication to counsel that the Court was not inclined to allow such testimony." In this latter connection, Defendant reminded the circuit court that it had sanctioned the DPA for the transgression.

Defendant's memorandum in support argued that the prejudicial effect of the two purported transgressions, when combined, warranted a new trial:

In this case, Defendant Puha was severely prejudiced by the State's remarks regarding his drug dealing and his status as a "boss man". While both these references were stricken by the Court, this information could easily have been linked up by the jury to conclude that Defendant Puha was a leader in a drug distribution ring. Moreover, during the State's opening and closing arguments, [the DPA] emphasized that Defendant Puha's motivation for his involvement in the alleged offenses arose out of the fact that he provided the narcotics which were allegedly stolen by the victim, Tracey Tominaga. This reference to Defendant Puha's providing drugs to Tominaga through Jason Perry and Ryan Onuma only emphasized the stricken information which never should have been provided to the jury.



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At the June 9, 2003 hearing on Defendant's motion for new trial, the parties submitted on the record, and the circuit court summarily denied the motion.

II. Discussion.

Defendant contends the circuit court erred in refusing to (1) grant him a mistrial and (2) grant him a new trial, because the DPA committed misconduct by (a) referring in his opening statement to Defendant's prior drug distribution activities and (b) allowing Mitchell to characterize Defendant as the "boss man."<sup>9</sup>

At the outset, we observe that Defendant's motion for new trial was not timely. Hawai'i Rules of Penal Procedure (HRPP) Rule 33 (2003) (a motion for new trial "shall be made within 10 days after verdict or finding of guilty or within such further time as the court may fix during the 10-day period"); HRPP Rule 45(b) (2003) ("the court may not extend the time for taking any action under Rules 29, 33, 34 and 35 of these rules . . . except to the extent and under the conditions stated in them"). The jury found and the circuit court adjudged Defendant guilty on April 21, 2003. Defendant filed his motion for new trial on May 2, 2003, one day late. We will therefore not review the circuit court's denial of it. State v. Reed, 77 Hawai'i 72,

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<sup>9</sup> On appeal, Defendant Delaneo Kawika Puha does not argue that the Circuit Court of the First Circuit erred in allowing Ryan H. Onuma and Jamison Mitchell to testify about Defendant's sexual conduct during Tominaga's murder.

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83, 881 P.2d 1218, 1229 (1994) (because Reed's motion for new trial was untimely, the circuit court "was without authority to waive the time requirement[] set forth in HRPP . . . [Rule] 33 and, therefore, was without jurisdiction to entertain Reed's motion[] for new trial"), overruled on other grounds, State v. Balanza, 93 Hawai'i 279, 1 P.3d 281 (2000).

As for Defendant's motions for a mistrial based upon prosecutorial misconduct,

The denial of a motion for mistrial is within the sound discretion of the trial court and will not be upset absent a clear abuse of discretion. The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Shabazz, 98 Hawai'i 358, 375, 48 P.3d 605, 622 (App. 2002) (citation and block quote format omitted). Further,

Allegations of prosecutorial misconduct are 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. 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. Misconduct of a prosecutor may provide grounds for a new trial if there is a reasonable possibility that the misconduct complained of might have contributed to the conviction.

Id. (citation and block quote format omitted).

Applying the foregoing tripartite analysis -- and assuming without deciding that the two instances complained of were indeed prosecutorial misconduct -- we first observe that in neither instance did the DPA violate a clear and final order *in limine*. We are also hard put to find in the record any clear and final "inclination" *in limine* of the circuit court, express or

implied, that the DPA might have ignored. And while we will not quibble with the circuit court's decisions to strike the DPA's statement about Defendant's predicate drug dealings and Mitchell's reference to Defendant as the "boss man," we certainly feel the weighty probative value underlying both utterances. To be sure, that power of proof *ipso facto* created powerful prejudice against Defendant, but query to what incremental extent, and to what extent that prejudice was unfair, cf. HRE Rule 403, defense counsel's speculation that the jury would link the two utterances notwithstanding. All in all under the first factor of the analysis, the nature of the conduct sways both ways, if at all in Defendant's direction.

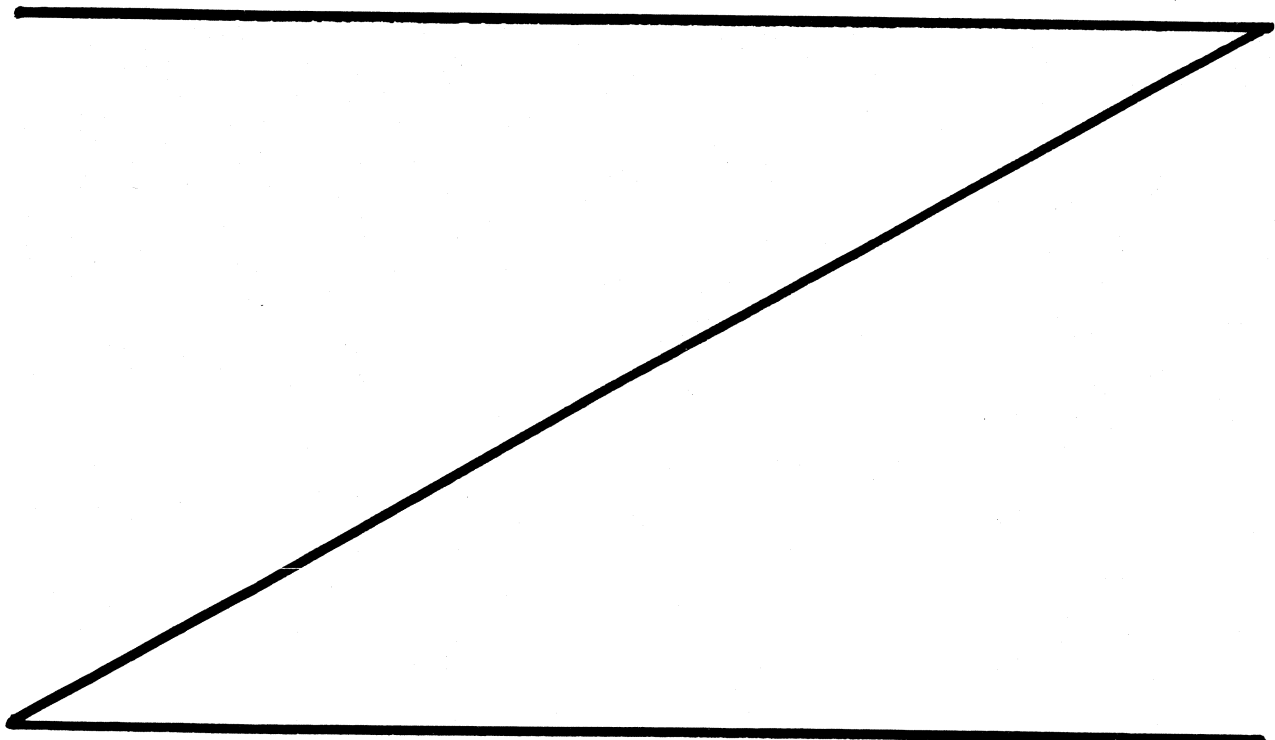
As for the promptness of a curative instruction, the circuit court in both instances immediately struck the utterance and instructed the jury to disregard it, see State v. Kahalewai, 55 Haw. 127, 129, 516 P.2d 336, 338 (1973) (when "the Court has instructed [the jury] that something which they have heard is not to be considered by them, we must presume in favor of their oath and public duty" (citation and block quote format omitted)), in the latter instance doing so twice. Considering also the relevant general instructions the circuit court gave to the jury, cf. State v. Meyer, 99 Hawai'i 168, 172-73, 53 P.3d 307, 311-12 (App. 2002) ("generally relevant jury instructions can cure improper arguments by a prosecutor; especially where, as here, such instructions were given repeatedly" (citations omitted)), we

can easily see that the second factor weighs heavily against Defendant.

Considering, finally, the strength or weakness of the evidence against Defendant, we are of the opinion that the evidence against him was very strong, if not overwhelming. Our exemplar in this respect is State v. Ganal, 81 Hawai'i 358, 917 P.2d 370 (1996):

In contrast to the instant case, the evidence against the defendant in Ganal was overwhelming. In Ganal, we held that despite Ganal's challenge to fourteen portions of the prosecution's closing argument, the prosecution's remarks did not constitute error in light of the overwhelming "strength of the case against Ganal[.]" 81 Hawai'i at 377, 917 P.2d at 389. Specifically, we considered the number of witnesses who had been present during the events in question and who testified against Ganal. Id. at 362-65, 917 P.2d at 374-77. In addition, there was abundant forensic evidence, including ballistics, supporting the prosecution. Id. at 363-65, 917 P.2d at 375-77.

State v. Rogan, 91 Hawai'i 405, 415, 984 P.2d 1231, 1241 (1999)  
(brackets in the original).



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III. Conclusion.

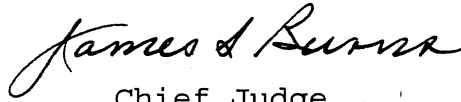
Accordingly, the circuit court did not abuse its discretion in denying Defendant's several motions for a mistrial, Shabazz, 98 Hawai'i at 375, 48 P.3d at 622, and the November 12, 2003 judgment of the circuit court, as amended on November 17, 2003 and again on February 18, 2004, is affirmed.

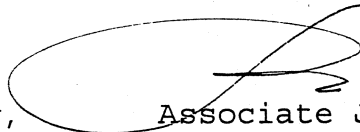
DATED: Honolulu, Hawai'i, November 4, 2005.

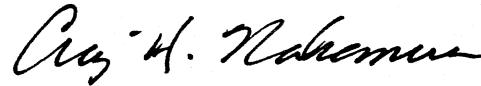
On the briefs:

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for Plaintiff-Appellee.

  
Chief Judge

  
Associate Judge

  
Associate Judge