

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27145

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
GREGORY AWANA, Defendant-Appellant
and
JODY AWANA, Defendant

KHAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 03-1-1913)

MEMORANDUM OPINION

(By: Burns, Chief Judge, Foley, and Nakamura, JJ.)

Defendant-Appellant Gregory Awana (Awana or Defendant) was convicted of the second degree murder of Yorck Woita (Woita) and other related offenses. At the time of the alleged murder, Awana was employed as an investigator for the Honolulu Medical Examiner's Office, a position he had held for ten months. Awana had previously worked for ten years as a deputy sheriff in the Sheriff's Department. Awana was acquainted with Woita due to Awana's involvement in growing marijuana. In a post-arrest statement to the police, Awana admitted that he killed Woita, but claimed that he acted in self-defense. Awana reported that he used the boat of his friend, Bruce Mau (Mau), to dispose of Woita's body in Kaneohe Bay. Woita's body was never found.

Awana appeals from the Judgment entered on February 22, 2005, by the Circuit Court of the First Circuit (circuit court).¹

¹ The Honorable Steven S. Alm presided.

After a jury trial, Awana was found guilty as charged of second degree murder (Count 1); carrying, using or threatening to use a firearm in the commission of a separate felony (Count 2); unauthorized control of a propelled vehicle (Count 3); first degree criminal property damage (Count 4); first degree commercial promotion of marijuana (Count 5); and unlawful use of drug paraphernalia (Count 6). The circuit court sentenced Awana to life imprisonment with the possibility of parole and a mandatory minimum term of fifteen years of imprisonment on Count 1, twenty years of imprisonment on Counts 2 and 5, and five years of imprisonment on Counts 3, 4, and 6, all terms to be served concurrently.

On appeal, Awana challenges the circuit court's "Findings of Fact, Conclusions of Law and Order Denying Defendant's Motion To Suppress Statements" (Suppression Order) filed on December 6, 2004, and his convictions on Counts 1, 2, and 5.² Awana argues that the circuit court erred in: 1) denying his motion to suppress his tape-recorded statement to the police, which Awana claims was involuntary; 2) sustaining objections to questions asked by his counsel on cross-examination; 3) permitting a detective to testify that Mau said he had not loaned his boat to Awana; 4) admitting photographs of Mau's boat without adequate foundation that the photographs depicted the boat Awana said he had used to dispose of Woita's body; 5) refusing to

² Because Defendant-Appellant Gregory Awana (Awana or Defendant) does not appeal his convictions on Counts 3, 4, and 6, we affirm those convictions without further discussion.

dismiss the first degree commercial promotion of marijuana charge; 6) allowing a criminalist to testify about the water content and dehydration of marijuana plants where no adequate foundation had been laid that she had expertise in those areas; and 7) denying his motions for judgment of acquittal on the second degree murder charge. We affirm.

BACKGROUND

The following evidence was adduced at trial.

Awana met Woita in about 1999. In his recorded statement, Awana asserted that he agreed to grow marijuana for Woita and Woita's father at a house that Awana was renting in Manoa from Mau. Woita and his father provided the initial investment and equipment for the marijuana grow operation. However, shortly after agreeing to grow marijuana for the Woitas, Awana has second thoughts due to concerns that Woita was associated with "ice heads" and had a "big mouth." Awana returned the equipment to Woita and advised Woita that Awana had lost the rental of the Manoa house and thus could not grow marijuana.

Unbeknownst to Woita, Awana continued to rent the Manoa house and later agreed to grow marijuana for people from Maui. Awana installed marijuana grow equipment paid for by his Maui partners in the Manoa house and grew marijuana for them. On occasion, Awana sold marijuana to Woita, but Awana concealed his grow operation from Woita and told Woita that the marijuana had been obtained from suppliers on Maui.

Woita grew suspicious that Awana had been growing marijuana behind Woita's back. In late August of 2003, Woita drove by the Manoa house and saw Awana there. By this time, Awana had been growing marijuana for the Maui people for about two years. Woita was angry and believed that Awana owed Woita a portion of the profits Awana had been making from growing marijuana. Woita estimated the amount he was owed was between \$600,000 and \$1.2 million and made plans to confront Awana. Woita set up a meeting with Awana and asked his step-brother Donaldson Santiago, also known as Moku (Moku), and his friend Phillip Alpis, also known as Alika (Alika), to provide backup for the meeting.

On August 29, 2003, Woita drove a Nissan Xterra, which Moku had borrowed from his grandmother, while Moku and Alika followed in Alika's car. The plan was for Moku and Alika to watch Woita from a distance. Woita and his father met with Awana in Kailua. After Woita's father departed, Awana's wife drove up and Awana took a backpack out of the car. The backpack contained a 9-millimeter Glock handgun. Woita was sitting in the driver's seat of the Xterra and Awana got into the passenger side. The two argued and then Woita drove to the Manoa house. Moku and Alika arrived at the house between 5:00 and 5:15 p.m., just in time to see Woita and Awana enter the front door.

While Woita and Awana were in the house, Moku and Alika waited outside in their car. Moku and Alika maintained contact with Woita through cellular telephone calls. Alika called Woita

at about 5:30 p.m., and Moku called a short time later. Woita told Moku that he was fine. At about 6:45 p.m., Woita called Moku and told Moku that Woita was safe and would catch up with Moku and Alikea in Kahaluu. Woita sounded fine and was not upset anymore. Moku and Akila left for Kahaluu.

Sometime between 7:30 and 7:45 p.m., Moku called Woita and told him that Moku's cousin, George, would drive Moku to Waikiki and that Moku would meet Woita back at their hotel room. Moku overheard Woita ask Awana if Awana needed a ride to Kailua and Awana respond that his wife was coming to pick him up. Woita sounded fine. Cellular telephone records show that Woita's girlfriend, Ai Ozaki (Okaki), called Woita at 7:51 p.m. Woita told Ozaki that he missed her and that he would call her right back. Woita sounded a little rushed, but not angry or scared. From about 8:00 p.m., Moku or George tried to call Woita every ten or fifteen minutes, but Woita did not answer.

At about 9:05 p.m., the police discovered the Nissan Xterra that Woita had driven earlier that day on fire in Waimanalo. At 9:20 p.m., Moku's grandmother called Moku and told him that the Xterra she had let him borrow had been found burning in Waimanalo. Moku spoke to the police the next day, August 30, 2003, in the evening.

On August 31, 2003, a team of Honolulu Police Department (HPD) officers conducted surveillance on the Manoa house rented by Awana. At about 12:30 p.m., one of the officers observed Awana and a woman, later identified as Awana's wife,

make several trips from the house carrying boxes and trash bags, which they loaded in a pickup truck. Awana got into the pickup truck and drove away, and his wife also departed driving a station wagon. The police surveillance team followed Awana to the Kapaa Transfer Station, where Awana dumped the trash bags and boxes. The police seized the items dumped by Awana and found marijuana plants, potting soil, towels and cinder blocks that appeared to have blood on them, and a spent .22-caliber cartridge casing. Awana was arrested later that day.

In the early morning of September 1, 2003, the police executed a search warrant on the Manoa house. They discovered materials in the house consistent with a marijuana grow operation, including pots and potting material, root systems of plants, a venting system, and high intensity lights.

In the evening of September 1, 2003, Detectives Theodore Coons (Detective Coons) and Larry Tamashiro (Detective Tamashiro) obtained a tape-recorded statement from Awana. In his statement, Awana claimed that after his meeting in Kailua with Woita and Woita's father ended, Woita demanded that Awana take Woita to the Manoa house or Woita would hurt Awana's family. Upon arriving at the Manoa house, Woita began opening drawers, searching for money. When Woita saw the marijuana plants growing in the house, he became angry and accused Awana of "ripping [Woita] off."

According to Awana, Woita must have grabbed a .22-caliber Baretta pistol that Awana kept in one of the drawers when

Woitā was looking for money. Woitā pointed the gun at Awana and said, "I should fucking kill you for ripping me off." Awana "made a move" for the gun. Awana claimed that while he wrestled with Woitā over the gun, the gun went off three times, with all three shots hitting Woitā in the head. Awana stated that when the gun went off, Woitā's hands were on the grips but that Awana's "finger might have slipped in over [Woitā's]" on the trigger.

Awana told the detectives that he panicked after Woitā was shot. Awana drove the Nissan Xterra to Waimanalo and burned it. Awana called his friend Mau, who picked Awana up in Waimanalo. Awana claimed that Mau did not know that Awana had burned the Xterra. Awana made arrangements to borrow Mau's boat, but did not tell Mau why Awana needed the boat. Awana had never borrowed this boat before. The next morning, Mau used his truck to deliver the boat, a Boston Whaler, to the Manoa house at about 8:30. The boat was attached to Mau's truck by a trailer. Mau left the truck and boat for Awana and Awana assumed that Mau walked to the house of Mau's mother, who lived nearby. Awana wrapped Woitā's body with plastic and a chain, carried the body onto the boat, drove to a beach park near Kaneohe Bay, launched the boat, and headed away from shore until the water was a deep blue. He attached a weight to Woitā's body and dumped the body along with the Baretta pistol into Kaneohe Bay. Awana cleaned up the Manoa house using Clorox and some towels. He flushed two of the three bullet casings down the toilet.

Detective Coons testified that during Awana's recorded statement, Awana described the circumstances of the shooting and indicated that Woita had been holding the gun in Woita's right hand and that Awana and Woita had been facing each other as they struggled over the gun. Detective Coons testified that Awana pointed to where the three bullets had hit Woita. Awana revealed that the three bullets all hit Woita in the same area on the left side of Woita's head -- "right at left temple, above the left ear, and above the head." HPD records showed that a .22 caliber Beretta model 21 semiautomatic handgun was registered to Awana. This Beretta model was a combination double action, single action handgun, in which a separate pull on the trigger was required to fire each shot, but the second and third pulls of the trigger required significantly less pressure and movement than the first trigger pull to fire the gun.

DISCUSSION

I.

A.

Awana argues that the circuit court erred in denying his motion to suppress the recorded statement he gave to Detectives Coons and Tamashiro. Evidence adduced at the suppression hearing revealed that Awana vacillated several times about whether he wanted to make a statement. Awana had been arrested on August 31, 2003, and was in custody on September 1, 2003, when Detectives Coons and Tamashiro turned on the tape recorder and began the interview of Awana at 6:12 p.m. After

preliminary questions about Awana's background, Detective Coons asked Awana, "Has anybody threatened you, forced you or coerced you in any way into making a statement with us?" Awana answered, "No, but I think I should get an attorney."

Detective Coons immediately terminated the interview at 6:15 p.m. and turned off the tape recorder. He allowed Awana to speak to a deputy public defender (DPD). At 6:33 p.m., the recorder was turned back on. Awana acknowledged that he had consulted with a DPD and that the DPD had advised Awana not to make a statement. Awana further acknowledged that after speaking to the DPD, Awana nevertheless had told the detectives that he wanted to make a statement. A short while after the interview was resumed, however, Awana told the detectives, "I'd better wait." The interview was terminated and the recorder turned off. As the detectives were about to leave the room to take Awana back to the cellblock, Awana again told the detectives he wanted to make a statement. The recorder was turned back on at 6:47 p.m. While Detective Coons was in the course of advising Awana of his constitutional rights, Awana asked about whether he could obtain an attorney faster than the DPD indicated he could come. Detective Coons terminated the interview and shut off the recorder. Awana was returned to the cellblock and the detectives went out to eat dinner.

While at dinner, Detective Coons was notified that Awana had informed the cellblock guard that Awana wanted to talk to the detectives. Upon returning to the police station,

Detective Coons was informed that Awana had asked several times to speak to the detectives. At 8:53 p.m., the tape recorder was turned back on, after the detectives retrieved Awana from the cellblock. Awana was informed of his constitutional rights, signed a form acknowledging the waiver of his rights, and gave a statement to the detectives.

Awana testified at the suppression hearing that he had been coerced into making a statement by threats Detective Coons made against Awana's family. Awana claimed that during the times that the tape recorder was turned off, Detective Coons: 1) threatened to arrest Awana's wife if Awana did not make a statement; 2) told Awana that his wife had already been arrested, but would be released if he gave a statement; 3) threatened to have Awana's wife taken out of her single cell and placed in a "general population" cell where she could possibly be assaulted; and 4) suggested that Awana's 11-year-old daughter would be placed in foster care if he did not make a statement. Detective Coons and Detective Tamashiro both testified that they had not discussed Awana's wife's situation with Awana. Detective Coons further testified that he did not threaten, lie to, or coerce Awana in any way. Detective Coons and Detective Tamashiro indicated that except for a few brief moments, they had always been together when interacting with Awana.

In denying Awana's motion to suppress, the circuit court found that after considering Awana's testimony and his recorded statement, Awana's allegations regarding coercion on the

part of the detectives was not credible. Instead, the court found Detective Coons and Detective Tamashiro to be credible witnesses. The circuit court entered a written Suppression Order which contained the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Defendant Gregory Awana ("Defendant") was arrested and taken into police custody on August 31, 2003.

2. On the following day, September 1, 2003, Honolulu Police Department ("HPD") investigating detectives Larry Tamashiro and Ted Coons met with Defendant at the police cellblock in the main police station at 801 South Beretania Street and escorted him to an interview room on the second floor of the main station in the area of the Criminal Investigation Division.

3. Once situated in the interview room, the detectives began speaking with Defendant commencing initially at 6:12 p.m. with a reading of his constitutional rights using HPD form 81; the interview was audiotape recorded.

4. During approximately the following 45 minutes, Defendant a) first asked to speak to an attorney, b) was put in telephonic contact with a deputy public defender ("DPD"), c) was told by the DPD not to make a statement, d) told the detectives that he wanted to make a statement anyway, e) then decided he'd better wait, f) then again told the detectives he wanted to make a statement, and finally g) continued to equivocate, at which point the detectives terminated the interview and returned Defendant to the cell block without having taken any statement from him. The detectives then left the main station to eat dinner together.

5. After being returned to the cell block, Defendant asked several times to speak again with the detectives, thereby himself voluntarily initiating further contact with them.

6. In response to Defendant's several requests to speak with them again, following their return from dinner, at a few minutes prior to 8:53 p.m. that same evening, the detectives went to the cell block and escorted Defendant back to a second-floor interview room.

7. Once there, beginning at 8:53 p.m., the detectives began to interview Defendant by reading him his constitutional rights using HPD form 81; again, the interview was audiotaped.

8. This time, Defendant was completely read his rights using HPD form 81, which he also signed and executed, thus waiving his rights; Defendant then gave a statement to the investigating detectives which was concluded at 9:50 p.m. that same evening.

9. Defendant understood his constitutional rights prior to waiving them and agreeing to give a statement to the detectives.

10. Defendant is an articulate, 40-year-old with a G.E.D., who reads, writes, and understands English, and who was not taking any medication or under a doctor's care at the time of the interview with the detectives.

11. Defendant had been employed for ten years with the Sheriff's Department as a deputy sheriff, and, more recently, was an investigator with the Honolulu Medical Examiner's office; he is not a naive or unsophisticated person.

12. During the interview with the detectives, Defendant sounded at all times to be coherent and in control of his faculties. He answered questions freely and spoke at times in narrative form, providing details and responding appropriately to questions from the detectives.

13. The court, based on a careful consideration of the hearing testimony of Detectives Tamashiro and Coons finds them to be credible witnesses; any minor inconsistencies in their respective testimony concerned matters of innocent error and not deliberate falsehood.

14. On the other hand, after a careful consideration of both the September 1, 2003 statement of the Defendant and his hearing testimony, the court finds that the allegations of Defendant regarding coercion on the part of the detectives not credible.

15. The court finds that the detectives did not coerce Defendant into making the September 1, 2003 statement; rather, he made such statement voluntarily, of his own free will and choice, after fully understanding his constitutional rights against self-incrimination.

CONCLUSIONS OF LAW

1. Defendant was subjected to custodial interrogation by the investigating detectives on September 1, 2003. State v. Ketchum, 97 Haw. 107, 34 P.3d 1006 (2001).

2. At all stages of the interview on September 1, 2003 prior to the taking of Defendant's statement, the investigating detectives adhered to proper legal procedure, and Defendant was also properly given his constitutional rights per Miranda and knowingly, intelligently, and voluntarily waived these rights prior to the taking of such statement. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981); Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830 (1983); State v. Brezee, 66 Haw. 162, 657 P.2d 1044 (1983); State v. Luton, 83 Haw. 443, 927 P.2d 844 (1996); State v. Henderson, 80 Haw. 439, 911 P.2d 74 (1996).

3. Based on a review of the entire record and the totality of the circumstances, Defendant was not coerced into giving his statement on September 1, 2003; rather, he gave his statement intelligently, knowingly, and voluntarily. State v. Kelekolio, 74 Haw. 479, 849 P.2d 58 (1993).

4. Additionally, Defendant's statement on September 1, 2003 was voluntarily made for purposes of Hawaii Revised Statutes Section 621-26.

ORDER

ACCORDINGLY, IT IS HEREBY ORDERED that, based on the foregoing findings of fact and conclusions of law, Defendant Gregory Awana's Motion to Suppress Statements is DENIED.

B.

The thrust of Awana's argument on appeal is that the circuit court erred in crediting the testimony of Detectives Coons and Tamashiro over the testimony of Awana. Awana points to certain inconsistencies between the testimony of Detective Coons and Detective Tamashiro and argues that there was evidence that corroborated Awana's version of what happened.

It is well settled, however, that the credibility of witnesses and the weight of the evidence is for the trier of fact to determine, not the appellate courts. State v. Buch, 83 Hawai'i 308, 321, 926 P.2d 599, 612 (1996). The circuit court was entitled to credit the testimony of the detectives over that of Awana. We conclude that the circuit court's findings of fact were supported by substantial evidence and were not clearly erroneous. Based on the court's factual findings, the court properly concluded that Awana's statement was voluntary and was given after a valid waiver of his constitutional rights. Moreover, upon review of the record and considering the totality of the circumstances surrounding Awana's statement, it is our independent determination that Awana's statement was voluntarily and freely given. See id. at 321-22, 926 P.2d at 612-13.

II.

A.

Awana argues that the trial court erred in sustaining objections to questions asked by Awana's counsel on cross-examination as argumentative. The objections were sustained during the cross-examination of Detective Tamashiro and forensic examiner Charles Davis (Davis).

A trial court has the authority to

exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Hawaii Rules of Evidence (HRE) Rule 611(a) (1993). The scope and extent of cross-examination of a witness is within the sound discretion of the trial judge. State v. Jackson, 81 Hawai'i 39, 47, 912 P.2d 71, 79 (1996); State v. Kauhi, 86 Hawai'i 195, 197, 206, 948 P.2d 1036, 1038, 1047 (1997). In State v. Sanchez, 82 Hawai'i 517, 923 P.2d 934 (App. 1996), this court stated:

An argumentative question is a "faulty form of examination of [a] witness by propounding a question which suggests [the] answer in a manner favorable to party who advances the question or which contains a statement in place of a question." Black's Law Dictionary 107 (6th ed. 1992).

A question is argumentative if its purpose, rather than to seek relevant fact, is to argue with the witness or to persuade the trier of fact to accept the examiner's inferences. The argumentative question . . . employs the witness as a springboard for assertions that are more appropriate in summation. There is a good deal of discretion here because the line between argumentativeness and legitimate cross-examination is not a bright one. Argumentative questions often tend to harass witnesses[.]

A. Bowman, Hawai'i Rules of Evidence Manual § 12.2, at 408 (1st Ed. 1990).

Id. at 531-32, 923 P.2d at 948-49 (ellipses and brackets in

original).

B.

Awana's counsel sought to cross-examine Detective Tamashiro by asking the detective about certain assertions Awana made during his recorded statement and then asking the detective whether physical evidence uncovered during the investigation was consistent with those assertions. Defense counsel's purpose was to enhance the credibility of Awana's recorded statement, including Awana's claim of self-defense, by showing that certain details Awana provided in his recorded statement matched the evidence found by the police. Awana's counsel was allowed to pursue this line of questioning for a while until the circuit court sustained the prosecutor's "argumentative" objection.

[Awana's counsel] Q: You were with detective Coons when [Awana] gave his statement, were you not?

[Detective Tamashiro] A: Yes, I was.

Q: [Awana] told you that [Woit] -- [Awana] had told you that [Woit] discovered his Baretta .22 semi-automatic handgun and pointed it at [Awana]; is that correct?

A: Yes.

Q: You folks recovered a .22 caliber shell casing consistent with a Baretta from the scene, is that true?

A: Yes.

. . . .

Q: Okay. Okay. [Awana] told you that the gun went off three times, but, he disposed of only two shell casings, correct?

A: Correct.

Q: And, in fact, only one shell casing was recovered from the scene; is that correct?

A: Yes.

Q: That was consistent with what [Awana] told you and detective Coons, correct?

A: Correct.

Q: [Awana] told you that he never used a nine millimeter Glock that was in his backpack; is that correct?

A: Right.

Q: And, in fact, there is no evidence in this case that a nine millimeter gun was fired; is that correct?

A: That's correct.

Q: And, that's consistent with what [Awana] told you, yes?

A: Yes.

Q: He told you that he panicked and destroyed the X-Terra, didn't he?

A: Yes.

Q: And, that was confirmed, wasn't it?

A: Yes.

Q: He told you that when [Woitla] pointed the gun at him, they struggled, [Awana's] back got shoved against the wall in the wall area of the bathroom, yes?

[Prosecutor]: Your Honor, I'm going to object to this line of questioning. The jury has the statement.

THE COURT: Counsel approach on the record.

At sidebar, the prosecutor argued that the questions by Awana's counsel were argumentative because Awana's recorded statement was already in evidence. Awana's counsel responded that he was entitled to show through his questions that the actual physical evidence recovered by the police was consistent with what Awana told the police in his recorded statement. The circuit court sustained the prosecutor's objection.

We conclude that the circuit court did not abuse its discretion in sustaining the prosecutor's objection. Awana's recorded statement was in evidence. Awana's counsel was permitted to question Detective Tamashiro, Detective Coons, and others involved in the police investigation about the evidence

that had been uncovered during the investigation. Awana was thus able to argue to the jury from the evidence admitted at trial that certain details provided by Awana in his recorded statement were consistent with the evidence found by the police. Indeed, in closing argument, Awana's counsel made this exact argument. Awana's counsel compared numerous details Awana provided in his recorded statement with the evidence found during the investigation and argued that they matched. The circuit court did not abuse its discretion in requiring Awana's counsel to make his argument regarding the consistency between details in Awana's recorded statement and the evidence found during the investigation in closing argument, rather than through the questioning of Detective Tamashiro.

C.

The prosecution called forensic examiner Davis as an expert witness, and the circuit court qualified Davis as an expert in the field of firearms. The circuit court sustained the prosecutor's objection to defense counsel's question to Davis about whether the type of Baretta pistol owned by Awana could be fired rapidly three times. Defense counsel's question was asked in the following context:

[Awana's counsel] Q: Okay. Now, in the single action mode and when we've got a double action single action combination like we've got on this Baretta once the first trigger -- once the first shot is discharged, then what happens with this gun?

[Davis] A: The cycle as I described it is performed, the hammer stays locked back.

Q: And, then what happens in terms of having to discharge it again?

A: Then only a slight pull on the trigger is required to start the firing chain again.

Q: Okay. And, that can occur, that slight pull, can then discharge the second and the third round, for example, correct?

A: Well, when I say slight, I'm talking about the measured pull.

Q: I understand.

A: Yeah.

Q: But it's less than the initial --

A: It's less than a double action pull.

Q: In fact, it's half or less than the double action, right?

A: Typically it's half or less, yes.

Q: Okay. And, it's also a shorter pull. The trigger has to travel a shorter distance, correct?

A: That's correct.

Q: Now, and, in that single action mode in the context of a struggle it's certainly reasonable in your mind that this kind of gun could fire three times very rapidly, is that true?

[Prosecutor]: Objection. Argumentative. Speculative.

THE COURT: Sustained.

(Emphasis added.)

After the circuit court sustained the objection, Awana's counsel was permitted to further explore how multiple shots could be fired by the type of Baretta gun owned by Awana.

[Awana's counsel] Q: But this kind of gun once the first shot is fired can have a second and third shot fired in the single action mode within one to two seconds, is that true? It has that capacity?

[Davis] A: It's possible.

. . . .

Q: What is a trigger rebound spring, a trigger rebound spring, what is that?

A: The rebound spring is the part that causes the trigger to retract back into its original position.

Q: To prepare for the next shot, correct?

A: Yes.

Q: And, a combination double action single action gun has one of those rebound springs as well, correct?

A: Return spring, yes.

Q: Yes. And, the return spring takes it after the first shot returns the trigger to a point somewhere not quite as far to be -- it doesn't take it back to the original position in a single action, correct?

A: No.

Q: It returns it to a place closer to where it needs to be depressed and fired?

A: It returns it to location of the sear.

Q: Of the what?

A: Of the sear, s-e-a-r.

Q: And, what is that?

A: It's a -- it's a notch that's typically found on a -- along the side of a striker or on the curved -- the pivot portion of a hammer.

Q: The trigger length of travel in the Baretta model 21 is between three quarter of an inch and a half a inch to fire the first shot, is that true, sir?

A: I would say that's true, yes.

.

Q: And, once it's in single action form the travel distance would be between a quarter inch and a eighth of an inch for the next shots, yes?

A: Probably within those distances, yes.

Defense counsel's question to Davis about whether the type of Baretta pistol owned by Awana could be fired three times rapidly was not argumentative or speculative. Thus, the circuit court erred in sustaining the prosecutor's objection on these grounds. We conclude, however, that this error was harmless beyond a reasonable doubt. See Hawai'i Rules of Penal Procedure (HRPP) Rule 52(a). The purpose of the prohibited question was to

show that the type of gun that Awana said was involved in Woita's shooting was capable of being fired rapidly in succession. Awana's counsel was able to establish this point convincingly through other questions posed to Davis that the court did permit.³ Accordingly, there is no reasonable possibility that the error in sustaining the objection to defense counsel's question might have contributed to Awana's second degree murder conviction or his convictions on the other charges. See State v. White, 92 Hawai'i 192, 198, 205, 990 P.2d 90, 96, 103 (1999).

III.

A.

In his recorded statement on September 1, 2003, Awana told the detectives that he borrowed Mau's boat, a Boston Whaler, and used it to dispose of Woita's body in Kaneohe Bay. In its case-in-chief, the prosecution called Detective Coons who testified on direct examination that he located Mau's Boston Whaler on September 3, 2003, and seized it on September 6, 2003. Detective Coons stated that when the boat was seized on September 6, 2003, it was parked in Mau's driveway behind an inoperable truck and was surrounded by dead leaves and other clutter. The prosecutor did not attempt to elicit Detective Coons's opinion on whether Awana had used Mau's boat to dispose of Woita's body. On

³ Awana's counsel also established through his cross-examination of Detective Larry Tamashiro (Detective Tamashiro) that for a combination double action, single action semiautomatic handgun, the second and third trigger pulls require much less force and a shorter trigger movement to discharge bullets than is required by the first trigger pull to discharge a bullet.

cross-examination, Awana's counsel established that Detective Coons had talked to Mau on September 3, 2003, after Awana had been charged with murder. In response to defense counsel's assertion that Detective Coons knew when he spoke to Mau that Mau had something to do with the removal of Woita's body, Detective Coons replied that personally, he did not believe Awana's story about Mau.

The prosecution's next witness was Detective Tamashiro. Awana's counsel established through cross-examination that Mau's boat had been processed with luminol solution, that areas in the interior of the boat tested positive for the presumptive presence of blood, and that additional tests that could have confirmed whether the areas that tested positive contained human blood were not conducted.⁴

In Awana's case-in-chief, Awana recalled Detective Coons. On direct examination, Awana's counsel questioned the integrity of the police's investigation by suggesting that the police (including Detective Coons) had tried to make the evidence fit their opinion that Awana was guilty of murder rather than allow the evidence to determine their opinion.

[Awana's counsel] Q: Detective, the job of the police as you've learned in your training and experience is to follow the evidence where it takes you when you're investigating a case, is that true?

[Detective Coons] A: Yes.

⁴ Detective Tamashiro testified on re-direct examination that luminol is used as a presumptive test for blood, that luminol does not distinguish between human blood and animal blood, such as fish blood, and that a variety of other things, including rust and detergent, can test positive on luminol.

Q: It is not your job as a detective to form an opinion and then try to make the evidence fit that opinion, is that true?

A: Yes.

Defense counsel noted that Detective Coons's testimony during the prosecution's case-in-chief suggested that Mau's boat, when it was seized on September 6, 2003, did not appear to have been moved for some time. Detective Coons acknowledged that this was his impression from "looking at the scene." Defense counsel attacked Detective Coons's credibility by questioning whether the evidence supported the detective's view that Mau's boat had not recently been moved before it was seized and by asking Detective Coons to explain how he had failed to locate any boats registered in Mau's name.

In the course of the direct examination, defense counsel elicited Detective Coons's opinion that Mau's boat had not been used to dispose of Woita's body, as Awana had stated. Defense counsel then offered evidence that Detective Coons's opinion testimony was inconsistent with a statement Detective Coons had made in a police report when referring to the impoundment of Mau's boat.

[Awana's counsel] Q: Now, detective, by September 7, 2003, you had already taken [Awana's] statement, yes?

[Detective Coons] A: That's correct.

Q: You had already viewed the boat; is that correct?

A: That's correct.

Q: And, last week it was your testimony that in your opinion the boat had not been used the way [Awana] said, is that true?

A: I did not believe that it had been used.

Q: You formed that opinion after talking with [Awana] and

viewing the boat, is that true?

A: Reviewed -- I formed that opinion after talking with Mr. Mau, after talking with [Awana], his explanation of carrying Mr. Woita in a plastic wrap a full grown adult male in a cardboard box through the hallway by himself, I didn't feel that that was -- that that would be very difficult, I felt.

Looking at the boat, looking at the foliage in front of the truck it looked like the leave -- the leaves of the foliage plant pushing up against the wall just the ends were brown and dead it looked like the truck hadn't been moved. Certainly if that truck hadn't been moved, there was no way that boat was going to get out of the area. Through that, the scene of the evidence, I didn't believe it.

Q: And, with the exception of what you said talking with Mr. Mau, all of the other things that you said you knew all of that by September 7th?

A: By September 7th.

Q: Yeah. Because you had been to the scene on the 6th and you talked to [Awana] on the first, right?

A: I talked to him on the -- I think it was Monday, we talked to him, whatever day that was.

Q: September 1st.

A: September 1st.

Q: Then you viewed the boat on the 6th.

A: That's correct.

Q: Submitting a false police report, that's a crime, isn't it?

A: Yeah.

Q: And, as a police detective, you would never knowingly submit a false police report, is that true?

A: That's true.

Q: Every report that you generated in this case was true to the best of your knowledge and belief; is that correct?

A: Yes.

Q: Is it true, sir, that as of September 8th, 2003, it was your opinion that the investigation that you had conducted as of that date revealed that this boat had in fact been used to transport the body of Yorck Woita to the ocean by Mr. Awana? Is it true that that was your opinion as of September 8th?

A: As of September 8th.

Q: 2003.

A: I didn't -- I didn't think after reviewing with

processing the boat that it had been.

Q: So, that was not your opinion as of September 8th, is that correct?

A: That's correct.

Q: Let me show you what we'll have marked as Defendants Double A.

May the record reflect that I'm showing counsel.

Defendant's Double A for identification, sir, do you recognize this as a Honolulu Police Department Incident Report signed by you?

A: Yes.

Q: What's the date that you signed it?

A: September 8th.

Q: 2003?

A: That's correct.

Q: Would you please read to the jury what you wrote under the P-R-O-P synopsis column what you typed in, sir.

A: Boat impounded on the strength of a search warrant. Investigation revealed that the boat was used to dispose of the body of the victim of a murder.

On cross-examination, the prosecutor asked Detective Coons to elaborate on the bases for his opinion that Awana did not use Mau's boat to dispose of Woita's body. One of the bases that Detective Coons had identified for his opinion was his conversation with Mau. In particular, the prosecutor asked Detective Coons what Mau had said when questioned on the subject of whether Mau had allowed Awana to use Mau's boat. The circuit court overruled Awana's hearsay objection, later explaining that "[t]he basis of the opinion was asked for." Detective Coons testified that Mau told Detective Coons that Mau did not lend the boat to Awana. Awana did not request, and the circuit court did

not give, a limiting instruction regarding this testimony.⁵

[Prosecutor] Q: Now, detective Coons, [Awana's counsel] devoted several questions to what he called the opinion that you rendered last week in your testimony when I called you that you did not believe -- essentially, your -- you did not believe that the defendant based on various counts of your investigation including his statement had in fact used that Boston whaler to transport the body of the decedent in this case Yorck Woita, right?

[Detective Coons] A: Yes, sir.

Q: Remember that question?

A: Yes.

Q: And, you said in fact that yeah, that was your opinion. And, then were you asked the bases of your opinion. Do you recall that?

A: Yes.

Q: You stated several bases for your opinion. Defendant's statement, your observations of the boat at the scene, and, also, you said that you had spoken to Mr. Mau, correct?

A: That's correct.

Q: And, that you testified on Direct just now to [Awana's counsel] that that -- your conversations -- conversation or conversations with Mr. Mau also formed part of your basis for your opinion, right?

A: That's correct.

Q: You and detective Tamashiro spoke to Mr. Mau on September the 3rd, 2003, right?

A: I believe that was the date.

Q: So three days before going over to his house and taking custody of the boat for processing, correct?

A: Actually, no, it was the third. It was after the interview. I was supposed to meet Mr. Mau at his house. He didn't show up. I subsequently got the search warrant for the boat.

Q: It's true, isn't it, because the reason that speaking for Mr. Mau forms part of the basis for your opinion that the defendant did not use that boat to transport the body is that Mr. Mau told you --

⁵ See Hawaii Rules of Evidence (HRE) Rule 105 (1993) (requiring the court, upon request, to give a limiting instruction); State v. Vliet, 91 Hawai'i 288, 299, 983 P.2d 189, 200 (1999) (holding that an evidentiary objection is waived by failure to object and that objecting to evidence on a specific ground is a waiver of all other objections).

[Awana's counsel]: Objection. Hearsay exception.

THE COURT: Overruled.

Q: Mr. Mau told you when you asked him specifically whether he had gone over that Saturday, delivered the boat to the defendant or knew anything about this, Mr. Mau specifically told you I don't know anything about this, correct?

A: That's -- That's correct. His answer -- we pressed him very hard on that in fact the point I thought he was going to false crack me because we were accusing him of in fact utilizing the boat and assisting in the disposal of the body.

Q: And, he was unequivocal when you asked him specifically about that Saturday morning about whether the defendant had borrowed his boat, whether he had dropped the boat off, whether he had used it, etc., he was unequivocal in saying I don't know anything about that. It didn't happen, correct?

[Awana's counsel]: I renew my objection, Your Honor.

THE COURT: Overruled. The basis of the opinion was asked for.

Q: Correct?

A: That's correct. I thought he was gonna punch me. I ended up apologizing to him.

Q: And, in fact, when you told him this is the boat we want to look at, he knew exactly what boat you were talking about, right?

A: He described it, told me where it was and said that it hadn't moved in weeks. His truck had been broken either a week or two weeks, something like that.

B.

Awana argues that the circuit court erred in allowing Detective Coons to testify that Mau denied lending his boat to Awana because such testimony constitutes "pure hearsay." The prosecution counters that Awana's counsel opened the door to this testimony through his questioning of Detective Coons. As a means of discrediting Detective Coons and the police investigation, defense counsel elicited and then attacked Detective Coons's opinion that Awana had not used Mau's boat to dispose of Woita's body. We conclude that defense counsel's questioning of

Detective Coons opened the door to Detective Coons's testimony about what Mau had told him, which was one of the bases for Detective Coons's opinion. We hold that because Awana opened the door to Detective Coon's testimony, the circuit court did not err in admitting it.

"[T]he proper scope of cross-examination includes full development of matters broached on direct examination, including facts reasonably related to matters touched on direct." State v. McElroy, 105 Hawai'i 352, 356, 97 P.3d 1004, 1008 (2004) (emphasis in original omitted) (quoting State v. Napulou, 85 Hawai'i 49, 57, 936 P.2d 1297, 1305 (App. 1997)). "Where the defendant delves into part of a subject, the [prosecution] is entitled to inquire into the whole of the matter in order to explain it or correct a false impression, even if the later evidence might otherwise be inadmissible." Clay v. State, 102 S.W.3d 794, 797 (Tex. App. 2003); see State v. Clark, 583 S.E.2d 680, 686 (N.C. Ct. App. 2003). As an evidentiary principle, the "opening the door" doctrine allows the admission of otherwise inadmissible evidence, including hearsay, to qualify, explain, or limit testimony or evidence previously elicited. Dennis v. State, 817 So.2d 741, 753 (Fla. 2002); see State v. Ashley, 616 S.W.2d 556, 561 (Mo. Ct. App. 1981).

Awana sought to discredit the police investigation by suggesting that the detectives had not been thorough or objective in pursuing and evaluating evidence because they had a preconceived opinion that Awana was guilty of murder. Awana also

directly attacked Detective Coons's credibility by both eliciting and impugning Detective Coons's opinion that Mau's boat had not been used to dispose of Woita's body, as Awana had asserted. In doing so, Awana opened the door to Detective Coons's explanation that his opinion was based in part on the fact that Mau had adamantly denied lending the boat to Awana.

We disagree with Awana's contention that allowing Detective Coons to testify about Mau's denial was unduly prejudicial. Awana was able to offer substantial evidence to refute Mau's statement. The jury was informed that Mau was questioned by the police after Awana had been charged with murder. As the defense pointed out, Mau had a powerful motive to deny any involvement in assisting Awana in disposing of Woita's body. Phone records and other evidence admitted at trial showed that several calls were made between cellular telephones belonging to either Awana or his wife and Mau's cellular telephone, starting at 8:00 on the night Woita was allegedly killed and ending at 7:23 the following morning, which was near the time Awana asserted that Mau had dropped off the boat. The defense also established that the luminol test performed by the police on Mau's boat was presumptively positive for blood in the interior of the boat, yet the police failed to follow up with tests that would have confirmed whether human blood was present. Indeed, by the end of the case, the prosecution essentially abandoned any argument based on the contention that Awana had not used Mau's boat to dispose of Woita's body. The prosecutor did

not refer to Mau's statement in closing argument and argued in rebuttal that whether Awana used Mau's boat was of no consequence.

Moreover, whether Mau's boat had been used to dispose of Woita's body was a peripheral concern. The central question on which the murder charge turned was whether Awana's statement that Woita had been shot three times in the same area on the left side of the head could be squared with Awana's claim of self-defense. In closing argument, the prosecutor argued that the scenario described by Awana -- a gun held in Woita's right hand being discharged three times in the midst of a face-to-face struggle over the gun, with all three shots hitting Woita in the same area on the left side of his head -- made no sense because it was virtually impossible. In our view, Detective Coons's testimony that Mau denied lending his boat to Awana did not affect the outcome of the case.

IV.

We reject Awana's contention that the circuit court erred in admitting photographs of Mau's boat because the prosecution failed to lay an adequate foundation that the photographs depicted the boat Awana said he had used. In his recorded statement, Awana stated that he borrowed Mau's boat, which Awana described as a Boston Whaler. The photographs admitted in evidence were of a Boston Whaler parked at Mau's residence on Oahu. Awana introduced registration records showing that two Boston Whaler boats were registered to Mau. However,

the registration certificates admitted in evidence indicated that one of the boats was stored on Molokai and the other on Oahu. The boat stored on Oahu had the same vessel number as the boat depicted in the photographs. The circuit court did not err in admitting the photographs of the boat into evidence.

V.

A.

Awana argues that the circuit court erred in refusing to dismiss the charge of first degree commercial promotion of marijuana because the prosecution failed to comply with the statutorily mandated methods of proving the minimum poundage of marijuana required for the offense. Awana reads HRS § 712-1249.4 (1993) as requiring the prosecution to introduce at trial either the actual marijuana meeting the threshold weight of twenty-five pounds or photographs of the marijuana satisfying that threshold. We disagree with Awana's interpretation of the statute and thus reject his argument.

Hawaii Revised Statutes (HRS) § 712-1249.4 provides in relevant part:

(1) A person commits the offense of commercial promotion of marijuana in the first degree if the person knowingly:

(a) Possesses marijuana having an aggregate weight of twenty-five pounds or more[.]

. . . .

(3) Any marijuana seized as evidence in violation of this section in excess of an aggregate weight of twenty-five pounds as stated in subsection (1)(a) . . . may be destroyed after the excess amount has been photographed and the number of plants and the weight thereof has been recorded. The required minimum amount of the marijuana needed to constitute the elements of this offense shall remain in the custody of the police until the termination of any criminal

action brought as a result of the seizure of the marijuana. Photographs duly identified as accurately representing the marijuana shall be deemed competent evidence of the marijuana involved and shall be admissible in any proceeding, hearing, or trial to the same extent as the marijuana itself; provided that nothing in this subsection shall be construed to limit or restrict the application of Rule 901 of the Hawaii Rules of Evidence.

HRS § 712-1249.4(3) simply provides that "[p]hotographs duly identified as accurately representing the marijuana shall be deemed competent evidence of the marijuana involved and shall be admissible . . . to the same extent as the marijuana itself[.]" The statute does not limit the means of proving the required amount of marijuana only to the introduction of the marijuana itself or photographs of the marijuana. Thus, Awana's interpretation of the statute is wrong. Here, the prosecution proved that the marijuana seized had an aggregate weight of twenty-five pounds or more through testimony establishing that a proper chain of custody had been maintained regarding the seized marijuana, that it had been weighed by HPD Criminalist Shirley Brown (Brown), and that Brown had determined that the seized marijuana weighed 27.05 pounds.⁶

B.

Brown testified that when she weighed the marijuana on September 1, 2003, the day after it was seized, the marijuana had an aggregate weight of 27.05 pounds. When the defense weighed the marijuana over a year later, shortly before trial, the

⁶ In any event, the prosecution did introduce photographs depicting the seized marijuana, which was found to weigh 27.05 pounds by Honolulu Police Department Criminalist Shirley Brown. Thus, assuming, *arguendo*, that Awana's reading of statute is correct, the prosecution complied with the statute as construed by Awana.

marijuana weighed only 16 pounds.

Awana contends that the circuit court erred in permitting Brown to testify regarding the water content of marijuana plants to explain the seized marijuana's weight loss. Over Awana's objection, Brown was allowed to testify as follows:

[Prosecutor] Q: Now, you've already told the jury the total weight when you tested [the marijuana] on September 1, 2003. Is there a reason based on your training[,] experience and expertise that the total weight of the marijuana that you tested might be substantially less today on November 26, 2004?

[Awana's counsel]: Objection, exceeds the scope of expertise, lacks foundation.

THE COURT: Overruled.

[Prosecutor]: You may answer, Ms. Brown.

[Brown] A: Well, plants themselves (sic) if, you know, they are nice and green and fresh, they will lose quite a bit of weight as they dry. Plants themselves are about 70 to 80 percent water, and if they're wet, of course, they will lose weight themselves.

Awana argues that the circuit court erred in permitting Brown's testimony that plants are made of 70 to 80 percent water and lose weight as they dry because she was not qualified to render such an opinion. We disagree.

Brown was qualified as an expert in drug analysis and identification. In explaining her qualifications, Brown testified that: 1) she had been employed as an HPD criminologist for over 13 years; 2) over 90 percent of her work load involved drug analysis and identification; 3) marijuana was one of the drugs she analyzed and identified on a regular basis; and 4) she received training from the HPD and the "Drug Enforcement Agency" or "DEA" in drug analysis and identification, "including weighing such substances." Brown's testimony also indicated that she was familiar through her own experience in analyzing marijuana that

marijuana plants lose weight as they dry. Brown stated that "whenever you package marijuana vegetable matter, first it needs to be in a more or less dry condition so it doesn't decay." She also stated that "[i]f the vegetable matter appeared damp, then it needed to be dried first." Brown described the procedures she followed in this case, which included setting the marijuana out to dry after weighing it and before repackaging it for storage. Brown also testified that after she dried the marijuana, she reweighed certain portions of the marijuana that had been described as green or moist when seized and recorded the weights of those items of dried marijuana in her notes.

We conclude that the prosecution laid a sufficient foundation to enable Brown to offer her opinion on why the total weight of the marijuana at the time of trial might be substantially less than when she first weighed it over a year earlier. The circuit court did not err in permitting Brown's testimony.

VI.

We reject Awana's argument that there was insufficient evidence to negate his self-defense defense and to convict him of second degree murder. In his recorded statement, Awana claimed that while at the Manoa house, Woita grew increasingly angry at Awana to the point where Woita threatened to kill Awana with Awana's Baretta pistol. The prosecution, however, introduced evidence that by 6:45 p.m., Woita had calmed down and sounded fine and not upset when he told Moku and Alika they could leave.

Awana indicated that he was facing Woita during the struggle over the gun, which Woita held in his right hand, and that Woita was shot three times in the head in the area near his left temple. The evidence showed that each shot required a separate trigger pull. The jury was entitled to conclude that there was no way that a gun held in Woita's right hand, if discharged during a struggle and in self-defense as Awana claimed, would have resulted in Woita's being shot three times in the same area on the left side of his head.

Moreover, the evidence showed that Awana failed to report the shooting, that he torched the vehicle Woita had driven to the Manoa house, that Awana surreptitiously disposed of Woita's body and the gun Awana claimed had fired the fatal bullets, and that Awana attempted to conceal other evidence linking him to Woita's killing. The jury could reasonably find that such evidence was inconsistent with Awana's claim of self-defense and demonstrated his consciousness of guilt. We conclude that there was substantial evidence to show that Awana did not act in self-defense and to support his conviction for second degree murder.

CONCLUSION

The February 22, 2005, Judgment entered by the circuit court and the court's December 6, 2004, "Findings of Fact,

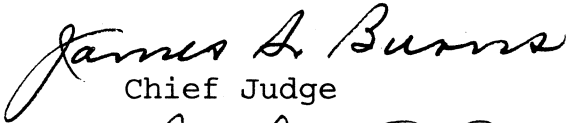
Conclusions of Law and Order Denying Defendant's Motion To Suppress Statements" are affirmed.

DATED: Honolulu, Hawai'i, April 13, 2007.

On the briefs:

David J. Gierlach,
for Defendant-Appellant

Daniel H. Shimizu
Deputy Prosecuting Attorney
City and County of Honolulu
for Plaintiff-Appellee


Chief Judge


Associate Judge


Associate Judge