NO. 23136

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

STEVEN DONALD STOW, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 96-0218(3))

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

Steven Donald Stow appeals from the second circuit court's[1] January 4, 2000 judgment of and conviction for attempted murder in the first degree in violation of Hawai'i Revised Statutes (HRS) §§ 705-500 (1993)[2] and 707-701(1)(a)

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[1] The Honorable Boyd P. Mossman presided over Stow's jury trial.

[2] HRS § 705-500 (1993) instructs as follows:

> **§ 705-500. Criminal attempt.** (1) A person is guilty of an attempt to commit a crime if the person:
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.
> (2) 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 with respect to the attendant circumstances specified in the definition of the crime, the person

(continued...)

(1993).[3] On appeal, Stow contends that the trial court: (1) erred in denying his motion to reconsider its determination that he was fit to proceed with trial; (2) erred in finding that Stow knowingly, intelligently and voluntarily waived effectuation of his right to remain silent; (3) committed plain error in failing to declare a mistrial after the prosecution called an intoxicated witness[4]; (4) erred in denying Stow's motion for a judgment of acquittal; (5) committed plain error in conducting

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[2](...continued)

> intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.
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> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

[3] HRS § 707-701(1)(a) (1993) instructs that a person commits the offense of murder in the first degree if the person intentionally or knowingly causes the death of more than one person in the same or separate incident.

[4] Stow's argument that the circuit court committed plain error by failing to sua sponte declare a mistrial after the prosecution called a witness who may have been intoxicated is without merit. The trial court determines when a mistrial is warranted, State v. Nupeiset, 90 Hawai'i 175, 179, 977 P.2d 183, 187 (App. 1999), and the denial of a motion for mistrial is reviewed under an abuse of discretion standard. State v. Loa, 83 Hawai'i 335, 349, 926 P.2d 1258, 1272 (1996) (citations omitted). As discussed herein, Stow's attorney did not request a mistrial at trial and only now, on appeal, asserts that the trial court abused its discretion by not declaring one. Matters not raised at trial will not generally be considered on appeal. See State v. Arceo, 84 Hawai'i 1, 38, 928 P.2d 843, 880 (1996) (noting that "the plain error rule should be exercised sparingly and utilized with great discretion and caution"). However, the trial court instructed the jurors that they should disregard Johnson's testimony and jurors are presumed to follow the trial court's instructions. State v. Klinge, 92 Hawai'i 577, 592, 994 P.2d 509, 524 (2000) (citing State v. Knight, 80 Hawai'i 318, 327, 909 P.2d 1133, 1142 (1996) (quoting Sato v. Tawata, 79 Hawai'i 14, 21, 897 P.2d 941, 948 (1995))). Stow baldly asserts that the testimony of Ronald Johnson was prejudicial. However, absent any specific showing of prejudice, we presume that the jurors disregarded Johnson's testimony and cannot conclude that the trial court abused its discretion by refusing to sua sponte declare a mistrial.

the second part of the Tachibana colloquy after the defense had rested its case[5]; and (6) committed plain error with respect to its jury instruction regarding the offense of attempted murder in the first degree.

We hold that the trial court (1) did not abuse its discretion in denying Stow's motion to reconsider his fitness to proceed and (2) did not err in concluding that Stow's statement to the police was knowingly, voluntarily, and intelligently given. However, we also hold that there was insufficient evidence to convict Stow of attempted first degree murder. We therefore vacate Stow's conviction of attempted murder in the first degree and remand this case for a new trial with respect to the two counts of attempted murder in the second degree.

I. BACKGROUND

[5] Stow's contention that the circuit court erred in this regard is without merit. There is no dispute that the trial court advised Stow of his right to testify and obtained an on-the-record waiver of that right. Stow objects only to the timing of the colloquy, arguing that the waiver was invalid because it was obtained after the defense rested. However, this court has instructed that if the defense rests and the trial court thereafter obtains an on-the-record waiver of the defendant's right to testify, "such waiver will be deemed valid unless the defendant can prove otherwise by a preponderance of the evidence." Tachibana v. State, 79 Hawai'i 226, 236, 900 P.2d 1293, 1303 (1995). Stow's argument that he was placed in the awkward position of having to object to his attorney's decision to rest if he wished to testify is simply not supported by the record or transcripts. To the contrary, the transcripts reflect that Stow's waiver was knowingly, voluntarily, and intelligently given. Before trial, Stow was advised of his right to testify and indicated that he understood his right to do so. After Stow's attorney informed the trial court that the defense did not intend to call any witnesses, Stow was again advised of his right to testify. After acknowledging this right, Stow informed the trial court that "I think it would be better if I don't."

A. Factual History

On April 18, 1996, Officer Daniel Ganancial of the Maui Police Department arrested Stow at the scene of a brutal machete attack. Stow was taken to the police station, informed of his Miranda rights, and questioned by two detectives. Stow thereafter gave a tape-recorded account of his recent activities in Lahaina.

Stow related that the previous evening he had attacked Samuel Nash with a machete in front of Hilo Hattie's after Nash "ripped him off." Stow explained that he gave Nash nine dollars to purchase liquor. When Nash returned from the store, however, he would not share any of the alcohol. This aggravated Stow, who retrieved a machete from his backpack, walked over to Nash, and "chopped him up."[6] Stow told the police that he did not try to

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[6] Stow's interview included the following dialogue:

Q: How come you chopped up Samuel [Nash]?
A: [by Stow:] Because he ripped me off.

Q: Samuel stole from you too?
A: Think he didn't?

Q: How much did he take from you?
A: Ahh, man he took a 9 spot from me. I sent him to the store, he came back and then I went back over and I wanted a drink and he wouldn't even give me a drink.

Q: So you chopped him up?
A: He even laughed at me.

Q: So you chopped `um up?
A: I chopped him up and you guys got my machete right now. You got both of `um.

(continued...)

kill Nash, but certainly could have done so had he so desired.

At Stow's trial, Adelaine Yip Chow, a security guard at Lahaina Center, testified that she was watching two people in front of Hilo Hattie's, one sitting on a bench and one standing nearby, at approximately 11:00 p.m. on the evening of April 17, 1996. From her vantage point, Yip Chow saw the person who was standing begin to "whack" the person sitting on the bench. After hearing the person being whacked yell for help, she grabbed her partner and they made their way towards Hilo Hattie's. As they approached, the aggressor fled the scene. On and around the bench where the person had been sitting, the security guards discovered a pool of blood. A trail of blood led to Nash, who

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[6](...continued)
. . . .

Q: . . . [W]here'd you hack him at? On the . . .
A: Back of the neck, across the face and the last one I did was his leg. Then he said "ow," as he was walking away from . . .

. . . .

Q: So how did you approach him?
A: I just walked up on `um.

Q: Did he stand up?
A: Cross the back of the neck.

Q: Did he stand up to try to box you before you got . . .
A: No.

Q: Oh, he didn't see you at all, oh, that's pretty good.
A: And that's why I went to work on `um. I said mother fucker, and when I started talking I get madder and I get madder and I get madder and I just start chopping at the man.

was laying in the parking lot with lacerations to his face, head and leg.[7]

During the police station interview, Stow also admitted attacking Douglas Parkison immediately prior to his arrest. Although unable to recall what Parkison said to aggravate him, Stow explained that he attacked Parkison because "[h]e just got mouthy."[8] Stow's statement indicated that the attack was, at least in part, also prompted by Parkison's earlier behavior

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[7] Nash died from causes unrelated to this attack prior to trial.

[8] The police interview included the following dialogue:

A: [Stow: ...]I can't say anything against Doug [Parkison] because he didn't steal from me[.]

. . . .

Q: What . . . what did he do?
A: He just got mouthy.

Q: He got mouthy.
A: He got . . . he got shit faced and got mouth[y].

Q: What . . . what did he say to you this morning?
A: I don't remember, he . . . but I didn't like it obviously or he wouldn't be all hacked up.

. . . .

Q: And the guy from this morning, you don't remember . . . what he was mouthing off about or what he was saying?
A: Oh[,] he was just mouthing off.

Q: Was he threatening you or anything like that?
A: And I went and bought us a jug this morning.

Q: You guys were drinking together?
A: Yeah.

Q: What caused him to get upset?
A: I don't know but he does that all the time.

towards one of Stow's acquaintances.[9]

At Stow's trial, Parkison testified that he was sitting on a park bench in Lahaina Square with an unopened 40-ounce bottle of beer when a man he did not know approached him and asked for a drink of the beer. After Parkison refused, the man forcibly grabbed the bottle. Parkison promptly recovered his beer and stood up to walk away. Before he could escape, however, the man reached into a backpack, withdrew a machete, and began to strike him.

A large crowd quickly assembled to watch the attack. Eventually, two bystanders intervened and forced Stow away from Parkison. Stow yelled something to the effect of: "I'm going to finish you. I'm going to kill you. I'm going to get you."

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[9] During questioning, the following exchange occurred:

Stow: . . . I seen him do it to Stephan [(one of Stow's acquaintances)] the other day and that's kind of what triggered me, I think, is Stephan had given [Parkison] some money, $1.82. And Stephan tried to get it back. "Well just give him the $1.82 back. As a matter of fact just give me my dollar back 'cause I wanna' bu[y] some more (unintelligible)," or something like that. Roll your own tobacco, you know, like that. He said, "come get it." And Stephan ain't stupid, he said, "I ain't walking up there man. He said, "do you wanna keep (unintelligible) attitude." You know, and . . . and Doug[Parkison's] a Vietnam Vet. I mean, he would've kicked his ass and Stephan (phonetic) knew it. That's why they call him Head Banger, 'cause he gets knocked around all the time. And it went on for quite a little while and finally Doug [Parkison] walked off. Steph (phonetic) let it go and everything like that, you know. . . . I seen his colors all right. . . . I read him like a book. I've seen how this guy can be towards people he knows.

Q: Pretty nasty.
A: Yeah. And so that's why he got hacked.

Parkison sustained severe and permanent injuries from numerous machete blows to his head, face and wrist.

B. Procedural History

The prosecution charged Stow with attempted murder in the first degree, in violation of HRS §§ 705-500 (1993) and 707-701(1)(a) (1993); two counts of attempted murder in the second degree, in violation of HRS §§ 705-500 and 707-701.5 (1993); attempted robbery in the first degree, in violation of HRS §§ 705-500 and 708-840 (1993); and terroristic threatening in the first degree, in violation of HRS § 707-716(1)(d) (1993).

1. Stow's fitness to proceed to trial

In July 1996, Stow filed a motion indicating his intent to rely upon the defense of mental irresponsibility and, pursuant to HRS § 704-404 (1993)[10], requesting the trial court to appoint

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[10] In 1996, HRS § 704-404 (1993) provided in relevant part that:

> (1) Whenever the defendant has filed a notice of intention to rely on the defense of physical or mental disease, disorder, or defect excluding responsibility, or there is a reason to doubt the defendant's fitness to proceed, . . . the court may immediately suspend all further proceedings in the prosecution. . . .
>
> (2) Upon suspension of further proceedings in the prosecution, the court shall appoint three qualified examiners to examine and report upon the physical and mental condition of the defendant. . . .
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> . . . .
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> (4) The report of the examination shall include the following:

(continued...)

a panel to evaluate his fitness to proceed to trial. The trial court suspended further proceedings and appointed a panel of examiners to evaluate Stow's mental fitness.

On August 19, 1996, Thomas Cunningham, Ph.D., filed his report with the circuit court. Dr. Cunningham interviewed Stow and reviewed his records. He opined that "[a]t the time of our interview, Mr. Stow's capacity to understand the legal proceedings against him and to participate in his own defense was not substantially impaired." He described Stow as appearing "bright and alert," and also "clear-headed and logical." Dr. Cunningham opined that "[a]t the time of the alleged offenses, Mr. Stow's cognitive and volitional capacities were not substantially impaired except perhaps by alcohol intoxication."

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[10](...continued)

> (a) A description of the nature of the examination;
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> (b) A diagnosis of the physical or mental condition of the defendant;
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> (c) An opinion as to the defendant's capacity to understand the proceedings against the defendant and to assist in the defendant's own defense;
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> (d) An opinion as to the extent, if any, to which the capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was impaired at the time of the conduct alleged[.]

Sections (2), (3) and (4) were amended effective June 21, 1997. 1997 Haw. Sess. L. Act 306, at 730. The amendments, however, have no impact upon the disposition of this case.

On September 27, 1996, George C. Choi, Psy.D., filed his report with the trial court after interviewing Stow and reviewing his files. Dr. Choi opined that "Mr. Stow currently has the capacity to understand the criminal proceedings against him or to assist in his own defense despite his [alcohol dependence] disorder." Dr. Choi concluded that

> It is my clinical judgment that Mr. Stow's cognitive and volitional capacities at the time of the alleged offense were not substantially impaired despite his [a]lcohol [d]ependence. Although he reportedly was under the influence of alcohol at the time of the alleged offense, he understood the purpose and was in control of his behaviors.

Nearly seventeen months later, in December 1997, Jon Betwee, M.D., filed his report with the circuit court after interviewing Stow and reviewing records. Dr. Betwee described Stow's thoughts as "clear, coherent, well articulated, relevant and goal-oriented without signs of disorder." He opined that Stow "fully understands the charges against him and their possible consequences and is capable of participating fully in his own defense." Dr. Betwee concluded that "Mr. Stow certainly possesses the cognitive capacity to know his assaults were wrong according to societal norms although he may view them as justified and necessary under the circumstances."

After receiving Dr. Betwee's report, the circuit court held a hearing on Stow's fitness to proceed. At the hearing, Stow's attorney did not contest the findings of the report, but

rather conceded that they indicated Stow to be mentally fit to proceed to trial. The trial court found and ordered that Stow was mentally fit to proceed to trial.

Five days before trial, Stow's attorney filed a motion requesting the trial court to reconsider Stow's mental fitness to proceed. The motion requested that the court order supplemental examinations of Stow to reflect the effects of anti-psychotic medication administered to Stow in prison. At a hearing on the motion, Stow's attorney argued that he had recently discovered that Stow had been prescribed anti-psychotic medication by prison psychiatrists since January 1997, apparently due to visual and auditory hallucinations. Although he conceded that he had not asked the prison psychiatrists whether they thought Stow was unfit to proceed to trial, Stow's attorney argued that since they felt it was necessary to administer medication, the panel should re-evaluate Stow in light of the medication and its effects on his mental fitness. The prosecutor pointed out that Dr. Betwee had examined Stow in December 1997, at which time Stow had been taking medication for nearly one year. As to the hallucinations, Dr. Betwee reported that "[t]he auditory hallucination [Stow] reports is not diagnostic of any particular psychiatric disorder and is considered to be an incidental finding for purposes of this examination."

Denying the motion, the trial court noted that three examiners concluded that Stow was fit to proceed. The trial court determined that, standing alone, the fact that the prison psychiatrists believed that Stow needed anti-psychotic medication was not sufficient evidence from which it could conclude that Stow was no longer fit to proceed to trial. The trial court invited defense counsel to investigate the matter further and file another motion if there was evidence that Stow was, in fact, no longer fit to proceed to trial. The record contains no further correspondence from Stow's attorney or any of the examiners in this regard.

On the first day of trial, Stow's attorney again asserted that Stow was not fit to proceed and requested the trial court to voir dire Stow. The trial court inquired whether defense counsel had any medical opinions that Stow was not fit to proceed and defense counsel conceded that he did not. The trial court declined to voir dire on the grounds that it was not in a position to judge whether Stow was or was not mentally fit.

2. Motion to suppress Stow's statement

On February 2, 1998, Stow filed a motion to suppress his statement to the police. Stow argued that he was intoxicated at the time he gave the statement and could not validly waive effectuation of his Miranda rights. The prosecutor counterargued

that intoxication, standing alone, did not invalidate Stow's waiver where the waiver was otherwise knowingly, voluntarily and intelligently given.

At the hearing on the motion, Sergeant Cedric Zumwalt testified that Stow was arrested on April 18, 1996 at approximately 11:15 a.m. Stow was placed in the cell block, where he remained until the interrogation, shortly after 2:00 p.m. Sergeant Zumwalt testified that prior to the interrogation, he used a Maui Police Department warning and waiver form to advise Stow of his Miranda rights. Sergeant Zumwalt gave one copy of the form to Stow while he read another copy out loud. Stow orally acknowledged that he understood his rights and both printed and signed his name on the form. Sergeant Zumwalt testified that Stow appeared to be in physical control of himself, had no difficulty walking, and appeared neither delusional nor incontinent. Although Stow had a "weak to moderate" odor of alcohol about him, Sergeant Zumwalt testified that Stow did not appear to be intoxicated.

Stow testified that he drank a couple fifths of vodka on April 17, 1996. The following morning, he drank slightly less than half of a fifth of vodka and took one Valium. Stow testified that when he woke up in the cell block shortly after 2:00 p.m., he was feeling "groggy." When asked to describe the

clarity of his thoughts at the time, Stow responded, "Pretty clear, except for I just -- I wasn't ready for anything right then. I wanted to go back to bed." When asked how the alcohol and Valium affected his thinking, Stow explained that "not the alcohol so much anymore, but the Valiums left me really groggy, groggy feeling." He elaborated that the Valium left him feeling "messed up" and that he "couldn't think right." Stow indicated that he was familiar with warning and waiver forms. While he could not recall whether Sergeant Zumwalt had read him the form and asked whether he understood his rights, Stow recognized his signature on the form.

The trial court determined that the only real question was whether Stow understood his rights. The court noted Stow's testimony that "the liquor didn't effect him," and that "all that the Valium did was make him groggy." The court also opined that "just because a person has alcohol in his system does not mean, in this Court's opinion, that he does not understand or cannot understand what is going on around him." The trial court concluded that Stow knowingly, intelligently, and voluntarily waived his Miranda rights and denied the motion to suppress.

3. The Ronald Johnson incident

The first degree terroristic threatening charge stemmed from an encounter between Stow and a man named Ronald Johnson. At trial, Johnson testified that on April 18, 1996, prior to the attack on Parkison, Stow threatened him with a machete. During cross-examination, the prosecutor interrupted Stow's attorney and requested a recess. After the jury left the courtroom, the prosecutor notified the court that she believed Johnson was under the influence of alcohol. She moved to strike Johnson's testimony and notified the court that the prosecution would dismiss the terroristic threatening charge. Stow's attorney did not object. The trial court agreed and the jury was thereafter notified that Stow was no longer charged with terroristic threatening. The trial court advised the jurors that Johnson's

testimony had been stricken and that they should disregard it.

4. Motion for judgment of acquittal

After the prosecution presented its case, Stow moved for a judgment of acquittal on the charges of attempted second degree murder and first degree robbery of Nash, as well as attempted first degree murder. Defense counsel argued that (1) the absence of life threatening injuries, and (2) Stow's repeated statements that he did not intend to kill Nash, warranted acquittal of the charge attempted second degree murder.

The trial court granted the motion for judgment of acquittal as to the first degree robbery charge after the prosecution conceded that there was little evidence to support the charge. The court determined that there was sufficient evidence for the charge of attempted second degree murder to go to the jury. Defense counsel then withdrew his motion with respect to the attempted first degree murder charge, apparently due to his belief that attempted murder in the first degree was the functional equivalent of two counts of attempted murder in the second degree.

5. Tachibana colloquy

Prior to jury selection, the trial court advised Stow

of his right to testify.[11] Subsequently, after Stow's motion for

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[11] The trial court engaged Stow in the following colloquy:

THE COURT: . . . You have a constitutional right to testify in your own defense.

Although you should consult with your lawyer regarding your decision to testify, it is your decision, and no one can prevent you from testifying should you choose to do so.

If you decide to testify, the prosecutor will be allowed to cross-examine you. You also have a constitutional right not to testify and to remain silent.

If you choose not to testify, the jury will be instructed that it cannot hold your silence against you in deciding your case.

If you have not testified by the end of trial, I will briefly question you to make sure that it was your decision not to testify.

So do you understand Mr. Stow?

STOW: Yes, sir, I do.

THE COURT: What's your understanding? What did I just say?

STOW: If -- I have a right not to testify, if I don't want to, on my own behalf. I choose to.

THE COURT: Yeah.

STOW: On my own behalf.

THE COURT: Also you have the right to testify.

STOW: I have the right to testify.

THE COURT: Do you understand that?

STOW: Yes, sir.

THE COURT: Okay. And if you don't want to testify or -- don't want to testify, nobody can force you. You can just sit there. But if you don't testify, I'll tell the jury that you have a right not to testify, and it cannot hold it against you.

STOW: Okay.

THE COURT: But if you want to testify, you can testify, and nobody can stop you from testifying. Do you understand that?

STOW: Right.

THE COURT: It's your choice. If you get up on the stand and testify, the State will cross-examine you. They will question you. Okay?

STOW: Yes.

(continued...)

a judgment of acquittal was denied, the trial court invited the defense to present its case. Defense counsel responded that, with the evidence as it was, they elected to rest without calling any witnesses. The trial court then excused the jury, informed Stow of his constitutional right to testify, and obtained an on-the-record waiver of that right. Stow advised the court that, although he had much to say, he elected to follow his attorney's advice to not testify.

6. Verdict and motions for a judgment of acquittal and a new trial

The jury found Stow guilty of attempted first degree murder.[12] On November 4, 1998, Stow filed motions for a judgment

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[11](...continued)

THE COURT: Do you understand that?
STOW: Yeah.

THE COURT: All right.

[12] The trial court instructed the jury on the offense of attempted first degree murder as follows:

> In count one of the complaint the defendant, Steven Donald Stow, is charged with the offense of attempted murder in the first degree.
>
> A person commits the offense of attempted murder in the first degree if he intentionally engages in conduct which under the circumstances as he believes them to be is a substantial step in a course of conduct intended to culminate in his commission of the crime of murder in the first degree by intentionally or knowingly attempting to cause the death of more than one person in the same or separate incidents.
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> There are two material elements of the offense of attempted murder in the first degree each of which the prosecutor must prove beyond a reasonable doubt.
>
> These two elements are: one, that on or about April

(continued...)

of acquittal and a new trial, both alleging, inter alia, that evidence presented by the prosecution was insufficient to support the verdict returned by the jury. The trial court entered its findings of fact, conclusions of law and order denying the motion on February 17, 2000. Stow timely appeals.

II. STANDARDS OF REVIEW

A. Plain Error

"We may recognize plain error when the error committed affects substantial rights of the defendant." State v. Gomez, 93 Hawai'i 13, 18, 995 P.2d 314, 319 (citing State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997)); See also Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) (1993) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

B. Competency

"A trial court's ruling with respect to the competency of a defendant is reviewed on appeal for an abuse of discretion. State v. Castro, 93 Hawai'i 424, 425, 5 P.3d 414 (2000) (citing

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[12](...continued)
17th and 18th, 1996, in the County of Maui, State of Hawai'i, the defendant intentionally engaged in conduct; and two, that under the circumstances as the defendant believed them to be, was a substantial step in a course of conduct intended or known to be practically certain by the defendant to cause the death of more than one person in the same or separate incident.

State v. Janto, 92 Hawai‘i 19, 27-29, 986 P.2d 306, 314-16 (1999)). Generally, to constitute an abuse of discretion, it must appear that the circuit court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant. State v. Rauch, 94 Hawai‘i 315, 322, 13 P.3d 324, 331 (2000) (citation omitted).

C. Voluntariness

On appeal, this court applies a de novo standard of review to the ultimate issue of the voluntariness of a confession. State v. Gella, 92 Hawai‘i 135, 142, 988 P.2d 200, 207 (1999) (citing State v. Hoey, 77 Haw. 17, 32, 881 P.2d 504, 519 (1994)). We thus "examine the entire record and make an independent determination of the ultimate issue of voluntariness based upon that review and the totality of the circumstances surrounding the defendant's statement." State v. Kelekolio, 74 Haw. 479, 502, 849 P.2d 58, 69 (1993).

D. Sufficiency of the Evidence

The appellate court reviews the findings of the circuit court regarding the sufficiency of the evidence for abuse of discretion:

> [E]vidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or a jury. The test on appeal is not whether guilt is established beyond a

> reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact. Substantial evidence as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. Under such a review, we give full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact.

State v. Valdivia, 95 Hawai‘i 465, 471, 24 P.2d 661, 667 (2001) (citations and internal quotation marks omitted).

III. DISCUSSION

A. Stow's Fitness to Proceed

Stow contends that the trial court abused its discretion by refusing to reconsider his mental fitness. He argues that because the anti-psychotic medication he took while in prison might have rendered him unfit to proceed to trial, HRS § 704-404 required the trial court to order supplemental evaluations to reflect the effects of the medication on his mental fitness. We disagree.

In Janto, this court noted that the statutory criteria for determining whether a criminal defendant is legally competent to proceed to trial is as follows:

> Pursuant to HRS § 704-403, the trial court must determine whether the defendant either (1) lacks capacity to understand the proceedings against him or her; or (2) lacks capacity to assist in his or her defense.

Janto, 92 Hawai‘i at 28 n.3, 986 P.2d at 315 n.3 (citation omitted).

In this case, upon Stow's initial motion, the trial

court suspended proceedings and appointed a panel of examiners to evaluate Stow to determine whether he was fit to proceed to trial. All three evaluators concluded that Stow had the capacity to (1) understand the proceedings against him and (2) assist in his defense. All three evaluators likewise concluded that Stow understood the wrongfulness of his actions at the time he attacked the victims. HRS § 704-405 (1993) instructs that "[i]f neither the prosecuting attorney nor counsel for the defendant contest the finding[s] of the report[s] filed pursuant to section 704-404, the court may make the determination on the basis of such report[s]." Stow's attorney did not contest the findings of the reports, but rather conceded that they indicated Stow to be mentally fit to proceed to trial. Accordingly, the trial court had an adequate basis for concluding that Stow was fit to proceed.

As to Stow's argument that the trial court should have ordered supplemental examinations, this court's decision in Janto

is instructive. In that case, three medical examiners determined that Janto was fit to proceed to trial. One of the examiners, however, reported that "[n]europsychological and neurological examinations" had been unavailable and if such examinations indicated severe negative findings, he would like to re-examine the defendant. On the basis of these reports, the circuit court found and ordered that Janto was fit to proceed to trial. Janto's attorney then requested and the circuit court ordered that Janto receive an electroencephalogram (EEG).

After jury selection commenced, Janto's attorney informed the circuit court that the EEG revealed "a sign of mild abnormality or that the defendant is mildly abnormal[.]" Id. at 25, 986 P.2d at 312. Defense counsel explained that the physician who performed the EEG "believes that it warrants further testing." Id. However, "[a]s far as a definative what it all means or what this other testing would be able to provide for us, I don't have that answer at this point in time." Id. Janto's attorney requested that the circuit court grant the defense time to conduct further testing to gather more information about the test results. Id. The circuit court denied the request, instructing Janto's attorney that, absent a report explaining "the extent as to what and how these additional test[s] are going to impact, if at all, upon this issue of penal

responsibility[,]" it would not permit further testing. Id. at 26, 986 P.2d at 313.

On appeal, Janto argued that the trial court's determination that he was fit to proceed was inadequate because the trial court did not receive testimony regarding the effect of the EEG on the examiner's opinions. Rejecting Janto's argument, this court noted that "[t]he trial court had three professional opinions that Janto was fit to proceed. Janto's attorney was given an opportunity, as he requested, to consult with experts in order to determine whether their opinions were changed by the abnormal EEG findings." Id. at 30, 986 P.2d at 317. The court instructed that "[i]t was the responsibility of Janto's counsel to provide the necessary information to the examiners and inform the trial court of any change in their opinion." Id. at 29-30, 986 P.2d at 316-17. The record on appeal, however, contained no information that Janto's attorney actually contacted the examiners and received any opinion as to whether the test results altered their initial findings. Accordingly, the court concluded that the trial court did not abuse its discretion by proceeding to trial.

In the instant case, Stow's attorney simply alleged the existence of evidence that might lead the examiners to change their minds. The argument advanced in this case was somewhat less convincing than that advanced in Janto because Dr. Betwee concluded Stow was fit to proceed to trial in December 1997, by

which time Stow had been taking anti-psychotic medication for nearly one year. Nonetheless, Janto plainly instructs that Stow's attorney bore the responsibility to inform the examiners of developments that might affect their opinions and then instruct the trial court of any changes in their opinions. Janto, 91 Hawai'i at 29-30, 986 P.2d at 316-17. The trial court expressly invited defense counsel to do so. Nonetheless, as in Janto, the record is devoid of any further communication from Stow's attorney or the examiners on this issue. Under these circumstances, the trial court did not abuse its discretion by relying on the findings of the panel of experts. Accordingly, we hold that the trial court did not abuse its discretion by proceeding to trial.

B. Motion to Suppress Stow's Statement

Stow also contends that the trial court erred by concluding that he knowingly, voluntarily, and intelligently waived effectuation of his Miranda rights. Our examination requires a two-fold analysis: (1) whether Stow was informed of his constitutional rights within the context of the custodial interrogation; and, if so, (2) whether Stow invoked or waived effectuation of these rights. State v. Luton, 83 Hawai'i 443, 452, 927 P.2d 844, 853 (1996).

Stow does not assert that he was not informed of his

Miranda rights, and the record reflects that Sergeant Zumwalt adequately apprised Stow of these rights. The sergeant gave Stow a warning and waiver form on which Stow's constitutional rights were listed. Sergeant Zumwalt then read the form to Stow and inquired whether Stow understood each of the rights. Stow orally acknowledged understanding his rights. Stow's testimony also indicated a familiarity with his constitutional rights independent from Sergeant Zumwalt's instruction. When Stow's attorney showed him a copy of warning and waiver form, Stow commented "I could show you about 200 of those." Stow's statement confirms that Stow was apprised of his Miranda rights.[13] The totality of the circumstances thus indicate that Stow was adequately informed of and understood his constitutional rights.[14]

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[13] Stow's tape-recorded statement begins with the following dialogue:

QUESTION: Okay, let's go over it again and I won't have you write everything down. We went over this, uhh, this warning of your rights. Your Miranda Right thing?
STOW: Rights.
QUESTION: And you read through it and you understand all that?
STOW: Right.
QUESTION: And did you . . . you signed the bottom of this form?
STOW: Right.

[14] As noted, Stow does not contest the trial court's finding that he was adequately apprised of his constitutional rights. However, at the voluntariness hearing, Stow appeared to argue that, because he had received Miranda warnings so many times, he ceased to realize that he had such rights. He testified that although he probably told Sergeant Zumwalt that he

(continued...)

The record also reflects that Stow waived effectuation of his Miranda rights and that this waiver was knowing, intelligent, and voluntary. After Stow orally acknowledged understanding his rights, Sergeant Zumwalt inquired whether he would waive effectuation of those rights. Stow responded in the affirmative and signed the "waiver" portion of the warning-and-waiver form. In State v. Kreps, 4 Haw. App. 72, 661 P.2d 711 (1983), the Intermediate Court of Appeals of Hawai‘i stated that evidence that a defendant has read and signed a police warning-and-waiver form can be sufficient to establish a valid waiver, provided that the court consider "whether the words used, considering the age, background, and intelligence of the individual impart a clear understandable warning of all his rights." 4 Haw. App. at 76-77, 661 P.2d at 715. Stow was not young, but rather in his forties. An inquiry into Stow's background reveals exposure to and familiarity with warning-and-waiver forms. And the record does not suggest Stow's intelligence to be limited in any manner that would render him unable to understand his rights.

Stow argues that his waiver was not valid because he

[14](...continued)
understood his Miranda rights, in reality he did not. When pressed, Stow explained that this was because "I've been read my rights so many times before that I just say right, whatever, you know, anyway." When asked whether he knew he had a right to remain silent, Stow responded, "I didn't think about it."

was intoxicated at the time of the interview. This argument is ill-supported by the record. At the voluntariness hearing, Stow twice asserted that he was not really feeling the effects of alcohol at the time of the interview. When asked to describe the clarity of his thinking, Stow responded that his thinking was "pretty clear." Stow testified that the Valium had left him feeling "groggy." Stow explained that by "groggy," he meant "messed up," and that he "couldn't think right." Sergeant Zumwalt testified that Stow did not appear to be intoxicated. Stow had no difficulty walking or sitting still. Stow understood the detectives' questions and responded appropriately. Sergeant Zumwalt testified that although Stow had a "mild to moderate" smell of alcohol about his body, Stow's breath did not smell of alcohol. And Stow's statement reflects that he was lucid and coherent during the interrogation. The totality of the circumstances thus indicates that although Stow might have been feeling "groggy" during the interrogation, his waiver was nevertheless knowing, intelligent, and voluntary.

Furthermore, intoxication, without more, will not prevent the admissibility of a confession or statement. Kreps, 4 Haw. App. at 78, 661 P.2d at 715 (citation omitted). Only where the defendant is "unable to understand the meaning of his statement or . . . the statement was not the product of a

rational intellect and free will" will a statement be inadmissible due to intoxication. Id. at 78, 661 P.2d at 715-16 (citation omitted). In this case, Stow knew why he had been arrested. Stow knew that he was facing possible criminal charges. Stow even hypothesized as to the specific charges that might be brought against him. Stow knew that a judge would likely review the statement and included a message for the judge, apologizing for the attacks and explaining that they were not the product of his "drinking." Thus, even if Stow was intoxicated at the time, Stow's statement was demonstrably the product of a rational intellect and free will, and Stow's waiver was not invalid.

In addition to the necessary waiver, the court must also find that Stow's statement was voluntarily made. Kekona, 77 Hawai'i 403, 406, 886 P.2d 740, 743 (1994) (citing Kreps, 4 Haw. App. at 77, 661 P.2d at 715). The conditions surrounding Stow's interrogation do not suggest that any impermissible tactics were employed by the detectives to coerce Stow into making a statement. The interrogation took place at approximately 2:20 p.m. Stow was interrogated for about one hour by two detectives. The detectives shared cigarettes with Stow upon his request. Sergeant Zumwalt testified that he did not promise leniency, offer to drop charges, or proffer any other type of benefit to

Stow in exchange for the statement. He likewise testified that he did not pressure, threaten, or otherwise force Stow to make a statement. Finally, the transcript of the interrogation reflects that it was conducted in a casual and friendly manner.

Accordingly, we hold that the trial court did not err by finding that Stow was adequately apprised of his Miranda rights and knowingly, voluntarily, and intelligently waived those rights.

C. Sufficiency of the Evidence

Stow asserts that the trial court erred by refusing to grant his November 4, 1998 motion for judgment of acquittal because there was insufficient evidence to convict him of attempted first degree murder. State v. Malufau, 80 Hawai‘i 126, 132, 906 P.2d 612, 618 (1995).

> [T]he trial court is the sole source of all definitions and statements of law applicable to an issue to be resolved by the jury. Moreover, it is the duty of the circuit judge to see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what it is they are to decide, and he or she shall state to them fully the law applicable to the facts.

State v. Kupau, 76 Hawai‘i 387, 394-95, 879 P.2d 492, 499-500 (1994) (citations, footnotes, internal quotation marks, brackets, and emphasis omitted); State v. Loa, 83 Hawai‘i 335, 358, 926 P.2d 1258, 1281 (1996). Inasmuch as the circuit court did not grant Stow's motion for judgment of acquittal, the circuit court

could only have been under the mistaken impression that there was sufficient evidence to support Stow's conviction.

We have previously explained that the key factor supporting a charge of first degree murder, in violation of HRS § 707-701(1)(a), as opposed to multiple charges of second degree murder, is the actor's state of mind. See State v. Briones (Briones II), 74 Haw. 442, 454-46, 848 P.2d 966, 973-74 (1993) (stating that "[t]he key factor supporting a charge of first degree murder is the actor's state of mind."). In Briones II, we stated:

> Finally, we examine the case of an actor who causes the death of two or more people in incidents separated in time but without the intent to cause both deaths as part of a common scheme or plan. For example, an actor, in the course of committing robbery of a convenience store, shoots and kills an employee. Afterwards, a passer-by is shot and killed by the actor attempting to escape. Although two people were killed in separate incidents during the same criminal episode, the actor may not be guilty of first degree murder because the requisite state of mind to cause the death of two or more people in the same or separate incident arguably is lacking. The actor would possibly be guilty, however, of two separate counts of second degree murder.

Briones II, 74 Haw. at 454-56, 848 P.2d at 973-74 (footnotes omitted).[15] In State v. Cullen, 86 Hawai'i 1, 946 P.2d 955

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[15] Briones II and Cullen establish that where a single act or incident leads to a charge of first degree murder or attempted first degree murder, the existence of "a common scheme or plan" need not be proven to establish the requisite intent to kill multiple persons. See Briones II, 74 Haw. at 454-56, 848 P.2d at 973-74 (footnotes omitted); Cullen, 86 Hawai'i at 11, 946 P.2d at 965. This is intuitive because, to the extent a defendant's state of mind may be inferred from his or her conduct, See, e.g., State v. Jenkins, 93 Hawai'i 87, 106, 997 P.2d 13, 32 (2000) (citation omitted), one need look no further than conduct and attendant circumstances to infer whether

(continued...)

(1997), we further instructed that

> the phrase "common scheme or plan" was used in Briones II, not to indicate a material element of the offense of first degree murder, but to provide an example of facts that would support a charge of first degree murder under HRS § 707-701(1) where the homicidal acts occurred in separate incidents and at different times.

Cullen, 86 Hawai‘i at 11, 946 P.2d at 965.

The prosecution's sole argument in this regard was that Stow attacked both Nash and Parkison pursuant to a general policy of getting even with people who "crossed" him. However, a general policy of retaliating against perceived enemies by no means translates into a present intent to kill more than one person as part of a continuing course of conduct, or common scheme or plan. The prosecution adduced no evidence that, at the time Stow attacked Nash, Stow intended to kill anyone other than Nash. And while Stow may have harbored some resentment towards Parkison, the prosecution adduced no evidence that Stow intended to "chop him up" until the very moment Parkison refused to part with his beer. Viewed in a light most favorable for the prosecution, the record in this case contains no evidence from which a trier of fact could reasonably conclude that Stow harbored a "common scheme or plan" to kill multiple persons. As

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[15](...continued)
a defendant intended to kill more than one person. Such is not the case, however, where multiple acts separated by time and/or location form the basis for a charge under HRS § 707-701(1)(a). Indeed, absent a "continuing course of conduct, or a common scheme or plan" connecting otherwise isolated incidents, there can be no "single" intent to kill more than one person.

such, we hold that there was insufficient evidence to convict Stow of attempted murder in the first degree. The trial court thus erred by failing to grant Stow's motions in this regard.

D. On Remand

Stow argues on appeal that the lower court erred in denying his motion for judgment of acquittal and that prevailing at this point would preclude this court from remanding the case for a new trial, as it would violate the constitutional and statutory prohibitions against double jeopardy. For the reasons discussed herein, we hold that retrial on the two counts of attempted murder in the second degree is not barred by double jeopardy.

The double jeopardy clause of the fifth amendment to the United States Constitution guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]" Similarly, article I, section 10 of the Hawai'i Constitution provides that "nor shall any person be subject to the same offense be twice put in jeopardy[.]" Finally, HRS § 701-110 (1993) provides in relevant part:

> **When a prosecution is barred by former prosecution for the same offense.** When a prosecution is for an offense under the same statutory provision and is based on the same facts as a former prosecution, it is barred by the former prosecution under any of the following circumstances:
>
> (1) The former prosecution resulted in an acquittal which has not subsequently been set aside. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a

> determination by the court that there was insufficient evidence to warrant a conviction.

This court has acknowledged that the underlying purpose of the double jeopardy clause is that

> the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

State v. Quitog, 85 Hawai‘i 128, 140, 938 P.2d 559, 571 (1997) (quoting Green v. United States, 355 U.S. 184, 187-88 (1957)). This court has also recognized that there are three separate and distinct aspects to the protections offered by the double jeopardy clause. "Double jeopardy protects individuals against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." Id. at 141, 938 P.2d at 572 (citations omitted). Therefore, "where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." State v. Timoteo, 87 Hawai‘i 108, 112, 952 P.2d 865, 869 (1997) (citing United States v. Wilson, 420 U.S. 332, 344 (1975)).

In the present case, the only protection at issue is Stow's right to be free from "a second prosecution for the same offense after acquittal." Stow argues that, "inasmuch as the jury returned verdicts acquitting [him] of second degree attempted murder," the prosecution is "bound by the preclusive effect of the not guilty verdicts as to the second degree attempted murder counts."

During closing arguments, the prosecutor informed the jurors that if they found Stow guilty of attempted murder in the first degree, they were not to consider the remaining charges.[16] However, contrary to this court's instructions in Briones II, the jury instructions issued by the trial court contained no such direction.[17] The verdict form on attempted first degree murder advised the jurors that if they found Stow guilty of attempted first degree murder, they were to proceed to "special interrogatory #1."[18] If, on the other hand, the jurors concluded that Stow was not guilty of attempted first degree murder, they were instructed to proceed to pages two and three, which dealt with the attempted second degree murder charges. The jurors found Stow guilty of attempted murder in the first degree, and then, for unascertainable reasons, proceeded to pages two and three, on which they wrote "not guilty."

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[16] The prosecutor stated: "If you find that this defendant, you find him guilty of the offense of murder in the first degree, you don't even look any further. That's it. That's your whole job."

[17] The trial court advised the jurors only that:

> If you find the Defendant not guilty in Count One of the offense of Attempted Murder in the First Degree, or if you are unable to reach a unanimous verdict as to this offense, then you must consider whether the Defendant is guilty or not guilty in Counts Three and Five of the offenses of Attempted Murder in the Second Degree.

[18] Special interrogatory #1 inquired whether the prosecution proved beyond a reasonable doubt that Stow was not under the influence of extreme mental or emotion distress for which there was a reasonable explanation at the time he committed the offense.

A verdict of acquittal represents the factfinder's conclusion that the evidence does not warrant a finding of guilty. See United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977). "[A] verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offense.'" Green v. United States, 355 U.S. 184, 223-24 (1957) (citation omitted). At the same time, however, an acquittal must actually, in both substance and form, acquit the defendant of the charged offense. See State v. Lee, 91 Hawai'i 206, 211, 982 P.2d 340, 345 (1999) (citing Martin Linen Supply Co., 430 U.S. at 572).

The threshold issue is thus whether the jury "acquitted" Stow of the two counts of attempted murder in the second degree. The words "not guilty" written on the verdict form undoubtedly represent an acquittal "in form." Accordingly, our sole inquiry is whether the jury acquitted Stow of attempted second degree murder "in substance."

It is evident that Stow was not, in substance, acquitted of the two counts of murder in the second degree. As discussed in section III.C, there is insufficient evidence to affirm Stow's conviction for attempted murder in the first degree. The jury's guilty verdict in the present case, however,

reveals that the jury did not, in substance, acquit Stow of the two counts of attempted murder in the second degree.

The jury instructions failed to apprise the jury that, in order to be found guilty of attempted murder in the first degree, Stow must have intended to kill Nash and Parkison pursuant to a continuing course of conduct, or a common scheme or plan.[19] Based on these instructions, the jury likely could not distinguish between attempted murder in the first degree and two counts of attempted murder in the second degree. Although we note that the jury's markings of "not guilty" on pages two and three amounted to juror error, we do not believe that the jury

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[19] The instructions given to the jurors in this case followed the language of HRS § 707-701(1)(a). The jurors were instructed to find Stow guilty of attempted murder in the first degree if he acted with intent to "cause the death of more than one person in the same or separate incidents." However, for reasons discussed herein, and consistent with our decision in Briones II, we note that, when separate and distinct acts give rise to a charge of first degree murder or attempted first degree murder, jury instructions that simply follow the language of HRS § 707-701(1)(a) do not adequately apprise the jurors of the requisite state of mind for the offense. Under such circumstances, jurors may not convict a defendant of first degree murder or attempted first degree murder unless they find that he or she acted pursuant to a continuing course of conduct or a common scheme or plan. In the instant case, the jurors were instructed to find Stow guilty if they determined that he attempted to "cause the death of more than one person in the same or separate incidents." This instruction is erroneous and misleading because a defendant who kills more than one person in two unrelated incidents and with two different states of mind does, in fact, "cause the death of more than one person in the same or separate incidents." The jury instructions should have apprised the jurors that they could not find Stow guilty of attempted first degree murder unless they found that he intended to kill Samuel Nash and Douglas Parkison pursuant to a continuing course of conduct, or a common scheme or plan. As a consequence of the erroneous instructions, it is entirely possible that the jury convicted Stow of attempted murder in the first degree simply because he attacked two people. As noted in section III.C, the record is noticeably devoid of evidence that Stow manifested the requisite intent to kill multiple persons in the same or separate incidents.

was so misguided as to believe that it could find Stow guilty of attempted murder in the first degree, as well as two counts of attempted murder in the second degree. Thus, when the jury found Stow guilty of attempted murder in the first degree, pursuant to the erroneous jury instructions, it marked "not guilty" with respect to the two counts of attempted murder in the second degree. On the specific record in this case, we hold that the jury's markings of "not guilty" were not, in fact, acquittals in

both substance and form. See Martin Linen Supply Co., 430 U.S. at 572.

Therefore, we hold that the double jeopardy clause does not foreclose the prosecution from retrying Stow for two counts of attempted murder in the second degree.

IV. CONCLUSION

For the foregoing reasons, we (1) vacate the circuit court's judgment and sentence for attempted murder in the first degree in violation of HRS §§ 705-500 (1993) and 707-701(1)(a) (1993) and (2) remand this case to the circuit court for a new trial on the two counts of attempted second degree murder.

DATED: Honolulu, Hawai'i, February 21, 2002.

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