NO. 22893

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
PEDRO SAPINOSO, Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CR. NO. 98-0182)

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

On September 21, 1998, Defendant-Appellant Pedro Sapinoso (Sapinoso) was charged via indictment with attempted sexual assault in the first degree (Count I), in violation of Hawaiʻi Revised Statutes (HRS) §§ 705-500 and 707-730(1)(b);[1] kidnapping (Count II), in violation of HRS §§ 707-720(1)(d) and

[1] Hawaiʻi Revised Statutes (HRS) § 705-500(1)(b) (1993) provides that "[a] person is guilty of an attempt to commit a crime if the person . . . [i]ntentionally 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.

HRS § 705-500(3) (1993) provides that "[c]onduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent."

HRS § 707-730(1)(b) (1993), provides, in pertinent part, that "[a] person commits the offense of sexual assault in the first degree if . . . [t]he person knowingly subjects to sexual penetration another person who is less than fourteen years old[.]"

HRS § 707-700 (1993), provides, in relevant part, that "'[s]exual penetration' means . . . any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight, but emission is not required. For purposes of this chapter, each act of sexual penetration shall constitute a separate offense."

(e);[2] and sexual assault in the third degree (Count III), in violation of HRS § 707-732(1)(b).[3]

Following a trial in the circuit court of the fifth circuit, a jury found Sapinoso guilty of the included offense of attempted sexual assault in the third degree in both Count I and Count III, and not guilty in Count II. A Judgment, Guilty Conviction and Sentence was entered on August 13, 1999. Sapinoso was sentenced to a five-year indeterminate term of imprisonment on Count I and on Count III, both terms to run concurrently.

Sapinoso now brings this appeal, contending that (1) numerous instances of misconduct by the prosecutor deprived him of his right to a fair trial; (2) his right to a unanimous verdict was violated due to insufficient jury instructions, (3) the cumulative effect of the foregoing errors deprived him of his right to a fair trial; and (4) if any of the errors were waived due to the failure of his trial counsel to preserve the issues for appeal, then he received ineffective assistance of counsel.

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2 HRS §§ 707-720(1)(d) and (e) (1993), provide, in pertinent part, that "[a] person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to . . . subject that person to a sexual offense [or] terrorize that person[.]"

3 HRS § 707-732(1)(b) (1993), provides that "[a] person commits the offense of sexual assault in the third degree if . . . [t]he person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person[.]"

HRS § 707-700 (1993) provides, in relevant part, that "'[s]exual contact' means any touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts."

We affirm the August 13, 1999 judgment for the following reasons.

I. BACKGROUND.

At trial, the eight-year-old complainant testified that on August 3, 1998, she was playing with her friends and younger sister in her backyard. Sapinoso, a masseur who lived next door, was carving a massager in his backyard. He called the complainant over to him, so she went to see what he wanted. He asked her if she wanted to see his massage book. She agreed to look at it.

Sapinoso told the complainant to follow him. He walked to the front door of his house and went in, but she waited outside the front door. Sapinoso called for her to come into his house. The complainant refused, because she did not know him well. Sapinoso called her to come into the house at least three more times. The complainant eventually entered the house. No one else was home at the time.

The complainant then testified that she entered Sapinoso's house and sat on a black stool while Sapinoso retrieved the illustrated massage book from a drawer in the living room.[4] After retrieving the book, Sapinoso sat on a

[4] The massage book, M. Carter & T. Weber, Body Reflexology, Healing At Your Fingertips (1994), discusses reflex massage, and various techniques for healing ailments of the human body. During trial, the complainant identified page eleven as the one Sapinoso showed her on the day of the

(continued...)

stool next to the complainant and told her to sit on his lap. While she sat on his lap, Sapinoso opened the book and put his arms around her. Sapinoso showed her pictures of hands and legs, but then he dropped the book to the floor. Sapinoso looked to the side, but did not pick up the book. The complainant also looked to the side.

Sapinoso then put his hands on the top part of the complainant's legs and started rubbing in a circular motion. Sapinoso put his hands between her legs and started rubbing, putting his thumbs into her thighs and under her shorts. Then he touched her vagina through her clothing.

At one point during the complainant's testimony, the prosecutor showed her an illustration of a female body, upon which the complainant had previously circled the location of her private area. The complainant verified that "private" meant vagina, and that Sapinoso had touched her there.

Sapinoso continued to rub between the complainant's legs. As Sapinoso was rubbing between her legs, he came "real close" to her private area again, so she whacked his arms away. The complainant testified that Sapinoso's hands were right next to her private area and that his thumbs were "into" her thighs

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[4](...continued)
incident. Page eleven contains an illustration of the internal structure of the upper body. The picture charts the internal organs of the body with reference to reflex points on the hands that relate to the various internal organs. It was entered into evidence, by stipulation.

and under her shorts. She then jumped off his lap and tried to run to the door, but Sapinoso pulled her back by grabbing her tank top and her waist. She punched his arm in order to get free of his hold. When Sapinoso still did not let go of her, she told him she had to go home to eat lunch. The complainant punched Sapinoso's arm again, got free of his hold and ran out of his house into her house.

During his cross-examination of the complainant, Sapinoso's attorney attempted to highlight certain inconsistencies between her trial testimony and prior statements she had made regarding the incident. This line of questioning proved difficult for the complainant to follow, so the court interrupted cross-examination to suggest that the statements be entered into evidence so that the jury could compare them to her trial testimony. The three statements were a statement the complainant made to Kaua'i Police Department Officer James Rodrigues (Officer Rodrigues) the day of the incident, a statement she made at the Children's Advocacy Center approximately a month later, and her grand jury testimony. The three statements were entered into evidence by stipulation.

The complainant's aunt Joyce testified that she was in the house washing dishes when the complainant returned home. The complainant's stepfather was home, but he was sleeping, having got off work early that morning. The complainant was crying and told Joyce that Sapinoso had "touched her private." Joyce

testified that she was responsible for babysitting the complainant that day and that Sapinoso had not asked if the complainant could come over to his house. Joyce woke the complainant's stepfather, and they then decided not to call the police until the complainant's mother returned from work. When the complainant's mother arrived home, the complainant told her what Sapinoso had done, whereupon she called the police. Officer Rodrigues arrived at the house and interviewed the complainant alone.

Officer Rodrigues testified that after he took the complainant's statement, he went to Sapinoso's home to inform him of the complaint and to see if he would make a statement. Officer Rodrigues verified that Sapinoso could understand English, then informed him of his constitutional rights. The constitutional rights were read off of Officer Rodrigues' rights-waiver cue card. Officer Rodrigues asked Sapinoso if he wanted to make a statement. Sapinoso nodded his head and said yes.

Sapinoso told Officer Rodrigues that the complainant sat on his lap as they looked through the massage book together. Sapinoso admitted that he massaged up and down her hips and legs, and that he massaged the inside of her thighs up to her crevice area, but he denied touching her vagina. Sapinoso also admitted that he grabbed her shirt and pulled her back into him when she tried to run away. The complainant then told him that she had to

go home to eat. Sapinoso also related, however, that kids come over to his house all the time to get a massage.

Officer Rodrigues further testified that while Sapinoso was explaining what happened, Sapinoso demonstrated with his hands on his body where he had touched the complainant. To be certain that he accurately understood Sapinoso, Officer Rodrigues demonstrated the same on his own body. Sapinoso confirmed in both ways his admission that he had massaged the complainant between her legs and up to her crevice area. When Officer Rodrigues put his hand over his own private area, however, Sapinoso again denied that he had touched the complainant there.

Officer Rodrigues arrested Sapinoso and transported him to the police substation in Waimea. At the station, Officer Rodrigues again verified with Sapinoso the contents of his earlier statement. Sapinoso confirmed what he had told Officer Rodrigues earlier.

After he was booked, Sapinoso was allowed to make a phone call to arrange bail. Detective Roy Asher (Detective Asher), the Waimea District Supervisor, testified that he overheard Sapinoso explain on the phone that "all he did was to take her off the clothesline." Officer Rodrigues had testified, however, that Sapinoso never mentioned the clothesline explanation, either in his statement at the scene of the incident or in his verification of his statement at the police station.

Also, the complainant had testified that she never went near the clothesline that day.

Sapinoso had brought with him to the police station a binder of business cards of clients that he had treated with massage. He initiated a conversation with Officer Rodrigues and Detective Asher about his massage business. Officer Rodrigues testified that Sapinoso bragged about being a good masseur, and that his clients included police officers, judges and politicians. The two police officers recognized the names of some fellow officers on the business cards in the binder.

Sapinoso did not testify and called no witnesses. It took the jury less than five hours to reach its verdict.

II. DISCUSSION.

A. Prosecutorial Misconduct.

Sapinoso contends that prosecutorial misconduct denied him his right to a fair trial. Specifically, Sapinoso complains of the following instances of alleged misconduct:

1) During voir dire, the prosecutor improperly influenced the jurors by making specific references to facts of the case.

2) During her opening statement, the prosecutor improperly appealed to juror emotion by calling the complainant "a precious, naive, eight-year-old."

3) During her closing argument, the prosecutor improperly appealed to juror emotion by asking the jurors to put themselves in the complainant's position.

4) During her closing argument, the prosecutor used "we" on numerous occasions to interject her personal belief as to the evidence.

5) During her closing argument, the prosecutor improperly expressed her opinion about Sapinoso's guilt by asserting that "[t]he State is not here to prosecute a person if it hasn't proven a case beyond a reasonable doubt."

Defense counsel did not object below to some of the foregoing instances of prosecutorial misconduct.

"The statutory provisions governing appeals in criminal cases thus prevent our consideration, save in exceptional circumstances, of alleged errors that were not called to the attention of the trial court when committed." State v. Fox, 70 Haw. 46, 55, 760 P.2d 670, 675 (1988). Hawai‘i Rules of Penal Procedure (HRPP) Rule 52(b) (1999) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." See also State v. Marsh, 68 Haw. 659, 661, 728 P.2d 1301, 1302 (1986). To constitute plain error, "[t]he conduct complained of must affirmatively appear to be of such a nature that substantial rights of the accused were prejudicially affected." State v. Ganal, 81 Hawai‘i 358, 376, 917 P.2d 370, 388 (1996) (citation

omitted). If such conduct implicates a defendant's constitutional rights, "an appellate court must reverse a resulting conviction unless it can conscientiously conclude that in the setting of [the] particular case [the error is] so unimportant and insignificant that [it] may . . . be deemed harmless." Id. at 376, 917 P.2d at 388 (citations and internal quotation marks omitted, brackets and ellipsis in the original).

"Prosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a fair trial. [T]o determine whether reversal is required under HRPP Rule 52(a) because of improper remarks by a prosecutor which could affect Defendant's right to a fair trial, we apply the harmless beyond a reasonable doubt standard of review." State v. Sanchez, 82 Hawai'i 517, 528, 923 P.2d 934, 945 (1996) (citations and internal quotation marks omitted, brackets in the original).

In deciding whether error is harmless beyond a reasonable doubt, we examine the record to determine "whether there is a reasonable possibility that the error complained of might have contributed to the conviction." State v. Balisbisana, 83 Hawai'i 109, 114, 924 P.2d 1215, 1220 (1996). This question is analyzed in light of "the nature of the alleged misconduct, the promptness or lack of a curative instruction, and the strength or weakness of the evidence against [the] defendant." State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992).

The critical inquiry is whether we can "conclude beyond a reasonable doubt that the prosecutor's remarks had little likelihood of influencing [the jury in their] critical choice[s]." Marsh, 68 Haw. at 661, 728 P.2d at 1302 (citations omitted).

In light of the relevant standards, we review each of the allegedly improper comments.

1. Prosecutorial misconduct during voir dire.

Sapinoso contends that the prosecutor improperly attempted to precondition the jury by asking questions in voir dire that referred specifically to the facts of the case. Sapinoso did not object to the prosecutor's questions, nor did the court instruct the prosecutor to rephrase her questions.

"[HRPP] Rule 24(a) leaves to the court's discretion the regulation of voir dire examination so as to keep the questioning by counsel within reasonable bounds and to confine it to assisting in the impaneling of an impartial jury." State v. Altergott, 57 Haw. 492, 499, 559 P.2d 728, 734 (1977). HRPP Rule 24(a) (1999) provides:

> The court shall permit the parties or their attorneys to conduct the examination of prospective jurors or shall itself conduct the examination. In the latter event the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper.

"An abuse of discretion occurs if the trial court has 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. Loa, 83 Hawai'i 335, 349, 926 P.2d 1258, 1272 (1996) (citation and internal quotation marks omitted). "Absent abuse of that discretion and a showing that the rights of the accused have been substantially prejudiced thereby, the trial judge's rulings as to the scope and content of voir dire will not be disturbed on appeal." State v. Churchill, 4 Haw. App. 276, 279, 664 P.2d 757, 760 (1983) (citation omitted).

During the court's voir dire, several prospective jurors indicated that they had utilized Sapinoso's massage services. All of them maintained that they would not be influenced by this relationship. Sapinoso challenges the following portions of the State's voir dire:

> [THE PROSECUTION]: Did any of you at any of your sessions, did he have you sit on his lap for any reason?
>
> A JUROR: No.
>
> [THE PROSECUTION]: No, okay. Mr. [Juror1], you have two children, is that correct?
>
> A JUROR: Correct.
>
> [THE PROSECUTION]: Assuming -- let's assume that you did not know your neighbor very well. Would you find it appropriate to have -- do you have a daughter?
>
> A JUROR: Yes.

[THE PROSECUTION]: Would you feel that it was appropriate -- or how would you feel if your daughter -- or your neighbor, who was a male who you did not know that well, had taken your daughter into his home without your permission?

A JUROR: I wouldn't like that.

[THE PROSECUTION]: Okay. And that would upset you, I would think.

A JUROR: I wouldn't like that.

[THE PROSECUTION]: Okay. Would you be even more upset if that person had made some physical contact with that child without the adult -- let's assume again adult male -- asking for your permission?

A JUROR: That wouldn't be appropriate.

. . . .

[THE PROSECUTION]: Now Mr. [Juror2], do you think, again question, is there a difference between penile penetration and digital penetration to you, or is it just totally inappropriate with a child in any event?

A JUROR: (Inaudible).

[THE PROSECUTION]: Now, when you took your daughter to see Mr. Sapinoso, did he have her lay on the massage table as well?

A JUROR: Yes.

[THE PROSECUTION]: Okay. Were you present during that entire time that he was, I guess, massaging her?

A JUROR: Yeah. We went for a couple of sessions, I was present for both.

[THE PROSECUTION]: And where did he massage, what parts of her body did he massage?

A JUROR: I don't recall.

[THE PROSECUTION]: Was there any occasion where Mr. Sapinoso had to take her clothes off?

A JUROR: No.

[THE PROSECUTION]: Would you have permitted that?

A JUROR: No.

[THE PROSECUTION]: So, in your mind, it's totally inappropriate to bring a child, I guess, to have a massage whereby you would have to go under her clothes or take off her clothes.

A JUROR: I believe so.

[THE PROSECUTION]: Do you think that when a person is going to perform a massage or et cetera that they should obtain the permission of a parent before doing so?

A JUROR: Most certainly.

[THE PROSECUTION]: Mr. [Juror3], do you think it's ever appropriate to have a person touch another child, a female -- have an adult male touch a female child between the legs without the parents' permission?

A JUROR: (Unintelligible)

[THE PROSECUTION]: Mr. [Juror4], how do you feel about that, do you think it's ever appropriate?

A JUROR: No.

[THE PROSECUTION]: Mr. [Juror5], do you feel it's ever appropriate?

A JUROR: No.

[THE PROSECUTION]: Is there anyone on this panel who would think -- or can think of a circumstance whereby a female child would require any kind of massage between her legs? Thank You.

. . . .

[THE PROSECUTION]: Would you agree with the statement that sexual assaults are crimes of secrecy, opportunity and desire?

A JUROR: (Inaudible).

. . . .

[THE PROSECUTION]: Do you think it's appropriate to have a -- let's say your daughter, if she was --

THE COURT: One minute.

[THE PROSECUTION]: [I]f she was in elementary school and a male acquaintance took her into his home without you knowing, would you be upset about that?

A JUROR: Very much.

. . . .

[THE PROSECUTION]: Do you feel that there are some adults that may use children for sexual gratification?

A JUROR: Yes.

. . . .

[THE PROSECUTION]: Do you have any that's currently in elementary school?

A JUROR: No.

[THE PROSECUTION]: No. Okay. How would you feel if you had a child that was in elementary school and that was a female and taken into the home of an adult male that you did not know, how would that make you feel?

A JUROR: (Inaudible).

[THE PROSECUTION]: Would you be upset?

A JUROR: (Inaudible).

[THE PROSECUTION]: Would you even be more upset if that person proceeded to put his hands between her legs?

A JUROR: (No audible response.)

In Altergott, supra, the Hawai‘i Supreme Court stated:

> In ruling as to a particular question, the trial judge must be guided in very large part by his appraisal of the usefulness of the question in achieving the selection of an impartial jury, which in turn will depend upon his judgment of the likelihood that the question will disclose a mental attitude which would be significant in exercising challenges, whether for cause or peremptory. The question for us is whether such a likelihood existed here and whether its existence should have been so apparent to the trial judge that his refusal to permit the question was an abuse of discretion.

Altergott, 57 Haw. at 500, 559 P.2d at 734. Furthermore, it is improper to use voir dire "to educate the jury panel on the facts of the particular case, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, to induce the jurors by use of . . . . [sic] hypothetical questions or otherwise to commit themselves to vote in a particular way, or to instruct them in matters of law." Id. at 499, 559 P.2d at 734 (citation and internal quotation marks omitted, ellipsis in the original). However, an otherwise proper voir dire question should not be excluded if it only incidentally constitutes anticipatory argument which might precondition the jury. Id.

In analyzing the nature of the alleged misconduct in this case, we note factors which militate against a finding of misconduct.

Both the court's and the State's voir dire revealed that several of the jury panel knew Sapinoso and had utilized his massage services. Four of the thirteen jurors (twelve jurors and

the one alternate juror) had utilized Sapinoso's massage services either for themselves or for their family members. One other had taken her daughter to a masseuse for therapy. In addition, Sapinoso had implied a defense of legitimate massage when he told Officer Rodrigues that kids come over to his house all the time for a massage. Hence, the State's voir dire could be viewed as reasonably calculated to ferret out juror bias in favor of Sapinoso, or juror misapprehension about the limits of legitimate massage activity.

Where a significant likelihood of juror prejudice or bias exists, it is appropriate for the trial court to allow further inquiry into the impartiality of the prospective jurors. However, questions not reasonably calculated to lead to the discovery of prejudice or bias should be restricted. Questions used solely to educate or commit jurors to the facts of the case are improper. We cannot conclude that the voir dire at issue here was solely for an improper purpose. Nor can we conclude that any improper purpose was anything more than incidental. Id. at 499, 559 P.2d at 734.

However, the State's use of the hypothetical form of voir dire merits discussion. While we are unable to discern what the actual intentions of the prosecutor were, the hypothetical form seemed to be directed at eliciting juror opinions as to fact patterns and evidence that would be presented during trial.

Also, the prosecutor often sought to involve the jurors personally in the hypotheticals.

These types of questions can tend to precondition the jury and to involve their emotions rather than their reason. We conclude that, on balance, the voir dire at issue very likely exceeded the bounds of propriety. However, it does not appear that Sapinoso agreed with this conclusion. Sapinoso never objected to any of the questions posed by the State, and he waived both his last peremptory challenge to the twelve jurors and his lone challenge to the alternate. The two jurors that were excused by Sapinoso were not directly involved in the questions he now challenges on appeal.

2. *Prosecutorial misconduct in the opening statement.*

In her opening statement, the prosecutor described the complainant as "a precious, naive, eight-year-old." Sapinoso objected to the use of the word "precious" as improper argument and an appeal to juror emotion. We agree. It was error for the circuit court to overrule Sapinoso's objection.

> An opening statement merely provides an opportunity for counsel to advise an outline for the jury, the facts and questions in the matter before them. Hence, the purpose of an opening statement is to explain the case to the jury and to outline the proof. It is not an occasion for argument.
>
> Ordinarily, the scope and extent of the opening statement is left to the sound discretion of the trial judge. However, the trial court should exclude irrelevant facts

> and stop argument if it occurs. The State should only refer in the opening statement to evidence that it has a genuine good-faith belief will be produced at trial.

Sanchez, 82 Hawai‘i at 528, 923 P.2d at 945 (brackets, citations and internal quotation marks omitted).

The State concedes on appeal that there is no apparent reason why the prosecutor used the word "precious" to describe the complainant, the term being so vague that it would be impossible to determine if the State could prove the description at trial. We agree. The terms "precious" and "naive" were irrelevant and represented an improper appeal to emotion.

Nonetheless, in context the comment was a brief and isolated indiscretion. Furthermore, the court instructed the jury, just before opening statements, that "opening statements, as well as any other comments of counsel throughout the trial, [are] not evidence. Evidence is the testimony of the witnesses and the exhibits that are received." And at the close of the trial, the court again instructed the jury that "[s]tatements or remarks made by counsel are not evidence," and that the jury should base its decision only on the evidence presented and reasonable inferences therefrom. "Generally, a prosecutor's improper remarks are considered cured by the court's instructions to the jury, because it is presumed that the jury abided by the court's admonition to disregard the statement." State v.

Pemberton, 71 Haw. 466, 475, 796 P.2d 80, 84 (1990) (citations and internal quotation marks omitted).

3. Prosecutorial misconduct during closing argument: appeal to juror emotion.

Sapinoso next contends that the prosecutor opened closing argument improperly by stating:

> Imagine the fear of an eight-year-old child who was held against her will and sexually assaulted by a man who is almost a stranger. Imagine the shame, the embarrassment, of having to relive that horrible experience to numerous people, all of you, to the public. And imagine the pain of an eight-year-old child of having the one few things that she owned, her self respect, her childhood innocence, her heart and soul. [The complainant's] (sic) life will never be the same after what [Sapinoso] did to her.

Then, during rebuttal argument, the prosecutor stated: "Look this over. And I would ask that you offer no pity for [Sapinoso] at all, and that you remind yourself that sexual assault is a crime of secrecy, opportunity and desire."

Sapinoso argues that the preceding statements improperly appealed to juror emotion by asking the jurors to place themselves in the complainant's position.

The supreme court has stated that prosecutors "'should not use arguments calculated to inflame the passions or prejudice of the jury.'" State v. Rogan, 91 Hawai'i 405, 413, 984 P.2d 1231, 1239 (1999) (quoting ABA Prosecution Function Standard 3-5.8(c) (3d ed. 1993)) (involving the prosecutor's reference to the defendant as a "black, military guy"). Such argument is

irrelevant and has "the potential of distracting the jury from considering only the evidence presented at trial." Id. at 414, 984 P.2d at 1240. Although the statements made here do not reach the egregious level of the references in Rogan, they nonetheless display the same defects.

Moreover, arguments which invite the jury to assume the complainant's position, especially when couched in the melodramatic language used here, distract the jury from concentrating on the evidence. In Rogan, the prosecutor described the subject incident as "every mother's nightmare." The supreme court found the statement improper because it was irrelevant and impliedly invited the jurors to put themselves in the mother's position. Id.

The State argues that the prosecutor did not ask the jurors to place themselves in the complainant's position, noting that "prosecutors are permitted to draw reasonable inferences from the evidence and are also afforded wide latitude in discussing the evidence[.]" State v. Bates, 84 Hawai'i 211, 229, 933 P.2d 48, 66 (1997) (citation omitted). The State further argues that the prosecutor was merely summarizing the case from the complainant's perspective. Yet, the State concedes that the introduction appealed to the emotions of the jurors "somewhat." We agree with the State's concession and conclude that the arguments were improper.

4. Prosecutorial misconduct during closing argument: interjection of the prosecutor's personal opinions as to the evidence.

Sapinoso next argues that the prosecutor, during closing argument, improperly interjected her opinions as to the evidence and the question of guilt.[5]

The problematic portions of the prosecutor's closing argument follow, numbered in the order identified on appeal:

> [1] [THE PROSECUTOR]: Well, what happened? Well, we know that [Sapinoso] was home alone. [The complainant] told you that. There is no other evidence to indicate that there was anyone else in that home. We know also that [Sapinoso] had --
>
> [DEFENSE COUNSEL]: Objection -- your Honor. Her personal belief as "we know," that's improper argument.
>
> [2] [THE PROSECUTOR]: The evidence has shown that [the complainant] knew -- or testified that [Sapinoso] was home alone. The evidence has also shown that [Sapinoso] had never had [the complainant] in his house alone, never had her in his house at all. We also know -- the evidence has shown that --
>
> [DEFENSE COUNSEL]: Objection, your Honor. "We also know"? She's putting in her personal beliefs again.
>
> [THE PROSECUTOR]: Your Honor, I'm sorry. I just clarified it with "the evidence has shown."
>
> THE COURT: Okay. Sustained.

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[5] Sapinoso raised this issue in his Motion for New Trial, filed on June 9, 1999. The trial court denied the motion, ruling that although the prosecutor's use of the pronoun "we" could be construed as improper, it gave three prompt and specific curative instructions. The court concluded that its prompt curative instructions effectively remedied any prejudice, and that Sapinoso's confession, corroborating the complainant's testimony, constituted overwhelming evidence in support of the convictions.

[3] [THE PROSECUTOR]: The evidence has shown that he was an adult male, he was not familiar with the child and that she was a stranger, in actuality, to him because they only say hi or bye. We know that was an inappropriate act.

[DEFENSE COUNSEL]: Objection, your Honor.

[THE PROSECUTOR]: I --

[DEFENSE COUNSEL]: Again --

[THE PROSECUTOR]: I'm sorry (inaudible).

THE COURT: Counsel. Ladies and gentlemen, the personal beliefs of the prosecutor is not involved in this case. So whenever the pronoun "I," "we" is [sic] incorrect usage of argument.

[4] [THE PROSECUTOR]: . . . . He takes [the complainant], he puts her on his lap. Again, totally inappropriate conduct, totally violates the laws in this society when he starts to put her on her (sic) lap and then he . . . [b]ut we know that was not his intent --

[DEFENSE COUNSEL]: Objection --

[THE PROSECUTOR]: -- because he never --

[DEFENSE COUNSEL]: -- your Honor.

THE COURT: Sustained.

[5] [THE PROSECUTOR]: . . . . You also know that by the statement from Officer Rodrigues that he didn't give any reason as to why his hands was between her legs. Basically he said he was playing.

And that's the truth, he was playing. He was playing for his own sexual gratification. And that is against the law. And that means he committed this act. That's sexual assault in the third degree because he knowingly touched [the complainant]'s vagina. We know that he knowingly did it because the definition of --

[DEFENSE COUNSEL]: Objection, your Honor.

[THE PROSECUTOR]: I'm sorry. I'm really sorry. Not we know, the evidence has shown --

THE COURT: Counsel.

(The following was held at the bench outside of the hearing of the jury.)

THE COURT: You will not use the word "we" --

[THE PROSECUTOR]: (Inaudible) -- I just --

THE COURT: -- no, we --

[THE PROSECUTOR]: The evidence will --

THE COURT: -- know --

[THE PROSECUTOR]: -- show, okay, the evidence will show.

THE COURT: Or you know, but not we know.

[THE PROSECUTOR]: Okay. So I can use you know? Okay.

. . . .

[6] [THE PROSECUTOR]: And so we know that he not only touched her vagina, but --

[DEFENSE COUNSEL]: Objection, your Honor.

[THE PROSECUTOR]: I'm sorry. You know that he only touched her vagina[.]

[7] [THE PROSECUTOR]: . . . . And what happens then? Well, then, thinking that hey, maybe she's not going to resist any further, his hands start to fondle between the crevice area and then work up the leg opening of her shorts. And we know again that he was --

[DEFENSE COUNSEL]: Objection, your Honor.

[THE PROSECUTOR]: I mean you know --

[DEFENSE COUNSEL]: May we approach?

(The following was held at the bench outside the hearing of the jury.)

[THE PROSECUTOR]: Your Honor, I'm sorry, I'm just (inaudible).

. . . .

THE COURT: She's been warned many times.

[DEFENSE COUNSEL]: I'm going to ask for sanctions the next time.

[THE PROSECUTOR]: (Inaudible).

THE COURT: You know, I'm going to instruct the jury --

[THE PROSECUTOR]: Can you just tell 'em you know?

THE COURT: -- you know what the State has proven --

[THE PROSECUTOR]: Yeah.

. . . .

(The following was heard in open court.)

THE COURT: Ladies and gentlemen of the jury, again the Prosecution is using the pronoun "we." Under the law, closing arguments is not what the Prosecution thinks, but what the evidence proves and has shown to you. So she can, in her argument, use the pronoun you know, or you can find, or the State has proven, and the term "we" is not acceptable or "I" is not acceptable. Because it is not what the Prosecution feels or things [sic] that is important in this case, but what you find and what you believe and what you feel the State has proven. So please remember that.

[8] [THE PROSECUTOR]: . . . . Well, we know he deceived her into going into the house --

[DEFENSE COUNSEL]: Objection, your Honor.

[THE PROSECUTOR]: Oh, my gosh. You know, you know that he deceived her by taking her into the house.

> [9] [THE PROSECUTOR]: . . . . Once you have determined that all of these elements existed and that the State has proven these beyond a reasonable doubt -- number 4, we've already discussed that about (unintelligible) he subject (sic) her to a sexual offense. We know -- I mean, I'm sorry.
>
> [DEFENSE COUNSEL]: Objection. Can I have a (sic) instruction again, your Honor?
>
> THE COURT: Again, ladies and gentlemen of the jury, Prosecution or the State cannot interject their own feeling with reference to the facts of the case, what was proven, because it is the jury's province. So they can say "you know," but not "we know" --
>
> [THE PROSECUTION]: You know.
>
> THE COURT: Because we includes the Prosecution. Proceed.
>
> [10] [THE PROSECUTOR]: . . . . Now we've gone through these several -- I guess through the elements of the offenses. And we know -- I mean, he -- I -- you know what the evidence have (sic) shown.

Clearly, the prosecutor could not refrain from using the phrase "we know" during closing argument. Sapinoso contends that she thus improperly asserted her personal opinions.

In Sanchez, supra, we approved the following standard: "'It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.'" Sanchez, 82 Hawai'i at 533, 923 P.2d at 950 (quoting 1 ABA Standards for Criminal Justice, The Prosecution Function, Standard 3-5.8 (2d ed. 1986)). We went on to explain that "[p]rosecutorial conduct in argument is a matter of special

concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Id. (quoting Commentary to Standard 3-5.8(b)).

Sapinoso argues that the prosecutor's use of the term "we" was an improper personal assertion of the kind rejected in Marsh, supra. In Marsh, the prosecutor during closing argument asserted her evaluation of the credibility of the defendant's witnesses. She made nine statements of her belief that the defense witnesses had lied, often using the pronoun "I". She stated, with respect to the defendant, "Ladies and gentlemen, I feel it is very clear and I hope you are convinced, too, that the person who committed this crime was none other than [the defendant] Christina Marsh." She also averred that "I'm sure she committed the crime." Marsh, 68 Haw. at 660, 728 P.2d at 1302. The supreme court concluded that "[i]n light of the inconclusive evidence against Marsh, the particularly egregious misconduct of the prosecutor in presenting her personal views on the dispositive issues, and the lack of a prompt jury instruction specifically directed to the prosecutor's closing remarks, we hold that the prosecutor's conduct so prejudiced Marsh's right to a fair trial as to amount to 'plain error.'" Id. at 661, 728 P.2d at 1303.

Here, the State argues that the prosecutor's use of the phrase "we know" was not improper. The prosecutor used the phrase "we know" on several occasions in conjunction with the phrase, "the evidence has shown." The State contends that this juxtaposition merely highlighted for the jury the evidence or fair inferences that could be made from the evidence.

In State v. Schmidt, 84 Haw. 191, 202-03, 932 P.2d 328, 339-40 (App. 1997), the prosecutor stated during closing argument:

> Your job is to sit here to decide if the State has proven its case. We have every reason to believe that we have, based on the evidence even if you believe the defendant's story.
>
> As I've told you, the State is also entitled to a conviction when it has proven each of his elements beyond a reasonable doubt, and I'll suggest in this case, beyond all doubt, each and every element.

We concluded that the use of the word "we," when taken in context, was not improper because it was not an assertion of the prosecutor's personal belief. It was merely a request for the jury to consider the evidence that bore on the defendant's guilt. Id. at 203, 932 P.2d at 340.

In State v. Nakoa, 72 Haw. 360, 817 P.2d 1060 (1991), the prosecutor argued in rebuttal:

> You have heard their [two police officers] testimony and I think that based on their demeanor in the courtroom, on your common sense, on your knowledge of human nature, and your experience that the police

> officers who testified are trying their best to be as accurate as they could in their recollection of the incident that occurred.

Id. at 371, 817 P.2d at 1066 (emphases and internal block quote format omitted). The supreme court held that the prosecutor's remarks, when considered in context, were not a direct averment of her personal belief but merely directed the jury to rely upon the decisional factors she catalogued in her remarks. Id.

In Ganal, supra, the supreme court observed that "the prosecutor's statements [in closing] appear to have been made in a rambling fashion, with a less-than-accusatory tone. Rather than injecting personal opinion, the prosecutor appears to have invited the jury to question whether [a witness] was telling the truth based on her testimony." Ganal, 81 Hawai'i at 376, 917 P.2d at 388. The comments were not held to be improper. Id. at 377, 917 P.2d at 389.

Analyzing the comments here in context, the prosecutor used the term "we know" only in reference to specific evidence. On nine such occasions the defense objected, prompting three curative instructions from the court. In the context of the entire argument, it appears that the prosecutor was not intentionally trying to interject her opinions, but rather was unskillfully trying to invite the jury to focus on the evidence. In almost every instance, she was apologetic and tried to correct herself. It seems she simply could not adapt to using "you" instead of "we." Although improper, the conduct seems

unintentional and more akin to the rambling which occurred in Ganal, rather than the intentionally accusatory and assertive remarks made in Marsh.

Furthermore, unlike the trial court in Marsh, the court here promptly issued three separate curative instructions specifically directed at the improper remarks. "[E]ven though a prosecutor's remarks may have been improper, any harm or prejudice resulting to the defendant can be cured by the court's instructions to the jury. In such cases it will be presumed that the jury adhered to the court's instructions." State v. Amorin, 58 Haw. 623, 629, 574 P.2d 895, 899 (1978) (citations omitted).

5. Prosecutorial misconduct during closing argument: opinion as to guilt.

Sapinoso next argues that the following portion of the prosecutor's rebuttal argument was improper: "The State is not here to prosecute a person if it hasn't proven a case beyond a reasonable doubt. And we are going to ask that you consider the testimony and make your ruling based on the evidence that the State has provided."

Sapinoso contends that this remark improperly expressed to the jury the prosecutor's personal belief that Sapinoso was guilty.

"[E]xpressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the

objective detachment that should separate a lawyer from the cause being argued." Marsh, 68 Haw. at 660-61, 728 P.2d at 1302 (quoting ABA Standards for Criminal Justice Commentary, at 3.89). For example, in Marsh, the supreme court held that the following remarks of the prosecutor were improper: "'Ladies and gentleman, I feel it is very clear and I hope that you are convinced, too, that the person who committed this crime was none other than [the defendant] Christina Marsh.' And later: 'I'm sure she committed the crime.'" Id. at 660, 728 P.2d at 1302. However, in Schmidt, 84 Hawai'i at 202-03, 932 P.2d at 339-40, we held that the following prosecutorial argument, when taken in context, was not opinion, but rather a request for the jury to consider the evidence:

> Your job is to sit here to decide if the State has proven its case. We have every reason to believe that we have, based on the evidence even if you believe the defendant's story.
>
> As I've told you, the State is also entitled to a conviction when it has proven each of his elements beyond a reasonable doubt, and I'll suggest in this case, beyond all doubt, each and every element.

While here we agree that the subject portion of the State's closing argument began with a potentially improper assertion of the prosecutor's opinion, we note at the same time the palliative effect of the succeeding remarks directing the jury to consider the evidence before it. The overall effect of the argument appears to be equivocal.

6. Any prosecutorial misconduct was harmless beyond a reasonable doubt.

Although we have decided that prosecutorial misconduct occurred at trial, these instances were harmless beyond a reasonable doubt and do not require us to vacate the judgment. Sanchez, 82 Hawai'i at 528, 923 P.2d at 945. The evidence at trial that is without dispute establishes conclusively that Sapinoso committed the included offense of attempted sexual assault in the third degree in Count I and in Count III.

A person commits the offense of attempted sexual assault in the third degree when he "[i]ntentionally 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 [sexual assault in the third degree]." HRS § 705-500(1)(b) (1993). "A person commits the offense of sexual assault in the third degree if . . . [t]he person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person[.]" HRS § 707-732(1)(b) (1993). "'Sexual contact'" means any touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts." HRS § 707-700 (1993).

At trial, the complainant testified in detail about the events that transpired on the day of the incident. Immediately after the incident, she told her aunt Joyce what had happened, and a short while later she gave a detailed statement to Officer Rodrigues. She made subsequent statements at the Children's Advocacy Center and before the grand jury. In each statement, there were minor deviations from her trial testimony, but none which related to the elements of attempted sexual assault in the third degree.

Although Officer Rodrigues testified that Sapinoso denied touching the complainant's vagina, the rest of Sapinoso's statement to Officer Rodrigues corroborates the complainant's story. Sapinoso admitted inviting her into his house in order to view his massage book. He admitted calling her repeatedly until she acceded to his invitation. He admitted that he had the complainant sit on his lap. He admitted that he extensively massaged up and down her legs and thighs right up to her private area. He admitted grabbing her shirt and pulling her back when she tried to run away. He also admitted that the complainant told him she had to go home to eat lunch while she was attempting to leave. While Sapinoso made his statement and later at the police station, Officer Rodrigues verified, in detail, with Sapinoso, the foregoing facts.

When put together, the complainant's testimony and Sapinoso's statements to Officer Rodrigues establish, without

dispute, all of the material elements of attempted sexual assault in the third degree.

Sapinoso committed the *actus reus* of the crime, "a substantial step in a course of conduct intended to culminate in the person's commission of [sexual assault in the third degree,]" HRS § 705-500, by running his hands right up to the complainant's vaginal area. Sapinoso admitted this act. His dispute was with the allegation of contact with the vaginal area; in other words, his dispute was with the charged offenses, attempted sexual assault in the first degree (attempted digital penetration) and sexual assault in the third degree (sexual contact). He disputed the alleged vaginal contact as the completed offense charged (sexual assault in the third degree), and as predicate to the attempt offense charged (attempted sexual assault in the first degree). By the same token, he failed to dispute the *actus reus* of the included offense of which he was eventually convicted.

As for the *mens rea* of attempted sexual assault in the third degree, "[i]ntentionally engag[ing] in conduct which, under the circumstances as the person believes them to be, [is] intended to culminate in the person's commission of [sexual assault in the third degree,]" id., Sapinoso similarly had no real defense. His purported intent in inviting the minor complainant into his house, without notice to or permission from her guardians, was to show her his massage book. He had no

explanation for how this translated into a running of his hands up and down her hips and thighs right up to her crevice area. Although he mentioned in his statement that he gives massages to kids at his home all the time, thus implying this was the case with the complainant, he had no explanation for another stubborn admission -- that he physically resisted her attempts to flee. We conclude that no reasonable jury could find an innocent intent from the undisputed evidence, and hence that there is no reasonable possibility that prosecutorial misconduct contributed to his convictions.

Translated into human terms, it appears that Sapinoso's statements, made to Officer Rodrigues immediately after the incident, were an attempt to avoid criminal liability made under the untutored and mistaken impression that no vaginal contact meant no possible crime.

If we need say more, we discern ample other reason for our conclusion that the prosecutorial misconduct was harmless beyond a reasonable doubt.

First, evidence presented by the State raised very serious doubts about any innocent interpretation of Sapinoso's actions. Detective Asher heard Sapinoso say on the telephone that all he had done was to take the complainant down from the clothesline. This conflicts with the statement he gave to Officer Rodrigues and with the testimony of the complainant, who maintained both at trial and in her statement at the Children's

Advocacy Center that she was never on or around the clothesline. In her statement at the Children's Advocacy Center, the complainant, unprompted, said that,

> A: [B]ecause some people found out, yeah, he told people that I was climbing a ladder and that I almost fell down and then he was helping me down . . . but that's not true . . . [t]hat I started climbing the clothesline and it cracked and I fell down, then he helped me and then asked if I was hungry.
>
> Q: He asked if you were hungry?
>
> A: Yeah, but that's not true.

If Sapinoso's actions and intentions during the incident were indeed innocent, he would have no reason to make up a different version of his innocence on the telephone.

In addition, questions arise as to why Sapinoso brought to the police station a binder that included the names and business cards of his clients. Both Officer Rodrigues and Detective Asher testified that Sapinoso initiated conversations with them about his massage services, showed them his binder, and was "bragging" about his clients, who included influential citizens such as judges, police officers and politicians.

Sapinoso's defense relied heavily upon highlighting some inconsistencies between the complainant's pre-trial statements and her trial testimony. The inconsistencies included: whether Sapinoso slammed the book down after showing her a picture; whether the complainant asked him where the massage book was located; whether the book was in or already out

of a drawer by the television; whether her uncle had ever gotten a massage from Sapinoso; whether her friends spoke to her after the incident; whether he grabbed her waist when she tried to get away; and in what manner she knocked Sapinoso's arms away. However, these inconsistencies are insignificant in light of the undisputably incriminating evidence before the jury.

On appeal, Sapinoso relies heavily on Marsh, supra, to support his argument that prosecutorial misconduct deprived him of his right to a fair trial. However, Marsh is easily distinguishable. In Marsh, the supreme court cited the inconclusiveness of the evidence in holding that egregious misconduct by the prosecutor was not harmless beyond a reasonable doubt. That case turned essentially on the credibility of the victim versus the testimony of the defendant and four alibi witnesses. Thus, the jury was left to believe either the victim or the defendant and his witnesses. Marsh, 68 Haw. at 661, 728 P.2d at 1303. Here we have no such difficulty.

Thus, in light of the conclusive and undisputed evidence pointing to Sapinoso's guilt, we decide that the prosecutorial improprieties recognized above had "very little likelihood of altering the result of the trial." State v. Hirano, 8 Haw. App. 330, 339, 802 P.2d 482, 487 (1990). Accordingly, we conclude that the misconduct was harmless beyond a reasonable doubt and did not prejudice Sapinoso's right to a fair trial.

We observe in this connection that, despite all of his protestations regarding prejudicial prosecutorial misconduct, Sapinoso actually won the battle for credibility with the jury. In convicting him of attempted sexual assault in the third degree rather than the completed offense and the higher degree of attempted offense, the jury apparently believed Sapinoso's claim that he never touched the complainant's vagina, and rejected the State's claim that he did.

B. Jury Instructions.

Sapinoso next claims that his right to a unanimous jury verdict was denied. Specifically, Sapinoso argues on appeal that,

> [t]he court erred or plainly erred in failing to properly instruct the jury that it had to unanimously agree on separate acts in order to convict [Sapinoso] of each of the counts of sexual assault [and that] the court's instructions to the jury did not specify that they would have to unanimously agree on distinct acts in order to convict [Sapinoso] of each separate count of sexual assault.[6]

In reviewing the sufficiency of jury instructions on appeal, the standard of review is "whether, when read and

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[6] Sapinoso originally raised this issue in his Motion for New Trial. The circuit court rejected his claim, reasoning that "[t]he jury instructions as a whole, with particular reference to instructions one, ten, and fourteen . . ., were sufficient to ensure that the jury was properly guided in its consideration of the issues before it." The court also noted that the State properly specified the particular acts upon which it was basing each of its charges. The court concluded that its unanimity instruction was alone sufficient to protect Sapinoso's right to a unanimous verdict and that the State's specificity in delineating the particular acts upon which it based its charges ensured that Sapinoso's right to a unanimous verdict was not violated.

considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Arceo, 84 Hawai'i 1, 11, 928 P.2d 843, 853 (1996) (block quote format, citations, and internal quotation marks omitted). Error in jury instructions is "presumptively harmful and . . . a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial." State v. Maumalanga, 90 Hawai'i 58, 62, 976 P.2d 372, 376 (1998) (block quote format, citations, and internal quotation marks omitted).

In Arceo, the Hawai'i Supreme Court held that,

> when separate and distinct culpable acts are subsumed within a single count charging a sexual assault - any one of which could support a conviction thereunder - and the defendant is ultimately convicted by a jury of the charged offense, the defendant's constitutional right to a unanimous verdict is violated unless one or both of the following occurs: (1) at or before the close of its case-in-chief, the prosecution is required to elect the specific act upon which it is relying to establish the "conduct" element of the charged offense; or (2) the trial court gives the jury a specific unanimity instruction, *i.e.*, an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt.

Arceo, 84 Hawai'i at 32-33, 928 P.2d at 874-75. Recently, the supreme court explained that this means a unanimity instruction is only necessary where, "(1) at trial, the prosecution adduces proof of two or more separate and distinct culpable acts; and (2)

the prosecution seeks to submit to the jury that only one offense was committed." State v. Valentine, 93 Hawai'i 199, 208, 998 P.2d 479, 488 (2000).

The record in this case shows that the complainant testified to precisely two separate and distinct acts of sexual assault for the two counts of sexual assault that were charged. For Count III, sexual assault in the third degree, the complainant testified that Sapinoso touched her vagina through her clothing. For Count I, attempted sexual assault in the first degree, the complainant testified that Sapinoso attempted to he put his hand under the leg opening of her shorts after he had already touched her vagina through her clothing. Thus, this case is distinguishable from the situation in Arceo, where there were more acts than counts. In this case, nonetheless, an Arceo instruction was given by the court.

The court gave the following Arceo instruction.

[State's Instruction No. 10]

> There has been testimony of multiple acts of sexual assault and/or attempted sexual assault between [Sapinoso] and [the complainant]. In order to find [Sapinoso] guilty of any count, you must unanimously agree that the same act for each -- that the same act for each count that you find [Sapinoso] guilty of has been proven beyond a reasonable doubt."

Sapinoso agreed to the court's unanimity instruction. The court also instructed the jury as follows:

> [Court's Instruction No. 1]
> You must consider all of the instructions as a whole and consider each instruction in light of all the others.
>
> [Court's Instruction No. 14]
>
> Each count and the evidence that applies to that count is to be considered separately.

Accordingly, any danger of jury confusion was minimized by the jury instructions given by the court.

Sapinoso argues that one of the questions the jury asked the court during deliberations shows that it was confused about the relationship between acts and counts, and that the instructions were therefore insufficient. The jury wrote to the court: "The jury is not clear as to the difference between Count 1, 'Guilty of the included offense of attempted sexual assault in the third degree' and Count 3 'Guilty of the included offense of attempted sexual assault in the third degree.' If the jury finds Count 3 guilty of above noted charge, do we necessarily have to find Count 1 as noted above?"

Although there may have been some confusion initially, any such confusion was eliminated by the court in its answer to the jury's interrogatory. The court responded, "[N]o you are not required to do so." The court also referred the jury to page twenty-three of its instructions -- the Arceo instruction. Sapinoso agreed to the court's response.

In light of the Arceo precaution taken, and considering the jury instructions as a whole, we conclude that the court did not err in its jury instructions. The jury instructions were not "prejudicially insufficient, erroneous, inconsistent or misleading." Arceo, 84 Hawai'i at 11, 928 P.2d at 853. The jury was properly instructed and Sapinoso's right to a unanimous verdict was not violated.

C. Ineffective Assistance of Counsel.

For his final point of error, Sapinoso contends that he received ineffective assistance of counsel.

Specifically, Sapinoso argues that if any errors were waived due to a failure of his trial counsel to preserve issues for appeal, then he was denied his right to effective assistance of counsel.

When an ineffective assistance of counsel claim is raised, the question is,

> [w]hen viewed as a whole, was the assistance provided to the defendant 'within the range of competence demanded of attorneys in criminal cases?' Additionally, the defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.

State v. Silva, 75 Haw. 419, 439-40, 864 P.2d 583, 593 (1993)

(block quote format, citations, and internal quotation marks omitted).

Because we have concluded that the errors Sapinoso complains of on appeal were either not errors or harmless beyond a reasonable doubt, there was no "withdrawal or substantial impairment of a potentially meritorious defense." Id. Hence, Sapinoso was not denied effective assistance of counsel.

III. CONCLUSION.

For the foregoing reasons, we affirm the August 13, 1999 judgment.

DATED: Honolulu, Hawaii, March 21, 2001.

On the briefs:

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Chief Judge

Tracy Murakami,
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Associate Judge

Associate Judge