

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

TETSUYA YAMADA, Defendant-Appellant.

NO. 22456

APPEAL FROM THE THIRD CIRCUIT COURT
(CR. NO. 96-380)

DECEMBER 24, 2002

MOON, C.J., LEVINSON, AND NAKAYAMA, JJ.,
AND ACOBA, J., CONCURRING SEPARATELY,
AND RAMIL, J., DISSENTING

AMENDED OPINION OF THE COURT BY LEVINSON, J.

The defendant-appellant Tetsuya Yamada appeals from the judgment of conviction and sentence of the third circuit court, the Honorable Greg K. Nakamura presiding, convicting him of two counts of manslaughter, in violation of Hawai'i Revised Statutes (HRS) § 707-702(2) (1993).¹ Yamada argues that the circuit court

¹ HRS § 707-702(2) provides:

In a prosecution for murder in the first and second degrees it is a defense, which reduces the offense to manslaughter, that the defendant was, at the time he caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believed them to be.

erred in: (1) instructing the jury on the offense of murder in the first degree, in violation of HRS § 707-701(1)(a) (1993),² on the basis that (a) the circuit court did not “instruct the jury that they were to find all of the elements of the charged offense beyond a reasonable doubt before they reach[ed] the insanity defense[,]” (b) the circuit court separated a single charge of murder in the first degree into two charges of manslaughter, and (c) the instruction was “extremely complicated, unnecessarily lengthy and confusing to read”; (2) submitting two separate verdict forms to the jury as to the offense of manslaughter under Count I of the complaint; (3) sentencing Yamada for two offenses of manslaughter under Count I of the complaint; and (4) disallowing as evidence the audio portion of a videotaped “reenactment” of Yamada’s role in the killings, as he recalled it, upon which an expert witness relied in assessing Yamada’s sanity.

As discussed more fully infra in section III, we hold: (1) that the circuit court’s jury instructions regarding Count I of the complaint were plainly erroneous³ in that they deprived Yamada of his constitutional right to a unanimous verdict; (2) that HRS § 707-702(2) does not, in a prosecution for first degree murder predicated upon an alleged violation of HRS § 707-701(1)(a), permit multiple manslaughter convictions, as a function of the number of victims, in the event that the jury finds that the prosecution has failed to carry its burden of

² HRS § 707-701(1)(a) provides: “A person commits the offense of murder in the first degree if the person intentionally or knowingly causes the death of . . . [m]ore than one person in the same or separate incident[.]”

³ Justice Acoba’s assertion that “the majority . . . has adopted [his] position that the [circuit] court’s Special Instruction No. 1 was erroneous” is puerile. But he is perfectly entitled to “set out [his] position in detail.”

proving beyond a reasonable doubt that the defendant, at the time that he or she caused the deaths, was not under the influence of extreme mental or emotional distress (EMED); and (3) that Hawai'i Rules of Evidence (HRE) Rule 803(b)(4) (1993)⁴ excepts statements made for the purpose of diagnosis, if reasonably pertinent to diagnosis, from the general rule against hearsay, even made to a physician who is consulted for the sole purpose of facilitating the physician's testimony as a witness at trial.⁵ Accordingly, we vacate the circuit court's judgment and sentence and remand the case for further proceedings consistent with this opinion.

I. BACKGROUND

On October 1, 1996, Yamada was charged by complaint with murdering his ex-wife, Carla Russell, and her daughter, Rachel DeCambra, on September 29, 1996, with a shotgun. Count I charged Yamada with murder in the first degree, in violation of HRS § 707-701, see supra note 2; counts II and III each charged him with murder in the second degree, in violation of HRS § 707-

⁴ HRE Rule 803(b)(4) excepts from the rule against hearsay, even though the declarant is available as a witness, "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

⁵ Although we agree with Yamada that the circuit court's Special Instruction No. 1 could have misled the jury into returning a verdict of not guilty because of a physical or mental disease, disorder or defect excluding criminal responsibility without first finding beyond a reasonable doubt that the prosecution had proved all of the elements of first degree murder, the error was harmless, inasmuch as the jury did not return such a verdict. We emphasize, however, that the trial court must clearly instruct the jury that it may consider a properly raised defense of physical or mental disease, disorder, or defect if and only if it first unanimously agrees that the prosecution has proved all of the elements of the charged offense beyond a reasonable doubt. See State v. Miyashiro, 90 Hawai'i 489, 500-01 & n.13, 979 P.2d 85, 96-97 & n.13 (App. 1999).

701.5 (1993);⁶ count IV charged him with carrying or use of a firearm in the commission of a separate felony, in violation of HRS § 134-6(a) (1993);⁷ and count V charged him with burglary in the first degree, in violation of HRS § 708-810(1)(a) (1993).⁸

At trial, Yamada did not dispute the fact that he had caused the victims' deaths; rather, he maintained that, "at the time he committed this act, he suffered from a physical or mental disorder which substantially impaired his ability to either appreciate the wrongfulness of his conduct or to control his actions to the requirement of the law." Yamada adduced evidence that, beginning in 1959, he had suffered a series of debilitating accidents that caused brain damage resulting in memory loss and blackouts. Harold Hall, Ph.D., an expert in the fields of clinical, forensic, and neuropsychology, testified, based on his interviews with Yamada, his review of Yamada's medical records, interviews with persons who were acquainted with Yamada, and Yamada's reenactment of the events of September 29, 1996 as he

⁶ HRS § 707-701.5(1) provides that, "[e]xcept as provided in [HRS §] 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person."

⁷ HRS § 134-6(a) provides:

It shall be unlawful for a person to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not[.]

The prosecution amended the complaint on October 3, 1996, in respects not relevant to the present appeal, and the circuit court subsequently dismissed Count IV of the complaint on the prosecution's motion.

⁸ HRS § 708-810(1)(a) provides:

A person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and:
. . . The person is armed with a dangerous instrument in the course of committing the offense

recalled them, that "because of deteriorating brain condition triggered by the massive stress reaction there was a substantial impairment in [Yamada's] cognitive and volitional . . . capacities" on that date. Consequently, in Dr. Hall's opinion, Yamada was, as a result of a mental disorder, disease, or defect, substantially impaired in his capacity to appreciate the wrongfulness of his conduct and to conform his actions to the requirements of the law.

At the time of the incident, Yamada was living with his third wife, Puanani Haili, in the Waiākea Uka area near Hilo, on a large property containing a number of houses, including that in which his ex-wife, Carla Russell, her daughter, Rachel DeCambra, and DeCambra's boyfriend lived. There was considerable conflict between the Yamada and Russell households at the time of the homicides, including a dispute over who owned the house in which Russell lived; indeed, a mutual TRO governing the conduct of the Yamadas, on the one hand, and Russell and her daughter, on the other, had been issued.

Yamada did not testify at trial, but Detective Edwin Tanaka of the Hawai'i County Police Department testified that, in the course of the Mirandized statement that Yamada gave him on the day of the incident, Yamada had claimed that he had been sitting on the porch of his house earlier in the day when he had heard Russell and DeCambra laughingly deriding him and his wife with ethnic slurs. Yamada had claimed to have become angry and to have proceeded to his warehouse to retrieve his shotgun and birdshot. Yamada represented to Detective Tanaka that his last recollection prior to killing Russell and DeCambra was walking toward their house, although he did not recall loading the shotgun. Following the deaths, Yamada recalled hearing the

telephone ring inside Russell's house, where he discovered Russell's and DeCambra's bodies.

In support of Dr. Hall's testimony regarding mental disease, disorder, or defect, Yamada sought, pursuant to HRE Rule 803(b)(4), see supra note 4, and HRE Rule 703 (1993), see infra note 11, to introduce a forty-two-minute videotape of Yamada's "reenactment" of the events of September 29, 1996, as he recalled them, into evidence. Dr. Hall had instructed Yamada to "go through the sequence involved in the incident . . . in [the] exact way as he recall[ed] it . . . from his memory, not from what people told him or what he concluded." Dr. Hall testified that the "reenactment" was conducted to aid him in diagnosing Yamada and preparing for trial, and not for purposes of treatment. In addition, he testified that such "reenactments" were "good practice" in the field of forensic psychology.

The circuit court granted Yamada's motion for a jury viewing of the videotape in part and denied it in part. Specifically, the circuit court permitted Yamada to play the videotape for the jury without the audio component. The circuit court ruled that the videotape did not qualify as an exception to the rule against hearsay pursuant to HRE Rule 803(b)(4), but that, even if it did, "the sound should still not be allowed under [HRE] Rule 403." The circuit court was concerned that, "[i]f the videotape is played with sound then the defendant's statement would be the equivalent of testimony . . . not under oath and not subject to cross-examination." The circuit court elaborated upon its ruling as follows:

The danger of allowing the videotape played with sound is that the jury would consider defendant's statements heard from the videotape as testimony even though their true probative value is to explain Doctor Hall's testimony. Therefore, it will be my position that the probative value of the videotape with the sound is substantially outweighed

by the danger of unfair prejudice, misleading or confusing the jury.

Regarding the admissibility of [Yamada's] statements as supporting the basis for Doctor Hall's opinions by way of, um, simply Doctor Hall's testimony, you -- Doctor Hall would be able to testify as to those statements provided that -- that the proper Tabieros[v. Clark Equipment Co., 85 Hawai'i 336, 944 P.2d 1279 (1997),] foundation is laid.

Further, regarding the showing of the videotape without sound, if the portions of the videotape shown merely show defendant's conduct not intended as assertions, those . . . portions would not be considered hearsay. On the other hand nonverbal conduct intended as assertions would be hearsay.

Regarding nonverbal conduct intended as assertions, this would be a close call, but, um, with Doctor Hall explaining what [Yamada's] conduct was intended to be rather than [Yamada] orally stating his perceptions and feelings[,] there is a minimal danger that the jury would consider defendant's conduct as shown in the videotape as testimonial in nature. So I'll . . . take the position that Doctor Hall can explain defendant's assertive conduct on the videotape provided also that the proper Tabieros foundation is laid.[⁹]

Accordingly, Yamada played the videotape for the jury without the audio component, while Dr. Hall narrated.

_____After closing arguments, the circuit court instructed the jury regarding first degree murder, pursuant to HRS § 707-701, see supra note 2, second degree murder, pursuant to HRS § 707-701.5, see supra note 6, manslaughter, pursuant to HRS § 707-702(2), see supra note 1, and first degree burglary, pursuant to HRS § 708-810(1)(a), see supra note 8. The circuit court's Special Instruction No. 1. set forth the material elements of first degree murder and directed the jury that it must unanimously decide whether the prosecution had proved all the elements of the offense beyond a reasonable doubt. In

⁹ Thus, although the circuit court ostensibly excluded the audio component of the videotape on the grounds that its probative value was substantially outweighed by the danger of unfair prejudice, irrespective of its admissibility pursuant to HRE Rule 803(b)(4), it appears from the transcripts that the perceived danger of unfair prejudice was that the jury would consider Yamada's statements as proof of the matters asserted (i.e., as substantive evidence), rather than merely as a basis of Dr. Hall's expert testimony. In other words, the circuit court's conclusion that the audio's probative value was substantially outweighed by the danger of unfair prejudice was inextricably linked with its conclusion that the audio constituted inadmissible hearsay.

addition, Special Instruction No. 1 instructed:

If you unanimously find that the prosecution has not proven beyond a reasonable doubt all of the material elements of the offense of Murder in the First Degree, then you are to enter a verdict of not guilty of the offense of Murder in the First Degree. Again, your verdict must be unanimous.

If you unanimously find that [Yamada] has proven by a preponderance of the evidence the affirmative defense of physical or mental disease, disorder or defect excluding criminal responsibility in regard to the offense of Murder in the First Degree, then you are to enter a verdict of not guilty because of a physical or mental disease, disorder or defect excluding criminal responsibility. Again, your verdict must be unanimous.

If and only if you unanimously find beyond a reasonable doubt that the prosecution has proven all of the elements of the offense of Murder in the First Degree, and you also unanimously find that . . . Yamada has not proven by a preponderance of the evidence the affirmative defense of a physical or mental disease, disorder or defect excluding criminal responsibility, you must then determine whether, at the time he caused the death of Carla Russell and Rachel DeCambra, [Yamada] was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. . . .

The Prosecution must prove beyond a reasonable doubt that . . . Yamada was not, at the time he caused the deaths of Carla Russell and Rachel DeCambra, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. If you unanimously find that the prosecution has done so, then you must return a verdict of guilty of Murder in the First Degree

. . . .
If one or more jurors believes or believe that the prosecution has not proven beyond a reasonable doubt that the Defendant Tetsuya Yamada was not, at the time he caused the death of Carla Russell, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation, then you must return a verdict of guilty of Manslaughter based upon extreme mental or emotional disturbance as to the death of Carla Russell

If one or more jurors believes or believe that the prosecution has not proven beyond a reasonable doubt that the Defendant Tetsuya Yamada was not, at the time he caused the death of Rachel DeCambra, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation, then you must return a verdict of guilty of Manslaughter based upon extreme mental or emotional disturbance as to the death of Rachel DeCambra

(Emphases added.) The jury's verdict found Yamada guilty of two separate and distinct manslaughter offenses under Count I and not guilty of first degree burglary as charged in the amended complaint, see supra note 7.

II. STANDARDS OF REVIEW

A. Statutory Interpretation

We review the circuit court's interpretation of a statute de novo. State v. Pacheco, 96 Hawai'i 83, 94, 26 P.3d 572, 583 (2001). Our statutory construction is guided by established rules:

When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .

In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.

. . . This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2) (1993).

Id. at 94-95, 26 P.3d at 583-84 (some citations and internal quotation marks added and some in original) (brackets in original).

Coon v. City and County of Honolulu, 98 Hawai'i 233, 245, 47 P.3d 348, 360 (2002).

B. Jury Instructions

We review the circuit court's jury instructions to determine whether, "when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent or misleading." State v. Valentine, 93 Hawai'i 199, 203, 998 P.2d 479, 483 (2000) (citations and internal quotations signals omitted).

[E]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.

[E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error may have contributed to conviction. If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been

based must be set aside.
Id. (citations and internal quotation marks omitted).

State v. Hironaka, 99 Hawai'i 198, 204, 53 P.3d 806, 812 (2002)
(brackets in original). Moreover,

Inasmuch as "the ultimate responsibility properly to instruct the jury lies with the [trial] court," if trial or appellate counsel fail to raise an objection to an erroneous jury instruction as to which there is a reasonable possibility of contribution to the defendant's conviction and which, consequently, cannot be harmless beyond a reasonable doubt, then the instruction, by its very nature, has affected the defendant's substantial rights -- to wit, his or her constitutional rights to a trial by an impartial jury and to due process of law -- and, therefore, may be recognized as plain error. Id. at 205, 998 P.2d at 485 (citations omitted); see State v. Jenkins, 93 Hawai'i 87, 101, 997 P.2d 13-27 (2000) ("We may recognize plain error when the error committed affects substantial rights of the defendant.") (Quoting State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997)); 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."); see also State v. Haanio, 94 Hawai'i 405, 414-16, 16 P.3d 246, 255-57 (2001) (distinguishing plain from harmless error in the context of jury instructions regarding included offenses).

State v. Rapoza, 95 Hawai'i 321, 326, 22 P.3d 968, 973 (2001)
(brackets in original). More specifically,

With respect to jury instructions, "[i]t is a grave error to submit a [criminal] case to a jury without accurately defining the offense charged and its elements. Accordingly, the jury may not be instructed in a manner that would relieve the prosecution of its burden of proving every element of the offense charged." State v. Jenkins, 93 Hawai'i 87, 108, 997 P.2d 13, 34 (2000) (citations and footnote omitted). Further, "where . . . the jury has been given instructions on a defense other than an affirmative defense,[] but has not been instructed that the prosecution bears the burden of proof beyond a reasonable doubt with respect to negating that defense, substantial rights of the defendant may be affected and plain error may be noticed." Raines v. State, 79 Hawai'i 219, 225, 900 P.2d 1286, 1292 (1995); see also HRS § 701-115 (1993).

State v. Jones, 96 Hawai'i 161, 168, 29 P.3d 351, 358 (2001)
(brackets and ellipsis points in original).

C. Admissibility Of Evidence

The admissibility of evidence requires different standards of review depending on the particular rule of evidence at issue. State v. Pulse, 83 Hawai'i 229, 246, 925 P.2d 797, 814 (1996).

When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard. However, the traditional abuse of discretion standard should be applied in the case of those rules of evidence that require a "judgment call" on the part of the trial court.

Id. at 246-47, 925 P.2d at 814-15 (citations omitted).

State v. Torres, 85 Hawai'i 417, 421, 945 P.2d 849, 853 (App. 1997).

We review the admissibility of evidence pursuant to HRE Rule 803 under the right/wrong standard, because "[t]he requirements of the rules dealing with hearsay are such that application of the particular rules can yield only one correct result." State v. Moore, 82 Hawai'i 202, 217, 921 P.2d 122, 137 (1996); accord State v. Samonte, 83 Hawai'i 507, 534, 928 P.2d 1, 28 (1996); State v. Jhun, 83 Hawai'i 472, 477-78, 927 P.2d 1355, 1360-61 (1996).

However, a trial court's balancing of the probative value of [hearsay] evidence against the prejudicial effect of such evidence under HRE Rule 403 (1993) is reviewed for abuse of discretion. See id. An abuse of discretion occurs when the court "clearly exceeds the bounds of reason or disregards rules or principles of law to the substantial detriment of a party litigant." State v. Furutani, 76 Hawai'i 172, 179, 873 P.2d 51, 58 (1994) (citations omitted).

Torres, 85 Hawai'i at 421, 945 P.2d at 853 (footnote omitted).

D. Plain Error

"We may recognize plain error when the error committed affects substantial rights of the defendant.'" State v. Jenkins, 93 Hawai'i 87, 101, 997 P.2d 13, 27 (2000) (quoting State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997)). See also 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.").

III. DISCUSSION

A. The Circuit Court's Special Instruction No. 1 Was Plainly Erroneous In That It Deprived Yamada Of His Constitutional Right To A Unanimous Verdict.

HRS § 707-702(1) (1993) proscribes the offense of manslaughter, which a person commits if he or she "recklessly cause[s] the death of another person" or "intentionally causes another person to commit suicide." Pursuant to HRS § 707-702(3) (Supp. 2001), the offense of "[m]anslaughter is a class A felony," for which the punishment is "an indeterminate term of imprisonment of twenty years without the possibility of suspension of sentence or probation." HRS § 706-659 (1993 & Supp. 2001). The prosecution did not charge Yamada with the offense of manslaughter. Rather, the prosecution pursued a two-fold strategy. First, in Count I, it sought to convict Yamada of first degree murder, pursuant to HRS § 707-701(1)(a), see supra note 2, and argued to the jury that he had "intentionally or knowingly caus[ed] the death of . . . [m]ore than one person in the same or separate incident." Second, and as a backup position, it charged Yamada in Counts II and III with two separate instances of second degree murder, in violation of HRS § 707-701.5, see supra note 5, on the basis that Yamada had, as a result of separate and distinct states of mind, intentionally or knowingly caused Carla Russell's and Rachel DeCambra's deaths, respectively.

However, HRS § 707-702(2), see supra note 1, provided Yamada with "a defense [(singular)], which[,]" "[i]n a prosecution [(singular)] for murder in the first and second degrees . . . ," "reduces the offense [(singular)] to manslaughter[.]" Cf. HRS § 701-115 (1993) (if the defendant presents evidence of "a fact or set of facts" that constitute a

defense and the defense is not an affirmative defense, then "the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in the light of any contrary prosecution evidence, raises a reasonable doubt as to the defendant's guilt"); see also HRS § 702-205 (1993) ("[t]he elements of an offense are such . . . (2) attendant circumstances . . . as . . . [n]egative a defense"); State v. Jones, 96 Hawai'i 161, 168 n.10, 29 P.3d 351, 358 n.10 (2001) ("An affirmative defense is not one that the prosecution is required to negative as an element of the offense. See State v. Anderson, 58 Haw. 479, 484-85, 572 P.2d 159, 163 (1977)."); HRS § 701-114 (1993) ("[e]xcept as otherwise provided in [HRS §] 701-115, no person may be convicted of an offense unless" the prosecution "prove[s] beyond a reasonable doubt . . . [e]ach element of the offense"); State v. Whiting, 88 Hawai'i 356, 360-61, 966 P.2d 1082, 1086-87 (1998); State v. Holbron, 80 Hawai'i 27, 43, 904 P.2d 912, 928 (1995). Thus, in order to convict Yamada of the offense of first degree murder, the prosecution bore the burden of proving beyond a reasonable doubt, inter alia, that Yamada was not under the influence of EMED for which there was a reasonable explanation at the time he caused Russell's and DeCambra's deaths. See HRS § 707-702(2), supra note 1; Whiting, 88 Hawai'i at 359-60, 966 P.2d at 1085-86; Holbron, 80 Hawai'i at 43, 904 P.2d at 928.

The jury's verdict (which never reached Counts II and III) convicting Yamada of two separate and distinct manslaughter offenses under the umbrella of Count I, reflects, of necessity, that the prosecution failed to carry the foregoing burden. In other words, pursuant to the circuit court's instructions, most notably Special Instruction No. 1, the jury -- or one or more of its members -- must have harbored a reasonable doubt with respect

to whether Yamada, at the time he intentionally or knowingly caused Russell's and DeCambra's deaths, was under the influence of EMED. Cf. Whiting, 88 Hawai'i at 360, 966 P.2d at 1086 (jury's verdict convicting defendant of offense of manslaughter by reason of EMED "established" that "the jury concluded beyond a reasonable doubt that [the defendant] intentionally or knowingly caused [the victim's] death," but that "the prosecution failed to negative [defendant's] EMED defense" and, thus, "that the prosecution failed to prove all the material elements of the offense of murder in the second degree"). But therein lies the rub. By directing the jury to find Yamada guilty of manslaughter "if one or more jurors believes or believe that the prosecution has not proven beyond a reasonable doubt that" Yamada was not under the influence of EMED for which there is a reasonable explanation, Special Instruction No. 1 potentially allowed a single juror to highjack the proceedings and strong-arm the other eleven panel members into returning a verdict convicting Yamada of manslaughter.

"[T]he right of an accused to a unanimous verdict in a criminal prosecution, tried before a jury in a court of this state, is guaranteed by article I, sections 5 and 14 of the Hawai'i Constitution.' [State v.] Arceo, 84 Hawai'i [1,] 30, 928 P.2d [843,] 872 [(1996)]." Jones, 96 Hawai'i at 169, 29 P.3d at 359 (some brackets added and some in original) (footnote omitted). "[T]he teaching of Arceo is that the jury must achieve unanimity as to each material element of a criminal offense before it can find a defendant guilty. The unanimity requirement is an essential part and parcel of the jury's formulation of its guilty verdict[.]'" State v. Jenkins, 93 Hawai'i 87, 113, 997 P.2d 13, 39 (2000) (quoting State v. Tanaka,

92 Hawai'i 675, 680, 994 P.2d, 607, 612 (App. 1999)) (some brackets added and some in original) (emphasis deleted).

The negating of Yamada's mitigating EMED defense being a material element of the offense of first degree murder, as charged in Count I, see HRS § 702-205; Whiting, 88 Hawai'i at 360, 966 P.2d at 1086, jury unanimity was a prerequisite to returning any verdict in connection with that count. And yet the circuit court's Special Instruction No. 1 expressly directed the jury to convict Yamada of manslaughter if a single juror believed that the prosecution had failed to negative the mitigating defense. In this respect, the circuit court's Special Instruction No. 1 was obviously erroneous. Because it is impossible to determine whether the jury was or was not unanimous with respect to its manslaughter verdicts, and, thus, "there is a reasonable possibility" that the erroneous instruction "contributed to" Yamada's convictions, see State v. Culkin, 97 Hawai'i 206, 219, 35 P.3d 233, 246 (2001), Yamada's substantial rights were of necessity substantially affected, and the instruction was prejudicially and plainly erroneous. That being so, and because we have no way of knowing whether the jury unanimously acquitted Yamada of first degree murder, as charged in Count I, there is no alternative but to vacate Yamada's convictions and remand this matter to the circuit court for a new trial as to first degree murder, as charged in Count I, and second degree murder, as charged in Counts II and III. Cf. State v. Miyashiro, 90 Hawai'i 489, 499, 979 P.2d 85, 95 (App. 1999) ("[I]f the jurors unanimously agreed that all the elements of the charged offense have been proved beyond a reasonable doubt but are unable to reach unanimous agreement as to the affirmative defense . . . , no unanimous verdict can be reached as to the

charged offense because some jurors would vote for conviction and others for acquittal. In such instance, a mistrial would have to be declared due to the hung jury.”).

Although the foregoing disposition is outcome-dispositive of the present appeal, we address two additional points of error raised by Yamada in order to provide the guidance to the circuit court and the parties on remand that would be necessary to avoid further grievous error. See Culkin, 97 Hawai'i at 219, 35 P.3d at 246; State v. Davia, 87 Hawai'i 249, 252, 953 P.2d 1347, 1350 (1998).

B. The Plain And Unambiguous Language of HRS § 707-702(2) Does Not, In A Prosecution For First Degree Murder Predicated Upon An Alleged Violation Of HRS § 707-701(1)(a), Permit Multiple Manslaughter Convictions, As A Function Of The Number Of Victims, In The Event The Jury Finds That The Prosecution Has Failed To Carry Its Burden Of Proving Beyond A Reasonable Doubt That The Defendant, At The Time That He Or She Caused The Multiple Deaths, Was Not Under The Influence Of EMED.

The jury's verdict, being derivative of Count I (which charged first degree murder), reflects, of necessity, that Yamada bore but a single intent to commit a single offense. See, e.g., Whiting, 88 Hawai'i at 360, 966 P.2d at 1086; cf. State v. Ganal, 81 Hawai'i 358, 381, 917 P.2d 370, 393 (1996) (jury's verdict convicting defendant of first degree murder pursuant to HRS § 707-701(1)(a) "necessarily included a finding that [the defendant] possessed a single intent to kill all the specific group of victims named" in the count charging the defendant with first degree murder); Briones v. State, 74 Haw. 442, 454-56, 848 P.2d 966, 973-74 (1993) (distinguishing state of mind requisite to first degree murder from that requisite to second degree murder). Thus, the jury's verdict in this matter "absolved" Yamada "from penal liability for [first degree] murder," but

found him criminally culpable as if he had committed a class A felony, to wit, as if he had committed the offense of manslaughter proscribed by HRS § 707-702(1).

Be that as it may, the plain and unambiguous language of HRS § 707-702(2) does not, in a prosecution for first degree murder predicated upon an alleged violation of HRS § 707-701(1)(a), permit multiple manslaughter convictions, as a function of the number of victims, in the event the jury finds that the prosecution has failed to carry its burden of proving beyond a reasonable doubt that the defendant, at the time that he or she caused the multiple deaths, was not under the influence of EMED. Rather, HRS § 707-702(2) expressly provides, plainly and unambiguously, that one charged murder offense -- be it first or second degree -- may be mitigated to one manslaughter conviction: "[i]n a prosecution for murder in the first and second degrees it is a defense, which reduces the offense to manslaughter, that the defendant was . . . under the influence of extreme mental or emotional disturbance[.]" (Emphasis added.)

A "cardinal" canon of statutory construction is that this court "cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts." State v. Dudoit, 90 Hawai'i 262, 271, 978 P.2d 700, 709 (1999) (quoting State v. Buch, 83 Hawai'i 308, 326, 926 P.2d 599, 617 (1996) (Levinson, J., concurring and dissenting) (quoting State v. Meyer, 61 Haw. 74, 78, 595 P.2d 288, 291 (1979))). This is because "[w]e do not legislate or make laws." Dudoit, 90 Hawai'i at 271, 978 P.2d at 709 (citations omitted). Accordingly, "[e]ven where the [c]ourt is convinced in its own mind that the Legislature really meant and intended something not expressed by the phraseology of the Act, it has no authority to

depart from the plain meaning of the language used.” Id. (citations and emphasis omitted); see also id. at 270 n.8, 978 P.2d at 708 n.8 (“[A]s Justice Ramil himself [has] aptly observed, as author of this court’s opinion in State v. Richie, 88 Hawai’i 19, 30, 960 P.2d 1227, 1230 (1998), “[i]t is a cardinal rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond that language for a different meaning. Instead, our sole duty is to give effect to the statute’s plain and obvious meaning.’” (Citations omitted.) (Some brackets added and some in original.)). Because the language of HRS § 707-702(2) is plain and unambiguous, “our only duty is to give effect to its plain and obvious meaning,” State v. Ontai, 84 Hawai’i 56, 59, 929 P.2d 69, 72 (1996) (quoting State v. Toyomura, 80 Hawai’i 8, 18, 904 P.2d 893, 903 (quoting State v. Ramela, 77 Hawai’i 394, 395, 885 P.2d 1135, 1136 (1994))) (emphasis added), rather than, as the dissent undertakes, to assign a meaning to HRS § 707-702(2) that is satisfactory to it but is unsupported by anything other than its own wistful thinking.

Inexplicably, the dissent asserts that the statute’s plain language “provides little assistance” as to whether a single first degree murder charge, alleging that the defendant caused the deaths of more than one person, can be bifurcated, by virtue of the prosecution’s failure to negate an EMED defense, into multiple manslaughter convictions predicated upon the number of people whom the defendant killed. Dissenting opinion at 7. The statute quite expressly provides that it cannot. Inasmuch as the statute’s language is plain, clear, and unambiguous, our inquiry regarding its interpretation should be at an end. See,

e.g., State v. Valdivia, 95 Hawai'i 465, 472, 24 P.3d 661, 668 (2001) (reiterating that this court must give effect to the plain meaning of a statute's unambiguous language and that resort to legislative history is an interpretive tool "[i]n construing an ambiguous statute") (emphasis added); State v. Rauch, 94 Hawai'i 315, 322-23, 13 P.3d 324, 331-32 (2000) (same); see also Dudoit, 90 Hawai'i at 270-71, 978 P.2d at 708-09; Ritchie, 88 Hawai'i at 30, 960 P.2d at 1230; Ontai, 84 Hawai'i at 59-60, 929 P.2d at 72-73; Toyomura, 80 Hawai'i at 18-19, 904 P.2d at 903-04.

The dissent predicates its belief that the statute's plain language "does not preclude multiple convictions of manslaughter" arising out of a single first degree murder charge upon the fiction that, "[w]hile HRS § 707-702(2) operates 'to reduce[] the offense to manslaughter,' the statute does not address the manner in which such a reduction is executed." Dissenting opinion at 7 (emphasis and brackets in original). Thus, in the guise of resolving the "manner" by which a first degree murder charge is "reduced" to "the offense [singular] of manslaughter," the dissent turns to "the statutory scheme to ascertain legislative intent" underlying HRS § 707-702(2). The statutory scheme that the dissent finds relevant, however, simply does not support the conclusion that the dissent reaches.

The dissent posits that "[t]he legislature created the offense of 'murder in the first degree[]' . . . to impose a more severe sentence upon those who kill multiple persons in the same or separate incidents" than those who intentionally or knowingly kill a single person. Id. at 8. We do not disagree with this proposition. But the dissent then extrapolates from this rather self-evident observation that it is "absurd" not to construe HRS § 707-702(2) in such a fashion as to permit -- by some alchemic

process of cell division -- a single charge of first degree murder to bifurcate into multiple convictions of the "mitigated" offense of manslaughter due to EMED. Id. at 8-10. With this proposition we cannot agree.

HRS § 707-701(1)(a) itself describes but a single offense that presupposes the deaths of multiple victims and does not predicate the severity of the resulting punishment upon the particular number of persons whom the jury determines the defendant has killed. See Ganai, 81 Hawai'i at 381, 917 P.2d at 393; Briones, 74 Haw. at 454-56, 848 P.2d at 973-74. Be it two people or twenty, the punishment flowing from a violation of HRS § 707-701(1)(a) does not vary as a function of the number of victims. See HRS § 706-656(1) (1993) ("[p]ersons convicted of first degree murder and attempted first degree murder shall be sentenced to life imprisonment without possibility of parole").

The dissent believes that to interpret HRS § 707-702(2) "to preclude more than one conviction of manslaughter due to EMED where a defendant has in fact killed more than one person[] would be to construe [the statute] in a manner inconsistent with [the] clear legislative intent [of HRS § 707-701(1)(a)] to impose a more severe punishment for those found guilty of first degree murder[]" than for those found guilty of second degree murder. Dissenting opinion at 8 (footnote omitted). One of the many flaws in the foregoing reasoning is that a defendant whose criminal culpability is reduced pursuant to HRS § 707-702(2) has not been found guilty of first degree murder. Because HRS § 707-702(2) sets forth a defense that the prosecution must negate beyond a reasonable doubt in order to convict a defendant of first degree murder, its failure to do so acquits the defendant of that offense. As such, the legislature's obvious intent to

punish convicted first degree murderers more severely than convicted second degree murderers is irrelevant to Yamada.

A second flaw in the dissent's terse rationale lies in its disregard of the clear legislative intent underlying HRS § 707-702(2) to sentence defendants convicted of manslaughter due to EMED more leniently than those convicted of murder. Indeed, the commentary on HRS § 707-702(2) expressly states that the defense set forth in HRS § 707-702(2) "mitigates" the defendant's culpability due to the fact that, although he or she acted intentionally or knowingly, he or she formulated the requisite state of mind and acted upon it while under the influence of extreme mental or emotional disturbance that caused him or her temporarily to lose self-control, thereby rendering his or her "state of mind . . . less culpable." Commentary on HRS § 707-702(2); see also Holbron, 80 Hawai'i at 42, 904 P.2d at 927 (quoting State v. Pinero, 70 Haw. 509, at 524, 778 P.2d 704, 714 (1989)); State v. Matias, 74 Haw. 197, 204-206, 840 P.2d 374, 378 (1992); State v. Russo, 69 Haw. 72, 77-79, 734 P.2d 156, 159-60 (1987).

A third and perhaps the most basic flaw in the dissent's reasoning is that it is grounded in a non sequitur. The dissent's conclusory pronouncement that,

[i]t is inconceivable that successful prosecution of all the elements for murder in the first degree (save negating an EMED defense)[] would result in only one conviction for manslaughter when successful prosecution of all the elements for two counts of murder in the second degree (save negating an EMED defense) would result in two convictions for manslaughter[,]

dissenting opinion at 8-9, simply does not follow from its self-evident observation that HRS § 707-701(1)(a) was designed "to impose a more severe sentence upon those who kill multiple persons in the same or separate incidents." Id. at 8. At most,

the dissent identifies an anomaly, which is but one of several embedded in HRS ch. 707, pt. II -- the statutory scheme relating to "criminal homicide." For example, pursuant to HRS § 706-656(1) (1993), had Yamada been convicted of first degree murder as charged in Count I, he would have been subject to one mandatory sentence of life imprisonment without the possibility of parole. However, had the jury acquitted Yamada of first degree murder but convicted him of the two counts of second degree murder charged in Counts II and III, he would have been subject, pursuant to HRS § 706-656(2) (Supp. 2001), to two mandatory sentences of life imprisonment with the possibility of parole, which, pursuant to HRS § 706-668.5 (1993), the sentencing court could impose concurrently or consecutively in its discretion. See State v. Tauiliili, 96 Hawai'i 195, 199, 29 P.3d 914, 918 (2001) (citing State v. Gaylord, 78 Hawai'i 127, 146, 890 P.2d 1167, 1186-87 (1995)). Moreover, pursuant to HRS § 706-657 (Supp. 2001), had Yamada been convicted of the two counts of second degree murder charged in Counts II and III, had the counts alleged that the murders were "especially heinous, atrocious, or cruel, manifesting exceptional depravity," and had the trier of fact found that the prosecution had proved the same beyond a reasonable doubt, Yamada could have been sentenced to two consecutive terms of life imprisonment without the possibility of parole instead of the one that he would be serving had he been convicted of first degree murder, as charged in Count I. See State v. Peralto, 95 Hawai'i 1, 5, 18 P.3d 203, 207 (2001); State v. Young, 93 Hawai'i 224, 234, 236, 999 P.2d 230, 240, 242 (2000); State v. Janto, 92 Hawai'i 19, 32-35, 986 P.2d 306, 319-22 (1999). Such a result may be anomalous and in tension with the legislature's intent to "impose more severe sentences" for

first degree murder; it is, however, not only not "inconceivable," but it is entirely possible and certainly not "absurd."

In the present case, the plain and unambiguous language of HRS § 707-702(2) mitigates the consequence of the single offense with which Yamada was charged and which the jury considered -- intentionally or knowingly causing the death of more than one person in the same or separate incident -- from a single term of life imprisonment without the possibility of parole, see HRS § 705-656(1), to a single non-probationable indeterminate twenty-year term of imprisonment, see HRS § 706-659 (Supp. 2001). In other words, deriving as it does from a single charge of first degree murder, Yamada's culpability under HRS § 707-702(2) cannot fluctuate as a function of the number of people killed any more than it could have had Yamada been convicted of the charged offense. The point is that a person charged with only one offense may be convicted of only one offense. To hold otherwise is to distort the plain meaning of HRS § 707-702(2), not to mention orthodox and elementary principles of statutory construction, and to engage in judicial legislation of the most egregious kind.

Because there is no "absurdity" in giving effect to the plain and unambiguous meaning of HRS § 707-702(2), we hold that the statute precludes multiple manslaughter convictions based on a single count charging first degree murder. If the legislature wishes to amend HRS § 707-702(2) to allow for multiple manslaughter convictions flowing from a charge of first degree murder, pursuant to HRS § 707-701(1)(a), it is free to do so. But because it has not (and, a fortiori, had not as of the time Yamada committed the offense at issue), the circuit court plainly

erred, as Yamada argues, in submitting two "manslaughter-due-to-extreme-mental-or-emotional-disturbance" verdict forms to the jury and, consequently, in sentencing Yamada for the commission of two manslaughter offenses. Accordingly, we hold that Yamada can be subject to only one manslaughter conviction resulting from a charge of first degree murder pursuant to HRS § 707-701(1)(a).

C. Statements Made Solely For The Purpose Of Diagnosis, If Reasonably Pertinent To Diagnosis, Are Excepted From The Rule Against Hearsay Pursuant to HRE Rule 803(b)(4).

Finally, the circuit court incorrectly concluded that Yamada's videotaped reenactment did not qualify, pursuant to HRE Rule 803(b)(4), as an exception to the rule against hearsay,¹⁰ on the basis that it was not made for the purpose of treatment. HRE Rule 803(b)(4) excepts from the general prohibition against hearsay, statements made "for purposes of medical diagnosis or treatment . . . insofar as reasonably pertinent to diagnosis or treatment." (Emphases added.) Thus, by its plain language, HRE Rule 803(b)(4) permits, contrary to the circuit court's belief, the admission of statements made solely for the purpose of diagnosis, insofar as reasonably pertinent to diagnosis, even if made in anticipation of litigation.

This exception, which is identical with Fed[eral] R[ule] [of] Evid[ence] (FRE) Rule] 803(4), liberalizes the common-law rule that admitted only statements made for the purpose of medical treatment, see, e.g., Cozine v. Hawaiian Catamaran, 49 H[aw]. 77, 412 P.2d 669 (1966). Statements made for purposes of treatment are admitted "in view of the patient's strong motivation to be truthful." [FRE Rule] 803(4), Advisory Committee's Note. Statements made for diagnostic purposes only, while not similarly motivated, would be recited in any event by a testifying physician

¹⁰ "[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted[,]" HRE Rule 801 (1993), "is not admissible except as provided by [the HRE], or by other rules proscribed by the Hawaii supreme court, or by statute." HRE Rule 802 (1993).

under Rule 703.^[11] Were these statements not substantively admissible, a limiting instruction would be necessary, and "[t]he distinction thus called for [is] one most unlikely to be made by juries." Advisory Committee's Note, supra. This difficulty is avoided by providing for substantive admissibility of all "reasonably pertinent" statements made for purposes of treatment or diagnosis.

Commentary on HRE Rule 803. See also United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993) (recognizing that FRE Rule 803(4) "'abolished the [common-law] distinction between the doctor who is consulted for the purpose of treatment and an examination for the purpose of diagnosis only; the latter usually refers to a doctor who is consulted only in order to testify as a witness.'" (quoting Morgan v. Foretich, 846 F.2d 941, 950 (4th

¹¹ HRE Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

In addition, HRE Rule 705 provides:

The expert may testify in terms of opinion or inference and give the expert's reasons therefor without disclosing the underlying facts or data if the underlying facts or data have been disclosed in discovery proceedings. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Thus, HRE Rules 703 and 705 do not address the admissibility of evidence per se, as both Yamada and the circuit court apparently believed, but merely permit an expert witness to reveal

the contents of the materials upon which he or she has reasonably relied -- hearsay though they may be -- in order to explain the basis of his or her opinion, provided, of course, that (1) the expert has actually relied on the material as a basis of the opinion, (2) the materials are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," and (3) the materials do not otherwise "indicate lack of trustworthiness."

Tabieros, 85 Hawai'i at 384, 944 P.2d at 1327.

Cir. 1988) (quoting United States v. Iron Shell, 633 F.2d 77, 83 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981))); Gong v. Hirsch, 913 F.2d 1269, 1273-74 (7th Cir. 1990) (recognizing the foregoing).

Accordingly, Yamada's videotaped reenactment of his role in the events of September 29, 1996, upon which Dr. Hall relied for the purpose of diagnosing Yamada and which he testified was "good practice" in the field of forensic psychology, qualified as an exception to the rule against hearsay, pursuant to HRE Rule 803(b)(4).

Of course, the fact that evidence qualifies as an exception to the rule against hearsay pursuant to HRE Rule 803(b)(4) does not preclude the trial court from excluding the evidence, or a portion thereof, pursuant to HRE Rule 403, assuming that the trial court properly weighs the evidence's probative value against the danger of unfair prejudice. We express no opinion regarding the circuit court's HRE Rule 403 balancing in the present matter, however, because it appears from the transcripts that the circuit court's conclusion that the audio's probative value was substantially outweighed by the danger of unfair prejudice was inextricably intertwined with its misunderstanding of HRE Rules 703 and 803(b)(4), see supra notes 9 and 11. Therefore, we believe that it is prudent to allow the circuit court to reconsider the matter in light of our clarification of HRE Rules 703, 705, and 803(b)(4) in the present opinion.

IV. CONCLUSION

In light of the foregoing, we vacate the circuit court's judgment of conviction and sentence, filed on April 12, 1999, and remand the case for further proceedings consistent with this opinion.

On the briefs:

Linda C.R. Jameson,
Deputy Public Defender,
for the defendant-appellant,
Tetsuya Yamada

Michael S. Kagami, Deputy
Prosecuting Attorney,
for the plaintiff-appellee,
State of Hawai'i