IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Plaintiff--Appellee

vs.

BYRAN UYESUGI, Defendant-Appellant

NO. 23805

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-2203)

DECEMBER 26, 2002

MOON, C.J., LEVINSON, AND NAKAYAMA, JJ., AND
ACOBA, J., CONCURRING SEPARATELY, WITH WHOM RAMIL, J., JOINS

OPINION OF THE COURT BY NAKAYAMA, J.

Defendant-appellant Byran Uyesugi appeals from the judgment of the first circuit court, the Honorable Marie N. Milks presiding, convicting Uyesugi of murder in the first degree in violation of Hawaiʻi Revised Statutes (HRS) § 707-701 (1993)[1] and attempted murder in the second degree in violation of HRS §§ 705-500 (1993)[2] and 707-701.5 (1993).[3] On appeal, Uyesugi argues

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

[2] HRS § 705-500 provides:

> (1) A person is guilty of an attempt to commit a crime if the person:
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.
> (2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with

that: (1) the circuit court erred when it failed to instruct the jury on the legal definition of the terms "appreciate" and "wrongfulness"; (2) the circuit court's verdict unanimity instruction violated his right to a unanimous jury verdict because it was prejudicially insufficient and misleading; (3) the circuit court erred when it failed sua sponte to intervene when the prosecution (a) described the victims' families, hobbies, and characteristics, and (b) obtained testimony from the family members of the victims describing personal details about the victim's lives; (4) the circuit court erred when it permitted the prosecution to introduce (a) an exhibit containing a picture of the twenty-four weapons he owned but were not used in the shooting, and (b) expert testimony about the characteristics of the weapons in the absence of an objection from defense counsel; and (5) he was deprived of effective assistance of counsel. We hold that: (1) as a matter of plain error analysis, defense counsel having failed to object to the jury instructions in which the term "appreciate" and "wrongfulness" were not defined, Uyesugi has failed to establish that his substantial rights were violated; (2) the unanimity instructions were not prejudicially insufficient or misleading; (3) the circuit court did not commit plain error when it did not, sua sponte, order the prosecution

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

[3] HRS § 707-701.5(1) provides that "[e]xcept as provided in section 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."

not to (a) allude to the characteristics of the victims in opening statements or (b) introduce testimony of victims' family members; (4) the circuit court did not commit plain error when, without objection, it allowed the introduction of one picture of the defendant's weapons and permitted the testimony of a weapons expert; and (5) Uyesugi did not receive ineffective assistance of counsel through the pretrial and trial proceedings.

I. BACKGROUND

On November 9, 1999, Uyesugi was indicted on one charge of first degree murder for the shooting deaths of seven individuals, seven counts of murder in the second degree, and one count of attempted murder in the second degree. Witnesses testified that Uyesugi was an employee of the Xerox Corporation, and that on November 2, 1999 he arrived at work in time for an 8:00 a.m. "work group" meeting. Two of the seven victims were in the meeting room when witnesses heard a loud explosion, saw the two victims shot, and observed Uyesugi crouched with a gun in his hand. Two other witnesses testified to hearing the loud explosions and discovering the remaining five victims. Uyesugi surrendered without further incident after a standoff with the police lasting several hours.

A. Jury instructions regarding the affirmative defense of physical or mental disease, disorder or defect excluding penal responsibility.

Jury instruction number 26, originally proposed by the prosecution, provided that:

> It is an affirmative defense to a criminal charge that, at the time of the offense, the Defendant was not criminally responsible for his conduct.
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> The Defendant is not criminally responsible for his conduct if it is more likely than not or more probable than not that, at the time of the charged offense(s) and as a

> result of a physical or mental disease, disorder or defect, the Defendant lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.
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> A person "lacks substantial capacity" either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law if his capacity to do so has been extremely limited by physical or mental disease, disorder or defect. The phrase "lack of substantial capacity" does not mean a total lack of capacity. It means capacity which has been impaired to such a degree that only an extremely limited amount remains. The term "physical or mental disease, disorder or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.
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> You must return a verdict of not guilty by reason of physical or mental disease, disorder or defect which excludes criminal responsibility if you find by a preponderance of evidence, that is, that it is more likely or more probable than not, that, at the time of the charged offense, 1) the Defendant was suffering from a physical or mental disease, disorder, or defect, and 2) that as a result of such physical or mental disease, disorder or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

Defense counsel withdrew their requested instructions on the affirmative defense of physical or mental disease, disorder, or defect excluding criminal responsibility on June 1, 2000. The withdrawn instructions did not provide definitions of "appreciate" or "wrongfulness." The circuit court also instructed that "[u]nless otherwise provided, the words used in these instructions shall be given their usual sense and in connection with the context in which they appear."

B. Jury unanimity instructions

The circuit court provided unanimity instructions. The prosecution's proposed instruction number 1, regarding first degree murder, was given over the defendant's objection. That instruction provided that "[i]n order to find that the prosecution has proven the first element, you must find that the Defendant caused the deaths of two or more of the people

specified. Your decision as to each death must be unanimous." Instructions regarding murder in the second degree were given by agreement: "However, if and only if you find the Defendant not guilty in Count I of the offense of Murder in the First Degree, or if you are unable to reach a unanimous verdict as to this offense, then you must consider whether the Defendant is guilty or not guilty in Counts II through and including Count VIII of Murder in the Second Degree." The court's instruction number 17, given by agreement, provided that "[a] verdict must represent the considered judgment of each juror, and in order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous." The court's instruction number 18 was given by agreement; it provided that, "[d]uring your deliberations, you must not discuss this case with any person other than your fellow jurors. You must not reveal to the court or to any other person how the jury stands, numerically or otherwise, until you have reached a unanimous verdict and it has been received by the court." Instruction number 29, given by agreement provided that "[i]f and only if you find the Defendant not guilty in Count I of the offense of Murder in the First Degree, or you are unable to reach a unanimous verdict as to that offense then you may bring in one of the following verdicts[.]" The circuit court instructed that if the defendant "has not proved both of these [lack of penal responsibility elements] by a preponderance of the evidence then you must find that this defense does not apply." At the conclusion of instruction number 29 the court reiterated to the jury that "[y]our verdicts must be unanimous." At no time during deliberations did the jury request clarification of any of the instructions.

C. The prosecution's opening statement and witness testimony

During opening statements, the prosecutor referred to the victims and the victims' families. He stated:

> Mel Lee, 58 years old; Waipahu High School; Electronics Institute of Hawaii; married for 18 years, two sons and a daughter; Xerox for 32 years. He was the defendant's boss. Along with the names of each of the victims, I will give you something about them or their life to help connect the two so you will ultimately understand exactly who was there and why they were there.
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> Also was Ford Kanehira, 41 years old; Castle High School, also the Electronics Institute of Hawaii. He had been married for 18 years. He had a son. He had been with Xerox for 19 years. He married, basically, his high school sweetheart. He was 17, she was 14 when they met. They dated for five years. They got married for a quarter of a century of their lives. They had been virtually inseparable until they had a child, and then the three of them were inseparable.
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> Ronny Kataoka, 50 years old; Leilehua High School. He learned his electronic trade at Honolulu Community College, also married his high school sweetheart, married for 25 years. He and his wife also worked for the Xerox Corporation, Lynn. They had a daughter. He had been with Xerox for 27 years. When the National Guard was called up from Hawaii to serve in Vietnam, Ronny was part of the National Guard, and he served. He was a Vietnam veteran. He carried a grenade launcher while he was in Vietnam.
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> Peter Mark, 46 years old; Kaimuki High School, Electronics Institute of Hawaii; married for 16 years, two sons; Xerox for 19 years. He loved everything to do with the ocean. He loved surfing, until he got married with two kids, and then surfing took a sort of a backseat to his love of the ocean [sic]. He was buried at sea within sight of Diamond Head.
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> John Sakamoto, easy person to remember. 36 years old; Kalani High School, Electronics Institute of Hawaii; married for seven years, son and daughter; Xerox for 10 years. Easy to remember because he's the fisherman. Hundreds of pictures of this man with the fish that he caught. When he -- before he joined Xerox, he helped make his own boat, and every weekend, Saturday and Sunday, every vacation it was fishing, fishing, fishing.
>
> Again, that took a backseat after his son and daughter. It was less frequently now, but this was somebody who was on the sea and was actually able to make a living, supplement his income because of his effectiveness as a fisherman in a boat that he helped to build.
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> . . . .
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> Around 8:00 Jason Balatico was in that room. 33 years old; Farrington High School graduate, Healds Institute of Technology; married for ten years, a son and a daughter. That very day he had made his eighth year at the Xerox Corporation.
>
> What you can remember about Jason Balatico is that he

> was a man who was fast and quick at everything he did. He was very fast to smile, sort of a prankster; one of his favorite tricks was to supergluing [sic] a penny on the floor, somebody would try to pick it up for good luck and spend a lot of time trying to pick the penny off the floor.
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> Ron Kawamai, nicknamed the politician, love karaoke. 54 years old; Kaimuki High School; previously married, a son; Xerox for 30 years. He loved socializing, and he loved people.

Defense counsel did not object either during or after the prosecution's opening statements.

The prosecution called six of the wives of the victims to testify and the son of the seventh victim. Excerpts of the questions are provided.

> PROSECUTION: Did you and Mel have any children?
> WITNESS: Yes.
> PROSECUTION: How many did Mel have all together?
> WITNESS: Three.
> . . . .
> PROSECUTION: Could you tell me what was Mel's -- just one thing what was his favorite past time?
> . . . .
> WITNESS: Golfing.

The second witness was asked whether the victim, prior to marriage, enjoyed particular activities and where the victim was buried. Defense counsel objected and the court overruled the objection. The third witness was asked about the victim's fishing business and the boat he built. The fourth witness was asked what hobbies his father enjoyed. The fifth witness was asked why she and her husband had returned to Hawaiʻi and she stated that "[w]e didn't want to deny our children knowing their parents -- God -- grandparents, their cousins, their aunties and uncles." This witness was also asked about pranks the victim liked to play on others, the victim's athletic prowess, and the names and ages of their children. The only objection made by defense counsel was noted above. Defense counsel cross-examined each of these witnesses, asking specific questions in order to

confirm or deny whether Uyesugi's beliefs about each of the victims were delusional. For example, Uyesugi was apparently acting under the delusion that one of his co-workers was an FBI agent. Defense counsel asked the wife of this victim if her husband worked for the FBI and whether he had ever been a federal agent. Of the remaining witnesses, defense counsel asked questions to establish whether any of the victims had discussed Uyesugi with them or if they were aware of the problems Uyesugi was having at work.

D. Testimony and evidence related to Uyesugi's gun collection

The prosecution called Charles Davis, a forensic firearm and toolmark examiner, to testify regarding the twenty-four guns owned by Uyesugi though not used in the shooting and the one gun used in the shooting. Davis testified that the prosecution requested that he identify, classify, and evaluate the weapons. He identified four types of weapons[4] and explained the differences among them. During this testimony, the prosecution offered a picture of the guns into evidence, which the circuit court received. The picture was an 8½ x 11 inch document containing a picture of each of the twenty-four guns. The prosecution then asked Davis to identify every weapon and describe its characteristics.[5] Davis extensively discussed the

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[4] Davis testified that he identified five rifles, two shotguns, nine revolvers, and eight pistols.

[5] For example, while discussing the difference between a .22 and .357 magnum revolver, Davis stated "the next pistol is a Browning model P 35, high power, Belgian pistol. It's a .9 mm caliber, has a five-inch barrel. It's a semiautomatic Belgian, the magazine, which is displayed here with the gun has a capacity of 13 cartridges."

Glock 17,[6] its bullet capacity, and reloading time. Davis concluded his testimony by explaining what a "jacketed hollow-point bullet" is, how this type of bullet functions, and the type of damage to the human body such a bullet will inflict.

II. STANDARD OF REVIEW

A. Harmless error and plain error in the context of jury instructions

"The standard of review for a circuit court's issuance or refusal of a jury instruction is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, inconsistent, or misleading." State v. Aganon, 97 Hawai‘i 299, 302, 36 P.3d 1269, 1272 (2001), reconsideration denied --- Hawai‘i --- (2002). "‘[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.’" State v. Sua, 92 Hawai‘i 61, 69, 987 P.2d 959, 967 (1999).

> 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.

State v. Rapoza, 95 Hawai‘i 321, 326, 22 P.3d 968, 973 (2001). "Whether we review the jury instructions in this case for plain error by the circuit court or as an ineffective assistance of counsel claim, the ultimate question is whether the erroneous

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[6] Uyesugi used the Glock 17, loaded with hollow point bullets in the shooting; 28 casings were recovered.

instructions prejudiced Defendant's rights." State v. Jones, 96 Hawai'i 161, 166, 29 P.3d 351, 356 (2001).

B. Ineffective assistance of counsel

> In assessing claims of ineffective assistance of counsel, the applicable standard is whether, "viewed as a whole, the assistance provided [was] 'within the range of competence demanded of attorneys in criminal cases.'" State v. Antone, 62 Haw. 346, 348, 615 P.2d 101, 104 (1980) (citation omitted).
>
>> General claims of ineffectiveness are insufficient and every action or omission is not subject to inquiry. Specific actions or omissions alleged to be error but which had an obvious tactical basis for benefitting the defendant's case will not be subject to further scrutiny. If, however, the action or omission had no obvious basis for benefitting the defendant's case and it "resulted in the withdrawal or substantial impairment of a potentially meritorious defense," then [it] . . . will be evaluated as . . . information that . . . an ordinary competent criminal attorney should have had.
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> Briones v. State, 74 Haw. 442, 462-63, 848 P.2d 966, 976 (1993) (emphasis in original) (internal citations omitted). The burden of establishing ineffective assistance rests with the petitioner and can only be met by demonstrating specific errors or omissions resulted in the withdrawal or substantial impairment of a meritorious defense. State v. Smith, 68 Haw. 304, 309, 712 P.2d 496, 500 (1986).

State v. Pacheco, 96 Hawai'i 83, 93-94, 26 P.3d 572, 582-83 (2001).

III. DISCUSSION

A. Uyesugi's substantial rights were not violated when the circuit court did not define the terms "appreciate" and "wrongfulness."

Uyesugi argues on appeal that the circuit court plainly erred when it failed to define the terms "appreciate" and "wrongfulness," which resulted in a violation of his right to a fair trial. Because Uyesugi failed to object to the instruction, thereby failing to preserve the issue for appeal, we have

nevertheless concluded that the circuit court did not plainly err because Uyesugi's substantial rights were not affected.

1. The circuit court did not need to define the term "appreciate."

Uyesugi argues that the instructions provided to the jury defining the affirmative defense of mental disease, disorder, or defect excluding penal responsibility (hereinafter "lack of penal responsibility") failed to define "appreciate," thereby depriving him of his right to a fair trial. Because the term was defined differently by the prosecution and defense experts, and because the prosecution argued the wrong definition, Uyesugi asserts that the jurors were left to speculate as to the exact meaning of the term. Uyesugi acknowledges that his trial counsel failed to object to these instructions, but argues that that failure amounted to ineffective assistance of counsel. The jury instructions regarding the defense of lack of penal responsibility could have substantially affected Uyesugi's rights; therefore analysis is appropriate. That analysis reveals that Uyesugi's substantial rights were not affected and that he was not prejudiced by the jury instructions. We hold that the circuit court did not plainly err when it did not define the term "appreciate."

In order to assign error, the Hawaiʻi Rules of Penal Procedure (HRPP) Rule 30(f)[7] requires a party to object to an

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[7] HRPP Rule 30(f) provides in relevant part:

> No party may assign as error the giving or the refusal to give, or the modification of, an instruction, whether settled pursuant to subdivision (b) or subdivision (c), of this rule, unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the

instruction before the jury retires to consider the verdict. State v. Culkin, 97 Hawaiʻi 206, 214, 35 P.3d 233, 241 (2001). Inasmuch as Uyesugi's trial counsel failed to object and appellate counsel is alleging ineffective assistance of counsel, the dispositive issue is whether Uyesugi's substantial rights were prejudiced. This issue, whether the jury instructions were prejudicially insufficient, can be resolved through study of HRS § 704-400(1) (1993),[8] the commentary to that section, the Model

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> objection. Opportunity shall be given to make the objection out of the hearing of the jury. Objections made to instructions at the time they were settled shall be deemed preserved even though not restated after the court has instructed the jury.

See also Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 28(b)(4)(B) which provides:

> (b) Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:
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> . . . .
>
> (4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:
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> . . . .
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> (B) when the point involves a jury instruction, a quotation of the instruction, given, refused, or modified, together with the objection urged at the trial[.]

[8] HRS § 704-400(1) provides:

> A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of law.

Penal Code (MPC), and our own case law.[9] HRS § 704-400(1) employs the phrase "appreciate the wrongfulness of the person's conduct," in place of the original M'Naghten rule that "resolves the problem solely in regard to the capacity of the individual to know what he was doing and to know that it was wrong." MPC, Tentative Drafts Nos. 1-4, Comments § 4.01 at 156 (American Law Institute ed., 1956). The Hawai'i legislature was convinced that the M'Naghten rule did not comport with modern medicine and psychiatry and, therefore, adopted the reasoning and language of the MPC. Hse. Stand. Com. Rep. No. 227, in 1971 House Journal, at 785; see also State v. Moeller, 50 Haw. 110, 116, 433 P.2d 136, 141 (1967) ("While we agree that the M'Naghten rule should have been discarded with the horse and buggy, it is part of our statutory law and as such, as long as we adhere to the rule that the legislature can prescribe rules of evidence, we must adhere to the statute.") (quoting State v. Dhaemers, 150 N.W.2d 61, 66 (Minn. 1967)).

Uyesugi argues that because the standard is no longer whether the defendant knows his act is wrong, the jury instructions should reflect the legislature's concern over the antiquated right/wrong standard and expressly inform the jury that "appreciate conveys a broader sense of understanding than simple cognition." The prosecution generally argues that "appreciate" is commonly used in daily conversation by people of ordinary intelligence and need not be defined. The prosecution

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[9] The Hawai'i Penal Code was adopted and modeled after the MPC; therefore reference to commentary from both Codes is relevant to this discussion. See HPC § 701-105 (stating that "[t]he commentary accompanying this Code shall be published and may be used as an aid in understanding the provisions of this Code, but not as evidence of legislative intent.").

asserts that the fact that the circuit court informed the jury that unless otherwise instructed, words are given their ordinary meaning reinforces its argument that the jury required no specific definition. Defense counsel and the prosecution called experts who testified as to the meaning of the term “appreciate.” This testimony was not dissimilar, but it was also not entirely consistent.

One defense expert, Park Dietz, M.D., stated:

> I use the word appreciate according to the ordinary dictionary definition, and appreciate in my use of it means to accurately weigh or judge. Now, that means having the capacity to estimate accurately; and in particular, a standard for insanity, the capacity to appreciate wrongfulness, I understand to mean the ability to accurately estimate how wrong the crime was.

The second defense expert, Robert Marvit, M.D., stated that “[t]he word appreciate . . . is not simply knowing. Otherwise, why not use the word know. The word appreciate is, in my understanding, the recognition of the greater significance of what’s happening.” Dr. Marvit then stated that “appreciate means to look beyond some kind of a narrow focus of either or, good or bad, right or wrong, this or that. It’s being able to look at the consequence of a behavior.” Based upon these definitions, Uyesugi states that the circuit court’s instructions failed to convey the meaning of the term “appreciate” as applied to the defense of lack of penal responsibility.

The prosecution rebuttal witness defined the term “appreciate” more specifically. For example, the following occurred between the prosecutor and his rebuttal witness, Harold Hall, Ph.D.:

> PROSECUTOR: Can I ask you, in terms of the word appreciate, and when you use that term and when you’re using the test in this case or when you’re giving your opinions on the test in

> this case, when you use that word, can it be or do you feel that it’s synonymous with know or understand or realize?
> WITNESS: Or to know or to realize.

During cross-examination of Dr. Hall, defense counsel asked, “Would you agree that to appreciate wrongfulness of conduct, it’s different from knowing right from wrong?” Dr. Hall stated, “Well, it goes beyond a simple knowing what’s legally right or wrong, yes.” The prosecution’s questioning of its expert witnesses during its case-in-chief indicated that the prosecution used the term “appreciate” interchangeably with the term “know.” For example, the prosecution asked Thomas Cunningham, Ph.D., “What is the significance of [Uyesugi] having a plan as it relates to the question of whether he knows what he’s doing is right or wrong?” The prosecution asked the same witness, “What do you look at to determine whether or not a person knows right from wrong?” The prosecution asked Tom Greene, Ph.D.:

> PROSECUTION: Do you have an opinion as to whether or not the capacity of the defendant to appreciate the wrongfulness of his conduct was substantially impaired by his delusional disorder?
> WITNESS: I have an opinion on that.
> PROSECUTION: What was your opinion?
> WITNESS: No significant impairment.
> PROSECUTION: Can you tell us why you had that opinion, why you did not believe that he knew right from wrong?
> . . . .
> WITNESS: So the question -- are the facts that he appreciated right or wrong behavior basically?

During cross-examination, Dr. Greene was asked whether he was equating “appreciate” with “knowing.” Dr. Greene answered affirmatively. The prosecution asked its expert, Leonard Jacobs, M.D., whether the field of medicine, and psychiatry in particular, provides a “scientific basis for making a decision as to whether somebody knows right from wrong?” During cross-examination, Dr. Jacobs was asked whether there is a difference

between "appreciating" the wrongfulness of conduct and "knowing" the wrongfulness of conduct. Dr. Jacobs answered, "I don't see a difference." During his closing arguments, the prosecution continued to use the term "appreciate" interchangeably with "know."[10] Defense counsel, in his closing argument, also focused on the term "appreciate" and the meaning that should be ascribed to the term.

At the beginning of its instructions, the trial court stated that "[u]nless otherwise provided, the words used in these instructions shall be given their ordinary meaning taken in their usual sense and in connection with the context in which they appear." Because the circuit court did not define the term "appreciate," the jury was left to define the word according to its ordinary usage.[11] The circuit court's instructions were consistent with the Hawai'i Standard Jury Instructions. See Hawai'i Standard Jury Instructions-Criminal, Vol. 1, § 7.07 at 93 (1991). The instructions were also consistent with the legislative intent in adopting the ALI/MPC insanity defense.

Given the variety of uses and definitions of the term "appreciate," the pivotal question becomes whether the lack of a specific definition during jury instructions denied Uyesugi a fair trial. In its case-in-chief, the prosecution adduced

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[10] For example, the prosecution stated, "Appreciating the options that he had, appreciating his idea of intimidation that had worked for so long but was not working on the date of the killings." Very soon after the above statement, the prosecution stated, "He even knows that the wrongfulness of what he's done will impact his entire family. . . . He did what he had to do to make a point, disregarding the wrongfulness of what he was doing understanding that it was wrong."

[11] The Merriam-Webster's Collegiate Dictionary defines "appreciate" as "to grasp the nature, worth, quality, or significance of (appreciate the difference between right and wrong)." Merriam-Webster's Collegiate Dictionary 57 (10th ed., 2001).

testimony from eyewitnesses, police investigators, and experts, which, if believed, established that: (1) Uyesugi could "appreciate the wrongfulness of his conduct but acted out of anger in spite of that appreciation[,]"; (2) Uyesugi's "major psychiatric disorder" did not "substantially impair [Uyesugi's] capacity to appreciate the wrongfulness of his conduct,"; (3) Uyesugi expressed concern that "everybody was out to get him, that he was going to lose his job. He also had talked about how he was going to let some people down"; (4) the Glock 17 that Uyesugi used carried seventeen rounds of ammunition and was reloaded once during the shooting; (5) three of the victims had died of multiple gunshot wounds; and (6) Uyesugi concealed the weapon when he entered the building.

The defense presented expert testimony that Uyesugi was acting under a delusion that prevented him from acting normally in relation to the individuals who were a part of Uyesugi's delusional framework. According to these experts, Uyesugi could, and did, interact normally with individuals outside of his delusions.[12] When acting within the context of his delusions, Uyesugi argued, he was unable to appreciate the wrongfulness of his actions. One defense expert, Dr. Dietz, testified that:

> In delusional disorder, the individual has ideas that are quite wrong. In lay terms, crazy ideas. And yet at the same time, the person can act normal, look normal, speak normally, think logically about all areas that aren't related to the delusion. And yet at the same time, have very odd whacky wrong ideas about everything connected to the delusions.

[12] For example, Uyesugi could firmly believe that co-worker "A" was sabotaging his work product. This belief did not permeate Uyesugi's beliefs about any other co-worker, even if "A" talked to or was friends with other co-workers.

He went on to state that Uyesugi's delusions had existed for ten to twelve years in relation to particular people at Xerox. These delusions included the belief that particular people he worked with were

> part of a conspiracy that has purposely, maliciously gone about trying to make him miserable, torment him, make him look bad, gossip about him, ruin his reputation, make it impossible for him to do his work well, make it likely he'll be fired, invade his home and begin to take away any chance of keeping his calm in the face of this repeated, constant day after day, year after year harassment and torment.

Dr. Dietz testified that Uyesugi was under the deluded belief that one co-worker was employed by the government, that the FBI and CIA had surveillance equipment in his car and bathtub drain, and that the victims had invaded his home, mutilated his fish, stolen wood working projects, and gone through his private possessions.[13] These defense experts agreed that Uyesugi knew killing was wrong, but that in the context of his delusions he could not appreciate the wrongfulness.

Despite the varying uses of the term "appreciate," none was improper. The ordinary meaning of the word is not precise. The jury heard testimony from experts who provided it with definitions, explanations, and examples of the meaning of "appreciate." The thorough and extensive expert testimony gave the jury the tools necessary for it to determine whether Uyesugi could "appreciate" the wrongfulness of his conduct. That testimony also brought forth the inherent subtleties of the term. The closing arguments of the prosecutor are not evidence and the jury was informed of this. When Uyesugi argues that the standard

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[13] All of the experts testified that Uyesugi's articulation of his delusional belief system was consistent throughout all of the examinations.

is more subtle than to simply know the difference between right and wrong, he fails to understand the jury's ability to listen to the judge's instructions and the testimony of the expert witnesses. On the record before us, we hold that the circuit court did not commit plain error in its instructions to the jury.

2. The circuit court did not err when it did not define the term "wrongfulness."

For the same reasons Uyesugi argued that his substantial rights were violated above, he argues that the term "wrongfulness" should have been defined and that the court's failure to do so resulted in a violation of his right to a fair trial. Specifically, Uyesugi argues that the term "wrongfulness" carries with it a moral distinction that was not reflected in the instructions provided to the jury. We agree with Uyesugi that the term "wrongfulness" reflects our legislature's attempt to distinguish between pure "criminality," in which the determining factor is whether the defendant knew his action was criminal, and "wrongfulness," in which the defendant knew his conduct was criminal "but because of a delusion believe[d] it to be morally justified." ALI MPC § 4.01. The prosecution argues that inasmuch as the legislature did not define the term "wrongfulness," the ordinary meaning of the word should be given effect. Although we agree generally with the prosecution's argument, its definition of "wrongfulness" is too selective and narrow.[14] Uyesugi did not argue at trial that he believed

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[14] The prosecution defines "wrongfulness" as "full of or characterized by wrong; unjust or unfair and having no legal right; unlawful." "Wrongful" is defined as "injurious, heedless, unjust, reckless, unfair; it implies the infringement of some right, and may result from disobedience to lawful authority." Black's Law Dictionary 1110 (6th ed. 1991). Black's also defines "wrongfully" as, <u>inter alia</u>, in a "manner contrary to the moral law,

society would agree that his conduct was morally justified, he did not request that the jury instructions reflect this distinction, he did not object to the instructions as given, and finally, he never raised any factual points or expert testimony supporting the assertion that, although he knew his conduct was criminal, he believed that his conduct was morally justified. Because Uyesugi failed to adduce evidence to support this issue at trial, and Uyesugi fails to demonstrate that the lack of specificity in the definition prejudiced his substantial rights, we hold that the circuit court did not plainly err.

The legislative history accompanying HRS § 704-400 expressly provides that the Hawaiʻi Penal Code test for criminal responsibility is derived from the MPC as interpreted in United States v. Freeman, 357 F.2d 606, 622 n.52 (2d Cir. 1966). In a brief footnote, the Freeman court stated, "We have adopted the word 'wrongfulness' in Section 4.01 as the American Law Institute's suggested alternative to 'criminality' because we wish to include the case where the perpetrator appreciates that his conduct is criminal, but, because of a delusion, believes it to be morally justified." Freeman, 357 F.2d at 622 n.52. There is no further discussion in Freeman that provides guidance as to how courts should interpret "morally justified." Freeman is construed in State v. Wilson, 700 A.2d 633 (Conn. 1997), a case upon which Uyesugi relies for the argument that this court should adopt a subjective test in determining whether the defendant

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or to justice." Id. at 1110. One definition of "wrong" in Merriam-Webster's Collegiate Dictionary provides "something wrong, immoral, or unethical; esp : principles, practices, or conduct contrary to justice, goodness, equity, or law." Merriam-Webster's Collegiate Dictionary at 1363. Clearly, the prosecution picked the words that most accurately reflected their argument and deleted those that supported Uyesugi.

understands the wrongfulness of his conduct.

Wilson was convicted of murder. Apparently, Wilson functioned under the delusion that his victim, Jack Peters, was systematically destroying Wilson's life.[15] At his trial, Wilson requested,

> that the circuit court instruct the jury that wrongfulness is comprised of a moral element, so that "an accused is not criminally responsible for his offending act if, because of mental disease or defect, he believes that he is morally justified in his conduct -- even though he may appreciate that his act is criminal."

Wilson, 700 A.2d at 637. On appeal, the supreme court held that Wilson was entitled to an instruction on the definition of "wrongfulness" and that the trial court's failure to so instruct was reversible error. Id. at 637.

The Wilson majority interpreted both Freeman and the MPC in adopting an objective test to determine whether the defendant appreciated the wrongfulness of his actions. Id. at 637. The Connecticut Supreme Court concluded that a defendant may

> establish that he lacked substantial capacity to appreciate the "wrongfulness" of his conduct if he can prove that, at the time of his criminal act, as a result of mental disease or defect, he substantially misperceived reality and harbored a delusional belief that society, under the circumstances as the defendant honestly but mistakenly understood them, would not have morally condemned his actions.

Id. at 640. The majority reasoned that the MPC and Freeman employed the term "wrongful" to encompass the situation where the

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[15] Wilson believed that Peters was poisoning him with methamphetamine, hypnotizing him to control his thoughts, and caused him to lose his job and become sexually inadequate. Wilson, 700 A.2d at 636. Prior to killing Peters, Wilson had gone to the police to seek their assistance in stopping Peters' harassment. The police informed Wilson that they could not intervene because there was no proof that Peters had done anything illegal. Id.

defendant knew the conduct was criminal but because of the delusion believed it to be morally justified.[16] Id. at 638.

The court further opined that Wilson "presented sufficient evidence to warrant a general charge on the insanity defense." Id. at 644. To receive a specific instruction on "wrongfulness," Wilson was also required to establish that he misperceived reality and in acting on that misperception did not appreciate that his conduct was "contrary to societal morality." Having met this burden, the supreme court vacated Wilson's conviction and remanded to the circuit court for a new trial.

In her concurrence, Justice Berdon opined that both Freeman and the MPC articulate a "subjective" test. She stated that the MPC and Freeman court "adopted the word 'wrongfulness' for the reason that [it would] include the case where the perpetrator appreciates that his conduct is criminal but because of [his delusion] believes it to be morally justified." Id. at 648 (Berdon, J., concurring) (alterations in original). Thus, Justice Berdon relies on the plain language of Freeman in which the Second Circuit Court of Appeals stated "[w]e have adopted the word 'wrongfulness' in Section 4.01 as the American law Institute's suggested alternative to 'criminality' because we

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[16] The court noted that the MPC provides states with the option of alternative phrasing. This permits states to choose between two standards, i.e., criminality or wrongfulness. Id. at 639. The Wilson court stated:

> By bracketing the term "wrongfulness" and juxtaposing that term with "criminality," the drafters purposefully left it to the individual state legislatures to decide which of these two standards to adopt to describe the nature of the conduct that a defendant must be unable to appreciate in order to qualify as legally insane. The history of the Model Penal Code indicates that "wrongfulness" was offered as a choice so that any legislature, if it wishes, could introduce a "moral issue" into the test for insanity.

wish to include the case where the perpetrator appreciates that his conduct is criminal, but, because of a delusion, believes it to be morally justified." Id. at 648 (Berdon, J., concurring). It is this test that Uyesugi urges this court to adopt.

Although our legislative history does not provide us with the specific reasoning found and relied upon by the Connecticut Supreme Court, it did expressly provide that the commentary from the MPC could be referenced in interpreting the Hawaiʻi Code. Although Wilson is not controlling in this jurisdiction, it is nonetheless persuasive because its reasoning is thorough and directly applicable to HRS § 704-400. The Hawaiʻi legislature had the opportunity to choose between the terms "criminality" and "wrongfulness" when it adopted HRS § 704-400. The fact that "wrongfulness" is found in this statute strongly supports a finding that the legislature determined that the term should carry with it the dual components of knowing that the conduct in question is criminal and honestly but mistakenly believing that conduct to be morally justified. Moreover, our legislative history expressly referenced Freeman, which lends further credence to this interpretation. Inasmuch as Hawaii's legislative history appears consistent with Wilson, we adopt a rule that reflects the reasoning from both the majority and concurrence. A subjective/objective rule would determine whether the defendant appreciated the wrongfulness of his conduct from the point of view of a reasonable person in the defendant's position under the circumstances as he believed them to be. See e.g., State v. Sawyer, 88 Hawaiʻi 325, 333, 966 P.2d 637, 645 (1998) ("'[T]he defendant must satisfy a subjective/objective test' in proffering a 'reasonable explanation' in accordance with

HRS § 707-702(2). First, in satisfying the subjective portion, the record must reflect the circumstances as the defendant believed them to be. Second, in satisfying the objective portion, the record must support 'a reasonable explanation or excuse for the actor's disturbance.'"); State v. Kaiama, 81 Hawai'i 15, 26, 911 P.2d 735, 746 (1996) ("To satisfy the second prong of HRS § 707-702(2), i.e., a reasonable explanation, the defendant must satisfy a subjective/objective test. The circumstances must be viewed as the defendant believed them to be (subjective); however, [t]he ultimate test is objective[.] [T]here must be a reasonable explanation or excuse for the actor's disturbance.") (Citations and quotation marks omitted.); State v. Pemberton, 71 Haw. 466, 477, 796 P.2d 80, 85 (1990) ("[T]he standard for judging the reasonableness of a defendant's belief for the need to use deadly force is determined from the point of view of a reasonable person in the Defendant's position under the circumstances as he believed them to be.") (Citation omitted.).

To rely solely on the ordinary meaning of "wrongful," as the prosecution recommends, would be contrary to the plain meaning of the MPC and our own legislature's reliance on Freeman when it enacted HRS § 704-400. Assuming arguendo that the use of the term "wrongfulness" meant that the legislature was adopting the Freeman and MPC reasoning, the question becomes whether Uyesugi adduced sufficient evidence at trial to entitle him to a specific instruction on this point. We think not.

Even if this court adopted the purely subjective test proposed by Justice Berdon in Wilson, Uyesugi would still not have established sufficient evidence to warrant an instruction on

the definition of the term "wrongfulness." In employing the subjective approach, Uyesugi argues in this appeal that although he knew that killing was wrong and that his conduct would transgress societal mores, he believed that he was justified because of his delusional state. This argument conflicts with Uyesugi's trial defense. At trial, Uyesugi's experts never testified that Uyesugi believed his conduct to be morally justified. Indeed, on appeal, Uyesugi fails to indicate where in the record he put forth such an argument. Although arguing that this court adopt the subjective approach, Uyesugi has never, even in his appellate brief, raised the issue that he believed violating societal moral boundaries was justified. Thus, even if the more liberal subjective test were applied, i.e., that Uyesugi was aware that his conduct was criminal but, because of his delusion, believed that he was morally justified in acting, Uyesugi failed to adduce evidence sufficient to support this instruction. In essence, Uyesugi asks this court to reverse his conviction so that he can try a new defense in place of the one that failed. Because Uyesugi's substantial rights were not violated, the circuit court did not commit plain error.

B. The circuit court's instruction regarding unanimity in the jury verdict was correct.

Uyesugi next argues that the jury instructions were prejudicially insufficient and misleading so as to violate his constitutional guarantee of a unanimous verdict. Uyesugi asserts that the jury could have been confused by the instructions because the jurors might have thought that if they could not arrive at a unanimous decision regarding Uyesugi's sanity, they were obligated to find him guilty of murder in the first degree.

Uyesugi states that the jurors were not informed that "before reaching a 'guilty as charged' verdict, rejection of the mental defense must also be unanimous." Thus, under Uyesugi's reasoning, the jury must be instructed to (1) determine whether the prosecution has met its burden of proving the elements of the charged offense beyond a reasonable doubt and (2) declare that it cannot reach a unanimous decision if it fails to unanimously decide whether Uyesugi has met his burden by a preponderance. Uyesugi concludes that some jurors would have voted not guilty by reason of lack of penal responsibility and others would have voted guilty as charged. Although Uyesugi's argument sets forth a correct statement of the law, it does not necessarily follow that the jury instructions, as given, were prejudicially insufficient, inconsistent, or misleading. Because the jury unanimously found Uyesugi guilty as charged and the instructions represented a correct statement of the jury's duties with regard to unanimity, we hold that the circuit court did not err.

Both the defendant and the prosecution agree that a criminal defendant has a right to a unanimous decision by the jury in all issues related to guilt and degree of the crime. See State v. Arceo, 84 Hawai'i 1, 29, 928 P.2d 843, 871 (1996) ("Pursuant to this constitutionally and statutorily conferred authority, this court has promulgated HRPP 31(a), which provides in relevant part that verdicts in criminal cases 'shall be unanimous, unless otherwise stipulated to by the parties.'"). Given that a criminal defendant has a constitutional right to a unanimous verdict, the issue in this case becomes whether the instructions confused the jury to the extent that there was no unanimity in its determination that Uyesugi was guilty of murder

in the first degree and attempted murder in the second degree.

In 1982, the Hawai‘i Legislature amended HRS § 704-402 to provide that the defense of lack of penal responsibility is an affirmative defense. Stand. Comm. Rep. No. 962-82, in 1982 House Journal, at 1348. Legislative history indicates that the legislature expressly adopted the reasoning of the United States Supreme Court in Leland v. Oregon, 343 U.S. 790 (1952), "which held that making the defense of insanity an affirmative defense is not unconstitutional and does not violate the Due Process Clause of the Fourteenth Amendment. Also, courts have widely held that insanity is not an element of any offense. Thus, shifting the burden of proving insanity upon the defendant does not relieve the State of its burden of proving the elements of the offense." Id.[17]

An affirmative defense requires the prosecution to prove each and every element of the charged crime beyond a reasonable doubt. The defendant claiming lack of penal responsibility "has the burden of going forward with the evidence to prove facts constituting the defense and of proving such facts by a preponderance of the evidence." State v. Fukusaku, 85 Hawai‘i 462, 481, 946 P.2d 32, 51 (1997); see also HRS § 701-115(2)(b) (1993) ("If the defense is an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in light of any contrary prosecution evidence, proves by a preponderance of the evidence

[17] Inasmuch as the 1982 amendment makes lack of penal responsibility an affirmative defense, case law relying on the pre-amendment analysis has been statutorily overruled. See State v. Nuetzel, 61 Haw. 531, 606 P.2d 920 (1980); State v. Moeller, 50 Haw. 110, 433 P.2d 136 (1967); Territory v. Adiarte, 37 Haw. 463 (1947); Davis v. United States, 165 U.S. 373 (1897).

the specified fact or facts which negative penal liability.”). Consonant with this statute is the reasoning in Leland, in which the United States Supreme Court stated that “Oregon required the prosecutor to prove beyond a reasonable doubt every element of the offense charged. Only on the issue of insanity as an absolute bar to the charge was the burden placed upon the [defendant].” Leland, 343 U.S. at 799. The jury instructions provided in this case reflected a correct statement of the law.

The jury instructions for the affirmative defense, see section I.A. for a complete recitation of these jury instructions, directed that “if the Defendant has proved both of these elements by a preponderance of the evidence, then you must find the Defendant not guilty of the offenses. If the Defendant has not proved both of these elements by a preponderance of the evidence, then you must find that this defense does not apply.” The instructions were not erroneous to the extent that they reflect a correct statement of the law. See HRS § 701-115. Recognizing that a correct statement of the law does not always reflect an appropriate jury instruction in every case, see In re Estate of Herbert, 90 Hawai‘i 443, 468-69, 979 P.2d 39, 64-65 (1999), we must resolve whether, “when considered as a whole, the instructions given are prejudicially insufficient, inconsistent, or misleading.” See Aganon, 97 Hawai‘i at 302, 36 P.3d at 1272.

Prior to orally charging the jury, the circuit court provided each juror with a written copy of the instructions. The circuit court instructed the jury that it “must consider all of the instructions as a whole and consider each instruction in light of all of the others.” As noted supra, the jury was instructed that Uyesugi must be found not guilty if he proved he

was suffering from a physical, or mental disease, disorder or defect and that, "as a result of such physical or mental disease, disorder or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." The jurors were informed that "in deciding what the verdict should be, all jurors are equal and the foreperson does not have any more power than any other juror." The circuit court apprised the jury that

> a verdict must represent the considered judgment of each juror, and in order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous. Each of you must decide the case for yourself, but it is your duty to consult with one another and to deliberate with a view to reaching an agreement, <u>if you can do so without violating your individual judgement</u>.

(Emphasis added.) After the verdict was rendered, the jury was polled. <u>See</u> <u>State v. Miyahira</u>, 6 Haw. App. 320, 325, 721 P.2d 718, 722 (1986) (stating that the purpose of polling is "to assure the court and the parties that a unanimous verdict has been reached and to give each juror an opportunity to indicate assent to the verdict in open court") (citations omitted). Each juror stated that he or she agreed with the verdicts and that the verdicts reflected his or her opinion. During voir dire, defense counsel stated, "Sure, the verdict has to be unanimous. All twelve of you have to agree either for acquittal or for conviction. All twelve of you have to agree in terms of a defense. Either you accept it, or you reject it. But each of you have an individual vote, and each of you with that individual vote can stop the verdict." The jury received unanimity

instructions no fewer than six times.[18] The jury did not seek clarification regarding any of the jury instructions; there is nothing in the record on appeal to suggest that these instructions were confusing, misleading, or prejudicially insufficient. The circuit court provided the jury with a correct statement of the law concerning unanimity of verdicts and the elements of the affirmative defense. The record as a whole does not support Uyesugi's contention.

Uyesugi relies on State v. Miyashiro, 90 Hawai'i 489, 979 P.2d 85 (App. 1999), and the recently enacted Pattern Hawai'i Standard Jury Instructions Criminal (HAWJIC) §§ 7.06[19] and 7.07[20]

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[18] See section I.B. for specific examples of the unanimity instructions given by agreement of the parties.

[19] The amendments came into effect on June 29, 2000. Uyesugi's trial ended prior to the implementation of the amendments. The recommended instructions in effect at the time of Uyesugi's trial were HAWJIC §§ 7.06 and 7.07. Amended HAWJIC § 7.06 relates to the Generic Affirmative Defense and provides in relevant part:

> If you unanimously find that the defendant has proven the elements of the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of (specify in the disjunctive charge(s) and any instructed included offense(s)). If you unanimously find that the defendant has not proven the elements of the affirmative defense by a preponderance of the evidence, then you must find the defendant guilty of (specify charge(s) or any instructed offense(s)).
>
> If you are unable to reach a unanimous agreement as to whether the affirmative defense has been proved or not been proved, then a verdict may not be returned on (specify in the disjunction charge(s) and any instructed included offense(s)).

[20] Amended HAWJIC § 7.07 Insanity provides in relevant part:

> If you unanimously find that the defendant has proven both elements of the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of (specify in the disjunctive charge(s) and any instructed included offense(s)). If you unanimously find that the defendant has not proven both elements of the affirmative defense by a preponderance of the evidence, then you must find the defendant guilty of (specify in the disjunctive

for his assertion that the instructions recommended in Miyashiro should have been used in his case to avoid the alleged jury confusion. In Miyashiro, the defendant was arrested and charged with various counts including promoting a dangerous drug in the first and third degrees, unlawful possession of drug paraphernalia, and possession of a firearm by a person convicted of certain crimes. Miyashiro, 90 Hawai‘i at 490, 979 P.2d at 86. The language of the jury instructions regarding the affirmative defense of entrapment were consistent with the instructions in the present case.[21] On appeal, Miyashiro argued two points, one of which was that the circuit court erred in its answer to a communication from the jury. The jury asked, “Is unanimity required in the decision of whether entrapment occurred regarding counts I - III [promoting dangerous drug in the first degree]?” The court responded “yes.” Shortly thereafter, the jury reached a verdict. Id. at 496, 979 P.2d at 92. Defense counsel objected after notice that a verdict had been reached. He argued that the

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> charge(s) and any instructed included offense(s)).
>
> If you are unable to reach a unanimous agreement as to whether the affirmative defense has been proved or not been proved, then a verdict may not be returned on (specify in the disjunctive charge(s) and any instructed included offense(s)).

[21] The circuit court instructed that:

> As to any of the offenses charged in Counts I, II, and III of the indictment, if [Defendant] has proved both elements of entrapment by a preponderance of the evidence -- that is, it is more likely than not or more probable than not that entrapment occurred, then you must find [Defendant] not guilty. If [Defendant] has not proved by a preponderance of the evidence both elements of entrapment, then the defense of entrapment does not apply.

Miyashiro, 90 Hawai‘i at 496, 979 P.2d at 92.

jury was misled because if it was unable to reach a unanimous verdict on the entrapment defense, it could still find the defendant guilty as charged. Id. at 496, 979 P.2d at 92. On appeal, the defendant argued that "the circuit court committed plain error when it responded affirmatively to question No. 1 to Jury Communication No. 1. "Defendant argues that '[i]t is not necessary that the jury be unanimous with respect to the defense of entrapment . . . only . . . that they [sic] be unanimous with respect to their [sic] verdict.'" Id. at 497, 979 P.2d at 93 (alterations in original).

Recognizing that "the circuit court's response to a jury communication is the functional equivalent of an instruction," id. at 492, 979 P.2d at 89, the ICA analyzed the jury communication and the circuit court's answer as an issue of alleged erroneous jury instructions. The ICA disagreed with the defendant's argument but nevertheless agreed that the jury instructions were misleading because the circuit court "did not instruct the jury that it was required to unanimously agree that all elements of the charged offenses had been established beyond a reasonable doubt before considering the entrapment defense." Id. at 500, 979 P.2d at 96. It was not, however, merely the absence of this instruction that rendered the instructions misleading, but also the circuit court's "affirmative answer to question No. 1 to Jury Communication No. 1" that

> may have implied to the jurors that if they failed to reach agreement as to the affirmative defense of entrapment, they were required to return a guilty verdict, even if they had not unanimously determined whether the prosecution had established all the elements of the charged offenses beyond a reasonable doubt.

Id. at 500, 979 P.2d at 96. The ICA held that "[b]ecause the

circuit court's answer to question No. 1 to Jury Communication No. 1 was prejudicially insufficient and misleading and affected Defendant's constitutional right to a unanimous verdict, we conclude that the circuit court plainly erred in giving its answer." Id. at 501, 979 P.2d at 97.

Uyesugi asserts that Miyashiro is directly on point. Pursuant to Miyashiro, Uyesugi contends that he was similarly prejudiced because the jury would have "logically, but incorrectly, concluded that [its] unanimous decision that the prosecution had proved the offenses represented [its] unanimous 'verdict' of guilt." Uyesugi completely ignores that part of the Miyashiro reasoning that expressly states that it was not the instructions, standing alone, that were prejudicially insufficient or misleading, but was the circuit court's answer to the jury communication in conjunction with the instructions that resulted in the plain error. Uyesugi's argument studiously disregards the factual application of, and the ICA's holding in, Miyashiro.

The Miyashiro analysis is correct. See id. at 500 n.13, 979 P.2d at 96 n.13 (providing recommended jury instructions for affirmative defenses). The ICA and HAWJIC have improved upon the affirmative defense instructions. The jury must unanimously determine whether the prosecution met its burden of proof. Only then should the jury proceed to a determination of whether the defendant met his or her burden in proving the affirmative defense. Whether the defendant met his or her burden must be determined by a unanimous decision of the jury. If the jury has successfully proceeded this far in its deliberations, it may then consider the proper verdict. If the jury fails to reach

unanimity as to the affirmative defense, the circuit court must declare a mistrial due to a hung jury. Applying the reasoning and analysis of Miyashiro to the present case does not effect the same outcome. Indeed, as Uyesugi argues, the single sentence, "if the Defendant has not proved both of these elements by a preponderance of the evidence, then you must find the defense does not apply," could be interpreted in the manner Uyesugi suggests. In Miyashiro, the ICA did not conclude that, viewed in isolation, this instruction was prejudicially insufficient. Nor do we. To do so would disregard the analytical imperative that we view and consider the jury instructions in their entirety. In the present case, there are numerous examples of proper jury instructions that reinforced the necessity of unanimity, that informed the jurors that each of their individual votes were of equal importance, and that they were not to concede their individual judgment to the other jury members. Unlike Miyashiro, the record is devoid of anything that suggests that the jury was confused or misled. We hold that when considered in their entirety and without evidence to the contrary, the jury instructions, as given, did not contribute to Uyesugi's conviction.

C. Uyesugi's substantial rights were not violated during the prosecution's opening statement and direct examination.

Uyesugi argues that it was plain error to allow the prosecutor to present allegedly irrelevant and prejudicial evidence which served to incite "the passions and resentment of the jurors." First, Uyesugi asserts that the prosecution's opening statement, in which the prosecutor stated that witnesses would assist the jury in knowing who the victims were and why the

victims were present in the building at the time of the killings, was not relevant. Second, Uyesugi contends that the questions the prosecutor asked when he called those witnesses were calculated to inflame the passions and prejudices of the jury. Because testimony from family members of crime victims is not per se disallowed and Uyesugi's substantial rights were not prejudiced, we hold that the circuit court did not plainly err.

In State v. Edwards, 81 Hawai'i 293, 300, 916 P.2d 703, 710 (1996), the defendant was charged with and convicted of the brutal murder, sexual assault, and robbery of a sixty-seven year-old woman.[22] On appeal, the defendant argued that "the daughter of the deceased . . . gave a detailed and moving account that personalized the deceased i[n] a sympathetic light, giving a romantic and pleasant picture of the deceased's life and the interactions of the deceased with her own immediate family."[23] Edwards, 81 Hawai'i at 300, 916 P.2d at 710 (alterations in original). Edwards argued that the daughter's testimony "romanticized" the deceased, thereby prejudicing the jury against him. Edwards had also argued that failure of his counsel to object to this testimony was indicative of ineffective assistance of counsel and led to an impairment of a potentially meritorious

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[22] In describing the murder, this court stated, "a sixty-seven year-old woman (the decedent), suffered horrific indignities and fatal physical injuries as a result of being bound at her ankles and wrists, beaten, sexually assaulted, and robbed." Edwards, 81 Hawai'i at 295, 916 P.2d at 705.

[23] The decedent's daughter testified that her mother was a seasonal resident of Maui, usually a resident of Alaska, a real estate agent, and for the five years preceding her death, a widow. Edwards at 300, 916 P.2d at 710. The daughter also recounted her mother's activities on January 25, 1993, the day her mother was murdered. "According to the daughter, on that date, the decedent had played golf; on the way home, she stopped at a store to buy a box of macadamia nuts for a friend." Id. at 300, 916 P.2d at 710.

defense. We disagreed with both arguments.[24] We were not convinced that testimony about golf and buying macadamia nuts romanticized anyone. Moreover, we stated that "regardless of the characterization of the decedent's activities, the evidence was relevant to show that she was alive[.]" Id. at 300, 916 P.2d at 710. In rejecting Edwards' ineffective assistance argument, we stated that "Edwards has failed to establish[] how defense counsel's failure to object to the daughter's testimony evinced counsel's 'lack of skill, judgment, or diligence' . . . nor how such alleged failure led to 'the withdrawal or substantial impairment of a potentially meritorious defense.'" Id. at 300, 916 P.2d at 710 (citation omitted). Edwards permits testimony from the victim's family members, but Edwards does not clarify when testimony may rise to the level of undue prejudice. It only comments that "[w]e fail[ed] to see how playing golf and buying a box of macadamia nuts for a friend portrays a 'romantic' and 'idyllic' life." Id. at 300, 916 P.2d at 710. We concluded that "given the overwhelming nature of the evidence linking Edwards to the crimes charged," defense counsel's failure to object did not "result[] in either the withdrawal or substantial impairment of a potentially meritorious defense." Id. at 301, 916 P.2d at 711.

Whether testimony of surviving family members inflames the jury to the extent that the jury is diverted from its objective considerations must be considered in light of the whole record. In particular, we focus attention on the purpose of the

[24] Edward's counsel also failed to object to the testimony of a Maui Police Department Detective "that implied that Edwards had a criminal record." Id. at 301, 916 P.2d at 711. In agreeing that the detective's testimony "may have suggested to the jury that Edwards had a criminal record and that the defense counsel's failure to object to such a reference reflected a 'lack of skill, judgment, or diligence[.]'" Id. at 301, 916 P.2d at 711.

testimony, whether the family members expressed their opinions or characterizations of the crime and the effect of the crime on the family, the strength and weakness of the evidence against the defendant, whether the failure to object to such testimony was the result of trial strategy or ineffective assistance of counsel, and whether and how the testimony was woven into the case.

In isolation, the testimony of the family members may indeed have prejudiced Uyesugi. The family members were asked about what may clearly be described as endearing personal characteristics of the decedents. The jurors were furnished with images of decent, happy, and caring family men. Defense counsel may have been put in a bind because to cross-exam the surviving spouses and children could very well have appeared cruel and disrespectful. It has not, however, been our philosophy to view a single aspect of a trial in isolation. See State v. Lagat, 97 Hawai‘i 492, 496, 40 P.3d 894, 898 (2002) (stating, in the context of jury instructions, that "error 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") (citations omitted); Aganon, 97 Hawai‘i at 303, 36 P.3d at 1272 (same); Culkin, 97 Hawai‘i at 213, 35 P.3d at 240 (same); State v. Apao, 95 Hawai‘i 440, 443, 24 P.3d 32, 35 (2001) (same); State v. Valdivia, 95 Hawai‘i 465, 471-72, 24 P.3d 661, 667-68 (2001) (same); Rapozo, 95 Hawai‘i at 326, 22 P.3d at 973 (same); State v. Valentine, 93 Hawai‘i 199, 207, 998 P.2d 479, 484 (2000) (same); State v. Gano, 92 Hawai‘i 161, 176, 988 P.2d 1153, 1168 (1999); State v. Vliet, 91 Hawai‘i 288, 298, 983 P.2d 189, 199

(1999); State v. Toyomura, 80 Hawai‘i 8, 26, 904 P.2d 893, 911 (1995); see also Vol. 1, Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 103.42[1] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2002). In viewing the entire trial record we note that: (1) the testimony of the family members comprises 33 pages of approximately 1800 pages of transcripts; (2) the questions propounded to the decedents' relatives concerned the characteristics of the decedents; (3) the family members did not testify as to the effects of the crime on the families; (4) the evidence that Uyesugi murdered the decedents was overwhelming; (5) the expert testimony regarding Uyesugi's mental state at the time of the murders was extensive; and (6) pursuant to our analysis in section III.A. and III.B. supra, the evidence that Uyesugi lacked penal responsibility was thoroughly examined by the prosecution and defense counsel. Defense counsel also used the opportunity to cross-examine the witnesses to elicit testimony regarding Uyesugi's delusional state. Combined, these factors support a conclusion that, while the circuit court's implied permission to the prosecution to elicit testimony from family members may have been error, it did not affect Uyesugi's substantial rights and therefore does not rise to the level of plain error.

Uyesugi also relies on two cases from other jurisdictions holding that testimony and evidence from family members of murdered victims to be prejudicially irrelevant. These cases are distinguishable. In People v. Hope, 508 N.E.2d 202, 206-07 (Ill. 1986), the prosecutor asked the wife of the murder victim about the couple's children, introduced a photograph of the victim and his family, and asked other

prosecution witnesses whether the photo accurately depicted the deceased and his family. Defense counsel objected to the introduction of the photo and identification of the photo by other witnesses. The circuit court overruled the objections. The Illinois Supreme Court ruled that the trial court erred because the testimony and photograph were presented as though they were material to the defendant's guilt, particularly because the prosecution asked other witnesses to identify the same photograph. Moreover, the court explained, defense counsel's objections were overruled, potentially amplifying the prejudicial effects by suggesting that the court thought the testimony and photograph were material to the guilt of the defendant.

In Hope, the record as a whole is distinguishable from the record in this case. Uyesugi's counsel never objected to the prosecution's opening statement or to the witnesses being called. During direct examination, Uyesugi's counsel objected to a single question. The circuit court overruled that objection. Repetition of the allegedly prejudicial questions is absent from Uyesugi's trial. The prosecution did not refer to the personal characteristics of the deceased or the testimony of the surviving family members during closing arguments. Viewing the record as a whole, Uyesugi has failed to demonstrate prejudice.

Like Uyesugi's reliance on Hope, his reliance on People v. Bernette, 197 N.E.2d 436, 444 (Ill. 1964), is misplaced. The facts of Bernette are, however, more similar to those found in the case sub judice. The prosecution brought forth testimony from the wife of the deceased victim regarding the children of the deceased and the ill-effects the family was suffering as a result of the murder. Defense counsel failed to make any

objections. In his closing argument, the prosecutor stated, "[The deceased] had a wife, he had a child and he had a right -- he was only 20 years old when he died -- to be with that family and to pursue his life and liberty." Bernette, 197 N.E.2d at 443. The Illinois Supreme Court determined that the trial court sua sponte should have stopped the argument because it was not relevant and was highly prejudicial. Unlike the prosecutor's argument in Bernette, the prosecutor in this case did not raise the specter of the effects of the crime on the family and did not weave the testimony into the evidence as a whole, thereby suggesting that it was material to Uyesugi's guilt or sanity.

Finally, Uyesugi relies on Territory v. Hays, 43 Haw. 58 (1958), in which this court stated that "the more heinous the crime, the more care must be exercised by the presiding judge to see that defendant's rights are protected and that prejudicial evidence is not admitted." Hays, 43 Haw. at 58. This statement, with which we continue to agree, was made in the context of looking at the record as a whole and admonishing the trial court to reject its impulse to permit the introduction of one-sided evidence. In 1958, a sixteen-year-old female accused Hays of a statutory rape that allegedly occurred between 1949 and 1953. The trial court admitted the complaining witness' testimony, in which she stated that the defendant had sexual intercourse with her several times over a four-year period. Admitted over the defendant's objection was testimony of a physician who examined the complaining witness shortly before the trial began. He testified that the complaining witness was not a virgin, implying that the defendant was responsible for her loss of virginity. The defendant sought to enter evidence tending to prove that the

complaining witness had engaged in sexual intercourse with other third parties, which was disallowed by the court. The defendant appealed, arguing, inter alia, that the court erred (1) when it refused to permit the defendant to cross-examine the complaining witness regarding acts of sexual intercourse with others because others may have been responsible for her loss of virginity and (2) in permitting the physician to testify about the state of the complaining witness' virginity six years after the alleged rapes, because her physical state at the time of the trial was not relevant. This court agreed with the defendant and reversed his conviction.

The principle expressed in Hays is as crucial to a defendant's right to due process today as it was in 1958. Unlike the facts in Hays, however, the record on appeal in this case demonstrates that Uyesugi was able to pursue his defense vigorously. He presented expert testimony and witnesses. There is no evidence that the circuit court permitted the prosecution greater opportunity than Uyesugi to support its theory of the case. We hold that, while it may have been error on the circuit court's part to fail sua sponte to stop the prosecution's potentially prejudicial comments during opening statements and direct examination, we are convinced from the record that Uyesugi's substantial rights were not prejudiced and, therefore, that the circuit court did not commit plain error.

D. The circuit court did not err when it admitted evidence that Uyesugi possessed twenty-four guns not used in the shooting and testimony that detailed the characteristics of each gun, because both were relevant and did not prejudice Uyesugi.

Uyesugi argues that the circuit court erred when it

admitted evidence of the twenty-four guns not used in the shooting and the testimony of a weapons specialist over defense counsel's objections. He states that, under HRE Rules 403[25] and 404(b),[26] the evidence was unduly prejudicial.

"[T]he determination of the admissibility of relevant evidence under HRE 403 is eminently suited to the circuit court's exercise of its discretion because it requires a cost-benefit calculus and a delicate balance between probative value and prejudicial effect[.]" State v. Janto, 92 Hawai'i 19, 31, 986 P.2d 306, 318 (1999) (quoting State v. Loa, 83 Hawai'i 335, 348, 926 P.2d 1258, 1271 (1996)). This balance is predicated upon an assessment of "the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence will probably rouse the jury to overmastering hostility." State v. Bates, 84 Hawai'i 211, 228, 933 P.2d 48, 65 (1997) (quoting State v. Renon, 73 Haw. 23, 38, 828 P.2d 1266, 1273, reconsideration

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[25] HRE Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[26] HRE Rule 404(b) provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

denied, 73 Haw. 625, 858 P.2d 734 (1992)).

Uyesugi argues that, although evidence was arguably relevant "to prove the 'concealability, compactness, firearm and magazine capacity' of the gun," such evidence could have been readily obtained by merely examining the gun that was used in the shootings and allowing testimony limited to that gun. The ownership of other firearms would, therefore, be irrelevant. The prosecution argues that the type of gun Uyesugi selected from his arsenal was relevant to demonstrate that Uyesugi could appreciate the wrongfulness of his conduct based upon the complex decision-making involved in choosing a gun that could be concealed, easily reloaded, was lightweight, and was loaded with bullets designed to cause severe destruction to the human body.

The prosecution's argument is persuasive given both the evidence available and Uyesugi's defense. Uyesugi's primary argument was that he was substantially impaired in his ability to appreciate the wrongfulness of his conduct. Witnesses testifying for the defense focused almost exclusively on Uyesugi's delusional belief system and its interference with Uyesugi's ability to appreciate wrongfulness. The prosecution's evidence was relevant to whether Uyesugi planned and then carried out his plan to kill his co-workers. Uyesugi had belonged to a gun club, was familiar with all types of guns, and had the ability to knowledgeably choose a weapon for his planned purposes. If the prosecution had presented the evidence in the manner proposed by Uyesugi, the jury would not have had all of the relevant facts in its determination whether Uyesugi could appreciate the wrongfulness of his conduct. Thus, the evidence was necessary because it was relevant and there was no alternative evidence

available.

Uyesugi states that he was prejudiced by the admission of the testimony and the exhibit that contained a picture of the guns because the two pieces of evidence created an overmastering hostility against him. Uyesugi does not really explain this point. He simply states it and then adds that this evidence, combined with the opening statement and testimony of surviving family members, resulted in prejudice. Uyesugi cites a California case for the proposition that the admission of evidence of weapons not used in the crime was improper if they were of no consequence to the determination of guilt. See People v. Archer, 99 Cal. Rptr. 2d 230 (Cal. App. 2000). The Archer court stated that evidence that "the defendant owned nine other knives was not relevant to show access to such weapons or his need to stockpile knives in order to commit the murder." Archer, 99 Cal. Rptr. 2d at 238. The prosecution, in Archer, argued that the evidence was necessary to demonstrate the planning that went into the murder. After dismissing this argument, the court concluded that the trial court had abused its discretion when evidence of the other knives was admitted. The court's reasoning offers little guidance. Like Archer, the evidence in this case failed to demonstrate the relevance of whether Uyesugi had a stockpile or that he needed to stockpile weapons. Unlike Archer, however, whether and how Uyesugi chose the weapon he did was relevant to his state of mind, particularly in light of his defense of lack of penal responsibility.

Further support for affirmance is found in HRE Rule

103.[27] Uyesugi had the burden of "creating an adequate record" in which he has articulated the flaw in the circuit court's actions. See HRE Rule 103; see also Addison M. Bowman, Hawai'i Rules of Evidence Manual § 103-2 at 7-8 (1990). In the absence of an objection and/or a proper record, the admission of the testimony and picture does not amount to plain error. We hold that the circuit court did not commit plain error, when, without objection it allowed introduction of one picture of Uyesugi's firearms and permitted testimony of a weapons expert.

E. Uyesugi fails to establish the necessary facts to successfully assert an ineffective assistance of counsel claim.

Uyesugi asserts that his trial counsel provided ineffective assistance because he failed (1) to request an instruction on the law defining "appreciate" and (2) to object to the prosecution's opening statement and questioning of surviving family members. Specifically, Uyesugi alleges that the failure to define properly the term "appreciate" led the jury to apply an inapplicable legal standard, thereby rendering his defense useless. The remaining issues cited by Uyesugi are addressed collectively and are based on the record as a whole that, according to Uyesugi, caused substantial impairment of his defense. Because the circuit court did not commit plain error in its jury instructions, the jury was unanimous in its verdict, and the opening statements and witness testimony did not prejudice Uyesugi, defense counsel acted within the range of competence

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[27] HRE Rule 103 provides in relevant part that "[t]he court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form."

demanded of attorneys in criminal cases.

HRPP Rule 40[28] permits the defendant to seek review of common law and statutory procedures invoked before, during, and after trial. In an appeal in which a defendant first makes an ineffective assistance claim, this court has stated that the burden is on the defendant to establish that, based upon all of the circumstances, defense counsel's performance was not objectively reasonable. Briones v. State, 74 Haw. 442, 463-64, 848 P.2d 966, 976-77 (1993). This court has established a two-part test to aid the appellate court in its determination whether the defendant has met this burden. This test requires the "defendant to show 'specific errors or omissions . . . reflecting counsel's lack of skill, judgment, or diligence' and that 'these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.'" Briones, 74 Haw. at 462, 848 P.2d at 976 (quoting State v. Antone, 62 Haw. 346, 348-49, 615 P.2d 101, 104 (1980)). General claims of errors or omissions are not sufficient to trigger review. The defendant must demonstrate that there is no obvious reason for the counsel's conduct "then the knowledge held and investigation performed by counsel in pursuit of an informed decision will be evaluated as that information that, in light of the complexity of the law and the factual circumstances, an ordinarily competent criminal attorney should have had." Id. at 462, 848 P.2d at 976. This rule is further narrowed by the

[28] HRPP Rule 40 provides in relevant part "Where the petition alleges the ineffective assistance of counsel as a ground upon which the requested relief should be granted, the petitioner shall serve written notice of the hearing upon the counsel whose assistance is alleged to have been ineffective and said counsel shall have an opportunity to be heard."

policy of both requiring and permitting lawyers "broad latitude to make on-the-spot strategic choices in the course of trying a case." State v. Samuel, 74 Haw. 141, 156, 838 P.2d 1374, 1381-82 (1992).

Upon a review of the record on appeal, Uyesugi has failed to meet the two-part test. Uyesugi argues that the first prong of the test is met because his trial attorney did not submit instructions on the term "appreciate." This is not so. Defense counsel actually withdrew the instruction it had submitted on this issue. Moreover, the term was properly defined, as noted above in section III.A.1. The jury had the opportunity to listen to two defense witnesses and two rebuttal witnesses on this very point. Defense counsel and the prosecution had the opportunity to put forth their arguments as to whether Uyesugi could appreciate the wrongfulness of his conduct in closing. Because the term "appreciate" was accurately defined, there was no substantial impairment in Uyesugi's defense. Uyesugi asserts that failure to object to the opening statements and testimony are further evidence of ineffective assistance. As discussed above, in section III.C., Uyesugi's substantial rights were not violated. Uyesugi has failed to demonstrate that his counsel's performance was not objectively reasonable and that his defense was substantially impaired. Uyesugi has failed to establish an ineffective assistance claim, therefore remand for a HRPP Rule 40 hearing is not necessary.

IV. CONCLUSION

In light of the foregoing, we affirm the judgment of conviction of the first circuit court.

On the briefs:

Deborah L. Kim and
Edward K. Harada, Deputy
Public Defenders, for
defendant-appellant

Donn Fudo, Deputy Prosecuting
Attorney and Brian Toma, Law
Clerk on the Brief, for
plaintiff-appellee