***** NOT FOR PUBLICATION *****

NO. 26503

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Respondent/Plaintiff-Appellee

vs.

EVAN KAKUGAWA, Petitioner/Defendant-Appellant,

and

JASON YOSHIMURA, BRANDEN KAKUGAWA, DON CABINIAN, and LAMAAR RICHARDSON, also known as Lamaar Silva, Defendants.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CR. NO. 01-1-2624)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Duffy JJ.; and Acoba, J., Dissenting)

On May 17, 2006, Petitioner/Defendant-appellant Evan Kakugawa filed a timely application for a writ of certiorari, urging this court to review the Summary Disposition Order (SDO) of the Intermediate Court of Appeals (ICA) in State v. Kakugawa, No. 26503, 110 Hawai'i 258, 131 P.3d 1240 (Haw. App. Apr. 17, 2006) [hereinafter, ICA's SDO]. The ICA's SDO affirmed, without prejudice to a subsequent Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition alleging ineffective assistance of counsel, the Circuit Court of the First Circuit's March 9, 2004 judgment of conviction and sentence[1] for murder in the second degree in

[1] The Honorable Marie N. Milks presided over this matter.

violation of Hawai'i Revised Statutes (HRS) § 707-701.5 (1993)[2] and attempted murder in the second degree in violation of HRS §§ 707-701.5 and 705-500 (1993).[3] Kakugawa, who is currently incarcerated, was sentenced to life imprisonment with the possibility of parole pursuant to HRS § 706-656 (Supp. 1996).[4]

In its SDO, the ICA concluded as follows:

1. The circuit court erred in attributing the stipulated testimony of Shannon Souza to his girlfriend, Gouveia, who did not testify at Kakugawa's trial. However, this error was harmless in that there is not a reasonable possibility that this error contributed to Kakugawa's conviction. State v. Pauline, 100 Hawai'i 356, 378, 60 P.3d 306, 328 (2002).

2. The circuit court did not err by using incorrect criteria to determine the state of mind for Murder in the Second Degree ("intentionally or knowingly causes the death of another person"). HRS §§ 707-701.5, 702-206(1) and (2). The circuit court's comment that "any reasonable person knows that a kick to the head of a person can result in death" was part of the court's summary of its findings and not the court's conclusion of law as to the mens rea for second degree murder.

3. There was substantial evidence that Kakugawa had the requisite state of mind, the intent "to promote or facilitate" the commission of second degree murder. State v. Keawe, 107 Hawai'i 1, 4, 108 P.3d 304, 307 (2005); State v. Brantley, 84 Hawai'i 112, 121, 929 P.2d 1362, 1371 (App. 1996).

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[2] HRS § 707-701.5(1) provides that "a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person."

[3] HRS § 705-500(2) provides:

> When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

[4] HRS § 706-656(2) provides in relevant part that "persons convicted of . . . attempted second degree murder shall be sentenced to life imprisonment with possibility of parole."

4. The circuit court did not err in denying Kakugawa's Motion for a New Trial. The record demonstrates a voluntary waiver by Kakugawa of his right to a jury trial. State v. Friedman, 93 Hawai'i 63, 69, 996 P.2d 268, 274 (2000).

5. Judge Milks did not err in not sua sponte recusing herself for comments she made during the pretrial conference. Judge Milks appropriately participated in plea discussions pursuant to Hawai'i Rules of Penal Procedure Rule 11(e). Kakugawa has failed to show there was judicial misconduct or bias that deprived him of the impartiality to which he was entitled or that his trial was unfair. State v. Hauge, 103 Hawai'i 38, 48, 79 P.3d 131, 141 (2003).

6. The record is insufficient on appeal to demonstrate ineffectiveness of counsel as claimed by Kakugawa. State v. Silva, 75 Haw. 419, 439, 864 P.2d 583, 592-93 (1993). It is not clear whether Kakugawa's trial counsel conducted "careful factual and legal investigations and inquiries." State v. Aplaca, 74 Haw. 54, 70, 837 P.2d 1298, 1307 (1992). Trial counsel must be given an opportunity "to explain his side of the story" in response [to] Kakugawa's ineffectiveness of counsel claims. Matsuo v. State, 70 Haw. 573, 578, 778 P.2d 332, 335 (1989). Trial counsel's statements in support of Kakugawa's Motion for a New Trial were not such an opportunity.

Therefore,

The Judgment . . . is affirmed without prejudice to Kakugawa's filing a [HRPP Rule 40 petition] on his ineffectiveness of counsel claims. Kakugawa will have the burden "to demonstrate actual, not speculative, prejudice." Matsuo, 70 Haw. at 578, 778 P.2d at 335 (quoting Stough v. State, 62 Haw. 620, 623, 618 P.2d 301, 304 (1980) (per curiam)).

(Emphasis added.)

In his application, Kakugawa raises the following points of error: (1) it was grave error for the ICA to conclude that the circuit court's violation of his constitutional right to confront adverse witnesses was harmless when the court relied on the testimony of Brandie Gouveia, who did not testify at his trial; (2) it was grave error for the ICA to conclude that the circuit court, when it stated that "any reasonable person knows that a kick to the head of a person can result in death," did not

erroneously apply a reckless or negligent state of mind to murder when HRS § 707-701.5(1) requires intentional or knowing conduct; (3) the ICA gravely erred in concluding that there was substantial evidence to support the finding that he had the requisite state of mind for accomplice liability; (4) the ICA gravely erred in affirming the circuit court's denial of his motion for a new trial because his waiver of his right to a jury trial, based on his attorney's advice and the trial judge's comment during a pretrial conference that the case "didn't sound like murder to me," was not knowing and voluntary; (5) the ICA gravely erred in concluding that the trial judge was not required to recuse herself sua sponte based on a pretrial comment that clearly demonstrated that she had prejudged the case and lacked impartiality; and (6) the ICA gravely erred when it concluded that he must demonstrate "actual, not speculative, prejudice" in order to make out an ineffective assistance of counsel claim in a subsequent HRPP Rule 40 proceeding.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issues raised, we hold as follows:

(1) Assuming arguendo that the circuit court relied on the testimony of Gouveia and thus violated Kakugawa's constitutional right to confront adverse

witnesses, the ICA correctly concluded that the error was harmless because the testimony of Shannon Souza, which was properly admitted by stipulation, was virtually identical to Gouveia's, and thus there is no reasonable possibility that Gouveia's testimony contributed to Kakugawa's conviction. See State v. Grace, 107 Hawai'i 133, 139, 111 P.3d 28, 34 (App. 2005) (concluding that the appellate court must reverse or vacate if "there is a reasonable possibility that the evidence complained of might have contributed to the conviction") (quoting Chapman v. United States, 386 U.S. 18, 23-24 (1967)). See also State v. Balisbisana, 83 Hawai'i 109, 113-14, 924 P.2d 1215, 1219-20 (1996) (same);

(2) Assuming arguendo that the circuit court erred in its formulation of the requisite state of mind for second degree murder, the error was harmless. In light of the fact that there was no jury in the instant case that could have been influenced by a possibly incorrect statement of the law, the real question is whether there is substantial evidence in the record to support Kakugawa's convictions under the correct legal standards for second degree murder and attempted murder. See State v. Vliet, 91 Hawai'i 288, 298, 983

P.2d 189, 199 (1999) ("Given the absence of a jury in the case at bar, and in light of the substantial evidence contained in the record, we are convinced that there is 'no reasonable possibility that error might have contributed to conviction.'" (Citations omitted.)). That question is addressed immediately below;

(3) There is substantial evidence to support the finding that Kakugawa had the requisite (i.e., "knowing") state of mind for second degree murder and attempted murder as a principal. See HRS § 702-206 (1993) (defining a knowing state of mind with respect to a result as when an actor "is practically certain that his conduct will cause such a result"). With respect to the attempted murder of Eufracio Esmeralda, Kakugawa admitted to hitting him with a log, and punching and kicking him when he was down. In addition, the testimony of Romeo Bulosan and Souza (that Kakugawa "whacked" or "clubbed" Esmeralda with the log), and the evidence that the log weighed approximately twelve pounds, requiring significant force to swing and suggesting its capacity for inflicting damage, also provide substantial circumstantial evidence from which the finder of fact

could reasonably infer that Kakugawa intentionally engaged in a course of conduct known (i.e., practically certain) to result in Esmeralda's death. HRS § 705-500(2); State v. Bui, 104 Hawai'i 462, 467, 92 P.3d 471, 476 (2004) (stating that intent may be proved by circumstantial evidence and from reasonable inferences arising from the circumstances surrounding the act). With respect to the murder of Leon Fernandez, Kakugawa again conceded that he punched and kicked the decedent. Witness Thomas Nowlin's testimony -- that Fernandez was already down on the ground after having been beaten, that Kakugawa kicked Fernandez's head with such force that it would have traveled "a hundred yards" had it been a football, and that Fernandez's whole body "just jumped" as a result -- is substantial circumstantial evidence from which the finder of fact could reasonably have inferred that Kakugawa knew (i.e., it was practically certain) that Fernandez would die as a result of such a kick. Whether Fernandez's death was actually caused by the kick or from some other blow is irrelevant because the actual result (death) was the same as the contemplated result (death), and not too remote or accidental in its occurrence to have a bearing on Kakugawa's liability or the gravity of the

offense. HRS § 702-215(2) (1993) (providing that "knowingly causing a particular result shall be deemed to be established even though the actual result caused by the defendant may not have been within the defendant's intention or contemplation [if t]he actual result involves the same kind of injury or harm as the intended or contemplated result and is not too remote or accidental in its occurrence or too dependent on another's volitional conduct to have a bearing on the defendant's liability or on the gravity of the defendant's offense");

(4) The ICA did not gravely err in concluding that the circuit court's denial of Kakugawa's motion for a new trial was not an abuse of discretion because Kakugawa's waiver of his right to trial by jury, which was regular on its face and the product of a thorough colloquy, was knowing, voluntary, and therefore valid. See State v. Friedman, 93 Hawai'i 63, 69, 996 P.2d 268, 274 (2000) ("Where it appears from the record that a defendant has voluntarily waived a constitutional right to a jury trial, the defendant carries the burden of demonstrating by a preponderance of the evidence that his/her waiver was involuntary.");

(5) Kakugawa has failed to meet his burden of demonstrating that the trial judge's remark was prejudicial to the extent that her failure to recuse herself sua sponte was plain error. See State v. Gomes, 93 Hawai'i 13, 17, 995 P.2d 314, 318 (2000) (holding that the defendant bears the burden of demonstrating that the court's failure to sua sponte recuse was plain error). HRPP Rule 11(e)(1) (1993) provides that the court "may participate in [plea] discussions[.]" In identifying the policy considerations and limiting constraint on the court's participation in such discussions, the Ninth Circuit Court of Appeals has stated:

> The rule against judicial participation in plea bargaining protects the parties against implicit or explicit pressure to settle criminal cases on terms favored by the judge. It does not establish a series of traps for imperfectly articulated oral remarks.

United States v. Frank, 36 F.3d 898, 903 (9th Cir. 1994), quoted with approval in United States v. Bierd, 217 F.3d 15, 21 (1st Cir. 2000) (emphasis added). Here, the trial judge's remark during pretrial plea discussions that the case "d[id]n't sound like murder to [her]" did not create implicit or explicit pressure on Kakugawa to settle or proceed on terms favored by the judge, even if Kakugawa's counsel took it as a cue

to proceed in a certain way. Accordingly, the remark was not improper, and the trial judge did not plainly err in failing to recuse herself sua sponte; and

(6) The ICA gravely erred in concluding that Kakugawa will have the burden of demonstrating "actual, not speculative, prejudice" to sustain a claim of ineffective assistance of counsel in a subsequent HRPP Rule 40 proceeding. As we have repeatedly held:

> The defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense. To satisfy this second prong, the defendant needs to show a possible impairment, rather than a probable impairment, of a potentially meritorious defense. A defendant need not prove actual prejudice.

State v. Wakisaka, 102 Hawai'i 504, 514, 78 P.3d 317, 327 (2003) (internal quotation marks, citations, and footnote omitted) (emphasis added). See also Barnett v. State, 91 Hawai'i 20, 27, 979 P.2d 1046, 1053 (1999) (same); State v. Fukusaku, 85 Hawai'i 462, 480, 946 P.2d 32, 50 (1997) (same). In Fukusaku, we explained:

> Determining whether a defense is "potentially meritorious" requires an evaluation of the possible, rather than the probable, effect of the defense on the decision maker . . . . Accordingly, no showing of "actual" prejudice is required to prove ineffective assistance of counsel.

Fukusaku, 85 Hawai'i at 480, 946 P.2d at 50 (quoting Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994)) (emphasis added).

Moreover, in Briones v. State, 74 Haw. 442, 848 P.2d 966 (1993), this court explicitly overruled Stough, the case indirectly relied upon by the ICA for its conclusion that a showing of actual prejudice is required. See id. at 464 n.13, 848 P.2d at 977 n.13 ("To the extent that our holding in [Stough] is inconsistent with our holding herein, it is overruled."). It thus follows that the 1989 case of Matsuo, to the extent it relied on Stough, was also overruled by our subsequent decision in Briones. Accordingly, the ICA gravely erred in relying on Matsuo and the exercise of this court's certiorari jurisdiction is required in order to prevent the error from becoming the law of the case and prejudicing Kakugawa's HRPP Rule 40 petition, if any.

Having found the need to exercise certiorari jurisdiction, however, we also consider the additional question of whether the ICA was correct in its conclusion that "[t]he record is insufficient on appeal to demonstrate ineffectiveness of counsel." See State v. Bolosan, 78 Hawai'i 86, 89, 890 P.2d 673, 676 (1995) (stating by implication that this court when exercising certiorari jurisdiction has the authority to consider any issue that arises in the case). We disagree with

the ICA's conclusion and conclude that the record in this case is already clear, thanks to the hearing on the motion for a new trial, as to trial counsel Richard Hoke's reasons for his actions; specifically, Hoke believed, based on the trial judge's pretrial remark, that she was biased in Kakugawa's favor and would find him guilty only of the lesser charges of manslaughter and assault in the first degree if he waived his sixth amendment rights to a jury trial and confrontation. Therefore, "this is not a case in which [Kakugawa's] ineffective assistance of counsel claim cannot be decided until the record is further developed in a subsequent post-conviction proceeding." State v. Poaipuni, 98 Hawai'i 387, 395, 49 P.3d 353, 361 (2002) (citations omitted). Indeed, given that the trial judge has already conceded that she made the remark and Hoke has already offered undisputed testimony as to the motives underlying his own conduct, further hearing on Kakugawa's ineffective assistance claim would serve no purpose.

The question is thus squarely before the court as to whether Hoke made an error in judgment, requiring vacatur, in advising Kakugawa as he did. The relevant rule is that "[s]pecific 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." State v. Uyesugi, 100 Hawai'i 442, 449, 60 P.3d 843, 850 (2002) (citation omitted). Here, Hoke believed that the trial judge was biased in Kakugawa's favor, and all of his subsequent actions and omissions flowed from that analysis. In other words, Hoke's actions had an obvious tactical basis for benefitting Kakugawa's case -- had he been correct in his judgment, Kakugawa, despite being the alleged "main actor" and "most culpable" participant in the attacks on Esmeralda and Fernandez, would have been convicted only of assault and manslaughter, while the allegedly "least culpable" participant, co-defendant Lamaar Richardson, who risked a jury trial, was convicted by the jury of second degree murder and sentenced to life imprisonment with the possibility of parole.[5] While it is clear in hindsight that Hoke's strategy ultimately failed, "matters presumably within the judgment of counsel, like trial strategy, will rarely be second-guessed by judicial hindsight." State v. Richie, 88 Hawai'i 19, 39-40, 960 P.2d 1227, 1247-48 (1998)

[5] State v. Richardson, No. 26173, 110 Hawai'i 216, 130 P.3d 1081 (App. Mar. 29, 2006), cert. denied, (Apr. 11, 2006).

(internal quotation marks, citation, and emphasis omitted). Accordingly, we hold that the ICA erred in concluding that further development of the record is necessary on this issue and therefore deny Kakugawa's ineffective assistance claim with prejudice.

Therefore,

IT IS HEREBY ORDERED that the ICA's April 17, 2006 SDO is vacated and the circuit court's March 9, 2004 final judgment is affirmed for the reasons stated herein.

DATED: Honolulu, Hawai'i, June 26, 2006.

On the writ:

Dwight C.H. Lum,
for petitioner/defendant-
appellant Evan Kakugawa