NO. 26763

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

ANTHONY CHATMAN, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(FC-CR. NO. 02-1-0011; CR. NO. 02-1-2353)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.;
With Acoba, J., Concurring Separately)

Defendant-appellant Anthony Chatman appeals from the Circuit Court of the First Circuit's July 19, 2004 judgment of conviction and sentence[1] of life imprisonment with the possibility of parole and a fifteen-year mandatory minimum for attempted murder in the second degree, Hawai'i Revised Statutes (HRS) §§ 707-701.5 (1993)[2] and 705-500(2) (1993)[3] in FC-Cr.

[1] The Honorable Karen S.S. Ahn presided over this matter.

[2] HRS § 707-701.5, entitled "Murder in the second degree," provides in relevant part:

> (1) . . . [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 in relevant part:

> 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

(continued...)

No. 02-1-0011; and sentences of five years' imprisonment each for bribery of a witness, HRS § 710-1070(1) (1993),[4] intimidating a witness, HRS § 710-1071 (1993),[5] and extortion in the second degree, HRS §§ 707-766(1)(b) (1993)[6] and 707-764(2) (Supp. 2001)[7] in Cr. No. 02-1-2353, to run concurrently with each other and consecutively with the sentence in FC-Cr. No. 02-1-0011. On

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[3](...continued)
substantial step in a course of conduct intended or known to cause such a result.

[4] HRS § 710-1070(1) provides in relevant part:

> A person commits the offense of bribing a witness if he confers, or offers or agrees to confer, directly or indirectly, any benefit upon a witness or a person he believes is about to be called as a witness in any official proceedings with intent to:
> (a) Influence the testimony of that person;
> (b) Induce that person to avoid legal process summoning him to testify; or
> (c) Induce that person to absent himself from an official proceeding to which he has been legally summoned.

[5] HRS § 710-1071 provides in relevant part:

> (1) A person commits the offense of intimidating a witness if he uses force upon or a threat directed to a witness or a person he believes is about to be called as a witness in any official proceeding with intent to:
> (a) Influence the testimony of that person;
> (b) Induce that person to avoid legal process summoning him to testify; or
> (c) Induce that person to absent himself from an official proceeding to which he has been legally summoned.
> (2) "Threat" as used in this section means any threat proscribed by section 707-764(1).

[6] HRS § 707-766(1)(b) provides that "[a] person commits the offense of extortion in the second degree if the person commits extortion . . . [a]s set forth in section 707-764(2)."

[7] HRS § 707-764(2) provides that a person commits extortion if the person "[i]ntentionally compels or induces another person to engage in conduct from which another has a legal right to abstain or to abstain from conduct in which another has a legal right to engage by threatening by word or conduct to do any of the actions set forth in [HRS § 707-764(1)(a) through (k).]"

appeal, Chatman contends that the circuit court: (1) erred when it requested that Chatman's brother Wesley and Wesley's girlfriend, Victoria Filoteo, leave the courtroom, in violation of Chatman's constitutional right to a public trial, based on the fact that Filoteo and one of the jurors, Jacom Reyes, were acquainted; (2) abused its discretion when it denied Chatman's motion for a mistrial after Asahi Suzuki (Suzuki) testified to a prior bad act by Chatman in violation of Hawai'i Rules of Evidence (HRE) Rules 402, 403, and 404(b); (3) abused its discretion when it excluded the written statement of an unavailable witness, Eri Gunji, when the statement was relevant and admissible under a catch-all exception to the hearsay rule, HRE Rule 804(b)(8); (4) abused its discretion when it allowed a police officer, Tai Nguyen, to testify as to his opinion and impression regarding Suzuki's state of mind; (5) plainly erred when it allowed testimony that a witness for the defense, Eugene Rupak, had been arrested and was in custody in that such testimony was irrelevant and overwhelmingly prejudicial; (6) erred when it allowed Chatman's ex-wife, Kaori Takenaka, to give a lay opinion on rebuttal that a letter purportedly written by Suzuki did not appear to be written in language natural for a Japanese person; (7) abused its discretion in admitting evidence that Chatman had previously assaulted Suzuki because such

evidence was irrelevant, unduly prejudicial, and improper character-propensity evidence; (8) violated Chatman's right to a fair trial due to the individual and cumulative impact of the foregoing seven errors; (9) erred when it failed to instruct the jury on the merger of the intimidation and extortion counts as required by HRS § 701-109 (1993); and (10) erred when it denied his motion for a mistrial due to prosecutorial misconduct based on (a) improper elicitation, during cross-examination, of references to Chatman's assertion of his fifth amendment privilege against self-incrimination, and (b) several improper, prejudicial remarks made during closing argument. For his eleventh point of error, Chatman argues that his trial counsel's failure to secure the attendance and testimony of Gunji at trial and other witnesses at the hearing on his motion for a new trial due to juror misconduct constituted ineffective assistance of counsel. The State of Hawai'i [hereinafter, the prosecution] counters that there was no error or alternatively that any error was harmless, and, in the case of the alleged merger error, the proper remedy, assuming the jury instruction was flawed, would be vacatur of one of the convictions rather than remand for a new trial.

Based on the following, we affirm the circuit court's judgment, except that: (1) Chatman's conviction and sentence for

extortion in the second degree in Cr. No. 02-1-2353 is vacated; and (2) Chatman's ineffective assistance claim is denied without prejudice to a subsequent Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition.

I. BACKGROUND

On April 26, 2002, the prosecution filed a complaint in the family court of the first circuit, docketed as FC-Cr. No. 02-1-0011, charging Chatman with the attempted murder of his infant son, Taison Suzuki (Taison), based on conduct occurring between April 6 and April 8, 2002. On October 29, 2002, the prosecution secured a grand jury indictment against Chatman, docketed in the circuit court of the first circuit as Cr. No. 02-1-2353, for bribing, extorting, and intimidating Taison's mother, Suzuki, between September 3 and October 20, 2002, in order to influence or prevent her testimony at his upcoming trial in FC-Cr. No. 02-1-0011.[8] On December 30, 2002, the circuit court orally granted the prosecution's motion to consolidate Cr. No. 02-1-2353 for trial with FC-Cr. No. 02-1-0011, which had already been committed from family court to circuit court.

[8] Chatman was also charged in Cr. No. 02-1-2353 with abuse of a household member in violation of HRS § 709-906 (1993), but was found not guilty of that charge at trial due to its merger with the intimidation charge.

A. The Prosecution's Case

Chatman's four-week jury trial began on May 29, 2003, and the prosecution, after opening statements, presented the following case in chief.

Suzuki's Testimony, Part I[9]

Through an interpreter, Suzuki gave the following testimony. She met Chatman at a Waikīkī nightclub in June 2000 while on vacation from her native Japan. Chatman accompanied her and a friend back to their room at the Ambassador Hotel, where Chatman spent a long time, mostly talking with Suzuki's friend. When the prosecution asked whether she saw Chatman after he left the room, she replied, "I think I had alcohol that night and I fell asleep. And the next thing I noticed that he was on top of me and --[.]"

Suzuki's reply was interrupted at this point by defense counsel's objection. When the trial judge called counsel for a bench conference, the defense moved for a mistrial, arguing that Suzuki's response could be construed as improper evidence of a prior bad act of Chatman. The prosecuting attorney explained that he did not know what Suzuki's response to his question would have been if completed, but that he had cautioned her prior to

[9] Suzuki's testimony was not actually given in two parts, but is divided herein to maintain a narrative structure.

testifying that she should "not talk about any other incidents unless she's specifically asked about them." The circuit court denied Chatman's motion, but instructed the jury to disregard both the prosecution's question and Suzuki's partial response.

After corresponding with Chatman by phone, Suzuki returned to Hawai'i in August 2000, again staying at the Ambassador Hotel. It was during this visit that she and Chatman first became intimate. She visited again in October 2000, staying at the Ambassador initially and then at Chatman's apartment, where Chatman's ex-wife, Kaori Takenaka, and daughter also resided. In December 2000, she made another visit, staying at Chatman's apartment for approximately two weeks.

In February 2001, Suzuki discovered she was pregnant with Taison. Chatman asked her via email not to have an abortion and stated that he would like to marry her. At that time, Suzuki too wanted them to be married, and had asked Chatman to leave his ex-wife. She visited Hawai'i again in April 2001 and stayed with Chatman at his new apartment, where he lived alone. She returned to Japan and gave birth to Taison in September 2001. In October 2001, Chatman visited her and Taison in Japan, applying for a birth certificate and passport for Taison. Suzuki, Taison, and her family then visited Chatman in Hawai'i in November 2001. In December 2001, just prior to returning to Japan, Suzuki decided

that she would not return to Hawai'i, and that she would not see Chatman again, but she did not tell Chatman of her intentions.

In February 2002, Suzuki changed her mind after Chatman called her in Japan and told her that "because Taison is a boy, he needs a father[.]" Suzuki subsequently returned to Hawai'i with Taison and her sister-in-law Noriko[10] to stay with Chatman at his apartment. Upon arriving in Hawai'i on April 2, 2002, however, Chatman told her they could not stay at his apartment. After her sister-in-law returned to Japan on April 6, 2002, she and Taison ended up back at the Ambassador Hotel.

On their first night at the Ambassador, Taison was being fussy. Chatman pushed Taison's chin upwards with his hand and said, "Shut your mouth." When Taison began to cry more, Chatman flipped him face down onto the bed and pressed his head and neck into the bed. Fearing that the situation might escalate if she said anything, Suzuki pretended as if nothing was happening and went into the bathroom. Chatman told her to come out, and eventually Taison cried himself to sleep.

The next afternoon, Sunday, April 7, at around 3 or 4 p.m., Chatman came to the Ambassador and met with Taison and Suzuki at the front desk. Chatman carried Taison as they

[10] Noriko also testified at trial. She confirmed that she arrived in Hawai'i on April 2, 2002, and left on April 6, 2002. She added that she thought prior to arriving that Suzuki and Chatman were going to get married, and that Suzuki, Taison, and Chatman would stay at his apartment while Noriko stayed at a hotel.

proceeded upstairs to their room; Taison began crying when Chatman took him. When the room key did not work, Suzuki went back to the front desk, leaving Chatman and Taison waiting by the door. After she returned about five to eight minutes later with a new key, Taison was still crying and had a reddish, raised bruise above his right eyebrow. Chatman told Suzuki that Taison got the bruise when Chatman had held him up in the air and Taison kicked Chatman's shoulder, sending Taison backwards.

When Taison continued to cry after they had entered the room, Chatman pushed Taison's chin upwards in the same manner as he had done the previous evening, and again said, "Shut your mouth, Taison." When Taison's crying only increased, Chatman loudly said, "No, Taison." As Suzuki again pretended not to see what was happening, Chatman again flipped Taison onto the bed, pushing him face-down into the bed. After a while, Chatman flipped him face-up again.

Chatman told Suzuki to come closer and watch, saying that a "mother should be near the baby." When she approached, Chatman again pushed Taison's chin upwards, causing a loud sound that "sounded like somebody bit really hard. It sound[ed] like a snappy sound. And [Taison] looked really uncomfortable because his chin was pressed upwards[.]" She saw some bubbles coming from Taison's mouth. Suzuki then went to the veranda because she

could not bear to watch, covered her ears, closed her eyes, and prayed that Taison would go to sleep.

When Suzuki heard banging noises coming from inside the room, she looked over and saw Chatman hitting Taison in the stomach. She again did nothing, feeling that she could not stop Chatman. She remained on the patio for about fifteen minutes while Taison cried loudly. When Taison then abruptly stopped crying, she looked into the room and saw that he appeared to be sleeping.

Suzuki then went back into the room, and saw Chatman sitting on the bed with his hand over his forehead, looking down. He said in a faint voice, "I'm no good." Suzuki then went to check on Taison, and noticed that the tip of his tongue was dark. She told Chatman, who put his finger in Taison's mouth, saying that Taison could not breathe.

Later, Chatman and Suzuki decided to go out to dinner, and the three of them went down to the car. When Suzuki put Taison in the car seat, he vomited. Suzuki told Chatman that they could not go out since Taison was sick. Suzuki and Chatman showered together, during which time Suzuki told Chatman that they should take Taison to the hospital, but he did not respond.

Suzuki thought about taking Taison to a hospital in Japan, given that her English was poor, she was unfamiliar with

the American medical system, and was unsure whether her Japanese health insurance would work outside of Japan. When she told Chatman that she wanted to take Taison back to Japan, he agreed. Suzuki then called her sister-in-law Noriko in Japan and arranged for her flight reservation to be changed so that she and Taison could return to Japan the next day since Taison was sick.[11] Chatman told Suzuki that Taison might have internal bleeding in his head and that "if anything should happen to Taison, [she] had to be strong." Chatman left the hotel after Suzuki told him to because "Taison would be stressed out when he wakes up and see[s] [him]."

During the night, Taison vomited several times and ran a fever. Suzuki placed a sticker on Taison's forehead in an attempt to reduce his fever. Also, she tried to feed him milk and juice, but he continued to vomit. Suzuki did not attempt to go for help because she did not "know anything about 911," could not speak English well "enough to really express [herself]," and was dependent upon Chatman, the only person she knew in Hawai'i.

The next day, April 8, Taison's appearance was changed. His eyes were open, but he was unresponsive when spoken to.

[11] Noriko confirmed that Suzuki called her in Japan, sounding a "little fearful." Suzuki requested that Noriko find a hospital near the airport in Japan and have Taison's health certificate ready so that they could go to the hospital as soon as she arrived. Noriko did not make the preparations, however, because Suzuki called her the next day "and said they went on the ambulance."

Chatman picked her and Taison up at the hotel and took them to the airport. Before leaving them, he told her that if anything were to happen, she could call him. Chatman did not interact with Taison at all. From April 6 to April 8, 2002, Suzuki and Chatman were the only people to interact with Taison.

At the Airport (Jeanne Kajimoto's and Suzuki's Testimony)

Suzuki proceeded with Taison to the departure gate at around 10 a.m. on April 8, 2002, but Jeanne Kajimoto, an airline supervisor, prevented her from boarding based on Taison's condition. Airport medical personnel were summoned and, after they recommended that Taison be taken to a hospital, an ambulance transported Taison and Suzuki to Kapiolani Medical Center (Kapiolani). Child Protective Services and police met Suzuki and Taison at the hospital.

Robert D. Bart's Testimony

Robert D. Bart, M.D., a child neurologist at Kapiolani, testified that Taison was admitted in a comatose condition on April 8, 2002. He had three bruises, one on each cheek and one on the right side of his forehead. In examining Taison's eyes, he found blood at the back of each eye, indicating that Taison had been shaken vigorously. He added that a CAT scan showed swelling along the right side of Taison's brain, suggesting either blunt-force trauma or lack of oxygen to the brain. While

in the ICU, Taison stopped breathing and had to be placed on a respirator. Dr. Bart noted that he was concerned that Taison might die due to the swelling in his brain, or suffer permanent impairment even if he survived. He concluded his testimony by opining, to a reasonable degree of medical certainty, that Taison had been shaken and had sustained his injuries within 48 hours prior to his admission to Kapiolani.

Robert DiMauro's Testimony

Robert DiMauro, M.D., a pediatric radiologist at Kapiolani, testified that Taison had suffered brain hemorrhages in areas which almost always lead to death to those parts of the brain. "The baby will have a stroke. And this part of the brain will just disappear. It will turn to water." Dr. DiMauro's opinion, like Dr. Bart's, "was that this was a case of shaken baby syndrome." He added that the injuries were consistent with the baby's head having been rapidly and violently shaken back and forth and slammed down onto a bed or other soft surface. In his opinion, the injuries occurred between 11:45 a.m. on April 6, 2002, and 11:45 a.m. on April 8, 2002. Dr. DiMauro concluded, to a reasonable degree of medical certainty, that Taison, when admitted on April 8, 2002, "was either in a coma or a semicoma," and at a significant risk of death.

Peggy Liao's Testimony

Peggy Liao, M.D., a pediatric ophthalmologist at Kapiolani, testified that Taison's retinas were covered with fresh blood and hemorrhages when she examined them on April 9, 2002. Dr. Liao concluded that, due to the hemorrhages and to brain damage, Taison was almost blind in his right eye and his vision in his left eye was also impaired. She also concluded that the injuries were caused by shaking.

Victoria Schneider's Testimony

Victoria Schneider, M.D., a pediatrician and child abuse expert at Kapiolani, also evaluated Taison on April 8, 2002. She testified that Taison had bruises on his chest and abdomen consistent with having been grabbed from under his arms and flipped over. Taison's brain injuries were, she opined, the result of shaking that occurred on April 7, 2002. She also concluded that the injury inside Taison's mouth was unlikely to have been caused accidentally, and was an additional indication that Taison had been abused.

Suzuki's Testimony, Part II

After Chatman was charged with Taison's attempted murder, Suzuki briefly returned to Japan. The family court entered a protective order enjoining Chatman and Suzuki from seeing each other. Suzuki subsequently returned to Hawai'i to

complete conditions set by the family court for her to regain custody of Taison, who had been placed in foster care.

On September 2, 2002, Suzuki ran into Chatman while waiting at a bus stop. Chatman told her to get in his car and she agreed. They ended up talking, and spent the night at the Hawaiian Monarch Hotel. Thereafter, they maintained daily contact and stayed together at various hotels and Chatman's apartment. Chatman was the kindest toward her that he had ever been, taking her clothes shopping, to the nail salon, and various other places.

At some point after she had begun staying at Chatman's apartment, they had a conversation regarding the criminal charges pending against him. Chatman told Suzuki that the case was "a very serious problem." He asked her to return to Japan, but she refused. He asked her on two other occasions to return to Japan, but she again refused. In asking her to return, Chatman told her that if she did not testify, the case would be dismissed. He also told her that "this was an accident." During the same time period, Chatman showed her two diamond rings, said that he had been meaning to give them to her for over a year, and asked her if she wanted them. Suzuki was very happy and said she would accept them when they were married.

Toward the end of September, Chatman began asking her to write a letter for him so that the criminal case "would

disappear." At around 1 p.m. on October 20, 2002, while at Chatman's apartment, Suzuki told him that she wanted some space apart from him. Chatman then struck her in the eye,[12] telling

[12] On cross-examination, Suzuki was unable to recall which eye Chatman had struck her in:

> [DEFENSE]: Okay. Let's see. You testified . . . that you got into an argument and Anthony Chatman got mad and that he hit you in your left eye; is that correct?
>
> [SUZUKI]: Now I don't remember whether it was the left eye or right eye, but I remember him hitting me with his hand.
>
> [DEFENSE]: So -- so you [are] testifying that today you don't recall what eye he hit you, what eye was hit; is that right? Is that right? I'm sorry.
>
> [SUZUKI]: Well, he hit me in the past on my eye, so . . .
>
> [DEFENSE]: I'm going to --
>
> [SUZUKI]: I'm confused as to --
>
> [DEFENSE]: I'm going to object, You Honor; ask to approach the bench.

At the bench, Chatman objected that her testimony was non-responsive and prejudicial in that it referred to a prior bad act (i.e., suggested that Chatman had hit her in the eye on an occasion other than October 20, 2002, the date of the charged offense) that he had not asked about, and moved for a mistrial. In the alternative, he asked that the testimony be stricken and the jury be instructed to disregard it. The circuit court overruled the objection, finding that the answer was responsive to why she could not recall which eye had been struck:

> [THE COURT]: I don't think it's non-responsive because the question was, "You testifying today you don't recall which eye he hit you, which eye was hit; is that right?"
>
> And she said, "Yeah, I can't remember because he hit me another time in the eye," or something to that effect. I think it's responsive to why you can't -- she can't remember. That was your question, "You're testifying you can't remember?" She said[,] "yeah."
>
> [DEFENSE]: I was asking specifically about October the 20 -

(continued...)

her not to "think about enjoying just yourself. Why are you here for?" He then dragged her by her hair into the next room, pulling her head backwards. Suzuki heard her neck snapping and screamed, but Chatman told her, "I can hurt you," adding, "[O]h, yeah, just come."

Chatman led Suzuki to a small table, gave her some white, unlined paper, and told her to write that he "didn't do anything," that she had lied to the police, and that she would tell her parents the truth. The undated letter, which was admitted into evidence, was written in Japanese and was read on the stand by Suzuki as follows:

> To Tony, How are you? It is your birthday. It's a good day today. I'm sorry I wrote you a letter. I wanted to apologize. What trouble came up because I lied to the police. I know that you didn't hit Taison or hurt Taison at that hotel. I was scared because you have trouble with the police. I don't want to lose Taison. I was scared and I was nervous. I talked to many people

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[12](...continued)

- you look at the follow-up question. That question refers to October the 20th, no other date. . . . [T]hat is not a responsive answer because that goes beyond what happened on October the 20th, 2002.

[THE COURT]: That is true, but the question was, "Are you testifying you can't remember which eye he hit you in," and that was her answer.

[DEFENSE]: On October the 20th. She gives an explanation of what happened to her other than October the 20th, which is prejudicial.

[THE COURT]: Okay. We have different interpretations of what a responsive answer is.

[DEFENSE]: So you're going to --

[THE COURT]: I'm going to leave it in. I think it's responsive.

> at the hospital. I couldn't quite understood what happened. Please forgive me.
>
> Because I lied and this thing happened. After I went back to Japan, I will call the prosecutor's office and tell them that you didn't hurt Taison, that you didn't hurt him at the hotel. And I will tell my mother and father truth.
>
> P.S., To Tony's friend, thank you for translating. Asahi Suzuki.

Suzuki explained that she usually uses lined paper, and chooses stationery with a matching envelope.[13] After she had written the letter, Chatman allowed her to leave the apartment. The following day, she went to the prosecutor's office to file a complaint against Chatman.

Tai Nguyen's Testimony

Honolulu Police Department (HPD) Officer Tai Nguyen testified that on October 21, 2002, he took Suzuki's statement via a Japanese interpreter regarding Chatman's conduct the previous day. He stated that during the interview, Suzuki "seemed really distraught" and was "constantly crying." Without objection, he continued that it was his impression that she "was really scared, scared of [Chatman], and seemed like she was really scared to lose her child." Based on her statements, mannerisms, and demeanor, Officer Nguyen further opined that Suzuki "was a girl that was afraid for her life, afraid for her child, afraid to lose her child." After a defense objection, the circuit court struck the statement and instructed the jury to

[13] At this point, the prosecution introduced a sample letter from Suzuki that was on lined paper, dated, and had a picture of a flower.

disregard it. In response to a subsequent question, Officer Nguyen again stated that it was his impression that Suzuki was afraid "she was going to lose her son." A defense objection that the testimony was non-responsive was overruled.

B. A Possible Problem with a Juror

On the second day of the trial, one of the jurors, Jacom Reyes, recognized a woman, Victoria Filoteo, in the courtroom. As the jury was exiting during a recess, he gave Filoteo a kiss as he passed her. It turned out that Chatman's brother, Wesley, was Filoteo's boyfriend and was standing next to her at the time of the kiss. After learning of the incident, the prosecution requested that Reyes be excused from the jury and replaced with an alternate juror.

Counsel for Chatman acknowledged that Reyes, and possibly other jurors, might have been affected by the incident, but proposed that Reyes and the other jurors be questioned by the court to determine whether this was in fact the case. The circuit court agreed to find out whether Reyes had recognized Wesley or realized the connection between Filoteo, Wesley, and Chatman. The court indicated that if no connection had yet been made, it was inclined to ask Wesley not to return to the trial in order to avoid the possibility that Reyes might eventually make the connection from Filoteo to her boyfriend, Wesley, to Wesley's brother, Chatman, and form a bias based thereon. Chatman's

counsel responded that Wesley had a right to attend the trial, which the court acknowledged.

When the court questioned Reyes, he revealed that he knew Filoteo as a childhood acquaintance, but had not seen her for over a year. He stated that his relationship with her would not impair his ability to be fair in the case, but asked if there was a reason why she was in the courtroom. The circuit court told him not to concern himself with that.

After this interview, the circuit court indicated that it was inclined to replace Reyes due to the danger that, over the course of the trial, Reyes would eventually connect the dots between his childhood acquaintance and Chatman, possibly affecting his impartiality. Counsel for Chatman offered an alternative proposal, stating, "Maybe [Wesley] would agree not to be here in court, along with [his girlfriend]." The circuit court balked, noting, "This is a public proceeding. And I don't want to bar anyone from the courtroom." However, the court added that if Chatman's counsel could persuade Wesley and Filoteo voluntarily not to return, it would be willing to retain Reyes.

The prosecution, however, maintained its position that it was better to replace Reyes, to which the defense objected that a juror could not be replaced "willy-nilly" without evidence that he had "been infected." After an extended back-and-forth, the circuit court decided to excuse Reyes over the defense's

objection. The defense continued to object, however, arguing that there was not a sufficient basis to do so. Finally, while voicing its continuing disagreement, the circuit court offered another choice: it would instruct Reyes to "bar the incident from his memory," question the other jurors individually to see if they had witnessed the incident and formed a bias, and follow the proposal to have Wesley and Filoteo not attend the trial. Chatman's counsel was agreeable to this alternative, and the circuit court stated, "I'm [going to] ask [the couple] to leave, please. If that's with their consent, because I'm not [going to] bar anyone from this courtroom."

C. The Defense Case

After the prosecution ended its case in chief, Chatman opened his case on June 18, 2003.

The Unavailable Witness

On June 9, 2003, Chatman had made submissions in support of the admission of the statement of an unavailable witness, Eri Gunji. Prior to trial, on February 14, 2003, Chatman had moved in limine to have the written statement of Gunji, a Japanese national, admitted at trial. The statement, which was written in Japanese, signed by Gunji, witnessed by Greg Tavares, an investigator at the Office of the Public Defender, and dated June 12, 2002, was officially translated as follows:

> I, Eri Gunji, give the following information freely and voluntarily. On the evening of April 6[, 2002] around 8:30, I met Tonii [sic] in front of the front desk of the Ambassador Hotel. At that time, I was doing monetary exchange [sic] at the front desk. Coming from the outside, Tonii walked into the hotel, noticed me, tapped me on my shoulders and talked to me. While chatting, "Why are you here?" and "How are you?," [sic] Tonii, who was carrying a baby, accompanied by a lady, was waiting for the elevator. The elevator came, and just when Tonii, who was carrying the baby, and the other lady, went inside, I saw that lady slap the left cheek of the baby with her right hand. The baby began to cry. Because I had gotten into the elevator quickly from the back, the sound of the slap sounded strong. I got off at the 6th floor, while the three of them continued to ascend in the elevator.

Chatman had argued that the statement was relevant because it established Suzuki's motive to lie as well as reasonable doubt as to the identity of the person who had caused Taison's injuries. In response to the prosecution's objection that the statement was hearsay, Chatman had countered that Gunji would be in Japan and thus unavailable for trial, bringing the statement under an exception to the hearsay rule for statements by unavailable declarants. The circuit court deferred its ruling on the admissibility of the statement until the presentation of the defense's case at trial in light of the possibility that Gunji might be available.

The defense now duly renewed its motion and the circuit court held a hearing outside the presence of the jury. Investigator Tavares testified that Gunji had told him she would be unavailable for the originally scheduled trial date of March 2003 because she planned to return to Japan in December 2002. He recalled discussions about taking a video deposition of Gunji,

but it was never done. He did not know if a motion for material witness had been filed with respect to Gunji. Finally, he admitted that he could not attest to Gunji's truthfulness, reliability, or competency.

During argument, defense counsel represented that efforts had been made to secure Gunji's presence at trial. Specifically, counsel argued that he had contacted Gunji in November 2002, whereupon she told him that she had changed her plans and would not be returning to Japan until late April or early May 2003. He also represented that she had been served with a subpoena before she eventually left Hawai'i in February 2003. Finally, counsel added that her statement would be corroborated by other defense evidence and was therefore reliable, accurate, and truthful.

The prosecution countered that the statement was not probative because it did not specifically identify Chatman, Suzuki, or the baby. Also, the prosecution noted that, after the trial had started, the defense had contacted Gunji in Japan, but she refused to return to Hawai'i due to the late notice and because she expected to be paid for her appearance.

After hearing the preceding evidence and argument, the circuit court excluded Gunji's statement, ruling:

> [E]ven if this woman is unavailable, . . . [HRE Rule 804 (1993)[14]] catchall requires equivalent circumstantial guarantees of trustworthiness as the other hearsay exceptions under [HRE Rule 804].
>
> In addition, [HRE Rule 804] requires that the Court must find that the statement is more probative on the point for which it is offered than any other evidence which the Defense can procure as to the equivalent guarantees of trustworthiness. Here, we have an apparent Japanese National about whom no one knows much, except that she may have been a student in Hawaii at one time. Neither State nor Defense knows this individual or anything about this individual. [Chatman] supposedly knew this witness, but there's, really, not much more available about her. And on that basis, it would be very difficult to test her motive, bias, intelligence, or memory. This individual statement was provided about two months after the incident at issue and identifies a Tonii, T-o-n-i-i, a lady and a baby about 8:30 in the evening on April 6th. There's no real certainty about who Tonii, the lady, or the baby are. Also[] unidentified[] are many other details including the witness's perspective, what she saw [that] is called a slap, how hard the slap was, and any surrounding circumstances. This individual defied a court order to appear at First Circuit Court and, apparently, offered to consider returning to Hawaii for sufficient monetary compensation. These do not suggest trustworthiness. These factors, the Court cannot find rise to the le[vel] of the guarantees of trustworthiness discussed in the other [HRE Rule 804] exceptions, such as cross-examination. These are four instances from the other [HRE Rule 804] exceptions: Cross-examination with motive and interest similar to the party against whom the hearsay statement is offered, a statement made under belief that death was imminent, corroboration required where a declarant exculpates an accused and takes the blame himself, or a statement of recent perception not provided in response to the instigation of a person investigating a case.
>
> Now, [the defense] has represented that there's another witness available to testify to this same matter. Further, Mr. Chatman, who plans to take the stand, anyway, can testify to this incident. So the Court is hard put to find that Ms. Gunji's statement is more probative than any other evidence that is available on this matter. And because the [HRE Rule 804] requirements are not met, even if we assume unavailability, the Court cannot let the statement go in.

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[14] HRE Rule 804(b)(8) (i.e., the "catchall") is an exception to the hearsay rule providing in relevant part that a statement of an unavailable witness is admissible

> if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Chatman's Testimony

Chatman took the stand in his own defense, and gave testimony which differed from or expanded upon Suzuki's testimony in the following material respects. With respect to Suzuki's April 2001 visit, he stated that the two discussed marriage. When she expressed her desire for them to be married, he told her he loved her but was not ready to commit to marriage. He told her the same thing during his October 2001 visit to Japan and asked her to tell her family this, given that he could not communicate with them in Japanese. When Suzuki brought her family to visit Hawai'i in November 2001 and her parents asked through an interpreter about their wedding date, he told them that in America having a child does not necessarily mean marriage, but that he would be responsible for his son. When he asked Suzuki whether she had told her parents they were getting married, she began crying. After her parents left, Suzuki became depressed; she cried a lot and lost her appetite.

The couple broke off contact for a time after this visit, but began corresponding again prior to Suzuki's April 2002 trip to Hawai'i. The subject of marriage again came up, with Suzuki reiterating her desire to get married while Chatman expressed his ambivalence.

As to the events of April 6-8, 2002, Chatman denied that he caused Taison's injuries; instead, he gave the following

version of events. On the evening of April 6, 2002, Chatman, Suzuki, and Taison returned from dinner to the Ambassador Hotel. On the way up to the room, they ran into Gunji, an acquaintance of Chatman's, and Gunji and Chatman engaged in some brief chit-chat. As all four were entering the elevator, Suzuki, who "had got angry for some reason," slapped Taison in the face.[15] Chatman believed that at this time Suzuki was intoxicated due to the two beers she had consumed at dinner.

In the room, they again talked about marriage. Chatman told Suzuki that he could not do it, that he was not ready to make that commitment. Suzuki reacted in a "hostile, violent, [and] depressed" manner. To calm her down, Chatman took a shower together with her. Throughout this time, Taison was mainly asleep on the next bed. Chatman did not push Taison's chin up, flip him onto the bed, hit, or slap him. He left the room at approximately 3 a.m. At that time, he did not see any marks or injuries to Taison.

On Sunday, April 7, 2002, Chatman returned to the hotel around 3 or 4 p.m. He met Suzuki, who was carrying Taison, in the lobby. Chatman, "took Taison and . . . noticed that Taison had a small bump on his head." Suzuki explained that he had been crawling on the bed and had bumped his forehead.

[15] Suzuki denied striking Taison in the elevator.

The three went up to the room, and Chatman played with Taison on the bed. Chatman and Suzuki talked, and the subject of marriage came up again. After about 15 minutes, during which time Chatman again expressed his unwillingness to commit to marriage, Chatman left the hotel because he did not want to listen to Suzuki's complaining.

Wanting to see his son, Chatman returned to the hotel around 6 p.m. Suzuki was intoxicated and would not let him enter the room. Chatman left. He did not push Taison's chin up, flip him onto the bed, hit, or slap him on Sunday evening. On cross-examination, Chatman agreed that he was "aware that shaking a baby could cause the child's death[.]"

On Monday, April 8, 2002, at about 7:30 or 7:45 a.m., Suzuki called Chatman and asked him "for the ticket to the airport." He went to the hotel to pick her up and take her to the airport for her flight, which was at 10:30 a.m. or thereabouts. He met her in the lobby; Taison was with her, but he did not notice any injury to Taison at that time. When he dropped Suzuki and Taison off curbside at the airport, he hugged and kissed Suzuki, and kissed Taison, who was in his stroller. Taison appeared to be asleep, but had a sticker on his forehead. When Chatman asked what it was, Suzuki explained that Taison had a fever. Needing to move the car, Chatman left it at that and

drove off. He never told Suzuki, at any time, that Taison was bleeding on the brain.

As to the events of September and October 2002, Chatman testified as follows. Contrary to Suzuki's version, Chatman stated that she called him three times beginning in mid- or late August, and they talked on two occasions, despite the family court restraining order. On September 3, 2002, Suzuki called him and asked if he could pick her up at the bus stop. He picked her up, they talked, went shopping, and he bought Suzuki a pair of shoes at her request. When Suzuki expressed the desire to spend the night with him, they went to the Hawaiian Monarch, where she got them a room.[16] They stayed together at various places thereafter, spending almost every day together.

Chatman stated that on each of Suzuki's visits in 2000 and 2001, he would do things for her such as take her shopping and to the salon, take her to dinner, and buy her things. During their time together in September 2002, they did much the same, going shopping, to dinner, and other "[t]ypical things that lovers do[.]" The subject of marriage came up very often, but he never showed or gave Suzuki any diamond rings.

[16] The parties stipulated that, if called to testify, the records custodian of the Hawaiian Monarch would state that Asahi Suzuki registered herself and Anthony Chatman as guests at 1:10 a.m. on September 4, 2002.

Chatman's birthday was on October 9. Within a day or two thereafter, he received a birthday card from Suzuki along with a letter in Japanese, which he could not read. This was the letter read by Suzuki on the stand and allegedly written on October 20, 2002. On or about October 12, 2002, Suzuki explained to him that the letter was an apology for lying to the prosecution.

On or about October 15, 2002, Chatman gave the original copy of the letter to his friend Anthony Brown, keeping copies for himself, because he wanted to find out exactly what it said, but was afraid that Suzuki might take the letter back. On October 18, 2002, Chatman had lunch with Phillip Maiava and another friend, during which he showed them the birthday card[17] and a copy of the letter, which he explained were from Suzuki. Later that evening, he called Brown to get the original so that a woman named Junko could translate the letter. After Junko translated the letter,[18] Chatman and Brown made more copies.

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[17] The birthday card and envelope were not introduced at the trial. Chatman testified that he believed Suzuki took them, although he did not see her do so.

[18] On cross-examination, Chatman agreed that he had had his ex-wife, Kaori Takenaka, translate the letter for him on October 22, 2002, but denied that he had asked her "[I]s it okay?" On redirect and recross, Chatman stated that he had Takenaka translate the letter on October 17, 2002. In denying that Takenaka had translated the letter for him on the night of October 21, 2002, Chatman engaged in the following colloquy with the prosecution:

> [PROSECUTION]: Isn't it true, sir, that at that particular time when [Takenaka] read the letter, she had
>
> (continued...)

Also on the night of October 18, Suzuki called and asked for the letter back because she was afraid of losing Taison. Having found out what the letter said, Chatman refused, stating that he intended to give it to his attorney.

On October 20, 2002, Chatman met with Akiko Wong at around 9:00 a.m. for an hour or an hour and a half. He then got in touch with Eugene Carroll, meeting him around 11:00 a.m. and staying at Carroll's place for two or three hours. Chatman denied being with Suzuki at or around 1 p.m. on October 20, 2002, denied striking her in the eye, grabbing her hair, or forcing her to write a letter that day.

During cross-examination, a bench conference was held at which the prosecution requested a ruling on whether it could impeach Chatman using a prior out-of-court statement made to the police on April 10, 2002. In the statement, Chatman failed to

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[18](...continued)

	questions about the letter?
[CHATMAN]:	She had questions about the letter.
[PROSECUTION]:	She didn't think it sounded like something a Japanese person would write, isn't that correct?
[CHATMAN]:	I don't think so.
[PROSECUTION]:	Didn't she express those concerns to you?
[CHATMAN]:	I don't think so.
[PROSECUTION]:	Didn't she pointedly ask you at that moment[,] [D]id you make [Suzuki] write this letter?
[CHATMAN]:	I . . . don't recall her making that statement.

mention that he had seen Suzuki strike Taison in the elevator on April 6, 2002; instead, while opining that Suzuki had caused Taison's injuries, he repeatedly stated, "I don't want to get into that[,]" when pressed as to how Taison's injuries might have occurred. Accordingly, the prosecution asked for clarification as to whether such a response was "tantamount to an assertion of [Chatman's] Fifth Amendment right" limiting the prosecution's ability to use the prior statement. Defense counsel noted that there would not be a problem and that he would object on a "question-by-question basis[.]" The circuit court then withheld a blanket ruling.

When trial resumed, the prosecution asked whether it was true that Chatman, when speaking to police on April 10, 2002, had failed to mention seeing Suzuki strike Taison in the elevator on April 6, 2002. Chatman replied, "At the time, I -- I didn't want to get her in trouble so I asserted my Fifth Amendment right privilege [sic]." The defense did not object to either the question or the answer, but another bench conference ensued at the prosecution's request, and the prosecution again requested a ruling as to how to proceed.

The circuit court stated that it did not really see a Fifth Amendment issue, but that it could not give a definite ruling in advance. When questioning resumed, the following exchange occurred:

[PROSECUTION]: So you never told [the police] anything about seeing this alleged incident in the elevator on April 6th, correct?

[DEFENSE]: Asked and answered.

[THE COURT]: Sustained.

[PROSECUTION]: Now, your testimony is that you didn't want to get Asahi Suzuki in trouble? Is that your testimony?

[CHATMAN]: And I asserted my Fifth Amendment right.

[PROSECUTION]: You're saying that when you spoke to the [police], you did not want to get Asahi Suzuki in trouble, correct?

[CHATMAN]: And I asserted my Fifth Amendment right.

[PROSECUTION]: Listen to -- and just answer the question I'm asking. I understand what you're saying about your Fifth Amendment.

[CHATMAN]: Yes.

. . . .

[PROSECUTION]: You're saying that you did not want to get Asahi Suzuki in trouble when you made these statements or you spoke to [the police]?

[DEFENSE]: Objection. Asked and answered. Ask to approach the bench . . . .

At the bench, the defense objected to the entire line of questioning and moved for a mistrial based on the impermissible negative inferences that could be drawn from Chatman's testimony regarding his assertion of a Fifth Amendment privilege. Defense counsel conceded, however, that the way in which Chatman was testifying made it unclear as to whether he had asserted a Fifth Amendment privilege on April 10, 2002, or was currently attempting to raise the privilege in response to the prosecution's questions. Counsel and the court also agreed that:

(1) Chatman clearly had no Fifth Amendment privilege regarding what Suzuki had allegedly done; and (2) no one had any idea why Chatman was persisting in such responses. Ultimately, the circuit court was concerned that "by asserting the Fifth, [Chatman was] making the jury think that he's hiding something[,]" and stated that it would instruct the jury not to draw any negative inference from Chatman's assertion of a Fifth Amendment privilege, and strike the problematic questions and answers. The circuit court then denied the motion for a mistrial, the testimony was stricken, and the jury was duly instructed to disregard it.

Eugene Rupak's Testimony

Eugene Rupak testified that he was working at a car wash on Saturday, April 6, 2002, when he saw Chatman arrive in a Corvette following a light-colored van occupied by a Japanese lady and a baby some time between 10 a.m. and 2 p.m. Rupak looked over again when he heard the baby crying and saw the Japanese lady slap the baby's face and choke his neck for approximately five seconds.[19] The lady stopped choking the baby when she noticed Rupak observing. He observed the incident from a distance of approximately 30 feet.

[19] Suzuki denied striking or choking Taison at the car wash that day.

On cross-examination, Rupak stated that he could not remember exactly when he began working at the car wash. Among a series of questions aimed at testing Rupak's memory for dates and whether he could be certain that the incident had occurred on April 6, 2002, the prosecution asked Rupak if he was currently incarcerated and the date on which he was arrested. Without defense objection, Rupak replied that he had been arrested on May 24, 2002, but admitted that when he was earlier questioned by the prosecution on May 23, 2003, he could not remember the specific date of his arrest even though it was almost precisely a year to the day. He also admitted that in his May 23, 2003 statement, he did not give a precise date for the slapping incident, stating only that it occurred during the first week of April 2002. He added that he could not remember the specific date when he immigrated to Hawai'i in 1997 or the date when he got his first job in Hawai'i, although those were important dates to him.

Chatman's Other Witnesses

Guy Okada stated that he saw Chatman with Taison and a Japanese woman on the morning of April 6, 2002, around 7:30 a.m., but did not notice any injuries to Taison. Anthony Brown testified that Chatman asked him to keep Suzuki's apology letter for him some time between October 15 and October 18, 2002. Brown added that he met with Chatman and a woman named Junko a few days

later so that Junko could translate the letter. Phillip Maiava testified that on October 18, 2002, Chatman showed him "a normal-size birthday card," written in Japanese, from the Japanese "wife of his son." On re-direct, Maiava clarified that he only saw an envelope, not an actual card. Eugene Carroll declared that Chatman visited him on October 20, 2002, arriving at around 11:15 a.m. and remaining for approximately 2.5 hours.

D. The Prosecution's Rebuttal

Kaori Takenaka's Testimony

The prosecution called Chatman's ex-wife, Kaori Takenaka, to challenge Chatman's testimony that she had not told him that she did not think Suzuki's letter sounded like something a Japanese person would write. Takenaka, originally from Japan and a native Japanese speaker, gave the following testimony regarding the letter. On October 21, 2002, Chatman called her at work and told her that he needed to see her after work. When he picked her up, he told her that he had a letter written by Suzuki that he wanted her to translate into English. This was the first time she had seen the letter, but Chatman told her that Junko had translated the letter for him earlier that day.

When the prosecution asked Takenaka whether she had asked Chatman about how the letter was prepared, the defense

objected that it was improper rebuttal. The circuit court, before allowing her to answer, instructed the jury as follows:

> [T]he answer you're about to hear, you cannot consider to prove any matters asserted within whatever is going to be asserted. Okay, this is only to be considered . . . on the issue of credibility and for no other purpose. You cannot consider it as proof of any substantive matters. It's only relevant and to be considered by you on the issue of credibility and for no other purpose.

Takenaka then answered that she asked Chatman whether he had forced Suzuki to write it, but he denied it. When the prosecution asked why Takenaka was concerned about the letter, the defense again objected, and the circuit court again gave the same instruction to the jury regarding the forthcoming answer. Takenaka then answered that she was concerned because the Japanese used in the letter "was not natural for Japanese would write. That was interpreted from English." The defense objected, arguing that there was no basis for Takenaka to give such an opinion. The circuit court sustained the objection and instructed the jury to disregard Takenaka's response in total.

When questioning resumed, Takenaka verified that, after translating the letter, she had told Chatman that the letter did not "sound like something a Japanese person would write[.]" The circuit court again instructed the jury that this answer could only be used on the issue of Chatman's credibility. Takenaka concluded her testimony, over objection, by stating that Chatman told her that he had pulled Suzuki's hair in anger, telling

Suzuki he was upset with her for being selfish and concerned only with herself and Taison.

E. Closing Argument

In its closing argument, the prosecution referred, without objection, to the fact that Rupak had been in custody during his questioning:

> Saturday might mean different things for different people. It might mean a weekend for many. It doesn't mean a weekend for Mr. Rupak. He works seven days a week. He worked the same hours every day. Every day was the same. Nothing, he tells you, happened around the date of April 6th that's significant in his life other than this alleged incident that he sees. He can remember that date. But how ironic that this same individual can't even remember the date that he had been arrested and was in custody when he was questioned one day short of a year of that date.

The prosecution also described defense counsel as having "played up" allegations that Suzuki had slapped Taison. In response to the defense's closing argument that "the defense position is that [Suzuki] did this to [Taison, but] we also submit that [Suzuki] did not mean to kill Taison," the prosecution, over the defense objection that the remarks were personal and demeaning, argued:

> [Defense counsel] tells you about Asahi Suzuki doing this to [Taison] and tells you[,] but she didn't mean it. Where did he get that from? If you believe Asahi Suzuki did it, isn't there every reason to believe that she would have done this purposely? What's the reason to say she didn't mean it? Why does he say this? Why does he make these comments? Why does he come forward, why does Mr. Kanai suggest to you that, well, Asahi Suzuki wouldn't have meant it, nobody would have meant it? Because you know why? He wants [to have] his cake and eat it, too.
>
> . . . .
>
> You see, ladies and gentlemen, when counsel made that argument, he wants you to say, well, you know, if Anthony Chatman

> -- if you find that Anthony Chatman is guilty or did the act against [Taison], I want to give you an out. I want to let you think that you can consider the included offenses. I got to find a way to do that. I got to find a way to argue out of both sides of my mouth, and that's really what he did. So he came up with, well, Asahi Suzuki didn't mean it, just like no one would have meant it. But there's no evidence of any of that.

With regard to the letter and whether Chatman had compelled Suzuki to write it, the prosecution argued:

> He had just assaulted her. He told her what to write. He's sitting there with his imposing presence next to her. He assaulted her in the past.[20] These are things that you can consider in determining whether or not the defendant was compelling [Suzuki] to write the letter.

The prosecution also mentioned, without objection, the effect of shame on Japanese people, arguing:

> Fear of the letter by [Suzuki] meant she was controlled. Was it intent to induce [Suzuki] to avoid legal process? Well, the contents of the letter will shame her. She has to tell her family, the prosecutors, the police[,] I'm a liar. Shame. Now, ladies and gentlemen, you can use your life experiences. Shame is a very big thing. It means a lot. Now, ladies and gentlemen, to people in Japan, to people in Japan, shame is even greater.

Finally, the prosecution asked rhetorically, "Why is it that the defense attorney didn't really want to address how that letter

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[20] Prior to closing, the defense objected to the prosecution's use of a Power Point slide referring to this evidence, arguing that it was prejudicial. The prosecution responded that Suzuki had testified on cross-examination that she had been struck in the eye by Chatman in the past and the court had denied the motion for a mistrial and request to strike, so the testimony was in evidence. The circuit court overruled the defense objection, reasoning that the evidence of the past assault was relevant to the extortion count under State v. Valdivia, 95 Hawai'i 465, 24 P.3d 661 (2001), because it would establish the genuineness of the threat and compulsion to write the letter. The defense argued that because Suzuki's statement was made in the context of explaining why she could not recall which eye she had been struck in, it was unconnected to any fear she may have had at the time she wrote the letter. The circuit court remained unmoved, and the slide was allowed. In total, the slide in question, titled "Defendant Compelled Asahi to Write the Letter," contained four numbered points: (1) "He had just assaulted her"; (2) "He told her what to write"; (3) "He was sitting next to her"; and (4) "He had assaulted her in the past."

was made and why there's all these [sic] inconsistent evidence with respect to that?"

At the close of argument, defense counsel noted for the record that he objected to all of the prosecution's personal references to him as unnecessarily demeaning.

F. Jury Instructions

When instructions were settled, the defense requested a merger instruction for the extortion, intimidation, and abuse counts. Counsel explained his request as follows:

> [W]e're saying that [the intimidation count] along with [the extortion count and abuse of a household member count] provides what I call a merger problem. In other words, . . . under the facts adduced, we take the position that whether you're talking [in] terms of conduct or intent, it's clear that there was just a singular incident or occurrence . . . . such that [Chatman] is being overcharged. And the impact upon the jury of being overcharged is quite significant. It is significant in the sense that a jury would tend to believe that -- they believe that a defendant charged with a greater number of offenses is more likely to be guilty than not.

The circuit court rejected Chatman's request in part, but did allow a merger instruction as to the abuse count. On the intimidation and extortion counts, the circuit court instructed the jury as follows:

> A person commits the offense of Intimidating a Witness if he uses force upon a person he believes is about to be called as a witness in any official proceeding, with intent to influence the testimony of that witness or to induce that person to avoid legal process summoning her to testify.
>
> There are two material elements of the offense of Intimidating a Witness, each of which the prosecution must prove beyond a reasonable doubt.
>
> These two elements are:

> 1. That, on or about the 20th day of October, 2002, . . . Chatman[] used force upon Asahi Suzuki, a person he believed is about to be called as a witness in any official proceeding; and
>
> 2. That [Chatman] did so with the intent to influence the testimony of Asahi Suzuki or to induce Asahi Suzuki to avoid legal process summoning her to testify.
>
> . . . .
>
> A person commits the offense of Extortion in the Second Degree if he intentionally compels or induces another person to engage in conduct from which she has a legal right to abstain by threatening by word or conduct to cause bodily injury in the future to the person threatened.
>
> There are three elements of the offense of Extortion in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt.
>
> These three elements are:
>
> 1. That, on or about the 20th day of October, 2002, . . . Chatman[] compelled or induced Asahi Suzuki to engage in conduct from which she had a legal right to abstain; and
>
> 2. That [Chatman] did so by threatening by word or conduct to cause bodily injury in the future to Asahi Suzuki; and
>
> 3. That [Chatman] did so intentionally.

The circuit court also charged the jury to consider the lesser included offenses of assault in the first degree and assault in the second degree in the event it could not reach a unanimous verdict on the attempted murder charge. In addition, the court cautioned the jury that "[y]ou must not be influenced by pity for the defendant or for any other person[.]"

G. Verdict and Post-Trial

The jury retired for deliberations on June 26, 2003. On June 30, 2003, the jury found Chatman guilty as charged. On July 24, 2003, Chatman filed a motion for a new trial, alleging, inter alia, juror misconduct by Jacom Reyes. The motion came on

for hearing on September 15, 2003, and November 17, 2003, was continued for further hearing on February 9, 2004, April 19, 2004, and May 10, 2004, and continued again to July 19, 2004. In between episodes of the new trial saga, Chatman filed a motion on April 20, 2004 for reconsideration of the request for a mistrial due to prosecutorial misconduct in eliciting references to Chatman's Fifth Amendment privilege.

With respect to the juror misconduct issue, Wesley testified at length that juror Reyes had spoken to him about the case at a graduation party in 'Ewa Beach on June 21, 2003. Filoteo also testified that Reyes and Wesley had talked. Reyes, on the other hand, denied that a conversation had taken place. Chatman then asked for a two- or three-week continuance to secure witnesses to rebut Reyes' testimony. At the July 19 hearing, Chatman moved for another continuance of the hearing in order to secure the appearance of witnesses. Counsel represented that one of the witnesses, according to the sheriff, was avoiding process. The circuit court denied the continuance, stating that the motion had now been pending for nearly a year. Defense counsel then moved to withdraw from the case, and Chatman addressed the court in support of the motion, stating that he had lost confidence in counsel due to his failure to procure the attendance of witnesses he considered crucial to his defense. The circuit court denied the motion to withdraw and request for new counsel, denied the

motion for reconsideration of the request for mistrial as already ruled upon, and denied the motion for a new trial based upon the following findings of fact:

1. Jacom Reyes . . . sat as a juror in the consolidated trials [of Chatman] from May 29, 2003, through June 26, 2003; jury deliberations began on the afternoon of June 26, 2003. During trial, Reyes occupied Chair No. 10.

2. On May 30, 2003, as he filed out of the courtroom with other jurors during a trial recess, Reyes greeted with a hello and kiss on the cheek a woman who was sitting in the back row of the courtroom gallery. This woman, identified as Victoria Filoteo, was a distant childhood friend of Mr. Reyes' [sic] and sat with [Chatman's] brother, Wesley Chatman. After questioning of Mr. Reyes by Court and counsel, at the request of the defense, the Court permitted Mr. Reyes to remain on the jury.

3. On June 30, 2003, the jury returned verdicts of guilty. . . . These verdicts were read in open court, with jury, counsel, and Defendant present. Then, pursuant to a request for a poll of the jury, the Court instructed the jury that, as to each count or case, the clerk would call each juror, who should answer "yes" if he or she agreed with the verdict read, and "no" if he or she did not agree with the verdict read. During the polling, Reyes, together with all other eleven jurors, responded that he agreed with each and all of the guilty verdicts which had been read. As to each count or case, Reyes answered in the affirmative.

4. During the hearing on the motion, Wesley Chatman testified that, on the evening of June 21, 2003, Reyes told him that Reyes did not think [Chatman] was guilty; no one listened to Reyes during "conferences," which therefore were meaningless; Reyes slept during some proceedings; and Reyes "sometimes" came to court "stoned," the three terms within apostrophes [sic] being undefined.

5. On June 21, 2003, during trial, Reyes, at the invitation of his brother, attended for 5 to 10 minutes a party, whose purpose and whose honoree Reyes did not know. He may have waved to Filoteo, who was present at the party with Wesley Chatman, whose last name Reyes did not know. At the time, Filoteo and Chatman were about 30 feet away from Reyes.

6. Reyes had a plate of food made up, then left the party. He told his brother that he had to leave the get-together "now" because two persons somehow connected to the trial for which Reyes was serving as a juror were present, Reyes had been instructed by the Court not to have contact with the two individuals, and Reyes was "under oath."

7. During the 5 to 10 minutes at the party, Reyes had about one-half of a Budweiser light beer. He was not under the influence of any substance at the time. Filoteo did not introduce Reyes to Wesley Chatman, nor did either exchange any words with Reyes. Reyes has not otherwise seen either individual; prior to trial, he had last seen Filoteo about 10 years earlier.

8. During the party, Reyes did not say or suggest that [Chatman] was not guilty, or that he did not pay full attention or slept during trial, or that he was under the influence of any substance during trial, or that he felt his opinions would not be listened or were not listened to by other jurors. On June 21, 2003, jury deliberations had not yet begun.

9. When Reyes responded during the jury polling that he agreed with the guilty verdicts which had been read, his answers reflected Reyes' considered opinion in accordance with the evidence and instructions of law, and reflected the vote of the jury.

10. On March 10, 2004, in response to the Court's subpoena, Reyes appeared and answered all questions put to him by the Court and both counsel. Reyes, a college student, appeared sober and appropriately responsive.

11. According to the verdict forms and the polling of the jury, the jury's verdicts . . . were unanimous.

12. Wesley Chatman's testimony was incredible, and Reyes' testimony was credible.

13. Based upon the credible evidence and the totality of the circumstances, Reyes was not under the influence of any substance during trial or deliberations, and he did not violate the Court's instruction to him that he have no contact with Filoteo.

The court then entered its judgment of conviction and sentence as indicated in the introduction above. Chatman filed a timely notice of appeal on August 18, 2004.

On February 24, 2005, the clerk of this court filed a letter from Chatman in which he alleged that his trial counsel, Chester Kanai, had failed to appear at a scheduled February 7, 2005 parole hearing, failed to communicate with him, failed to

diligently pursue his appeal, and failed to effectively assist him at trial. Chatman attached a letter, dated November 16, 2004, and addressed to Kanai regarding: (1) Kanai's failure to take a video deposition of Gunji in Japan when he had taken a video deposition of Rupak; (2) Kanai's failure to subpoena a witness named Akiko Wong who would have provided an alibi for Chatman and testified that she translated Suzuki's letter for him on October 18, 2002; (3) Kanai's failure, due to alleged unwillingness to delay his trip to Japan, to raise the issue of Jacom Reyes' alleged misconduct before the defense rested or the jury retired for deliberations; and (4) Kanai's slow pace in pursuing the appeal. On February 25, 2005, Kanai filed a motion for withdrawal and substitution of counsel based upon his belief that Chatman intended to claim on appeal that Kanai provided ineffective assistance. He agreed in an attached declaration that Chatman had complained to him regarding the points raised above. After remand by order of this court, the motion was granted and Chatman's current counsel, Linda Jameson, was appointed.

II. STANDARDS OF REVIEW

A. Constitutional Questions, Statutory Interpretation, and Questions of Law

"A trial court's conclusions of law are reviewed de novo, under the right/wrong standard of review." Child Support

Enforcement Agency v. Roe, 96 Hawai'i 1, 11, 25 P.3d 60, 70 (2001) (quoting State v. Ah Loo, 94 Hawai'i 207, 209, 10 P.3d 728, 730 (2000)) (brackets omitted). Questions of constitutional law and statutory interpretation are reviewed under the same standard. State v. Rogan, 91 Hawai'i 405, 411, 984 P.2d 1231, 1237 (1999); State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996).

B. Motion for a Mistrial

A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. State v. Loa, 83 Hawai'i 335, 349, 926 P.2d 1258, 1272 (1996). "Generally, to constitute an abuse [of discretion] it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Sapp v. Wong, 62 Haw. 34, 41, 609 P.2d 137, 142 (1980) (quoting State v. Sacoco, 45 Haw. 288, 292, 367 P.2d 11, 13 (1961)).

C. Prosecutorial Misconduct

"Prosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a fair trial." State v. McGriff, 76 Hawai'i 148, 158, 871 P.2d 782, 792 (1994) (citations omitted). "Allegations of prosecutorial misconduct are reviewed under the harmless beyond a

reasonable doubt standard, which requires an examination of the record and a determination of 'whether there is a reasonable possibility that the error complained of might have contributed to the conviction.'" State v. Hauge, 103 Hawai'i 38, 47, 79 P.3d 131, 140 (2003) (citations omitted). In determining whether such a reasonable possibility exists, the appellate court considers: (1) the nature of the alleged conduct; (2) the promptness or lack of a curative instruction; and (3) the strength or weakness of the evidence against the defendant. State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992).

D. Evidentiary Rulings

> [D]ifferent standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard of appellate review is the right/wrong standard. However, the traditional abuse of discretion standard should be applied in the case of those rules of evidence that require a "judgment call" on the part of the trial court.

Kealoha v. County of Hawai'i, 74 Haw. 308, 319-20, 844 P.2d 670, 676 (1993). Evidentiary rulings on relevance under HRE Rules 401 and 402 are reviewed under the right/wrong standard. Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 350-51, 944 P.2d 1279, 1293-94 (1997). Similarly, the admissibility of evidence based on the hearsay rules is generally reviewed under the right/wrong standard. State v. Moore, 82 Hawai'i 202, 217, 921 P.2d 122, 137 (1996). However, determinations of trustworthiness under HRE

Rule 804(b)(8) are reviewed for abuse of discretion. State v. Haili, 103 Hawai'i 89, 99-100, 79 P.3d 1263, 1273-74 (2003).

Admission of opinion testimony is also reviewed under the abuse of discretion standard. State v. Ferrer, 95 Hawai'i 409, 422, 23 P.3d 744, 757 (App. 2001). Similarly, the decision to exclude otherwise relevant evidence under HRE Rule 403 because of the potential for prejudice "is eminently suited to the trial court's exercise of its discretion because it requires a cost-benefit calculus and a delicate balance between probative value and prejudicial effect." Haili, 103 Hawai'i at 101, 79 P.3d at 1275 (citations, brackets, and internal quotation marks omitted).

Finally, absent plain error, a party may not assign as error the admission or exclusion of evidence unless a substantial right of the party is affected and a timely objection, stating the specific grounds, was made. HRE Rule 103(a). Whether an error in admitting or excluding witness testimony is harmless beyond a reasonable doubt or affects a substantial right depends on various factors including: (1) the importance of the witness to the party's case; (2) whether the testimony was cumulative; (3) the presence or absence of testimony corroborating the testimony on material points; and (4) the overall strength of the party's case. State v. Cordeiro, 99 Hawai'i 390, 420, 56 P.3d 692, 722 (2002).

E. Jury Instructions

> When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading. Erroneous 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. [However, e]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction. If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.

State v. Gonsalves, 108 Hawai'i 289, 292-93, 119 P.3d 597, 600-01 (2005) (internal citations, quotation marks, indentations, and paragraphing omitted; bracketed material added).

F. Improper Remarks by a Witness

Whether a witness's improper remarks constitute reversible error depends on: (1) the nature of the impropriety; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant. State v. Samuel, 74 Haw. 141, 148-49, 838 P.2d 1374, 1378 (1992).

G. Ineffective Assistance of Counsel

> 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).

III. DISCUSSION

A. The Circuit Court Did Not Plainly Err in Acceding to the Defense Request to Retain Juror Reyes and Have Wesley and Filoteo Voluntarily Not Attend the Trial.

Chatman first argues that the circuit court violated his constitutional right to a public trial when it excluded Wesley and Filoteo from the trial. The prosecution counters that this claim is without merit because it was in fact at the strenuous insistence of the defense that Reyes was retained as a juror in conjunction with Wesley and Filoteo's voluntary agreement not to return to court. Based on the following, we hold that the circuit court did not plainly err in acceding to the defense request to keep Reyes as a juror and secure the voluntary departure of Wesley and Filoteo.

At the outset, it must be emphasized that not only did the defense not object to the retention of Reyes as a juror when it was determined that he was acquainted with Filoteo, but it expressly requested his retention even after the circuit court and prosecution indicated their desire to have him excused. As such, any error can only be considered invited, and, as a general rule, invited errors are not reversible. State v. Jones, 96 Hawai'i 161, 166, 29 P.3d 351, 356 (2001); State v. Puaoi, 78 Hawai'i 185, 189, 891 P.2d 272, 276 (1995); State v. Smith,

68 Haw. 304, 313-14, 712 P.2d 496, 502 (1986). However, it is also true that this court will still reverse where an invited error is so prejudicial as to be plain error or to constitute ineffective assistance of counsel. Smith, 68 Haw. at 314, 712 P.2d at 502.

In this case, however, there was no error at all. A defendant in a criminal case is guaranteed by state and federal constitution the right to a public trial. State v. Ortiz, 91 Hawai'i 181, 190, 981 P.2d 1127, 1136 (1999). As set forth above, the circuit court in this case acknowledged this right, stating, "This is a public proceeding. And I don't want to bar anyone from the courtroom." After agreeing to the defense proposal to keep Reyes, the court also stated, "I'm [going to] ask [the couple] to leave, please. If that's with their consent, because I'm not [going to] bar anyone from this courtroom."[21] (Emphasis added.) Based on the facts of this case, therefore, it cannot be said that the trial court's assent to the defense proposal to have Chatman's brother and Filoteo leave can even be considered a closure of the courtroom; had the couple or the defense requested that they be allowed to stay, it appears from

[21] We note that the focus on the spectators' consent rather than Chatman's consent was misplaced. It is well settled that the sixth amendment right to a public trial belongs to the defendant, not the spectators. Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 379-80 (1979). Similarly, article I, section 14 of the Hawai'i Constitution, entitled "Rights of Accused," provides that "the accused shall enjoy the right to a speedy and public trial[.]" (Emphasis added.)

the record that Reyes would have been excused as a juror and their attendance would have been permitted. Because the circuit court did not bar anyone from the courtroom, Chatman's right to a public trial was not violated and there was no error, much less plain error.[22]

B. The Circuit Court Did Not Abuse Its Discretion in Denying Chatman's Motion for a Mistrial Based on Suzuki's Testimony that Chatman "Was on Top of" Her.

Chatman next argues that the circuit court abused its discretion in denying his motion for a mistrial based on Suzuki's testimony that, after falling asleep the first night she met Chatman, the next thing she noticed was that he "was on top of [her.]" Chatman argues that the prejudicial effect of this testimony, which constituted evidence of a prior bad act, could not be cured because this case ultimately boiled down to a

[22] Alternatively, we believe that Chatman's right to a public trial should be deemed waived. Although it does not appear that this court has ever passed on the issue, other courts have held that, unlike other constitutional rights, waiver of the right to public trial need not be made by the defendant personally. See Levine v. United States, 362 U.S. 610, 619 (1960) (holding that the failure to object to closure of the courtroom constitutes waiver of the right to a public trial); see also People v. Bradford, 929 P.2d 544, 570 (Cal. 1997) (holding that no personal waiver by the defendant is required to waive the right to a public trial and defense counsel's failure to object to closure is sufficient for waiver to be found); Berkuta v. State, 788 So. 2d 1081, 1082-83 (Fla. Dist. Ct. App. 2001) ("A defense counsel's affirmative representation to the court that the defendant consents to excluding persons otherwise entitled to be in the courtroom is sufficient to effectively waive the defendant's right to a public trial."); People v. Hayden, 788 N.E.2d 106, 113-14 (Ill. App. Ct. 2003) (stating that the right to a public trial may be waived by counsel or by failure to object to closure); People v. Daughtry, 664 N.Y.S.2d 306, 308 (1997) (finding that defense counsel effectively waived the defendant's right to a fair trial by consenting to closure of the courtroom). Here, assuming arguendo that the courtroom was constructively closed in part, defense counsel not only failed to object but affirmatively requested and consented to the partial closure. Accordingly, he waived Chatman's right to have Wesley and Filoteo present.

credibility contest between Suzuki and Chatman; as such, the effect of her testimony damaged his credibility and could easily have tipped the contest in her favor. The prosecution responds that: (1) the incomplete response given by Suzuki was not prior bad act evidence; and (2) even assuming that it was improper prior bad act evidence, the circuit court's prompt curative instruction was an adequate remedy in light of the strength of the evidence. Based on the following, we conclude that the prosecution's response has merit.

The controlling case regarding this point of error is Samuel. In that case, an expert witness for the prosecution, who had previously been warned not to mention prior bad acts, testified that the defendant had a history of violence. 74 Haw. at 149, 838 P.2d at 1378. After the defense objected, the trial court struck the remark and instructed the jury to disregard it. Id. On appeal, the defendant contended that the trial court's response was inadequate to remedy the prejudicial effect of the witness's improper remarks and a mistrial should have been granted. Id. at 148, 838 P.2d at 1378. This court disagreed, applying the three-pronged prosecutorial misconduct analysis and concluding that the curative instruction was sufficient. Id. at 148-49, 838 P.2d at 1378-79.

The circumstances of the instant case are indistinguishable from Samuel. Having been cautioned by the

prosecution not to refer to other incidents unless specifically asked, Suzuki nevertheless began to describe what could be construed as Chatman's initiation of a sexual act without consent. Also as in Samuel, the defense promptly objected and the trial court struck the remark, instructing the jury to disregard it.

It must also be acknowledged, however, that while the circumstances here and in Samuel are similar, the substance of the analysis is different. As Chatman correctly notes, the principal issue in this case was the identity of the person who caused Taison's injuries. The prosecution's only substantive evidence on this point was the testimony of Suzuki, which the defense countered with the denials of Chatman. In short, the jury was tasked with weighing the credibility of Suzuki against that of Chatman. Thus the third prong of the misconduct analysis points in Chatman's favor.

On the other hand, the first two prongs point in the prosecution's favor. First, the harm to Chatman was less than in Samuel in that Suzuki, unlike the expert in Samuel, who clearly stated that the defendant had a history of prior bad acts, was not allowed to finish her response. Therefore, although Suzuki's testimony might suggest non-consensual sexual activity, there was no definitive introduction of prior bad act evidence. Moreover, the testimony did not bear on Chatman's character for

truthfulness, nor were there any charges of sexual misconduct in this case such that there was a danger that the testimony could be used as improper propensity evidence. Finally, the circuit court responded promptly by striking the testimony and instructing the jury to disregard it. Accordingly, we hold that the circuit court's remedy was adequate, and thus no abuse of discretion was committed in denying the motion for a mistrial.

C. The Circuit Court Did Not Abuse its Discretion in Refusing to Admit the Statement of Gunji Under the Catchall Exception to the Hearsay Rule.

Chatman's third point of error is that the circuit court abused its discretion in refusing to admit Gunji's statement that she saw a woman, presumably Suzuki, strike a baby, presumably Taison, in the hotel elevator on April 6, 2002. Chatman argues that the hearsay analysis is less stringent when it is the defense seeking admission of an out-of-court statement because the defendant's constitutional right to confront witnesses is not implicated, only the rules of evidence. The prosecution counters that the circuit court did not abuse its discretion because Chatman failed to show that Gunji's statement was trustworthy and more probative on the point for which it was offered than any other evidence that Chatman could procure. Again, the prosecution's argument has merit.

First, it is true that the hearsay analysis in this case is both simpler and less stringent because it is the

defendant who seeks to introduce the out-of-court statement. In Haili, this court noted, "Evidence may be admissible pursuant to the hearsay rules and yet violate a defendant's constitutional right to confront adverse witnesses." Haili, 103 Hawai'i at 100, 79 P.3d at 1274 (citations omitted). Here, only the catchall exception to the hearsay rule, HRE 804(b)(8), is implicated, because it is the defendant proffering the evidence. To be admissible under HRE Rule 804(b)(8), a statement must be "trustworthy." Id. at 102, 79 P.3d at 1276.

As set forth above, the circuit court engaged in a detailed inquiry as to the trustworthiness of Gunji's statement. The court found the statement untrustworthy on the grounds that: (1) it did not clearly identify Chatman, Suzuki, or Taison; (2) various material details were lacking; and (3) Gunji had refused to obey a subpoena and had indicated a willingness to testify only upon sufficient compensation. We do not believe that the foregoing analysis clearly exceeds the bounds of reason; as such, it cannot be said that the circuit court's decision to exclude the statement constituted an abuse of discretion.

D. Chatman's Argument that Officer Nguyen's Testimony Was Improper Opinion Should Be Deemed Waived.

Chatman next contends that the circuit court abused its discretion in allowing Officer Nguyen to give his lay opinion that Suzuki was afraid she was going to lose Taison. He argues

that Nguyen's opinion was not helpful to the jury and was unduly prejudicial in that, due to Nguyen's status as a police officer, the opinion had the effect of improperly bolstering Suzuki's credibility. The prosecution argues that: (1) this objection should be deemed waived because Chatman failed to raise it in the trial court; (2) the objection fails on the merits; and (3) even if the testimony was improperly admitted, any error was harmless. We agree with the prosecution that Chatman failed to preserve an objection.

As set forth above, Officer Nguyen gave what could be considered opinion testimony at three points: (1) he testified, without objection, that Suzuki "was really scared, scared of [Chatman], and seemed like she was really scared to lose her child"; (2) he testified that Suzuki "was a girl that was afraid for her life, afraid for her child, afraid to lose her child[,]" but that testimony was stricken in response to a defense objection and the jury was instructed to disregard it; and (3) in response to a subsequent question, he gave his impression that Suzuki was afraid "she was going to lose her son[,]" and a defense objection that the testimony was non-responsive was overruled.

It is well settled that testimonial objections not raised or properly preserved at trial will generally not be considered on appeal. See, e.g., State v. Crisostomo, 94 Hawai'i

282, 290, 12 P.3d 873, 881 (2000) ("A hearsay objection not raised or properly preserved in the trial court will not be considered on appeal." (Citation omitted.)). Moreover, "[w]here specific grounds are stated in an objection, the implication is that there are no others or, if there are others, that they are waived." State v. Matias, 57 Haw. 96, 101, 550 P.2d 900, 904 (1976) (citations omitted). See also Crisostomo, 94 Hawai'i at 290, 12 P.3d at 881 (holding that even if an objection to testimony was made on other grounds, a hearsay objection on appeal was waived). Here, Chatman did not object to the first opinion statement, and objected only on responsiveness grounds to the third. In between, his objection to the second statement was sustained and the jury was instructed to disregard the statement. Accordingly, his objection on appeal is waived in two cases and moot in the third.

E. The Circuit Court Did Not Plainly Err in Allowing Evidence of Rupak's Arrest and Imprisonment.

Chatman's fifth assignment of error is that, even though he did not object, the circuit court plainly erred in allowing the prosecution to elicit testimony from Rupak that he had been arrested and imprisoned. The prosecution responds that the evidence was relevant to Rupak's memory for specific dates and, therefore, also to his credibility. Chatman counters that even if the evidence tended to undermine Rupak's memory as to the

precise date, April 6, 2002, of the slapping incident, it was outweighed by the risk of unfair prejudice. Based on the following, we hold that the circuit court did not plainly err in allowing the testimony.

Evidence of the date of Rupak's arrest was relevant both to Rupak's memory and to his credibility. It is well established that on cross-examination, a party is entitled to test a witness's perception, memory, and credibility. State v. Peseti, 101 Hawai'i 172, 180, 65 P.3d 119, 127 (2003). On May 23, 2003, Rupak testified in his deposition that he had seen the woman slap the child some time during the first week of April. Consistent with this level of precision for dates, he also testified that he did not remember the precise date on which he was arrested (even though it was almost a year to the day) or the day on which he first came to Hawai'i, though he acknowledged that these were important dates in his life. However, less than a month later, Rupak testified at trial that the date of the slapping incident was April 6, 2002. Accordingly, the prosecution asked a question designed to show that, if Rupak could not even remember the day on which he was arrested, May 24, 2002, it was unlikely that he could suddenly remember the precise date of an event that occurred one month earlier and was presumably of less significance in his life.

Of course, this question also implicated Rupak's credibility (e.g., it suggested that perhaps he had been coached subsequent to his deposition and prior to trial). With respect to attacks on credibility, this court has held:

> Evidence to be admissible for the purpose of affecting the credibility of a witness must be such as bears directly upon his character for truth and veracity. Otherwise it would be irrelevant. It is not competent if it merely tends to disgrace the witness.

Asato v. Furtado, 52 Haw. 284, 294, 474 P.2d 288, 295 (1970) (citation omitted; emphasis added). Here, however, the evidence did not tend merely to disgrace Rupak; rather, it also demonstrated his memory for dates. Moreover, its probative value could not clearly be said to be outweighed by any unfair prejudice because the prosecution did not dwell on the arrest, nor did it reveal the nature of the crime for which it had been made or whether a conviction had resulted. Accordingly, there was no error, much less plain error, in admitting it.

F. The Circuit Court Did Not Abuse Its Discretion in Allowing Takenaka's Rebuttal Testimony Regarding Her Concerns as to Whether the Apology Letter Was Translated from English.

Chatman next contends that the circuit court abused its discretion in allowing Takenaka to give her opinion as to whether the letter appeared to have been translated from English. He argues that Takenaka was not qualified to give such an opinion and that the opinion was not relevant to impeachment. The prosecution counters that: (1) Takenaka's testimony was relevant

to impeachment; and (2) her testimony did not constitute an opinion, but was simply her statement as to the conversation that took place between her and Chatman regarding the letter (i.e., whether or not it was in fact Takenaka's opinion that the letter appeared to have been translated from English, the point was that Chatman had denied that Takenaka had expressed such concerns and Takenaka on rebuttal impeached that denial by stating that she had expressed such concerns). The prosecution's argument is convincing.

Assuming without deciding that Takenaka's testimony would have been an improper opinion if considered for substantive purposes, Takenaka's testimony was nevertheless properly admitted for impeachment purposes to contradict Chatman's version of the facts. As set forth above, Chatman denied on cross-examination that Takenaka had expressed the concerns that the letter did not sound like something a Japanese person would write and that Chatman had forced Suzuki to write it. On rebuttal, Takenaka testified to the exact opposite, and the circuit court instructed the jury that it could consider her testimony for the purposes of impeachment. The contradiction of Chatman's version of events -- i.e., that no opinion had been given by Takenaka regarding the origin of the letter -- with impeachment testimony to the effect that an opinion had been given does not constitute a substantive opinion. Cf. State v. Rabe, 5 Haw. App. 251, 260, 687 P.2d 554,

561 (1984) (noting that "mere contradiction of a witness's version of the facts does not constitute" an attack on that witness's character) (citations omitted). Here, Takenaka's testimony, which directly contradicted Chatman's, was highly relevant to the events that occurred during the meeting where Takenaka translated the letter and was clearly framed with a limiting instruction. As such, its probative value was not compromised by any danger that the jury might consider Takenaka's testimony as a substantive opinion on the nature of the letter; thus, the circuit court did not abuse its discretion in admitting it.

G. The Circuit Court Did Not Abuse Its Discretion in Overruling Chatman's Objection to Suzuki's Testimony on Cross-Examination that Chatman Had Previously Struck Her in the Eye.

Chatman next argues that the circuit court abused its discretion in failing to strike (or grant a mistrial based on) Suzuki's testimony that Chatman had previously struck her in the eye when her testimony was non-responsive to the question asked by the defense. In response, the prosecution argues that: (1) the circuit court did not abuse its discretion in concluding that the testimony was responsive as to why Suzuki could not remember which eye Chatman had struck her in on October 20, 2002; (2) in the alternative, the testimony was relevant to the question of whether Chatman's threat to harm Suzuki was genuine,

and therefore admissible; and (3) assuming arguendo that the circuit court erred in admitting the testimony, the error was harmless in light of the "overwhelming and compelling evidence" of Chatman's guilt. For the reasons set forth below, we hold that the circuit court did not abuse its discretion.

To review, Suzuki was unable to recall on cross-examination which eye Chatman had struck her in during the letter-writing incident of October 20, 2002. Chatman's counsel then pressed her, "So . . . you [are] testifying that today you don't recall what eye he hit you, what eye was hit; is that right? Is that right? I'm sorry." Suzuki replied, "Well, he hit me in the past on my eye, so . . . I'm confused[.]" The circuit court denied Chatman's request to strike and motion for a mistrial, finding that the answer was responsive to why she could not recall which eye had been struck.

We do not believe that there is a fair basis on which to conclude that the trial judge's determination regarding the responsiveness of Suzuki's answer constituted an abuse of discretion. See State v. Corella, 79 Hawai'i 255, 265, 900 P.2d 1322, 1332 (App. 1995) (concluding that a trial court's rulings on the scope of cross-examination and the admission of testimony generally are reviewed for abuse of discretion). While it may appear from the transcript that the defense asked a yes-no question as to Suzuki's recall of the incident, not for an

explanation, the transcript of course provides no indication as to the tone or manner in which the question was asked. The trial judge, who was there to hear the question as posed, concluded that the defense's question called for an explanation as to why Suzuki could not recall which eye Chatman had struck her in. See State v. McElroy, 105 Hawai'i 352, 357 n.1, 97 P.3d 1004, 1009 n.1 (2004) (stating by implication that a witness's answer to a question on cross-examination is responsive where the question calls for or requires the witness to answer as he or she did). Given that the defense's purportedly desired answer ("I don't remember") had already been elicited from the witness in response to the previous question, and given that the trial judge, unlike this court, had the benefit of hearing both the question and response live and in full context, it cannot be said that the circuit court's determination of the answer's responsiveness clearly exceeded the bounds of reason.

Assuming arguendo, however, that the circuit court abused its discretion in finding the answer responsive, "responsiveness is not the ultimate test of admissibility." State v. Batts, 277 S.E.2d 385, 388 (N.C. 1981). "If an unresponsive answer is otherwise competent as evidence, it need not be stricken." State v. Williams, 305 S.E.2d 519, 522 (N.C. 1983) (citations omitted). To put it another way, the erroneous admission of non-responsive testimony is harmless error if the

testimony would have otherwise been admissible. Here, Chatman argues that the "alleged prior assault was not relevant and its only [effect] was to prejudice the jury against [him]." Accordingly, he contends that the evidence should have been excluded under HRE Rules 402 (relevancy),[23] 403 (prejudice),[24] and 404(b)[25] (prior bad act). The prosecution counters that: (1) as the circuit court found, the evidence was relevant not as improper character-propensity evidence but to establish an element of the extortion count because it showed Suzuki's fear of Chatman and compulsion she was under to write the letter; and (2) the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. The prosecution's argument has merit.

First, the evidence was not precluded by HRE Rule 404(b) because it was not used for improper character-propensity

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[23] HRE Rule 402 provides in pertinent part that all irrelevant evidence is inadmissible.

[24] HRE Rule 403 provides in relevant part that a trial court may exclude otherwise relevant evidence

> 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.

[25] HRE Rule 404(b) provides in relevant part:

> 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 any other 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.

purposes (i.e., no attempt was made to use the impermissible inference that because Chatman had struck Suzuki in the past, it is therefore more probable that he struck her on October 20, 2002). Second, the evidence was not precluded as irrelevant under HRE Rule 402 because it was used to establish that Suzuki was under threat from Chatman to write the letter. Because the evidence was relevant for a permissible purpose, the real question is the applicability of the HRE Rule 403 balancing test, i.e., did the danger of unfair prejudice (the risk that the jury would on its own draw an impermissible character-propensity inference or conclude that Chatman was a bad person generally and therefore must be guilty) substantially outweigh the probative value of the evidence (that Suzuki was under a genuine compulsion to write the letter). See State v. Castro, 69 Haw. 633, 643, 756 P.2d 1033, 1041 (1988) (holding that the use of the word "may" in HRE Rule 404(b) was designed to trigger the HRE Rule 403 balancing test).

In applying the balancing test to prior bad act evidence, this court has identified various, non-exclusive factors, such as: "the strength of the evidence as to the commission of the other [bad act], the similarities between the [bad acts], the interval of time that has elapsed between the [bad acts], the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably

will rouse the jury to overmastering hostility." Castro, 69 Haw. at 644, 756 P.2d at 1041 (citation omitted). Here, the multi-factor analysis can be simplified. While there was no compelling need for the testimony in that Suzuki had already testified to various other acts to establish threat or compulsion, it was also unlikely that the jury was roused to overmastering hostility against Chatman based on the context in which the response was given. Unlike in Castro, where the prosecution deliberately elicited testimony from the complaining witness of multiple prior bad acts including threats, assault, and rape, id. at 641, 756 P.2d at 1039-40, the prior bad act evidence here constituted only one isolated response not solicited by the prosecution. As such, it could not be considered clearly beyond the bounds of reason to conclude that the prejudicial effect of the testimony did not substantially outweigh its probative value. Accordingly, the circuit court did not abuse its discretion in allowing Suzuki's response because it was otherwise admissible.

H. The Cumulative Effect of the Circuit Court's Errors Does Not Require Reversal.

Chatman argues that the cumulative effect of the foregoing errors justifies a reversal. As this court has recognized, there are cases where the cumulative weight of individually harmless errors can prejudice the defendant's right to a fair trial such that reversal is warranted. State v.

Pemberton, 71 Haw. 466, 475-76, 796 P.2d 80, 84-85 (1990). Chatman contends that this is one such case because the "credibility of [Suzuki] was pitted against the credibility of [Chatman]. Yet each of the evidentiary rulings, individually and cumulatively, unfairly bolstered [Suzuki's] credibility." The prosecution counters that because each of the errors alleged by Chatman is individually without substance, it necessarily follows that his claim of cumulative error fails as well. Because we agree that none of Chatman's first seven assignments of error has merit individually, we also agree that there is necessarily no cumulative effect to consider. See Samuel, 74 Haw. at 160, 838 P.2d at 1383 (declining to address the cumulative effect of errors where each alleged error was individually insubstantial).

I. The Circuit Court Did Not Abuse Its Discretion in Denying Chatman's Motion for a Mistrial Due to Prosecutorial Misconduct.

Chatman argues that the prosecution engaged in misconduct when it: (1) deliberately induced Chatman on cross-examination to invoke his Fifth Amendment privilege, thereby allowing the jury to draw negative inferences (i.e., that Chatman was hiding something); and (2) made a variety of improper remarks during closing argument. The prosecution responds that there was no misconduct, and even if there was, it was harmless. For the reasons set forth below, we agree with the prosecution.

a. Chatman's reference to his Fifth Amendment privilege during cross-examination

Chatman's first point -- that the prosecution committed misconduct by asking questions designed to induce him into invoking or referencing his Fifth Amendment privilege -- is without merit. First, the prosecution did not "unfairly, by implication, comment[] on [Chatman's] Fifth Amendment rights thereby committing misconduct," because it did not induce Chatman into invoking his Fifth Amendment right against self-incrimination. As set forth above, Chatman did not clearly invoke the Fifth Amendment in his April 10, 2002 statement to police; instead, he deflected inquiries into the cause of Taison's injuries by stating, "I don't want to get into that." When the prosecution advised the circuit court and defense counsel of its intent to inquire into the April 10 statement and asked whether Chatman's refusal to answer certain questions should be considered the equivalent of a Fifth Amendment invocation, the defense did not raise a general objection, agreeing instead to proceed on a question-by-question basis. Then, when the prosecution asked Chatman to confirm that, in contrast to his trial testimony, he never mentioned in his April 10 statement that he had seen Suzuki strike Taison in the elevator, the defense did not object either before or after Chatman's response that he did not want to get Suzuki into

trouble and so asserted his Fifth Amendment privilege. Accordingly, the error, if any, must be plain for this court to consider it.

Second, Chatman's volunteered references to the Fifth Amendment were non-responsive to the questions posed by the prosecution. As set forth above, the prosecution asked a series of yes-or-no questions about the conduct of a party other than Chatman. Even assuming that Chatman was reasonable in his belief that the questions called for an explanation other than or in addition to a yes or no, he could easily have answered, "I didn't want to get her in trouble[,]" without volunteering a reference to the Fifth Amendment. Contrary to Chatman's assertions that the prosecution persisted in this line of questioning to bait him into a Fifth Amendment assertion, the record clearly shows that the prosecution persisted only because Chatman initiated the exchange by refusing to listen to and address the questions asked. See People v. Briggman, 316 N.E.2d 121, 127 (Ill. App. Ct. 1974) (finding that it was proper for the prosecution to pursue a line of questioning that was initiated by the defendant). Moreover, the prosecution made every effort to notify the defense and the court of its intended line of questioning (both bench conferences were initiated by the prosecution), and thus to the extent it erred, it was a mistake, not misconduct. See State v. McElroy, 105 Hawai'i 379, 285,

98 P.3d 250, 256 (App. 2004) ("It is settled that a mere mistake relative to the admissibility of proffered evidence is not misconduct in the absence of a showing that the prosecutor was not acting in good faith." (Citation omitted.)), overruled on other grounds, 105 Hawai'i 352, 97 P.3d 1004 (2004).

Assuming arguendo, however, that the prosecution did engage in misconduct or induce error, application of the three-pronged misconduct analysis demonstrates that reversal is not required. While the third prong favors Chatman for the reasons set forth above, see Section III.B, supra, the first two prongs favor the prosecution.

As to the first prong, the nature of Chatman's testimony and the inferences that could reasonably be drawn from it are harmless, if not beneficial, to Chatman. In contrast to the typical fact pattern where a witness is asked, did you do such-and-such (bad) act, and remains silent or invokes the Fifth Amendment, Chatman was asked about an inconsistency in his statements regarding the conduct of another, Suzuki. Thus, to the extent that the jury might draw an inference from the Fifth Amendment reference (as distinct from the inconsistency in Chatman's two statements, which does not derive from or arise out of the voluntary Fifth Amendment assertion at trial), the reasonable inferences would be (1) Chatman was trying to protect Suzuki even at his own expense (which might in turn cause them to

believe, to Chatman's benefit, that he was a stand-up, credible person), or (2) Chatman was simply confused, because there was, in context, no reason to refuse to answer a question, on self-incrimination grounds, about something someone else did. As such, Chatman's concern that he was prejudiced because the jury might have drawn an inference that he was hiding something is unfounded.

The second prong also favors the prosecution. The circuit court struck the whole line of testimony and instructed the jury to disregard it. Given that the jury is presumed to follow the court's instructions, State v. Kupihea, 80 Hawai'i 307, 317-18, 909 P.2d 1122, 1132-33 (1996), any prejudicial effect was cured. On balance, therefore, it cannot be said that the prosecutorial conduct complained of rises to the level of plain error.

b. The prosecution's closing argument

Chatman also argues that the prosecution "committed misconduct by repeatedly disparaging defense counsel during closing and rebuttal[,] and argued evidence that should not have been admitted." The prosecution counters that prosecutors have broad latitude in closing arguments and committed no impropriety here. The prosecution's arguments have merit.

First, the prosecution correctly states the applicable law:

> [A] prosecutor, during closing argument, is permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence. It is also within the bounds of legitimate argument for prosecutors to state, discuss, and comment on the evidence as well as to draw all reasonable inferences from the evidence.

State v. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209 (1996) (citations omitted). Where no objection was made to closing remarks, this court reviews only for plain error. Id. The application of this law to the alleged improprieties raised by Chatman is considered next.

i. Reference to Rupak being in custody

As set forth above, the prosecution referred to the fact that Rupak had been in custody during his questioning:

> Saturday might mean different things for different people. It might mean a weekend for many. It doesn't mean a weekend for Mr. Rupak. He works seven days a week. He worked the same hours every day. Every day was the same. Nothing, he tells you, happened around the date of April 6th that's significant in his life other than this alleged incident that he sees. He can remember that date. But how ironic that this same individual can't even remember the date that he had been arrested and was in custody when he was questioned one day short of a year of that date.

However, testimony that Rupak had been arrested and was in custody was properly admitted. See Section III.E, supra. Moreover, the prosecution in its closing used the evidence in precisely the same way it had on cross-examination -- to impeach Rupak's memory (and, by implication, his credibility). Because

the prosecution, without objection, drew a reasonable inference from properly admitted evidence, this argument was not improper.

ii. Reference to a prior bad act of Chatman

Also as set forth above, the prosecution used a Power Point slide stating that Chatman "had assaulted Suzuki in the past" to establish that Suzuki was under a genuine compulsion from Chatman to write the apology letter. However, testimony that Chatman had struck her in the eye before was properly admitted. Moreover, the prosecution in its closing used the evidence to establish compulsion, not to encourage an improper character-propensity inference. Because the prosecution drew a reasonable inference from properly admitted evidence, this argument was not improper.

iii. Characterizations of defense arguments

The prosecution also described defense counsel as having "played up" allegations that Suzuki had slapped Taison and asked, "Why is it that the defense attorney didn't really want to address how that letter was made and why there's all these [sic] inconsistent evidence with respect to that?" Defense counsel objected below that the prosecution's remarks were unnecessarily personal and demeaning. The circuit court overruled the objection, stating that this was argument. As set forth below, we hold these remarks were within the bounds of permissible closing argument.

In Clark, this court cited with approval People v. Sutton, 631 N.E.2d 1326 (Ill. App. Ct. 1994). Clark, 83 Hawai'i at 305, 926 P.2d at 210. In Sutton, the court held that in its closing argument, "[t]he prosecution may . . . respond to comments by defense counsel which invite or provoke response, denounce the activities of defendant and highlight the inconsistencies in defendant's argument." 631 N.E.2d at 1335 (emphases added). The prosecution's comments here were made for precisely those purposes. They were not improper ad hominem attacks on defense counsel; rather, they were attacks on defense counsel's argument.

iv. Reference to the importance of shame in Japan

Although no objection was made below, Chatman argues on appeal that the prosecution's argument that Japanese people like Suzuki are powerfully influenced by shame was an improper emotional and racist appeal. He cites no authority for this point, and we conclude that it does not constitute plain error.

Assuming arguendo that the prosecution's remarks constituted an unfairly prejudicial emotional appeal,[26] any prejudicial effect was preempted by the circuit court's prior

[26] The remark was not racist, at least as that word is commonly understood, because it cannot be understood to contain a view that the Japanese "race" is superior or inferior to any other. See Webster's Third New Int'l Dictionary at 1870 (1993) (stating that racism "is usu[ally] coupled with a belief in the inherent superiority of a particular race and its right to domination over others").

instruction to the jury that "[y]ou must not be influenced by pity for the defendant or for any other person[.]" Accordingly, we are unable to identify any harm from the prosecution's remarks that rises to the level of plain error.

v. Negative characterizations of the defense's inconsistent argument

Chatman also contends that the prosecution's criticism that his counsel was arguing "out of both sides of [his] mouth" was an improper criticism of his right to argue inconsistent defenses. The prosecution responds that the allegedly offending remark "was not a negative comment on [Chatman's] inconsistent defenses[,]" but was merely a characterization of defense counsel's statement that Asahi injured Taison but without intent to kill. We hold that the prosecution's remark was improper, but harmless.

As a preliminary matter, the prosecution acknowledges, that "[i]t is the rule in Hawai'i that a defendant has the right to argue inconsistent defenses[.]" State v. Smith, 91 Hawai'i 450, 457, 984 P.2d 1276, 1283 (App. 1999) (internal quotation marks, brackets, and emphasis omitted). The prosecution also recognizes that "it is improper for the State to speak negatively to the jury about such an argument by the defendant." Id. Here, the prosecution clearly offended that rule when it argued:

> You see, ladies and gentlemen, when counsel made that argument, he wants you to say, well, you know, if Anthony Chatman -- if you

> find that Anthony Chatman is guilty or did the act against [Taison], I want to give you an out. I want to let you think that you can consider the included offenses. I got to find a way to do that. I got to find a way to argue out of both sides of my mouth, and that's really what he did. So he came up with, well, Asahi Suzuki didn't mean it, just like no one would have meant it. But there's no evidence of any of that.

It is commonly understood that "to talk out of both sides of one's mouth" is dishonorable, and the prosecution used that phrase in connection with Chatman's attempt to argue the lesser included offense of assault, based on lack of the requisite state of mind for the greater offense, while simultaneously maintaining that he did not commit any offense. Accordingly, the remark was an improper negative characterization of Chatman's inconsistent defenses.

However, this case is distinguishable from Smith. In Smith, the defense timely objected to the prosecution's pejorative characterizations of its inconsistent arguments for acquittal and conviction of a lesser included offense. Id. at 455, 984 P.2d at 1281. Here, on the other hand, defense counsel below did not raise the correct objection; instead, counsel objected only on the ground that the comments constituted an improper ad hominem attack. Accordingly, the objection now raised was forfeited and this court may reverse only if the error is plain.

As Chatman himself repeatedly points out, this case was a credibility contest; either the jury would believe his story,

in which case he would be acquitted, or it would believe Suzuki, in which case he would be convicted of the charged offense of attempted murder. Accordingly, it cannot be said that there is a reasonable possibility that the prosecution's improper comments on his lesser included offense defense contributed to Chatman's conviction on the attempted murder count.

J. The Circuit Court Erred in Concluding that the Extortion and Intimidation Counts Were Separate, but Remand Is Not Required.

Chatman next argues that the circuit court erred in not giving the jury his requested instruction regarding the merger of the extortion and intimidation counts. The prosecution disagrees, arguing that the evidence supports the conclusion that Chatman acted with two distinct intents: (1) "to intimidate [Suzuki] from appearing as a witness against him or influence her testimony when he pulled her hair and dragged her across the room[;] and later, [(2) to] compel[] her to write a letter exonerating him when he 'threaten[ed], by word or conduct, to cause bodily injury in the future' to [Suzuki] by telling her 'I can hurt you.'" We hold that the prosecution's argument is without merit, but that remand for a new trial is not required.

Both parties appear to concede the issue is controlled by HRS § 701-109(1)(e) (1993). That statute provides that a defendant cannot be convicted of more than one offense where "[t]he offense is defined as a continuing course of conduct and

the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of conduct constitute separate offenses." This court, in turn, has interpreted the statute as follows:

> Whether a course of conduct gives rise to more than one crime [within the meaning of HRS 701-109(1)(e)] depends in part on the intent and objective of the defendant. The test to determine whether the defendant intended to commit more than one offense is whether the evidence discloses one general intent or discloses separate and distinct intents. Where there is one intention, one general impulse, and one plan, there is but one offense. All factual issues involved in this determination must be decided by the trier of fact.

State v. Matias, 102 Hawai'i 300, 305, 75 P.3d 1191, 1196 (2003) (citations omitted) (bracketed material and emphasis in original). In Matias, we held that a merger instruction should have been given where place to keep and felon in possession of a firearm charges "arose out of the same factual circumstances[.]" Id. at 306, 75 P.3d at 1197. In so doing, we emphasized that "the question whether [the defendant's] conduct constituted separate and distinct culpable acts or an uninterrupted continuous course of conduct . . . was one of fact that should have been submitted to the jury[.]" Id. (internal quotation marks and citation omitted).

In this case, as in Matias, the two offenses have similar elements and arise out of the same factual conduct. First, the offense of extortion is committed if a defendant "[i]ntentionally compels or induces another person to engage in

conduct from which another has a legal right to abstain or to abstain from conduct in which another has a legal right to engage by threatening by word or conduct[.]" HRS § 707-764(2), supra note 7. Similarly, intimidating a witness is committed if a defendant "uses force upon or a threat directed to a witness or a person he believes is about to be called as a witness in any official proceeding" in order to influence the witness's testimony or cause the witness to avoid legal process. HRS § 710-1071, supra note 5.

Second, the two charges arise out of the same factual circumstances -- the events of October 20, 2002, when Chatman assaulted and threatened Suzuki, who he knew or believed would be a witness at his upcoming attempted murder trial, in order to make her write the exculpatory letter and influence (i.e., prevent or discredit) her testimony. To the extent the prosecution attempts to isolate discrete points in time and separate Chatman's intent to compel Suzuki to write the letter from his intent to influence or prevent her testimony, it merely raises a question of fact that should, under Matias, have been decided by the jury. First, whether the hair-pulling and dragging can be separated from Chatman's statement, "I can hurt you," is a question for the jury as to whether each act was or was not part of one course of conduct designed to end in Suzuki writing a letter exculpating Chatman. Second, the fact that

Chatman acted with the intent to compel Suzuki to write the exculpatory letter begs the question, "To what end?" Again, the jury should have decided whether his intent to make her write the letter could be separated from his intent to use the letter to dissuade her from testifying or, in the event she did testify, to undermine the credibility of her testimony. In other words, it was for the jury to decide whether there was an overriding general intent connecting each of Chatman's acts during an uninterrupted span in order to prevent or influence Suzuki's testimony as a witness against him in the attempted murder trial. Accordingly, the circuit court erred in not giving the jury a merger instruction as requested by Chatman.

The next question, however, is with regard to the appropriate remedy for the circuit court's error. The prosecution requests that this court vacate one of the convictions rather than remand. We agree that this is the appropriate remedy based on a review of two cases in which the same statute at issue here, HRS § 701-109, was violated, albeit in different part.

The case most closely on point is Matias because it involves an HRS § 701-109(1)(e) merger violation, as does this case. In that case, we remedied the violation by remanding for a new trial. 102 Hawai'i at 306, 75 P.3d at 1197. However, it does not appear in Matias that the prosecution requested vacatur

instead of remand in the event error was found, and the court in any case did not discuss the remedy issue at all.

Instead of citing Matias, the prosecution directs us to a case, this one involving HRS § 701-109(1)(a) merger error, where vacatur, rather than remand, was found to be the appropriate remedy. In State v. Jumila, this court, finding that the defendant had been improperly convicted of both an offense (use of a firearm in commission of felony murder in the second degree) and an included offense (murder in the second degree) as defined by HRS § 701-109(1)(a), vacated the conviction for the firearm offense. 87 Hawai'i 1, 3-4, 950 P.2d 1201, 1203-04 (1998), overruled on other grounds by State v. Brantley, 99 Hawai'i 463, 56 P.3d 1252 (2002). The Jumila Court reasoned, "This solution is fair to the defendant because it remedies the HRS § 701-109 violation, and it is fair to the prosecution and the public because it sustains the conviction of the offense of the highest class and grade of which the defendant was convicted." Id. at 4, 950 P.2d at 1204.

The precise question presented on these facts, then, is whether Matias forecloses vacatur as a remedy where there is a subsection 109(1)(e) merger error, but the prosecution indicates its willingness to give up one conviction rather than retry both. Based on the rationale espoused by this court in Jumila, we hold that the prosecution may avoid remand by offering to give up the

extra, improper conviction.[27] Such a solution remedies the violation while avoiding the hardship of a retrial on the victims and witnesses and conserving judicial and prosecutorial resources. Here, both the intimidation and extortion in the second degree offenses are of equal grade. See HRS § 707-766(2) (providing that extortion in the second degree is a class C felony); HRS § 710-1071(3) (providing that intimidating a witness is a class C felony). Accordingly, this court may vacate either; however, we believe that it is more appropriate to vacate the extortion conviction and leave intact the intimidation conviction, as that offense more precisely covers the conduct committed by Chatman.

K. Chatman's Ineffective Assistance of Counsel Claim Is Premature.

Chatman's final assignment of error is that his trial counsel was ineffective in failing to secure: (1) the presence and testimony of Gunji at trial; and (2) the attendance and testimony of witnesses to support his allegations of juror misconduct in his motion for a new trial. The prosecution argues that this claim is without merit or, in the alternative, premature. We agree that the claim is premature. Accordingly,

[27] Of course, had the prosecution elected to pursue both convictions, then remand would be required. Moreover, if, as in Matias, 102 Hawai'i at 306 n.11, 75 P.3d at 1197 n.11, the defendant's improper conviction had served as the basis for extended term or other enhanced, multiple offender sentencing, the prosecution's willingness to give up the conviction could not avoid the necessity of remand for resentencing.

Chatman's claim is denied without prejudice to a subsequent post-conviction petition on ineffectiveness grounds.

IV. CONCLUSION

Based on the foregoing, we affirm the circuit court's July 19, 2004 judgments of conviction and sentences, except that (1) Chatman's conviction and sentence in Cr. No. 02-1-2353 for extortion in the second degree is vacated, and (2) Chatman's ineffective assistance of counsel claim is denied without prejudice to a HRPP Rule 40 petition for post-conviction relief on that ground.

DATED: Honolulu, Hawai'i, August 3, 2006.

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CONCURRENCE BY ACOBA, J.

I concur in the result only.