IN THE SUPREME COURT OF THE STATE OF HAWAI'I

---o0o---

STATE OF HAWAI'I, Plaintiff-Appellee-Respondent,

vs.

REGINALD FIELDS, Defendant-Appellant-Petitioner.

NO. 25455

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(FC-CR. NO. 02-1-0083)

OCTOBER 10, 2007

MOON, C.J., LEVINSON, NAKAYAMA, AND DUFFY,
AND ACOBA, J., DISSENTING

AMENDED OPINION OF THE COURT BY NAKAYAMA, J.

On June 30, 2005, defendant-appellant-petitioner Reginald Fields ("Fields") filed an application for writ of certiorari to review the published decision of the Intermediate Court of Appeals ("ICA") in State v. Fields, No. 25455 ("the ICA's opinion"), affirming the October 11, 2002 judgment of the family court of the fifth circuit,[1] convicting Fields of, and sentencing him for, the offense of abuse of a family or household member, in violation of Hawai'i Revised Statutes ("HRS") § 709-906(1).[2]

---

[1] The Honorable Calvin K. Murashige presided.

[2] HRS § 709-906(1) (Supp. 2003) provides, in pertinent part, that "[i]t shall be unlawful for any person, singly or in concert, to physically abuse a family or household member . . . . For the purposes of this section, 'family or household member' means . . . persons jointly residing or formerly

(continued...)

The parties do not dispute that Fields was convicted on the strength of hearsay. In affirming the conviction, the ICA held that the admission of these extrajudicial statements as substantive evidence of Fields' guilt did not violate Fields' constitutional right of confrontation. During the pendency of Fields' appeal before the ICA, the United States Supreme Court decided Crawford v. Washington, 541 U.S. 36 (2004), a case that substantially modifies the standard for admitting hearsay evidence consistent with the confrontation clauses of the United States and Hawai'i Constitutions. We granted certiorari to consider whether the admission of the inculpatory hearsay in the present case violated Crawford. Subsequently, while the matter was pending before this court, the United States Supreme Court revisited Crawford in Davis v. Washington, 547 U.S. __, 126 S. Ct. 2266 (2006),[3] clarifying the distinction between testimonial and nontestimonial hearsay. Considering Fields' points of error in light of Crawford and Davis, we now affirm his conviction.

I. BACKGROUND

A. Factual Background

On the night of April 13, 2002, Fields was home with his then-girlfriend, Melinda Staggs ("Staggs") and a friend, Dave Richards ("Richards"). Fields and Richards were eating dinner when Fields received a phone call from Staggs' mother, Patsy Pepper ("Pepper"), who threatened to "com[e] over to the house to

[2](...continued)
residing in the same dwelling unit."

[3] The Davis opinion has not yet been published in the United States Reports, and we henceforth refer to it by its Supreme Court Reporter citation.

kick his ass and kill him." Pepper and several men thereafter arrived, and a fight ensued. Staggs was struck multiple times while attempting to protect Fields, who was wearing a colostomy bag and recovering from an operation.

Fields' landlord, Karma Lhamo ("Lhamo"), also lived on the property in a house approximately one-hundred feet away. Hearing Staggs yelling, Lhamo summoned the police; officers arrived fifteen minutes later and escorted Pepper and her friends off the property. No arrests were made, however, because Staggs refused to press charges.

Later that night, a second argument arose between Staggs, Fields, and Richards. From her bedroom, Lhamo heard "slapping sounds" and a "hard thug" that sounded like "somebody falling to the ground." She then heard someone (presumably Richards) yell, "Reggie, get off her." Phoning the police again, Lhamo made her way to the neighboring house, where she found Staggs sitting on her couch "kind of shook up, kind of scared and . . . half beaten or something."

Kauai Police Department ("KPD") Officers Karen Kapua ("Officer Kapua") and Elliot Ke ("Officer Ke") arrived at the residence to find that Fields and Richards had already departed. Staggs was crying and her clothes were torn. The officers also observed red marks or scratches on Staggs' chin, shoulder, and left cheek, and that she appeared intoxicated.

Officer Ke questioned Staggs, who informed him that Fields was upset with her about the evening's earlier altercation with Pepper. She stated that she was lying on the couch watching

television when Fields approached her from behind, held her neck against the couch, and punched her on the left side of her face. Officer Ke urged Staggs to fill out a statement, but Staggs declined and instead requested a lawyer. She also rebuffed the officer's suggestion that she visit a women's shelter. Officers Ke and Kapua left without seeing Fields or Richards.

B. Procedural History

On April 29, 2002, plaintiff-appellee-respondent State of Hawai'i ("prosecution") filed a complaint charging Fields with committing the offense of abuse of a family or household member, in violation of HRS § 709-906(1).

Fields' jury-waived trial commenced on July 29, 2002. Staggs, the prosecution's first witness, testified on direct examination that she had "a hard time remembering" any of the events on April 13, 2002 and could not recall her conversation with Officer Ke. Nevertheless, on cross-examination, she testified about the incident as follows:

> Q. Do you recall, Ms. Staggs, on this particular night, April 13th we're talking, David Richards being present?
> A. I believe -- yes, I believe he was.
>
> . . . .
>
> Q. And do you recall whether on this night -- on this -- or this evening whether or not you were drinking anything?
> A. Yes, I was.
> Q. What were you drinking?
> A. Beer.
> Q. Okay. Did you have a lot to drink?
> A. Yes.
> Q. Is that, perhaps, why you have no recollection?
> A. Perhaps.
> Q. Do you -- do you under- -- do you recall, perhaps, any incident involving Mr. Fields' surfboards -- surfboard?
> A. Um-hmm.
> Q. And might that involve a threat to Mr. Fields that if he left that you were going to break his surfboard?
> A. I think that may have occurred.

> Q. Okay. Do you recall laying on his board in such a way, I guess maybe it was between the table and the chair, and then threatening to sit on it that -- something like that?
> A. Yeah, I do remember that.
> Q. Okay. Do you recall perhaps Mr. Richards trying to hold your wrists to keep you from slapping him, et cetera? Do you recall that at all?
> A. No, I don't remember that.
> [DEFENSE COUNSEL]: Nothing further. Thank you, your Honor.

Lhamo then testified for the prosecution. Regarding her second emergency phone call, Lhamo stated the following:

> [DEPUTY PROSECUTING ATTORNEY:] Okay. After you called 911 what did you do?
> [LHAMO:] I went to go over and to see if [Staggs] was okay cuz Reginald and his company had left in his Suzuki. They left the property, and I guess Melinda was wanting to know if he was okay or not.
> [DPA:] How -- how was Melinda acting when you (inaudible)?
> [LHAMO:] She was kind of shook up, kind of scared, kind of, you know, like what is -- what is really going on here, you know.

The prosecution subsequently inquired whether Richards said anything to Fields during Fields' argument with Staggs. Her memory initially faltering, Lhamo utilized a police report[4] to refresh her recollection. After reviewing the police report, Lhamo testified without objection that Richards told Fields, "Reggie, get off her."

Next to the witness stand was Officer Kapua, who recalled that Staggs "was crying" and had "a red mark on her chin and also a red scratch on her right shoulder" when she and Officer Ke arrived at Staggs' home.

Officer Ke recounted, without objection, the substance of Staggs' answers to his questions on the night of April 13,

---

[4] The police report was not submitted into evidence.

2002:

> [DPA:] Did you talk to Ms. Staggs?
> [OFFICER KE:] Yes, I did.
> [DPA:] And where did you talk to her?
> [OFFICER KE:] She was in the living room at the -- her residence.
> [DPA:] And did you ask her what happened?
> [OFFICER KE:] Yes, I did.
> [DPA:] What did she say?
> [OFFICER KE:] She said that she and Reggie got into a [sic] argument. Reggie was upset. I guess her mom brought some friends over earlier in the evening and the police had to come by. They were upset so they were arguing. And she said she was laying down on the couch watching TV, and I guess Reggie came up behind her and started holding her down, pressing on her neck with both of his hands, like, kind of holding her down on the couch. And then she also said that he punched her in the face, left side of her face, Melinda's face.

Upon further questioning by the prosecution, Officer Ke also described Staggs' appearance at the scene:

> [DPA:] Can you describe Ms. Staggs' appearance when you saw her?
> [OFFICER KE:] She -- her clothes was [sic] torn at the front, she had -- her face -- her face was red on her left cheek was -- and there were also abrasion [sic] on her chin and a scratch on her shoulder. She was also -- appeared to be intoxicated.
> [DPA:] And how was her demeanor when she was talking to you?
> [OFFICER KE:] She was crying and upset.

On cross-examination, Officer Ke confirmed that Staggs declined to sign a written statement because she wanted to consult a lawyer. The prosecution rested at the conclusion of Officer Ke's testimony.

The parties thereafter stipulated to the admission of a report prepared by special investigator Leon Gonsalves ("Gonsalves"), who interviewed Richards on July 2, 2002. In his report, Gonsalves related Richards' recollection that he was present when Fields and Staggs began to argue, and that Fields "never physically assaulted [Staggs]." Gonsalves noted that

Richards "had a strong order [sic] of liquor on his breath, . . . was flushed, and appeared unsteady on his feet" during the interview. The report did not mention Richards' statement, allegedly overheard by Lhamo, telling Fields, "Reggie, get off her."

Finally, Fields took the stand and testified in his own defense. According to Fields, Richards asked to be driven home following the altercation with Pepper. Staggs protested that she did not want to be left alone and struck Fields after he insisted that she remain at home. She also "kicked in the door" and threatened to break Fields' surfboard. Fields testified that he and Richards nevertheless departed, and he denied ever hitting Staggs. He also noted that he was wearing a colostomy bag that restricted his movements on the night of the alleged offense.

During closing arguments, the prosecution emphasized that Lhamo heard Richards say, "Reggie, get off her," and that Staggs informed Officer Ke that Fields "was on her holding her down." The prosecution argued that both statements were substantive evidence that Fields abused Staggs.

Counsel for Fields submitted on the evidence presented and declined to make a closing argument.

In its oral ruling, the family court relied heavily on the out-of-court statements of Staggs and Richards to support its finding of guilt:

> The Court understands from the testimony that there were two instances -- or incidents on the same day. The initial incident had to do with a carload of people coming to the residence where the Defendant and victim were living. And following that incident there was another incident about 11:30, 11:40 when the police were called as a result of the landlord hearing some sounds. Among the statements or

> sounds that the landlord heard was the statement of one person, believed to be [Richards], saying: Reggie, get off her.
>
> The police observed the demeanor and condition of [Staggs]. Her clothes were torn in front, cheek was red, there was abrasion on her chin, scratch on her shoulder. There were statements that [Fields] and [Staggs] had got into an argument because of the earlier incident involving the -- when the police came over, and that [Fields] grabbed or came -- came upon her from behind, held her down and struck her in the face.
>
> Based upon what the Court has heard, . . . the Court will find that the [prosecution] has proven its case beyond a reasonable doubt and will find you guilty of the offense.

Based on its oral ruling, the family court entered a judgment of conviction on October 11, 2002 and sentenced Fields to a term of two years' probation. On November 7, 2002 Fields filed a timely notice of appeal.

C. Fields' Appeal Before the ICA

On appeal before the ICA, Fields argued that the family court plainly erred by admitting Staggs' statement, as related by Officer Ke, that Fields held her down and punched her in the face.[5] Specifically, Fields contended that: (1) the admission of Staggs' hearsay statements to Officer Ke violated the rule against hearsay set forth in Hawai'i Rules of Evidence ("HRE") Rule 802 (2002); (2) the family court's acceptance of Staggs' hearsay statements as substantive evidence violated the confrontation clauses of the sixth amendment to the United States Constitution and article I, section 14 of the Hawai'i Constitution; (3) the record lacked substantial and

[5] Neither the parties nor the ICA disputed that Staggs' out-of-court statements were "hearsay." HRE Rule 801 (2002) provides, in pertinent part: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The statements were hearsay under HRE Rule 801 inasmuch as they were offered as substantive evidence of the truth of the matters asserted therein -- i.e., that Fields abused Staggs.

admissible evidence to support his conviction; and (4) the prosecution failed to prove the corpus delicti of the offense using evidence other than hearsay.

The prosecution answered that: (1) Fields' conviction should be affirmed because Fields did not timely object to the admission of Staggs' and Richards' hearsay statements; and (2) if the ICA noticed plain error, the case should be remanded for an evidentiary hearing on whether the statements were admissible hearsay.

Fields replied that: (1) the ICA should notice plain error because the error complained of violated his constitutional right of confrontation; (2) neither statement was admissible as a hearsay exception under the HRE; and (3) insofar as neither statement was admissible, the record lacked sufficient evidence to support his conviction.

On September 14, 2004, the ICA ordered the parties to file supplemental briefs addressing State v. Haili, 103 Hawai'i 89, 79 P.3d 1263 (2003), and Crawford, cases which were decided on December 3, 2003 and March 8, 2004 respectively.

Fields' supplemental brief added that the family court plainly erred by accepting Lhamo's testimony as to Richards' statement, "Reggie, get off her," inasmuch as it violated his rights under Crawford.

The prosecution answered that: (1) the family court properly admitted Staggs' and Richards' hearsay statements; and (2) assuming, arguendo, that the family court erred by admitting Richards' statement, such error was harmless.

On May 31, 2005, the ICA filed a published opinion affirming Fields' conviction.

1. Fields' confrontation clause claims

Addressing Fields' confrontation clause claims, the ICA first quoted at length from Ohio v. Roberts, 448 U.S. 56 (1980), and Haili for the proposition that the prosecution must demonstrate that the hearsay statements of an unavailable declarant bear adequate indicia of reliability in order for those statements to be admissible as substantive evidence without infringing upon the protections afforded criminal defendants by the confrontation clauses of the United States and Hawai'i Constitutions. The ICA subsequently acknowledged that Crawford fundamentally altered the analysis by holding that the confrontation clause of the sixth amendment to the United States Constitution precludes "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54.

Based upon Crawford, as well as a lengthy excerpt from United States v. Owens, 484 U.S. 554 (1988), the ICA concluded that the family court did not violate Fields' sixth amendment right of confrontation by permitting Staggs' out-of-court statements insofar as Staggs both appeared at trial and testified. The ICA also concluded that, with respect to the confrontation clause incorporated into the Hawai'i Constitution, Haili, not Crawford, was the applicable precedent. Accordingly the ICA determined that, pursuant to Haili, any objection by

Fields' counsel to Staggs' out-of-court statements could have been validly denied.

2. The HRE

The ICA subsequently noted that the admission of Staggs' and Richards' out-of-court statements did not comply with the statutory provisions of the HRE. The ICA conceded that, had counsel objected to Staggs' and Richards' hearsay statements, such objections could not have been validly denied. Nevertheless, the ICA concluded that the family court did not commit "error" when admitting the hearsay statements because it had no "duty" to exclude the evidence absent trial counsel's objection. The ICA emphasized that trial counsel's failure to object to Staggs' and Richards' hearsay statements presented an ineffective assistance of counsel claim, which Fields could assert in a collateral post-conviction proceeding, pursuant to Hawai'i Rules of Penal Procedure ("HRPP") Rule 40.

3. Sufficiency of the evidence

Finally, the ICA concluded that, because the admission of Staggs' and Richards' out-of-court statements was not trial error, Fields' assertion that his conviction lacked sufficient evidence was moot.

Accordingly, the ICA affirmed the family court's October 11, 2002 judgment without prejudice to Fields asserting an ineffective assistance of counsel claim in a post-conviction proceeding, pursuant to HRPP Rule 40.

D. Fields' Application for Writ of Certiorari

On June 30, 2005, Fields filed a timely application for

writ of certiorari, in which he contended that the ICA gravely erred by (1) failing to find that the admission of Staggs' and Richards' hearsay statements did not violate the confrontation clause of the Hawai'i Constitution, (2) declining to notice plain error and abdicating judicial review in favor of a post-conviction HRPP Rule 40 proceeding, and (3) failing to acknowledge that the prosecution failed to adduce sufficient admissible evidence to support his conviction.

II. STANDARDS OF REVIEW

A. Application for Writ of Certiorari

When determining whether to grant or deny an application for writ of certiorari,

> this court reviews decisions for (1) grave errors of law or of fact, or (2) obvious inconsistencies in the decision of the ICA with that of the supreme court, federal decisions, or its own decision and the magnitude of such errors or inconsistencies dictating the need for further appeal. See HRS § 602-59 (1993).

Wemple ex rel. Dang v. Dahman, 103 Hawai'i 385, 392, 83 P.3d 100, 107 (2004).[6]

---

[6] Presently, this court employs the following standard of review when determining whether to accept or reject applications for writs of certiorari:

> §602-59 Review of decision of the intermediate appellate court, certiorari. (a) After issuance of the intermediate appellate court's judgment or dismissal order, a party may seek review of the intermediate appellate court's decision and judgment or dismissal order only by application to the supreme court for a writ of certiorari, the acceptance or rejection of which shall be discretionary upon the supreme court.
>
> (b) The application for writ of certiorari shall tersely state its grounds, which shall include:
>
> (1) Grave errors of law or of fact; or
>
> (2) Obvious inconsistencies in the decision of the intermediate appellate court with that of the supreme court, federal decisions, or its own decision, and the magnitude of those errors or inconsistencies dictating

(continued...)

B. Constitutional Questions

"We answer questions of constitutional law by exercising our own independent judgment based on the facts of the case. . . . Thus, we review questions of constitutional law under the 'right/wrong' standard." State v. Feliciano, 107 Hawai'i 469, 475, 115 P.3d 648, 654 (2005) (ellipses in original) (citing State v. Jenkins, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000)).

C. Sufficiency of the Evidence

Regarding a criminal defendant's claim that the prosecution failed to adduce sufficient evidence, we have stated as follows:

> We have long held that evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or a jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact. . . .
>
> "Substantial evidence" as to every material element of the

---

[6](...continued)

> the need for further appeal.
>
> (c) An application for writ of certiorari may be filed with the supreme court no later than ninety days after the filing of the judgment or dismissal order of the intermediate appellate court. Opposition to an application for writ of certiorari may be filed no later than fifteen days after the application is filed. The supreme court shall determine to accept the application within thirty days after an objection is or could have been filed. The failure of the supreme court to accept within thirty days shall constitute a rejection of the application.
>
> (d) Upon the acceptance of the application, the clerk shall forward the complete file of the case to the supreme court. Supplemental briefs shall be accepted from the parties only upon the request of the supreme court.

HRS § 602-59 (Supp. 2006). However, we utilize the prior formulation when reviewing the case at bar insofar as Fields' application for writ of certiorari was filed before the change took effect.

> offense charged is credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion.

State v. Batson, 73 Haw. 236, 248-49, 831 P.2d 924, 931 (1992), reconsideration denied, 73 Haw. 625, 834 P.2d 1315 (1992) (citations omitted).

III. DISCUSSION

A. The Hawai'i Constitution's Confrontation Clause

Fields contends that the ICA gravely erred by affirming a conviction that was based primarily on hearsay evidence rendered inadmissible by the confrontation clause of the Hawai'i Constitution. For the reasons that follow, we disagree.

1. The right of confrontation as understood at the time of Fields' trial

The confrontation clause of article I, section 14 of the Hawai'i Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against the accused[.]"[7]

The right of confrontation "affords the accused both the opportunity to challenge the credibility and veracity of the prosecution's witnesses and an occasion for the jury to weigh the demeanor of those witnesses." State v. Ortiz, 74 Haw. 343, 360, 845 P.2d 547, 555 (1993) (citing State v. Rodrigues, 7 Haw. App. 80, 84, 742 P.2d 986, 989 (1987)). For this reason, the admission of a hearsay statement as substantive evidence of its

---

[7] The confrontation clause of the United States Constitution is virtually identical, and provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI.

truth "raises special problems" whenever the hearsay declarant is unavailable for meaningful cross-examination on the witness stand. See State v. Sua, 92 Hawai'i 61, 70, 987 P.2d 959, 968 (1999) (citing State v. Hoffman, 73 Haw. 41, 47, 828 P.2d 805, 809 (1992) (quoting Blue v. State, 558 P.2d 636, 644 (Alaska 1977))).

Nonetheless, we have stopped short of holding that the right of confrontation poses an absolute bar to the admission of all out-of-court statements. See Haili, 103 Hawai'i at 103, 79 P.3d at 1277 (citing State v. McGriff, 76 Hawai'i 148, 156, 871 P.2d 782, 790 (1994) (quoting Bourjaily v. United States, 483 U.S. 171, 182 (1987))). Instead, we have long held that a trial court may, consistent with a criminal defendant's constitutional right of confrontation, permit a hearsay statement uttered by an unavailable declarant as substantive evidence if the statement satisfies the two-part test announced by the United States Supreme Court in Roberts. See Haili, 103 Hawai'i at 104, 79 P.3d at 1278 (citing Sua, 92 Hawai'i at 71, 987 P.2d at 969 (quoting Ortiz, 74 Haw. at 361, 845 P.2d at 555-56)).

> As regards the first part of the Roberts test, we have remained resolute that[,] under the confrontation clause of the Hawai'i Constitution, a showing of the declarant's unavailability is necessary to promote the integrity of the fact finding process and to ensure fairness to defendants. . . .
>
> Upon demonstrating that a witness is unavailable, under the second half of the Roberts test, only statements that bear "adequate indicia of reliability" may be admitted into evidence. "Reliability" may be shown in two ways. First, reliability may be inferred without more if it "falls within a firmly rooted hearsay exception[.]" Ortiz, 74 Haw. at 361, 845 P.2d at 556 (quoting Roberts, 448 U.S. at 66, 100 S. Ct. 2531). . . .
>
> Alternatively, reliability may be demonstrated "upon a showing of particularized guarantees of trustworthiness." Ortiz, 74 Haw. at 361, 845 P.2d at 556 (quoting Roberts, 448 U.S. at 66, 100 S. Ct. 2531). The United States Supreme

> Court has declined "to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under the [Confrontation] Clause." Idaho v. Wright, 497 U.S. 805, 822, 110 S. Ct. 3139, 111 L.Ed.2d 638 (1990). Instead, the Court has determined that "'particularized guarantees of trustworthiness' must be shown from the totality of the circumstances" and that "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." Id. at 819, 110 S. Ct. 3139.

Sua, 92 Hawai'i at 71-72, 987 P.2d at 969-70 (brackets in original) (some citations and quotation marks omitted).

Our endorsement of Roberts as the appropriate litmus for identifying constitutionally inadmissible hearsay was therefore settled at the time of Fields' trial. See id. at 71, 987 P.2d at 969 (citing State v. Moore, 82 Hawai'i 202, 223, 921 P.2d 122, 143 (1996)).

2. *Crawford v. Washington*

The United States Supreme Court's decision in Crawford, decided during the pendency of Fields' appeal before the ICA, makes untenable our continued reliance on Roberts to define all forms of hearsay inadmissible under the confrontation clause. At issue in Crawford was an unavailable declarant's tape-recorded statement that was played to the jury to refute the defendant's theory of self defense. Id. at 39-40. In considering the admissibility of the hearsay evidence, the Court declined to reassess the statement's reliability using the Roberts test. Rather, the Court overruled Roberts and, in its place, set forth a new interpretation of the federal confrontation clause that purports to hew more closely to the Framers' original intent.

Crawford concludes that the history behind the sixth amendment supports important inferences about the constitutional

right of confrontation. "First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." Id. at 50. That inference in turn led the Court to a second, more fundamental proposition: "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Id. at 53-54.

As interpreted by Crawford, then, the primary object of the right of confrontation lies in securing for the criminal defendant a basic procedural guarantee: that he be entitled to confront and cross-examine "witnesses" who bear "testimony" against him. Id. at 51. To the extent that an out-of-court statement is testimonial in nature, such hearsay is admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine" him about the statement. Id. at 59. However, the procedural precondition of cross-examination does not apply when nontestimonial statements are involved, as the Framers did not rank the prosecutorial use of this latter type of hearsay among their "core concerns." Id. at 51. Thus, in contrast to the absolute rule governing testimonial hearsay, id. at 61, Crawford subjects nontestimonial statements to a more relaxed standard of admissibility -- one that "afford[s] the States flexibility in their development of hearsay law." Id. at 68.

In sum, instead of asking whether an unavailable

declarant's statement bears "sufficient indicia of reliability" (as Roberts required), Crawford commands that we query, "Is the hearsay testimonial?"

To that end, Crawford confirms that some types of hearsay -- "prior testimony at a preliminary hearing, before a grand jury, or at a former trial[,] . . . police interrogations[,]" and plea allocutions -- are undeniably testimonial under the sixth amendment. Id. at 64, 68. Other classes of hearsay -- "business records," "statements in furtherance of a conspiracy," and "casual remark[s]" -- are likewise clearly nontestimonial. See id. at 51, 56. Crawford ultimately declines, however, to unify these examples within a "comprehensive definition" of testimonial hearsay, id. at 68, and simply observes, without further clarification, that some suggested formulations of the term trace the basic contours of the procedural right:

> Various formulations of this core class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," White v. Illinois, 502 U.S. 346, 365 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it.

Id. at 51-52.

3. *Davis v. Washington*

Having left several foundational questions unresolved

in Crawford, the United States Supreme Court revisited the analysis in its consolidated opinion in Davis.[8] Therein, the Court clarified that the federal confrontation clause applies only to testimonial hearsay: "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." Davis, 126 S. Ct. at 2273 (emphasis added). Thereafter, the Court continued where Crawford left off:

> Without attempting to produce an exhaustive classification of all conceivable statements--or even all conceivable statements in response to police interrogation--as either testimonial or nontestimonial, it suffices to decide the present cases as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 126 S. Ct. at 2273-74 (footnote omitted). The Court subsequently applied its new-fashioned distinction between testimonial and nontestimonial hearsay to the specific facts presented by Davis and Hammon.

a. Davis, No. 05-5224

Davis involved out-of-court statements made by Michelle McCottry ("McCottry") while speaking with a 911 emergency operator on the telephone. Id. at 2270-71. McCottry reported an ongoing domestic disturbance with her former boyfriend, Adrian Davis ("Davis"). McCottry informed the operator that Davis was

---

[8] The opinion of the Court consolidated Davis, No. 05-5224, with Hammon v. Indiana, No. 05-5705.

"jumpin' on [her] again[,]" and that he was "usin' his fists." Id. at 2271. During the conversation, Davis struck McCottry and ran out the door. Id. The operator informed McCottry that the police were on their way, and that, "They're gonna check the area for him first[.]" Id. The police arrived four minutes later and observed that McCottry appeared distressed, that she recently sustained injuries to her face and forearm, and that she had frantically collected her children and her belongings in her preparation to leave the residence. Id. Davis was charged with violating a "domestic no-contact order." Id. McCottry did not testify, and, over Davis' objection, the trial court permitted a recording of McCottry's conversation with the emergency operator. Id. The jury thereafter returned a verdict of guilt, and Davis' conviction was affirmed by both the Washington Court of Appeals and the Washington Supreme Court. Id. The United States Supreme Court granted certiorari. Id. at 2272.

The Court ultimately concluded that McCottry's statements made to the 911 emergency operator were nontestimonial. Id. at 2277. The Court reasoned that (1) "McCottry was speaking about events as they were actually happening, rather than 'describ[ing] past events,'" id. at 2276 (emphasis in original) (brackets in original) (citation omitted), (2) "any reasonable listener would recognize that McCottry . . . was facing an ongoing emergency[,]" id., and (3) "the nature of what was asked and answered . . ., again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn . . .

what had happened in the past." Id. The Court pointed out that even the emergency operator's attempt to establish the identity of McCottry's attacker produced nontestimonial hearsay insofar as the information was elicited "so that the dispatched officers might know whether they would be encountering a violent felon." Id. Accordingly, the Court held that McCottry's statements were properly admitted and affirmed the Washington Supreme Court's judgment. Id. at 2280.

b. Hammon, No. 05-5705

In Hammon, the police responded to a reported domestic disturbance at the residence of Hershel and Amy Hammon (hereinafter individually referred to as "Hershel" and "Amy"). Id. at 2272. Upon arrival, the police discovered Amy sitting alone on the front porch. Id. Amy gave the police permission to enter the dwelling, and the police further observed broken glass in front of "a gas heating unit" from which flames were being emitted. Id. Hershel was also on the premises, and he informed the police that he and Amy were arguing, but that the dispute had been resolved without becoming physical. Id. Amy's account differed. Id. After reporting the incident to the police, she filled out a "battery affidavit" as follows: "Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter." Id. Hershel was charged with domestic battery and violating his probation. Id. At trial, Amy did not testify. Id. The trial court nevertheless admitted Amy's affidavit under the present

sense impression exception to the hearsay exclusionary rule. Id. The trial court also permitted the introduction of Amy's oral account, via the testimony of one of the responding police officers, under the excited utterances exception. Id. The trial judge found Hershel guilty as charged, and Hershel's convictions were affirmed by both the Indiana Court of Appeals and the Indiana Supreme Court. Id. at 2273. The United States Supreme Court granted Hershel's application for certiorari. Id.

The Court thereafter perceived a clear factual distinction between Hammon and Davis, and concluded that Amy's statements were testimonial:

> It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct--as, indeed, the testifying officer expressly acknowledged . . . . There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything . . . . When the officers first arrived, Amy told them that things were fine . . . and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in Davis) 'what is happening,' but rather 'what happened.' Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime--which is, of course, precisely what the officer should have done.

Id. at 2278 (emphasis in original). The Court continued:

> The statements in Davis were taken when McCottry was alone, not only unprotected by police (as Amy Hammon was protected), but apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. McCottry's present-tense statements showed immediacy; Amy's narrative of past events was delivered at some remove in time from the danger she described. And after Amy answered the officer's questions, he had her execute an affidavit, in order, he testified, "[t]o establish events that have occurred previously."

Id. at 2279 (brackets in original). The Court reversed the judgment of the Indiana Supreme Court and remanded the matter for further consistent proceedings. Id. at 2280.

4. The admissibility of Staggs' and Richards' statements following *Crawford* and *Davis*

Crawford fundamentally alters our own analysis of article I, section 14 of the Hawai'i Constitution. To the extent that our cases have predicated the admissibility of testimonial hearsay on conformance with the now-abandoned "reliability" test set forth in Roberts, Crawford invalidates them. Cf. State v. Grace, 107 Hawai'i 133, 141, 111 P.3d 28, 36 (App. 2005), cert. denied, 107 Hawai'i 348, 113 P.3d 799 (2005) ("[F]ederal constitutional guarantees are the absolute minimum constitutional protections we must afford criminal defendants[.]"). We read Crawford to unequivocally require that the admissibility of testimonial hearsay be governed by the following standard: where a hearsay declarant's unavailability has been shown, the testimonial statement is admissible for the truth of the matter asserted only if the defendant was afforded a prior opportunity to cross-examine the absent declarant about the statement. See Crawford, 541 U.S. at 68.

However, to the extent that the hearsay statements in question are nontestimonial, Davis places them beyond the reach of the federal confrontation clause. See Davis, 126 S. Ct. at 2273 ("It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.") (Emphasis added.); see also Crawford, 541 U.S. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law[.]").

Thus, we are disinclined to alter our application of Roberts to nontestimonial hearsay. Roberts embodies the commonsense principle that, when face-to-face cross-examination cannot be secured, extrajudicial statements are admissible as evidence of their truth only when demonstrably more "reliable" than the straightforward application of our rules of evidence would normally require. See, e.g., Sua, 92 Hawai'i at 70, 987 P.2d at 968; McGriff, 76 Hawai'i at 155, 871 P.2d at 789; Ortiz, 74 Haw. at 360, 845 P.2d at 555. In our estimation, the fairness of criminal proceedings would be significantly diminished were we to renounce Roberts in favor of conditioning the admission of nontestimonial hearsay on the vagaries of evolving rules of evidence.

We therefore reaffirm Roberts' continued viability with respect to nontestimonial hearsay. Our position accords with that of other jurisdictions that continue to rely on Roberts to test the admissibility of nontestimonial statements. See, e.g., United States v. Holmes, 406 F.3d 337, 348 (5th Cir. 2005) ("With respect to nontestimonial statements . . . Crawford leaves in place the Roberts approach to determining admissibility.") (Footnote omitted.); State v. Rivera, 844 A.2d 191, 202 (Conn. 2005) ("[B]ecause th[e] statement was nontestimonial in nature, application of the Roberts test remains appropriate."); United States v. Hendricks, 395 F.3d 173, 179 (3d Cir. 2005) ("[U]nless a particular hearsay statement qualifies as 'testimonial,' Crawford is inapplicable and Roberts still controls."); State v. Staten, 610 S.E.2d 823, 836 (S.C. Ct. App. 2005) ("Because

nontestimonial hearsay is at issue here, we apply the reliability test of Roberts[.]"); United States v. Saget, 377 F.3d 223, 227 (2d Cir. 2004) ("Crawford leaves the Roberts approach untouched with respect to nontestimonial statements.").

These principles thus settled, we turn to whether Fields' right of confrontation was violated in the circumstances of this case.

a. Staggs' statement to Officer Ke

When disposing of Fields' state constitutional claim, the ICA apparently believed that Haili, and not Crawford, was the relevant precedent. The ICA concluded as follows:

> When applying the Hawai'i Constitution, Haili, 103 Hawai'i 89, 79 P.3d 1263 (2003), not Crawford, 541 U.S. 36, 124 S.Ct. 1354, (March 8, 2004), is the applicable precedent. Haili applies the rule of Roberts. If counsel for Fields had objected to the introduction of [Staggs'] prior testimonial statement into evidence on the ground that it violated the right guaranteed to Fields by the confrontation clause in the Hawai'i Constitution, the objection would have lacked merit and could validly have been denied.

The ICA's opinion, slip op. at 23-24. However, it is fundamental that, when interpreting our own constitution, our divergence from federal interpretations of the United States Constitution may not convey less protection than the federal standard. See State v. Richie, 88 Hawai'i 19, 42, 960 P.2d 1227, 1250 (1998) ("However, when departing from the federal standard, this court must at least provide the minimum level of protection required by the federal interpretation of the United States Constitution."); State v. Quino, 74 Haw. 161, 170, 840 P.2d 358, 362 (1992) ("[W]e acknowledged that '[a]s long as we afford defendants the minimum protection required by federal interpretations of the Fourteenth

Amendment to the Federal Constitution, we are unrestricted in interpreting the constitution of this state to afford greater protection.'") (Some brackets added and some in original.) (Quoting State v. Texeira, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967).).

Nevertheless, we agree with the ICA's ultimate conclusion that Fields' constitutional right of confrontation was not violated by the circuit court's admission of Staggs' statement to Officer Ke on the grounds that Hawai'i's confrontation clause, like its federal counterpart, is not implicated where, as here, the hearsay declarant attends trial and is cross-examined about his or her prior out-of-court statement. In so concluding, we note that the confrontation clause contained within article I, section 14 of the Hawai'i Constitution is virtually identical to the confrontation clause of the sixth amendment to the United States Constitution.[9] See discussion supra at n.7. We thus find the following language in Crawford, delineating the scope of the federal confrontation clause, compelling:

> [W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places non constraints at all on the use of his prior testimonial statements. See California v. Green, 399 U.S. 149, 162, 90 S. Ct. 1930, 26

[9] Although we recognize that we may, under the Hawai'i Constitution, give broader protection than that afforded by the United States Constitution, see Sua, 92 Hawai'i at 73 n.8, 987 P.2d at 97 n.8 (stating that "this court will not hesitate to extend the protections of the Hawai'i Constitution beyond federal standards[]"), that maxim does not justify the construction of constitutional barriers where none are appropriate. To do so here would expand the protections of Hawai'i's confrontation clause beyond its purpose.

> L.Ed.2d 489 (1970).[10] . . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

Crawford, 541 U.S. at 60 n.9.

Crawford, despite its absolute rules restricting admission of an absent declarant's hearsay statement, leaves no room for doubt that the federal confrontation clause is not concerned with the admission of an out-of-court statement where the declarant appears at trial and is cross-examined about that statement. Other jurisdictions interpreting the foregoing excerpt have reached similar conclusions. See Robinson v. State, 610 S.E.2d 194, 197 (Ga. Ct. App. 2005) ("Here, because the witnesses were present at trial and testified, Crawford does not apply."); State v. Tester, 895 A.2d 215, 221 n.2 (Vt. 2006) ("Crawford is inapposite because [the declarant] testified at trial.") (Citing Crawford, 541 U.S. at 60 n.9.); People v. Johnson, 845 N.E.2d 645, 655 (Ill. Ct. App. 2005) ("Here, the victim testified at trial and was subject to cross-examination. As such, none of the statements admitted . . . were improper under Crawford."); State v. Corbett, 130 P.3d 1179, 1189 (Kan. 2006) (concluding that Crawford did not preclude the admission of

---

[10] In Green, the United States Supreme Court stated, in relevant part, as follows:

> Finally, we note that none of our decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial. The concern of most of our cases has been focused on precisely the opposite situation--situations where statements have been admitted in the absence of the declarant and without any chance to cross-examine him at trial.

Green, 399 U.S. at 161.

pretrial depositions of Jenny Williams and Bryan Miller, that contradicted their trial testimony, "because both Williams and Miller were available for cross-examination and testified at trial"); Commonwealth v. Ruiz, 817 N.E.2d 771, 778 n.5 (Mass. 2004) ("The defendant does not argue that admission of [the declarant's] spontaneous utterances constituted a violation of the principles stated in [Crawford]. Here [the declarant] testified at trial and was subjected to cross-examination. We, therefore, do not need to address what impact the Crawford case might have on the admission of spontaneous utterances made by persons who do not testify."); Gomez v. State, 183 S.W.3d 86, 90 (Tex. Ct. App. 2005) ("The fact that [the declarant] testified and was available for Appellant to cross examine her makes Crawford inapplicable here."); Mumphrey v. State, 155 S.W.3d 651, 657 n.1 (Tex. Ct. App. 2005) ("[The declarant] testified at trial. Therefore, the concerns raised by the recent decision by the United States Supreme Court in [Crawford] are not relevant in this case.").

Inasmuch as the dissent takes issue with the afore-referenced cases, we now discuss them at length. In so doing, we find Robinson and Tester particularly persuasive inasmuch as the hearsay declarants in those cases claimed losses of memory at trial.

In Robinson, Rodney Shaw ("Shaw") and Thomas Milo ("Milo") were at a café when Aunterio Robinson ("Robinson") entered. Robinson, 610 S.E.2d at 195. Robinson became aggravated when Shaw demanded payment on a debt owed by Robinson.

Id. Not wanting trouble, Shaw and Milo left the café and proceeded to a gas station. Id. Robinson followed them and a fist fight ensued. Id. During the fight, Robinson pulled out a gun and shot Shaw twice. Id. Milo wrestled the gun away from Robinson and threw it over a nearby fence and into a neighboring apartment complex. Id. Robinson retrieved the gun and fled. Id. Milo then drove Shaw to the hospital. Id. Both Shaw and Milo provided statements identifying Robinson as the shooter, and each man picked Robinson's picture out of a photographic lineup. Id. However, at trial, Shaw and Milo exhibited losses of memory on the witness stand:

> Both witnesses testified that they were intoxicated when the incident occurred. Milo admitted being shown the lineup, remembered he picked someone out, and testified that he signed the lineup form. He could not recall any other relevant facts concerning the incident except that Shaw was shot and that he transported Shaw to the hospital. He first testified that he remembered talking to Detective Foster, but shortly afterward he stated, "I don't even remember him." He was certain, though, that he did not "tell him anything." Shaw testified that he did not know who shot him, that he did not know or speak to Detective Foster, and that he did not talk to Detective Johnson. He did not remember being shown a lineup or signing the lineup form.

Id. at 196.

The Georgia Court of Appeals held that the admission of Shaw's and Milo's prior statements made to the police did not violate Robinson's right of confrontation under the sixth amendment to the United States Constitution:

> Robinson asserts the authority of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), in support of his contention. But in Crawford, the prior statement improperly admitted was that of a wife who did not testify at trial because of a Washington state marital privilege barring her from testifying without her husband's consent. The United States Supreme Court held that admission of her prior statement violated the Confrontation Clause. The Court explicitly held, however, that

> when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.
>
> (Citations and punctuation omitted.) Id. at 38, n.9, 124 S.Ct. 1354. On the other hand, "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (Citations and footnote omitted.) Id.
>
> Here, because the witnesses were present at trial and testified, Crawford does not apply. Robinson's confrontation right was not violated.

Id. at 197 (ellipses in original).

In the case at bar, as in Robinson, the reluctant witness testified to an extent, despite claiming memory loss as to material elements of the alleged crime. Furthermore, neither Staggs nor the hearsay declarants in Robinson testified as to the subject matter of their prior out-of-court statements. Insofar as the Robinson court thus concluded that Crawford was inapplicable, we are similarly persuaded that the same result should be reached here.

In Tester, Dwight Tester, Sr. ("Tester") was convicted of the offense of aggravated sexual assault. Tester, 895 A.2d at 220. Tester's daughter ("D.T.") had reported to her therapeutic foster mother that "she had been sleeping on a blow-up bed, and she heard [Tester] enter the room. [Tester] knelt by the bed, and touched her vagina." Id. at 218. She repeated her allegations to a Department of Social and Rehabilitation Services official and a police detective. Id. At trial, however, she claimed some degree of memory loss:

> She stated that [Tester] had hurt her. When asked how, she testified that she did not remember. D.T. acknowledged that she had told [her therapeutic foster mother] that [Tester] had touched her vagina. She reiterated that [Tester] had touched her, but testified that she did not know how he had touched her.

Id. at 220.

In a pro se brief, Tester argued that D.T.'s out-of-court statements should have been excluded because they violated his right of confrontation guaranteed by the sixth amendment to the United States Constitution, as interpreted by Crawford. Id. at 221 n.2. The Supreme Court of Vermont rejected that argument, stating that "Crawford is inapposite because D.T. testified at trial." Id.

Here, as in Tester, the hearsay declarant -- despite some degree of memory loss -- testified at trial and was cross-examined. Accordingly, Tester supports the proposition that the Crawford analysis is not applicable to Staggs' out-of-court statements to Officer Ke.

Although the factual backgrounds of the remaining cases do not parallel the facts presented in the case at bar, the principles espoused in those cases are nevertheless persuasive.

In Johnson, Glenn Johnson ("Johnson") was found guilty of two counts of aggravated criminal sexual abuse. Johnson, 845 N.E.2d at 648. The victim was twelve years old at the time and suffered from "mental, vision, speech, and language impairments." Id.

Johnson was one of the care providers assigned to the victim, and had contact with the victim on eight separate occasions. Id. at 648-49. Johnson then resigned from his

position. Id. at 649. Thereafter, the victim told another care provider that he wished that Johnson was still his care provider. Id. When asked why, the victim responded that they "did fun things together." Id. After further questioning, the victim related that Johnson "licked his asshole" and that Johnson had "bubbles in his ass." Id. The victim's mother was informed, and the following conversation ensued:

> The victim told his mother, while pointing at his genital area, that [Johnson] licked him. [The care provider] explained that the victim had told him that [Johnson] "licked his asshole." The victim's mother asked the victim to show her what his asshole is, and the victim pointed to his penis. The victim's mother asked the victim if he meant his penis, and the victim said yes. The victim also said that the defendant was pulling on the defendant's penis and that stuff came out.

Id. The victim also related the foregoing to a police investigator. Id. at 650.

At trial, the victim testified, in relevant part, as follows:

> The victim testified that on the way to his uncle's house, the defendant would stop the car, unbutton or unzip his pants, pull down his underwear, and stick out his penis. The defendant would move his hand up and down on his penis and bubbles would come out. The defendant would then wipe the bubbles off with a napkin. The defendant would then do the same to the victim: unbutton his pants, pull down the victim's underwear, and squeeze the victim's penis. The victim saw bubbles come out of his penis. After that they went to the victim's uncle's house. However, the victim did not tell his uncle about the incident.
>
> The victim further testified that a similar incident occurred when he and the defendant were in a parking lot. In the parking lot they would stop, and the defendant would unbutton the victim's pants and pull down his underwear. The defendant held the victim's penis. The defendant then took the victim home. The victim testified that he did not tell anybody because the defendant told him not to and because he (the victim) would have been in trouble.

Id. at 652.

The victim's out-of-court statements were admitted

pursuant to 725 Ill. Comp. Stat. Ann. 5/115-10 (West 2002), which reads, in pertinent part, as follows:

> § 115-10. Certain hearsay exceptions.
>
> (a) In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13, or a person who was a moderately, severely, or profoundly mentally retarded person as defined in this Code and in Section 2-10.1 of the Criminal Code of 1961 at the time the act was committed, . . . the following evidence shall be admitted as an exception to the hearsay rule:
>
> (1) testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another; and
>
> (2) testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.

On appeal, Johnson argued that In re E.H., 823 N.E.2d 1029 (Ill. Ct. App. 2005) held that 725 Ill. Comp. Stat. 5/115-10 was unconstitutional, based upon the United States Supreme Court's decision in Crawford. Johnson, 845 N.E.2d at 655. The Illinois Court of Appeals, however, held that Crawford was inapplicable:

> In Crawford, the Supreme Court held that testimonial forms of hearsay evidence are inadmissible absent a finding of unavailability and an opportunity to cross-examine the witnesses. Crawford, 541 U.S. at 53-54, 124 S.Ct. at 1365-66, 158 L.Ed.2d at 194. However, when "the declarant appears for cross-examination at trial, the [c]onfrontation [c]lause places no constraints at all on the use of his prior testimonial statements." Crawford, 541 U.S. at 59 n. 9, 124 S.Ct. at 1369 n. 9, 158 L.Ed.2d at 197 n. 9. In other words, when a child sex abuse victim appears at trial and is subject to cross-examination, any prior statement of the victim being offered pursuant to section 115-10 of the Code is a nonevent. People v. Sharp, 355 Ill.App.3d 786, 796, 292 Ill.Dec. 118, 825 N.E.2d 706 (2005).
>
> Here, the victim testified at trial and was subject to cross-examination. As such, none of the statements admitted pursuant to section 115-10 were improper under Crawford.

Id. (brackets in original).

In Corbett, Trever Corbett ("Corbett") was convicted of

the offense of first degree premeditated murder of his ex-wife Crystal Casey ("Crystal"). Corbett, 130 P.3d at 1185.

Crystal married Corbett in August 1995. Id. They divorced in December 1996. Id. Crystal married her second husband, Shane Casey ("Shane"), in September 1997. Id. On the morning of June 26, 2000, Crystal's part-time roommate returned to find Crystal's body lying in her apartment. Id. Crystal's neighbor, Jenny Williams ("Williams") was walking around the apartment complex with her boyfriend, Bryan Miller ("Miller"), at approximately 1:30 A.M. on the morning that Crystal was murdered. Id. at 1186. Williams observed a partially clothed man emerging from the doorway to Crystal's apartment carrying a pile of laundry. Id. Williams thought she recognized the man as Corbett and greeted him. Id. The man did not respond. Id. Upon learning of Crystal's death, Williams and Miller contacted the police. Id. Erin Bailey, one of Williams' friends convinced Williams that she had actually seen Shane, because Corbett was the "nice" ex-husband, and Crystal's marriage with Shane was tumultuous. Id.

The police presented Williams with a photographic lineup that included Shane's picture, but not Corbett's picture. Id. Williams did not know Shane, but she selected his picture from the lineup. Id. The police approached Miller with the same lineup. Id. Miller did not initially select a photograph, and the police accused Miller of smoking marijuana and ordered him to return at a later time. Id. Miller then spoke with Williams, who informed Miller of which photograph she had selected. Id.

Miller subsequently met with the police and selected Shane's picture from the lineup. Id. at 1186-87. Williams and Miller later appeared for depositions at which Williams reaffirmed her identification. Id. at 1187. Miller, however, recanted. Id. Williams thereafter expressed concerns about her own photographic identification. Id.

In January 2001, the police approached Williams and Miller with a second photographic lineup containing pictures of both Corbett and Shane. Id. Both Williams and Miller selected Corbett's picture from the lineup. Id. At trial, Williams and Miller testified about seeing Corbett outside of Crystal's apartment the morning she was murdered. Id. at 1188.

On appeal, Corbett argued that the trial court erred by admitting the transcripts from Williams' and Miller's depositions. Id. The Supreme Court of Kansas, however, held that the admission of prior testimony of witnesses who testify at trial was not precluded by either Kan. Stat. Ann. § 60-460(a) or the United States Supreme Court's decision in Crawford. Id. at 1189. The Supreme Court of Kansas stated that

> Crawford does not apply . . . because both Williams and Miller were available for cross-examination and testified at trial. The language in K.S.A. 60-460(a), which limits the application of the statute to "a person who is present at the hearing and available for cross-examination," specifically protects the defendant's right to confrontation by requiring the person to be available for cross-examination at trial. Thus, the application of K.S.A. 60-460(a) negates the application of Crawford.

Id. at 1189-90.

In Ruiz, Juan Ruiz ("Juan") was convicted of the offense of first degree murder for killing his wife, Carmen Ruiz ("Carmen"). Ruiz, 817 N.E.2d at 774.

Juan and Carmen had been married for fourteen years and had four children. Id. Often, Carmen's friends and co-workers Angel Negron ("Negron") and Anthony Matos ("Matos") would drink and socialize at the Ruiz home. Id. During the summer of 1998, Carmen had an affair with Negron. Id. Eventually, Juan told Carmen that he did not want Negron and Matos at his home. Id. In August, Juan moved out of the house. Id.

On September 1, 1998, Negron and Matos were at the Ruiz home when Juan entered the premises. Id. at 775. Carmen and Juan argued in the kitchen while Negron was in the bathroom. Id. Juan proceeded to the bathroom and pounded on the door demanding that Negron come out so they could talk. Id. Matos approached Juan and stated that they were not looking for trouble. Id. Juan responded by stabbing Matos six times in the chest and abdomen. Id. Juan then attacked Carmen and stabbed her multiple times in the torso. Id. During his attack on Carmen, Juan's twelve-year-old daughter opened her bedroom door and saw Juan stabbing Carmen. Id. She went back into her room and called the police. Id. Juan saw his daughter on the phone and ran out of the house, got into his vehicle, and drove away. Id. Officer Maria Lavita ("Officer Lavita") arrived at the Ruiz home and found Carmen lying on the porch, bleeding but conscious. Id. at 777. Officer Lavita also found Juan's daughter, visibly upset, and asked her what happened. Id. Juan's daughter stated, "My father did this to my mother." Id. She then described the stabbing. Id.

At trial, the court admitted Juan's daughter's out-of-

court statements under the spontaneous utterances exception to the exclusionary hearsay rule. Id.

The Supreme Judicial Court of Massachusetts affirmed the trial court's ruling, agreeing that Juan's daughter's statements were properly admitted as spontaneous utterances. Id. The court also noted that the principles set forth in Crawford were not implicated because Juan's daughter testified at trial:

> The defendant does not argue that admission of [Juan's daughter's] spontaneous utterances constituted a violation of the principles stated in [Crawford]. Here, [Juan's daughter] testified at trial and was subjected to cross-examination. We, therefore, do not need to address what impact the Crawford case might have on the admission of spontaneous utterances made by persons who do not testify.

Id. at 778 n.5.

In Gomez, police officers were dispatched to a local convenience store where they encountered a crying and hysterical Carmen Perez ("Perez"). Gomez, 183 S.W.3d at 88. Perez told the officers that she had been assaulted by her ex-boyfriend, Mario A. Gomez ("Gomez"). Id. Perez was a reluctant witness, but "she ultimately testified about the early morning events of October 19, 2003." Id. She testified that Gomez wanted to talk to her and that she received scrapes when he tried to force her into his vehicle. Id. at 89. She stated, however, that Gomez only wanted to talk and that he "did not intend to hurt her." Id. The responding police officers also testified at trial, as to what Perez related to them about the incident in question. Id. at 88.

The Texas Court of Appeals rejected Gomez's claim that his right of confrontation was violated, as follows:

> In the case before us, [the responding officers] testified about the statements made to them by the victim, Perez. However, Perez also testified, and [Gomez] had the opportunity to cross

> examine her three separate times. The fact that Perez testified and was available for [Gomez] to cross examine her makes Crawford inapplicable here.

Id. at 90.

In Mumphrey, Johnifer Ray Mumphrey ("Johnifer") was convicted of perpetrating an assault on Theresa Reedy ("Reedy"), a member of his family or household. Mumphrey, 155 S.W.3d at 655.

According to the trial testimony of the responding police officer, Sheriff's Deputy Craig Strickhausen ("Deputy Strickhausen"), Reedy informed him that Johnifer came over to her residence and asked her for some money. Id. at 657. When she refused he followed her into the house. Id. She retreated to her bedroom and leaned against the door, but he forced his way in and assaulted her by striking her in the face and in the back and neck areas. Id. Reedy also testified, stating that Johnifer "struck her several times and chased her through the house because she had refused to give him money." Id. at 658.

On appeal, the Texas Court of Appeals held that the trial court properly admitted Deputy Strickhausen's testimony regarding Reedy's out-of-court statements under the excited utterances exception to the exclusionary hearsay rule. Id. at 659. In a footnote, the court also stated that "Reedy testified at trial. Therefore, the concerns raised by the recent decision by the United States Supreme Court in [Crawford] are not relevant[.]" Id. at 657 n.1.

These cases, while somewhat factually dissimilar, share one unifying theme: Crawford does not preclude the admission of

a prior out-of-court statement where the hearsay declarant is cross-examined at trial about the out-of-court statement.[11]

That concept is not a novel one. For even under this jurisdiction's version of the Roberts analysis, sufficient cross-examination of the hearsay declarant at trial terminated the inquiry. See Sua, 92 Hawai'i at 77, 987 P.2d at 975 ("Both Kaowili and Puahi were cross-examined with respect to their prior inconsistent statements . . . . It therefore follows that the substantive use of these statements did not infringe upon Sua's right of confrontation."); State v. Clark, 83 Hawai'i 289, 294, 926 P.2d 194, 199 (1996) ("Because the witness is subject to cross-examination, the substantive use of his [or her] prior inconsistent statement does not infringe the sixth amendment confrontation rights of accused in criminal cases, see California v. Green, 399 U.S. 149 [90 S.Ct. 1930, 26 L.Ed.2d 489] (1970)."). (Quoting State v. Eastman, 81 Hawai'i 131, 136, 913 P.2d 57, 62 (1996) (citing commentary to HRE Rule 802.1 (1993)).) (Brackets in original.); Owens, 484 U.S. at 561 ("The dangers associated with hearsay inspired the Court of Appeals in the present case to believe that the Constitution required the testimony to be examined for 'indicia of reliability,' . . . or 'particularized guarantees of trustworthiness,' . . . . We do not think such an inquiry is called for when a hearsay declarant is present at trial and subject to unrestricted cross-examination.") (Emphasis

---

[11] Although the dissent claims that these cases are distinguishable, the factual dissimilarities highlighted by the dissent do nothing to undermine the underlying rationale that the federal confrontation clause is not concerned with the admission of out-of-court statements where the declarant appears and is cross-examined about those statements at trial.

added.).

Here, Staggs claimed memory loss as to her prior statement on direct examination by the prosecution. Tr. 7/29/02 at 8-9. Indeed, she claimed that she could not even remember the incident in question. Tr. 7/29/02 at 8. On cross-examination, however, she willingly and informatively responded to virtually all of the questions posed by Fields' counsel. Tr. 7/29/02 at 10-11. Her earlier claim that she could not recall the incident was belied by her subsequent testimony on cross-examination. Staggs was able to recall that (1) Richards was present during the incident, tr. 7/29/02 at 10, and (2) during the incident she was "laying on [Fields'] [surf]board" while it was positioned "between the table and the chair" and that she threatened to sit on it and break it if Fields left the premises. Tr. 7/29/02 at 11. She further testified, on cross-examination, that her memory loss as to other portions of the incident could have been caused by the fact that she drank "a lot" of beer on the evening of the incident in question. Tr. 7/29/02 at 10. Fields' counsel then terminated the cross-examination, having asked only a handful of questions occupying less than two pages of transcript. Tr. 7/29/02 at 10-11. Given the foregoing, we do not think that Fields' opportunity for cross-examination was insufficient. The trier of fact was provided with adequate information to test the credibility and veracity of Staggs' prior statement insofar as it could have reasonably inferred that (1) Staggs' drunken state rendered her prior statement inaccurate or unreliable, and/or (2) Staggs was not an innocent victim but an aggressive participant

in the incident who, while angry at Fields, gave a false statement to the police. Fields certainly had the opportunity to develop those theories and cast doubt on Staggs' earlier out-of-court statement, but voluntarily declined to do so by terminating the cross-examination. Moreover, the fact of Staggs' memory loss further permitted the trier of fact to test the truth of her prior out-of-court statement. See Owens, 484 U.S. at 559 ("It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his [or her] lack of care and attentiveness, his [or her] poor eyesight, and even (what is often a prime objective of cross-examination, see 3A J. Wigmore, Evidence § 995, pp. 931-932 (J. Chadbourn rev. 1970)) the very fact that he [or she] has a bad memory.") (Emphases added.). Therefore, we hold that the admission of Staggs' out-of-court statement did not violate Hawai'i's confrontation clause inasmuch as Fields was afforded a sufficient opportunity to cross-examine Staggs about her prior statement at trial.

Insofar as Fields had a meaningful opportunity for cross-examination, the dissent's focus on the "unavailability" paradigm is misplaced. See dissenting opinion, slip op. at 44 ("[D]isagreement with the majority rests on the unavailability requirement[.]"). The "unavailability" paradigm has alternatively been referred to as the "rule of necessity." See State v. Lee, 83 Hawai'i 267, 275, 925 P.2d 1091, 1100 (1996) ("First, in conformance with the Framers' preference for face to face confrontation, the [confrontation clause] establishes a rule of necessity. In the usual case (including cases where prior

cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.") (Citing Roberts, 448 U.S. at 65.) (Brackets in original.) The "rule of necessity" is so named because it imposes a burden on the prosecution to demonstrate the necessity of introducing a prior out-of-court statement by demonstrating the "unavailability" of the declarant at trial. Id. Thus, the constitutionally infused term, "unavailable," means that the declarant is "unavailable" as a witness for the prosecution at trial. But that is not a relevant inquiry here, insofar as Staggs' "unavailability" has been conclusively established by her claimed loss of memory. As is intuitively obvious, the present matter turns on whether, given the circumstances, Fields was afforded a meaningful opportunity to cross-examine Staggs about her prior out-of-court statement.[12] The point here is that the protections guaranteed by Hawai'i's confrontation clause have been fully afforded to an accused where the hearsay declarant attends trial and is cross-examined about the prior hearsay statement. The explicit right conferred by both the state and federal confrontation clauses is the right to "confront adverse witnesses." Id. at 70, 987 P.2d at 968. "The right of confrontation affords the accused both the opportunity to challenge the credibility and veracity of the prosecution's witnesses and an occasion for the jury to weigh the demeanor of

[12] We acknowledge the dissent's view that Fields' opportunity to cross-examine Staggs was insufficient. However, on the record before us, we simply and respectfully disagree.

those witnesses." Id. (citing State v. Ortiz, 74 Haw. 343, 360, 845 P.2d 547, 555 (1993) (citing State v. Rodrigues, 7 Haw. App. 80, 84, 742 P.2d 986, 989 (1987))). These foundational interests are preserved where an accused is afforded the opportunity to cross-examine, and thereby challenge the credibility and veracity of, a hearsay declarant regarding his or her prior out-of-court statement. See 5 J. Wigmore on Evidence § 1396, at 154 (Chadbourn rev. 1974) ("The satisfaction of the right of cross-examination . . . disposes of any objection based on the so-called right of confrontation."); Owens, 484 U.S. at 557-59 (stating that "a defendant seeking to discredit a forgetful expert witness is not without ammunition, since the jury may be persuaded that his opinion is as unreliable as his memory[,]" and that "[i]t is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination, see 3A J. Wigmore, Evidence § 995, pp. 931-932 (J. Chadbourn rev. 1970)) the very fact that he has a bad memory.") (Quotation marks omitted.) (Citations omitted.). Consistent with the foregoing, we acknowledge that the dissent is correct to the extent that it accuses us of concluding that Staggs' was available for cross-examination. See dissenting opinion, slip op. at 45. Our holding that Fields had a sufficient opportunity to cross-examine Staggs about the subject matter of her prior out-of-court statement necessarily implies our acceptance of the proposition that Staggs was physically present at trial and thereby available for cross-

examination. We emphasize, however, that we do not conclude that Staggs was constitutionally "available" as a witness for the prosecution because that finding is precluded by her claimed loss of memory, in accordance with Sua.

Given the foregoing, the dissent's discomfort with our application of Sua is unwarranted. In Sua, Jonah Gooman ("Gooman") was driving an automobile in which Alomalietoa Sua ("Sua"), Cory Kaowili ("Kaowili"), and Trent Puahi ("Puahi") were passengers. Sua, 92 Hawai'i at 64, 987 P.2d at 962. Sua believed that Gooman owed a sum of money to his brother, and demanded that Gooman relinquish the money. Id. Gooman noticed Sua "fiddling" with a gun. Id. Sua continued to demand the money and struck Gooman in the head with the butt of the gun. Id. Kaowili produced $120.00 hoping that Sua would "back off." Id. Sua thereafter exited the car. Id. On July 23, 1997, Sua was indicted for committing the offense of first degree robbery. Id.

At trial, Puahi and Kaowili testified, but they denied making statements to the police. Id. at 64-65, 987 P.2d at 962-63. Gooman also testified at trial. Id. at 65, 987 P.2d at 963. When asked about his previous testimony before the grand jury, he claimed that he could not remember. Id. Over objection, the circuit court allowed Gooman's grand jury testimony to be read to the jury. Id. at 65-66, 987 P.2d at 963-64.

On December 30, 1997, the jury found Sua guilty as charged. Id. at 67, 987 P.2d at 965. On August 30, 1999, the Intermediate Court of Appeals vacated the circuit court's judgment of conviction. Id. at 67-68, 987 P.2d at 965-66. On

September 23, 1999, the prosecution filed an application for writ of certiorari, which this court accepted. Id. at 68, 987 P.2d at 966.

On appeal, we applied this jurisdiction's version of the Roberts test to Sua's claim that the admission of Gooman's grand jury testimony as a "past recollection recorded" violated his constitutional right of confrontation. Id. at 70, 987 P.2d at 968. We first concluded that Gooman was "'unavailable' by virtue of his loss of memory." Id. at 73, 987 P.2d at 971. Turning to the second prong of the Roberts analysis, this court concluded that Gooman's prior grand jury testimony constituted a "past recollection recorded," and thus fell within a "firmly rooted hearsay exception." Id. To ensure the "highest standard of protection of Sua's constitution right of confrontation," we proceeded to analyze whether Gooman's grand jury testimony "bore 'particularized guarantees of trustworthiness.'" Id. We found such "guarantees of trustworthiness," as follows:

> First, we note that Gooman's grand jury testimony was given under oath. Second, as the victim, Gooman had direct personal knowledge of the relevant facts. Third, Gooman exhibited no reluctance in the grand jury proceeding to implicate Sua. Fourth, Gooman bore no relationship to the government that would have benefitted him to testify against Sua. Finally, Gooman never recanted his inculpatory testimony or expressed belated views regarding its accuracy; in fact, at Sua's trial, Gooman testified that he was able to testify at the grand jury "fully and accurately." Given these indicia of trustworthiness, we cannot say that the trial court abused its discretion in admitting Gooman's grand jury testimony into evidence.

Id. at 74, 987 P.2d at 972.

We subsequently cited the following excerpt from Carey v. United States, 647 A.2d 56 (D.C. 1994):

> [The witness] was available for cross-examination by [the defendant's] trial counsel. Indeed, he did cross-examine her at

> trial about her failure to remember the events on the night of the murder. "The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee." [Owens, 484 U.S.] at 560[108 S.Ct. 838.] Though [the defendant's] trial counsel may not have been able to cross-examine [the witness] as he would have liked, our review of the record reveals nothing giving rise the [sic] a deprivation of appellant's constitutional right of confrontation.

Sua, 92 Hawai'i at 75, 987 P.2d at 973 (emphasis added) (brackets in original) (citing Carey, 647 A.2d at 59).

We thus concluded that Gooman's grand jury testimony met both requirements of the Roberts test and that Sua had a sufficient opportunity for cross-examination:

> Similarly, in the present matter, Gooman made assertions before the grand jury and later claimed a loss of memory at trial. Sua was provided with the opportunity to cross-examine Gooman regarding his loss of memory. Inasmuch as Gooman's grand jury testimony met both requirements of the Roberts test, and Sua was able to cross-examine Gooman regarding his failure to remember the alleged incident, we cannot say that the admission of Gooman's grand jury testimony violated Sua's right to confrontation.

Id. at 75, 987 P.2d at 973 (emphases added).

A fair reading of Sua indicates that this court rejected Sua's confrontation clause argument on two independent and dispositive, but coequal grounds: (1) both prongs of the Roberts test were met; and (2) Sua had a sufficient opportunity for cross-examination. See Sua, 92 Hawai'i at 75, 987 P.2d at 973 ("Inasmuch as Gooman's grand jury testimony met both requirements of the Roberts test, and Sua was able to cross-examine Gooman regarding his failure to remember the alleged incident, we cannot say that the admission of Gooman's grand jury testimony violated Sua's right to confrontation.") (Emphasis added.).

To interpret the conclusion that Sua was able to cross-examine Gooman regarding his failure to remember the alleged

incident as a mere "circumstantial fact," as the dissent suggests, see dissenting opinion, slip op. at 58, ignores Sua's citation of Carey, discussed supra. The dissent believes that Sua cannot be interpreted as adopting Carey's conclusion that a forgetful declarant was nevertheless "available for cross-examination," Carey, 647 A.2d at 59, inasmuch as that conclusion would be inconsistent with Sua's holding that a witness who claims a loss of memory at trial as to a prior out-of-court statement is constitutionally "unavailable." See dissenting opinion slip op. at 60 ("If considered other than a circumstantial fact as the majority proposes, Carey would be contradictory of Sua II's formulation of Roberts, because Gooman's memory loss made him unavailable for confrontation purposes on the same facts that Carey would deem him available. Therefore, the purported 'two independent . . . grounds,' . . . asserted by the majority cannot coexist.") (Some ellipses in original and some added.). The dissent's position is unpersuasive because it confuses the semantic statement "available for cross-examination" with the constitutionally infused statement "available as a witness for the prosecution." The "unavailability" paradigm was not at issue in Carey. The Carey court made the foregoing statement in the context of analyzing whether the accused had a sufficient opportunity for cross-examination, the declarant's loss of memory notwithstanding. Thus, the Carey court's statement that the forgetful declarant was "available for cross-examination" implies nothing as to whether it would or would not have determined

whether the forgetful witness was constitutionally "unavailable" (i.e., "unavailable" as a witness for the prosecution). It is not contradictory to suggest that a witness may be constitutionally "unavailable" as a witness for the prosecution by virtue of that witness' claimed loss of memory at trial as to a prior out-of-court statement, yet simultaneously semantically "available for cross-examination" as a result of the witness' physical presence on the witness stand.[13] Sua is consistent with that distinction, holding, inter alia, that (1) Gooman was constitutionally "unavailable" as a witness for the prosecution by virtue of his loss of memory, and (2) Gooman was nevertheless semantically available for cross-examination by virtue of his physical presence at trial, thereby providing Sua with an opportunity to cross-examine Gooman. Thus, Sua concluded that "[i]nasmuch as Gooman's grand jury testimony met both requirements of the Roberts test, and Sua was able to cross-examine Gooman regarding his failure to remember the alleged incident, we cannot say that the admission of Gooman's grand jury testimony violated Sua's right to confrontation." Sua, 92 Hawai'i at 75, 987 P.2d at 973 (emphasis added).

Additionally, the dissent's analysis is wrong because it misconstrues the Crawford opinion in an attempt to conjure disparity with this jurisdiction's confrontation clause

[13] In such situations, as is the case here, the dispositive question becomes whether the witness can nevertheless recall the subject matter of the statement, notwithstanding the loss of memory as to the statement itself. If the accused has the opportunity to elicit the witness' testimony as to the subject matter of the statement on cross-examination at trial, the accused's right of confrontation has been satisfied.

jurisprudence. To wit, the dissent claims that, under Crawford, a declarant is "unavailable" for confrontation clause purposes only if he or she never takes the stand, and thus our endorsement of Crawford's view on unavailability directly contradicts this jurisdiction's view of "unavailability" as set forth in Sua. See dissenting opinion, slip op. at 84 ("Pursuant to Crawford, a declarant is 'unavailable' for confrontation clause purposes only if he or she never takes the stand."). However, Crawford does not state that a declarant is constitutionally "unavailable" only if the declarant is not present at trial. Indeed, the dissent provides no citation for that proposition. What Crawford does say, is that "[t]he Clause[,]" i.e., the confrontation clause analysis, "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." Crawford at 60 n.9. Thus, the appropriate principle gleaned is that the confrontation clause analysis does not apply to exclude a prior out-of-court statement where a declarant is physically present at trial to "defend or explain it[,]" not that a hearsay declarant's presence at trial mandates the conclusion that the declarant is constitutionally "available" (i.e., not "unavailable").

The dissent's misapprehension of Crawford again demonstrates its improper equation of the constitutional "unavailability" paradigm with the inquiry whether the hearsay declarant is physically present and available for cross-examination. Because the dissent believes that the federal "unavailability" paradigm asks whether the declarant is available for cross-examination at trial, it consequently concludes that

the hearsay declarant's physical presence at trial establishes the declarant's "availability" (i.e., lack of "unavailability"). Thus, the dissent translates Crawford's statement in footnote 9 -- that the confrontation clause analysis does not bar the admission of a prior out-of-court statement "so long as the declarant is present at trial to defend or explain it," Crawford at 60 n.9 (emphasis added) -- as stating that the confrontation clause analysis does not apply so long as the declarant is available for cross-examination at trial. This explains the dissent's opposition to our application of that principle to the present case. As previously mentioned, the dissent takes the federal courts' use of the phrase "available for cross-examination" to mean constitutionally "available" (i.e., not "unavailable"). Thus, the dissent believes that an application of Crawford here mandates the conclusion that Staggs was constitutionally "available" despite the fact that her memory loss would render her constitutionally "unavailable" under Sua. See dissenting opinion, slip op. at 84-85.

To the contrary, we read the federal courts' use of the phrase "available for cross-examination" as taking an intermediate step towards the conclusion that the accused had a meaningful opportunity to cross-examine a hearsay declarant who was physically present at trial; not as establishing the declarant's constitutional "availability" (i.e., lack of "unavailability") as a witness for the prosecution. See discussion supra. It is the dissent's erroneous substitution of the phrase, "available for cross-examination," with the phrase,

"available as witness for the prosecution," that creates the foregoing appearance of incompatibility.

Finally, the dissent claims that we have retained the "unavailability" paradigm with respect to nontestimonial situations and that by excluding the present out-of-court statement from the purview of Hawai'i's confrontation clause we have failed to preserve the "unavailability" paradigm with respect to testimonial situations, thus creating an anomalous result. Dissenting opinion, slip op. at 63-65. However, contrary to the dissent's assertions, we have not extinguished the "unavailability" requirement with respect to testimonial situations. Under Hawai'i's confrontation clause, if an out-of-court statement is testimonial, it is subject to the Crawford analysis, which mandates that (1) the witness be "unavailable,"[14] and (2) the accused had a prior opportunity for cross-examination. If an out-of-court statement is nontestimonial, it is subject to the Roberts analysis, requiring a showing that (1) the declarant is "unavailable," and (2) the statement bears some indicia of reliability. Thus, the "unavailability" paradigm is retained in both testimonial and nontestimonial situations, and the result achieved is not anomalous. Indeed, we reiterate that "a showing of the declarant's unavailability is necessary to promote the integrity of the fact finding process and to ensure fairness to defendants." Sua, 92 Hawai'i at 71, 987 P.2d at 969

[14] We note that the "unavailability" paradigm embedded within this jurisdiction's version of the Crawford analysis, as with this jurisdiction's version of the Roberts analysis, must be interpreted to include a witness' lack of memory, pursuant to the greater protection afforded by the Hawai'i Constitution as recognized by this court in Sua.

(citations omitted).

To reiterate, and in sum, our present holding is no more, and no less, than that a trial court's admission of a prior out-of-court statement does not violate the Hawai'i Constitution's confrontation clause where the declarant appears at trial and the accused is afforded a meaningful opportunity to cross-examine the declarant about the subject matter of that statement. In such situations, the cross-examination satisfies the accused's right of confrontation and neither the Crawford analysis nor the Roberts analysis need be employed.

b. Richards' statements overheard by Lhamo

The ICA declined to address Fields' claim that Richards' out-of-court statement,[15] as related by Lhamo, violated Fields' right of confrontation under the Hawai'i Constitution.[16] Inasmuch as Fields failed to raise the argument in his opening brief, the ICA was within its discretion to deem the error waived. See HRAP Rule 28(b)(4) (2003) (stating that "the appellant shall file an opening brief, containing . . . [a]

---

[15] Richards' statement, "Reggie, get off her[,]" is clearly nontestimonial, and, thus, its admissibility under the confrontation clause of the Hawai'i Constitution is governed by the Roberts test. See Medina v. State, __ P.3d __, __, 2006 WL 2830167, at *2 (Nev. 2006) (holding that a rape victim's statement to her neighbor, "Look at me. Look at me. I've been raped[,]" was nontestimonial, whereas the rape victim's statement to a "Sexual Assault Nurse Examiner" was testimonial); State v. Maclin, 183 S.W.3d 335, 347 n.13 (Tenn. 2006) ("Numerous courts have determined that statements made to friends, family, or acquaintances, as opposed to a government representative, do not constitute testimonial hearsay.") (Citations omitted.).

[16] Although the ICA did not expressly state that Fields waived his argument by failing to assert it in his opening brief, we presume that its silence so indicates, inasmuch as (1) Fields concedes that he did not challenge the admission of Richards' hearsay statement in his opening brief, (2) Fields raised the argument for the first time in his supplemental appellate brief, and (3) the ICA completely ignored the argument.

concise statement of the points of error . . . . Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented."). We therefore perceive no grave error.

B. Plain Error

Pursuant to HRPP Rule 52(b), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Here, Fields expressly argues that his "constitutional right of confrontation is undoubtedly a 'substantial right' and the erroneous admission of both statements, in violation of the Hawai'i Constitution, did affect [his] substantial rights . . . ." However, inasmuch as we have already determined that the admission of Staggs' prior out-of-court statement did not violate Fields' right of confrontation, his assertion that his substantial rights have been adversely affected on confrontation grounds is likewise without merit. Insofar as Fields does not advance any other plain error argument on certiorari, he has failed to demonstrate that his substantial rights have been adversely affected. See State v. Nichols, 111 Hawai'i 327, 337 n.6, 141 P.3d 974, 984 n.6 (2006) (stating, in the context of a review of erroneous jury instructions, that the appellant's burden to demonstrate error "is not to be taken lightly").

We are, of course, cognizant of our inherent power to notice plain error sua sponte. See State v. Grindles, 70 Haw. 528, 530, 777 P.2d 1187, 1189 (1989) ("Although Appellant did not

raise on appeal any due process claim, 'the power to sua sponte notice plain errors or defects affecting substantial rights' clearly resides in this court.") (Citing State v. Hernandez, 61 Haw. 475, 482, 605 P.2d 75, 79 (1980).). However, we do not believe it appropriate to do so under the present circumstances.

We have recently stated that the "power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system--that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes." State v. Rodrigues, 113 Hawai'i 41, 47, 147 P.3d 825, 831 (2006) (citing State v. Aplaca, 96 Hawai'i 17, 22, 25 P.3d 792, 797 (2001) (quoting State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993))). See also Penson v. Ohio, 488 U.S. 75, 84 (1988) ("This system is premised on the well-tested principle that truth--as well as fairness--is best discovered by powerful statements on both sides of the question."); Hines v. United States, 971 F.2d 506, 509 (10th Cir. 1992) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.") (Citing United States v. Burke, 504 U.S. 229, 249 (1992) (Scalia, J., concurring).); Ford v. United States, 533 A.2d 617, 624 (D.C. 1987) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued

by the parties before them.") (Citation omitted.); Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) ("Failure to enforce this requirement will ultimately deprive us in substantial measure of that assistance of counsel which the system assumes--a deficiency that we can perhaps supply by other means, but not without altering the character of our institution.").

Here, we decline to notice plain error sua sponte inasmuch as Fields retains the ability to vindicate his rights by filing a petition, pursuant to HRPP Rule 40, asserting a claim of ineffective assistance of counsel. Indeed, the ICA contemplated the appropriateness of such a proceeding, given the unique circumstances presented by the case at bar, as follows:

> In cases where the same counsel has represented the defendant/appellant both at trial and on direct appeal, and defendant/appellant, as reasonably expected, does not in his direct appeal contend that he is the victim of his trial counsel's negligent failure to object to the admission of two hearsay statements into evidence, may defendant/appellant in his direct appeal avoid the issue of whether his trial counsel was ineffective by asserting that the court's admission of the two hearsay statements into evidence was the court's plain error?

We emphasize that we offer no opinion as to the merits of such a claim as that question was not presented in Fields' application for writ of certiorari.[17]

---

[17] The dissent cites State v. Poaipuni, 98 Hawai'i 387, 49 P.3d 353 (2002), to support its assertion that any such ineffective assistance of counsel claim should be addressed and resolved, as opposed to postponed for a HRPP Rule 40 proceeding. See id. at 395, 49 P.3d at 361 ("[T]he record on appeal is sufficiently developed to establish that there was no legitimate tactical bases upon which defense counsel's omissions could conceivably have been predicated. Thus, this is not a case in which [the defendant's] ineffective assistance of counsel claim cannot be decided until the record is further developed in a subsequent post-conviction proceeding."). However, in Poaipuni, the defendant raised and argued the ineffective assistance of counsel claim on appeal. Id. at 388, 49 P.3d at 354. Here, no such argument was asserted, and therefore there may be other portions of the trial record that were not made a part of the record on appeal because they were not

(continued...)

C. Sufficiency of the Evidence

Fields' final point of error asserts that the prosecution failed to adduce sufficient admissible evidence to support his conviction.

Our standard for assessing the sufficiency of the evidence is well settled: "considered in the strongest light for the prosecution," the finding of guilt must be supported by "substantial evidence" -- i.e., "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion" that every material element of the charged offense was proven. State v. Martinez, 101 Hawai'i 332, 338-39, 68 P.3d 606, 612-13 (2003) (citations omitted). Furthermore, the analysis excludes from its purview all evidence erroneously admitted for consideration by the trier of fact. See Wallace, 80 Hawai'i at n.30, 910 P.2d at 727 n.30 (stating that "sufficiency of the evidence is reviewed based only on the evidence that was properly admitted at trial") (some emphasis omitted).

HRE § 709-906(1) describes the offense for which Fields was convicted, and provides, in pertinent part, as follows:

> **§709-906 Abuse of family or household members' penalty.** (1) It shall be unlawful for any person, singly or in concert, to

---

[17](...continued)
relevant to the points of error actually presented. Thus, we cannot know whether or not the present record is "sufficiently developed." Rather, we think it prudent to reserve judgment and permit Fields to file a HRPP Rule 40 petition for post-conviction relief, as the ICA concluded. To that end, we acknowledge that Fields' trial counsel's failure to object to Officer Ke's testimony as to Staggs' out-of-court statements will require a great deal of explanation. However, we believe that deciding the issue at the present time, without affording the parties the benefit of argument and the opportunity to present a complete record, is inappropriate.

> physically abuse a family or household member . . . .
> For the purposes of this section, "family or household member" means . . . persons jointly residing or formerly residing in the same dwelling unit.

In assessing whether sufficient evidence supports a conviction under HRS § 709-906(1), the following additional guidance is relevant:

> [T]o "physically abuse" someone is to "maltreat in such a manner as to cause injury, hurt or damage to that person's body." State v. Nomura, 79 Hawai'i 413, 416, 903 P.2d 718, 721 (App.), cert. denied, 80 Hawai'i 187, 907 P.2d 773 (1995); State v. Ornellas, 79 Hawai'i 418, 421, 903 P.2d 723, 726 (App.), cert. denied, 80 Hawai'i 187, 907 P.2d 773 (1995). HRS § 709-906 does not designate the requisite state of mind attendant to the offense of physical abuse of a household member. Thus, "that element is established if, with respect thereto, a person acts intentionally, knowingly, or recklessly." HRS § 702-204 (1985). Cf. State v. Holbron, 78 Hawai'i 422, 424, 895 P.2d 173, 176 (1995) (requisite state of mind under HRS § 134-7(b) (Supp. 1992) unspecified, thus, it is intentionally, knowingly, or recklessly), reconsideration denied, 79 Hawai'i 424, 903 P.2d 729 (1995).

State v. Canady, 80 Hawai'i 469, 474-75, 911 P.2d 104, 109-10 (App. 1996).

Here, the admissible evidence[18] indicates that (1) Staggs, Fields, and Richards were present, (2) Lhamo heard slapping noises and a "hard thug," (3) Lhamo admitted that she did not know who was being slapped and whose body she heard

---

[18] We note that Wallace requires that each "material element of the offense [be] supported by substantial and admissible evidence . . . ." 80 Hawai'i at 413, 910 P.2d at 726 (emphasis in original). However, Wallace does not preclude consideration of Staggs' and Richards' statements in the present case inasmuch as Wallace makes clear that unobjected to evidence is deemed admissible and may be considered when analyzing whether the record contains sufficient evidence to affirm a conviction. See id. at 410-13, 910 P.2d at 723-26. Wallace only restricts a sufficiency of the evidence analysis to "properly admitted" evidence "for purposes of determining whether the double jeopardy clause of article I, section 10 precludes retrial of a defendant whose conviction has been set aside because of insufficient evidence . . . ." Id. at 414 n.30, 910 P.2d at 727 n.30 (emphasis added). Fields' right against double jeopardy is not at issue here.

hitting the ground, (4) Lhamo testified that she heard someone, presumably Richards, yell, "Reggie, get off her," (5) after Fields and Richards left the premises, Lhamo found Staggs "shook up, kind of scared and . . . half beaten or something," (6) the responding police officers, Officers Kapua and Ke, observed that Staggs had sustained injuries to her face and right shoulder, and (7) despite exhibiting some degree of memory loss at trial, Staggs had earlier reported to Officer Ke that Fields approached her from behind, held her neck against the couch, and punched her on the left side of her face.

Hence, we conclude that, considered in the light most favorable to the prosecution, the evidence is of sufficient quality and probative value to enable a person of reasonable caution to support the conclusion that Fields intentionally, knowingly, or recklessly maltreated Staggs. See Martinez, 101 Hawai'i at 338-39, 68 P.3d at 612-13.

IV. CONCLUSION

Based upon the foregoing, the judgment of conviction is affirmed.

Karen T. Nakasone,
Deputy Public Defender,
for defendant-appellant-
petitioner on the application