DISSENTING OPINION OF REIFURTH, J.

I respectfully dissent. I agree that the Circuit Court erred in its application of the plain view doctrine, but only because I think it was mistaken to apply the doctrine at all. As to the warrantless seizure of the hammer, I would hold that, by dialing 911 and asserting that his wife had been assaulted, Phillips impliedly consented to a routine investigation into the circumstances of the assault, and the seizure of the hammer was thereby justified. I would, therefore, reach Phillips's other points of error and ultimately affirm the Circuit Court's order denying Phillips's suppression motion.

I. DISCUSSION

A. The Hammer.

To the extent that the inadvertency requirement of the plain view doctrine, *see, e.g.*, *State v. Meyer*, 78 Hawai‘i 308, 893 P.2d 159 (1995), is held, as it is today, to equate to intentionality, then, logically, the plain view doctrine can *never* apply to a seizure of evidence that is discovered during a search intended precisely to turn up evidence of the sort discovered. In other words, application of the plain view doctrine is pointless where the search and seizure of evidence are so related. *See Arizona v. Hicks*, 480 U.S. 321, 325 (1987) ("[W]here action is taken for the purpose justifying the entry, invocation of the [plain view] doctrine is superfluous."); *see also* 1 Wayne R. LaFave et al., *Search and Seizure: A Treatise on the Fourth Amendment* § 2.2(a), at 598 (5th ed. 2012) [hereinafter LaFave et al., *Search and Seizure*]. Consequently, I would avoid use of the plain view doctrine entirely.[1]

Phillips's implied consent is the proper starting point for our analysis. "[C]onsent is an exception to and dispenses with the requirement of a warrant." *State v. Hanson*, 97 Hawai‘i

[1] While neither party below nor the Circuit Court considered exceptions other than the plain view and open view doctrines (I find the latter equally inapposite here), "it is well-settled that an appellate court may affirm a judgment of the lower court on any ground in the record that supports affirmance." *State v. Fukagawa*, 100 Hawai‘i 498, 506, 60 P.3d 899, 907 (2002) (brackets and internal quotation marks omitted) (quoting *State v. Dow*, 96 Hawai‘i 320, 326, 30 P.3d 926, 932 (2001)).

71, 76, 34 P.3d 1, 6 (2001) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)) (additional citations omitted). In addition to express consent, "consent may . . . be implied 'from an individual's words, gestures, or conduct.'" *Id.* at 75, 34 P.3d at 5 (quoting *United States v. Buettner-Janusch*, 646 F.2d 759, 764 (2d Cir. 1981)); *see also* 4 LaFave et al., *Search and Seizure* § 8.2(l), at 163 n.345 (citing cases where consent is established through circumstantial evidence).

Because the record in this case firmly supports the conclusion that Phillips had impliedly consented to an investigation of the circumstances of his wife's attack, I would conclude that the warrantless search leading to discovery, and the subsequent warrantless seizure, of that hammer were lawful.

Other jurisdictions have recognized implied consent in the context of summoning authorities to investigate a crime allegedly committed by a third person. For example, in *Brown v. State*, the Texas Court of Criminal Appeals held:

> [W]hen a crime is reported to the police by an individual who owns or controls the premises to which the police are summoned, and that individual either states or suggests that it was committed by a third person, he or she implicitly consents to a search of the premises reasonably related to the routine investigation of the offense and the identification of the perpetrator. As long as the individual is not a suspect in the case or does nothing to revoke his consent, the police may search the premises for these purposes, and evidence obtained thereby is admissible. This implied consent is valid only for the initial investigation conducted at the scene and does not carry over to future visits to the scene.

856 S.W.2d 177, 182 (Tex. Crim. App. 1993) (en banc). And in *State v. Flippo*, the West Virginia Supreme Court of Appeals recognized broad support for the notion of implied consent generally, *see* 575 S.E.2d 170, 178-80 (W. Va. 2002), and continued:

> The implied consent exception is undoubtedly a rational and practical rule to be applied when the police are summoned by the owner or occupier of a dwelling and told that a crime has occurred in his/her dwelling. Indeed, "one can hardly expect the police to get a search warrant for a house or building when the owner is obviously cooperative and gives every appearance of being the victim, rather than the perpetrator, of a crime."

Id. at 180 (brackets omitted) (quoting *State v. Koedatich*, 548 A.2d 939, 958 (1988). *Flippo* cited a Minnesota case for further

support:

> When the owner or occupant of the premises permits the police to make a search without a warrant at a time when the occupant is not even suspected of complicity in the crime, the police are lulled into a sense of security, and therefore the occupant cannot later object if the search led to the discovery of evidence which ultimately resulted in his being charged with complicity in the crime.

Id. (quoting *Thompson v. State*, 384 N.W.2d 461, 463-64 (Minn. 1986)). *Flippo*, after examining *Brown*, among other cases, stated: "Based upon the foregoing authorities, we have little hesitancy in concluding that the implied consent exception to the warrant requirement, when properly invoked, does not offend federal or state constitutional guarantees against unreasonable searches and seizures." *Id.* at 183. It went on to issue a holding practically identical to that of *Brown*. *Id.; see also Thompson*, 384 N.W.2d at 463-64 (similar holding); *Koedatich*, 548 A.2d 939 at 957-58 (similar holding and collecting cases with similar holdings).

Recognizing that *Flippo* and *Brown* are no more than specific invocations of the implied consent exception to the warrant requirement recognized in Hawai‘i, *see Hanson*, 97 Hawai‘i at 75, 34 P.3d at 5, I would adopt their holdings.

Thus, when Phillips called 911 to report that his wife had been attacked, and hastened responding officers into his home, I would rule that Phillips impliedly consented to an investigation into the circumstances of the attack on his wife. Further, I would rule that such consent was valid until such time as the initial investigation ceased;[2] he revoked, or limited the scope of, that consent; or he became a suspect.

The initial investigation remained ongoing as Phillips

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[2] *Flippo* observed that "[i]t is not practical to attempt to establish a bright line as to when an initial investigation ends and a subsequent investigation begins. This issue must be determined on a case-by-case basis when it is relevant." 575 S.E.2d at 183 n.12. This distinction was relevant in neither *Brown*, *see* 856 S.W.2d at 182-83, nor *Flippo*, *see* 575 S.E.2d at 183 n.12.

Hawai‘i, however, has partly demarcated this line; in *State v. Lopez*, our Supreme Court held that consent "terminated when the police and the [residents] closed the doors and left the . . . residence." 78 Hawai‘i 433, 442, 896 P.2d 889, 898 (1995). A search conducted during a subsequent, improperly authorized entry was therefore held unconstitutional. *Id.* at 447, 896 P.2d at 903.

was transported to the police station. Phillips never evinced any desire to limit the scope of police activity; indeed, he seemed intent on facilitating the investigation. The only question, then, is at what point Phillips had become a suspect such as to negate implied consent.

In *Flippo*, this latter issue was central; that court ruled that implied consent was effectively revoked once police informed the individual that he was a suspect. *See* 575 S.E.2d at 186. Indeed, so long as Phillips continued to manifest an openness to the ongoing investigation at his residence, I do not find it significant that the discovery of the hammer may have been roughly simultaneous with the point at which officers began to formulate suspicions about Phillips.

Moreover, Phillips, in the proceedings below, conceded that the investigatory activity, including the search for and discovery of the hammer, was lawful: "We won't deny that, yeah, [the officers] discovered the hammer, you know, and that was lawful, I mean, they were in the house, they were there because, you know, [Phillips] had called 911 and they were -- they had a right to be there at the time . . . ." Phillips does not suggest otherwise on appeal. Rather, his challenge is to Officer Eliza's removal of the hammer, which occurred several hours after its discovery.

The removal of the hammer, however, is not the crucial event. At the time that the hammer was discovered, Phillips concedes on appeal that police had "probable cause to believe the hammer was evidence of a crime as Officer Tokunaga noticed what appeared to be blood on . . . the hammer." Therefore, the officers had every right to seize it at that time. *See Brown*, 856 S.W.2d at 183 (holding that evidence obtained during an implied consent search is admissible); *Flippo*, 575 S.E.2d at 183 (same).

Moreover, I would hold that officers seized the hammer at the time it was discovered. The parties stipulated at trial that "[f]rom [the time that the fire and police personnel first arrived], the house was secured by [those personnel]. . . . [and] no one was allowed to tamper with anything in the house in

any way." Additionally, Sergeant Keliinui upon learning of the hammer, testified that he told Officer Tokunaga "not to touch it. We'll just - SIS come and process the hammer." While the hammer was not physically removed until several hours later, this is not significant, as "evidence may be lawfully 'seized' without being immediately physically transported away from the crime scene." *Phillips v. State*, 604 S.E.2d 520, 526 (Ga. Ct. App. 2004).

I would therefore hold that the hammer was lawfully obtained as evidence.

B. The Clothing.

Phillips also challenges the Circuit Court's conclusion that the bloodied clothing first noticed by Officer Franks would have been inevitably discovered pursuant to execution of the search warrant.[3] He makes two distinct arguments. Neither, however, is persuasive.

Phillips first argues that the search warrant was issued based on unlawfully obtained evidence and statements, and that absent such, there would not have been probable cause for a warrant to issue. He grounds this argument, in part, on his contention that the blood-stained hammer should be excluded from the basis for probable cause.

Under the United States and Hawai‘i Constitutions, "no search warrant shall issue unless there is a finding of probable cause, supported by oath or affirmation, and particularly describing the place to be searched." *State v. Kanda*, 63 Haw. 36, 41, 620 P.2d 1072, 1076 (1980). For a search warrant to issue, "[a] magistrate need only determine that a fair probability exists of finding evidence, considering the type of crime, the nature of items sought, the suspect's opportunity for concealment and normal inferences about where a criminal might hide [evidence of a crime]." *State v. Navas*, 81 Hawai‘i 29, 34, 911 P.2d 1101, 1106 (App. 1995) (quoting *United States v. Jackson*, 756 F.2d 703, 705 (9th Cir. 1985)). "[A] search warrant is not constitutionally defective because it is based, in part,

[3] The Circuit Court, without explicitly stating so, appeared to treat this clothing as unlawfully discovered.

on illegally seized evidence where sufficient probable cause exists to issue the warrant without relying on the suppressed evidence." *Lopez*, 78 Hawai‘i at 447-48, 896 P.2d at 903-04 (quoting *State v. Brighter*, 63 Haw. 95, 101, 621 P.2d 374, 379 (1980)) (internal quotations marks omitted).

Here, because the hammer was lawfully discovered, it formed part of a legitimate basis for establishing probable cause to search Phillips's residence for the particulars described in the warrant. In addition to the blood-stained hammer, the affidavit recited that Phillips reportedly left his home early in the morning after arguing with his wife, that upon returning he found her laying injured in bed, that she was taken to the hospital with "massive blunt force trauma to her head[,]" as well as a broken wrist and ripped-off fingernails, that Phillips maintained that his wife had been attacked, that there were no signs of a burglary, that a neighbor reported hearing persons inside Phillips's residence arguing one night earlier, and that around a half-hour after Phillips alleged to have departed on his drive, the neighbor "heard a loud thumping sound coming from the [Phillips's residence], as if someone had fallen down the stairs[.]" I would conclude that these recitals established probable cause for the police to search Phillips's residence for evidence of the attack.

Phillips also argues that the State failed to establish below that the bloodied clothing inevitably would have been discovered. He contends that the State neglected the possibility that the clothing might have been removed from the trash can inside Phillips's garage prior to execution of the search warrant. He also contends that the State did not establish that they would have searched the trash can in the course of executing the warrant. Neither of these contentions, however, bear out.

When the State argues that unlawfully obtained evidence should nevertheless be admissible under the inevitable discovery doctrine, it is the State's burden "to present clear and convincing evidence that [such unlawfully obtained evidence] would inevitably have been discovered by lawful means. . . ." *Lopez*, 78 Hawai‘i at 451, 896 P.2d at 907. The State did so

here. Phillips hypothesizes that, having been released from interrogation, he might have returned home to dispose of the evidence. But this fails to recognize the parties' stipulation that the house had been secured and that tampering had been disallowed, discussed *supra*; the authorities had secured the premises from 4:00 a.m. onward, they were not allowing any unauthorized persons in, and they were not allowing anyone to tamper with anything.[4] The evidence in the record clearly and convincingly establishes that the authorities would not have permitted Phillips to re-enter his home - a crime scene - to dispose of anything therein. *Cf. State v. Rodrigues*, 128 Hawai‘i 200, 286 P.3d 809 (2012).

As to his second contention, the police, via application for the warrant, sought the authority to search all closed containers within the residence. The State argued: "clearly . . . that search warrant would have resulted in the discovery of the clothing . . . -- the search warrant that was granted was to go through all of the [closed] containers, and that is logically what a good investigation would've entailed[.]" The State thereby established that the trash can in the garage would have been searched in the course of executing the search warrant.

In sum, the Circuit Court did not err in concluding that the warrant would have issued absent inclusion in the warrant application of any improperly obtained evidence, and there is clear and convincing evidence in the record demonstrating that the police would have discovered the bloodied clothing pursuant to execution of the search warrant.

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[4] Although this evidence was admitted at trial rather than in the course of resolving Phillips's suppression motion:

> [W]hen [a] defendant's pretrial motion to suppress is denied and the evidence is subsequently introduced at trial, the defendant's appeal of the denial of the motion to suppress is actually an appeal of the introduction of the evidence at trial. Consequently, when deciding an appeal of the pretrial denial of the defendant's motion to suppress, the appellate court considers both the record of the hearing on the motion to suppress and the record of the trial.

State v. Kong, 77 Hawai‘i 264, 266, 883 P.2d 686, 688 (App. 1994).

C. Restitution.

Phillips's final challenge is to the Circuit Court's imposition of liability on him for his wife's funeral expenses, pursuant to Hawaii Revised Statutes ("HRS") § 706-646.[5] Phillips contends that the only evidence relevant to the cause of her death was the parties stipulation at trial that "[his wife's] death was unrelated to the September 3, 2008 attack." He therefore concludes, without citation to authority, that such evidence should control.

The Circuit Court, however, considered other evidence at sentencing, and such evidence is sufficient to affirm the Circuit Court's finding of liability. A sentencing court can only impose restitution where a defendant has caused a victim's losses. *State v. Domingo*, 121 Hawai‘i 191, 194, 216 P.3d 117, 120 (App. 2009). *Domingo* requires that there be a nexus between a defendant's acts and a victim's injuries before causation may be found. *Id.; cf. People v. Moncada*, 149 Cal. Rptr. 3d 1 (Cal. Ct. App. 2012) (requiring that a defendant's acts be a substantial factor in causing a victim's death for liability to

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[5] HRS § 706-646 provides:

> **Victim restitution**. (1) As used in this section, "victim" includes . . . the following:
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> . . . .
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> (b) If the victim dies as a result of the crime, a surviving relative of the victim as defined in chapter 351[.]
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> . . . .
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> (2) The court shall order the defendant to make restitution for reasonable and verified losses suffered by the victim or victims as a result of the defendant's offense when requested by the victim. . . .
>
> (3) . . . Restitution shall be a dollar amount that is sufficient to reimburse any victim fully for losses, including but not limited to:
>
> . . . .
>
> (c) Funeral and burial expenses incurred as a result of the crime.

HAW. REV. STAT. § 706-646 (Supp. 2011).

attach).

The parties' stipulation notwithstanding, at sentencing, the Circuit Court recalled evidence at trial establishing that Phillips' wife was in a coma after the attack, she was suffering from the head injuries, and she later had to be put in a nursing home, where she died. Furthermore, there was testimony regarding the lethality of her injuries; at trial, Dr. Cherylee Chang testified that Phillips' wife's injuries had placed her at substantial risk of death. That medical professionals were apparently able to stave off death for some sixteen months does not mitigate Phillips's responsibility for what he caused. There was a sufficient nexus for the Circuit Court to order restitution for Tara's funeral expenses. *Domingo*, 121 Hawai‘i at 194, 216 P.3d at 120.

II. CONCLUSION

Rather than remand for a new trial, for the foregoing reasons I would affirm the Circuit Court's suppression and restitution orders. I, therefore, respectfully dissent from today's order.