IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee,

vs.

SHAUN L. CABINATAN,
Petitioner/Defendant-Appellant.

SCWC-11-0000550

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000550; CR. NOS. 10-1-0904, 09-1-0854)

January 30, 2014

CONCURRING AND DISSENTING OPINION BY ACOBA, J.,
IN WHICH POLLACK, J., JOINS

History and scientific studies have established that misidentification is the "'the single greatest cause of wrongful convictions in this country.'" State v. Cabagbag, 127 Hawaiʻi 302, 313, 277 P.3d 1027, 1038 (2012) (Part I by Acoba, J.) (quoting Perry v. New Hampshire, 132 S. Ct. 716, 738 (2012) (Sotomayor, J., dissenting)). There is nothing that indicates that that fact changed only after May 17, 2012, when respectfully, the majority in Cabagbag decided that the duty to

instruct on eyewitness identification should apply. As proper jury instructions play a vital role in ensuring that juries properly evaluate eyewitness testimony today, see Cabagbag, 127 Hawaiʻi at 310-311, 277 P.3d at 1035-36 (explaining that jurors may be unaware of the factors that affect the reliability of eyewitness testimony and therefore will "'over believe' witness identification testimony") (citing Brigham & Bothwell, The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications, 7 Law & Hum. Behav. 19, 22-24 (1983)) they most certainly applied two years ago in 2011 when this case was tried. As explained infra, even under pre-Cabagbag case law, it must be an abuse of discretion to reject an eyewitness instruction under circumstances similar to this case.

I.

Appropriate instructions on eyewitness testimony would have informed the jury of the dangers inherent in eyewitness testimony and would have provided the jury guidance in evaluating the testimony of the key identification witness against Petitioner-Defendant/Appellant Shaun L. Cabinatan (Cabinatan). But, the Circuit Court of the First Circuit (the court) rejected the instructions proposed by Cabinatan out of hand because, prior to Cabagbag, a court did not abuse its discretion in refusing to give a specific instruction on eyewitness testimony if the jury's attention was "adequately drawn" to the issue of eyewitness

identification by the testimony adduced at trial, the parties' arguments, and the court's general instructions to the jury. Cabagbag, 127 Hawaiʻi at 317, 277 P.3d at 1042 (Part II by Recktenwald, C.J.). However, under the pre-Cabagbag formulation, the more important that the identification evidence was to the case, the more likely the jury's attention would be drawn to the issue of eyewitness testimony. Thus, under the pre-Cabagbag rule, the jury would be denied guidance on how to appraise eyewitness testimony precisely when that testimony was crucial to a case and judicial guidance was most important. In the absence of a specific eyewitness instruction, a jury may give undue weight to unreliable identification evidence, see Perry, 132 S.Ct. at 728-29 (majority opinion), when it is the dispositive factor in determining guilt or sustaining innocence.

Consequently, there was no rational basis for rejecting eyewitness proposed jury instructions under the circumstances. The court's refusal to give a specific eyewitness instruction amounted then to an abuse of discretion. Because of the central role eyewitness testimony played in this case, it is impossible to determine how a properly instructed jury would have weighed the testimony of Jennifer Kincaid (Kincaid). Hence, the court's error was not harmless, and the case must be remanded for a new trial.

I therefore respectfully disagree with the majority's reliance on the "adequately drawn" rule as governing pre-Cabagbag cases following our decision in Cabagbag. The majority adheres to its position that "the rule . . . in Cabagbag" that "a special jury instruction on eyewitness identification [must be given] when identification evidence is a central issue and the defendant requests it [] was prospective," majority opinion at 34, and since "Cabinatan's case was tried months before Cabagbag . . . Cabinatan's claim" is controlled by "the pre-Cabagbag standard." Id.

But, continued adherence to the "adequately drawn" rule may perpetuate injustice in pre-Cabagbag cases by requiring affirmance of a trial court's refusal to give specific identification instructions even though such instructions were crucial for the jury to adequately assess the evidence. The majority notes that "to the extent that Cabinatan receives a new trial, this court's prospective rule as set forth in Cabagbag will apply," majority opinion at 40, and therefore the court will be required to give an eyewitness identification instruction if requested by Cabinatan and the court determines that eyewitness identification is central to the case. Id. Thus, the majority presumably would have upheld the court's refusal to give specific

eyewitness identification instructions.[1] However, in future pre-Cabagbag cases that come before this court, there may not be the existence of a showup that permits the remand of this case, and therefore allows for the opportunity to apply this court's directive in Cabagbag. By continuing to apply the pre-Cabagbag standard, the majority's decision ensures that, in other pre-Cabagbag cases, the court's refusal to give an eyewitness instruction will be affirmed even if eyewitness testimony was central to the case. To prevent the substantial risk of an unwarranted conviction in all remaining pre-Cabagbag cases, we should review the trial court's exercise of discretion by determining whether, as with other instructions, the refusal to give a specific eyewitness instruction rendered the jury instructions prejudicially insufficient, inconsistent, or misleading.

Moreover, if eyewitness identification is central to a case, instructions on eyewitness testimony should be given by the court even if not requested by the defendant. First, in light of the pre-Cabagbag standard, such a request may have been futile. Second, the lack of a request for a specific instruction on

[1] The majority does not discuss whether the court abused its discretion in failing to give eyewitness identification instructions. However, as explained infra, eyewitness identification instructions were necessary for the jury to evaluate the eyewitness testimony. In light of the crucial role of Kincaid's testimony, plainly there was no basis for refusing to give such instructions.

eyewitness testimony does not make the jury's evaluation of eyewitness testimony any less inaccurate in the absence of such an instruction. Thus, the eyewitness instruction should be given by the court irrespective of whether such an instruction was requested by defense counsel.

II.

In Cabagbag, this court held that "in criminal cases, the circuit courts must give the jury a specific eyewitness identification instruction whenever identification evidence is a central issue in the case and it is requested by the defendant."[2] Id. at 304, 277 P.3d at 1029 (Part I by Acoba, J.). This court recognized that, under prior law, "the giving of special instructions regarding eyewitness identification [was] within the discretion of the trial court." Id. at 309, 127 P.3d at 1034. However, in light of the overwhelming scientific evidence demonstrating the unreliability of eyewitness testimony, we unanimously concluded that special instructions were necessary to overcome the likelihood that the jury would erroneously evaluate eyewitness testimony. Id. at 313, 277 P.3d at 1038.

As Cabagbag explained, "a robust body of research in the area of eyewitness testimony" demonstrates its limitations.

[2] The dissenting opinion as to Part II in Cabagbag would have required that the instruction must be given sua sponte by the trial court, even when not requested by the defendant, if eyewitness identification evidence is central to the case. Cabagbag, 127 Hawaiʻi at 319, 277 P.3d at 1044 (Acoba, J., dissenting).

For example, in a study involving 250 exonerated defendants, "'eyewitnesses misidentified 76% of the exonerees (190 of 250 cases).'" 127 Hawaiʻi at 310, 277 P.3d at 1035 (quoting Brandon L. Garrett, Convicting the Innocence: Where Criminal Prosecutions Go Wrong, 48 (2011)) (internal brackets omitted). Another study "concluded that eyewitness identification testimony was the leading contributing factor to wrongful convictions and was four times more likely to contribute to a wrongful conviction than a false confession." Id. (citing Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 76 (2008)). Numerous other studies reached similar results. Id.; see also Perry, 132 S.Ct at 738 (2012).

Cabagbag identified several variables that affected the reliability of an eyewitness's identification. These variables include "the passage of time, witness stress, duration of exposure, distance, 'weapon focus' (visual attention eyewitnesses give to a perpetrator's weapon during crime) and cross race bias[.]" 127 Hawaiʻi at 310-11, 277 P.3d at 1035-36. "Empirical research has also undermined the commonsense notion that the confidence of the witness is a valid indicator of the accuracy of the information." Id. at 311, 277 P.3d at 1036.
"Juries, however, may not be aware of the extent to which these factors affect an individual's ability to make an accurate identification," and therefore may overvalue eyewitness

testimony. Id. For example, in one study "respondents estimated an average accuracy rate of 71 percent," when in fact "only 12.5 percent of eyewitnesses had in fact made a correct identification." Id.

Because eyewitness testimony is susceptible to error, it is vital that the "danger that a jury might give undue weight to an unreliable identification [be] mitigated by the use of appropriate jury instructions." Id. (internal quotation marks omitted). "Without appropriate instructions from the court, the jury may be left without sufficient guidance on how to assess critical testimony, sometimes the only testimony, that ties a defendant to an offense." Id. at 313, 277 P.3d at 1038. Further, although a jury may intuitively grasp some of the factors affecting the reliability of eyewitness testimony, "this court does not rely on jurors to divine rules themselves from cross-examination or summation." Id. (internal quotation marks omitted). It is not surprising, then, that this court concluded that requiring eyewitness identification instructions would be a salutatory step where identification was a crucial issue in a case. The majority held that, pursuant to its supervisory power, that trial courts must give an eyewitness instruction when requested by the defendant and when it was a central issue in the case. Id. at 315, 277 P.3d at 1040 (Part II by Recktenwald, C.J.).

However, this court was split as to whether to apply its holding retroactively. A majority held that the requirement that a court give an eyewitness instruction when requested applied only prospectively. Id. On the other hand, the dissent as to Part II would have applied the court's holding retroactively to cases then pending on appeal. Id. at 323, 277 P.3d at 1048 (Acoba, J., dissenting).[3] But even under the pre-Cabagbag standard, a specific identification instruction should have been given in light of the fact that Cabinatan requested an instruction and identification was the deciding factor in this case.

III.

A.

To reiterate, prior to Cabagbag, a trial court did not abuse its discretion in refusing to give an eyewitness instruction if, after an "[e]xamination of all aspects of the trial, including the opening statements, the cross-examination of prosecution witnesses, the arguments to the jury, and the general instructions given by the court . . . the jury's attention was adequately drawn to the identification evidence." State v. Okumura, 78 Hawaiʻi 383, 405, 894 P.2d 80, 102 (1995); accord Cabagbag, 127 Hawaiʻi at 315, 277 P.3d at 1041; (Part II by

[3] As used herein, the dissenting opinion in Cabagbag refers to the dissenting opinion to Part II of the opinion in that case.

Recktenwald, C.J.); State v. Pahio, 58 Haw. 323, 331, 568 P.2d 1200, 1206 (1977); State v. Vinge, 81 Hawaiʻi 309, 316-17, 916 P.2d 1210, 1217-18 (1996); State v. Padilla, 57 Haw. 150, 162 552 P.2d 357, 365 (1976). In case after case, this standard was used to absolve the trial court of the duty to give a specific eyewitness instruction when requested, precisely because the importance of the eyewitness testimony was deemed to sufficiently draw the jury's attention to the eyewitness evidence. For example, in Cabagbag, eyewitness testimony was "critical" to the State's case and the remainder of the State's evidence was "extremely weak." Cabagbag, 127 Hawaiʻi at 319, 277 P.3d at 1044 (Acoba, J., dissenting). Nevertheless, the majority held that a specific instruction was unnecessary because "identification was a primary issue in the case," the eyewitness was cross-examined regarding his identification of the defendant, and opening and closing statements "highlighted for the jury" the identification evidence. Cabagbag, 127 Hawaiʻi at 318, 894 P.3d at 1043 (Part II by Recktenwald, C.J.).

Similarly, in Vinge "[t]he only direct evidence that placed [the defendant] near the scene of the crime was the eyewitness testimony." 81 Hawaiʻi at 313, 916 P.2d at 1214. However, it was held that, a specific instruction was unnecessary because "defense counsel vigorously cross-examined [the witness]" on his identification of the defendant and defense counsel's

closing argument "enumerated several reasons" why the eyewitness was not "worthy of belief." Id. at 317, 916 P.2d at 1218.[4]

B.

As the foregoing cases demonstrate, the pre-Cabagbag rule created the paradoxical result that a jury would qualify for an eyewitness instruction when eyewitness identification seemed less necessary to the disposition of the case. When identification is not a central issue to the case, the jury's attention is less likely to be drawn to the issue. Therefore, under the logic of the pre-Cabagbag rule, the less significant the issue of identification in the case, the more likely the jury would qualify to receive an instruction on eyewitness identification.

On the other hand, where identification is central or crucial or heavily disputed, the jury's attention will always be "adequately drawn," Cabagbag, 127 Hawaiʻi at 317, 277 P.3d at 1042 (Part II by Recktenwald, C.J.) to the issue by the parties, hence, negating the duty of the court to instruct on eyewitness identification. Id. Under the "adequately drawn" pre-Cabagbag

[4] See also Okumura, 78 Hawaiʻi at 405, 894 P.2d at 102 (holding that a specific instruction was unnecessary because eyewitness was cross-examined and the eyewitness testimony was discussed in defense counsel's opening statement); Pahio, 58 Haw. at 331, 568 P.2d at 1206 (holding that an identification instruction was unnecessary because of defense counsel's opening statement and cross-examination); Padilla, 57 Haw. at 162, 552 P.2d at 365 (holding that an identification instruction was unnecessary because of "the cross-examination of the prosecution witnesses," and "the arguments to the jury").

rule, the more critical the eyewitness testimony was the less likely juries would receive guidance on how to evaluate identification evidence.

Such a result lacks rationality. The jury requires more guidance on a crucial disputed issue (and in the case of identification perhaps the sole issue) in the case. See Cabagbag, 127 Hawaiʻi at 313, 277 P.3d at 1038 (Part I by Acoba, J.) ("Without appropriate instructions from the court, the jury may be left without sufficient guidance on how to assess critical testimony, sometimes the only testimony, that ties a defendant to an offense."). A rule that declines to provide the jury with direction when eyewitness testimony is central to the case can only serve to perpetuate error, see Garrett, Judging Innocence, 108 Colum. L. Rev. at 76 (explaining that in a study of the evidence introduced against 200 defendants who were later exonerated, eyewitness evidence was a contributing factor in seventy-nine percent of cases), and therefore, is ultimately unjust.

IV.

But even under the pre-Cabagbag abuse of discretion standard that applies here, the court's duty to give accurate and complete jury instructions remains. Thus, it must be determined whether the court's rejection of Cabinatan's proposed eyewitness instruction "clearly exceeded the bounds of reason or disregarded

rules or principles of law or practice," State v. Oughterson, 99 Hawaiʻi 244, 253, 54 P.3d 415, 424 (2002) in light of the requirement that jury instructions when read and considered as a whole, cannot be prejudicially insufficient, inconsistent, or misleading. Cabagbag, 127 Hawaiʻi at 319, 277 P.3d at 1044 (Acoba, J., dissenting) (citing State v. Nichols, 111 Hawaiʻi 327, 334, 141 P.3d 974, 981 (2006)).

A.

The State's case against Cabinatan hinged entirely on the testimony of one eyewitness, inasmuch as the only evidence presented by the State connecting Cabinatan to the thefts was the eyewitness identification by Kincaid. No physical evidence linked Cabinatan to either of the charged offenses. The State's other two eyewitnesses were unable to identify Cabinatan.

The circumstances surrounding Kincaid's identification raises questions as to its reliability. Cabinatan pointed to several inconsistencies between Kincaid's description of the driver in the police report and her identification of Cabinatan as the driver. Shortly after she viewed the individual she later identified as Cabinatan driving a sports utility vehicle (SUV) involved in the thefts, Kincaid filled out a police report indicating that the driver was wearing dark sunglasses and a black baseball cap. However, Cabinatan was not wearing dark sunglasses or a baseball cap when the police stopped him shortly

after the incident. Kincaid also indicated that the driver's complexion was "[t]anned" and "[b]rown[.]" Cabinatan, however, described himself as "fair." Kincaid did not indicate that Cabinatan had any tattoos in the police report. However, in court Cabinatan showed the jury tattoos on his neck and left arm. According to Cabinatan, the tattoos were ten years old.

Additionally, the suggestive nature of the field showup[5] also raised issues as to the reliability of Kincaid's identification. Prior to Kincaid making an identification at the showup, the police told her that they had found an SUV matching the description she had given, which contained items that she had described as stolen. Kincaid testified that when she arrived at the field show-up, she saw "[a] lot of police cars." The SUV was also at the show-up. The police repeatedly referred to Cabinatan and co-defendant Moore as "suspects." When Kincaid arrived at the scene, Cabinatan's hands were handcuffed behind his back. Kincaid then identified Cabinatan as the driver of the SUV she had seen outside her home when the theft occurred.

The police did not have Kincaid identify Cabinatan in either a line-up or photographic array. Thus, identification of Cabinatan was made at an inherently suggestive field showup where

[5] A showup is defined as "[a] pretrial identification procedure in which a suspect is confronted with a witness to or the victim of a crime. Unlike a lineup, a showup is a one-on-one confrontation." Blacks Law Dictionary 1506 (9th ed. 2009).

Cabinatan was in handcuffs. See, e.g., United States v. Newman, 144 F.3d 531, 535 (7th Cir. 1998) ("We have noted many times that a showup identification, in which witnesses confront only one suspect, is inherently suggestive.") (citing United States ex rel. Kirby v. Sturges, 510 F.2d 397, 403 (7th Cir. 1975) (Stevens, J.) ("Without question, almost any one-to-one confrontation between a victim of crime and a person whom the police present to him as a suspect must convey the message that the police have reason to believe him guilty."). The United States Supreme Court has noted that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor." United States v. Wade, 388 U.S. 218, 229 (1967) (internal quotation marks omitted). Such suggestive circumstances have a "corrupting effect" on reliability. Manson v. Brathwaite, 432 U.S. 98, 114 (1977); see also Stovall v. Denno, 388 U.S. 293, 302 (1967) ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned."); State v. DeCenso, 5 Haw. App. 127, 131, 681 P.2d 573, 578 (1984). As explained by the dissent in Perry, an initial identification derived through suggestive circumstances often is difficult to discredit as part of the adversary process:

> Eyewitness evidence derived from suggestive circumstances . . . is uniquely resistant to the ordinary tests of the adversary process. An eyewitness who has made an identification often become convinced of its accuracy. . . . At trial, an eyewitness'

> artificially inflated confidence in an identification's accuracy complicates the jury's task of assessing witness credibility and reliability. . . . The end result of suggestion . . . is to fortify testimony bearing directly on guilt that juries find extremely convincing and are hesitant to discredit.

Perry, 132 S. Ct. at 732 (Sotomayor, J., dissenting).

Finally, Cabinatan presented affirmative alibi evidence that he had not committed the thefts. Donald Campbell reported to police that he had witnessed the original burglary occur at 7:35 a.m., although he later indicated that the incident may have occurred at some time between 7:30 a.m. and 8:00 a.m. However, Pearl Lafaver testified that she had left her house in Makakilo between 7:45 a.m. and 8:00 a.m., and Cabinatan was present at her house when she left.

B.

It may be noted that Cabinatan requested three instructions for the purpose of guiding the jury in evaluating the eyewitness testimony. The first instruction[6] informed the jury, inter alia, that "[a]lthough nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken." Further "when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an

[6] Cabinatan's first proposed instruction was patterned after New Jersey Model Criminal Jury Charges, Identification: In-court and out-of-court identifications.

indication of the reliability of the identification." The first proposed instruction listed seven specific factors and six circumstances to be considered in evaluating the eyewitness testimony.

The second instruction[7] stated, inter alia, that "[p]sychological studies have shown that when the police indicate to a witness that a suspect is present in an identification procedure, or fail to warn the witness that the perpetrator may or may not be in the procedure, there is an increased likelihood that the witness will select one of the individuals in the procedure, even when the perpetrator is not present. Thus, such behavior on the part of the police tends to increase the probability of misidentification."[8]

Finally, the third proposed instruction explained that "[s]how-up identifications, such as a field showup are inherently suggestive and raise risks of mis-identification." The third jury instruction was based on DeCenso, which stated that "[s]howup identifications are inherently suggestive." 5 Haw. App. at 131, 681 P.2d at 578. On remand, the court may of course

[7] Cabinatan's second proposed instruction was patterned after Connecticut Criminal Jury Instructions, §3.15A, Risk of mis-identification.

[8] At oral argument before this court, defense counsel indicated that the second instruction was necessary because the first instruction did not explain the psychological research in the area of eyewitness identification. Oral Argument at 32:00, State v. Cabinatan, No. SCWC-11-0000550, available at http://state.hi.us/jud/oa/13/SCOA_062613_11550.mp3.

modify or substitute its own instructions. This court provided an example of eyewitness instructions in Cabagbag.

V.

To recount, jury instructions are insufficient if they are prejudicially insufficient, inconsistent, or misleading. Cabagbag, 127 Hawaiʻi at 319, 277 P.3d at 1044 (Acoba, J., dissenting). In light of the importance of Kincaid's testimony to the State's case, the disputed reliability of her testimony, and the substantial risk of misidentification posed by the showup, it was crucial that the jury be given adequate instructions on how to properly gauge her testimony. The jury instructions proposed by Cabinatan provided the jury with the benefit of the empirical research widely acknowledged by this court and other courts as necessary to properly assess the reliability of eyewitness testimony.

For example, Cabinatan's first instruction would have given the jury the benefit of scientific research explaining that a eyewitness's confidence in his or her identification is not necessarily indicative of the accuracy of his or her identification.[9] See Cabagbag, 127 Hawaiʻi at 311, 277 P.3d at 1036 (Part I by Acoba, J.). The first instruction would also

[9] During closing argument, the State asserted that Kincaid's identification was "unequivocal."

have provided the jurors with a list of factors of which they would otherwise have been unaware.

The parties' arguments did not discuss the factors a jury should use in evaluating eyewitness testimony and the relevant psychological research. The court's general instruction on credibility only instructed the jury to consider "the witness's means and opportunity of acquiring information." However, the court's instruction on credibility did not cite any of the other factors in Cabinatan's first proposed instruction. Credibility is not the equivalent of reliability. Cabagbag, 127 Hawaiʻi at 322, 277 P.3d at 1047 (Acoba, J., dissenting). "A witness may wholeheartedly believe that he or she has identified the defendant, but may nevertheless be wrong. By highlighting credibility and nothing else, the jury may have been misled into thinking that confidence is correlated with reliability, even though no correlation has been shown between the two." Id. Hence, as explained supra, the list of factors in the first instruction would have allowed the jury to accurately weigh Kincaid's testimony. The second instruction would have allowed the jury to accurately weigh the effect of the police officer's repeated references to Cabinatan as a "suspect" on Kincaid's identification.

Cabinatan's third proposed instruction, about the suggestiveness inherent in a showup would have informed the jury

of what is already established as a matter of law in this jurisdiction. DeCenso, 5 Haw. App. at 131, 681 P.2d at 578. The potential for misidentification ingrained in a showup procedure has long been recognized by the courts. See, e.g., Newman, 144 F.3d at 535. For a showup demonstrates to the eyewitness "that the police have reason to believe [the suspect] to be guilty," Strurges, 510 F.2d at 403. There was no justifiable basis for denying the information in the instruction to the jury. This information could not have been obtained either from the arguments of counsel or the court's general instructions. In closing argument, counsel disagreed regarding the reliability of showup identifications. Defense counsel asserted that the showup was a "highly, highly suggestive procedure."

However, the State maintained that it was evident that showups were not overly suggestive, and pointed out that only one out of the three eyewitnesses was able to identify Cabinatan. Without instructions from the court, the jury would not have known that as a matter of law, showups are inherently suggestive as defense counsel argued. Cf. Cabagbag, 127 Hawaiʻi at 313, 277 P.3d at 1038 (Part I by Acoba, J.) ("[C]ourt instructions are more authoritative than lawyers' opening statements and closing arguments.").

The court's refusal to issue any focused eyewitness instructions left the jury without guidance. Given the critical

nature of the eyewitness testimony, the failure to instruct the jury on how to weigh the eyewitness evidence that was effectively dispositive of Cabinatan's guilt or innocence meant that the jury would be unable to properly weigh testimony identifying him. Thus, the jury instructions were incomplete inasmuch as further instructions were necessary for the jury to adequately perform its function as the finder of fact. Cf. Cabagbag, 127 Hawaiʻi at 320, 277 P.3d at 1045 (Acoba, J., dissenting) ("To preserve the integrity of criminal trials it is [] necessary that our courts instruct juries on how to weigh [eyewitness identification] evidence, in the same way that courts instruct juries on other fundamental matters such as the credibility of witnesses.").

The jury instructions also were misleading, because they in effect informed the jurors that they were capable of properly evaluating the eyewitness evidence based on credibility. For example, without an instruction explaining that the level of confidence exhibited by an eyewitness is not correlated with the accuracy of his or her identification, the jurors would have mistakenly adhered to the "common sense notion" that "confidence is a valid indicator of the accuracy of the identification." See Cabagbag, 127 Hawaiʻi at 311, 277 P.3d at 1036 (Part I by Acoba, J.). Hence, the refusal to give specific eyewitness instructions misled the jury as to their ability to weigh Kincaid's testimony.

Because there was no plausible reason for the court's refusal to instruct the jury on how to appropriately evaluate Kincaid's testimony, the court "clearly exceeded the bounds of reason." Oughterson, 99 Hawaiʻi at 253, 54 P.3d at 424. Hence, the court's refusal to give specific eyewitness instructions, and not only the instruction on showups, constituted an abuse of discretion. In similar pre-Cabagbag cases, the refusal to give the jury instructions on how to assess eyewitness testimony would constitute an abuse of discretion.

VI.

Finally, the failure to give eyewitness identification instructions was not harmless. To reiterate, the State lacked any evidence directly connecting Cabinatan to the charged offenses. The testimony of Kincaid was in some respects inconsistent with the police report she filled out before viewing Cabinatan. Also, her identification was the result of the inherently suggestive environment of a police showup. Cabinatan presented alibi evidence that indicated that he was not present when the thefts occurred. Hence, there was a reasonable possibility that the absence of eyewitness instructions caused the jury to place undue weight on Kincaid's testimony; thus contributing to Cabinatan's conviction. See State v. Pauline, 100 Hawaiʻi 356, 378, 60 P.3d 306, 328 (2002) (holding that under the harmless error standard, an appellate court must "determine

whether there is a reasonable possibility that the error complained of might have contributed to the conviction") (internal quotation marks omitted).

Absent such proposed instructions, "[i]t is not for us to speculate about what the jury would have done had it been properly instructed, for it is the jury's role, not that of the appellate courts, to weigh the evidence." Cabagbag, 127 Hawaiʻi at 321, 277 P.3d at 1046 (Acoba, J., dissenting) (citing State v. Kikuta, 125 Hawaiʻi 78, 89, 253 P.3d 639, 650 (2011)). Consequently, the court's rejection of eyewitness identification instructions was not harmless.

VII.

Based on the foregoing, I respectfully concur in part and dissent in part.

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack