IN THE SUPREME COURT OF THE STATE OF HAWAI I

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STATE OF HAWAI I, Petitioner-Plaintiff-Appellee,

vs.

KENNETH DELOS SANTOS, Respondent-Defendant-Appellant.

NO. 29337

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(FC-CR NO. 08-1-1310)

AUGUST 19, 2010

MOON, C.J., NAKAYAMA, DUFFY AND RECKTENWALD, JJ.
AND ACOBA, J., CONCURRING SEPARATELY

OPINION OF THE COURT BY NAKAYAMA, J.

On April 1, 2010, this court accepted a timely application for a writ of certiorari filed by petitioner-plaintiff-appellee, the State of Hawai i (the prosecution), on February 18, 2010, requesting that this court review the Intermediate Court of Appeals (ICA) November 24, 2009 judgment on appeal, entered pursuant to its November 9, 2009 Memorandum Opinion reversing the Family Court of the First Circuit s (family court) August 6, 2008, Judgment of Conviction and Sentence.[1] Oral argument was held on June 3, 2010.

In its application for writ of certiorari before this

[1] The Honorable Rhonda A. Nishimura presided.

court,[2] the prosecution presents the following question:

> Did the ICA gravely err in holding the family court was wrong by admitting into evidence a police officer s testimony regarding the complainant s hearsay statement as an excited utterance?

For the following reasons, we hold that the ICA gravely erred by determining that the complainant s statement that my boyfriend beat me up was not admissible as an excited utterance. We also hold that the admission of this statement does not violate the confrontation clause of article I, section 14 of the Hawai i Constitution. Therefore, we vacate the ICA s judgment on appeal and remand to the family court for a new trial.

I. BACKGROUND

Kenneth Delos Santos (Delos Santos) was convicted of Abuse of Family or Household Members, in violation of Hawai i Revised Statutes (HRS) § 709-906 (Supp. 2008).[3] The prosecution claimed that on March 26, 2008, Delos Santos struck his girlfriend (the Complainant) in the face and stomped on her thigh in their apartment in Waikiki. The crucial piece of

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[2] Delos Santos did not file a memorandum in opposition to certiorari.

[3] HRS § 709-906 provides in relevant part:

> (1) It 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 residing in the same dwelling unit.

evidence supporting Delos Santos conviction was Officer Jason Kubo s (Officer Kubo) testimony summarizing the Complainant s statements when he arrived at the scene shortly after the incident. The family court admitted these statements as excited utterances. The relevant testimony is described below.

A. August 5, 2008, Hearing

The family court held a Hawai i Rules of Evidence (HRE) Rule 104 hearing in part to determine the admissibility of the Complainant s statements to the police. At the hearing, two witnesses testified.

The Complainant testified that Delos Santos was her boyfriend and that they were living together in a hotel in Waikiki at the time of the incident. She recalled that she and Delos Santos were involved in an incident on March 26, 2008. She did not remember calling the police, making a written statement to the police, or anything that happened that night[.]

The prosecution then called Jason Kubo, an officer of the Honolulu Police Department. He testified that he responded to an argument type call at approximately 1:07 in the morning. When he arrived, he met with [s]ecurity down stairs. He then went up to the room. When he arrived at the room with security, he knocked on the door, entered the room, and observed the Complainant and Delos Santos. Officer Kubo described the Complainant s emotional state as clearly in a state of fear and crying. Officer Kubo immediately spoke with her, and she basically said that her boyfriend beat her up. The deputy prosecuting attorney also elicited the following testimony from

Officer Kubo:

> Q. Is that specifically what she said?
> A. Yes -- well, after speaking with her and getting the full facts and circumstances, basically she said she was arguing with Mr. Delos Santos about some other matters and while in the room he struck her once in her face hitting her in her jaw with enough force to cause her to fall.
> While on the ground, the victim actually said that while lying on the ground he was -- he had stomped on her right thigh several times causing pain.

Officer Kubo testified that her emotional state did not change at any point during this interaction, and that she continued crying and at all times [he] kept trying to calm her down. Officer Kubo also obtained a signed written statement from the Complainant.[4] He testified that he had to keep calming the Complainant down.

On cross-examination, Officer Kubo testified that the incident occurred at 1:00 a.m. and that he arrived at the hotel at around 1:10 in the morning. During his interview with the Complainant, he asked a series of questions listed on the written statement, including the question what happened. He also testified that being a police officer, he wanted the Complainant to answer the questions on the written statement.

At the close of the hearing, the trial court determined preliminarily that the prosecution laid the proper foundation to admit the statements under the excited utterance exception to hearsay. The court stated that:

> What we have down is the Complaining Witness demeanor

[4] The written statement was not entered into evidence at trial and neither party has cited to the written statement in the application to this court or in their briefs to the ICA. Officer Kubo testified that the written statement was consistent with what the Complainant told him.

> during her utterances. It was not the situation where this is a lengthy narrative or lengthy recitation, that he did observe her demeanor, that she was continuously crying, that he attempted to calm her down.

B. August 6, 2008, Trial

At trial, the prosecution called the Complainant and Officer Kubo as witnesses. The Complainant testified that Delos Santos was her boyfriend at the time of trial and the incident. They lived together at the time of the incident at a hotel in Waikiki. She testified that she did not remember anything that happened on the night of the incident. She testified that she woke up the next afternoon in Delos Santos car feeling pain from a hangover and that her legs were sore from rollerblading.

On cross-examination, she testified that she did not remember anything because she drinks a lot, and was drinking on the night of the incident. She did not remember how much she drank that night, but remembered drinking at a hotel and then a bar.

Officer Kubo also testified at the trial. His testimony was similar to the Rule 104 hearing, with some differences. He testified that he received a call from dispatch at [a]pproximately 1 -- about 1:05 and that it took him a few minutes to get to the hotel. He testified that he arrived at the hotel shortly after about 1:05. He met with security downstairs and took the elevator to the room with security and

other officers.[5] When arriving at the room, he met with the Complainant, Delos Santos, and another waiting security officer. When he arrived, Delos Santos was in the threshold of the door to the hotel room. He testified that he went in the room to investigate a crime. After entering the room, Officer Kubo noticed that the Complainant was really shaken, crying and appeared to be in a lot of pain. He also observed her limping. Officer Kubo testified that before the Complainant said anything, he asked her what happened when [he] went in there . . . . Officer Kubo testified that he asked her what happened because of the apparent pain that she was in and also for officer safety reasons . . . . At the time he asked, the Complainant was crying and shaken[.] Over objection, Officer Kubo testified that she responded that my boyfriend beat me up. He then walked with her further into the room, [and] knowing that she was in pain also, [he] wanted to sit her down. He walked her to a table inside the room and sat her down. He then asked what do you mean[.] The deputy prosecuting attorney elicited the following testimony about the conversation:

> Q. And at the time you asked her, what do you mean, why did you ask her that question?
> A. I need to know what happened, especially for our safety-wise also in there.
> Q. And at the time that you asked her what happened, what was her emotional state like?
> A. Still she was shaken, crying. And I needed a lot of time to try to calm her down also.
> Q. And how did she respond to your question, what do you mean?
> * * *

[5] He testified that none of the other officers met with the Complainant.

> A. She basically said that she got into an argument with her boyfriend and while inside the apartment -- hotel room, rather, he punched her once in the face with enough force to her to fall onto the ground. While on the ground, he stomped on her right thigh.[6]

During his conversation with the Complainant at the table, he could see the right side of her lower chin area starting to swell and that her chin had a red mark . . . . She also kept favoring her leg and he noticed a two-inch-by-two-inch red mark on her right thigh area. The mark was circular. He also noticed slight abrasions to her knee. Officer Kubo left the room approximately forty-five minutes after he met the Complainant, and testified that the Complainant s emotional state did not change during that period. He testified that the Complainant had no smell of alcohol and she -- other than being scared, frightened, crying and in pain, . . . appeared totally sober to me. Additionally, he testified that the Complainant was unsteady on her feet when he left because of the pain to her right thigh.

At the close of trial, the jury found Delos Santos guilty of Abuse of Family and Household Members, and the family court subsequently placed Delos Santos on probation for two years and sentenced him to ten days in prison with credit for time already served. The family court stayed the sentence pending appeal. Delos Santos subsequently appealed the trial court s judgment.

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[6] We refer to the Complainant s initial statement that my boyfriend beat me up as her first statement and her response to the question what do you mean as her second statement.

C. The ICA s November 24, 2009, Judgment On Appeal

Delos Santos appealed to the ICA raising three points of error: 1) the family court erroneously admitted [the Complainant] s purported statements to Officer Kubo as an excited utterance under HRE 803[;] 2) Delos Santos was not afforded meaningful opportunity to cross-examine [the Complainant], [and] the family court erred in admitting the statement[;] and 3) absent the admission of [the Complainant] s purported statements to Officer Kubo, the State failed to adduce any evidence that Delos Santos had abused [the Complainant].

Without addressing Delos Santos second point of error, the ICA, in its majority opinion,[7] held that the family court was wrong and violated Delos Santos rights to a fair trial and due process by admitting into evidence Officer Kubo s testimony regarding Complainant s hearsay statements as excited utterances, under HRE 803(b)(2). State v. Delos Santos, No. 29337 (Haw. App. Nov. 9, 2009) (mem.) at 8-9. It correctly laid out the foundational requirements for the excited utterance exception to the hearsay rule: 1) a startling event or condition occurred; 2) the statement was made while the declarant was under the stress of excitement caused by the event or condition; and 3) the statement relates to the startling event or condition. Id. at 5 (block quote formatting omitted) (quoting State v. Machado, 109 Hawai i 445, 451, 127 P.3d 941, 947 (2006)).

[7] The Honorable Daniel R. Foley and Katherine G. Leonard signed the majority opinion, and the Honorable Alexa D.M. Fujise filed a dissent, which is described below.

The ICA held that the prosecution failed to establish the second requirement. Id. at 7. It held that the nature and circumstances of the Complainant s statement indicated non-spontaneity. Id. at 6. The ICA focused on Officer Kubo s testimony that he asked the Complainant what happened before she made her statements, he needed to calm the Complainant down when he asked her what happened, and a security officer was already waiting at the scene when Officer Kubo arrived . . . . Id. at 6-7. Although the ICA recognized that the Complainant was in a state of agitation throughout Officer Kubo s investigation and there was a short interval of time between the incident and the arrival of the officer at the scene[,] the ICA held that those factors did not mitigate against [its] conclusion. Id. at 7 (citing State v. Moore, 82 Hawai i 202, 221-22, 921 P.2d 122, 142-43 (1996)).

Additionally, the ICA analogized Machado, 109 Hawai i at 451, 127 P.3d at 947. It noted that in Machado, the complaining witness was pretty emotional when the officers arrived and that the complaining witness remained visibly upset as she described to the sergeant what had transpired. Delos Santos, mem. op. at 8. Furthermore, only a short time had passed when the complainant in Machado gave her statement to the police. Id. This court held that the statements were not excited utterances because the complaining witness s statement involved a lengthy narrative of the events of an entire evening, was detailed, logical, and coherent, and was not delivered under . . . life threatening physical conditions. Id. at 8 (quoting Machado,

109 Hawai i at 452, 127 P.3d at 948). The ICA held that the facts underlying Machado were substantially similar to the facts in this case. Id.

After holding that the Complainant s statements should not have been admitted as excited utterances, the ICA held that without Officer Kubo s testimony about Complainant s hearsay statements, the State can not adduce substantial evidence to sustain Delos Santos conviction. Id. at 9. The ICA reversed the family court s August 6, 2008, Judgment of Conviction and Sentence.

While the dissent agree[d] that the more detailed statement made by the complaining witness . . . to the police officer in this case did not qualify for the excited utterance exception to the hearsay rule, [the dissent] would [have held] that [the Complainant] s initial statement that my boyfriend beat me up, made upon the officer s arrival, was admissible under this exception. Delos Santos, dissenting op. at 1 (Fujise, J., dissenting) (citing Hilyer v. Howat Concrete Co., 578 F.2d 422, 424 (D.C. Cir. 1978) (held bystander s statements, describing fatal accident in response to police officer s questions as he was so excited he could not remember the officer s questions, admissible as excited utterances); Bosin v. Oak Lodge Sanitary District No. 1, 447 P.2d 285, 290 (Or. 1968) (that statement was elicited by an inquiry is one factor to consider; the trial judge must be given considerable lee-way of decision) (internal quotation marks and citation omitted); United States v. Joy, 192 F.3d 761, 766 (7th Cir. 1999) ([A]

court need not find that the declarant was completely incapable of deliberative thought at the time he uttered the declaration.)).

The dissent would also have held that admission of this initial statement was not a violation of the confrontation clauses of either the Hawai i or United States constitutions because the Complainant appeared at trial and Delos Santos had the opportunity to cross-examine her, notwithstanding her testimony that she could not remember the incident in question or her statements to police. Id. at 1-2 (footnote omitted) (citing United States v. Owens, 484 U.S. 554, 559-60 (1988); People v. Garcia-Cordova, 912 N.E.2d 280 (Ill. App. Ct. 2009); State v. Fields, 115 Hawai i 503, 523, 168 P.3d 955, 975 (2007)).

Finally, the dissent would have held that there was sufficient evidence to remand to the family court for a new trial because the Complainant s statement that my boyfriend beat me up, her testimony that she and Delos Santos were living together at the time and the police officer s observations of her swelling and marked chin, limp, and two-inch by two-inch circular red mark on her thigh were sufficient to support a conviction for Abuse of Family or Household Member. Id. at 2 (citing HRS § 709-906 (Supp. 2007)).

II. STANDARDS OF REVIEW

A. Application For Writ Of Certiorari

The acceptance or rejection of an application for writ of certiorari is discretionary. HRS § 602-59(a) (Supp. 2009).

In deciding whether to accept an application, this court reviews

the decisions of the ICA 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 decisions and whether the magnitude of such errors or inconsistencies dictate the need for further appeal. State v. Wheeler, 121 Hawai i 383, 390, 219 P.3d 1170, 1177 (2009) (citing HRS § 602-59(b)).

B. Excited Utterance Exception To Hearsay Rule

This court reviews the admissibility of evidence by application of the hearsay rules under the right/wrong standard. State v. Machado, 109 Hawai i 445, 450, 127 P.3d 941, 946 (2006); State v. Moore, 82 Hawai i 202, 217, 921 P.2d 122, 137 (1996). Thus, this court reviews whether the ICA gravely erred by determining that the trial court s decision to admit Officer Kubo s testimony was wrong.

C. 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. Fields, 115 Hawai i 503, 511, 168 P.3d 955, 963 (2007) (internal quotation marks omitted) (quoting State v. Feliciano, 107 Hawai i 469, 475, 115 P.3d 648, 654 (2005)).

D. Sufficiency of the Evidence

We review the sufficiency of the evidence under the following standard:

> [E]vidence 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 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.

State v. Richie, 88 Hawai i 19, 33, 960 P.2d 1227, 1241 (1998) (quoting State v. Quitog, 85 Hawai i 128, 145, 938 P.2d 559, 576 (1997)). Substantial evidence as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. Id. (internal quotation marks omitted) (quoting State v. Eastman, 81 Hawai i 131, 135, 913 P.2d 57, 61 (1996)).

III. DISCUSSION

The prosecution argues that Officer Kubo s testimony was admissible under the excited utterance exception to hearsay for two reasons. First, the prosecution asserts that Officer Kubo s entire summary of the Complainant s statements was admissible. Alternatively, the prosecution asserts that, at the very least, [the] initial statement by the complainant that [Delos Santos] beat her up, made upon Officer Kubo s arrival, was admissible as an excited utterance.

We agree with the ICA that the trial court should not have admitted the Complainant s second statement as an excited utterance under Machado, 109 Hawai i at 452, 127 P.3d at 948 (holding that the complainant s statement was not admissible as an excited utterance in part because it involved a lengthy

narrative of the events of an entire evening). However, the Complainant s initial statement that my boyfriend beat me up was admissible as an excited utterance, and the ICA gravely erred by holding that this statement was not an excited utterance. Furthermore, the admission of the Complainant s initial statement did not violate the confrontation clause of the Hawai i Constitution. Therefore, we reverse the ICA s judgment on appeal, and remand to the family court for a new trial.

A. The Complainant s More Detailed Statement Was Not an Excited Utterance.

HRE 803(b)(2) (2002) provides that a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not excluded by the hearsay rule. To qualify as an excited utterance, the proponent of a statement must establish that: (1) a startling event or condition occurred; (2) the statement was made while the declarant was under the stress of excitement caused by the event or condition; and (3) the statement relates to the startling event or condition. Machado, 109 Hawai i at 451, 127 P.3d at 947 (citing HRE 803(b)(2) (2002)). Delos Santos did not assert that a startling event did not occur or that the Complainant s statement related to the

startling event.[8] Thus, the crucial issue on appeal is whether the Complainant s statement was made under the stress of excitement caused by Delos Santos physical altercation with her.

The ultimate question in these cases is whether the statement was the result of reflective thought or whether it was rather a spontaneous reaction to the exciting event. Machado, 109 Hawai i at 451, 127 P.3d at 947 (quoting Moore, 82 Hawai i at 221, 921 P.2d at 141). The time span between the startling event and the statement to be admitted as an excited utterance is a factor in the determination, but a short time period is not a foundational prerequisite. Id. (quoting Moore, 82 Hawai i at 221, 921 P.2d at 141). Other factors that courts often look to in determining whether a statement was the product of excitement include . . . the nature of the event, the age of the declarant, the mental and physical condition of the declarant, the influences of intervening occurrences, and the nature and circumstances of the statement itself. Id. (citing Moore, 82 Hawai i at 221, 921 P.2d at 141).

The prosecution asserts that the ICA gravely erred by concluding that the Complainant did not make her statement under

[8] Additionally, under generally prevailing practice, the statement itself is considered sufficient proof of the exciting event, and therefore the statement is admissible despite absence of other proof that an exciting event occurred. 2 Kenneth S. Broun et al., McCormick on Evidence§ 272 at 256-57 (6th ed. 2006) (footnote omitted).

the stress of excitement. Additionally, the prosecution asserts that the ICA s reliance on the facts underlying State v. Machado, 109 Hawai i 445, 127 P.3d 941 (2006) as substantially similar to the facts of this case is misplaced because Machado involved *a lengthy narrative* of the events *of the entire evening* . . . . (Emphasis and italics in original.) After considering the relevant factors, the prosecution s argument is not persuasive because the prosecution failed to establish when the statement was made and whether it was a brief spontaneous comment or a lengthy narrative which was then summarized by Officer Kubo. Therefore, the nature and circumstances of the statement indicate that the Complainant s second statement could have been the product of reflective thought. Machado, 109 Hawai i at 451, 127 P.3d at 947 (quoting Moore, 82 Hawai i at 221, 921 P.2d at 141).

1. Nature of the event

The prosecution correctly asserts that the nature of the event was violent, which supports its argument that the Complainant s statement was an excited utterance. Officer Kubo testified that the Complainant told him that Delos Santos hit her in the face hard enough to fall to the ground. While on the ground, Delos Santos stomped on her thigh. During their conversation, Officer Kubo noticed that the Complainant s lower chin started to swell, she had slight abrasions on her knee, and

had a two-inch by two-inch red mark on her thigh area. Thus, the nature of the event was violent, which supports the prosecution s assertion that the Complainant s statement was made without reflective thought. See generally State v. Clark, 83 Hawai i 289, 297-98, 926 P.2d 194, 202-03 (1996) (holding that a complainant s statements that her husband stabbed her were admissible as an excited utterance in part because of the violent nature of the startling event); Moore, 82 Hawai i at 222, 921 P.2d at 142 (holding that the complainant s statement that her husband shot her was an excited utterance in part because of the violent nature of the startling event); People v. Swinger, 180 Misc.2d 344, 350, 689 N.Y.S.2d 336, 341 (N.Y. Crim. Ct. 1998) (The nature of the attack on the complainant - abuse by a family member - was undeniably traumatic and could have triggered the excited utterance by the complainant.). Although the incident did not rise to the level of the stabbing in Clark and the shooting in Moore, the incident was still violent, which supports admitting it as an excited utterance.

2. The mental and physical condition of the declarant

The mental and physical condition of the Complainant supports the prosecution s argument that her statement was not the product of reflective thought. For instance, when Officer Kubo arrived, he noticed that the Complainant was really shaken,

crying and appeared to be in a lot of pain. Additionally, at the time he asked the Complainant what happened, the Complainant was still shaken and crying.Finally, the Complainant s emotional state did not change during the forty-five minute period that Officer Kubo was at the hotel. This court has held that a declarant s statements five minutes after being stabbed were excited utterances in part because the declarant was really shaken, obviously scared and terrified, and was trembling and starting to cry. Clark, 83 Hawai i at 297, 926 P.2d at 202; see also Machado, 109 Hawai i at 451, 127 P.3d at 947 (noting that the complaining witness remained visibly upset as she described what had transpired). Additionally, as discussed above, the Complainant s lower chin swelled and she had slight abrasions on her knee and a red mark on her thigh area. Thus, the Complainant s mental and physical condition supports the prosecution s argument that her statement was an excited utterance.

3. Time span between the startling event and the statement

The prosecution asserts that the elapsed time between the abuse and the Complainant s statements was short as Officer Kubo was on the scene within minutes . . . . (Footnote omitted.) In State v. Moore, this court stated that a statement

made within minutes of a startling event can often fairly be characterized as the product of excitement rather than of deliberation. 82 Hawaii at 221, 921 P.2d at 141; see also Machado, 109 Hawai i at 447, 451, 127 P.3d at 943, 947 (describing ten minute time period between violent incident and police officer s arrival as short). The ICA did not address this factor in detail, but held that the short interval of time between the incident and the arrival of the officer at the scene does not mitigate against our conclusion. Delos Santos, mem. op. at 7.

The amount of time does not weigh in favor of admitting the second statement because the prosecution did not establish when the Complainant made the second statement. Officer Kubo arrived at the apartment shortly after about 1:05.[9] At the hearing, he testified that the incident occurred at 1:00. Although it is impossible to know exactly when the Complainant made her initial statement, at the time Officer Kubo met the Complainant, he immediately spoke with her. Because the Complainant s initial statement was the first part of their forty-five minute interaction, it is reasonable to infer that her

[9] At trial, Officer Kubo testified that he arrived at the hotel at shortly after about 1:05 . . . . At the hearing, he testified that he received the call from the dispatcher at approximately 1:07 a.m., and that he arrived at the complex at 1:10.

initial statement occurred a short time after the incident. Thus, a short amount of time elapsed between the Complainant s initial statement and the incident.

However, the prosecution never established when the second statement occurred. At the hearing, Officer Kubo testified that he talked with the Complainant for at least thirty minutes. The prosecution never established when in this thirty minute window the Complainant s second statement occurred. Thus, the time period between the incident and the second statement does not support admitting the second statement as an excited utterance.

4. Nature and circumstances of the statement

The nature and circumstances of the Complainant s second statement illustrate that her statement was the product of reflective thought for two reasons.

First, the Complainant made her statements under circumstances which could indicate reflective thought. That the Complainant responded to a question after officer Kubo attempted to calm her down weighs in favor of concluding that her statement was the product of reflective thought, but does not automatically bar its admissibility as an excited utterance. See infra at 26-28; 30B Michael Graham, Federal Practice & Procedure § 7043 at 417-18 (2006) (stating that one factor in evaluating whether a

statement is an excited utterance is whether the statement was volunteered or in response to a question) (footnote omitted). Thus, the nature and circumstances of the statement weigh against admitting the second statement as an excited utterance partly because the statement was made in response to a police officer s question.

Second, the nature and circumstances of the statement weigh against admitting the second statement as an excited utterance because the record does not clearly establish whether the statement is a recitation of the events of the evening rather than a disjointed or spontaneous outburst. See Machado, 109 Hawai i at 451-52, 127 P.3d at 947-48. For instance, in Machado, this court recognized that other courts have held that lengthy, narrative statements are not admissible as excited utterances. Id. at 451, 127 P.3d at 947. It held that a witness detailed statement was not admissible as an excited utterance because the statement, made in response to questioning by the police, exceeded a truly spontaneous outburst. Id. at 452, 127 P.3d at 948 (quoting West Valley City v. Hutto, 5 P.3d 1, 4 (Utah Ct. App. 2000)). Instead, this court noted that the statement was a specific and inclusive rendition of the circumstances leading up to the incident and of the incident itself and described the statement as detailed, logical, and coherent. Id. This court

contrasted the inadmissible statements in Machado with those in State v. Moore, noting that the statements in Moore were several brief and disjointed remarks such as he shot me, he s a good man[,] I told him I was leaving him, and keep him away from me . . . . Id. (quoting Moore, 82 Hawai i at 217, 921 P.2d at 137).

Similar considerations in this case indicate that the Complainant s statements were not excited utterances, because it appears that the testimony by Officer Kubo may have paraphrased some or all of a thirty minute conversation. Officer Kubo testified at trial that the Complainant basically said that she got into an argument with her boyfriend and while inside the apartment -- hotel room, rather, he punched her once in the face with enough force to her to fall onto the ground. While on the ground, he stomped on her right thigh. [10] (Emphasis added.) This statement may have been Officer Kubo s synopsis of a lengthy conversation rather than a discrete or disjointed statement, as in Moore. Thus, the nature and circumstances as adduced by the prosecution do not support admitting the statement as an excited utterance.

[10] Officer Kubo s testimony at the pretrial hearing also suggested that he was summarizing the Complainant s comments: [A]fter speaking with her and getting the full facts and circumstances, basically she said she was arguing with Mr. Delos Santos about some other matters and while in the room he struck her once in her face hitting her in her jaw with enough force to cause her to fall. (Emphasis added)

The prosecution attempts to distinguish Machado by asserting that the statements in Machado involved *a lengthy narrative* of the events *of the entire evening* . . . . (Emphasis and italics in original.) The prosecution also notes that Officer Kubo was not allowed to recount an entire 30 to 45 minute interview with the complainant, but rather, was limited to particular utterances of the complainant while under the stress of excitement caused by [Delos Santos] assault on her.

The prosecution correctly observes that the police officer s statement in Machadois much longer than Officer Kubo s and Officer Kubo did not recount every detail of the Complainant s statement. SeeMachado, 109 Hawai i at 447-48, 127 P.3d at 943-44 (quoting State v. Machado, 109 Hawai i 424, 425-26, 127 P.3d 84, 85-86 (App. 2005)). However, this argument is not persuasive given the record in the instant case, which does not establish whether Officer Kubo was repeating a short, disjointed statement of the type at issue in Moore, or whether he was summarizing a thirty minute narrative similar to that in Machado.

5. The age of the declarant

The age of the declarant does not have any bearing on whether the statement is likely the product of reflective thought in this case. Courts evaluate the age of the declarant because

child victims of sexual abuse are generally allowed more time between the event and the statement . . . . Boyd v. City of Oakland, 458 F. Supp.2d 1015, 1026 (N.D. Cal. 2006). This issue is not present in this case.

6. The influences of intervening occurrences

Courts evaluate the influences of intervening occurrences between the event and the statement. Machado, 109 Hawai i at 451, 127 P.3d at 947 (citing Moore, 82 Hawai i at 221, 921 P.2d at 141). The prosecution argues that there were no intervening occurrences other than the police being called . . . . Delos Santos did not argue in his Opening Brief that intervening occurrences influenced the Complainant to make her statement. Intervening occurrences did not dull the Complainant s excitement from the startling event. Officer Kubo arrived at the apartment a few minutes after receiving the call from dispatch. Although a security guard waited with the Complainant before Officer Kubo arrived, there is no evidence that the security guard or Delos Santos took any action to dull the Complainant s excitement during that period of time. Therefore, there is no evidence that intervening occurrences dulled the Complainant s excitement.

7. Totality of the circumstances

Evaluating the totality of the circumstances, Clark, 83

Hawai i at 297, 926 P.2d at 202, the Complainant s second statement was not admissible as an excited utterance because the prosecution failed to lay adequate foundation that the statement was not the product of reflective thought. Although the incident was violent and the Complainant was crying and appeared upset, the prosecution failed to adduce evidence regarding when the Complainant made the second statement and the nature and circumstances of the statement. Machado, 109 Hawai i at 451, 127 P.3d at 947. Officer Kubo may have summarized a lengthy narrative with the Complainant rather than reiterating a discrete statement. Therefore, under State v. Machado, 109 Hawai i at 451, 127 P.3d at 947, the ICA did not gravely err by holding that the prosecution failed to establish the foundational requirements to admit the second statement as an excited utterance.

B. The Complainant s Initial Statement That My boyfriend beat me up Is Admissible As an Excited Utterance.

Although Officer Kubo s summary of the witness second statement does not qualify as an excited utterance, his testimony regarding the Complainant s initial statement that my boyfriend beat me up does. As discussed above, the violent nature of the event, the short period of time between the incident and Officer Kubo s arrival, and the Complainant s physical and mental state support admitting the Complainant s initial statement as an

excited utterance. See supra at 16-20. There are three reasons that the Complainant s initial statement is admissible as an excited utterance while her later statements are not: 1) her initial statement does not summarize a longer conversation; 2) evidence that her statement was made in response to a police officer s question does not bar its admissibility as an excited utterance; and 3) the totality of the circumstances indicates that her statement was made under the stress of excitement.

1. The Complainant s initial statement does not summarize a lengthy conversation.

The Complainant s initial statement is admissible as an excited utterance because it is not a lengthy narrative as discussed in Machado. See supra at 21-23.

2. Evidence that a statement was made in response to a police officer s question does not bar its admissibility as an excited utterance.

Although the Complainant s statement was made in response to Officer Kubo s question, this does not automatically bar its admissibility as an excited utterance. 30B Michael Graham, Federal Practice & Procedure § 7043 at 417-18 & n.13 (2006); People of Territory of Guam v. Cepeda, 69 F.3d 369, 372 (9th Cir. 1995) (The fact that a statement is made in response to a question is one factor to weigh in considering the statement s admissibility, but it does not per se bar

admission.). In Machado, this court noted that the complainant s statement made in response to questioning by the police, exceeded a truly spontaneous outburst. Machado, 109 Hawai i at 452, 127 P.3d at 948 (emphasis added) (quoting Hutto, 5 P.3d at 4). However, it did not explicitly hold that responses to police questions cannot be excited utterances.

Other Hawai i courts and scholars have concluded that evidence that the statement is made in response to an inquiry does not automatically bar admitting the statement as an excited utterance. See State v. Konohia, 106 Hawai i 517, 524, 107 P.3d 1190, 1197 (App. 2005) (The fact that some of Coral-Sands statements were made in response to questions by the 911 dispatcher did not prevent them from qualifying as excited utterances.) (citing People v. Roybal, 19 Cal. 4th 481, 79 Cal. Rptr. 2d 487, 966 P.2d 521, 542-43 (1998)); see also State v. Dunn, 8 Haw. App. 238, 246, 798 P.2d 908, 912-13 (App. 1990) (holding that the complainant s statements, made in response to a police officer s question, were admissible as excited utterances);[11] 2 Kenneth S. Broun et al., McCormick on Evidence §

[11] Although not expressly overruled, the validity of Dunn was called into question in State v. Moore. 82 Hawai i 202, 219, 921 P.2d 122, 139 (1996) (It is therefore worth examining how our interpretation of the excited utterance exception has evolved to the point where, rather than looking to a short time interval between event and statement as an indicator that the declarant was still excited by the event, the ICA, in State v. Dunn, 8 Haw.

(continued...)

272 at 259 (6th ed. 2006); C.f. Territory v. Lewis, 39 Haw. 635, 640 (Haw. Terr. 1953) (holding that defendant s statements, made in response to questions by a police officer, were part of the res gestae because they were made under the exciting influence of said events, reasonably contemporaneous thereto and without prior opportunity for deliberation or manufacture), superceded by rule as recognized in State v. Fetelee, 117 Hawai i 53, 175 P.3d 709 (2008). Therefore, the fact that the Complainant s statement responded to Officer Kubo s question does not automatically bar its admission as an excited utterance.

At the ICA, Delos Santos also asserted that the questions posed by Officer Kubo were done with investigative intent and objective. The ICA also held that the fact that Officer Kubo s investigatoryquestioning prompted Complainant s statements about the incident with Delos Santos strongly supports an inference that Complainant was in a reflective state at the time she described the incident to Officer Kubo. Delos Santos, mem. op. at 7 (emphasis added). However, the intent behind Officer Kubo s questions is not legally relevant in establishing

[11](...continued)
App. 238, 246, 798 P.2d 908, 912 (1990), pointed to the fact that the declarant was crying and visibly upset to establish that the event had occurred only a short time before the statement was made.). Dunn is still valid for the proposition that a response to a police officer s question can constitute an excited utterance.

whether a statement was made under the stress of excitement. In State v. Machado, this court assessed whether a statement, made in response to a police officer s question, was an excited utterance. 109 Hawai i at 452, 127 P.3d at 948. This court did not analyze whether the question was asked with investigative intent and objective and we decline to adopt it as a criteria in determining whether a statement is an excited utterance. Id. Therefore, the fact that the Complainant responded to a question posed by Officer Kubo does not require concluding that the Complainant s initial statement was not an excited utterance.

3. The totality of the circumstances indicates that the Complainant s statement was made under the stress of excitement.

Evaluating the totality of the circumstances, it appears that the statement was not the product of reflective thought and therefore qualifies as an excited utterance.

Other courts have held statements made in similar circumstances are excited utterances. For instance, in State v. Fowler, 829 N.E.2d 459, 463 (Ind. 2005), police officers responded to a domestic violence call and arrived at the home approximately five minutes after the incident occurred. They asked the complainant what happened, and she responded that everything was alright. Id at 462 (internal quotation marks omitted). The complainant then told the police that Fowler, the

assailant, was upstairs. Id. The police officers found Fowler and arrested him. Id. When the police officers came back to talk to the complainant approximately fifteen minutes after the incident, she stated that Fowler punched her in the face multiple times and choked her. Id. at 462, 463. While making this statement, she claimed to be in pain and was still crying, bleeding from the nose, and having trouble catching her breath. Id. at 463. The court held that the trial court did not abuse its discretion in admitting the statement as an excited utterance.

Similarly, in State v. Robinson, 773 A.2d 445, 447 (Me. 2001), police officers responded to a domestic violence incident. When the officers arrived, they observed the complainant in a terrified state, crying, upset, and frazzledId. They also noticed that her face was red and puffy, and that she had visible red marks on her neck. Id. An officer asked [her] what had happened, and she responded that [the defendant] had hit her and that he was in the bedroom. Id. at 448 (footnote omitted).[12] The officers arrested the defendant and interviewed the complainant approximately three to twelve minutes after they initially talked with the complainant. Id. The complainant was

[12] The defendant did not challenge the admissibility of this first statement. Robinson, 773 A.2d at 448 n.2.

still crying and appeared terrified and very, very upset. Id. She again told the police officer that the defendant had hit her and this time, more specifically, that he had thrown [her] onto the living room floor and had punched, kneed, kicked and choked her. Id. (footnote omitted).

The court held that the complainant s statements were admissible as excited utterances because the complainant was still very, very upset at the time that she made the statement[,] and appeared terrified and was still sobbing from the events of that night . . . . Id. at 450. Additionally, the court noted that the complainant had visible bodily injuries[,] and did not have the time nor the opportunity to consult with anyone, and there was no evidence that she had had the time for reflection. Id. Thus, in a situation similar to this case, the court concluded that a complainant s response to an inquiry from a police officer was admissible as an excited utterance.

These cases are analogous to this case and indicate that statements made to police officers, even if in response to a question, are admissible as excited utterances if the complainant is still under the stress of excitement. See also People v. Gwinn, 851 N.E.2d 902, 916-17 (Ill. App. 2006) (holding that the trial court did not abuse its discretion in admitting as an excited utterance the complainant s statement to a police officer

approximately fifteen minutes after the father of her children punched her in the face).

In the present case, under the totality of the circumstances, the Complainant s first statement to the police officers was an excited utterance. The nature of the event was violent. The Complainant was still in a state of excitement as indicated by Officer Kubo s testimony that she was crying, scared, and had a red mark on her thigh and a swollen lower chin. Furthermore, the statement was made a short time after the incident. Thus, although the statement was given in response to Officer Kubo s question, the factors outlined in State v. Machado indicate that the Complainant s initial statement was admissible as an excited utterance.

The ICA also held that the fact that a security officer was already waiting at the scene when Officer Kubo arrived, suggesting that order had been restored there, and Officer Kubo s testimony that he needed to calm Complainant down when he asked her what happened suggests that Complainant s statements were not spontaneous. Delos Santos, mem. op. at 7. These facts do not require concluding that the statement was not an excited utterance.

The ICA s discussion of the security guard waiting with the Complainant until Officer Kubo s arrival does not negate the

Complainant s mental and physical state when Officer Kubo arrived shortly after the incident. Officer Kubo testified that the Complainant was shaken and crying when he arrived. He testified that the Complainant was scared and frightened throughout the interview. Additionally, Delos Santos was in the threshold of the door to the room when Officer Kubo arrived, which also indicates that the Complainant was under the stress of excitement when she made her initial statement.

Furthermore, although Officer Kubo testified that he tried to calm the Complainant down for a lot of time, this does not indicate that her statements lacked spontaneity. Officer Kubo testified that despite his attempts to calm the Complainant down, her emotional state remained the same throughout the interview, and that she was scared, frightened, crying, and in pain. Therefore, Officer Kubo s attempt to calm the Complainant down does not indicate that her statement was the product of reflective thought.

Although neither party nor the ICA cited to it, in State v. Beyer, this court held that a complainant s statement to police officers after being questioned was not an excited utterance. 72 Haw. 469, 472, 822 P.2d 519, 521 (1991), overruled by, State v. Moore, 82 Hawai i 202, 220-21, 921 P.2d 122, 140-41 (1996) (holding that a very short time interval between a

startling event and an excited utterance . . . is not a foundational prerequisite to the admissibility of the statement under HRE Rule 803(b)(2)). At first, the complainant was extremely nervous and upset and would not answer the police officer s questions but, after 10 or 15 minutes and smoking . . . two cigarettes, she calmed down and stated that she and the [defendant] had been living together for about four months, that he had not paid his share of the rent, that he had disappeared for several days and so she threw his belongings out in the yard, and that later, while she was sleeping, the appellant came in and struck her in the face. Id. at 470-71, 822 P.2d at 520. This court held that the statement was not proximately caused by the excitement generated from the event, but as a result of questioning by the police after they had calmed the person down. Id. at 472, 822 P.2d at 521. Beyer is distinguishable because in Beyer the complainant had calmed down, while the Complainant in this case was still crying and shaken when she made the statement. Although Officer Kubo attempted to calm the Complainant down, she made her statement under the stress of excitement. Thus, Officer Kubo s attempt to calm the Complainant down does not indicate her statement was not spontaneous.

Therefore, we hold that the ICA gravely erred by concluding that the Complainant s initial statement was not an

excited utterance.

C. The Admission Of the Complainant s Statements Did Not Violate the Confrontation Clause Of the Hawai i Constitution.

The ICA did not reach Delos Santos argument that the admission of Officer Kubo s testimony violated his right to confront the Complainant. Delos Santos, mem. op. at 2. Because we conclude that the Complainant s first statement was admissible as an excited utterance, we address this argument.

Delos Santos asserts that admission of the statement violated his right to confrontation under article I, sections 5 and 14 of the Hawai i Constitution because Hawai i s confrontation clause requires a meaningful opportunity to cross-examine the declarant about the subject matter of a hearsay statement. (Citing State v. Fields, 115 Hawai i 503, 528, 168 P.3d 955, 980 (2007.)) Delos Santos argues that: 1) the Complainant s statements were testimonial; 2) the Complainant was unavailable at trial; and 3) he did not have a meaningful opportunity to cross-examine the Complainant at trial due to her claimed memory loss. In response, the prosecution asserts that the admission of the Complainant s hearsay statements did not violate the confrontation clause because Delos Santos had a sufficient opportunity to cross-examine the Complainant at trial. (Citing Fields, 115 Hawai i at 523-24, 168 P.3d at 975-76.) As discussed

below, we hold that the admission of the Complainant s hearsay statements did not violate the confrontation clause because the Complainant appeared for cross-examination at trial. Therefore, we do not decide whether the Complainant s statements were testimonial, and the application of the two-part tests in Crawford or Roberts is unnecessary. See Fields, 115 Hawai i at 528, 168 P.3d at 980.

Article I, section 14 of the Hawai i Constitution provides the accused with the right to be confronted with the witnesses against the accused . . . . Haw. Const. art. I, § 14. In State v. Fields, this court adopted the following standard for assessing whether testimonial hearsay violates the confrontation clause: 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. Fields, 115 Hawai i at 516, 168 P.3d at 968 (citing Crawford v. Washington, 541 U.S. 36, 68 (2004)). Importantly, this court also held that Hawaii s confrontation clause, like its federal counterpart, is not implicated where . . . the hearsay declarant attends trial and is cross-examined about his or her prior out-of-court statement. Id.at 517, 168 P.3d at 969. This court found the following language in Crawford

compelling:

> [W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no 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 L.Ed.2d 489 (1970). . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

Id. (footnote omitted) (emphasis added) (quoting Crawford, 541 U.S. at 60 n.9).

Relying on numerous cases from other jurisdictions, this court held that 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. Id. at 523, 168 P.3d at 975 (footnote omitted). Under Fields, the relevant inquiry is whether the Complainant appear[ed] at trial and [was] cross-examined about [her] statement. See Fields, 115 Hawai i at 517, 168 P.3d at 969.[13]

Neither this court nor the United States Supreme Court has specifically determined whether a witness who is cross-examined by the defendant but testifies that she cannot remember the subject matter of her out-of-court statements or making her prior statements appears for cross-examination at trial under

[13] Any difference between Fields and Crawford s formulations is aesthetic. A witness that appears for cross-examination at trial under Crawford is a witness that appeared at trial and was cross-examined about her statement under Fields. See Crawford, 541 U.S. at 60 n.9; Fields, 115 Hawai i at 517, 168 P.3d at 969.

Crawford and Fields. See Crawford, 541 U.S. at 60 n.9; Fields, 115 Hawai i at 517, 168 P.3d at 969. Delos Santos asserts that Fields extended Crawford s holding by requiring substantive and meaningful cross-examination. He asserts that he did not have a meaningful opportunity to cross-examine the Complainant because, unlike the declarant in Fields, the Complainant could not remember anything about the incident. See Fields, 115 Hawai i at 523-24, 168 P.3d at 975-76. He points to footnote 13 of our opinion in Fields, where we observed that 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. Id.at 526 n.13, 168 P.3d at 978 n.13 (emphasis added). This court noted that 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. Id.

This argument is not persuasive because language in Fields also supports concluding that a witness need not recall the subject matter of her statements to appear for cross-examination at trial, and our adoption of Crawford supports interpreting Fields in this manner. For instance, this court held that Hawaii 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. Id. at 517, 168 P.3d at 969 (emphasis added). When analogizing Robinson v. State, 610 S.E.2d 194, 195 (Ga. App. 2005), this court also observed:

> 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.

Fields, 115 Hawai i at 519, 168 P.3d at 971 (emphasis added).

Although Fields is ambiguous regarding whether a witness must recall the subject matter of her statements, our adoption of Crawford as the test for whether a witness appears at trial for cross-examination resolves this ambiguity. See id. at 517 & n.9, 168 P.3d at 969 & n.9. To the extent that Fields can be interpreted as indicating that a witness must testify about the subject matter of a statement to satisfy the confrontation clause, we reject this interpretation and instead hold that, under Crawford, a witness who appears at trial and testifies satisfies the confrontation clause, even though the witness claims a lack of memory that precludes them from testifying about the subject matter of their out-of-court statement. As discussed below, this conclusion is supported by United States Supreme Court precedent, the precedent of other

jurisdictions applying Crawford, and the policies espoused in Fields.

First, concluding that a witness appears for cross-examination at trial despite a memory loss is supported by United States Supreme Court precedent, which this court relied on to interpret the Hawai i Constitution s confrontation clause in Fields. Id. Although Delos Santos challenge comes under the Hawai i Constitution, we have relied on Crawford in determining whether a witness appears for cross-examination at trial. Id. Thus, the Supreme Court s construction of the federal confrontation clause is persuasive on this issue.[14]

The Supreme Court s construction of the federal confrontation clause indicates that a witness who forgets both the underlying events and her prior statements nonetheless appears for cross-examination at trial. For instance, in Crawford, the Supreme Court drew the following inference from the historical application of the confrontation clause: the Framers

[14] The concurring opinion asserts that federal and state case law applying Crawford is immaterial because it does not implicate the established jurisprudence construing our state constitution s confrontation clause. Concurring opinion at 19. We respectfully disagree because in Fields this court adopted Crawford as this jurisdiction s test for whether a witness appears for cross-examination at trial. See Fields, 115 Hawai i at 517 & n.9, 168 P.3d at 969 & n.9. Fields also examined the case law of other jurisdictions applying Crawford. Therefore, case law of the United States Supreme Court and other jurisdictions applying Crawford is not wholly irrelevant to whether Delos Santos right to confront the Complainant was violated in this case. See Concurring opinion at 19.

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. Crawford, 541 U.S. at 53-54 (emphasis added). The Supreme Court also observed that [o]ur cases have thus remained faithful to the Framers understanding: Testimonial 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. Id. at 59 (emphasis added). In a footnote, the Supreme Court confirmed that when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. Id. at n.9 (emphasis added) (citing California v. Green, 399 U.S. 149, 162 (1970)). Thus, Crawford indicates that regardless of a witness inability to remember the subject matter of her statements, the witness appearance for cross-examination at trial satisfies the confrontation clause.[15]

[15] Delos Santos asserts that this court required that the declarant must not only be present at trial, but must be able to address the statement by defending or explaining it. (CitingFields, 115 Hawai i at 517, 168 P.3d at 969.) Delos Santos refers to our quotation of the following sentence in Crawford: The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. Fields, 115 Hawai i at 517, 168 P.3d at 969 (quoting Crawford, 541 U.S. at 60 n.9). This argument is not persuasive because such an interpretation both ignores the fact that the Court s language still focuses on presence and ability to act without

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The Supreme Court s pre-Crawforddecisions support a similar conclusion. For instance, in California v. Green, the Supreme Court held that the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories. 399 U.S. at 164. The Supreme Court did not reach the question of whether the witness apparent lapse of memory so affected [the defendant] s right to cross-examine as to make a critical difference in the application of the Confrontation Clause . . . . Id. at 168-69. However, it stated that:

> [W]e 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.

Id. at 161 (emphasis added).

Justice Harlan filed a concurring opinion, and would

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[15](...continued)
requiring that the record show the declarant actually did defend or explain the statement, . . . , and is at odds with the Court s more explicit assertion that when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements, ... State v. Holliday, 745 N.W.2d 556, 565-66 (Minn. 2008) (internal citation omitted) (quoting Crawford, 541 U.S. at 59 n.9). Thus, under Crawford and Fields, a declarant need not actually defend or explain the statement.

have reached the issue of whether the witness failure to remember the events affected the defendant s right to confront the witness. Justice Harlan would have held that:

> The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence. The prosecution has no less fulfilled its obligation simply because a witness has a lapse of memory. The witness is, in my view, available.

Id. at 188 (Harlan, J., concurring) (emphasis added).

In Owens, the Supreme Court observed that the question left unanswered in Green was squarely presented, and the Court agreed with the answer suggested 18 years ago by Justice Harlan. United States v. Owens, 484 U.S. 554, 559 (1988). The Supreme Court held that the Confrontation Clause guarantees only an opportunityfor effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. Id. (internal quotation marks omitted) (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987)). The Court also held that it 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. Id. Finally, the Court found it unnecessary to apply Roberts:

> We do not think such an inquiry is called for when a hearsay declarant is present at trial and subject to unrestricted cross-examination. In that situation, as the Court recognized in Green, the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness demeanor satisfy the constitutional requirements.

Id. at 560 (emphasis added) (citing Green, 399 U.S. at 158-161).

Although the factual scenario in Owens is distinguishable from this case because the witness in Owens remembered making his prior identification, the principles elucidated in these decisions support concluding that a witness appears for cross-examination at trial despite her inability to recall the incident and making her prior statements. See State v. Holliday, 745 N.W.2d 556, 566 (Minn. 2008) (acknowledging that Owens and Green are distinguishable but concluding that these cases suggest what was settled in Crawford-that when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.). The Supreme Court s adoption of the reasoning in Justice Harlan s concurring opinion in Green indicates that the confrontation clause is satisfied when the witness appears at trial and is available for unrestricted cross-examination. See Owens, 484 U.S. at 560;

Crawford, 541 U.S. at 60 n.9. Thus, Supreme Court precedent, which this court has relied upon in delineating the requirements of the Hawai i Constitution s confrontation clause, indicates that a witness appears for cross-examination despite a nearly total loss of memory regarding the incident and her statements.

Second, courts in other jurisdictions applying Crawford have held that a testifying witness appears for cross-examination at trial despite a nearly total lapse in memory.

For instance, in State v. Holliday, the defendant chased and shot at a person, but killed a different person than the one he intended. 745 N.W.2d at 560. The prosecution called the intended victim at trial as a witness to testify as to information he gave in an interview with Sergeant Charles Adams in April 2006 and in his meetings with Assistant Hennepin County Attorney Robert Streitz in May 2006 and September 2006. Id. at 561. The witness claimed he could not remember his interview with the police officer or the May meeting with the county attorney, and, after viewing a document from the September meeting, [the witness] said he remembered talking to someone in the county attorney s office but could not remember what the conversation was about. Id. On cross-examination, the witness agreed that his regular ecstasy use possibly affected his ability to remember. Id. The police officer testified as to

what [the witness] said in the April 2006 interview, including [his] claim that he was appellant s intended victim when Reitter was shot. Id. A legal services specialist was present at the September meeting between the witness and the county attorney. Id. She testified that, at the September meeting, the county attorney read the witness a report of the witness April interview with the police officer and two memoranda documenting the county attorney s meetings with the witness. Id. She testified that the witness affirmed the contents of these documents at the meeting. Id. At trial, the legal service specialist read portions of these documents into evidence. Id.

On appeal, the defendant claimed that the admission of [the witness] s prior statements violated the Confrontation Clause because [the witness] s memory loss precluded the opportunity to cross-examine [the witness] about the circumstances surrounding his prior statements and the contents of those statements. Id. at 565. The court observed that language from the Supreme Court s Crawford decision indicates that the admission of a witness s prior statements does not violate the Confrontation Clause where the witness appears for cross-examination and claims that he or she cannot remember either making the statements or the content of the statements. Id. Applying Crawford, the court held that the admission of the

witness statements did not violate the confrontation clause because [t]he Confrontation Clause is satisfied by a declarant s appearance at trial for cross-examination, and it is for the factfinder to evaluate a declarant s credibility. Id. at 567-68. Thus, despite the witness failure to testify regarding the underlying events or recall his prior statements, the admission of his prior statements did not violate the confrontation clause.

In State v. Bush, the Supreme Court of Wyoming held that the admission of prior statements from a witness that had no recollection of her father killing her mother did not violate the confrontation clause. 193 P.3d 203, 212 (Wyo. 2008). After the witness mother died when the witness was very young, the witness was placed with the department of family services. Id. at 207. The witness grandparents noticed that the witness exhibited unusual behavior, and sought treatment for her at a mental health hospital. Id. During her treatments, when the witness was almost three years old, the witness made statements to her counselor and psychiatrist implicating her father in the murder of her mother. Id. At trial, the witness was eighteen years old, and testified that she could not remember any of the events in 1990. Id. at 207-08. She also testified that the counseling she had as a child pretty much made her unable to remember what had happened. Id. at 208. Defense counsel did

not cross-examine her. Id. The prosecution called the witness psychiatrist and counselor, and they testified about the witness incriminating statements. Id.

The court held that the admission of the witness hearsay statements did not violate the confrontation clause because the witness appeared at trial, was placed under oath and testified. Thus, [defendant] was confronted with the witness and had the opportunity to cross-examine her and the Sixth Amendment was satisfied. Id. at 211. Relying on persuasive cases, the court held that what is important for purposes of the Sixth Amendment is that the defendant is confronted by the witnesses against him at trial and has the opportunity to cross-examine them. Id. at 212.

Thus, other courts have held that the admission of hearsay statements does not violate the confrontation clause despite the declarant s complete failure to remember the subject matter of the statements. See also Mercer v. United States, 864 A.2d 110, 113, 114 & n.4 (D.C. 2004) (holding that the the requirements of Crawford were met where the witness was unable to recall in any meaningful way the events of the day of the shooting, her testimony before the grand jury, or her testimony in the first trial); People v. Perez, 82 Cal. App. 4th 760, 766, 98 Cal. Rptr. 2d 522, 526 (2000) (Even though [the witness]

professed total inability to recall the crime or her statements to police, and this narrowed the practical scope of cross-examination, her presence at trial as a testifying witness gave the jury the opportunity to assess her demeanor and whether any credibility should be given to her testimony or her prior statements. This was all the constitutional right to confrontation required.); United States v. Keeter, 130 F.3d 297, 302 (7th Cir. 1997) (holding that the admission of a witness affidavit and grand jury testimony did not violate the confrontation clause even though the witness claimed an inability to remember anything but his own name). The cases discussed above indicate that when a witness is presented for cross-examination, the Confrontation Clause does not bar the admission of a prior statement. State v. Legere, 958 A.2d 969, 978 (N.H. 2008); Bush, 193 P.3d at 211, 212 (holding that the admission of a witness out-of-court statements did not violate the confrontation clause because the witness appeared at trial, was placed under oath and testified). Therefore, the admission of the Complainant s testimony did not violate the Hawaii Constitution s confrontation clause.

Finally, the policies outlined in State v. Fields are not undermined in this case. In distinguishing the factual circumstances of Fields, Delos Santos generally asserts that he

did not have an adequate opportunity to test the credibility and veracity of the Complainant s prior statements. In Fields, this court noted that 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, 115 Hawai i at 523, 168 P.3d at 975. This policy of providing the trier of fact with adequate information to test the credibility of an out-of-court declarants statements is not undermined by allowing a witness with no recollection of the incident or her statements to testify. For instance, in this case, Delos Santos was able to show that the Complainant was drunk that evening. Thus, although a witness may not recall the incident or her prior statements, the defendant may still impugn the credibility of the witness.

Based on the analysis above, we hold that the admission of the Complainant s first statement that my boyfriend beat me up did not violate the Hawaii Constitution s confrontation clause.

The concurring opinion observes that HRE Rule 802.1

requires that the declarant is subject to cross-examination at trial about the subject matter of the statement.[16] Concurring opinion at 38-40. The concurring opinion then asserts that Hawai i case law and the commentary to HRE 802.1 suggest[] that the same definition of the phrase subject to cross-examination should be employed for purposes of the confrontation clause. Id. at 40-41. We respectfully disagree.

Initially, the concurring opinion asserts that the

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[16] The concurring opinion also asserts that under this court s precedent interpreting the Hawai i Constitution, the proposition that the mere physical presence of a hearsay declarant at trial does not take the defendant out of the realm of protection afforded him or her by the confrontation clause has been established. Concurring opinion at 20. The concurring opinion rejects this court s reading of State v. Sua, 92 Hawai i 61, 75, 987 P.2d 959, 973 (1999), in Fields. Respectfully, these arguments are not persuasive in light of our opinion in Fields.

First, the concurring opinion asserts that this court misread Sua in Fields because if the declarant s mere physical presence at trial was dispositive, as the majority holds in the instant case, Sua II s analysis regarding the two-prong test is a lengthy and preliminary discussion amounting to dicta -- Roberts should not have been addressed. Concurring opinion at 24. However, Fields established that 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. Fields, 115 Hawai i at 526, 168 P.3d at 978 (citing Sua, 92 Hawai i at 75, 987 P.2d at 973). This opinion has not altered our interpretation of Sua in Fields, and we decline to overrule Fields interpretation of Sua.

Second, the concurring opinion asserts that this court s interpretation of Sua in Fields is erroneous because it ignores that this court has held that unavailability may be demonstrated by loss of memory. Concurring opinion at 25, 26. The concurring opinion then concludes that our confrontation clause jurisprudence necessarily contemplates reaching the two-pronged tests stemming from Roberts and Crawford, where the hearsay declarant is physically present at trial but suffers from a loss of memory. Id. at 25. This argument was rejected in Fields. In Fields, this court held that Hawai i s confrontation clause is not implicated where . . . the hearsay declarant attends trial and is cross-examined about his or her prior out-of-court statement. Fields, 115 Hawai i at 517, 168 P.3d at 969. Thus, this court s confrontation clause jurisprudence does not necessarily contemplate reaching the unavailability prong of Roberts and Crawford when a witness claims a loss of memory.

commentary to HRE 802.1 suggests that the same definition of the phrase subject to cross-examination should be employed for purposes of the confrontation clause. Id. However, the commentary to HRE Rule 802.1,[17] on its own, cannot bind this court s construction of a constitutional provision.

The concurring opinion next asserts that, in Fields and pre-Fields cases, this court adopted HRE Rule 802.1 as its test for whether a witness appeared at trial for cross-examination. Concurring opinion at 42-43. However, Fields adoption of Crawford indicates that this court has not adopted HRE Rule 802.1 as its test for whether a witness appears at trial for cross-examination. See supra at 38-39. As discussed above, courts applying Crawford have concluded that a witness without recollection of the subject matter of her statements still appears for cross-examination. Therefore, we do not interpret Fields to require cross-examination regarding the subject matter of the statement to satisfy the confrontation clause. To the extent that our cases have concluded otherwise, they were displaced by our adoption of Crawford in Fields.

[17] Additionally, we note that Officer Kubo s summary of the Complainant s statements was admitted as an excited utterance under HRE Rule 803(b)(2).

D. The Proper Relief Is To Remand For a New Trial.

At the ICA, Delos Santos asserted that [a]part from the inadmissible evidence regarding Officer Kubo s testimony of what [the Complainant] purportedly told him, the State failed to adduce any evidence that Delos Santos had abused [the Complainant]. As such, there was no admissible evidence that Delos Santos had intentionally, knowingly, or recklessly physically abused [the Complainant], a family or household member. In light of the discussion above, this argument is not persuasive and therefore we remand the case to the family court for a new trial.

When considering whether sufficient evidence supports a conviction, courts consider the evidence in the strongest light for the prosecution and 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. State v. Richie, 88 Hawai i 19, 33, 960 P.2d 1227, 1241 (1998) (block quote formatting omitted) (quoting State v. Quitog, 85 Hawai i 128, 145, 938 P.2d 559, 576 (1997)). Substantial evidence as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. Id.(internal quotation marks omitted) (quoting

Eastman, 81 Hawai i at 135, 913 P.2d at 61).

Even disregarding the Complainant s more detailed statement, her statement that my boyfriend beat me up, her testimony that she and Delos Santos were living together at the time and the police officer s observations of her swelling and marked chin, limp, and two-inch by two-inch circular red mark on her thigh were sufficient to support a conviction for Abuse of Family or Household Member. Delos Santos, dissenting op. at 2 (Fujise, J., dissenting). Therefore, we remand this case to the family court for a new trial.

IV. CONCLUSION

Based upon the foregoing analysis, we vacate the ICA s judgment on appeal and remand to the family court for a new trial.

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