IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

---o0o---

STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

ORLANDO PECPEC, Petitioner/Defendant-Appellant.

NO. SCWC-30500

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 30500; FC-CR NO. 09-1-2378)

March 20, 2012

CONCURRING AND DISSENTING OPINION BY ACOBA, J.,
WITH WHOM DUFFY, J., JOINS

In this case, certain multiple acts were submitted in evidence to the jury by Respondent/Plaintiff-Appellee State of Hawaiʻi (Respondent or prosecution) without any election at or before the close of its case-in-chief as to which act pertained to a particular count. In the absence of such an election, the circuit court of the first circuit (the court) was required to "give[] the jury a specific unanimity instruction, i.e., an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved

beyond a reasonable doubt." State v. Arceo, 84 Hawaiʻi 1, 32-33, 928 P.2d 843, 874-75 (1996) (emphasis added). The court failed to do this, leaving the reasonable possibility that "'conviction [] occur[ed] as a result of different jurors concluding that [Petitioner/Defendant-Appellant Orlando Pecpec (Petitioner)] committed different acts'" with respect to any particular count, or that a single act supported more than one count. Id. at 32, 928 P.2d at 874 (quoting United States v. Echeverry, 719 F.2d 974, 975 (9th Cir. 1983). Thus, Petitioner's right to secure unanimous agreement by the jurors as to the specific act attributable to a particular count, see id. at 32-33, 928 P.2d at 874-75, "guaranteed by article I, sections 5 and 14 of the Hawaiʻi Constitution[,]" id. at 30, 928 P.2d at 872, was violated.[1]

Consequently, I must respectfully dissent. In my view, (1) because Respondent did not elect the specific exhibit that was being offered in support of each count, the court was required to give the jury a specific unanimity instruction, (2) the court's failure to give the jury a specific unanimity instruction violated Petitioner's right to secure a unanimous verdict, (3) such error was not harmless beyond a reasonable doubt, and (4) in order to avoid unnecessary appeals in this type

[1] Article I, section 5 the Hawaiʻi Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." Article I, section 14 provides in relevant part that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury."

of case in the future, the circuit "courts in every [such] case [should be mandated] to instruct the jury that all of its members must unanimously agree to 'the same underlying . . . act' or acts that constitute the conduct they find culpable under the charge, before they may find a defendant guilty[,]" without regard to the prosecution's election. State v. Kealoha, 95 Hawaiʻi 365, 378, 22 P.3d 1012, 1025 (App. 2000) (ellipsis in original).[2]

I.

A.

Respondent charged Petitioner by complaint with twenty-five counts of Violation of an Order for Protection (Protection Order), HRS § 586-11(a)(1)(A) (Supp. 2010).[3] The language of all twenty-five counts was identical except for the dates of the alleged violation. The counts alleged violations of the Protection Order occurring on the following dates:

Counts 1-6:	October 19, 2009
Count 7:	October 22, 2009
Counts 8-15:	November 6, 2009
Count 16:	November 7, 2009
Counts 17:	November 8, 2009
Counts 18-22:	November 6, 2009
Counts 23-25:	November 7, 2009.

At trial, Respondent introduced nineteen separate exhibits in support of Counts 7-25. The exhibits consisted of

[2] As discussed infra, I concur as to the majority's conclusion that Petitioner's conviction on Count 13 was not unanimous and thus did not support Petitioner's consecutive sentence on that count.

[3] HRS § 586-11(a)(1)(A) provides:

> (a) Whenever an order for protection is granted pursuant to this chapter, a respondent or person to be restrained who knowingly or intentionally violates the order for protection is guilty of a misdemeanor. A person convicted under this section shall undergo domestic violence intervention at any available domestic violence program as ordered by the court.

eight copies of text messages, five messages dated November 6, 2009 and three dated November 7, 2009. Respondent also introduced a total of eleven compact disks of voice mail messages, one dated October 22, 2009, eight dated November 6, 2009, one dated November 7, 2009, and one dated November 9, 2009.[4]

At no point prior to or during trial did Respondent specify the act, as represented by an exhibit, upon which it was relying to prove each count. During closing argument, with the exception of Counts 7, 16, and 17, Respondent attempted to tie groups of counts with groups of exhibits:

> Okay. So we're talking about 25 counts of Violation of an Order for Protection. We know that they fall into two categories—voice mails and text messages. The voice mails would be your first 17 counts, Counts 1 to 17. The text messages would be your next eight counts, Counts 18 to 25.
>
> Now, let's look first at the voice mails. The voice mails are grouped in terms of the dates of incident. Counts 1 through 6 are from October 19, 2009; Count 7 is from October 22; Counts 8 to 15 are November 6; Count 16 from November 7; and Count 17 is from November 8.

[4] The exhibits introduced were as follows:

Exhibit 5: 11/06/09 text message
Exhibit 6: 11/06/09 text message
Exhibit 7: 11/06/09 text message
Exhibit 8: 11/06/09 text message
Exhibit 9: 11/06/09 text message
Exhibit 10: 11/07/09 text message
Exhibit 11: 11/07/09 text message
Exhibit 12: 11/07/09 text message
Exhibit 13: 11/08/09 voice mail
Exhibit 14: 11/07/09 voice mail
Exhibit 15: 11/06/09 voice mail
Exhibit 16: 11/06/09 voice mail
Exhibit 17: 11/06/09 voice mail
Exhibit 18: 11/06/09 voice mail
Exhibit 19: 11/06/09 voice mail
Exhibit 20: 11/06/09 voice mail
Exhibit 21: 11/06/09 voice mail
Exhibit 22: 11/06/09 voice mail
Exhibit 23: 10/22/09 voice mail

> Now, you listened to the voice mails. These voice mails are also associated with these dates. Exhibit 23 is the voice mail from October 22; Exhibit[s] 15 to 22 are from November 6; Exhibit 14 is from November 7; Exhibit 13 is from November 8.
>
> Switching now to the text messages. Counts 18 to 25, they are also grouped in terms of the dates of incident. Counts 18 to 22 are from November 6; Counts 23 to 25 are from November 7. For each of these text messages there are exhibits. Exhibits 5 through 9 are the text messages from November 6; and Exhibits 10 to 12 are the text messages from November 7.

However, Respondent never linked a specific exhibit to a specific count.

No exhibits were offered in support of Counts 1-6 pertaining to October 19, 2009 and the jury acquitted Petitioner on those counts. The jury found Petitioner guilty on Counts 7-25. There was only one exhibit for each of the dates set forth in Counts 7, 16, and 17. Accordingly, it would have been obvious to the jury which exhibit was being offered in support of those Counts and Petitioner does not appeal those convictions. Petitioner argues that the jury verdict was not unanimous as to the remaining counts.

II.

This case is governed by the well-established principles announced in Arceo. In Arceo, the defendant was charged with one count of sexual assault in the third degree (sexual contact) and one count of sexual assault in the second degree (sexual penetration). The prosecution offered evidence of multiple acts of sexual contact and multiple acts of sexual penetration to support each count. See id. at 5-10, 928 P.2d at 847-52. This court held that when separate and distinct culpable acts are subsumed within a single count--any one of which could

support a conviction thereunder--the defendant's constitutional right to a unanimous verdict is violated unless, to reiterate, "at or before the close of its case-in-chief, the prosecution . . . elect[s] the specific act upon which it is relying to establish the 'conduct' element of the charged offense[,]" or "the trial court gives the jury a specific unanimity instruction, i.e., an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt." Arceo, 84 Hawaiʻi at 32-33, 928 P.2d at 874-75 (emphasis added).

While the facts of the instant case differ slightly from Arceo, insofar as in Arceo there was evidence of more acts than there were counts and here there was an equal number of exhibits and counts, Arceo precepts nevertheless apply. What controls here, as in Arceo, is the principle that a defendant is entitled to have the jury unanimously agree that the same underlying criminal act supported conviction on a particular count. Petitioner's constitutional right to a unanimous verdict was not guaranteed here because the prosecution failed to elect the particular exhibit representing a specific act that was being offered in support of each count and, in light of that failure, the court should have given the jury a specific unanimity instruction but did not do so. Arceo, 84 Hawaiʻi at 32-33, 928 P.2d at 874-75.

State v. Mundon confirms that a specific unanimity instruction was required. In Mundon, the prosecution offered two separate acts in support of two counts of terroristic threatening

in the first degree (TT1), and the jury found the defendant (Mundon) guilty on only one count. See 121 Hawaiʻi 339, 353, 219 P.3d 1126, 1140 (2009). The Mundon court noted that "[a]t first blush, it would seem that, under Arceo, a unanimity instruction would not be required inasmuch as Mundon was charged with two counts of TT1 based on two separate and distinct culpable acts" whereas in Arceo, the prosecution offered two separate acts, but argued that they supported only one offense. Id.

But, according to Mundon, Arceo "referred to a line of federal decisions that recognized that the jury should be given a specific unanimity instruction under additional circumstances." Id. For example, Echeverry, 719 F.2d at 974-75, held that where "'there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice" and "[t]o correct any potential confusion in such a case, the trial judge must augment the general instruction to ensure the jury understands its duty to unanimously agree to a particular set of facts[.]" (Emphases added.)

The Mundon court concluded that there was a possibility of jury confusion since the jury "(1) was not given a specific unanimity instruction with respect to the offense of TT1; (2) was never informed which act committed by Mundon coincided with Counts 4 and 26, respectively; and (3) convicted Mundon of one count of TT1 and acquitted him of the other[.]" Id. (emphasis in original). Mundon thus held that "to 'correct any potential

confusion' in [that] case, a specific unanimity instruction should have been given[.]'" Id. (quoting Echeverry, 719 F.2d at 975).

III.

In the instant case, as to Counts 7-25, various alleged acts were offered by Respondent to support each count, with the exception of Counts 7, 16, and 17, as previously noted. For example, there were a total of thirteen counts alleging violations occurring on October 6, 2009 and a total of thirteen exhibits dated October 6, 2009. The ICA concurring and dissenting opinion (hereinafter, "ICA dissent") pointed out that Respondent did not specify which exhibit related to which count:

> At trial, [Respondent/Plaintiff-Appellee State of Hawaiʻi (Respondent)] introduced exhibits in support of nineteen of the counts (Counts 7-25)[] . . . . The exhibits consisted of:
> [] eleven compact disks[] . . . of voice mail messages left by [Petitioner/Defendant-Appellant Orlando V. Pecpec (Petitioner)] on the work telephone of the Complaining Witness ("CW") on October 22 (1 message), November 6 (8 messages), November 7 (1 message) and November 8, 2009 (1 message) . . .
> [] copies of eight text messages, identified by date, sent by [Respondent] to CW's cellular telephone on November 6 (5 messages) and November 7, 2009 (3 messages).
> Although each count in the complaint indicates the date on which an alleged violation occurred, the time at which it occurred was not included, and [Respondent] did not explain which messages related to which counts.
> In closing argument, [Respondent] tied Counts 7-25 to the evidence of nineteen incidents that supported those counts. For all counts except Count 7 (Exhibit 23), Count 16 (Exhibit 14) and Count 17 (Exhibit 13) [] the correlation was non-specific (to a group of exhibits) rather than specific (to a single exhibit)[.]

State v. Pecpec, No. 30500, 2011 WL 2037679, at * 6 (App. May 25, 2011) (Reifurth, J., concurring and dissenting) (emphases added).

At no point then did Respondent identify the "specific act upon which it was relying to establish the 'conduct' element

of" each count. Arceo, 84 Hawaiʻi at 32-33, 928 P.2d at 874-75. Although Respondent attempted during closing argument to associate groups of counts with groups of alleged acts, even then, Respondent never linked any specific act with a particular count.

Moreover, as discussed infra, even if Respondent had identified the act upon which it was relying to support each count, Respondent had to make this election before its closing argument in its case-in-chief. See Arceo, 84 Hawaiʻi at 32-33, 928 P.2d at 874-75 (holding that a unanimity instruction is required unless the prosecution elects "the specific act upon which it is relying to establish the 'conduct' element of the charged offense" "at or before the close of its case-in-chief"); see also State v. Kassebeer, 118 Hawaiʻi 493, 509, 192 P.3d 409, 425 (2008).

In Kassebeer, the prosecution elicited during its case-in-chief testimony regarding facts that could serve as a basis for two instances of kidnapping to support a single kidnaping charge. 118 Hawaiʻi at 509, 193 P.3d at 425. The prosecution contended that by referencing only one instance during its closing argument, "a de facto election of the specific act was effected." Id. at 508, 193 P.3d at 424. This court rejected that argument because "the prosecution's election of the specific act must take place 'at or before the close of its case-in-chief[.]'" Id. at 509, 193 P.3d at 425 (quoting Arceo, 84 Hawaiʻi at 33, 928 P.2d at 875) (emphasis in original). Thus, according to Kassebeer, the prosecution's attempted election

during closing argument was invalid. Id. In light of Kassebeer, Respondent could not have made a valid election during its closing argument.

The reason for this would seem obvious. Initially, it would be unfair to allow the prosecution to elect the specific act upon which it is relying at a time when the defendant is unable to respond by challenging the selected act or by presenting counter-evidence as to that act. Moreover, the prosecution must elect at or before its case-in-chief because "'arguments of counsel are not evidence'" that the jury must consider in deliberating over a defendant's guilt or innocence. State v. Quitog, 85 Hawaiʻi 128, 144, 938 P.2d 559, 575 (1997) (quoting State v. Marsh, 68 Haw. 659, 661, 728 P.2d 1301, 1303 (1986)). "'Arguments by counsel are likely to be viewed as statements of advocacy," as opposed to "a definitive and binding statement of law." Kassebeer, 118 Hawaiʻi at 510, 193 P.3d at 426 (quoting State v. Nichols, 111 Hawaiʻi 327, 340 n.8, 141 P.3d 974, 987 n.8 (2006)). In sum, the prosecution's election during closing argument would not "'ensure that the jury understands its duty to unanimously agree to a particular set of facts.'" Arceo, 84 Hawaiʻi at 32, 928 P.2d at 874 (quoting Echeverry, 719 F.2d at 975).

IV.

First, because there was a possibility "'that a conviction may occur as a result of different jurors concluding that [Petitioner] committed different acts,'" and Respondent failed to specify which act supported each count, a specific

unanimity instruction was required. Arceo, 84 Hawaiʻi at 32, 928 P.2d at 874 (quoting Echeverry, 719 F.2d at 975. Without such an instruction, there is no way to assure that the jury understood its duty to unanimously agree that the same exhibit supported a particular count.

Additionally, as stated by the ICA dissent nothing prevented any individual juror, uninstructed as to his or her duty, from concluding that a single exhibit was sufficient to support a conviction on more than one count with the same date:

> [N]othing prevent[ed] individual jurors from concluding that different conduct support[ed] conviction on any particular count. For example, Juror 1 might [have] conclude[d] that Exhibit 15 (voice mail received November 6, 2009 at 1:00 p.m.) support[ed] conviction on Count 8 and that Exhibit 16 (voice mail received November 6, 2009 at 1:25 p.m.) support[ed] conviction on Count 9, while Juror 2 [did] not believe that Exhibit 15 support[ed] a conviction at all, but that Exhibit 16 support[ed] a conviction on both Counts 8 and 9.

Pecpec, 2011 WL 2037679, at * 7 (Reifurth, J., concurring and dissenting) (emphasis added).

Several counts alleged violations of the Protection Order occurring on the same date and various exhibits (some text messages and some voice mail messages) with the same date were presented to the jury without any other identifying information.[5] It is entirely conceivable, then, that different jurors could have tied different acts to different counts, or that some jurors could have tied a single act to more than one count containing the same date. Therefore, there is a reasonable possibility the

[5] It is noted that although CW testified as to the times each text message was received, none of the counts alleged a specific time. Also, Petitioner submitted evidence that contradicted the existence of certain messages and the times of the messages claimed by CW.

jury did not agree unanimously on the same act as supporting a particular count for which Petitioner was convicted.

Because "there may not have been a unanimous verdict as to [Petitioner]'s conviction for [each act,]" Mundon, 121 Hawaiʻi at 355, 219 P.3d at 1142, the court's error in not giving a specific unanimity instruction contributed to Petitioner's conviction on the several counts. A defendant's right to a unanimous verdict is so fundamental that the court's error in failing to secure it cannot be said to be harmless beyond a reasonable doubt. See Arceo, 84 Hawaiʻi at 33, 928 P.2d at 875 (concluding that because the defendant's "substantial constitutional right to unanimous jury verdicts was prejudiced" and it could not be said "that there was no reasonable possibility that the circuit court's error contributed to [the defendant]'s convictions, . . . the error was not harmless beyond a reasonable doubt").

V.

The same problem infected the court's sentence of a consecutive term on Count 13. Respondent urged the court to sentence Petitioner to one year of imprisonment on each count to run concurrently, except for four counts to run consecutively. The court asked Respondent for which four counts Respondent was seeking a consecutive sentence. Respondent conceded that it had not "identified any particular four" and the reason it was seeking four consecutive sentences was because Respondent believed "five years [imprisonment] total [was appropriate] in light of the number of violations, the nature of the violations,

the impact that it's had on [CW], as well as the fact that there's been an extended history."

Before sentencing Petitioner, the court attempted to determine the particular count with which Exhibit 17 coincided:

> THE COURT: Okay. [Respondent], Exhibit 17, November 6, 2009, turning your attention to the transcripts, is that Count [10]?"
> [RESPONDENT]: Exhibit 17 is Count [13].
> THE COURT: Exhibit 17 is -- is Count [13]?
> [RESPONDENT]: Yes, your honor.

According to the majority, the complaint identified specific police reports relating to each count, and based on those police reports Exhibit 17 was in fact tied to "Count 10 rather than Count 13." Majority opinion at 43. These police reports, however, were not admitted into evidence or given to the jury. Respondent itself, then, was apparently confused as to the particular count that was related to Exhibit 17 telling the court that Exhibit 17 was related to Count 13 rather than Count 10. The court nevertheless accepted Respondent's mistaken view, re-stating that Count 13, "I believe is [related to] Exhibit 17."[6]

Emblematic of the seeming confusion generated at trial, even Respondent, under its own view of the case, erred in connecting Exhibit 17 to the wrong count. The court apparently went along with Respondent's incorrect response and had to have assumed that the jury also related Exhibit 17 to Count 13 in order to impose a consecutive sentence. Of course Respondent was

[6] The court said that in Exhibit 17, a November 6, 2009 voice mail message, Petitioner "blames [CW] for sending him to jail[,]" states that "because he went to jail because of her it made him stronger[,]" and that "there's a price to pay for all of these things." The court interpreted this "in its context to be a threat to the victim's life. The court takes this serious [sic]."

in error and the court based its consecutive sentence on that error. Relatedly there is no ground for believing that the jury would ascertain without instruction that Exhibit 17 was connected with Count 10 when Respondent itself could not make that connection and the court in adopting the Respondent's error, did not do so.

More significantly, as discussed, Counts 8-15 and Counts 18-22 all allege a violation of the Protection Order on the same date, November 6, 2009. Exhibits 5-9 are text messages allegedly sent on November 6, 2009, and exhibits 15-22 are voice messages allegedly left on November 6, 2009. It is impossible to ascertain which of the November 6, 2009 exhibits each juror concluded supported Petitioner's conviction on Count 13. There is no assurance, then, that the conviction as to Count 13 was unanimous as to a specific act. In the absence of assurance that there was unanimous agreement on one act as to Count 13, the court's imposition of a consecutive sentence on that count cannot be sustained.

VI.

The majority likewise deduces that the court erred in not providing the jury with a specific unanimity instruction and that the verdict on Count 13 "was not unanimous." Majority opinion at 37, 42. Nevertheless, the majority concludes the court's failure to give a specific unanimity instruction was harmless. Respectfully, the majority's positions cannot be reconciled with one another. The majority's conclusion that the court's error in failing to give a specific unanimity instruction

was harmless is entirely inconsistent with its conclusion that Petitioner's conviction as to Count 13 "was not unanimous." Majority opinion at 42.

As the majority appears to acknowledge, the verdict as to Count 13 was not unanimous because it cannot be assured that the jury agreed unanimously that the same act supported that count. See Arceo, 84 Hawaiʻi at 33, 928 P.2d at 875 (where the prosecution fails to elect the specific act upon which it is relying, the circuit court must "advise[] the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt") (emphasis added). Like Count 13, it cannot be assured that, as to all the other counts appealed, that the jurors agreed unanimously on the same act as to a particular count. If there cannot be assurance that the verdict was unanimous as to the alleged act on Count 13, the verdict cannot be assured to be unanimous as to a specific act with respect to each of the other counts. On the same rationale, if the verdict as to Count 13 is invalid, the verdict must be invalid as to the other counts. Hence, the conviction on the other remaining counts, like Count 13, must also be vacated.[7]

[7] As the majority acknowledges, it "would not be apparent which exhibit the jury relied on in convicting on Count 13." Majority opinion at 44 n.23. But, had Respondent identified which exhibit pertained to which count, it would be apparent on which exhibit the jury relied. Because the prosecution did not make that necessary identification, "a specific unanimity instruction would [have indeed] cure[d] this defect." Id. Thus, respectfully, it is the absence of assurance that the jury unanimously agreed as to a specific exhibit that invalidates the consecutive sentence on Count 13, as it must every other sentence on the remaining counts appealed.

VII.

According to the majority, however, there is no reasonable possibility the jurors did not unanimously agree that Petitioner committed each alleged act because (1) "the presentation of evidence, (2) jury instructions, and (3) arguments of counsel made it clear that there was a one-to-one relationship between [the] exhibits and the charged counts." Id. at 38-39.

A.

Preliminarily, as the majority must acknowledge, see majority opinion at 37, "[e]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial." State v. Nichols, 111 Hawaiʻi 327, 334, 141 P.3d 974, 981 (2006) (emphasis added). The majority's assertion that a one-to-one relationship between the counts and exhibits was clear to the jury cannot be discerned from the record. Correlatively, nothing affirmatively appears from the record to rebut prejudice from giving only the general unanimity instruction.

B.

1.

As to the presentation of evidence, the fact that there were an equal number of counts as there were exhibits would not ipso facto suggest a one-to-one relationship between the counts and exhibits to the jury. Indeed, Mundon is to the contrary.

As recounted, in Mundon, the prosecution adduced evidence of an equal number of alleged acts and counts. 121 Hawaiʻi at 354, 219 P.3d at 1141. This court did not conclude that the jury would have understood that there was a one-to-one relationship between the counts and alleged acts. Nor did this court presume in light of the equal of number of counts to acts that the jury would understand that it was to unanimously agree that the same act supported Mundon's conviction on the single count for which Mundon was convicted. Rather, this court determined that there was a possibility the jury would have been confused as to this duty because the prosecution did not specify which act coincided with each count and the court did not give the jury a specific unanimity instruction. Id.[8] The majority's assertion that the one-to-one relationship between the counts and acts was clear to the jury cannot be reconciled with Mundon.

2.

As to the jury instructions, the majority notes that the jury was instructed 25 separate times (a) as to the elements of the offense, (b) that it was required to return a verdict of "guilty" or "not guilty," and (c) that its verdict must be

[8] The majority states that in Mundon, this court held that there was a possibility for jury confusion because (1) no unanimity instruction was given, (2) the prosecution failed to elect the particular supporting each count, and (3) the jury convicted Mundon on one count and acquitted him on the other, emphasizing the third item. Majority opinion at 36 n.19 (citing 121 Hawaiʻi at 355, 219 P.3d at 1141-42). However, as the majority must acknowledge, the necessity for a specific unanimity instruction cannot hinge on the third ground inasmuch as the jury must be instructed before it deliberates. See majority opinion at 36. Rather, the confusion coupled with the acquittal manifested the confusion that occurred because no specific unanimity instruction was given. Hence, Mundon must be read as requiring a specific unanimity instruction where there is an equal number of counts and acts and the prosecution fails to elect the act supporting each count, in order to avoid the situation where it is uncertain as to which act the jury convicted and on which it acquitted.

unanimous. Id. at 39. With respect to the elements of the offense, the court repeated identical instructions (except for the number of the count and date) seventeen times for Counts 1-17, as follows:

> As to Count [x] of the Complaint, [Petitioner] is charged with the offense of Violation of An Order for Protection.
>
> A person commits the offense of Violation of An Order for Protection if he intentionally or knowingly engages in conduct which is prohibited by an Order for Protection issued by a Judge of the Family Court that was then in effect. There are four material elements of the Offense of Violation of An Order for Protection, each of which the prosecution must prove beyond a reasonable doubt.
>
> These four elements are:
>
> 1. That on or about [x date], in the City and County of Honolulu, State of Hawaiʻi, an Order for Protection issue by a Judge of the Family Court pursuant to Chapter 586 of the [HRS], was in effect, prohibiting [Petitioner] from engaging in certain conduct, namely contacting or threatening [CW], by either telephone or recorded message; and
>
> 2. That on or about [x date], in the City and County of Honolulu, State of Hawaiʻi, [Petitioner] intentionally or knowingly engaged in certain conduct, namely contacting or threatening [CW], by either telephone or recorded message, which was conduct prohibited by the Order [for] Protection; and
>
> 3. That [Petitioner] knew, at the time, that such conduct was prohibited by the Order for Protection; and
>
> 4. That [Petitioner] was given notice of the Order for Protection prior to engaging in such conduct by having been personally served with the Order for Protection.
>
> The prosecution must prove beyond a reasonable doubt that [Petitioner] acted intentionally or knowingly as to each element of the offense.

(Emphases added.) Then, as to Counts 18-25, the court repeated the same instruction, but replaced the phrase "by either telephone or recorded message" with the phrase "by text message."

Assuming the foregoing instructions at least alerted the jury that Counts 1-17 were voice mail messages and Counts 18-25 were text messages, none of these matters would indicate to the jurors that each count was to be supported by only one of the multiple alleged acts. The instructions would neither inform the jury that each count must be supported by only one of the alleged

acts nor that it had to agree unanimously that that same one act supported a particular count.

Similarly, because there were 25 counts, the court instructed the jury 25 times on the verdict options as follows:

> In Count [x] of the Complaint, as to [Petitioner], you may bring in either one of the following verdicts:
> 1. Not guilty; or
> 2. Guilty as charged of Violation of An Order for Protection.
>
> Your verdict must be unanimous.

Again, the fact that the foregoing instruction was given 25 separate times would not inform the jury that each count had to be supported by only one of the exhibits. The instruction told the jury that it had to be unanimous as to whether Petitioner was guilty or not as to each count, but it did not apprise the jury that it was required to agree unanimously that the same exhibit supported a particular count. The foregoing instruction is the general unanimity instruction; however, a specific unanimity instruction was required. Mundon, 121 Hawaiʻi at 353, 219 P.3d at 1140.

It should be noted that the foregoing instructions are no different from the standard instructions given in every criminal case. Presumably, they would be the same instructions that were given in Arceo, Mundon, and the other cases in which this court subsequently concluded that the jury may have been confused as to its duty to agree that the same act supported the defendant's conviction as to a specific count. Consequently, it cannot be concluded, as the majority does, that the jury would have known based simply on the foregoing general instructions

that it was required to agree unanimously that the same single act had been proven beyond a reasonable doubt in support of a particular count. That majority's position would be contrary to Arceo and Mundon.

3.

Finally, as to the arguments of counsel, the majority emphasizes that, in its opening remarks, Respondent said that Petitioner had left a total of 25 voice mails and text messages and was charged with 25 counts of violating a Protection Order, that Respondent attempted to separate the counts into categories during closing argument, and, that during rebuttal, Respondent reiterated that Petitioner had violated the Protection Order "'25 times.'" Id. at 40-41. As has already been discussed, the overriding response to this argument is that the prosecution's election cannot be made in final argument. That aside, it bears reiterating that at no time did Respondent elect the specific act coinciding with a particular count. Additionally, the majority's position assumes that the jury ipso facto accepted Respondent's argument, when such an assumption is contrary to our law that counsels' arguments are not evidence. Quitog, 85 Hawaiʻi at 144, 938 P.2d at 575. General Instruction No. 3, as given by agreement in this case, in fact instructed the jury that "[s]tatements or arguments made by lawyers are not evidence. You should consider their arguments to you, but you are not bound by their memory or interpretation of the evidence." (Emphases added.)

The majority concedes that Respondent's arguments do not constitute evidence but maintains that Respondent's arguments reflected a one-to-one relationship between the alleged acts and counts. Majority opinion at 38 n.20. To the contrary, applying General Instruction No. 3, the jury presumably would correctly view Respondent's statements during its closing arguments as "'statements of advocacy,'" not as "'binding statement[s] of law.'" Kassebeer, 118 Hawaiʻi at 510, 193 P.3d at 426 (quoting Nichols, 111 Hawaiʻi 327, 340 n.8, 141 P.3d 974, 987 n.8). Those statements plainly did not carry the imprimatur of the court, which is duty-bound to instruct on propositions of law for the jury to follow. See Nichols, 111 Hawaiʻi at 335, 141 P.3d at 982 (stating that "it is ultimately the trial court that is responsible for ensuring that the jury is properly instructed").

This court has declared that "'[a]rguments by counsel cannot substitute for an instruction by the court.'" Kassebeer, 118 Hawaiʻi at 509, 510, 193 P.3d at 425, 426 (quoting Nichols, 111 Hawaiʻi at 340 n.8, 141 P.3d at 987 n.8). No argument by Respondent could "take the place of a specific unanimity instruction" that the court was required to give in this case. Id. Thus in this case, the arguments of counsel are not relevant to the analysis of whether the court's error was harmless. See majority opinion at 38 n.20.

Respectfully, the majority's suggestion that the jury would have known that each count was to be supported by only one act is wrong. We do not rely on jurors to glean for themselves the law they must apply in a case; to reiterate, it is the duty

of the circuit court to properly instruct the jury as to the law the jury must apply. Nichols, 111 Hawaiʻi at 335, 141 P.3d at 982; See State v. Henderson, 27 A.3d 872, 924 (N.J. 2011) ("[W]e do not rely on jurors to divine rules themselves or glean them from cross-examination or summation" because "it is the court's obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial").

C.

The majority concludes that where it reasonable to assume that the jury may have inferred that there was a one-to-one relationship between the counts and acts, the failure to give the jury a specific unanimity instruction is harmless if the jury convicts on all counts. See majority opinion at 38. According to the majority, conviction on all counts means the jury unanimously agreed that "each of the acts represented in the exhibits" had been proven beyond a reasonable doubt. Id. at 39. Respectfully, the majority's position is flawed for several reasons.

First, in the absence of a specific unanimity instruction, the acceptance of a one-to-one relationship was not required of the jury. Id. at 38-39. Thus, it would not be unreasonable for jurors to decide that different acts could be assigned to different counts or for a juror to believe that a single exhibit could satisfy more than one count. See id. at 39. In the latter instance, conviction on all counts would not mean that the jury had unanimously agreed that "each of the acts represented in the exhibits" had been proven beyond a reasonable

doubt. Id. If the majority were correct, Mundon would have held, that either election by the prosecution or a specific unanimity instruction is not required where there is an equal number of counts and acts.

If the jury had been told that each count could be supported by only one act and that the jury must agree unanimously that the same act supported a particular count, this court would presume the jury followed the law embodied by the instruction. State v. Klinge, 92 Hawaiʻi 577, 592, 994 P.2d 509, 524 (2000) ('As a rule, juries are presumed to . . . follow all of the trial court's instructions.'" (quoting State v. Knight, 80 Hawaiʻi 318, 327, 909 P.2d 1133, 1142 (1996)). But where, as in this case, the jury was never instructed as to the law in that regard, it would be unreasonable to presume that the jury somehow divined or followed the Arceo rule in the absence of being told about it. To conclude otherwise, as the majority does, is to engage in prohibited speculation. See Arceo, 84 Hawaiʻi at 32, 928 P.2d at 874.[9]

[9] As stated, Arceo declared that this court may not speculate about how jurors deliberated over a defendant's guilt or innocence. 84 Hawaiʻi at 32, 928 P.2d at 874. The majority suggests that such reliance on Arceo is misplaced because Arceo is factually distinguishable in that multiple acts were offered in support of one count. Majority opinion at 42. However, this distinction was expressly noted in Mundon and rejected. This court acknowledged that "[a]t first blush, it would seem that, under Arceo, a unanimity instruction would not be required inasmuch as Mundon was charged with two counts of TT1 based on two separate and distinct culpable acts[.]" 121 Hawaiʻi at 353, 219 P.3d at 1140. Nevertheless, Mundon held that a specific unanimity instruction was required where the number of acts were equal to the number of counts as in this case. Id. at 354-55, 219 P.3d at 1141-42. Therefore, contrary to the majority's assertion, the principles of Arceo apply to this case pursuant to Mundon.

In addition, the majority suggests that speculation regarding how the jury deliberated is not required to reach its conclusion. However, respectfully, the majority's assertion that the jury may have applied a one-to-one relationship between the acts and counts can only be a guess because Respondent did not identify a specific act supporting each count and no

Thus, "it is ultimately the trial court that is responsible for ensuring that the jury is properly instructed[,]" Nichols, 111 Hawaiʻi at 335, 141 P.3d at 982, it is not for the jury to ascertain by inference what the law requires. As a result of the failure to instruct on this proposition at all, the reasonable possibility cannot be eliminated that, different jurors tied different alleged acts to different counts or that a juror convicted Petitioner on multiple counts having the same date based on one or more but not all alleged acts.

The majority suggests that it does not matter whether each juror tied the same act to the same count because so long as the jury convicted on all counts, the jury unanimously agreed that all acts had been proven beyond a reasonable doubt. But, Arceo mandates just that -- that where the prosecution fails to elect the specific act supporting a particular count, the court is required to instruct that the jurors must unanimously "agree that the same underlying criminal act has been proved beyond a reasonable doubt." Arceo, 84 Hawaiʻi at 33, 928 P.2d at 875 (emphasis added). Also, as noted before, conviction on all counts does not mean the same acts were unanimously agreed to by the jurors or that the same acts were not tied to more than one count.

Preliminarily, as the majority concedes, State v. Keomany, 97 Hawaiʻi 140, 34 P.3d 1039 (App. 2000), an ICA decision, was decided before this court's decision in Mundon,

specific unanimity instruction was given.

which implicitly overruled Keomany. Keomany thus provides no authoritative value in light of Mundon. It may be noted that in Keomany, the concurrence took a position similar to that taken by the majority, noting that "'any error cause by individuals jurors considering different instances of culpable conduct for each count is probably harmless.'" Id. (quoting Keomany 97 Hawaiʻi at 155, 34 P.3d at 1054 (Watanabe, J., concurring) (emphasis added).

Respectfully, the foregoing position is plainly incorrect. Error is either harmless beyond a reasonable doubt or it is not, and the question is not whether there was a "probability" that error contributed to the defendant's conviction but whether there is a reasonable possibility error might have contributed to the conviction. Mundon, 121 Hawaiʻi 339, 368, 219 P.3d 1126, 1155 (2009) ("In applying the harmless beyond a reasonable doubt standard[,] the court is required to examine the record and determine whether there is a reasonable possibility that the error complained of might have contributed to the conviction.") (Brackets in original.) The concurrence also did not consider that any juror may have erroneously believed one act could support multiple counts. In any event, Mundon plainly controls, not Keomany.

The majority suggests that the potential for jury confusion in Mundon was evidenced in large part by the acquittal on one count, and because there the jury convicted on all counts, here, the error harmless beyond a reasonable doubt. See majority opinion at 38. But, the Mundon court specifically emphasized that the potential for jury confusion exited because the jury

"was never informed which act committed by Mundon coincided with [which of the two] counts[;]" not on the fact that the jury acquitted Mundon on one count. Id. at 354, 219 P.3d at 1141 (emphasis in original). Thus, even if the jury convicts on all counts, absent a specific unanimity instruction there can be no reasonable assurance that there was unanimous agreement as to the same one act on each of the counts. Mundon mandates either an election or specific unanimity instruction even where there are an equal number of acts and counts, as in this case.

Moreover, error "'constitut[ing] an infraction of a substantial constitutional right of the accused . . . will rarely be considered harmless error.'" State v. Napeahi, 57 Haw. 365, 373, 556 P.2d 569, 574 (1976) (quoting Chapman v. California, 386 U.S. 18, 23 (1967)). Before "constitutional error will in fact be held harmless, 'the court must be able to declare a belief that it was harmless beyond a reasonable doubt[.]'" Id. (quoting Chapman, 386 U.S. at 23). "[I]f there is a reasonable possibility that the matter complained of might have contributed to the conviction, the error must give rise to a reversal." Id. (internal quotation marks and citation omitted). In light of the foregoing, there is a reasonable possibility that the court's failure to give the jury a specific unanimity instruction in this case contributed to Petitioner's convictions. Such an error is not harmless beyond a reasonable doubt. Therefore, Petitioner's convictions on the appealed counts must be vacated and the case remanded for a new trial.

VIII.

In addition, in my view, it is the duty of the court to properly instruct the jury as to the law it must follow. Thus, anytime there is a "'possibility [] that a conviction may occur as the result of different jurors concluding that the defendant committed different acts,'" Mundon, 121 Hawaiʻi at 353, 219 P.3d at 1140 (quoting 719 F.2d at 974-75), or that the jury might conclude that a single act supports more than one count, the circuit courts must be mandated to "instruct the jury that all of its members must unanimously agree to the same underlying act or acts that constitute the conduct they find culpable under the charge, before they may find a defendant guilty[,]" regardless of whether the prosecution elects particular acts in support of the charge. State v. Kealoha, 95 Hawaiʻi 365, 378, 22 P.3d 1012, 1025 (App. 2000) (ellipsis and quotation marks omitted). This approach would avoid unnecessary error leading to appeals such as this one. See id.

IX.

I concur as to the vacation of Petitioner's sentence on Count 13. However, I would vacate Petitioner's convictions on Counts 8-15, 18-22, and 23-25 and remand for a new trial on those counts. On that ground, I respectfully dissent.

/s/ Simeon R. Acoba, Jr.

/s/ James E. Duffy, Jr.