IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

LESS ALLEN SCHNABEL, Petitioner/Defendant-Appellant.

NO. SCWC-29390

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 29390; CR. NO. 07-1-0863)

MAY 11, 2012

DISSENTING OPINION BY
RECKTENWALD, C.J., IN WHICH NAKAYAMA, J., JOINS

This case requires us to consider one of the recurring questions faced by appellate courts in an adversarial system of justice: whether to address a possible error in the admission of evidence against a defendant in a criminal case, when the defendant failed to object in the trial court. We have visited this issue many times recently, utilizing the principle of plain error that is expressly set forth in Hawaiʻi Rules of Penal Procedure (HRPP) Rule 52(b). The court today relies on plain error and concludes that it is appropriate to reach an argument

not raised by the defendant at trial, a conclusion with which I respectfully disagree. However, the court goes further and also relies on the concept of judicial notice to reach that argument.

Respectfully, such an approach is contrary to our rules of evidence and penal procedure. Moreover, the evidence in question -- which related to a prior juvenile proceeding involving defendant Less Allen Schnabel, Jr. -- was admissible in any event. Because I believe that the appeal is otherwise without merit and that Schnabel received a fair trial, I respectfully dissent.

Schnabel was indicted for manslaughter, pursuant to Hawaiʻi Revised Statutes (HRS) § 707-702(1)(a), and unauthorized entry into a motor vehicle in the first degree, pursuant to HRS § 708-836.5, in connection with the death of Christopher Reuther. It was undisputed that Reuther died from a single punch to the head from Schnabel during a confrontation at a beach park. In order to show that Schnabel was aware of the risk that a punch to the head could kill, the state sought to introduce evidence relating to a prior juvenile proceeding involving Schnabel. Schnabel objected and sought to exclude that evidence on the grounds of relevancy and unfair prejudice, pursuant to Hawaiʻi Rules of Evidence (HRE) Rules 402 and 403. The trial court, after several exchanges with counsel, indicated an "inclination" to "give [the State] some latitude" to cross-examine Schnabel with regard to the evidence.

Schnabel never raised HRS § 571-84[1] as a possible ground for excluding the evidence in either the circuit court, the Intermediate Court of Appeals (ICA), or his application for a writ of certiorari to this court. It was not until this court requested supplemental briefing on the statute that Schnabel addressed the issue. Under the circumstances, Schnabel waived his argument that the circuit court's in limine ruling violated the statute, see HRE Rule 103(a)(1) (requiring a "timely objection or motion to strike" that states "the specific ground of the objection, if the specific ground was not apparent from the context"), and the argument is not noticeable as plain error, see State v. Wallace, 80 Hawaiʻi 382, 410, 910 P.2d 695, 723 (1996) (holding that an evidentiary ruling did not violate the defendant's "fundamental rights" and thus could not be noticed as plain error).

Respectfully, the doctrine of judicial notice does not provide an alternative basis for an appellate court to address this issue. As set forth below, HRE Rule 202(b), entitled "Judicial Notice of Law," establishes rules for determining how courts can ascertain the content of a law. Nothing in the rule purports to address the distinct question of whether an appellate court can address a potential objection to the admissibility of

[1] HRS § 571-84(h) (2006) provides: "Evidence given in proceedings under section 571-11(1) or (2) shall not in any civil, criminal, or other cause be lawful or proper evidence against the minor therein involved for any purpose whatever, except in subsequent proceedings involving the same minor under section 571-11(1) or (2)."

evidence which was not raised below. The majority's interpretation of the rule to allow that result runs contrary to the principles of review which are explicitly set forth in HRE Rule 103 and HRPP Rule 52(b).

In any event, the circuit court's in limine ruling did not violate HRS § 571-84(h) because the court did not propose to admit the fact of the juvenile adjudication and because the use of the evidence was conditioned on Schnabel "opening the door" during his testimony.

Schnabel also challenges the following closing argument by the Deputy Prosecuting Attorney (DPA):

> And when you go in the deliberation room, read the [jury] instructions but use your common sense. That's what this is all about. It's about common sense. Don't get too caught up in the mumbo jumbo of all the words but use your common sense. . . . [D]ig deep down inside and ask yourself, deep down inside, you know, the gut feeling that we talk about deep down inside. Put aside those words. You've heard them. You're analyzing them. And then you reach down deep inside, deep down inside: Is he guilty? And if you can say that, that's your common sense.

(Emphasis added).

I believe that, although the remarks were improper, they were cured by the court's instructions to the jury. Therefore, I would affirm the conviction.

I. Factual Background

In brief summary, the evidence at trial showed the following. Reuther, an avid photographer and aspiring lawyer, came to Hawaiʻi in April of 2007 to visit the University of Hawaii's law school. The evening he arrived, Reuther drove to

Zablan Beach Park in Nanakuli.[2] Shortly after arriving, a group at the beach park called Reuther over to their campsite and began talking with him. Several individuals who conversed with Reuther at the campsite described Reuther as a "friendly" "cruise guy[,]" and indicated that "[h]e had smiles the whole time."

At some point in the evening, Reuther left the group and headed to his car. Harold Kaeo and Nicole Ako, who met Reuther for the first time that night, testified that Schnabel punched Reuther in the parking lot without any provocation or warning. Specifically, Ako testified that just before Schnabel punched Reuther in the parking lot, she heard Schnabel say, "[g]et the fuck out of here." When asked whether Reuther "lunged towards [Schnabel]" or "charg[ed] [Schnabel] like he was going to tackle him[,]" Ako responded, "No." Kaeo and Ako also testified that, in their opinion, Schnabel was under the influence of "ice," or methamphetamine, at the time. They also acknowledged being under the influence of drugs at the time. The witnesses indicated a strong aversion to testifying against Schnabel because they either knew him or were his friends. The medical examiner testified that the death-causing injury resulted from a blow to the head which Reuther did not anticipate.

Kristie Reverio was the defense's only witness. Reverio, who was with Schnabel at the time of the incident,

[2] Reuther's sister, Heather Litton, testified that she received Reuther's backpack from the police department after his death, and found a travel guide that "explicitly stated [Nanakuli State Park] was a great place to learn about local people and be treated with true aloha spirit."

testified that Reuther took a photograph of Schnabel and her, that Schnabel confronted Reuther, and that Reuther assumed a fighting stance against Schnabel before Schnabel punched. Reverio testified that she knew Schnabel for over a year because of Schnabel's close friendship with Reverio's brother and that Schnabel was her friend as well.

II. In Limine Ruling

In his application, Schnabel challenged the circuit court's in limine ruling, arguing that the evidence from his juvenile proceeding was inadmissible pursuant to HRE Rule 402 because it was not relevant.[3] This court, in an order granting Schnabel's request to continue oral argument, requested supplemental briefing on the applicability of HRS § 571-84(h). In his supplemental memorandum, Schnabel argues that the circuit court's ruling violated HRS § 571-84(h).

The background of the court's in limine ruling was as follows. On February 6, 2008, the State filed a notice of intent to use at trial the testimony which Dr. Jorge Camara gave at Schnabel's juvenile proceeding.[4] According to the State, Schnabel was adjudicated a law violator for the offense of

[3] At trial, Schnabel also argued that the evidence was more prejudicial than probative, pursuant to HRE Rule 403. This argument did not appear in Schnabel's briefing on appeal.

[4] The State noted that, "[i]f there are any references to any matters within the discovery materials that defense counsel may construe as 'prior bad acts' evidence under Rule 404(b), [HRE], defense counsel should file the appropriate trial motions to preclude the presentation of such evidence."

Assault in the First Degree. A partial transcript of Dr. Camara's testimony indicates that the complainant in that proceeding was punched in the face and was subsequently kicked. Prior to the juvenile proceeding, Dr. Camara signed a police form in which he stated that the "injury" created a "substantial risk of death[.]" During his testimony in the juvenile proceeding, Dr. Camara clarified that the orbital fracture which the complainant sustained could not have caused the risk of death by itself, but that "[a]ny injury that could rupture the bones of the socket of the eye could have also led to a subdural hematoma[,]" which created the risk of death.

The State sought to show that Schnabel, having heard Dr. Camara's testimony, was aware of the risk of death from "similar acts[.]" On June 19, 2008, at the first hearing on the issue, the State initially indicated that it wanted to call Dr. Camara in its case in chief to testify regarding his testimony at the juvenile proceeding. However, the State then offered the possibility of reading the transcript of the juvenile testimony into the record and omitting any reference to the fact that Schnabel was adjudicated a law violator. At that time, the court postponed its ruling, noting that if any evidence were to be admitted, the court would give the jury a "limiting instruction[.]"

During the next discussion, on June 25, 2008, the court decided to "deny this prior incident completely." When the State

asked for reconsideration or clarification on June 27, 2008, the court noted that "reconsideration is not going to happen" but asked whether the defense "would object to having Dr. Camara come in or cross-examining [Schnabel] saying weren't you in a room when you heard a doctor say 'X' and 'Y' and 'Z'." Defense counsel responded that she would object. The court noted the need "to take this under advisement and read over [sic] again[,]" but indicated its "inclination . . . to give [the State] some latitude" if Schnabel responded in the negative to the question whether he knew that one punch could kill. That was the last actual ruling by the court on the record.

The last discussion on the subject took place on July 2, 2008, when the State rested its case and defense counsel notified the court that Schnabel decided not to take the stand in part because of the court's earlier ruling. The court then summarized what had occurred for the record. The court described its earlier ruling as follows: "[if] the door was opened, [the court] would give a very limiting instruction there, but allow [the DPA] to get into the earlier situation[.]"

A. Judicial notice rules do not excuse Schnabel's failure to present the HRS § 571-84(h) argument at trial and on appeal

Schnabel did not argue in the circuit court, the ICA or in his initial application to this court that evidence relating to his juvenile proceeding was inadmissible under HRS § 571-84(h). Nevertheless, the majority concludes that HRE Rule

202(b), concerning judicial notice of state statutes, permits this court to take judicial notice of this potential objection. Majority Opinion at 23-25. However, nothing in HRE Rule 202(b) or the caselaw interpreting it supports the view that the rule relieves a party of the obligation to make "a timely objection or motion to strike" that states "the specific ground of objection, if the specific ground was not apparent from the context," HRE Rule 103(a)(1), or that the failure to do so should not be examined for plain error, see HRPP Rule 52(b).

HRE Rule 103 provides as follows:

> **Rulings on Evidence.**
>
> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
>
> (b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.
>
> (c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.
>
> (d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

HRPP Rule 52(b) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Read together, HRE Rule 103 and HRPP Rule 52(b) establish a framework under which a criminal defendant who objects to the admission of certain evidence must articulate a "specific ground" for the objection, unless it is apparent from the context. This requirement conserves judicial resources and fosters the truth-seeking process. See A. Bowman Hawaii Rules of Evidence Manual § 103-2 (2010-11 ed.) (hereinafter "HRE Manual") (stating that objections must be "specific" and "timely" and that "[s]pecific, timely objections promote informed rulings by trial courts, enable proponents to pursue corrective measures, and illuminate points for appellate review"). The purpose of requiring "specific" and "timely" objections is to provide the trial court with the opportunity to correct the alleged error. See State v. Long, 98 Hawaiʻi 348, 353, 48 P.3d 595, 600 (2002) ("Case law from our state indicates . . . that the purpose of requiring a specific objection is to inform the trial court of the error.") (citations omitted);[5] State v. Fox, 70 Haw. 46, 55,

[5] The majority asserts that Long's rationale can be applied to this case to support its position that this court may notice HRS § 571-84 as the basis of Schnabel's objection. See Majority Opinion at 59. However, in Long, this court stated that a general objection for "lack of foundation" will preserve an issue for appellate review where "the objection is overruled and, based on the context, it is evident what the general objection was meant to convey." 98 Hawaiʻi at 353, 48 P.3d at 600 (emphasis added). Here, Schnabel made an objection based on "relevancy," and from the context, it was not apparent or obvious that HRS § 571-84(h) formed the basis of his objection. Thus, the majority's reliance on Long for the proposition that notice should be taken of HRS § 571-84(h) as a ground for objection is misplaced.

(continued...)

760 P.2d 670, 675 (1988) ("Fairness to the trial court impels a recitation in full of the grounds supporting an objection to the introduction of inadmissible matters. Otherwise, the court would be denied the opportunity to give the objection adequate consideration and rule correctly.") (citation omitted); Republic v. Nenchiro, 12 Haw. 189, 220, 1899 WL 1549, at *22 (Rep. 1899) ("[Defendants] cannot be allowed to quietly stand by and allow the case to proceed throughout a long trial without raising any objection where they are represented by able and competent counsel and then [present the objections] after conviction[.]"). This recognized purpose to allow the trial court to prevent error would be frustrated by using judicial notice in these circumstances.

Failure to state an objection as required by HRE Rule 103 results in the waiver of the objection. HRE Manual § 103-2[1] ("An opponent who fails to object is held to have waived the appellate point."); see also State v. Matias, 57 Haw. 96, 101, 550 P.2d 900, 904 (1976) (holding, in a case decided prior to the adoption of the HRE, that "there can be no doubt that the making of an objection upon a specific ground is a waiver of all other

[5](...continued)

In addition, the majority cites State v. Walker, No. SCWC-29659, 2012 WL 1139312 (Haw. Mar. 28, 2012), for the proposition that general objections are sufficient to preserve an error for appeal. Majority Opinion at 59 n.54. Respectfully, the holding in Walker did not address the requirement of "specific" and "timely" objections under HRE Rule 103(a)(1), but rather the distinct issue of whether Walker's indictment properly charged an included offense. Id. at *1. Thus, Walker is distinguishable from the instant case insofar as it did not address evidentiary objections. Rather, it addressed whether the liberal construction standard, applicable to challenging an indictment for the first time on appeal, applied in Walker's case. Id. at *15.

objections") (internal quotation marks and citation omitted); Onaka v. Onaka, 112 Hawai'i 374, 386, 146 P.3d 89, 101 (2006) (noting that "[t]he rule in this jurisdiction prohibits an appellant from complaining for the first time on appeal of error to which he has acquiesced or to which he failed to object") (citation and ellipses omitted). However, an appellate court "may" notice an unobjected-to "plain error" if it affects the "substantial rights" of a criminal defendant. HRPP Rule 52(b). Put another way, these rules authorize the review of unobjected-to errors in the admission of evidence only when there is plain error. Thus, it is within this established framework that this court "may" notice error based on HRS § 571-84(h).

Nevertheless, the majority contends that judicial notice allows the court to address the HRS § 571-84(h) issue here because the ground for exclusion should have been "obvious." Majority Opinion at 59. Our rules of evidence and penal procedure reflect the view that the party against whom evidence is offered has the obligation to object. The majority suggests that the court's obligation to sua sponte raise the objection will only arise in cases in which the applicable law is "directly and obviously applicable and plainly controlling." Majority Opinion at 60 n.56. However, as this case illustrates, the question of whether a law is applicable and controlling may not be readily apparent, and even experienced trial counsel and judges could reasonably come to a contrary conclusion. Moreover,

the "directly and obviously applicable and plainly controlling" test has no basis in the text of any of our rules of penal procedure, evidence or appellate procedure, and most notably, none in the asserted basis for the authority to notice such error, HRE Rule 202(a). See Majority Opinion at 60 n.56.

The majority also suggests that its ruling is not expansive because HRS § 571-84(h) represents "a state policy" rather than a rule of evidence. Majority Opinion at 66. Respectfully, since HRS § 571-84(h) speaks directly to the question of admissibility of juvenile adjudications, it is analytically indistinguishable in this context from the provisions of the HRE. Thus, the principles that the court adopts here will apply to those rules as well.

The majority's reading of HRE Rule 202(b), as permitting the appellate courts to notice potential grounds for excluding evidence that were not raised in the trial court, would have the effect of nullifying HRPP Rule 52(b) and much of HRE Rule 103(a) and (d). HRPP Rule 52(b) provides that a court "may" notice plain error affecting "substantial" rights. However, under the majority's view of judicial notice, it would appear that the court can notice any error, even those that do not implicate substantial rights, as long as the alleged error is based on one of the sources of law identified in HRE Rule

202(b).[6] Majority Opinion at 23-25. Those sources of law include Hawaiʻi statutes, and hence the HRE, which were adopted by statute in 1980. 1980 Haw. Sess. Laws Act 164, § 1 at 244.

Respectfully, the majority's approach misconstrues the purpose of HRE Rule 202, and is inconsistent with our substantial body of caselaw applying plain error review since the Hawaiʻi Rules of Evidence were adopted. Rule 202 provides in relevant part:

> **Judicial notice of law.**
>
> (a) Scope of rule. This rule governs only judicial notice of law.
>
> (b) Mandatory judicial notice of law. The court shall take judicial notice of (1) the common law, (2) the constitutions and statutes of the United States and of every state, territory, and other jurisdiction of the United States, (3) all rules adopted by the United States Supreme Court or by the Hawaiʻi Supreme Court, and (4) all duly enacted ordinances of cities or counties of this State.
>
> (c) Optional judicial notice of law. Upon reasonable notice to adverse parties, a party may request that the court take, and the court may take, judicial notice of (1) all duly adopted federal and state rules of court, (2) all duly published regulations of federal and state agencies, (3) all duly enacted ordinances of municipalities or other governmental subdivisions of other states, (4) any matter of law which would fall within the scope of this subsection or subsection (b) of this rule but for the fact that it has been replaced, superseded, or otherwise rendered no longer in force, and (5) the laws of foreign countries, international law, and maritime law.

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[6] The majority suggests that its approach would be limited to situations where "the court fails to notice a statute that obviously and undeniably governs, the failure of which has affected the substantial rights of a defendant[.]" Majority Opinion at 67. However, there is nothing in the plain language of HRE Rule 202(b) to support the limitations suggested by the majority. The rule does not distinguish between errors involving statutes and those involving other sources of law, nor does it provide a basis for addressing some types of errors (those that are obvious and undeniable, and that implicate substantial rights) but not others. This is because the rule is concerned solely with determining the content of the law, see infra at 15-16, and not the distinct question of whether evidentiary error should be noticed when it was not raised in the trial court. The latter issue is addressed directly by HRE Rule 103 and HRPP Rule 52(b), and those rules should govern here.

> (d) Determination by court. All determinations of law made pursuant to this rule shall be made by the court and not by the jury, and the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under these rules.

Nothing in HRE Rule 202 purports to limit or modify the principles set forth in Rule 103 or HRPP Rule 52(b). To the contrary, Rule 202 deals with the distinct issue of how various provisions and sources of law should be established.[7] For certain well-defined and widely circulated sources of law, such as federal and state statutes and constitutions, the common law, rules adopted by the United States and Hawaiʻi Supreme Courts, and ordinances from counties located in Hawaiʻi, the court must take judicial notice of their content. See State v. West, 95 Hawaiʻi 22, 26, 18 P.3d 884, 888 (2001) ("We hold that the courts are duty-bound to take 'judicial notice' of municipal ordinances."); State v. Vallejo, 9 Haw. App. 73, 79, 823 P.2d 154, 158 (1992) ("[HRE Rule 202(b)] requires the courts to take judicial notice of all duly enacted ordinances. When the court took judicial notice of the Schedules filed with the clerk, it took judicial notice of [Revised Ordinances of Honolulu (ROH)]

[7] The commentary to the Rule is consistent with this analysis, and describes the various provisions that governed the determination of the law prior to the enactment of Rule 202. Commentary to HRE Rule 202 (stating that this rule "generally restates statutory law"). Thus, for example, it notes that although early Hawaiʻi caselaw provided that the law of foreign jurisdictions was "an issue of fact that required pleading and proof" that was subject to determination by the trier of fact, a 1976 statute (that was repealed in 1980) provided that it was an "issue for the court" although not subject to judicial notice. Id. In short, these predecessors to HRE Rule 202, just like Rule 202 itself, deal with the question of how various sources of law are established, rather than whether issues related to those sources of law have been properly preserved or are otherwise subject to appellate review.

§ 15-7.2. Consequently, the ordinance was proved.") (internal footnote omitted); Hiner v. Hoffman, 90 Hawaiʻi 188, 192 n.3, 977 P.2d 878, 882 n.3 (1999) ("We take judicial notice of the ROH because [HRE Rule 202(b)], requires the courts to take judicial notice of all duly enacted ordinances.") (internal quotation marks omitted). For other sources of law, which were presumably less-widely available in 1980, such as the law of foreign countries or ordinances from municipalities in other states, the court "may" take notice of the law upon the request of a party. See Doe v. Doe, 98 Hawaiʻi 144, 146 n.3, 44 P.3d 1085, 1087 n.3 (2002) (taking judicial notice of the Hague Convention under HRE Rule 202(c)); Roxas v. Marcos, 89 Hawaiʻi 91, 117 n.16, 969 P.2d 1209, 1235 n.16 (1998) (noting that "[t]his court may take judicial notice of the law of foreign countries[]" under HRE Rule 202(c)(5)); Dominguez v. Price Okamoto Himeno & Lum, No. 28140, 2009 WL 1144359, at *3 (Haw. App. Apr. 29, 2009) (SDO) ("The circuit court did not abuse its discretion in taking judicial notice of Japan law pursuant to [HRE Rule 202] and Hawaiʻi Rules of Civil Procedure (HRCP) Rule 44.1.") (citation omitted). Nothing in the rule or its commentary suggests that it addresses the distinct question of whether an issue arising under one of these sources of law is properly preserved for appellate review or otherwise properly addressed by the appellate court.

Respectfully, the majority's construction of HRE Rule 202(b) is not consistent with this court's substantial caselaw,

which addresses whether issues relating to the admissibility of evidence may be addressed by an appellate court even though they were not raised below. Those cases either hold that the issue was waived, or address it as plain error. See, e.g., State v. Fields, 115 Hawaiʻi 503, 528, 168 P.3d 955, 980 (2007) (declining to notice plain error in regard to an out-of-court statement that purportedly violated defendant's right of confrontation under the Hawaiʻi Constitution); State v. Crisostomo, 94 Hawaiʻi 282, 290, 12 P.3d 873, 881 (2000) ("A hearsay objection not raised or properly preserved in the trial court will not be considered on appeal. This is true even where the testimony is objected to on other grounds."); State v. Sua, 92 Hawaiʻi 61, 76, 987 P.2d 959, 974 (1999) (determining that defendant waived the issue of whether certain prior inconsistent statements were properly recorded pursuant to HRE Rule 802.1(1)(C) because the defendant failed to object at trial on that ground, thereby rendering those statements admissible); Wallace, 80 Hawaiʻi at 410, 910 P.2d at 723 (finding that the defendant's argument based on the HRE was waived for failure to object at trial and was not noticeable as plain error); State v. Samuel, 74 Haw. 141, 147, 838 P.2d 1374, 1378 (1992) ("Appellant's attorney failed to preserve this alleged 'error' by not objecting to it at trial. The general rule is that evidence to which no objection has been made may properly be considered by the trier of fact and its admission will not constitute grounds for reversal.").

In support of its position, the majority relies on four cases: Life of the Land, Inc. v. City Council of City and Cnty. of Honolulu, 61 Haw. 390, 606 P.2d 866 (1980); West, 95 Hawaiʻi at 22, 18 P.3d at 884; Eli v. State, 63 Haw. 474, 630 P.2d 113 (1981); and Demond v. Univ. of Hawaii, 54 Haw. 98, 503 P.2d 434 (1972). Respectfully, these cases are distinguishable and do not support the majority's expansive interpretation of the rule's effect. In Life of the Land, the plaintiffs opposed the construction of a high-rise building project, and they brought suit against the City Council and other city officials challenging the approval of the developers' application for variance or modification of an interim development control (IDC) ordinance, referred to as the "Kakaako Ordinance." 61 Haw. at 393-94, 606 P.2d at 871. As a preface to addressing the issues before it, this court stated:

> Preliminarily, we preface our consideration of the first three issues by reviewing the program of interim control of land development pending the formulation of updated development policies and plans, which has been in effect, not only in the City and County of Honolulu, but also in municipalities of mainland United States, for many years.
>
> The Kakaako Ordinance was a part of such program. The program is carried out by the enactment and operation of interim development control ordinances similar to the Kakaako Ordinance, which will be referred to, hereafter in this opinion, as IDC ordinances.
>
> We think that such review will place the Kakaako Ordinance in proper perspective because, in the presentation of their case in the circuit court and in this court, plaintiffs treated the Kakaako Ordinance as Sui generis, the only ordinance of its kind, and the approval of the Developers' application for variance and modification as the only approval given by the City Council under section IV-A of that ordinance.

Id. at 417-18, 606 P.2d at 884 (emphasis added).

This court observed that only the Kakaako Ordinance and an ordinance that extended its expiration date were in the record on appeal. Id. at 419, 606 P.2d at 885. Nevertheless, this court took judicial notice of other "IDC ordinances" enacted by the City Council in order to "place the Kakaako Ordinance in proper perspective[.]" Id. at 417-22, 606 P.2d at 884-86. This court took judicial notice pursuant to HRS § 622-13(b),[8] which provided one of the ways a county ordinance could be proven prior to the enactment of HRE Rule 202(b). Id. at 419, 606 P.2d at 885. Accordingly, Life of the Land is factually distinguishable, since it did not involve this court taking judicial notice of an evidentiary objection that was waived.

Likewise, West, which involved a traffic infraction, does not support the majority's position. 95 Hawaiʻi at 23, 18 P.3d at 885. At issue in West was whether the district court properly took judicial notice of the speed limit under HRE Rule 202(b). Id. at 26-27, 18 P.3d at 888-89. At trial, the following exchange occurred:

> THE STATE: May the Court take judicial notice that the posted speed limit on Lunalilo Home Road traveling in the makai direction is 30-miles-an-hour as indicated by the speed schedule? This is on file with

[8] At the time, HRS § 622-13(b) (1968) (repealed 1980) provided, in pertinent part:

> A certified copy or copies of an ordinance or ordinances of any county may be filed by the clerk of the county with any court and thereafter the court may take judicial notice of the ordinance or ordinances and the contents thereof in any cause, without requiring a certified copy or copies to be filed or introduced as exhibits in such cause.

> the District Court.
>
> THE COURT: You have it there?
>
> THE STATE: Yes, your Honor.
>
> THE COURT: You showed West?
>
> THE STATE: And may the record reflect that I'm showing speed schedule-this is schedule four, speed limit, 30 miles-an-hour under Section 15-7.2(3)(a) of the Revised Ordinances of City and County of Honolulu, State of Hawaii, to defense counsel [sic].
>
> THE COURT: Based upon West's objection to those materials, it will be-noted by the Court over the objections of West. So you have your record on that now.

Id. at 24, 18 P.3d at 886 (footnotes and some brackets omitted).

The ICA held that the trial court erred in taking judicial notice of the speed schedules, because it determined that they were not ordinances for purposes of judicial notice. Id. This court disagreed with the ICA's holding. Id. at 27, 18 P.3d at 889. As a threshold matter, this court held that "the courts are duty-bound to take 'judicial notice' of municipal ordinances" pursuant to HRE Rule 202(b). Id. at 26-27, 18 P.3d at 888-89. This court noted the following justifications for the trend in taking judicial notice of municipal ordinances: "(1) accessibility and (2) verifiability." Id. at 27 n.10, 18 P.3d at 889 n.10. In holding that the trial court properly took judicial notice of the speed limit, this court explained that the City Council had properly delegated authority to the County Director of Transportation and that it would be "wholly impractical" to require the City Council "to pass ordinances setting the speed limit for each and every street in the county." Id. at 27-28, 18 P.3d at 889-90. Thus, West stands for the proposition that speed

limits do not need to be "proven," but must be judicially noticed in the same way as municipal ordinances. Accordingly, the holding of West does not support the majority's position that this court may use judicial notice to consider Schnabel's HRS § 571-84(h) argument without resorting to plain error. Majority Opinion at 61.

Eli is also distinguishable because it involved taking judicial notice of the underlying record in a case involving a HRPP Rule 40 petition. In Eli, the defendant sought post-conviction relief pursuant to HRPP Rule 40 based in part on the argument that his guilty plea was not made knowingly, intentionally, and voluntarily. 63 Haw. at 480, 630 P.2d at 115. With regard to HRPP Rule 40 petitions, this court stated in pertinent part:

> In a petition seeking relief under Rule 40 on [the] ground that the guilty plea was entered into involuntarily, the [circuit] court is required to look at the entire record in order to determine whether the petitioner's claims or recantation are credible and worthy of belief. The record is vital to the ultimate determination of whether the plea was made voluntarily; as this court has repeatedly emphasized, it will not presume from a silent record a waiver of a constitutional right.

Id. at 477, 630 P.2d at 116. (Emphasis added).

However, this court noted that "the verbatim record [of the proceeding in which the defendant entered his guilty plea] was never submitted in evidence or called to the [circuit] court's attention during the Rule 40 proceedings." Id. at 478, 630 P.2d at 116. Noting that other courts have taken judicial notice of a record in similar circumstances, this court, in the

exercise of its discretion, took judicial notice of the verbatim record. Id. Thus, Eli involved taking judicial notice of a record where the proceeding itself "required" the circuit court "to look at the entire record," which is not the case here. Id. at 477, 630 P.2d at 116.

Although the majority also relies on Demond, this case appears to run counter to the majority's position. Demond involved a University of Hawai'i employee who was injured in an automobile accident in California while doing research there. 54 Haw. at 100, 503 P.2d at 436. After the accident, the employee sent letters to the university informing it of the accident and her injuries, but not of the circumstances in which the accident occurred. Id. The university's reply letters did not disclose that the employee might be eligible for worker's compensation benefits. Id. The employee sought worker's compensation almost ten years after the accident. Id. at 101, 503 P.3d at 436. At the hearing, the university asserted a statute of limitations defense, and the Director of the Department of Labor and Industrial Relations denied the employee's claim. Id. "On appeal to the Labor and Industrial Relations Appeal Board the denial was affirmed on the ground that [the employee] failed to notify [the university] of the compensable nature of her injuries and failed to file her claim within the prescribed limitation period." Id. On appeal, the employee argued that she complied with the notice requirement and her claim was not barred by the

limitation period. Id. at 101, 503 P.2d at 101.

In support of her argument regarding the limitation period, the employee pointed to a section of the California Labor Code, which provided a basis for the tolling of the limitation period, and Section 97-8 of the Hawaiʻi Workmen's Compensation Law.[9] Id. at 102, 503 P.2d at 437. This court, however, stated:

> [E]ven if it is assumed that Section 3713 of the California Labor Code and Section 97-8 of our laws are authority for all that [the employee] claims, the issue is not properly before us and need not be considered on this appeal. In the proceedings below [the employee] did not mention the possibility that California rather than Hawaii law applied. Nor did she indicate at any time a desire to take advantage of the procedure set forth in Section 97-8.
>
> We have held in numerous cases that this court on appeal will not consider issues beyond those that are properly raised in the trial court[.] . . . . Although we have never considered the application of this general rule to workmen's compensation proceedings, we are of the opinion that it should apply, particularly in cases where the unique procedure contemplated by Section 97-8 is involved.

Id. at 102-03, 503 P.2d at 437 (emphasis added) (citations omitted).

This court recognized "its power to take judicial notice of applicable foreign law, or to remand for its application[.]" Id. at 103, 503 P.2d at 437-38 (citing HRS

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[9] Revised Laws of Hawaiʻi (RLH) § 97-8 (1955), concerning "[i]njuries without the Territory," provided in pertinent part:

> If a workman who has been hired without the Territory is injured while engaged in his employer's business, and is entitled to compensation for the injury under the law of the State or territory where he was hired, he shall be entitled to enforce against his employer his rights in this Territory as if his rights are such that they can reasonably be determined and dealt with by the director, the appellate board and the court in this Territory.

§ 623-1 (repealed 1980)[10]). However, this court explained that "nothing in the record suggest[ed] that it [was] appropriate to do so in this case," because "[a]t all times prior to this appeal [the employee] not only failed to rely on California law but affirmatively argued that she was eligible for compensation under Hawaii law." Id. at 103, 503 P.2d at 437-38. Accordingly, this court stated:

> In these circumstances, the orderly and efficient administration of our workmen's compensation system requires that [the employee] should not at this late stage be allowed to rely on the law of California to establish her claim to benefits in this state.

Id. at 103-04, 503 P.2d at 438.

The majority focuses on the fact that Demond acknowledged "that this court had the 'power to take judicial notice of applicable foreign law, or to remand for its application[.]'" Majority Opinion at 64-65 (quoting Demond, 54 Haw. at 103, 503 P.2d at 437-38). I agree that pursuant to HRE Rule 202(b) and (c), this court has that authority.[11] The

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[10] Prior to the adoption of the HRE in 1980, HRS § 623-1 governed judicial notice of "common law, state laws, and other statutes[.]" As explained supra, HRE Rule 202 "generally restates statutory law," including HRS § 623-1. Commentary to Rule 202. HRS § 623-1 provided:

> Every court of this State shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States. The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining information. The determination of such laws shall be made by the court and not by the jury, and shall be reviewable.

[11] As stated supra, HRE Rule 202(b) allows this court to take judicial notice of the content of HRS § 571-84(h), but the rule does not relieve Schnabel of the obligation under HRE Rule 103(a)(1) to make a timely, specific objection based on HRS § 571-84(h). Accordingly, Schnabel's HRS

(continued...)

majority overlooks, however, the reason why this court in Demond affirmed on the basis of the limitation period notwithstanding the relevant law cited by the employee. Put simply, "this court on appeal will not consider issues beyond those that are properly raised in the trial court[.]" Demond, 54 Haw. at 103, 503 P.2d at 437. This court noted that this general rule was particularly applicable given the "unique procedure contemplated by Section 97-8[,]" id., which involved the "director, the appellate board, and the court" reasonably determining the employee's rights. Id. (citing RLH § 97-8).

Similarly, this general rule applies to the instant situation because an evidentiary framework exists where parties are expected to make timely, specific objections when challenging the admissibility of evidence. See HRE Rule 103(a)(1). Here, Schnabel failed to argue before the trial court that HRS § 571-84(h) barred the use of evidence from his juvenile proceeding. Rather, "[a]t all times prior to this appeal" Schnabel not only "failed to rely on" HRS § 571-84(h), "but affirmatively argued that" the evidence was inadmissible on relevancy grounds. Demond, 54 Haw. at 103, 503 P.2d at 438. Thus, although this court is obligated to take judicial notice of statutes pursuant to HRE 202(b), this court is not obligated to notice arguments raised for the first time on appeal. Accordingly, absent plain

[11](...continued)
§ 571-84(h) argument can only be reviewed for plain error under HRPP Rule 52(b).

error, "the issue is not properly before us[.]" Id. at 102, 503 P.2d at 437.

As set forth above, our prior cases do not support the majority's reading of HRE Rule 202(b). Rather, there is an established evidentiary framework in place that this court has consistently applied, under which objections must be made, and if not, review is for plain error. Accordingly, this court should not depart from this longstanding precedent and use HRE Rule 202(b) to address Schnabel's HRS § 571-84(h) argument.

B. Schnabel's argument based on HRS § 571-84(h) is not noticeable as plain error

As an alternative to its judicial notice analysis, the majority also concludes that Schnabel's argument based on HRS § 571-84(h) can be noticed as plain error. Majority Opinion at 30. As a preliminary matter, we have repeatedly stated that this court's "power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system--that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes." Fields, 115 Hawaiʻi at 529, 168 P.3d at 981 (quoting State v. Rodrigues, 113 Hawaiʻi 41, 47, 147 P.3d 825, 831 (2006)); see also State v. Aplaca, 96 Hawaiʻi 17, 22, 25 P.3d 792, 797 (2001); State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993). Even when an alleged error affects a defendant's substantial rights, this court still has discretion to determine whether review for

plain error is appropriate. See Rodrigues, 113 Hawaiʻi at 47, 147 P.3d at 831 ("We may recognize plain error when the error committed affects the substantial rights of the defendant.") (emphasis added) (quoting State v. Cordeiro, 99 Hawaiʻi 390, 405, 56 P.3d 692, 707 (2002)). This discretion is articulated in HRPP Rule 52(b), which states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." (Emphasis added). The majority also recognizes that plain error review is discretionary. See Majority Opinion at 30-31 n.28. Under the circumstances of this particular case, I respectfully disagree with the majority that this court should exercise its discretion in recognizing plain error. See Fox, 70 Haw. at 56, 760 P.2d at 676 ("[T]he decision to take notice of plain error must turn on the facts of the particular case to correct errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings.") (quotation marks and citation omitted). For the following reasons, I do not believe that the alleged error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Id.

The alleged error stemmed in this case from an evidentiary ruling. As discussed supra, an established framework exists in which objections to the admission of incompetent evidence, which a party failed to raise at trial, are generally not subject to plain error review. For instance, this court held

in Wallace that the defendant's relevance-based objection to the introduction of the gross weight of cocaine failed to preserve the distinct issue of whether the scale used to weigh the cocaine was accurate. 80 Hawaiʻi at 410, 910 P.2d at 723. This court then went on to note that plain error review was not available in that case:

> It is the general rule that evidence to which no objection has been made may properly be considered by the trier of fact and its admission will not constitute ground for reversal. It is equally established that an issue raised for the first time on appeal will not be considered by the reviewing court. Only where the ends of justice require it, and fundamental rights would otherwise be denied, will there be a departure from these principles. [HRPP Rule 52(b) (1994)]. We find no such justification here.

Id. (emphasis added) (quoting State v. Naeole, 62 Haw. 563, 570-71, 617 P.2d 820, 826 (1980)).[12]

Likewise, in State v. Uyesugi, this court declined to notice plain error where the defendant failed to preserve a potential HRE 403 objection to the admission of evidence. 100 Hawaiʻi 442, 463-64, 60 P.3d 843, 864-65 (2002). On appeal, the defendant argued, inter alia, that the trial court's admission of testimony and an exhibit that contained a picture of firearms

[12] In State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971), this court used plain error review to announce a new evidentiary rule, i.e., disallowing "the introduction of prior convictions in a criminal case to prove the defendant's testimony is not credible[.]" Id. at 260-61, 492 P.2d at 661-62. This court declared that the use of evidence of prior felonies solely to attack the defendant's credibility as a witness raised particularized concerns of chilling the exercise of the right to take the stand in one's own defense. Id. at 258-61, 492 P.2d at 660-61. Specifically, this court was concerned with the risk that criminal defendants will avoid taking the stand out of concern that testifying would make evidence of prior convictions admissible at trial and available for the jury to rely on in finding guilt. Id. However, the in limine ruling in the instant case does not implicate such concerns. As discussed infra, the court's ruling indicates that Schnabel could have taken the stand without opening the door to the disputed evidence.

that were not used in the crime "created an overmastering hostility against him." Id. at 463, 60 P.3d at 864. This court distinguished the case relied on by the defendant, and then stated:

> Further support for affirmance is found in HRE Rule 103. [The defendant] had the burden of 'creating an adequate record' in which he has articulated the flaw in the circuit court's actions. See HRE Rule 103; see also Addison M. Bowman, Hawai'i Rules of Evidence Manual § 103-2 at 7-8 (1990). In the absence of an objection and/or proper record, the admission of the testimony and picture does not amount to plain error.

Id. at 463-64, 60 P.3d at 864-65 (emphases added) (footnote omitted).

Accordingly, this court held "that the circuit court did not commit plain error, when, without objection it allowed introduction of one picture of [the defendant's] firearms and permitted testimony of a weapons expert." Id. at 464, 60 P.3d at 865.

The majority asserts that review for plain error is appropriate because the court's ruling infringed on Schnabel's right to testify. Majority Opinion at 30 n.28. Respectfully, I disagree with this conclusion. While I agree that a defendant's right to testify is a fundamental right, this right is not implicated in the instant case. The record makes clear that the court's in limine ruling prior to Schnabel's testimony was preliminary and subject to revision.[13] Indeed, the ruling itself

[13] In fact, the court had already once changed its ruling during the course of prior discussions on the issue.

contained several qualifications based on how the evidence would develop:

> THE COURT: Okay. Well, counsel, I need to take this under advisement and read over [sic] again. I would allow "could", you know, what I instruct is another thing and read over Dr. Camara's testimony [sic] and my inclination is to give [the DPA] some latitude over your strong objection but -- and I'm not going to help -- I don't want to go into that with the jury now because we don't know if we're going to get there. I think it's premature. I don't want to have this whole jury panel snake bit right out of the box that's why I changed my mind. The depth and breadth and intensity of this jury's emotions about this case frankly surprise me, and it shouldn't have because the organs were donated. The family -- it struck many of the jurors as an untoward tragic, unprovoked act and -- but that's just the media. We're going to hear the rest of the story as I mentioned. Okay. So I've ruled and I'm taking under advisement.
>
> [Defense counsel]: Can I --
>
> THE COURT: Yes.
>
> [Defense counsel]: -- for the record object to the you're [sic] not asking the jurors about this --
>
> THE COURT: Right.
>
> [Defense counsel]: -- in voir dire that would be my motion if you're going to reconsider this at all.
>
> THE COURT: Okay. Thank you. Your objection's noted. I need to think about it and hear the evidence come out.

(Emphasis added).

In addition, the court's ruling indicated that Schnabel would have had to "open the door" in order for the evidence to come in. Specifically, the court post hoc characterized its ruling as follows: "[if t]he door was opened, [the court] would give a very limiting instruction there, but allow [the DPA] to get into the earlier situation[.]" (Emphasis added). Thus, it appears that as long as Schnabel did not testify on direct examination that he was unaware that one punch could kill, the trial judge would have excluded the evidence from Schnabel's prior juvenile proceeding. Accordingly, Schnabel could have

testified without risking the disputed evidence would come in.[14]

Moreover, it is unclear whether the court's ruling actually caused Schnabel not to testify. Defense counsel stated that it was "one [of] the factors" that Schnabel considered in deciding not to testify, which implies that there were other reasons that contributed to his decision. Thus, even if the court ruled the evidence inadmissible, Schnabel still may have declined to take the stand. Because the effect of the court's ruling was speculative, and Schnabel did not make an offer of proof as to what his testimony would have been, I do not believe it is appropriate for this court to exercise its discretion and recognize plain error. Cf. Warren v. State, 124 P.3d 522, 527 (Nev. 2005) ("[T]he problem of meaningful review is unfounded when the record sufficiently demonstrates, through an offer of proof, the nature of the defendant's proposed testimony and that the defendant refrained from testifying when faced with impeachment by a prior conviction.") (emphasis added). In accordance with our prior cases, plain error should be "exercised sparingly and with caution[,]" Fields, 115 Hawaiʻi at 529, 168 P.3d at 981, and I believe that the record before this court

[14] I respectfully disagree with the majority's assertion that this argument is "flaw[ed]" based on criticism of the United States Supreme Court's ruling in Luce v. United States, 469 U.S. 38 (1984). Majority Opinion at 73. Luce held that a defendant must testify to preserve his right to appeal an allegedly improper ruling concerning impeachment of the defendant with a prior conviction. 469 U.S. at 42-43. As noted by the majority, this holding has been subject to criticism. Majority Opinion at 73-74.

However, I do not suggest that Schnabel was required to testify to preserve his right to appeal. Rather, I note that Schnabel could have testified without "opening the door" to the disputed evidence. Because Luce did not address this circumstance, it is not applicable here.

counsels against exercising that discretionary power.

C. The in limine ruling did not violate HRS § 571-84(h)

Even assuming arguendo that this court can address Schnabel's HRS § 571-84(h) argument, the circuit court's ruling did not violate that statute. Hawaiʻi appellate courts have not ruled on whether HRS § 571-84(h) precludes cross-examination of a defendant, regarding juvenile matters, in order to rebut testimony by the defendant which the State argues was false or misleading.[15] However, other state courts interpreting similar statutes have recognized that the defendant may not use the statute to shelter such testimony from adversarial testing, thereby subverting the truth-seeking function of the trial. Lineback v. State, 301 N.E.2d 636, 637 (Ind. 1973) (holding that "evidence of the disposition of a juvenile matter" is admissible where "defendant tenders his supposed good character in

[15] Respectfully, although the majority relies on State v. Nobriga, 56 Haw. 75, 527 P.2d 1269 (1974), Majority Opinion at 26-27, that case did not deal with the question of whether and to what extent the evidence from prior juvenile adjudications was admissible at trial. Rather, it held that, despite the seemingly broad language of HRS § 571-84(h), such evidence was available for use in sentencing. Nobriga, 56 Haw. at 78-79, 527 P.2d at 1271-72.

The majority also relies on the dissenting opinion in State v. Riveira (Riveira I), 92 Hawaiʻi 546, 993 P.2d 580 (App. 1999) (Acoba, J., dissenting), rev'd, 92 Hawaiʻi 521, 993 P.3d 555 (2000), and the majority opinion in State v. Riveira (Riveira II), 92 Hawaiʻi 521, 993 P.2d 555 (2000). Majority Opinion at 27-29, 77 n.72. However, this court's sole holding in Riveira II was that a juvenile adjudication may not be treated as a conviction for purposes of applying a repeat offender sentencing statute because HRS § 571-1 explicitly provided that "no adjudication by the [family] court of the status of any child under this chapter shall be deemed a conviction[.]" 92 Hawaiʻi at 522-23, 993 P.2d at 556-57. Although Riveira II "summarily adopted the dissent" in Riveira I on this point, id., Riveira II did not address the issue of whether and to what extent the evidence from prior juvenile adjudications was admissible at trial, and therefore is not dispositive of the issue before this court.

evidence") (block quote formatting and citation omitted);[16] State v. Marinski, 41 N.E.2d 387, 388 (Ohio 1942) (noting that a similarly-worded statute should not be interpreted to "enable a defendant to employ the statute for the purpose of deception" and holding that evidence of the defendant's juvenile adjudications was admissible where he "place[d] himself in a favorable light before the court and jury" by "narrating the story of his previous years").[17]

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[16] The majority asserts that Lineback is inapposite. Majority Opinion at 78 n.73. However, Lineback stands for the general proposition that statutes prohibiting the introduction of evidence from juvenile proceedings do not act as an absolute shelter, and that under certain narrow circumstances, evidence from juvenile proceedings may be introduced. 301 N.E.2d at 637.

In Lineback, the statute at issue stated, in pertinent part, that "[t]he disposition of a child or any evidence given in the court shall not be admissible as evidence against the child in any case or proceeding in any other court." Id. (emphasis added, internal quotation marks omitted). Although the statute in Lineback was different from the one at issue here, the reasoning in Lineback is still applicable. The plain language of the statute in Lineback would arguably have barred the question regarding the defendant's reputation in the community as an "incorrigible juvenile." Id. Notwithstanding the plain language of the statute, the court in Lineback recognized that "an entirely different principle of law prevails when a defendant directly places his reputation in the community before the jury through character witnesses." Id. Similarly, even though HRS § 571-84(h) prohibits evidence from a juvenile proceeding for "any purpose whatever, except in subsequent proceedings[,]" HRS § 571-84(h), "an entirely different principle of law" arguably prevails if a defendant gives false or misleading testimony. Lineback, 301 N.E.2d at 637.

[17] The majority asserts that Marinski is distinguishable because there, the defendant "insisted upon" discussing his "previous years." Majority Opinion at 78-79 n.73. However, the circuit court's narrow ruling requiring Schnabel to "open the door" for the evidence to come in, comports with the holding of Marinski. It appears from the record that if Schnabel had insisted upon testifying that, as set forth by the circuit court, "he was completely unaware, totally unaware" that if he "hit somebody in the head, that [it] might cause [the person] serious injury or death[,]" then the prosecutor, on cross-examination, could have been allowed to ask Schnabel, "[W]eren't you in a room when you heard a doctor say 'X' and 'Y' and 'Z'."

The majority further asserts that Malone v. State, 200 N.E. 473 (1936), a case cited in Marinski, is "directly applicable to this case." Majority Opinion at 79 n.73. Yet, the facts of Malone are distinguishable. In Malone, the prosecutor asked the defendant whether he had "wrecked a railroad train[,]" "wrecked an engine on the New York Central Belt Line[,]" "held up a man by the point of a gun[,]" "entered a place and burglarized it and took some property[,]" "committed burglary and larceny[,]" and "escaped twice from the Hudson Boys Farm[.]" 200 N.E. at 477. Indeed, these questions

(continued...)

State v. Rodriguez, 612 P.2d 484, 486-88 (Ariz. 1980), is particularly instructive. In that case, a defendant charged with murder in the first degree moved in limine to preclude the admission of his juvenile record, which included an adjudication as a delinquent. Id. at 485-86. In his motion, the defendant relied on Arizona Revised Statutes § 8-207(C) which provided that "[t]he disposition of a child in the juvenile court may not be used against the child in any case or proceeding in any court other than a juvenile court, whether before or after reaching majority, except . . . for the purposes of a presentence investigation and report." Id. at 486. The trial court denied the motion, stating that, "in denying that motion I'm not denying [the defense] leave to make objections in the course of the trial if they are appropriate, but at this time I will not preclude the juvenile records." Id. The State did not mention the juvenile record in its case in chief and defense counsel opted not to present any evidence.[18] Id. The defendant was found guilty and appealed, arguing that the trial court erred in its in limine

[17](...continued)
were undoubtedly linked to express "matters" in the defendant's previous juvenile proceedings and prohibited by the relevant statute. In contrast, the proposed question in the instant case, i.e., whether Schnabel was in a room when he heard a doctor say "X" and "Y" and "Z," cannot fairly be described as the same type of juvenile "matter" prohibited in Malone.

[18] The opinion states that the defendant "strongly opposed counsel's decision, and submitted a motion to have his attorney dismissed and a new attorney appointed[,]" but that the trial court denied that motion. Rodriguez, 612 P.2d at 486. The opinion also states that "[t]he defendant did not insist on exercising his right to take the stand and testify in his own behalf." Id. at 490.

ruling. Id. at 485-87.

The Arizona Supreme Court noted that it had previously held that juvenile records were inadmissible as "evidence in chief" or as impeachment evidence, but also noted that exceptions existed to this general rule. Id. at 486. One such exception applied where the defendant "waives [the protection of the statute] by opening the door to his past." Id. at 487 (citing Marinski, 41 N.E.2d 387). The court stated that defense counsel had indicated an intention to use the insanity defense at trial. Id. at 487. Noting that the insanity defense makes "all prior relevant conduct of the person's life" relevant, the court held that, "[h]ad defense counsel chosen to present evidence relating to defendant's sanity, he would have opened the door to defendant's past and waived the [statutory protection] of his juvenile records." Id.

The rationale of Rodriguez is applicable to the case at bar. As in Rodriguez, the trial court in the instant case denied Schnabel's in limine motion to preclude the introduction of juvenile matters. As the defendant in Rodriguez, Schnabel did not testify at trial and was convicted. In addition, in both cases "[the in limine] ruling did not admit the juvenile records, but merely denied their total preclusion until it became apparent as to the context in which they were to be offered."[19] Id.

[19] I respectfully disagree with the majority's conclusion that the rationale in Rodriguez is inapplicable because of differences in the underlying statutes. Majority Opinion at 78-80. Although the statute in (continued...)

Most importantly, the ruling here was contingent on Schnabel "open[ing] the door" by testifying that he did not know that one punch could kill.[20] The State argued in the circuit court that Dr. Camara's statement at Schnabel's juvenile hearing gave Schnabel notice that a punch and some kicks carried a "substantial risk of death[.]" It was a reasonable inference to put to the jury that, if Schnabel heard Dr. Camara's statement, he should have known that a single unexpected punch also carried such a risk. The jurors were free to rely on their own judgment and common sense in evaluating that inference. Thus, had Schnabel testified that he did not know that one punch could

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[19](...continued)
Rodriguez was narrower than that in the instant case because it prohibited only the use of the "disposition of a child in the juvenile court[,]" the court had interpreted the statue to prohibit the instruction of "juvenile records." 612 P.2d at 485-86 (emphasis added). Nevertheless, the court noted that there are exceptions to this prohibition, including where a defendant "open[s] the door" to that evidence. Id. at 487. Accordingly, Rodriguez stands for the proposition that even a seemingly absolute bar on the admission of juvenile records must, on occasion, yield to competing concerns.

[20] Respectfully, the majority's argument that Schnabel could not "open" any "door" because HRS § 571-84(h) expressly prohibits the admission of evidence ignores the recognized distinction between using a privilege as a "sword" rather than merely a "shield." See People v. Johnson, 395 N.Y.S.2d 885, 885-88 (N.Y. App. Div. 1977) (permitting the witness' juvenile records to be admitted as impeachment evidence and holding that the witness had waived the protection of the Family Court Act by giving misleading testimony), rev'd on other grounds by People v. Johnson, 434 N.Y.S.2d 389 (N.Y. App. Div. 1981); State v. L.J.P., 637 A.2d 532, 536-37 (N.J. Super. Ct. App. Div. 1994) (In discussing the physician-patient privilege, the court noted, "if the patient discloses emotional or mental problems by filing an action in which those problems are at issue, at least limited disclosure is warranted despite the privilege. The patient/litigant cannot be permitted to use the privilege as a 'sword' rather than merely a 'shield'") (citations omitted). Under this analysis, the statute would not protect a defendant if he perjured himself or gave misleading testimony.

Moreover, this court in other circumstances has recognized that statutory privileges can yield to countervailing interests. See State v. Peseti, 101 Hawaiʻi 172, 180, 65 P.3d 119, 127 (2003) ("The scope of a statutory privilege, however, is tempered by the principle that 'privileges preventing disclosure of relevant evidence are not favored and may often give way to a strong public interest.'") (quoting L.J.P., 637 A.2d at 537).

kill, he would have opened the door for rebuttal by the State with regard to Dr. Camara's statement and how he understood it.[21]

Lastly, the circuit court's in limine ruling did not violate HRS § 571-84(h) because the court offered the option of introducing the relevant evidence without reference to the adjudication or its result. By its plain language, HRS § 571-84(h) does not apply absent an adjudication. HRS § 571-84(h) ("Evidence given in proceedings under section 571-11(1) or (2) shall not in any civil, criminal, or other cause be lawful or proper evidence against the minor therein involved for any purpose whatever, except in subsequent proceedings involving the same minor under section 571-11(1) or (2).") (emphasis added). Thus, it does not preclude the introduction of juvenile misconduct which was not adjudicated. It would follow that, even if a juvenile was adjudicated a law violator, the statute does not prohibit the admission of information relating to such misconduct without reference to the adjudication and its result. Otherwise a juvenile who was adjudicated would stand in a substantially better position at his adult trial than one who was not adjudicated, despite having engaged in the same

[21] This conclusion would not allow the State to introduce evidence of juvenile adjudications solely for the purpose of impeaching the defendant's credibility as a witness. HRE 609 specifically addresses that situation and allows such impeachment only with adjudications involving a crime of dishonesty. HRE 609(c) ("Evidence of juvenile convictions is admissible to the same extent as are criminal convictions under subsection (a) of this rule."); HRE 609(a) (prohibiting impeachment of credibility by criminal convictions not involving a crime of dishonesty).

conduct.[22] Cf. Laney v. State Farm Mut. Auto. Ins. Co., 479 S.E.2d 902, 907-09 (W. Va. 1996) (stating that, although an in limine ruling based on a statute similar to HRS § 571-84(h) precluded a plaintiff from adducing "evidence . . . directly related to the juvenile proceeding" of the defendant, the plaintiff could still "try to establish at trial exactly what the defendant admitted" at the juvenile proceeding).

Although the State initially sought to introduce Dr. Camara's testimony by transcript, the DPA subsequently noted that the State could introduce the needed evidence without mentioning "that the defendant was ultimately convicted or adjudicated by the [family] court[.]" The court's proposed cross-examination question, "weren't you in a room when you heard a doctor say 'X' and 'Y' and 'Z'[,]" also did not mention the adjudication or its result.

Therefore, the circuit court's ruling did not violate HRS § 571-84(h).

III. Closing Argument

Prior to closing argument, the circuit court read and provided copies of the following relevant instructions to the

[22] The majority states that "[i]t should be apparent, however, that there would be even more reason for the court to exclude reference to the 'misconduct' of a juvenile where he or she was not adjudicated a law violator." Majority Opinion at 82-83 (brackets and internal citation omitted). Under HRE Rule 404(b), however, "[e]vidence of other crimes, wrongs, or acts" may be admissible for certain purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident." Thus, the "misconduct" of a juvenile who was not adjudicated a law violator could be admissible under HRE Rule 404(b) at a subsequent adult trial.

jury:

> You must presume the defendant is innocent of the charges against him. This presumption remains with the defendant throughout the trial of the case, unless and until the prosecution proves the defendant guilty beyond a reasonable doubt.
>
> The presumption of innocence is not a mere slogan but an essential part of the law that is binding upon you. It places upon the prosecution the duty of proving every material element of the offense charged against the defendant beyond a reasonable doubt.
>
> You must not find the defendant guilty upon mere suspicion or upon evidence which only shows that the defendant is probably guilty. What the law requires before the defendant can be found guilty is not suspicion, not probabilities, but proof of the defendant's guilt beyond a reasonable doubt.
>
> What is a reasonable doubt?
>
> It is a doubt in your mind about the defendant's guilt which arises from the evidence presented or from the lack of evidence and which is based upon reason and common sense. Each of you must decide, individually, whether there is or is not such a doubt in your mind after careful and impartial consideration of the evidence.
>
> Be mindful, however, that a doubt which has no basis in the evidence presented, or the lack of evidence, or reasonable inferences therefrom, or a doubt which is based upon imagination, suspicion or mere speculation or guesswork is not a reasonable doubt.
>
> What is proof beyond a reasonable doubt?
>
> If, after consideration of the evidence and the law, you have a reasonable doubt of the defendant's guilt, then the prosecution has not proved the defendant's guilt beyond a reasonable doubt and it is your duty to find the defendant not guilty.
>
> If, after consideration of the evidence and the law, you do not have a reasonable doubt of the defendant's guilt, then the prosecution has proved the defendant's guilt beyond a reasonable doubt and it is your duty to find the defendant guilty.
>
> . . . .
>
> You must not be influenced by pity for the defendant or by passion or prejudice against the defendant. Both the prosecution and the defendant have a right to demand, and they do demand and expect, that you will conscientiously and dispassionately consider and weigh all of the evidence and follow these instructions, and that you will reach a just verdict.

(Emphasis added).

During the State's rebuttal closing argument, the following exchange took place after the DPA discussed the jury

instructions relating to recklessness and witness credibility:

> [DPA:] And when you go in the deliberation room, read these instructions but use your common sense. That's what this is all about. It's about common sense. Don't get too caught up in the mumbo jumbo of all the words but use your common sense.
>
> Do your best to understand what we're talking about and then dig deep down inside and ask yourself, deep down inside, you know, the gut feeling that we talk about deep down inside. Put aside those words. You've heard them. You're analyzing them. And then you reach down deep inside, deep down inside: Is he guilty? And if you can say that, that's your common sense.
>
> [Defense counsel:] Objection, your honor.
>
> THE COURT: I'm going to allow this by way of illustration. The jury has the instructions. Overruled.
>
> [DPA:] If you can tell yourself, you reach deep down inside and you tell yourself, you know what, deep down inside I know he's guilty, that is your common sense.
>
> [Defense counsel:] Your honor, objection. May I make a record?
>
> THE COURT: Yes. Come on up. Make a record please.
>
> (The following proceedings were held at the bench:)
>
> [Defense counsel:] Your honor, the fact whether the jury knows he's guilty is not the issue and they cannot decide it on their gut. It's whether the State has proven beyond a reasonable doubt that he's guilty that they have to answer. To say it otherwise implies that if you have a gut feeling he's guilty, he's just guilty, forget the instructions.
>
> [DPA:] No. The argument is that the feeling inside is your common sense speaking to you. Common sense is what supports all of their decisions in applying the law and determining what the facts are.
>
> [Defense counsel:] But that's not what you're saying.
>
> THE COURT: Well, anyway, I'll remind them that the instructions apply without -- pity, passion don't apply, and the definition of reasonable doubt is in there and I'll let you keep going. Objection overruled.
>
> (The following proceedings were held in open court in the presence of the jury:)
>
> THE COURT: Ladies and gentlemen of the jury, I give the attorneys some latitude at closing. The instructions you have as to what reasonable doubt is and isn't and that pity, passion and prejudice have no play, I'll allow you to argue that basically as an illustration of your take on common sense. There's no definition of reason and common sense so I'll give you a little bit of latitude over objection. Thank you.
>
> [DPA:] Yes. And, ladies and gentlemen, that's why we asked you in the beginning -- we laughed about it -- we asked, do you have common sense, and there was humour [sic] about it being a loaded question but,

> really, that's what it is. It's applying common sense, the law and the facts as you see them.

I agree with the majority that the DPA's "mumbo jumbo[,]" "[p]ut aside those words[,]" and "gut feeling" remarks improperly denigrated the judicial process and could be interpreted as inviting the jury to ignore the law. However, I respectfully disagree with the majority's suggestion that "no curative instruction was given in this case." Majority Opinion at 48. After the court overruled the initial objection, the prosecutor continued making the same argument and defense counsel objected again. The court then addressed the jury immediately after the ensuing bench conference. Viewed in context, it was clear that the court's comments to the jury at that point referred to the prosecutor's improper statements. Moreover, the court's comments specifically reminded the jury of "[t]he instructions you have as to what reasonable doubt is and isn't and that pity, passion and prejudice have no play[.]" By referring specifically to those instructions, the court nullified any suggestion by the prosecutor that the jury could ignore the law, and thus sufficiently addressed the prejudicial impact of the prosecutor's improper argument. See State v. Wakisaka, 102 Hawaiʻi 504, 516, 78 P.3d 317, 329 (2003) ("Generally, we consider a curative instruction sufficient to cure prosecutorial misconduct because we presume that the jury heeds the court's instruction to disregard improper prosecution comments.") (citations omitted).

Although the court went on to say that it was overruling the objection, it did so by noting specifically that it was allowing the prosecutor to "illustrat[e] . . . [the DPA's] take on common sense." After the court's comments, the prosecutor agreed with the court, and made no further reference to "mumbo jumbo" or "gut feelings." Instead, the prosecutor properly argued that the jury's task was to "apply[] common sense, the law and the facts as you see them." Thus, viewed in context, the court's overruling of the objection did not convey approval of the prosecutor's earlier improper statements, or vitiate the effect of the court's comments reminding the jury to follow the instruction on reasonable doubt without regard to pity, passion or prejudice.

In suggesting that no curative instruction was given here, the majority relies on cases in which either: (1) there was no objection made to the prosecutors' improper remarks, and hence no instruction given, or (2) an objection was made and overruled without further comment by the court. State v. Pacheco, 96 Hawaiʻi 83, 91-92, 95, 97-98, 26 P.3d 572, 580-81, 584, 587-88 (2001) (holding that no curative instruction was given where the court, "[w]ithout explanation, . . . overruled defense counsel's objection" after the first instance of prosecutorial misconduct, and "[d]efense counsel did not object" after the second instance of misconduct); State v. Meyer, 99 Hawaiʻi 168, 170-73, 53 P.3d 307, 309-12 (App. 2002) (noting that no "specific" curative

instruction was given where the court overruled defense counsel's objection without explanation or further instruction).[23]

Respectfully, these cases are all distinguishable from the instant situation, where the court specifically referred the jurors to jury instructions which were contrary to the argument being made by the prosecutor. The test should be whether, viewed in context, the entirety of the court's comments were sufficient to alleviate the prejudice caused by the prosecutor's improper remarks. See People v. Katzenberger, 101 Cal. Rptr. 3d 122, 128 (Ct. App. 2009). In Katzenberger, a California appellate court held that a trial court cured the prosecutor's mischaracterization of reasonable doubt when it initially overruled an objection but subsequently reread to the jury the instruction on reasonable doubt:

> Although the trial court overruled defendant's objection to the Power Point presentation allowing the presentation to go forward, the court later told the jury (after defendant vigorously contended during his argument that the presentation of the Statue of Liberty did not represent reasonable doubt at all) that it would "clarify" the issue by reading the jury instruction on reasonable doubt. The court proceeded to instruct the jury with the correct definition of reasonable doubt. Under these circumstances, the jury was alerted to the dispute regarding the presentation and impliedly told by the trial court to rely on the jury instruction. We presume they did so.

Id. at 128 (emphasis added) (citation omitted); see also Rodriquez v. Peters, 63 F.3d 546, 559 (7th Cir. 1995) (holding

[23] In fact, the ICA in Meyer held that, although the "there was no specific curative instruction" in that case, "generally relevant jury instructions can cure improper arguments by a prosecutor; especially where, as here, such instructions were given repeatedly." 99 Hawaiʻi at 172-73, 53 P.3d at 311-12 (emphasis added) (citations omitted).

that a prosecutor's remark that a witness had been relocated, a matter that was not in evidence, did not require a retrial in part because the trial court, after overruling the defense's objection, "nonetheless issued a contemporaneous limiting and clarifying instruction to the jury stating, 'that's not the evidence,' and that [the witness's] location at the time of the trial 'has nothing to do with the case'"); Uvalle v. State, Nos. 05-98-00466-CR, 05-98-00467-CR, 05-98-00468-CR, 1999 WL 592397, at *6 (Tex. Ct. App. Aug. 9, 1999) (not designated for publication) ("Initially, we note that although the trial judge overruled appellant's objection [to the prosecutor's alleged reference to matters not in evidence], he immediately instructed the jury to 'remember the evidence as they heard it.' A trial judge's instruction will generally cure any harm created by an improper question.") (citations omitted);[24] Morrison v. State, No. 05-94-01649-CR, 1997 WL 282232, at *4 (Tex. Ct. App. May 29, 1997) (not designated for publication) (holding that a trial court's overruling the defense's objection and then instructing the jury to disregard the prosecutor's gestures "cured" the prosecutor's implication that the defendant was a cocaine user). That test was met here.[25]

[24] Texas Rules of Appellate Procedure Rule 47.7(a) provides, "Opinions and memorandum opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, '(not designated for publication).'"

[25] The majority relies on three factors in determining that the instructions in this case were insufficient: (1) the defense objection was (continued...)

The majority also relies on State v. Espiritu, 117 Hawaiʻi 127, 176 P.3d 885 (2008). Majority Opinion at 51. In Espiritu, the allegedly curative instructions were given in the regular course, i.e., along with all other instructions. 117 Hawaiʻi at 143, 176 P.3d at 901. Here, the circuit court, immediately after the improper remark, referred the jurors to the reasonable doubt instruction and reminded them not to be influenced by pity, passion, and prejudice. It was readily apparent that the instruction was in response to the DPA's remarks. Therefore, Espiritu is distinguishable.

Because the circuit court's comments to the jury cured any prejudice, I do not believe it is necessary to assess the strength of the evidence against the defendant. See Wakisaka,

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[25](...continued)
overruled; (2) the jurors were not instructed to reject the DPA's remarks; and (3) the instructions given did not "relate[] to" or "correct" the DPA's remarks. Majority Opinion at 47-51. However, this court has held that a prosecutor's improper remarks were harmless beyond a reasonable doubt in substantially similar circumstances. See State v. Sawyer, 88 Hawaiʻi 325, 329 n.6, 966 P.2d 637, 641 n.6 (1998). In Sawyer, during closing arguments, "the DPA told the jury not to 'let the law try to cloud you out with all of these instructions when you look at it. You just come down to common sense.' The defense objected, and the court instructed the jury that the law had to be followed." Id. at 328, 966 P.2d at 640. This court concluded that the remarks were improper, and characterized them as "an attempt by the DPA to encourage the jury to use its common sense." Id. at 329 n.6, 966 P.2d at 641 n.6. Moreover, although the trial court did not explicitly sustain the objection or tell the jury to disregard the improper argument, id., this court nonetheless concluded that the trial court "effectively sustained the DPD's objection and immediately cured any error by stating that the 'law has to be followed and it's the jury's standpoint.'" Id. (emphasis added).

Similarly, in the instant case, the DPA encouraged the jury to use "common sense," but also made other improper remarks that characterized the jury instructions as "mumbo jumbo" and encouraged the jury to "[p]ut aside those words" in favor of their "gut feeling[.]" By reminding the jury of "[t]he instructions [they had] as to what reasonable doubt is and isn't and that pity, passion and prejudice have no play," the circuit court "effectively sustained" the objection to the improper remarks and cured the error. See id.

102 Hawaiʻi at 516, 78 P.3d at 329 ("Generally, we consider a curative instruction sufficient to cure prosecutorial misconduct because we presume that the jury heeds the court's instruction to disregard improper prosecution comments.") (citations omitted); Klinge, 92 Hawaiʻi at 595-96, 994 P.2d at 527-28 (omitting the harmlessness analysis where the prosecutor misstated the elements of an offense in rebuttal closing and the court responded to defense counsel's objection by stating, "Let him finish[,]" but where the court instructed the jury on the elements of the offense before and after the presentation of evidence).

However, because the majority concludes that the instruction was insufficient, it goes on to assess the strength of the evidence against Schnabel. The majority concludes that the evidence was not overwhelming, and therefore the error was not harmless. Majority Opinion at 53-55. At the outset, overwhelming evidence is not required in order to render an error harmless.[26] Klinge, 92 Hawaiʻi at 593, 994 P.2d at 525 ("While the evidence in this case was not overwhelming, a reasonable trier of fact might fairly conclude upon the evidence that [the defendant] left the objects at the churches in reckless disregard

[26] Although the majority cites a string of cases to support its position that "overwhelming evidence" is required in order to render an error harmless, there are a number of cases that hold otherwise. See State v. Valdivia, 95 Hawaiʻi 465, 484, 24 P.3d 661, 680 (2001) (concluding that the evidence against defendant was not "so weak" as to favor finding the DPA's remarks harmful and holding that the DPA's statements were "harmless beyond a reasonable doubt"); State v. Mara, 98 Hawaiʻi 1, 17, 41 P.3d 157, 173 (2002) (concluding that the prosecutor's remark was harmless after considering the "strength of the overall evidence" against the defendant and holding that the prosecutor's improper comment "[did] not constitute reversible error").

of the risk of terrorizing and/or evacuation.").

The evidence that Schnabel was reckless and did not punch Reuther in self defense was very strong. Two apparently independent (and indeed, reluctant) witnesses for the State testified that the attack was unprovoked and unexpected. According to Kaeo, who observed Reuther walking back to his car "[t]he whole time[,]" Schnabel followed Reuther "from behind[,]" and when Reuther reached his car, Schnabel "whacked" Reuther in the face. Kaeo repeatedly denied that Reuther, in any way, provoked Schnabel into hitting him. Based on what Kaeo saw, he was "positive" that there was no provocation. Ako testified that just before Schnabel punched Reuther in the parking lot, she heard Schnabel say, "[g]et the fuck out of here." When asked whether Reuther "lunged towards [Schnabel]" or "charg[ed] [Schnabel] like he was going to tackle him[,]" Ako responded, "No."

Moreover, the medical examiner's testimony provided strong corroborating evidence that Schnabel was reckless and did not punch Reuther in self defense. The medical examiner testified that Reuther's cause of death was a "[t]raumatic subarachnoid hemorrhage" caused by an "assaultive blunt force injury to the head." The medical examiner stated that the hospital thought it was a ruptured aneurism, but that conclusion was drawn based on scans and prior to the medical examiner's autopsy. The medical examiner testified that when the autopsy

was performed, "[she] did not see any aneurysms as the doctors suspected, but instead saw this tear right in the middle" where "you never see an aneurysm[.]" The medical examiner explained that the stretching of blood vessels can cause this type of tear, and that stretching occurs when there is rotational acceleration of the head, but the brain lags. The medical examiner further explained that when one expects a blow, "that sudden acceleration/deceleration is not there." In contrast, the medical examiner explained that when one does not expect a blow, "even if the blow is not really hard, the brain goes through that acceleration/deceleration process[.]" Accordingly, the medical examiner's testimony provided strong support that Reuther's injury was caused by a punch that he did not anticipate.

The only person who testified to the contrary was not an independent witness; Reverio was the sister of Schnabel's close friend and, in fact, identified Schnabel as her friend. There was also uncontradicted testimony from an independent witness that Schnabel was much larger than Reuther. Moreover, the two independent witnesses testified that they believed that Schnabel was under the influence of methamphetamine at the time of the confrontation. Thus, the State adduced independent witness testimony and forensic evidence that indicated that Schnabel, under the influence of methamphetamine, struck Reuther, a person much smaller than himself, without provocation or warning. The only contrary evidence came from a non-independent

witness.

Unlike in a typical "credibility contest," here the testimony of independent witnesses and forensic evidence strongly supported the State's theory of the case. In such situations, this court has consistently found strength of the evidence to weigh in favor of the State for purposes of the harmlessness analysis. Compare Pacheco, 96 Hawaiʻi at 96-97, 26 P.3d at 585-86 (characterizing as a "credibility contest" a trial where the defendant's testimony conflicted with that of the police officers regarding the defendant's intent to commit the offense of second degree escape from the police) and State v. Rogan, 91 Hawaiʻi 405, 415, 984 P.2d 1231, 1241 (1999) (holding that strength of the evidence weighed against the State when, in the absence of "independent eyewitnesses or conclusive forensic evidence[,]" the case "turned on the credibility of . . . the [c]omplainant and [the defendant]") with State v. Maluia, 107 Hawaiʻi 20, 27, 108 P.3d 974, 981 (2005) (holding that strength of the evidence weighed against the defendant where the State's case was supported by two independent witnesses and evidence of a blood alcohol content which "rais[ed] additional doubts as to the defendant's credibility") and Klinge, 92 Hawaiʻi at 593, 994 P.2d at 525 (holding that strength of the evidence weighed against the defendant where the defendant's case hinged on his own testimony and the State's case was supported by photographs and independent witnesses).

The majority's analysis of the strength of the evidence focuses on the fact that some evidence (i.e., Reverio's testimony) contradicting the State's case was introduced. Majority Opinion at 53-54. Respectfully, this approach is a departure from this court's harmlessness jurisprudence. As the name of this factor, "strength or weakness of the evidence," and this court's case law indicate, the question is not merely whether some evidence in the defendant's favor exists, but whether the State's evidence is strong enough to overcome the potential effect of the misconduct. Valdivia, 95 Hawaiʻi at 484, 24 P.3d at 680 ("[T]he evidence against [the defendant] was not so weak as to favor finding the remarks harmful."); Klinge, 92 Hawaiʻi at 593, 994 P.2d at 525 ("While the evidence in this case was not overwhelming, a reasonable trier of fact might fairly conclude upon the evidence that [the defendant] left the objects at the churches in reckless disregard of the risk of terrorizing and/or evacuation."); Rogan, 91 Hawaiʻi at 415, 984 P.2d at 1241 (holding that the evidence against the defendant, which turned on the credibility of the complainant and the defendant, "was [not] so overwhelming as to outweigh the inflammatory effect of the [DPA's racially charged] comments").

The majority also states that there was some doubt as to whether Schnabel's punch caused Reuther's death because of the evidence that the hospital staff that treated Reuther after the incident concluded that he died from an aneurysm. Majority Opinion at 53. This argument is contrary to Schnabel's position

at trial. During closing argument, defense counsel explicitly acknowledged that the punch killed Reuther: "[Schnabel] punched [Reuther] . . . . [Reuther] died from that punch. We know that . . . . Those facts are not in dispute."[27]

In sum, considering the curative effect of the instruction and the strength of independent witness testimony and forensic evidence against Schnabel, the DPA's remarks were harmless.

Accordingly, I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

[27] The majority also relies on the medical examiner's testimony that the injury was "unique" for the proposition that the jury could have reasonably arrived at the conclusion that the death was not caused by Schnabel's strike. Majority Opinion at 53. This takes the word "unique" out of the context of the examiner's testimony:

> There was no bruising to the other areas. Usually, if somebody falls, you get what's called subdural hemorrhage. He didn't have any of that; only he had this subarachnoid hemorrhage. That's what was so unique about this.

Contrary to the majority's implication, the medical examiner consistently testified that an "assaultive blunt force injury" "and nothing else" had caused the death in this case.