IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee,

vs.

MELCHOR B. ADVIENTO,
Petitioner/Defendant-Appellant.

SCWC-30171

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 30171; CR. NO. 07-1-2068)

FEBRUARY 10, 2014

DISSENTING OPINION BY NAKAYAMA, J.
WITH WHOM RECKTENWALD, C.J., JOINS

I respectfully dissent from the majority's holding that the trial court plainly erred in failing to instruct the jury on the extreme mental and emotional disturbance (EMED) defense because there is no evidence to support the EMED instruction and, regardless, Mr. Adviento waived this instruction.

I. EMED is an affirmative mitigating defense

EMED is a mitigating defense which can reduce a charge of murder in the first or second degree to a charge of manslaughter. Hawaiʻi Revised Statutes (HRS) § 707-702(2) (Supp. 2008). Manslaughter committed under extreme mental or emotional disturbance is "the intentional [or knowing] killing of another 'while under the influence of a reasonably induced emotional disturbance causing a temporary loss of normal self-control.'" State v. Aganon, 97 Hawaiʻi 299, 304, 36 P.3d 1269, 1274 (2001) (alterations in original) (quoting State v. Sawyer, 88 Hawaiʻi 325, 333, 966 P.2d 637, 645 (1998)). "But for the presence of these extenuating circumstances the intentional or knowing killing of another human being would be murder . . . ." State v. Holbron, 80 Hawaiʻi 27, 42, 904 P.2d 912, 927 (1995).

To warrant an instruction as to the EMED defense, there must be evidence of the defendant's extreme mental or emotional disturbance as well as a "reasonable explanation" for that disturbance. HRS § 707-702(2). "The reasonableness of the explanation shall be determined from the viewpoint of a reasonable person in the circumstances as the defendant believed them to be." HRS § 707-702(2). We have explained extreme emotional disturbance as:

> "the emotional state of an individual who: (a) has no mental disease or defect that rises to the level established by Section 30.05 of the Penal Law; and (b) is exposed to an

> extremely unusual and overwhelming stress; and (c) has an extreme emotional reaction to it, as a result of which there is a loss of self-control and reason is overborne by intense feelings, such as passion, anger, distress, grief, excessive agitation or other similar emotions."

State v. Perez, 90 Hawaiʻi 65, 73, 976 P.2d 379, 387 (1999) (emphasis omitted) (quoting State v. Dumlao, 6 Haw. App. 173, 181–82, 715 P.2d 822, 829 (1986)). We reasoned that "'a killer's self-control, or lack of it, at the time of the killing is a significant, even determining, factor in deciding whether the killer was under the influence of an extreme emotional disturbance such that his conduct would fall under HRS § 707-702(2).'" Sawyer, 88 Hawaiʻi at 333, 966 P.2d at 645 (quoting State v. Matias, 74 Haw. 197, 204, 840 P.2d 374, 378 (1992)).

EMED manslaughter is an affirmative defense. HRS § 707-702(2). Therefore, the defendant bears the burden of proving by a preponderance of the evidence that he or she was acting under the influence of reasonably induced extreme mental or emotional disturbance at the time of the offense. See HRS § 701-115(2)(b) (1993) ("If the defense is an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in light of any contrary prosecution evidence, proves by a preponderance of the evidence the specified fact or facts which negative penal liability."). If the jury unanimously determines that the defendant has established the EMED defense by a preponderance of the evidence,

the jury must acquit the defendant of murder and convict the defendant of the lesser offense of manslaughter.

HRS § 701-115(1) defines a defense as a "'fact or set of facts which negatives penal liability.'" The majority implies that because proof of a mitigating defense results in a conviction for a lesser offense, rather than a complete acquittal, a mitigating defense is not a "true defense." See Majority at 50-52. The majority's analysis ignores that, when proved, a mitigating defense "negatives penal liability" for the charged offense and results in an acquittal for that offense. That proof of the mitigating defense also results in conviction for a lesser offense does not mean that it is not a defense. Mitigating defenses are "defenses" pursuant to HRS § 701-115(1).

II. There is no evidence to support the EMED instruction

The majority states that "it is the trial court's obligation to provide an EMED instruction when 'the record reflects any evidence . . . that the defendant acted under a loss of self-control resulting from [EMED].'" Majority at 30-31 (emphasis in original) (quoting Aganon, 97 Hawaiʻi at 304, 36 P.3d at 1274). Even under this lenient standard, there is no evidence in the record to support the giving of an EMED instruction. Where the record contains no evidence to support an EMED defense, the defendant is not entitled to such an

instruction. Sawyer, 88 Hawaiʻi at 331, 966 P.2d at 643.

The majority states that the evidence adduced at trial clearly raises the issue of whether Mr. Adviento acted under the influence of EMED. Majority at 63. The majority first emphasizes evidence of Mr. Adviento's anger preceding the fatal stabbing. Majority at 65-66. Citing the allegations regarding Mrs. Adviento's possible romantic relationship with her co-worker Merced, the majority surmises that Mr. Adviento "may have been under significant strain and stress . . . due to the problems he and [Mrs. Adviento] were experiencing." Majority at 65. The majority also notes Mr. Adviento's statements that he felt "frustrated" when he heard Mrs. Adviento speaking on the phone and that he was "mad" during his subsequent argument with her. Majority at 66. The majority emphasizes that this lengthy argument and Mr. Adviento's anger were corroborated by Officer Sooto's testimony that Villaver told him the argument went on for several hours and by Merced's statement that Mr. Adviento was "screaming mad." Majority at 66.

However, the evidence of the Advientos' purported marital difficulties does not rise to the level of "an extremely unusual and overwhelming stress" that would reasonably explain a loss of self-control. Perez, 90 Hawaiʻi at 73, 976 P.2d at 387 (emphasis added). Mr. Adviento testified that he had suspected

Mrs. Adviento of "fooling around" for about a year and that Mrs. Adviento had requested a divorce two or three times. Mr. Adviento also stated that he would not be ashamed to be divorced and it would "be okay" if Mrs. Adviento left him. Although Mr. Adviento stated that he felt frustration and anger while arguing with Mrs. Adviento regarding her phone call with Merced, this testimony regarding his emotional reaction falls far short of constituting evidence of a physical loss of self-control.

The majority also cites to Mr. Adviento's testimony regarding his mental state immediately before and during the fatal stabbing of Mrs. Adviento. Majority at 66. Mr. Adviento testified that he was "surprised" that Mrs. Adviento stabbed him in the stomach. Majority at 66. He stated that, while he struggled with Mrs. Adviento, he was "afraid of [his] life" and he "thought [he] was going to die." Majority at 66. Mr. Adviento also testified that he did not know how many times, or where he stabbed Mrs. Adviento. Majority at 66.

Mr. Adviento's testimony regarding his deadly struggle with Mrs. Adviento is similar to the testimony in Sawyer from which we concluded that there was no evidence to warrant an EMED manslaughter instruction. In Sawyer, we reasoned that there are "situation[s] where a defendant exerts deadly force in self-defense, without a loss of self-control due to the influence of

extreme mental or emotional disturbance." 88 Hawaiʻi at 333, 966 P.2d at 645.

The altercation in Sawyer occurred between two women living in Kapiolani Park. Id. at 327, 966 P.2d at 639. The complaining witness (CW) testified that she had accused defendant Sawyer of stealing CW's mother's food stamps and that Sawyer had then hit CW with a vodka bottle. Id. An altercation ensued during which the women punched each other and CW was cut by the, then broken, vodka bottle. Id. Sawyer testified that it was CW who threw the first punch. Id. at 328, 966 P.2d at 640. She stated that the vodka bottle broke during the ensuing fight, and that she used the broken bottle to push CW away, inadvertently cutting CW in the process. Id. When the police arrived on the scene, CW was bleeding heavily from wounds to her face, neck, and head. Id. at 327, 966 P.2d at 639.

As in Sawyer, Mr. Adviento testified that he was involved in a potentially deadly fight. Both Sawyer and Mr. Adviento testified that they were not fully aware of the results of their actions during the fight. Compare Majority at 73-74 (stating that Mr. Adviento did not know where and how many times he stabbed Mrs. Adviento), and Sawyer, 88 Hawaiʻi at 328, 966 P.2d at 640 (stating that Sawyer did not realize that she was cutting CW). Although Mr. Adviento testified that he was

surprised and afraid, none of his testimony indicated that he lost self-control. Without evidence of a loss of self-control, an EMED instruction is not warranted.

Finally, the majority references Mr. Adviento's testimony regarding his state of mind following the stabbing. Mr. Adviento stated that after Mrs. Adviento stopped moving he felt "shocked." Majority at 67. This testimony is irrelevant. Only evidence of Mr. Adviento's state of mind at the time of the altercation is pertinent to the EMED defense. In State v. Moore, 82 Hawaiʻi 202, 921 P.2d 122 (1996), we concluded that evidence that the defendant was "agitated," "nervous," "frantic," "anxious," and "distraught" at the time of his arrest, immediately following the shooting of his wife, was not probative of his state of mind at the time of the shooting. 82 Hawaiʻi at 210, 921 P.2d at 130. We concluded that "even if this evidence supported a conclusion that [the defendant] was under the influence of an EMED when he was arrested, the relevant inquiry is whether he was under such influence at the time he shot [his wife] and whether there was a reasonable explanation, viewed from [the defendant's] standpoint, for the disturbance." Id. Likewise, Mr. Adviento's "shock" upon realizing that his wife was dead, is not evidence of his state of mind at the time of the altercation.

The strain in the Advientos' relationship, Mr. Adviento's purported "surprise" at Mrs. Adviento's attack, and Mr. Adviento's emotional reactions subsequent to Mrs. Adviento's death are not evidence of a loss of self-control. Therefore, there is no evidence to support an EMED instruction.

III. An unrequested jury instruction regarding a defense is not subject to the "any" evidence standard

The majority's "any evidence" standard directly contradicts the test for unrequested jury instructions this court recently developed in State v. Taylor, 130 Hawaiʻi 196, 307 P.3d 1142 (2013). The Taylor test provides that the appellate court must first review unrequested defense instructions for plain error affecting substantial rights. Id. at 197-98, 307 P.3d at 1143-44. "[P]lain error exists if the defendant, at trial, had met his or her initial burden to adduce credible evidence of facts constituting the defense (unless those facts are supplied by the prosecution's witness)." Id. at 198, 307 P.3d at 1144. Credible evidence is "evidence with reasonable grounds for being believed." Id. at 205 n.10, 307 P.3d at 1151 n.10. Even if the trial court plainly erred in omitting a jury instruction, this is grounds for reversal only "if an examination of the record as a whole reveals that the error was not harmless beyond a reasonable doubt." Id. at 208, 307 P.3d at 1154.

In our opinion in Taylor, we first clarified our

earlier holding in State v. Stenger, 122 Hawaiʻi 271, 226 P.3d 441 (2010), another case involving a mistake of fact jury instruction. Id. at 203, 307 P.3d at 1149. We stated that in Stenger, the trial court had a duty to provide the defense instruction because the defendant had requested it and had provided some evidence in support of the defense. Id. We reached this conclusion by applying our standard for requested jury instructions from Locquiao, 100 Hawaiʻi 195, 58 P.3d 1242 (2002). Id. at 202-03, 307 P.3d at 1148-49. In Locquiao, we held that "'where a defendant has adduced evidence at trial supporting an instruction on the statutory defense of ignorance or mistake of fact, the trial court must, at the defendant's request, separately instruct as to the defense . . . no matter how weak, inconclusive, or unsatisfactory the evidence [as to the defendant's mistake of fact] may be.'" Id. at 202, 307 P.3d at 1148 (alterations in original) (quoting Stenger, 122 Hawaiʻi at 281, 226 P.3d at 451).

Pursuant to Locquiao, Stenger, and Taylor, the trial court is obligated to give a requested jury instruction on a defense when "some evidence" in support of the defense is proffered. However, a trial court is only required to give an unrequested jury instruction on a defense when "credible evidence" is proffered. Id. at 203-04, 307 P.3d at 1149-50. In

Taylor, we concluded that the omission of a mistake of fact jury instruction did not constitute plain error because neither the defendant nor the State produced sufficient evidence to support the defense. Id. at 208, 307 P.3d at 1154.

Because Mr. Adviento did not request an EMED instruction, and, in fact, actively waived such an instruction, the Taylor test should apply. Under this test, the trial court would only err in failing to give the EMED instruction if credible evidence was proffered at trial. As discussed above, there was no evidence to support the EMED instruction and thus the trial court did not err in failing to give the instruction under either the "any evidence" or the "credible evidence" standards.

The majority contends that the holding in Taylor is not applicable here because Taylor concerned a non-affirmative complete defense whereas this case concerns an affirmative mitigating defense. Majority at 56-58. However, the majority fails to adequately justify why the rules for these different types of defenses should differ. The majority notes Taylor's reasoning that it may be difficult for a trial court to identify the existence of "weak, inconclusive, or unsatisfactory evidence" that would support the non-affirmative complete defense of mistake of fact. Majority at 57 (quoting Taylor, 130 Hawaiʻi at

207 n.12, 307 P.3d at 1153 n.12). Under the majority's reasoning, the possible existence of an EMED defense is far more readily apparent. Yet, it is not clear that affirmative mitigating defenses are always more easily identified than non-affirmative complete defenses, and the majority does not make this contention. Even if the trial court is alert to the possibility of an affirmative mitigating defense such as EMED, it may be difficult for the court to differentiate between the existence of no evidence to support the defense, and the existence of only weak, inconclusive, and unsatisfactory evidence to support the defense. Furthermore, there is no rational justification for requiring a circuit court to give an instruction regarding an affirmative defense supported by only weak, inconclusive, and unsatisfactory evidence because the defendant is required to prove this defense by a preponderance of the evidence.

IV. Jury instructions on affirmative defenses are waivable by the defendant

A. Our caselaw does not bar the waiver of affirmative defense instructions

The majority contends that because it is the trial court's duty to instruct the jury on the law and to determine whether the record contains the necessary evidence to support a defense instruction, a defendant should not be allowed to waive

an instruction for which there is evidentiary support. Majority at 36. The majority also reasons that to allow a defendant to waive an EMED defense impairs the jury's truth finding abilities and promotes an "all or nothing" approach. Majority at 38-39. According to the majority, when the jury is prevented from receiving an instruction on a warranted defense, the jury is unable to "accurately determine the defendant's criminal liability based on the evidence that was presented to it." Majority at 42. In support of this conclusion, the majority relies upon this court's opinion in State v. Haanio, 94 Hawaiʻi 405, 16 P.3d 246 (2001), overruled in part on other grounds, State v. Flores, 131 Hawaiʻi 43, 314 P.3d 120 (2013). Majority at 38-43.

In Haanio, we held that a trial court must instruct a jury of any lesser included offense for which there is a rational basis in the evidence, regardless of whether the defendant objects to such instructions. Id. at 407, 16 P.3d at 248. We reasoned that a defendant should not be permitted to waive an included offense instruction for "strategic reasons." Id. at 414, 16 P.3d at 255. We strongly disapproved of "'a strategy that permits parties in a criminal trial to forego instructions on provable lesser-included offenses, thereby forcing the jury to choose between conviction and acquittal on the greater charge.'"

Id. (quoting C. Carpenter, The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?, 26 Am. J. Crim. L. 257, 258 (1999)). We also reasoned that neither a defendant nor the prosecution have constitutional or substantial rights not to have the jury instructed on lesser included offenses. Id. at 414-15, 16 P.3d 256-57.

Our opinion in Haanio cited to the California Supreme Court's decision in People v. Barton, 906 P.2d 531 (Cal. 1995), concluding that a defendant could not waive a jury instruction on lesser included offenses supported by the evidence. Haanio, 94 Hawaiʻi at 415, 16 P.3d at 256; Barton, 906 P.2d at 536-37. However, in Barton, the California court stressed the distinction "between a trial court's relatively broad duty to instruct on lesser included offenses and its less expansive duty to instruct on defenses." 906 P.2d at 536-37. The California court reasoned that limiting a trial court's duty to issue defense instructions in no way limits the jury's ability to fully consider all criminal offenses supported by the evidence:

> When . . . the question is whether the trial court must, on its own initiative, instruct the jury on *defenses* not asserted by the defendant, different considerations arise. Failure to so instruct will not deprive the jury of the opportunity to consider the full range of criminal offenses established by the evidence. Nor is the prosecution denied the opportunity to seek conviction on all offenses included within the crime charged. Moreover, to require trial courts to ferret out all defenses that might possibly be shown by the evidence, even when inconsistent with the defendant's theory at trial, would not only place an undue burden on the trial courts but would also create a potential of prejudice

> to the defendant. "Appellate insistence upon *sua sponte* instructions which are inconsistent with defense trial theory or not clearly demanded by the evidence would hamper defense attorneys and put trial judges under pressure to glean legal theories and winnow the evidence for remotely tenable and sophistical instructions."

Id. at 536 (quoting People v. Sedeno, 518 P.2d 913, 921-22 (Cal. 1974), overruled on other grounds by People v. Breverman, 960 P.2d 1094 (Cal. 1998)). The California court concluded that the trial court only has a duty to give a sua sponte jury instruction "if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." Id. at 534.

While the California courts recognize that, "even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence," they have repeatedly concluded that this duty does not extend to instructing a jury on defenses that are inconsistent with a defendant's theory of the case. Sedeno, 518 P.2d at 921; see also Breverman, 960 P.2d at 1102 (emphasizing the "sharp distinction" between instructions on defenses and those on lesser included offenses); Barton, 906 P.2d at 536-37 (reasoning that there are strong policy considerations to support the distinction between defense instructions and lesser included offense instructions); People v. Elize, 84 Cal. Rptr. 2d 35, 39-40 (Cal.

Ct. App. 1999) (stating that courts have a duty to instruct on lesser included offenses sua sponte, but that courts only have a duty to instruct on defenses as requested by the defendant). The California courts acknowledge that a defendant may not waive an instruction on a lesser included offense because "a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense." Sedeno, 518 P.2d at 921. However, the California courts also observe that to mandate a court to sua sponte instruct on every defense supported by substantial evidence places an undue burden upon trial judges and is possibly prejudicial to defendants. Id. Therefore, when "there is substantial evidence of a defense inconsistent with the defense advanced by defendant, the court should ascertain whether the defendant wants instructions on the alternate theory" and should give the instruction when it is expressly requested by the defendant. Elize, 84 Cal. Rptr. 2d at 42.

B. Defendants have a constitutional right to control their defenses

In crafting rules regarding the sua sponte issuance of jury instructions, we must not only be cognizant of the trial court's duty to instruct the jury properly on the law, but also of a defendant's right to present the defenses of his or her choosing. Compare Haanio, 94 Hawaiʻi at 414-15, 16 P.3d at 255-56 (stating that it is the duty of the trial courts to ensure

that juries are properly instructed) and State v. Kupau, 10 Haw. App. 503, 516, 879 P.2d 559, 565 (1994) (discussing a defendant's right to dictate a defense strategy). The defendant's right to control his or her defense emanates from the sixth amendment to the United States Constitution[1] and article I, section 14 of the Hawaiʻi Constitution[2]. The United States Supreme Court has explained that the sixth amendment provides both the right to the effective assistance of counsel and also the right to control one's defense. See Strickland v. Washington, 466 U.S. 668, 686 (1984) ("The Sixth Amendment recognizes the right to the assistance of counsel . . . . Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."). Previous United States Supreme Court cases have held that the right to present a defense free from government interference was violated by a Tennessee rule that required the defendant to be the first defense witness, Brooks v. Tennessee, 406 U.S. 605, 612-613 (1972), and by a Georgia statute barring direct examination of the defendant, Ferguson v. Georgia,

[1] The sixth amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

[2] Article I, section 14 of the Hawaiʻi Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . and to have the assistance of counsel for the accused's defense." Haw. Const. art. I, § 14.

365 U.S. 570, 593-96 (1961). The Court in Brooks explained, "Whether the defendant is to testify is an important tactical decision . . . [and] the statute restricts the defense -- particularly counsel -- in the planning of its case." 406 U.S. at 612-13.

Hawaiʻi courts have also recognized that "[t]he sixth amendment and article I, section 14 of the Hawaiʻi Constitution guarantee an accused the right to the assistance of counsel in his or her defense, . . . as well as the right to present a defense." State v. Vliet, 91 Hawaiʻi 288, 294 n.3, 983 P.2d 189, 195 n.3 (1999) (internal citations omitted). We have explained that this right to offer a defense extends to the right to control that defense:

> Undeniably, the defendant has a constitutional right under the sixth amendment to offer a defense, and, as an adjunct to this right, to devise a proper and appropriate trial strategy to blunt or otherwise neutralize the thrust of the prosecution's case-in-chief. But this right and option, while relevant to the jury's duty to properly perform its constitutional functions in arriving at a just decision, is separate and distinct from the independent duty of the court to reasonably assist and instruct the jury in the intelligent discharge of these functions so as to avoid a miscarriage of justice.

Kupau, 10 Haw. App. at 516-17, 879 P.2d at 565 (emphasis added) (quoting Edward G. Mascolo, Procedural Due Process and the Lesser-Included Offense Doctrine, 50 Alb. L. Rev. 263, 299-300 (1986)). Furthermore, "under the Hawaii's [sic] Constitution, defendants are clearly afforded greater protection of their right

to effective assistance of counsel," which extends to their right to dictate trial strategy. State v. Aplaca, 74 Haw. 54, 67 n.2, 837 P.2d 1298, 1305 n.2 (1992).

A defendant's choice of defenses is a crucial element of trial strategy. Just as the government may not dictate the order of defense witnesses or interfere with the direct examination of the defendant, the government must also refrain from forcing a defense instruction upon a defendant. For the court to issue a defense instruction actively opposed by the defendant is a governmental intrusion into the defendant's trial strategy. This intrusion deprives a defendant of his or her control over the defense and deprives the defendant of the value of his or her attorney's strategic advice regarding the choice of defenses.

Generally, a defendant or "[d]efense counsel's tactical decision at trial will not be questioned by a reviewing court." State v. Samuel, 74 Haw. 141, 156, 838 P.2d 1374, 1382 (1992). As I emphasized in my dissent in Stenger, "it is not the trial court's responsibility to implement defense strategy with a defense instruction when the defense counsel fails to do so." Stenger, 122 Hawaiʻi at 305, 226 P.3d at 475 (Nakayama, J., dissenting) (emphasis in original). Furthermore, the trial court should not actively undermine a defense strategy by issuing a

defense instruction contrary to a defendant's theory of the case. When a trial court issues a defense instruction over a defendant's waiver of that instruction, the trial court is reaching beyond its established role as the instructor of law and interfering with a defendant's sixth amendment and article I, section 14 right to control his or her defense.

While we have concluded that the trial court's duty to instruct on lesser included offenses outweighs any interest the defendant might have in waiving such an instruction, the balancing of these interests is fundamentally different for jury instructions regarding defenses. See State v. Auld, 114 Hawaiʻi 135, 149, 157 P.3d 574, 588 (App. 2007) (Nakamura, J., concurring and dissenting) ("[T]he question of whether the defendant should have a say in how to defend against the charges presented to the jury by forgoing a self-defense instruction is different from the question . . . of whether the defendant can prevent the jury from considering his or her guilt on lesser included offenses.") Trial courts are mandated by statute to instruct the jury as to any lesser included offense for which "there is a rational basis in the evidence." HRS § 701-109(5) (1993) ("The court is not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting

the defendant of the included offense." (emphasis added)); see also Haanio, 94 Hawaiʻi at 414, 16 P.3d at 255 ("We now conclude that the better rule is that trial courts must instruct juries on all lesser included offenses as specified by HRS § 701-109(5), despite any objection by the defense, and even in the absence of a request from the prosecution.").

There is no analogous statutory mandate for defense instructions. The jury may only receive an instruction on a defense if "evidence of the specified fact or facts has been presented." HRS § 701-115(2). In the case of affirmative defenses such as EMED, the defendant may only be acquitted if the jury concludes that the defense was proven by a preponderance of the evidence. It would seem particularly strange for a court to foist an affirmative defense upon a defendant, forcing a defendant to bear the burden of proving that defense by a preponderance of the evidence, where the defendant altogether opposes instructing the jury on such a defense.

C. The Taylor test should be modified to permit waiver

To provide clear rules for trial courts while protecting the rights of defendants, we should incorporate aspects of California's test for the issuance of sua sponte jury instructions into the Taylor "credible evidence" standard. The California Supreme Court has elaborated upon a similar standard:

"[T]he duty to give instructions, Sua sponte [sic], on particular defenses and their relevance to the charged offense arises only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." Sedeno, 518 P.2d at 921. "[W]hen the trial court believes 'there is substantial evidence that would support a defense inconsistent with that advanced by a defendant, the court should ascertain from the defendant whether he wishes instructions on the alternative theory.'" Breverman, 960 P.2d at 1102 (emphasis omitted) (quoting Sedeno, 518 P.2d at 922 n.7).

I recommend that we clarify the Taylor test to allow a defendant to enter a knowing, intelligent, and voluntary waiver of a defense jury instruction. Under this test, a trial court only has a duty to give unrequested instructions on defenses if the defense is supported by credible evidence and the defendant does not waive such an instruction. When the prosecution or the trial court identifies a defense supported by credible evidence, the trial court should seek the defendant's approval before instructing the jury on such a defense. This process will prevent a defendant from being unduly prejudiced by defense instructions inconsistent with the defendant's theory of the case.

D. The majority's fears are unfounded

The majority fears that permitting waiver of defense instructions will undoubtedly lead to the defendant challenging the waiver on appeal. Majority at 45 n.21. The majority's concern appears unfounded. Where a defendant has entered an on the record waiver of a defense instruction, the defendant may not allege on appeal that the court plainly erred in not issuing the defense instruction.[3] Indeed, it appears that it is the majority's test that will lead to a greater number of appellate challenges. Under the majority's test, defendants may prevail on appeal by arguing that the circuit court plainly erred in failing to give a defense instruction that the defendant did not request at trial and that was supported by only a scintilla of evidence.[4]

The concerns we raised in Haanio regarding the waiver of lesser included offense instructions are also not implicated by the waiver of defense instructions. Allowing a defendant to waive a lesser included offense instruction "forecloses the

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[3] Defendants may of course raise ineffective assistance of counsel claims if they allege that the waiver was based on constitutionally defective advice from their attorneys. Additionally, defendants may challenge whether the waiver of the defense instruction was knowing, voluntary, or intelligent. However, these possible points of error would not raise any obstacles on appeal not present in other challenges to the effectiveness of counsel or the validity of a waiver.

[4] This result is particularly illogical because a jury may only convict a defendant of EMED manslaughter if it concludes that the preponderance of the evidence proves that the defendant was acting under the influence of reasonably induced extreme mental or emotional disturbance at the time of the offense. See HRS § 701-115(2)(b) (1993)

determination of criminal liability where it may in fact exist." Haanio, 94 Hawaiʻi at 414, 16.P.3d at 255. However, allowing defendants to choose which defenses to raise, and which to waive, does not constrain the trial court from instructing the jury on the full range of offenses for which defendants may be liable. It simply allows defendants, assisted by their counsel, to exercise their sixth amendment right to control their defenses.

The majority also references the concern we expressed in Haanio, regarding the trial court's role in determining whether to give an included offense instruction where the State and the defendant express divergent interests. 94 Hawaiʻi at 413-14, 16 P.3d at 254-55. We stated, "[P]ermitting the parties, for their strategic reasons, to cast upon the trial court the burden, at the risk of error, of deciding not to give an included instruction when the evidence supports it, may have unduly complicated the trial court's ultimate obligation to promote justice in criminal cases." Id. at 414, 16 P.3d at 255. The majority reasons that this same concern would be implicated were waiver of defense instructions permitted. Majority at 44-45. However, in the case of defense instructions, the trial court will not "be required to 'steer[] through the competing interests' of the parties and determine, at the risk of error, whether or not to give the instruction." Majority at 44

(alteration in original) (quoting Haanio, 94 Hawaiʻi at 414, 16 P.3d at 255). The State may alert the court to a defense it believes to be supported by the evidence or it may argue that there is no evidence to support a particular defense instruction. However, the State has no legitimate interest in requesting that the circuit court not give a defense instruction when that instruction is requested by the defendant and supported by credible evidence. The presentation of a particular defense is a tactical decision constitutionally reserved for the defendant. If the defendant wishes to waive an instruction, this decision must be honored by the trial court.[5]

The majority also posits that permitting a defendant to waive the consideration of a defense supported by some evidence would place the trial court in an untenable situation in the case of bench trials. Majority at 48-49. The majority contends that where a defendant in a bench trial has waived a defense, "the trial judge would be forced to reach an 'untrue' verdict not based on the facts but instead dictated by the defendant's trial strategy." Majority at 48. However, this fear ignores the fact

[5] The majority contends that the State's interest in obtaining a "true verdict" supports giving "the jury the opportunity to convict the defendant of manslaughter." Majority at 44. However, if the State believed the evidence supported a conviction of manslaughter it was not precluded from arguing as much to the jury. The jury received an instruction regarding the lesser included offense of reckless manslaughter and could have convicted Mr. Adviento of this offense.

that judges are often privy to factual and legal information that they are barred from considering when adjudicating a bench trial. In a bench trial, judges routinely receive incompetent evidence or evidence that is admissible for a only a limited purpose. "[W]hen evidence is admissible for a limited purpose, we presume that the judge only considered the evidence for the permissible purpose." State v. Lioen, 106 Hawaiʻi 123, 133, 102 P.3d 367, 377 (App. 2004); see also State v. Vliet, 91 Hawaiʻi 288, 298, 983 P.2d 189, 199 (1999) ("'[A] judge is presumed not to be influenced by incompetent evidence.'" (quoting State v. Antone, 62 Haw. 346, 353, 615 P.2d 101, 107 (1980)). A judge may also have knowledge of statutory violations, other than those with which the defendant was charged, which are proved by the evidence presented during the bench trial. However, the judge is of course barred by due process considerations from convicting the defendant of these uncharged offenses. Judges' verdicts in these situations are no less "true" simply because the judges are barred from considering facts and law outside the scope of the matter before the court.

Judges must maintain neutrality and "'should not assume the role of advocate for either party.'" State v. Medeiros, 80 Hawaiʻi 251, 261, 909 P.2d 579, 589 (App. 1995) (quoting State v. Silva, 78 Hawaiʻi 115, 118, 890 P.2d 702, 705 (App. 1995)). In

bench trials, this admonishment is of particular importance because, "'the court acts both as the judge of the law and as the judge of the facts.'" Id. (quoting Silva, 78 Hawaiʻi at 118, 890 P.2d at 705). "'When the trial judge fails to act impartially and takes on the role of the prosecutor, the resulting conviction will be reversed.'" Id. (quoting Silva, 78 Hawaiʻi at 118, 890 P.2d at 705). It is equally important that the judge not take on the role of defense attorney. But, pursuant to the majority's opinion, a judge must now assert a defense on behalf of a defendant when the defendant has specifically waived that defense.[6]

V. Mr. Adviento validly waived the EMED instruction

As discussed in Part I, there was no evidence to support an EMED instruction. However, even if sufficient evidence was presented to support an EMED instruction, Mr. Adviento entered a knowing, intelligent, and voluntary waiver of the instruction. In determining "'whether a waiver was voluntarily and intelligently undertaken, this court will look to the totality of facts and circumstances of each particular case.'" State v. Friedman, 93 Hawaiʻi 63, 68-69, 996 P.2d 268, 273-74 (2000). The majority suggests that even if defendants are

[6] Of course, there is nothing to prevent a judge from convicting a defendant of a lesser included offense such as manslaughter if it is supported by the evidence.

permitted to waive defense instructions, Mr. Adviento's purported waiver of the EMED instruction was not knowing, intelligent, and voluntary. Majority at 46-47. The majority contends that Mr. Adviento was motivated to waive the EMED instruction by his belief that such a waiver would prevent the State from admitting his prior assault conviction into evidence. Majority at 46-47. However, a review of the circuit court's multiple colloquies with Mr. Adviento demonstrates that the admission of Mr. Adviento's prior conviction into evidence was not directly tied to Mr. Adviento's assertion of the EMED defense, and Mr. Adviento's waiver of the defense instruction was knowing, intelligent, and voluntary.

A. Mr. Adviento entered a knowing, intelligent, and voluntary waiver of the EMED instruction

In a pretrial hearing, Mr. Adviento and the State first discussed the admissibility of his prior assault conviction resulting from an altercation with Mrs. Adviento. The trial court stated that it would not rule upon the admissibility of the conviction at that time because it was potentially prejudicial and its probative value was as of yet undefined. The trial court reasoned that if Mr. Adviento raised an EMED defense based upon the nature of his relationship with Mrs. Adviento, the evidence of the prior conviction could be used in rebuttal to demonstrate that their marital problems were longstanding. However, the

trial court did not foreclose the possibility of admitting the prior conviction into evidence if Mr. Adviento was to forego the EMED defense.

Prior to trial, Mr. Adviento's attorney stated on the record that Mr. Adviento had decided not to assert the EMED defense. The State responded that if Mr. Adviento raised the EMED defense, the State would move to admit evidence of Mr. Adviento's prior assault conviction. The trial court responded: "If EMED is not raised, it's unlikely that the Court's going to allow that." The court then stated that it would not decide the issue at that time and that it would conduct a full voir dire after opening statements.

At the conclusion of Mr. Adviento's case, the trial court questioned Mr. Adviento regarding the EMED defense. The trial court established that Mr. Adviento understood that EMED is an affirmative defense that reduces the crime of murder to manslaughter and that if the jury was not instructed on EMED, the jury would not have the option of convicting Mr. Adviento of manslaughter. Mr. Adviento stated that he had discussed the defense of EMED with his attorney and that he had decided to give up his right to assert the defense. At the urging of the State, the trial court asked Mr. Adviento if he would like to discuss his waiver with his attorney again and stressed that Mr. Adviento

was free to change his mind. Mr. Adviento responded that he would like to speak to his attorney and the court took a brief recess.

When Mr. Adviento returned, his attorney stated that he had discussed the EMED defense "quite extensively" with Mr. Adviento previously and that Mr. Adviento had simply had "a few clarification questions." In response to questions from the trial court, Mr. Adviento said that he had received sufficient time to discuss the waiver with his attorney and that he did not have any further questions. Mr. Adviento then stated that he would "go for the self-defense" and that he would not raise the defense of EMED. The trial court then found that "the Defendant having been fully informed has knowingly, intelligently, and voluntarily waived any jury instruction on extreme mental or emotional disturbance."

Mr. Adviento's waiver of the EMED defense appears to have been a decision that he entered into after extensive discussions with his attorney. In waiving the EMED defense instruction, Mr. Adviento specifically stated his desire to rely instead upon the complete defense of self-defense. The trial court explicitly informed Mr. Adviento of the consequences of his waiver and Mr. Adviento stated that he did not have any questions regarding the instruction. The record demonstrates that his

waiver was knowing, intelligent, and voluntary.

B. Evidence of Mr. Adviento's prior conviction would have been admissible had the court instructed the jury on the EMED defense

Mr. Adviento's waiver of the EMED instruction is in no way invalidated by the connection between the EMED defense and the admission of evidence of Mr. Adviento's prior assault conviction. Had the court issued an EMED instruction, the evidence of Mr. Adviento's prior conviction would have been admissible pursuant to Hawaiʻi Rules of Evidence (HRE) Rule 404(b) (2008). Thus, although the trial court had yet to rule on this issue, Mr. Adviento's waiver of the EMED instruction may have been partially motivated by his desire to prevent his prior conviction from coming into evidence. The majority would disrupt Mr. Adviento's strategic decision and force him to receive the unwanted jury instruction and the resultant entry of his prior conviction into evidence.

Evidence of prior bad acts "'is admissible when it is 1) relevant and 2) more probative than prejudicial.'" State v. Cordeiro, 99 Hawaiʻi 390, 404, 56 P.3d 692, 706 (2002) (some internal quotation marks omitted) (quoting State v. Torres, 85 Hawaiʻi 417, 421, 945 P.2d 849, 853 (App. 1997)). HRE Rule 404(b) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible

> where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

"'The list of permissible purposes in Rule 404(b) is not intended to be exhaustive for the range of relevancy outside the ban is almost indefinite.'" State v. Behrendt, 124 Hawaiʻi 90, 103, 237 P.3d 1156, 1169 (2010) (some internal quotation marks omitted) (quoting State v. Clark, 83 Hawaiʻi 289, 300-01, 926 P.2d 194, 205-06 (1996)). Here, evidence of Mr. Adviento's prior conviction for assaulting Mrs. Adviento would have been admissible to rebut an EMED defense based on the Advientos' relationship.

In State v. Maelega, 80 Hawaiʻi 172, 907 P.2d 758 (1995), we held that the trial court did not err in introducing prior bad act evidence to rebut an EMED defense. 80 Hawaiʻi at 184, 907 P.2d at 770. The defendant Maelega was charged with murdering his wife by choking her with his hands, strangling her with an electric cord, slashing her throat, and stabbing her in the back and breasts. Id. at 175, 907 P.2d at 761. At trial, Maelega argued that he was acting under an extreme emotional disturbance caused by the state of their marriage. Id. The trial court concluded that evidence of Maelega's prior acts of abuse was admissible to "rebut[] both prongs of the extreme mental or emotional disturbance defense in that it may tend to

show that [Maelega] acted with self-control at the time that he allegedly killed his wife, and secondly, it may tend to show that even if [Maelega] did not act with self-control, then there was no 'reasonable explanation' for his extreme mental or emotional disturbance." Id. at 184, 907 P.2d at 770 (first alteration added). We reasoned that the evidence was admissible despite the fact there was "little similarity between [Maelega's] prior acts and the instant offense as alleged in that the prior acts do not involve weapons, and do not involve strangulation or stabbing." Id. at 183, 907 P.2d at 769 (alteration in original).

In State v. Haili, 103 Hawaiʻi 89, 79 P.3d 1263 (2003), we again held that prior bad acts could properly be admitted into evidence to rebut an EMED defense. Id. at 106, 79 P.3d at 1280. We commented that where a defendant alleged that he was under the influence of EMED when he killed his wife, evidence of his prior threats to kill his wife "may have been sufficient for the jury to conclude that [the Defendant] was not under the influence of EMED." Id.

The majority states that an EMED instruction was required because there was evidence that "[Mr.] Adviento may have been under significant strain and stress at the time he caused [Mrs. Adviento]'s death, particularly due to the problems he and [Mrs. Adviento] were experiencing." Majority at 65. As in

Maelega and Haili, the evidence of Mr. Adviento's prior violent acts would be highly probative in rebutting such an EMED defense. The evidence of Mr. Adviento's previous conviction for assault resulting from an altercation with Mrs. Adviento may tend to show that he acted with self-control when he killed Mrs. Adviento and that there was not a "reasonable explanation" for his very violent reaction to the preexisting strain in their relationship. Although the prior conviction is also prejudicial, the evidence appears to be more probative than prejudicial and the circuit court could have admitted it to rebut an EMED defense.

VI. Conclusion

While it is the duty of trial courts to instruct juries upon the law, this duty must not be extended so far as to mandate that trial courts control a defendant's choice of defenses. The majority would require trial courts to issue defense instructions even where, as here, the defendant has entered a knowing, intelligent, and voluntary waiver of the instruction for strategic reasons. Furthermore, the majority's adoption of the "any evidence" standard for unrequested defense instructions is unsupported by our recent precedent and overly burdensome upon the trial courts. The majority's opinion requires the trial courts to intrude upon defendants' exclusive purview in presenting their defenses, to be constantly alert to the

possibility that "any evidence" has been raised to support an unrequested defense instruction, and to give this instruction, even over the objections of defendants. The majority's rule places an impracticable burden upon the trial courts and is potentially highly prejudicial to defendants.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama