IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

MARYANN ACKER, Petitioner/Defendant-Appellant,

and

WILLIAM GERALD ACKER, Respondent/Defendant.

SCWC-30205

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 30205; CR. NO. 056042)

FEBRUARY 14, 2014

RECKTENWALD, C.J., NAKAYAMA, J., AND CIRCUIT JUDGE NACINO, ASSIGNED IN PLACE OF POLLACK, J., RECUSED, WITH ACOBA, J., CONCURRING AND DISSENTING SEPARATELY, WITH WHOM McKENNA, J., JOINS

OPINION OF THE COURT BY RECKTENWALD, C.J.

Maryann and William Acker, a newly married couple, were involved in a series of crimes in California and Hawaiʻi during

June, 1978. On June 10, 1978, Maryann went to a Waikiki bar and began conversing with Joseph Leach. William joined the conversation and introduced himself as Maryann's relative. Leach subsequently gave a ride to William and Maryann. During the drive, William pulled a gun on Leach, demanded his wallet, and ordered that he drive to Hanauma Bay. At Hanauma Bay, Leach was bound and taken to a secluded area off of the road. William and Maryann then left in Leach's vehicle.

On June 18, 1978, Maryann met Lawrence Hasker at a Waikiki bar. William, again posing as a relative of Maryann, joined the conversation and asked for a ride home. Hasker agreed to give William and Maryann a ride. Hasker was subsequently robbed at gunpoint and the three proceeded to Hanauma Bay. While at Hanauma Bay, Hasker was fatally shot.[1] William and Maryann then left Hawaiʻi for California.

On June 24, 1978, William and Maryann were hitchhiking through California and were picked up by Cesario Arauza. Arauza was fatally shot and his body was later discovered by the side of the road. Maryann and William then engaged in several robberies before Maryann was apprehended. William fled California, but eventually turned himself in.

In July 1978, William and Maryann were charged in California with Arauza's murder. Following a jury waived trial,

[1] As set forth below, the State contends that Maryann shot Hasker, while Maryann contends that it was William who fired the gun.

Maryann was convicted of Arauza's murder, but was acquitted of the allegation of use of a firearm. William, who was cooperating with authorities and had divulged information regarding the Leach and Hasker incidents in Hawaiʻi, pleaded nolo contendre to the murder of Arauza.

In August 1981, William and Maryann were indicted in Hawaiʻi for various charges relating to the Leach and Hasker incidents. William pleaded guilty to robbing Hasker and agreed to testify against Maryann. Maryann was subsequently found guilty of the charges regarding the Leach incident and Hasker's murder. Maryann appealed to this court, which affirmed her convictions.

In 1991, William testified under oath at a parole hearing in California that he was solely responsible for Hasker's murder.

Maryann eventually filed a Hawaiʻi Rules of Penal Procedure (HRPP) Rule 40 petition for post-conviction relief, and was granted a new trial in 2007 in relation to the charge for Hasker's murder. At the retrial, which is the basis for the instant appeal, the State was allowed to introduce evidence of the Leach incident, the Arauza murder, and the California robberies. Maryann was again convicted of Hasker's murder, and the Intermediate Court of Appeals affirmed her conviction.

In her application, Maryann asserts that she was denied a fair trial because: (1) the circuit court erred in ruling that

she had opened the door, during the cross-examination of William, to the admission of "bad acts" evidence regarding her involvement with William in the murder of Arauza in California; (2) the circuit court erred in denying a mistrial after Hasker's friend, Timothy Millard, testified regarding a police request that Millard take a lie detector test; (3) the prosecution engaged in misconduct by improperly cross-examining her using information in her presentence report and by making false and misleading statements during rebuttal closing; and (4) the circuit court erroneously refused to enforce a subpoena recalling William to testify in Maryann's case. In addition, Maryann contends that the circuit court's jury instructions on murder and accomplice liability were erroneous, and that the cumulative effect of these errors violated her right to a fair trial.

We hold that the circuit court erred in its determination that defense counsel opened the door to evidence concerning Maryann's convictions in California. Nevertheless, such evidence was admissible under Hawaiʻi Rules of Evidence (HRE) Rule 404(b), and relevant to rebut Maryann's suggestion that she was acting under duress in the Hasker incident and to establish intent and a common plan. Thus, the circuit court's error regarding the basis for admitting this evidence was harmless beyond a reasonable doubt.

We also conclude that the circuit court did not abuse its discretion in denying Maryann's motion for mistrial because

it struck the testimony of Millard regarding the lie detector test and instructed the jury to disregard that testimony. We further conclude that the prosecution did not engage in prosecutorial misconduct, and that the circuit court did not abuse its discretion in denying Maryann's request to extract William during Maryann's case and instead allowing a deputy sheriff to testify regarding William's refusal to testify. Finally, we hold that the challenged jury instructions were not prejudicially insufficient, erroneous, inconsistent, or misleading.

Accordingly, we affirm the ICA's judgment.

I. Background

The following factual background is taken from the record on appeal, and recounts the various court proceedings related to this case.

A. Arauza Case

On June 28, 1978, Maryann was arrested while driving Arauza's vehicle. William subsequently turned himself in on July 1, 1978. On July 20, 1978, Maryann and William were charged in California with the murder of Arauza. The charge alleged that in the commission of the offense, William and Maryann "personally used a firearm, to wit a 38 caliber revolver[.]" Maryann and William were also charged with committing two unrelated

robberies. Maryann was charged with an additional unrelated robbery.

The cases against William and Maryann were severed for trial. William pleaded nolo contendere to the murder of Arauza, which included the use of a firearm allegation. William also pleaded nolo contendere to the two charged robberies. William was sentenced to life imprisonment with the possibility of parole.

After a bench trial, Maryann was found guilty of Arauza's murder, but the court found the use of a firearm allegation to be "not true and order[ed] [it] stricken." Maryann also was convicted of the three charged robberies, and was sentenced to life imprisonment.

B. Initial Trial in Hawaiʻi

On August 19, 1981, Maryann was charged with: kidnapping Leach; robbing Leach; exerting unauthorized control of Leach's vehicle; kidnapping Hasker; robbing Hasker; murdering Hasker in violation of HRS § 707-701;[2] exerting unauthorized control of Hasker's vehicle; and burglarizing Hasker's residence. William was charged with the same offenses as Maryann, except that he was not charged with Hasker's murder. Pursuant to a plea agreement, William pleaded guilty to robbing Hasker in exchange

[2] HRS § 707-701 (1976), provided in relevant part: "a person commits the offense of murder if he intentionally or knowingly causes the death of another person."

for his testimony against Maryann. All other charges against William were dismissed.

William was called as a prosecution witness at Maryann's first trial in 1982, and testified that Maryann shot Hasker. William testified that he pleaded nolo contendere to Arauza's murder, even though he believed Maryann had shot and killed Arauza, because he thought he was responsible for her actions under California's felony murder rule. William, thus, suggested to the jury that he pleaded guilty to felony murder, when he in fact pleaded nolo contendere to murder and the use of a firearm allegation. The circuit court also allowed other individuals to testify regarding the Arauza incident.

Maryann was subsequently found guilty as charged on all counts. On the murder conviction, Maryann was sentenced to a term of life imprisonment with the possibility of parole, and a mandatory minimum term of ten years.

Maryann appealed her conviction to this court and argued in relevant part that the trial court erred in permitting evidence of her other crimes because:

> [T]he Arauza case was not relevant to establish any of the exceptions to [HRE] Rule 404. It did not provide motive since the Arauza case occurred after the present case, and the two cases were not related. It did not prove opportunity since the crimes were committed several days and several thousand miles apart from each other. It did not prove preparation or plan since no common or continuing scheme was established by the State. It did not prove intent, knowledge, or absence of mistake or accident since these were not issues at trial. . . . It did not establish identity since [Maryann] testified that she was present at the general scene of the shooting.

> Finally, it did not prove modus operandi since the two crimes were dissimilar in nature. . . .
>
> Assuming, arguendo, that one or more of the exceptions were relevant, the prejudice against [Maryann] far outweighed any probative value in view of the issues and the evidence available to the State.

This court issued a Memorandum Opinion affirming Maryann's convictions, stating that it found "no merit" to any of Maryann's arguments.

B. Hawaiʻi Rules of Penal Procedure (HRPP) Rule 40 Petition

Maryann filed an HRPP Rule 40 Petition for Post-Conviction Relief on August 15, 2000, arguing, inter alia, that: (1) her murder conviction should be dismissed, or she should receive a new trial, because William admitted during a parole hearing before the California Parole Board that he was responsible for Hasker's murder; and (2) she was denied a fair trial because the State did not disclose that William pleaded nolo contendere to first degree murder with the use of a firearm in California and was sentenced to life imprisonment with the possibility of parole for that offense. Acker v. State, No. 27081, 2007 WL 2800803, at *1 (Haw. App. Sept. 27, 2007) (SDO). The circuit court granted Maryann's HRPP Rule 40 Petition, vacated her conviction and sentence, and ordered that she receive a new trial for all counts. Id. On appeal, the ICA determined in relevant part:

> The State did not disclose to [Maryann] that William had pleaded nolo contendere to both murdering Arauza and using a gun in the commission of that murder. Thus, contrary to the impression left by William's testimony, his first degree murder conviction in California had not been based on a felony murder

> theory, but on the allegation that he had been the person pulling the trigger. The State also failed to disclose to [Maryann] that William had been sentenced in California to life with the possibility of parole and, instead, disclosed an FBI "rap sheet" that erroneously reported William's sentence as life without parole.
>
> We conclude that the State's failure to disclose the true facts concerning William's nolo contendere plea, conviction, and sentence in California denied Acker her right to a fair trial on her Murder charge.

Id. at 2-3.

Accordingly, the ICA affirmed the circuit court's order to the extent that it vacated Maryann's murder conviction and ordered a new trial on only that count. Id. at *3.

C. Retrial on the Hasker Murder Charge

1. Circuit Court Proceeding

a. Pre-Trial

The State filed a Notice of Intent to Use Evidence, in which it sought to admit evidence of the Leach and California incidents, as well as evidence of the additional Hasker convictions, i.e., robbery, kidnapping, burglary, and unauthorized control of propelled vehicle.

Maryann opposed the notice of intent to use the prior evidence. Maryann argued, "Besides the problems of allowing William to again lie regarding the Arauza matter,[3] evidence of that incident is prohibited by [HRE] Rule 404(b)[.] Nothing in

[3] As will be discussed further infra, Maryann appears to be referring to William's 1991 testimony before the California Parole Board, in which he testified that he shot both Hasker and Arauza and that Maryann did "[a]bsolutely nothing[,]" which contradicted his testimony at Maryann's initial trial that she told him that she shot Arauza.

the Arauza incident makes William's assertion that Maryann shot Hasker any more or less probable."

At a subsequent hearing, the circuit court stated that it would allow in the Leach incident, and that it would keep out the Arauza incident "unless the door is open[ed]":

> What worries me is if William [] gets on the stand and says he is pure as the driven snow and he has constantly told the truth, we're going to get into whether or not he lied in this Court, in the Circuit Court, lo these -- whatever many years ago it was.
> . . . .
> And whether he -- or whether he lied up in California and pled to being the shooter. And we'll get to that. But if the door is opened, we're going to have to go down that road[.]

The circuit court subsequently entered its Findings of Fact, Conclusions of Law, and Order which provided in relevant part:

> FINDINGS OF FACT
>
> 6. From March 16, 1982 to March 31, 1982, [Maryann] proceeded to trial in the [circuit court], on the offenses involving [] Leach and [] Hasker. The original trial court allowed the State to present evidence of [Maryann's] complicity in the murder of [] Arauza in its case in chief.
> . . . .
> 8. On June 2, 1982, [Maryann] filed Notice of Appeal of her convictions for the crimes involving [] Leach and [] Hasker, including the murder of [] Hasker. In her Opening Brief, filed December 29, 1983, [Maryann] advanced as point of error "C" that "The Trial Court erred in permitting evidence of [Maryann's] prior crimes."
> . . . .
> 9. On December 11, 1984, the Hawaiʻi Supreme Court issued its Memorandum Opinion affirming [Maryann's] convictions . . . and establishing the "law of the case."
> . . . .
>
> CONCLUSIONS OF LAW
>
> . . . .
> 7. In the instant case, the cogent reasons supporting the Court's denial of State's request

> to admit evidence regarding [Maryann's] complicity in the murder of [] Arauza are:
> a) [William's] plea of nolo contendere to the offense of Murder . . . and the included allegation of use of a firearm . . . for the murder of [] Arauza;
> b) [Maryann's] conviction for offense of Murder . . . and the court's rejection of the included allegation of use of a firearm[;]
> c) [William's] sentence for the offense of Murder and the included allegation of use of a firearm for the murder of [] Arauza was life with the possibility of parole, a fact which was known to the State but not to the Court or [Maryann] at the time of trial in 1982. Evidence that [William] had plead [sic] nolo contendere to being the shooter and murdering [] Arauza would have served to undermine and impeach his claim that [Maryann] had shot [] Arauza. It would also have served to contradict [William's] explanation for pleading to [] Arauza's murder and cast [William's] role in the murders of [] Arauza and [] Hasker in a different light to the jury. Competent defense counsel could also have used [William's] sentence of life with the possibility of parole to attack [William's] interest and motives for cooperating with the State and placing blame on [Maryann]. Finally, the belief that [William] had been sentenced to life without the possibility of parole may have influenced defense counsel to tread lightly in attacking [William] on bias and caused the trial court to find that evidence concerning [William's] sentence was not relevant. [William's] testimony was critical to the State's murder prosecution. The State's non-disclosures of the true facts concerning [William's] California plea, conviction, and sentence deprived [Maryann] of valuable evidence that could have been used to forcefully impeach [William's] credibility.
>
> 8. Upon revisiting the issue of the admissibility of the evidence of [Maryann's] complicity in the murder of [] Arauza in its case in chief, this Court concludes as a matter of law, the State is not permitted to present such evidence in its case in chief for the cogent reasons listed above.

In her Third Motion in Limine, Maryann requested that the circuit court preclude the State from calling William as a

witness because the State was aware that his testimony was "false" and, if allowed, "would be suborning perjury." Alternatively, Maryann requested that she be allowed to introduce evidence that William failed a polygraph examination during the initial investigation into Hasker's murder, refused to take another polygraph examination, and was still given immunity for his role in the instant case. In addition, Maryann noted that on May 2, 1991, and while under oath, William stated that he "committed the murder for which he was incarcerated (California), that he pulled the trigger and that he committed the murder in Hawaii[.]" Attached as Exhibit C to Maryann's Third Motion in Limine were excerpts from William's May 2, 1991 hearing before the California Board of Prison Terms (California Parole Board). The transcript indicates that the following exchange occurred between William and a commissioner on the Board:

> COMMISSIONER []: . . . Did you commit the murder for which you're in custody?
> [William]: Yes, I did.
> COMMISSIONER []: What about the one in Hawaiʻi?
> [William]: I committed them all and I want the woman behind it, the woman that's incarcerated, I would like her set free.
> COMMISSIONER []: Okay. So [Maryann] didn't do anything?
> [William]: Nothing. Absolutely nothing.
> COMMISSIONER []: And is this the first time you've said that?
> [William]: The very first time.

At a hearing on Maryann's motions, the circuit court considered whether Maryann would be allowed to cross-examine

William about his statements to the California Parole Board in 1991. The following conversation occurred:

> [Defense]: . . . I realize that the fact that [William] failed a polygraph examination is not admissible. I will grant the court that and I'll grant the State that. However, I think that it's fair for me to ask that you were -- before entering into agreement you were asked to complete certain tasks which you failed but nevertheless you still got a plea agreement. I don't have to come out and say, did you fail -- didn't they tell you to take a polygraph test and you failed it? But, I'm saying, hey, you were asked to complete certain tasks before we would accept you as a witness and you failed those tasks but they still accept him as a witness.
>
> THE COURT: What task other than the polygraph which I can't let in?
>
> [Defense]: That's what I'm saying. I'm not going --
>
> THE COURT: Just that one task?
>
> [Defense]: Yes. I mean, that's a pretty big task. He lied. But I'm not going to term it that way. I can simply say, you were asked to complete a task, you failed that task, nevertheless they still gave you this plea agreement. And obviously I can bring up all the lies he had at trial.
>
> THE COURT: If he takes the stand here in this court, you're going to cross him on what he said in 1991 to the Paroling Authority, is that right, where he basically said he did it, [Maryann] did not do it?
>
> [Defense]: Yes.
>
> THE COURT: And he'd like her to go free?
>
> [Defense]: Yes.
>
> THE COURT: And you don't want to stop there, you want to also say he also didn't perform this earlier task?
>
> [Defense]: Yes.
>
> THE COURT: The jury's not going to understand that. It's another vague thing but I understand your position.
>
> . . . .
>
> [State]: . . . [j]ust so long as the court's clear, if he goes there, the State's position is: can of worms.
>
> . . . .
>
> THE COURT: . . . Well, I'm going to obviously let [William] testify subject to vigorous cross. Court will not let in the -- and you have a good record on . . . the polygraph failure. If that's the only reason, I don't even want you to ask that question at this particular point but you

> certainly can cross him based upon what he told the Paroling Authority. After he was divorced from [Maryann] he testified in this court in 1991 he basically wanted to exculpate her, and that I'll decide at the time the scope beyond that.

At a subsequent hearing, defense counsel noted his understanding from the initial hearing on the Motions in Limine that if he attempted to use William's statements before the California Parole Board to show that William "committed perjury[,]" then "the door could be opened" to the Arauza incident. Defense counsel then stated: "[I]f I can't bring in the fact of [William's] reputation and his admission of perjury, then I don't think I'm doing my job. If the Court says that by bringing that in, I open the door, then so be it, but if that's what happens, that's what happens." The State argued that cross-examining William on his statements to the California Parole Board would lead to the State asking why his story changed. The State contended that William's answer "is going to be, well, because he was approached by [Maryann's] attorney, who told him if he told the paroling authority that he did it, they'd let her out, which is going to bring in the back that she's serving a life sentence in California[,]" thus opening the door to the Arauza incident. The circuit court then stated, "That makes sense to me[,]" and asked defense counsel, "How are we going to get around that, the California situation?" Defense counsel then replied: "If California comes in, California comes in for the whole thing, Judge. I'm not trying to . . . just nip and tuck

things. If it comes in, it comes in." The State subsequently stated:

> Just to clarify, the only way then that California should come in, if at all, through [defense counsel] is if he confronts William [] with his statement to the [California] paroling authority, at which point I get to bring in evidence of her conviction because that goes to his reason why he said that -- made that statement.

Defense counsel replied "That's my understanding[,]" and the circuit court stated, "Fair enough."

In its Order granting in part and denying in part Maryann's Third Motion in Limine, the circuit court determined, inter alia:

> IT IS HEREBY ORDERED that [Maryann's] Third Motion In Limine is hereby GRANTED IN PART, [Maryann] may question William [] on his 1991 statement to the California Parole Board, subject to proper foundation being laid;
>
> IT IS FURTHER ORDERED that should [Maryann] question William [] on his 1991 statement to the California Parole Board, the State may then introduce evidence of William[']s reasons for making that statement, including [Maryann's] conviction and sentence for the murder of [] Arauza in California.
>
> IT IS FURTHER ORDERED that [Maryann's] Third Motion In Limine is hereby DENIED IN PART, William [] may testify; [Maryann] may not introduce evidence of failed or refused polygraph tests, and Defense Counsel shall approach the bench and obtain a ruling prior to attempting to introduce any evidence of or mentioning William[']s informant activities.

b. Trial

i. William's Testimony

William acknowledged that he received a plea agreement with the State when he testified against Maryann at her initial trial, under which all of the other charges against him were dropped in exchange for pleading guilty to robbing Hasker and

testifying against Maryann. William was sentenced to twenty years incarceration for the robbery charge, which he had completed prior to Maryann's retrial. William then stated that no one made any promises to or agreements with him in exchange for his testimony at Maryann's retrial.

William stated that he and his then-wife Maryann came to Hawaiʻi in June 1978 after Maryann purchased round trip tickets. William brought a ".38 Special" gun and a hunting knife with him to Hawaiʻi. William and Maryann eventually "[ran] out of money." To deal with their financial situation, William and Maryann were "going to sell bunk marijuana to tourists." William explained that Maryann would get "dolled up" and go to bars in Waikiki to look for tourists. William continued:

> [Maryann's] there to meet dudes, guys, men, and find out everything she can about them. I'm going to sell them bunk marijuana. And if we find out they're leaving - if we are there Friday and Saturday and Sunday, and they are leaving Monday, well, what are they going to do when they find out they got a bag of nothing?
> . . . .
> I come up to her and I give her the signal, either some kind of facial or I walk up, you know, walk up to her, say, "What's up, sis". She was like usually my sis when she's meeting these guys. I would come up to her and I would be like her brother.
> . . . .
> And I tell her, hey, let me talk to you a minute. I pull her aside, what's up. And she'd give me the low down on what's happening with the Vick [sic].
> . . . .
> If the guy is good, I take him to the park, get him high, he buys it, he leaves. You know, very seldom was a gun pulled or in play. Sometimes it was.

Maryann kept the gun and the knife in her purse "if it had to" be used. Maryann "could have left any time if she wasn't on board" with their plan.

William stated that on June 10, 1978, Maryann met Leach. William could tell that Leach was not a tourist and did not want to sell "bunk" to Leach. Maryann wanted to "just play it out" with Leach because Leach had a lot of money. William and Maryann agreed to rob Leach, rather than try to sell him "bunk" marijuana. Maryann, William, and Leach left in Leach's car. While in the car, William "pulled the gun on [Leach] and told him this [was] a robbery." William instructed Leach to drive to Hanauma Bay and to give his wallet to Maryann, and Leach did so. When they arrived at Hanauma Bay, William tied Leach up and gagged him, while Maryann pointed the gun at Leach. William and Maryann left Hanauma Bay in Leach's car and took things out of his trunk.[4]

On June 19, 1978, William and Maryann kidnapped and robbed Hasker. Maryann got "dolled up," went to the Garden Bar, and met Hasker.[5] William approached Maryann and Hasker, and

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[4] Although Leach was unavailable to testify at Maryann's retrial, his testimony from Maryann's initial trial was read into the record, without objection. Leach's testimony regarding his robbery was similar to the testimony provided by William.

[5] Timothy Millard testified that on June 19, 1978, he and Hasker made plans to meet at the Hilton Hawaiian Village. Millard, however, did not show at the Hilton Hawaiian Village that night. A few days later, Millard was questioned by police officers. Millard stated: "They asked me if I would take a lie detector test, asked me a lot of questions like where were you and all this and all that. And apparently, you know, I answered all the questions and (continued...)

asked, "What's happening, sis." William got the impression that Hasker was a drug dealer and discovered that Hasker was local. William told Maryann to stop talking with Hasker so that they could rob a tourist. Maryann responded, "No. . . . He's got big money, he's a dealer." William agreed and asked Hasker for a ride back to their apartment, and Hasker agreed. When they arrived, Maryann and William went into the bedroom and discussed their plan. William again insisted that Hasker be taken home, to which Maryann responded, "No, let's take him. He's got cocaine, he's got big money[.]" William agreed, grabbed the gun from Maryann's purse, pointed it at Hasker, and said, "This is a robbery, man." Maryann then tied Hasker's hands behind his back, and drove with William and Hasker to Hasker's apartment. William then told Maryann to go inside and "get the cocaine and the money." Maryann left and came back twenty minutes later with money and marijuana, but no cocaine.

Maryann then drove William and Hasker to Hanauma Bay. Maryann parked the car and William told Hasker to exit the vehicle and walk down a grassy knoll. Maryann had the gun pointed at Hasker. Hasker stated that he needed to urinate. William told Maryann that they should leave, to which Maryann responded, "Wait, I want to make sure he does what you tell him

[5](...continued)
everything to their liking." Defense counsel objected, and the circuit court struck the testimony from the record, and instructed the jury to "disregard and also not speculate on any other police activity."

to do." William stated, "[Hasker] took a leak first. . . . He zipped up and he turned toward her. And she pulled the gun and went (witness making shooting sound) shot him, fire came out of the gun three times." Maryann was approximately "[t]en, fifteen feet" away from Hasker when she shot him.[6] William stated that he did not threaten or force Maryann to go along with their plan: "We did this together. There was no force. She wasn't compelled to do anything. At any time she could have left. Any time."

On cross-examination, William was asked, "Do you ever lie under oath, commit perjury as it pertains to Maryann?" William responded, "Yeah, I -- [,]" at which point the State objected. At a bench conference, the State argued that the question "opens the door" to William explaining his answer. The circuit court overruled the objection and allowed defense counsel to proceed. Defense counsel then asked William, "[h]ave you ever committed perjury as it pertains to Maryann?" William stated that he "never lied in court." Defense counsel then asked, "have you ever lied under oath as it pertains to Maryann?" William then asked the circuit court, "does a board hearing count?" The circuit court responded, "If it's under oath, yes. I don't know what the board -- I assume we are talking about a California

[6] Dr. William Goodhue, First Deputy Medical Examiner for the City and County of Honolulu, testified that Hasker's death was caused by a "fatal penetrating gunshot wound" to the head, and that Hasker had a penetrating gunshot wound to his left lower leg. Dr. Goodhue testified that he could not determine the distance from the muzzle of the gun to the wound for the head injury, but estimated that the distance from the muzzle of the gun to the leg wound to be "six to eleven or twelve inches[.]"

board hearing; is that right?" A bench conference was held, and the following conversation occurred:

> THE COURT: He can't get into the California Paroling Authority?
> [State]: This is exactly what I was talking about.
> . . . .
> [Defense]: Let me make my -- I simply asked him have you ever committed perjury, lied under oath, and he's saying --
> THE COURT: Are you going to get into him going before the California Paroling Authority?
> [Defense]: Not right now.
> THE COURT: Do you want to get into that?
> [Defense]: I'm not sure.
> THE COURT: If you told him -- that's a different story there, you can't get into that, what he told them?
> [Defense]: Judge, the ruling was the California stays out unless I open the door, and I'm not opening the door right now.
> . . . .
> THE COURT: Let me strike it and start all over again after I have a thorough hearing, I know where you're heading. You're going to have to make offers of proof. I will give you a lot of latitude.
> [Defense]: Well, Judge, you know, I don't think you should strike it right now. You can just tell me to stop going any further, but I don't think you should strike it right now because I am entitled to open the door if I choose to open the door.
> . . . .
> THE COURT: I'm going to strike it now, let you reinitiate it if need be. I want to make -- I'm giving you a lot of latitude.
> [Defense]: I understand that, Judge.
> THE COURT: And you kind of wiggled the doorknob, but you haven't opened it.

The circuit court struck "that last whole series of questions about perjury and the answers" and directed the jury to disregard those questions and answers.

Defense counsel then asked William about a 1978 report in which he admitted to using cocaine since the age of 18, using one to two grams of cocaine on a daily basis for approximately three months, and supporting his cocaine habit by selling

narcotics and robbing individuals. William stated that he lied to the report writer so that he could go to a "rehab center as opposed to prison." William stated that he would lie to get himself out of prison, but he would not lie under oath. At another bench conference, defense counsel then stated, "[William] just said he wouldn't lie under oath. Now I can ask him." Defense counsel then informed the circuit court that he would ask William "[i]f he's ever committed perjury, he's lied under oath." The circuit court stated, "[s]ounds like you are going to open the door." Defense counsel then replied, "I'm thinking about it, but I'm not going to do it right now." The following testimony was then elicited:

> [Defense]: My question then is to you, [William], have you ever lied under oath as it pertains to anything about Maryann?
> [William]: Probably.
> [Defense]: Probably. Does that mean yes?
> [William]: Yeah, that means yes.
> [Defense]: Okay.
> [William]: But not in court.
> [Defense]: And so when you lie -- I'm sorry. When you lied under oath about Maryann, was there any repercussion to you?
> [William]: No.
> [Defense]: No.
> [William]: No, there wasn't because there wasn't a lie on her. I'm trying to do something for her.

Defense counsel then requested a recess and the trial ended for the day.

The next day, the circuit court expressed its concern that the door may have been opened on the Arauza matter: "It strikes me that the door may well have been opened for a variety of reasons to the California situation, either under the rule of

[] completeness or the rule of relevance and under [HRE] Rule 611."[7] Defense counsel argued that the door was not opened. The State asserted that the door was opened as to Maryann's prior convictions:

> Your Honor, the only reason that the door has been opened at this point is because William [] said on the stand that he was lying for [Maryann]. What was happening at the time was that he believed he had been approached by some folks who said that they represented Maryann []. He believes that they were from the Innosense [sic] Project. He does not know for sure and he did not attempt to confirm.

Defense counsel then stated:

> Your Honor, I didn't bring in his statement. The order says if I bring in his statement, I have to lay proper foundation.
>
> His statement was, "I shot him." That was not brought in before the jury. So yes, if I bring in that statement, yes, I have to lay the foundation.
>
> I didn't ask him that. I simply asked him have you ever lied under oath.
>
> And so, you know, obviously, now they want to split the hairs and say, well, you can only talk about this, you can only talk about that.
>
> They need to know, in terms of motive, interest or bias, that when he said that he was doing it for Maryann [], that's just another one of his outright lies because he's there asking for parole at this point. And when he tells something like that, it is damaging his opportunity for parole and it's not helping hers because they are not even considering her for parole.
>
> If the door is open, the door is open, that's fine.

---

[7] HRE Rule 106 (1993), commonly referred to as the rule of completeness, provides, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

HRE Rule 611(a) (1993) provides:

> Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

The circuit court stated: "To me, the door is open given what [William] has said. And I'm not criticizing anybody. The door is open. Once it's open, it's going to be completely open . . . to the entire Cesario Arauza – not about the incident, certainly the convictions. Because [the jurors] are going to need to have a context by which to operate."

Based on its ruling, the circuit court admitted the California judgments against Maryann and William into evidence.[8] Although defense counsel objected to the circuit court's ruling regarding the Arauza conviction, it did not object to the admission of the California judgments. The circuit court then gave the jury the following limiting instruction:

> [Y]ou are about to hear evidence that the defendant and the witness at another time may have or have engaged in and committed other crimes, wrongs or acts. You must not use this evidence to determine that . . . the defendant is a person of bad character and must have committed the offense charged in this case. Such evidence may be considered by you only on the issue of the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, modis [sic] operandi, absence of mistake or accident, and for no other purpose.
>
> So it doesn't go to propensity or character. It goes to the specific reasons detailed in our statute and the rules.

Defense counsel resumed the cross-examination of William. William testified that he turned himself in to authorities in California in connection with the Arauza incident,

[8] Exhibit 39 was a copy of Maryann's judgment of conviction for the murder of Arauza and for the three robberies. Exhibit 40 was a copy of William's California conviction for the murder of Arauza, in which William was sentenced to a term of life imprisonment with the possibility of parole. The judgment further indicated that William was convicted of two robberies.

after Maryann was arrested in connection with that incident.[9] William testified that he met with Deputy Sheriff Wilbert Ahn on July 3, 1978, and lied to Deputy Sheriff Ahn about particular details of the Arauza incident. William also testified that when he talks to the police "[he] usually [does not] give them proper — correct knowledge or correct information" in an effort to improve his legal situation.

William testified that when he turned himself in, there were no suspects in the Hasker and Leach incidents in Hawaiʻi. Maryann went to trial for Arauza's murder and in January 1979, was found guilty of the murder, but the court determined that the use of a firearm allegation was not true, and thus, the allegation was stricken.

William again contacted Deputy Sheriff Ahn on March 9, 1979, and told him that he wanted "to come clean" about what happened with Hasker and Leach. In addition, William told Deputy Sheriff Ahn that he wanted to prove that he did not shoot Arauza.

On May 9, 1979, William pleaded nolo contendere to the murder of Arauza and to using a firearm in the commission of the murder. William stated, "I wanted to accept my responsibility for the crimes that happened." William thought he pleaded guilty

[9] Sergeant Mark Aguirre, whose testimony from Maryann's initial trial was read into the record, testified that on June 28, 1978, he and his partner stopped Maryann, who was driving a 1974 Chevy Blazer, that was registered to Arauza. Sergeant Aguirre and his partner subsequently went to Maryann's motel room and recovered a brown pouch that contained thirty-three .38 caliber revolver rounds.

to felony murder, but acknowledged that the transcript of the proceeding indicated that he pleaded nolo contendere to the Arauza murder. William was sentenced to life with the possibility of parole for Arauza's murder.

In 1991, William appeared before the California Parole Board and stated under oath that he committed the murders of Arauza and Hasker and that Maryann did "[a]bsolutely nothing." In a 1994 hearing before the Board, William stated that he shot Arauza in self-defense. William, however, testified at Maryann's retrial that he lied to the Board in both instances. William stated that he lied because UCLA law students informed him that Maryann could be set free if he told the Board that he shot Arauza and Hasker. In 1997 and 2000 California Parole Board hearings, William denied admitting in the prior Board hearings that he killed Hasker and Arauza.

On redirect examination, William indicated that Arauza gave him and Maryann a ride, that Maryann "drove off" with Arauza when they got to a restaurant, and that Maryann came back without Arauza. He acknowledged that he and Maryann were convicted of Arauza's murder, as evidenced by the California judgments. The following exchange then occurred:

> [State]: Now, in those judgments, there were other robberies that occurred after [] Arauza's murder?
> [Defense]: Objection, Your Honor. Ask to approach.
> THE COURT: In those judgments? Why don't you approach briefly.
> (The following proceedings had at the bench:)

THE COURT: We're talking about other robberies or the Arauza robbery?

. . . .

[Defense]: Judge, they're bringing up robberies that the Court already said that they can't bring up. I mean, this is --

THE COURT: Did you get into 'em? Did you open the door?

[State]: Yes, he did.

THE COURT: How?

[State]: He asked [William] what he pled guilty to.

[Defense]: I did not ask him that. I asked him did he plead nolo contendre to murder of [] Arauza.

THE COURT: Yeah.

[State]: The judgment's already in, Your Honor.

THE COURT: I understand. This is all new information, and I don't want a surprise here.

[Defense]: Judge, I don't think the judgments have the other charges on 'em.

. . . .

[State]: We can look at the judgment, Your Honor.

THE COURT: Let me look at the judgment.

[Defense]: This is Maryann and this is William.

THE COURT: As far as Maryann Acker's, does it show here? Got a bunch of 'em there.

[Defense]: I move to strike. I wasn't looking at that. I was looking at the first page when she was talking about --

THE COURT: They're separate robberies?

[State]: Maryann's charged with three, William's charged with two. The two that William is charged with are the same two that Maryann has. She also has a third.

THE COURT: Other than confuse the jury or dirty up both of them, what's the -- where is this going to help --

[State]: Your Honor, this goes to the pattern and practice. This goes to the crime spree that they were engaged in. Your Honor, she's saying that she had no choice, that she -- you know, that she was forced to do this, that she had no opportunity to get away, all those sort of things.

THE COURT: You were unaware of those others?

[Defense]: Yeah. I'm just saying I was unaware.

THE COURT: The objection's overruled. We're going to get into 'em.

[Defense]: What is he allowed to get into?

THE COURT: Pattern and practice.

[Defense]: So he's allowed to get into all these other robberies in California?

THE COURT: Yes.

[Defense]: Your Honor, at this point in time, I don't have discovery pertaining to that.

THE COURT: To me, it came in. It was cross-examined and the jury is entitled to know. So with that, let's keep going.

William testified that he and Maryann committed two robberies together in California and that she committed one additional robbery. But, William stated that he did not know, at that time, that Arauza had been killed. William stated that he found out that Maryann had been convicted of the Arauza murder when they were both on a bus together while incarcerated. William stated that Maryann told him, "Look, you idiot, haven't you snapped [] I shot him[.]"[10]

ii. Deputy Sheriff Ahn's Testimony

Deputy Sheriff Ahn testified that he was assigned to investigate the Arauza murder. On March 9, 1979, William contacted Deputy Sheriff Ahn and talked to him about the Arauza homicide and criminal activity that occurred in Hawaiʻi. William told Deputy Sheriff Ahn that both he and Maryann robbed Leach and Hasker in Hawaiʻi. William also indicated that Maryann shot Hasker. Deputy Sheriff Ahn contacted HPD Detective Jimon You in Hawaiʻi to confirm the allegations. Detective You flew to California to interview Maryann and William, and brought with him "two expended .38 caliber bullets . . . to compare with the

[10] Dr. Eugene Carpenter, whose testimony from Maryann's initial trial was read into the record, testified that he performed an autopsy on Arauza on June 27, 1978, and determined that the cause of Arauza's death was two gunshot wounds to Arauza's head -- one entry wound on the right forehead and one entry wound on the right cheek. Dr. Carpenter stated that Arauza was "shot at close range[.]" Two bullets were recovered from Arauza's head, which Dr. Carpenter placed in an envelope and turned over to the evidence custodian.

bullets" found in Arauza.[11] Deputy Sheriff Ahn stated that he had official contact with William between 50 to 75 times, and acknowledged that William "was in [his] custody[.]"

iii. Defense's Case

Maryann testified that in May of 1978, her then-husband, William, "broke into a neighbor's apartment and stole" a .38 caliber revolver. Maryann did not question William because she did not want to agitate him: "He wasn't always the easiest guy to talk to. He would get angry very quickly." In June of 1978, the couple came to Hawaiʻi. William brought the .38 caliber revolver with him. Maryann stated that William began talking about a plan to rob tourists:

> [William] wanted [her] to be a lure basically and go into bars, try and meet guys, see who lived here, who was a tourist, and see if I could get them interested in me. And then he would come up, introduce himself either as my brother or brother-in-law, suggest that we go someplace else, and ask for a ride. And during that point he would rob the individual.

Maryann did not want to participate, but she eventually agreed to do so because William started threatening her: "He would hold the gun to my head or my ribs and tell me I would do what he said." Maryann never did anything about the situation because she was fearful, did not know how to deal with the situation, and did not have the courage or strength to deal with

[11] Sergeant Robert Christansen, whose testimony from Maryann's initial trial was also read into the record, identified the four bullets submitted by Deputy Sheriff Ahn and Detective You as ".38 Special caliber." Sergeant Christansen stated, "In my opinion, all four of the expended bullets were fired in one firearm."

William. At one point, William aimed the gun toward Maryann and fired it, and the bullet "went into the doorjamb right beside [her] head."

The couple first executed the plan against Leach. While Maryann and Leach were talking at a bar, William introduced himself as Maryann's brother-in-law and requested a ride home. Leach subsequently gave William and Maryann a ride in his car. During the ride, William pulled a gun on Leach. William and Maryann then robbed Leach and left him at Hanauma Bay. A few days after the Leach incident, William "wanted to pull another robbery[.]" Maryann stated, "I didn't want to do it again. I kept trying to talk him into letting me go get a job. If he was insistent on staying here, I'll go get a job, let's do this the right way."

On June 19, 1978, while at a bar, Maryann met Hasker. Maryann discovered that Hasker lived in Hawaiʻi and was not a tourist. She tried to talk William out of the robbery, but William, who was carrying the gun, stated: "But he's talking about having money and drugs, and I want that." Maryann and William then told Hasker that they were going to another bar, and then left. Maryann and William were at another bar when Hasker showed up. After a few drinks, William asked Hasker for a ride back to their apartment. Hasker drove William and Maryann to their apartment. Maryann tried talking William out of the robbery. But, William pulled the gun on Hasker, and told him

that he was being robbed. Maryann then drove the three of them to Hasker's apartment, and went inside in search of "money and the drugs." Maryann felt that she was being forced to burglarize Hasker's apartment because "of William, his threats, my commitment to him, I guess. Eighteen years old and married to this guy and doing what my husband told me to do." Maryann took money from the apartment, but did not look for any drugs.

William became angry when Maryann returned without drugs, so he instructed her to return to Hasker's apartment and take Hasker's cocaine. Although Hasker explained to Maryann where the cocaine was, Maryann was unable to find it. William and Maryann then decided that they would take Hasker to Hanauma Bay. When they arrived at Hanauma Bay, William told Maryann to pull over to the side of the road, and he instructed Hasker to get out of the car. William, who was holding a gun, and Hasker exited the car and walked down the embankment "out of [Maryann's] line of sight." Maryann then heard two gunshots. William returned to the car and got into the driver's seat. When Maryann asked William what happened, he responded, "Nah, don't worry about it. It's just something I had to do. You wouldn't understand." Later that day, William made flight reservations for himself and Maryann to return to Los Angeles.

While in California, William and Maryann were hitchhiking and were picked up by Arauza. During the ride, William pulled the gun on Arauza and instructed him to pull over

to the side of the road. William and Arauza exited the vehicle and walked down an embankment on the side of the highway "[o]ut of [Maryann's] line of vision." A few minutes later, Maryann heard two gunshots. William returned to Arauza's car. When Maryann asked what happened, William stated that "it was just something he had to do and [she] wouldn't understand." They drove Arauza's car to Los Angeles, where Maryann and William participated in other robberies.

Maryann was subsequently arrested while driving Arauza's vehicle and charged with various robberies that she and William committed, as well as the murder of Arauza. While imprisoned, Maryann wrote William "love" letters because when he was arrested, he told her that "he was going to tell the truth, tell them what happened, and tell them that I didn't kill anybody, that he did, that he killed [] Arauza."

Maryann also stated that, contrary to William's testimony, she was never represented by "UCLA" law students. She was, however, represented by "USC" students in 1995, which was after William testified to the California Parole Board in 1991 and 1994 that he shot Hasker and Arauza.

On cross-examination, Maryann could not recall whether William had asked to move in with her two weeks after they met. The State then provided Maryann with a statement that she made in a confidential Presentence Diagnosis and Report (Presentence Report) from her initial trial. Maryann objected to the use of

the Presentence Report because such confidential reports cannot be used to impeach the defendant. The circuit court overruled the objection. After reviewing her Presentence Report, Maryann was asked whether William asked to move in with her two weeks after they met, whether she was initially reluctant, and whether she eventually agreed to William moving in. Maryann responded affirmatively to the inquiries.

Maryann also testified that she was involved in a total of three robberies. Maryann testified that the first robbery occurred in Los Angeles, and that she stood inside the door of a store as the lookout, while William robbed the store. The State asked whether Maryann had thought to "dash" into a neighboring store to tell them, "There's a man committing a robbery," to which Maryann responded, "I didn't think to do that, no." The State continued:

> [State:] And then the next one is you by yourself.
> [Maryann:] Yes, I did.
> [State:] Isn't that right? You had the gun?
> [Maryann:] I had the gun.
> [State:] You went inside the store?
> [Maryann:] I did. He had tried to get into the store, and the woman that was working wouldn't let him in, and so he sent me in. And I went in. And again, I see another opportunity where I should have and wish I had told the woman lock the door, call the police. And I did not.
> [State:] Instead you put your purse down on the counter; right?
> [Maryann:] Yes.
> [State:] You pulled out the gun?
> [Maryann:] Yes.
> [State:] And you instructed that woman, Just put all of the money in the purse?
> [Maryann:] Yes.
> [State:] I won't hesitate to shoot? You told her that; right?
> [Maryann:] (Witness nodded.)

[State:] I won't hesitate to shoot? Those are your words. Right?
[Maryann:] Probably.
[State:] William's not in there next to you; right?
[Maryann:] No.
[State:] You have the gun at this point; right?
[Maryann:] Yes. And I was still doing what he told me to do.
[State:] No. I understand that. But you're in there with the gun?
[Maryann:] Yes.
[State:] And he's outside?
[Maryann:] Yes.
[State:] How far away?
[Maryann:] I'm not sure exactly where he was.
[State:] Could he see you?
[Maryann:] I don't recall where he was. I don't know.
[State:] So there was nothing stopping you then from just telling the clerk, Look, my husband's outside, he wants me to rob you, call the police?
[Maryann:] And I realized later that that was the perfect opportunity. At that moment I did not. I was operating under what he told me to do. I know now there were so many times that there were things I could have done. I made the wrong choices. I admit that. I robbed that woman. I admit that. And I admit that I know it was the wrong choice to do. I knew the difference between a right and wrong, and I did it anyway.

Maryann also confirmed that she later committed another robbery with William.

Outside of the presence of the jury, Maryann stated that she would be recalling William to testify as to why he met with Deputy Sheriff Ahn 50 to 75 times, and to further inquire about William's testimony that he met with "law students from UCLA" who told him to take responsibility for the murders of Arauza and Hasker so that Maryann could be released from prison. The circuit court agreed to allow her to do so. Pursuant to a subpoena, William was transferred to the courthouse and held in the cellblock. Subsequently, Deputy Sheriff Thomas Cayetano was

called to testify outside the presence of the jury, and stated that William knew that he was subpoenaed to testify, but informed Deputy Sheriff Cayetano that he "did not want" to testify because of concern for his safety. On cross-examination, Deputy Sheriff Cayetano specified that William was informed that the nature of his testimony would be in regard to the "cooperation or testimony he's given in other cases on the mainland[.]" Deputy Sheriff Cayetano stated that William expressed concern for his safety in relation to testifying regarding his informant activities.

Deputy Sheriff Cayetano acknowledged that there was an "extraction" process, by which the sheriffs could remove a reluctant witness from his or her cell and bring him or her to the courtroom. Deputy Sheriff Cayetano testified that it would take between one to two hours to complete the extraction process, during which time various command personnel would be notified, a team of officers would be assembled, equipment would be distributed, and an "operational plan" would be formulated. Maryann requested that the circuit court extract William from his cell.

The circuit court recognized Maryann's right to compulsory process, but decided against extracting William because it concluded that "in the interest of justice" and out of "fairness to both sides" that would not be helpful. Specifically, the circuit court noted that extracting William "wouldn't work and wouldn't be helpful for the jury."

Although the State argued that the jury should not even be informed of William's refusal to testify, the circuit court allowed Maryann to call Deputy Sheriff Cayetano as a witness, stating that it did so out of a concern for fairness and in order to avoid any juror confusion.

Deputy Sheriff Cayetano testified before the jury that William was transferred to the courthouse to testify as a witness, but refused to testify.

iv. Jury Instructions

As relevant to this appeal, the State requested that the following instruction be given on murder (State's Instruction No. 1):

> A person commits the offense of Murder if she intentionally or knowingly causes the death of another person.
>
> There are two material elements of the offense of Murder, each of which the prosecution must prove beyond a reasonable doubt.
>
> These two elements are:
>
> 1. That on or about the 18th day of June 1978, through and including the 20th day of June 1978, in the City and County of Honolulu, the Defendant intentionally or knowingly engaged in conduct; and
> 2. That by engaging in that conduct, the Defendant intentionally or knowingly caused the death of [] Hasker.

The State also proposed the following instruction on accomplice liability (State's Instruction No. 2):

> A defendant charged with committing an offense may be guilty because she is an accomplice of another person in the commission of the offense. The prosecution must prove accomplice liability beyond a reasonable doubt.
>
> A person is an accomplice of another in the commission of an offense if, with the intent to promote or facilitate the commission of the offense, she

> a. Solicits the other person to commit it; or
> b. Aids or agrees or attempts to aid the other person in the planning or commission of the offense.
>
> Mere presence at the scene of an offense, or knowledge that an offense is being committed, without more, does not make a person an accomplice to the offense. However, if a person plans or participates in the commission of an offense with the intent to promote or facilitate the offense, she is an accomplice to the commission of the offense.

Maryann objected to the murder instruction:

> I would only point to Count [VI] of the indictment itself, which specifically states Maryann [] did intentionally or knowingly cause the death of [] Hasker by shooting him with a firearm, thereby committing the offense of murder. And they specifically charged her with shooting him. And I believe that that's like a bill of particulars. It's not surplusage. The indictment cannot be modified or amended and, therefore, they are limited to proving that. . . . But that's why I'm objecting to State's Instruction No. 1, because it does not include the language that they need to prove that she shot and killed [] Hasker.

(Emphasis added).

Maryann appeared to object to the accomplice liability instruction on the same ground. Over Maryann's objection, the circuit court gave the State's Instruction No. 1, and the following modification of State's Instruction No. 2:

> A defendant charged with committing the offense of Murder may be guilty because she is an accomplice of another person in the commission of that offense. The prosecution must prove accomplice liability beyond a reasonable doubt.
>
> A person is an accomplice of another in the commission of the offense of Murder if, with the intent to promote or facilitate the commission of that offense, she
>
> a. solicits the other person to commit it; or
> b. aids or agrees or attempts to aid the other person in the planning or commission of that offense.
>
> Mere presence at the scene of an offense, or knowledge that an offense is being committed, without more, does not make a person an accomplice to that offense. However, if a person plans or participates in the commission of that offense with the intent to

> promote or facilitate that offense, she is an accomplice to the commission of that offense.

(Emphases added).

v. Closing Arguments, Verdict, and Sentence

The State argued that William was a credible witness and that Maryann had shot Hasker. The State further emphasized that Maryann had numerous opportunities to report William's criminal conduct, but never did. The State also argued that Maryann lied multiple times during the investigation and that her testimony was not credible.

Defense counsel attacked William's credibility by referring multiple times to his inconsistent statements under oath regarding Maryann's involvement in the murders of Hasker and Arauza. For example, defense counsel argued, "William [] admitted that he committed perjury against Maryann. William admitted under oath that he shot and killed [] Hasker and [] Arauza. And he did it more than once." With regard to the Arauza murder, defense counsel also stated, "William [] was facing a murder charge. The Court found that Maryann did not shoot [] Arauza. The only logical legal conclusion was that William shot and killed Arauza. . . . And the truth is that Maryann was found not to have shot and killed Arauza."

In its rebuttal closing, the State again emphasized the credibility of the witnesses. Relevant to this appeal, the State asserted:

> [Defense counsel] wants you to believe that at the time William [] gave his first statement to Detective Ahn regarding the Hawaii and the California incidents saying that Maryann was the shooter, he was trying to save himself. [Defense counsel] says that [William] knew that she had been convicted. [William] knew that the use allegation was found untrue, and therefore, he must be the shooter.
>
> Well, think back to the testimony, ladies and gentlemen. And you recall, when William [] was shown Maryann[']s judgment on the stand, that was the first time he had ever seen it. He did not know that she had her use allegation stricken. He only knew she had been convicted of murder. And recall, the conviction happened in January. William [] didn't say anything to Wilbert Ahn until March, after he had that meeting with [Maryann] on the bus from court, where she said, "Have you snapped? I killed Cesario Arauza."
>
> And at that point, he just gave up, ladies and gentlemen. He pled nolo contendere, no contest. It's not an admission, but the Court did find him guilty of everything charged. There was no trial, no admission, but he just gave up. He didn't ask for anything. He didn't get anything. He's still in custody today.

Maryann then objected:

> It's improper. We weren't allowed to present the testimony of William that he made all these deals on the side and he was trying to get something out of it. So, I mean, he's saying that he didn't get anything out of it. He didn't have any other ulterior motive. That's not true. We couldn't present that evidence because he refused to testify.

The State then responded, "There's no evidence of that[.]" The circuit court overruled the objection and denied Maryann's subsequent motion for a mistrial.

The jury found Maryann guilty of murder. The jury was given a special interrogatory: "Did the prosecution prove beyond a reasonable doubt that [Maryann] actually possessed, used, or threatened to use a pistol during the commission of the Murder or Manslaughter?" The jury answered, "No." The circuit court subsequently entered its Judgment of Conviction and Sentence,

convicting Maryann of murder and sentencing her to life in prison with the possibility of parole. Maryann timely appealed.

2. ICA Appeal

In its Memorandum Opinion, the ICA affirmed Maryann's conviction, and concluded that: (1) Maryann opened the door to the California incidents, and the circuit court did not abuse its discretion in permitting the challenged evidence; (2) the circuit court did not abuse it discretion denying Maryann's motion for mistrial because of Millard's testimony regarding the lie detector test; (3) the State's use of Maryann's presentence report did not result in any significant prejudice to Maryann and did not affect her substantial rights; (4) the manner in which the circuit court dealt with William's refusal to be recalled as a witness in Maryann's case did not deprive Maryann of a fair trial; (5) the deputy prosecuting attorney (DPA) did not engage in prosecutorial misconduct for his statements during rebuttal closing; and (6) the circuit court's jury instructions on murder and accomplice liability were not erroneous. State v. Acker, No. 30205, 2012 WL 4857018, **1-17 (Haw. App. Oct. 12, 2012) (Mem. Op.).

II. Standards of Review

A. Right to a Fair Trial

"A fair trial by an impartial jury is guaranteed to the criminally accused by both the sixth amendment of the United

States Constitution and article I, § 14 of the Hawaiʻi Constitution." State v. Furutani, 76 Hawaiʻi 172, 179, 873 P.2d 51, 58 (1994) (citation and brackets omitted). "This court reviews questions of constitutional law de novo, under the right/wrong standard and, thus, exercises its own independent constitutional judgment based on the facts of the case." State v. Mattson, 122 Hawaiʻi 312, 321, 226 P.3d 482, 491 (2010) (citation, brackets, and internal quotation marks omitted).

B. Evidentiary Rulings

The appellate court applies "two different standards of review in addressing evidentiary issues. Evidentiary rulings are reviewed for abuse of discretion, unless application of the rule admits of only one correct result, in which case review is under the right/wrong standard." State v. Ortiz, 91 Hawaiʻi 181, 189, 981 P.2d 1127, 1135 (1999) (internal quotation marks and citations omitted).

C. Prior Bad Acts Evidence

> "Prior bad act" evidence under [HRE] Rule 404(b) . . . is admissible when it is 1) relevant and 2) more probative than prejudicial. A trial court's determination that evidence is "relevant" within the meaning of HRE Rule 401 . . . is reviewed under the right/wrong standard of review. However, a trial court's balancing of the probative value of prior bad act evidence against the prejudicial effect of such evidence under HRE Rule 403 . . . is reviewed for abuse of discretion. An abuse of discretion occurs when the court clearly exceeds the bounds of reason or disregards rules or principles of law to the substantial detriment of a party litigant.

State v. Behrendt, 124 Hawaiʻi 90, 102, 237 P.3d 1156, 1168 (2010) (brackets and ellipses in original) (citation omitted).

D. Prosecutorial Misconduct

"Allegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of whether there is a reasonable possibility that the error complained of might have contributed to the conviction." State v. Rogan, 91 Hawaiʻi 405, 412, 984 P.2d 1231, 1238 (1999) (internal quotation marks and citations omitted) (quoting State v. Sawyer, 88 Hawaiʻi 325, 329 n.6, 966 P.2d 637, 641 n.6 (1998)).

"Prosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a fair trial." State v. McGriff, 76 Hawaiʻi 148, 158, 871 P.2d 782, 792 (1994). "In order to determine whether the alleged prosecutorial misconduct reached the level of reversible error, [the appellate court considers] the nature of the alleged misconduct, the promptness or lack of a curative instruction, and the strength or weakness of the evidence against defendant." State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992) (citation omitted).

E. Jury Instructions

> When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading.

> Erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.

State v. Arceo, 84 Hawaiʻi 1, 11, 928 P.2d 843, 853 (1996) (internal quotation marks, brackets, and citations omitted); see also State v. Nichols, 111 Hawaiʻi 327, 337, 141 P.3d 974, 984 (2006) ("[O]nce instructional error is demonstrated, we will vacate, without regard to whether timely objection was made, if there is a reasonable possibility that the error contributed to the defendant's conviction, i.e., that the erroneous jury instruction was not harmless beyond a reasonable doubt.").

F. Motion for Mistrial

> The denial of a motion for mistrial is within the sound discretion of the trial court and will not be upset absent a clear abuse of discretion. The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Lagat, 97 Hawaiʻi 492, 495, 40 P.3d 894, 897 (2002) (internal quotation marks and citations omitted).

III. Discussion

Maryann argues that she was denied a fair trial because: (1) the circuit court erred in admitting the prior "bad acts" evidence, i.e., the Arauza incident and California robberies; (2) the circuit court erred in denying a mistrial when Millard testified that the police officers administered a polygraph test on him and that he passed the test, implying that William also passed a polygraph test; (3) the prosecutor engaged

in misconduct when he cross-examined Maryann using her confidential Presentence Report and bolstered William's credibility during his rebuttal closing; (4) the circuit court erred in refusing to extract William; and (5) the jury instructions on accomplice liability and the offense of murder were erroneous.

A. Evidence of the Arauza incident and California robberies was admissible

1. The circuit court erred in determining that Maryann opened the door to evidence of the Arauza incident

Maryann argues that the door was not opened to the Arauza incident by defense counsel's cross-examination of William regarding whether he lied under oath as it pertained to Maryann. First, Maryann argues that "[t]he trial court indicated that Maryann could 'cross' William about what he told the Paroling Authority and his wanting to exculpate Maryann. The trial court indicated that it would decide the scope beyond that." Maryann also appears to argue that in any event, defense counsel had not questioned William about the facts of his testimony to the California Parole Board at the time the circuit court determined he opened the door.

The record shows that defense counsel did not open the door to the Arauza incident and California robberies. At a pre-trial hearing on July 24, 2009, the circuit court, which was aware that William had exculpated Maryann in testimony to the

California Parole Board, determined that defense counsel could "cross [William] based upon what he told the Paroling Authority." In addition, the circuit court stated: "I'll decide at the time the scope beyond that."

In its Order granting in part and denying in part Maryann's Third Motion in Limine, the circuit court ordered that "should [Maryann] question William [] on his 1991 statement to the California Parole Board, the State may then introduce evidence of William['s] reasons for making that statement, including [Maryann's] conviction and sentence for the murder of [] Arauza in California." (Emphasis added).

That same day, defense counsel cross-examined William, and began with the question: "[Did] you ever lie under oath, commit perjury as it pertains to Maryann?" William responded, "Yeah," the State objected and argued that the question had opened the door to the Arauza incident. The circuit court overruled the objection and allowed defense counsel to proceed. Defense counsel asked: "[H]ave you ever lied under oath as it pertain[ed] to Maryann?" William then asked the circuit court, "does a board hearing count[,]" to which the circuit court responded, "If it's under oath, yes. I don't know what the board -- I assume we are talking about a California board hearing; is that right?" After a bench conference, the circuit court struck the "last whole series of questions about perjury and the answers[.]" Defense counsel then questioned William about

statements he had made regarding prior cocaine use. William stated that he lied about his cocaine use so that he could go to a rehabilitation center as opposed to prison. William then stated that he would lie to get himself out of prison, but he would not lie under oath.

Defense counsel then requested that he be able to question William as to whether he ever lied under oath: "He just said he wouldn't lie under oath. . . . I'm going to ask him if he ever did that." The circuit court then stated, "I will allow that particular question, but I want you to know you got your hand on that doorknob." The following exchange then occurred:

> [Defense]: My question then is to you, [William], have you ever lied under oath as it pertains to anything about Maryann?
> [William]: Probably.
> [Defense]: Probably. Does that mean yes?
> [William]: Yeah, that means yes.
> [Defense]: Okay.
> [William]: But not in court.
> [Defense]: And so when you lie -- I'm sorry. When you lied under oath about Maryann, was there any repercussion to you?
> [William]: No.
> [Defense]: No.
> [William]: No, there wasn't because there wasn't a lie on her. I'm trying to do something for her.

The circuit court ruled that defense counsel had opened the door. Defense counsel objected to that ruling, but said he would proceed based on the circuit court's ruling.

Under the circuit court's July 24, 2009 oral ruling, defense counsel was expressly allowed to cross-examine William on "what he told the Paroling Authority." Specifically, pursuant to the circuit court's August 18, 2009 Order, defense counsel would

open the door only if he questioned William about his "statement" to the California Parole Board. Clearly, up until the point where the circuit court ruled that defense counsel had opened the door, defense counsel did not ask William what his "statement" was to the California Parole Board. Defense counsel merely asked William if he had ever lied under oath as it pertained to Maryann, and if there were any repercussions for that lie.

When viewed in context, defense counsel limited his line of questioning to elicit a response from William as to whether he lied under oath as it pertained to Maryann and if there were any repercussions to him. Defense counsel did not ask about specific facts regarding the Arauza incident, or about the details of William's testimony to the California Parole Board. Therefore, defense counsel's questioning was consistent with the circuit court's oral rulings and written order granting in part and denying in part Maryann's Third Motion in Limine.

Accordingly, defense counsel had not yet opened the door to the Arauza incident. Furthermore, in ruling that defense counsel opened the door, the circuit court appears to have made conflicting determinations as to what questions defense counsel was allowed to pursue on cross-examination without opening the door.[12]

[12] Moreover, in both its August 18, 2009 Order and its oral ruling, the circuit court indicated that only the Arauza convictions would be allowed into evidence. The circuit court, however, disregarded its own limitation on the evidence and allowed evidence of the facts of the Arauza incident.

Thus, contrary to the ICA's position, the door was not opened to the Arauza convictions and the California evidence when defense counsel asked whether William lied under oath as it pertained to Maryann and whether there were any repercussions for that lie. Accordingly, the circuit court erred in allowing the testimony of the Arauza incident based on its determination that defense counsel had opened the door.

2. The circuit court's error was harmless because the evidence of the Arauza incident and California robberies was admissible under HRE Rule 404(b) to show intent and a common plan, and to rebut Maryann's assertion that she was coerced

Although the circuit court erred in determining that defense counsel opened the door to the Arauza incident and California robberies, that error was harmless because the evidence was admissible under HRE Rule 404(b).[13] Maryann argues that the evidence involving the Arauza incident was irrelevant and inadmissible under HRE Rule 404(b), as it "served to prove bad character[.]" However, as explained below, the Arauza incident and California robberies were admissible for other proper purposes.

HRE Rule 404(b) provides:

[13] At Maryann's initial trial, the circuit court allowed evidence of the Arauza incident. That determination, which was initially challenged on appeal, was affirmed by this court. At retrial, the circuit court revisited this prior determination and, in its December 29, 2008 Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part State's Notice of Intent to Use Evidence, concluded that regardless of the doctrine of "law of the case" there were cogent reasons to preclude use of this evidence. As explained infra, this determination was incorrect and we therefore reaffirm our prior ruling regarding admissibility of this evidence.

> Other crimes, wrongs, or acts. 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. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

The purpose of HRE Rule 404(b) is to prohibit the admission of evidence "that a party possesses a criminal character and acted in conformity therewith." State v. Yamada, 116 Hawaii 422, 434, 173 P.3d 569, 581 (App. 2007). In addition,

> Although such evidence may never be used solely for the purpose of suggesting criminal propensity, under certain circumstances it may be offered to prove other facts of consequence. Such facts include, but are not limited to, motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

Id. at 435, 173 P.3d at 582 (citations and quotation marks omitted).

Furthermore, under HRE Rule 404(b), "any purpose for which bad-acts evidence is introduced is a proper purpose so long as the evidence is not offered solely to prove character." Id. (citation and emphases omitted). In addition, the evidence must be more probative than prejudicial. Behrendt, 124 Hawaiʻi at 102, 237 P.3d at 1168. This court has stated:

> When weighing probative value versus prejudicial effect in this context, a court must consider a variety of factors, including . . . the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for

> the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

Id. at 106, 237 P.3d at 1172.

Evidence of the Arauza incident was relevant to show intent and common plan because the Arauza, Hasker and Leach incidents involved similar scenarios, i.e., Maryann and William robbed lone men, left them at remote locations, and escaped in their victims' vehicles. By so doing, they were able to minimize their chances of being caught.

The Arauza incident and California robberies were also relevant to refute Maryann's theory that William orchestrated and forced her to participate in the criminal activity, and to show that Maryann was an intentional and willing participant in Hasker's murder and not merely a pawn in William's conduct. In Maryann's opening statement, defense counsel argued that William was an "infection" that had struck fear into Maryann by shooting at her to force her to participate in his plan to commit robberies. Defense counsel argued that William pressured and forced Maryann to go along with William's plan. Defense counsel also asserted that Maryann did not shoot Hasker, did not intend for Hasker to die, and did not know that William would shoot Hasker.

The evidence of the California incidents was relevant to rebut Maryann's theory of coercion. It showed that she had the opportunity on the mainland — after Maryann and William

returned there from Hawaiʻi — to disassociate herself from William's control.[14]

Moreover, the probative value of the Arauza incident and California robberies outweighs the prejudicial effect against Maryann. Several factors weigh in favor of admission of the evidence. The evidence was strong insomuch as it was undisputed that the California incidents occurred and that, at the very least, Maryann was present during each of the incidents. The time that elapsed between the crimes was relatively brief: Hasker was murdered "[o]n or about" June 18, 1978 through June 20, 1978, Arauza was murdered on June 24, 1978, and the California robberies occurred on June 25, 26, and 28, 1978. See United States v. Basham, 561 F.3d 302, 326-28 (4th Cir. 2009) (holding that evidence of other acts during a sixteen-day crime spree was more probative than prejudicial). There was a strong need for the evidence, since the pattern of conduct helped to rebut Maryann's suggestion that she had been coerced into participating in Hasker's killing. All of the incidents involved armed robberies, and there were strong factual similarities between the Hasker and Arauza incidents. Although the Arauza incident began somewhat differently than the Hasker incident (with Maryann and William hitchhiking, rather than Maryann

[14] With regard to the California robberies, defense counsel did not object to the admission of Maryann's California judgment, which included the robbery convictions. Defense counsel appeared to suggest subsequently that he did not realize that the robberies were included on the judgment.

getting "dolled up" and meeting their victim at a bar), once they were alone with Arauza the incidents were similar. Lastly, the evidence of the California incidents was not likely to rouse the jury to an overmastering sense of hostility against Maryann because the conduct (murder and robbery) was the same type of conduct that was committed in Hawaiʻi.

In sum, the California incidents were more probative than prejudicial. Thus, evidence of the Arauza incident and the California robberies was admissible under HRE Rule 404(b).

Additionally, through William's testimony regarding the Arauza incident and the California robberies, Maryann was able to mount a strong attack on William's credibility. On cross-examination, defense counsel was able to elicit the following testimony from William: (1) he acknowledged that he would lie in order to obtain favorable treatment; (2) he stated that he would lie under oath and that he lies to police and prosecutors; (3) he testified that he reported the Hasker murder to divert suspicion away from him in the Arauza incident and that when he talks to police it is usually to improve his legal situation; (4) he stated that he lied to Deputy Sheriff Ahn about details regarding the Arauza incident; and (5) he stated that there was no objective way to judge if he was telling the truth, and that he was a convict and convicts do not tell truth.

Furthermore, Maryann used the evidence of the Arauza incident and both Maryann's and William's convictions for the

incident to argue during closing argument that William shot Arauza (and therefore, also shot Hasker), and Maryann did not.

Finally, the jury was given the following limiting instruction regarding the California convictions:

> [Y]ou are about to hear evidence that the defendant and the witness at another time may have or have engaged in and committed other crimes, wrongs or acts. You must not use this evidence to determine that the defendant or the witness are persons of bad character and, therefore, must have committed the offense charged in this case.
>
> Actually, I'm talking only about [Maryann], the defendant is a person of bad character and must have committed the offense charged in this case. Such evidence may be considered by you only on the issue of the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, modis [sic] operandi, absence of mistake or accident, and for no other purpose.
>
> So it doesn't go to propensity or character. It goes to the specific reasons detailed in our statute and the rules.

This limiting instruction dissipated the risk of prejudice to Maryann because a jury is presumed to follow the instructions it is given by the court. See State v. Knight, 80 Hawaiʻi 318, 327, 909 P.2d 1133, 1142 (1996) ("[A]s a rule, juries are presumed to . . . follow all of the trial court's instructions.").

Thus, although the circuit court erred in its determination that defense counsel had opened the door to the Arauza incident and California robberies, the error was harmless because that evidence was nevertheless admissible under HRE Rule 404(b).

B. The circuit court did not abuse its discretion in denying Maryann's motion for a mistrial because it struck Millard's testimony regarding the lie detector test and instructed the jury to disregard it

Maryann contends that Millard's testimony that he took a lie detector test after being questioned by police regarding the night of Hasker's murder and passed that test "generated insurmountable prejudice[.]" Citing State v. Kahinu, 53 Haw. 536, 498 P.2d 635 (1972), Maryann asserts that Millard's testimony was an "evidentiary harpoon" because the jury could infer from Millard's testimony that the police also administered a lie detector test to William and that William passed. Maryann's argument is without merit.

In Kahinu, the defendant, Robert Edson Kahinu, was convicted of burglary in the first degree and assault with the intent to rape. Id. at 537, 498 P.2d at 637. During Kahinu's trial, Detective Rivera testified that Kahinu was in police custody on another case at the time he interviewed the complaining witness about her photographic identification of Kahinu. Id. at 548, 498 P.2d at 643. Defense counsel objected to the testimony, but the circuit court overruled the objection. Id. The circuit court, however, struck any testimony regarding other cases from the record. Id. Kahinu was subsequently found guilty. Id. at 537, 498 P.2d at 637. This court stated, "the deliberate and unresponsive injection by prosecution witnesses of irrelevant references to prior arrests, convictions, or

imprisonment may generate insurmountable prejudice to the cause of an accused." Id. at 549, 498 P.2d at 643 (citation omitted). This court stated that Detective Rivera's testimony could constitute an "evidential harpoon" requiring a mistrial. Id.

In this case, Millard's testimony was not an "evidential harpoon." Millard testified that he and Hasker planned to meet on the evening of June 19, 1978, at the Garden Bar at the Hilton Hawaiian Village. Millard, however, did not show for the meeting. A few days later, Millard was questioned by police: "They asked me if I would take a lie detector test, asked me a lot of questions like where were you and this and all that. And apparently, you know, I answered all the questions and everything to their liking." Maryann objected to Millard's testimony, and at her request, the circuit court struck Millard's testimony regarding the lie detector test: "the Court has struck from the record the testimony about the polygraph test as irrelevant and inadmissible. And the jury will disregard and also not speculate on any other police activity. It's just not going to be part of this case, nor any case."

First, because the jury is presumed to follow the court's instructions, see Knight, 80 Hawaiʻi at 327, 909 P.2d at 1142, it cannot be said that Maryann was prejudiced. Second, it is not clear from the record that the jury would have necessarily inferred that William also took and passed a lie detector test. Accordingly, the circuit court did not abuse its discretion in

concluding that striking Millard's testimony and directing the jury to disregard it was sufficient to protect Maryann's right to a fair trial.

C. The DPA's use of the Presentence Report to question Maryann during cross-examination was harmless beyond a reasonable doubt and the DPA's comments during his rebuttal closing argument did not violate Maryann's right to a fair trial

First, citing State v. Greyson, 70 Haw. 227, 768 P.2d 759 (1989), Maryann argues that the State improperly cross-examined her using information contained in her Presentence Report. Maryann raised the same argument before the ICA. The ICA concluded that the DPA's use of the Presentence Report was improper under Greyson, but held that the error was harmless because it did not result in any substantial prejudice to Maryann or affect her substantial rights. Acker, 2012 WL 4857018, at *15.

Although Maryann argues that Greyson was applicable, she does not challenge the ICA's determination that the error was harmless. HRAP Rule 40.1(d)(4) ("The application for a writ of certiorari . . . shall contain [a] brief argument with supporting authorities."). Thus, Maryann's argument is not discussed further. See State v. Metcalfe, 129 Hawaiʻi 206, 221 n.8, 297 P.3d 1062, 1077 n.8 (2013) (noting that an issue not raised in an application need not be discussed).

Second, Maryann contends that the DPA falsely and misleadingly "argued that William didn't ask for anything and

didn't get anything as part of its attempt to bolster William's credibility." This argument also is without merit.

During rebuttal closing argument, the DPA stated:

> [W]hen William [] was shown Maryann[']s] judgment on the stand, that was the first time he had ever seen it. He did not know that she had her use allegation stricken. He only knew she had been convicted of murder. And recall, the conviction happened in January. William [] didn't say anything to Wilbert Ahn until March, after he had that meeting with [Maryann] on the bus from court, where she said, "Have you snapped? I killed Cesario Arauza."
>
> And at that point, he just gave up, ladies and gentlemen. He pled nolo contendere, no contest. It's not an admission, but the Court did find him guilty of everything charged. There was no trial, no admission, but he just gave up. He didn't ask for anything. He didn't get anything. He's still in custody today.

The DPA's comments did not constitute misconduct, but rather permissible comment on the evidence. See Rogan, 91 Hawaiʻi at 412, 984 P.2d at 1238 ("It is also within the bounds of legitimate argument for prosecutors to state, discuss, and comment on the evidence as well as to draw all reasonable inferences from the evidence." (citations omitted)). Here, the DPA's statement during rebuttal closing argument referred to William's plea to the California charges. William's California judgment reflects that he pleaded nolo contendere to the two robbery charges and the murder of Arauza with the use of a firearm. William also acknowledged that he pleaded nolo contendere to Arauza's murder and the use of a firearm allegation. The judgment does not indicate that he received any deal in exchange for his plea. Thus, there was a basis in the evidence for the DPA's argument and the DPA's comments were

permissible "comment[s] on the evidence[.]" Id.; see also State v. Clark, 83 Hawaiʻi 289, 304, 926 P.2d 194, 209 (1996).

Although Maryann argues that there was evidence to show that William was making "all these deals on the side[,]" that William received preferential treatment, and that William's refusal to testify in her case precluded her from bringing in that evidence, there is nothing in the record to indicate that William asked for or was given "anything" for his plea of nolo contendere on the California charges. Maryann had ample opportunity to cross-examine William on any agreements he made regarding the California incidents, but did not. All that is in the record is William's plea and his testimony, from which the DPA could draw reasonable inferences. See Rogan, 91 Hawaiʻi at 412, 984 P.2d at 1238; Clark, 83 Hawaiʻi at 304, 926 P.2d at 209.

Moreover, Maryann adduced significant evidence to show that William received a substantial benefit in his plea agreement regarding the Hawaiʻi charges, specifically, that all charges were dropped against him, except the robbery count, for his testimony against Maryann. Defense counsel also argued during closing argument that William continued to lie when he testified in Maryann's retrial regarding the Hasker murder in order to maintain his immunity from the remaining Hawaiʻi charges that were dismissed under his plea agreement with the State.

The DPA's alleged misconduct occurred during rebuttal closing, where the prosecution is given "wide latitude" to

discuss the evidence. See State v. Mars, 116 Hawaiʻi 125, 142, 170 P.3d 861, 878 (App. 2007) ("Prosecutors have latitude to respond in rebuttal closing to arguments raised by defense counsel in their closing. The prosecution may base its closing argument on the evidence presented or reasonable inferences therefrom, respond to comments by defense counsel which invite or provoke response, denounce the activities of defendant and highlight inconsistencies in defendant's argument." (internal citation and quotation marks omitted)); Clark, 83 Hawaiʻi at 304, 926 P.2d at 209. The DPA's comments during rebuttal closing were in direct response to defense counsel's statements during Maryann's closing argument. Specifically, defense counsel argued in closing that at the time William gave his statement to Deputy Sheriff Ahn, William was trying to convince Deputy Sheriff Ahn that he was not the shooter:

> William [] was facing a murder charge. The Court found that Maryann did not shoot [] Arauza. The only logical legal conclusion was that William shot and killed Arauza. Feeling desperate, William called Ahn to try to convince him that William was not the shooter.
>
> Now, William thought they wouldn't believe him because of his criminal history, but he tried, anyway. Maryann shot Arauza, even though a judge has already said that was not true. Oh, and to prove to you that she did it, she also shot a guy in Hawaii.
>
> Now, all of his scheming, all of his statements did not convince California that he did not shoot and kill Arauza, because you know what? At that point, William was right. They didn't believe him. California refused to drop the use-of-a-firearm allegation, so William pled nolo contendere, and the Court found that he shot and killed Arauza. He voluntarily did that. Nobody forced him. He said he understood everything that was going on, and he went in and he said nolo contendere.

Defense counsel thus portrayed William's reporting of the Arauza murder to Deputy Sheriff Ahn as an effort by William to deflect blame for the Arauza murder from himself to Maryann. However, the DPA argued in rebuttal closing that the evidence showed that William pleaded no contest to the Arauza murder because he knew that Maryann had been convicted, and because Maryann had told him on the bus that she shot Arauza. When viewed in context, the DPA's comments with regard to the nolo contendere plea, i.e., that "[William] didn't ask for anything[,] . . . [h]e didn't get anything[,]" appear to have been in response to defense counsel's suggestion during Maryann's closing argument that William was trying to deflect the blame of the murder from himself to Maryann, and had a reasonable basis in the evidence. Again, the prosecution is given "wide latitude" during rebuttal closing to respond to comments by defense counsel. See Mars, 116 Hawaiʻi at 142, 170 P.3d at 878; Clark, 83 Hawaiʻi at 304, 926 P.2d at 209.

Accordingly, the DPA did not mislead the jury and did not engage in prosecutorial misconduct.

D. The circuit court did not abuse its discretion in denying Maryann's request to have William extracted from the courthouse cellblock

Maryann argues that she had a right to compulsory process and to present a defense, and that she was denied a fair trial by the circuit court's denial of her request to have William extracted from the courthouse cellblock. On the facts of

this case, we conclude that the circuit court did not abuse its discretion in denying Maryann's request to have William extracted from his cell.

"The due process guarantee of the Federal and Hawaii constitutions serves to protect the right of an accused in a criminal case to a fundamentally fair trial." State v. Matafeo, 71 Haw. 183, 185, 787 P.2d 671, 672 (1990) (citing State v. Keliiholokai, 58 Haw. 356, 569 P.2d 891 (1977)). As relevant here, a "fundamental element of due process of law is the right of compulsory process." State v. Diaz, 100 Hawaiʻi 210, 226, 58 P.3d 1257, 1273 (2002). "The right to compulsory process affords a defendant in all criminal prosecutions, not only the power to compel attendance of witnesses, but also the right to have those witnesses heard." State v. Mitake, 64 Haw. 217, 224, 638 P.2d 324, 329 (1981).

Although "the right to compulsory process is of paramount importance in assuring a defendant the right to a meaningful defense and a fair trial," it "does not guarantee the right to compel attendance and testimony of all potential witness absolutely." Id. In other words, the "right is not without just limitations." Id. at 224, 638 P.2d at 330. For example, this court has stated that "unless the witness denied to defendant could have produced relevant and material testimony benefiting the defense, there exists no constitutional violation." Id. at 224, 638 P.2d at 329; see also Diaz, 100 Hawaiʻi at 226, 58 P.3d

at 1273 (noting that the right to compulsory process "is subject to limitations, the most important of which, is that the defendant may only obtain witnesses who can give relevant and beneficial testimony for the defense" (quotation marks omitted)); State v. DeCenso, 5 Haw. App. 127, 133, 681 P.2d 573, 578 (1984).

A trial court is not required to have a witness take the stand solely to invoke his privilege against self incrimination in front of the jury. See State v. Sale, 110 Hawaiʻi 386, 392-94, 133 P.3d 815, 821-23 (App. 2006); HRE Rule 513; see also, United States v. Edmond, 52 F.3d 1080, 1109 (D.C. Cir. 1995) ("[T]he accused's right to compulsory process does not include the right to compel a witness to waive his fifth amendment privilege[.]" (quotation marks omitted)); United States v. Bowling, 239 F.3d 973, 976 (8th Cir. 2001) (same). Thus, "[o]nce a witness appears in court and refuses to testify, a defendant's compulsory process rights are exhausted." United States v. Griffin, 66 F.3d 68, 70 (5th Cir. 1995). In Griffin, the defendants argued that their right to compulsory process guaranteed them the right to place a witness on the stand for the sole purpose of having that witness invoke an invalid Fifth Amendment privilege in the jury's presence. 66 F.3d at 70. The Fifth Circuit rejected this argument, noting that the "Sixth Amendment requires that a witness be brought to court, but it does not require that he take the stand after refusing to testify." Id.

Although William did not invoke his privilege against self incrimination in this case, the analysis of the Fifth Amendment cases is nevertheless pertinent. As the court noted in Griffin, "[i]t is irrelevant whether the witness's refusal is grounded in a valid Fifth Amendment privilege, an invalid privilege, or something else entirely." Id.

The right to compulsory process must therefore "be considered in the light of its purpose, namely, to produce testimony for the defendant." United States v. Roberts, 503 F.2d 598, 600 (9th Cir. 1974). As the Ninth Circuit has observed, "[c]alling a witness who will refuse to testify does not fulfill [this] purpose[.]" Id.; In re Bizzard, 559 F. Supp. 507, 510 (S.D. Ga. 1983).

In Bizzard, for example, a defense witness refused to testify out of a fear for his life after he had testified during an earlier trial. Id. at 509. Bizzard argued that his right to compulsory process was denied because the court did not enforce a subpoena of the witness. Id. at 510. The court rejected this argument, explaining that because the witness was excused as a witness after he had refused to testify, enforcing the subpoena "would have been an exercise in futility." Id.

Here, after the circuit court determined that Maryann would be allowed to recall William, William was transported to the courthouse, informed that he was there to testify, and knew that he had been subpoenaed to testify. After William refused to

testify, Maryann requested that William be extracted from his cell. As explained by Deputy Sheriff Cayetano, extraction would have required command personnel to be notified, a team of officers to be assembled, equipment to be distributed, and an operational plan to be formulated. The team of officers may have consisted of SWAT team members in battle dress uniform or other personnel assigned to the courthouse cellblock. William would then be removed from his cell and transported to the courtroom. The circuit court noted that it was not concerned by the time necessary to have William extracted, but that it was nevertheless denying Maryann's request because the court didn't think "in the interest of justice and in fairness to both sides that would be helpful." The circuit court further explained that there would not be "any gain" in extracting William, since it "wouldn't work and wouldn't be helpful for the jury."

At that point, Maryann requested that she be allowed to call Deputy Sheriff Cayetano as a witness so that he could testify that William had been subpoenaed to testify but that he was refusing to do so. The State, however, argued that the jury should not be informed of William's refusal to testify. Specifically, the DPA stated "I don't want them to know anything, Your Honor." The circuit court repeatedly noted that, given William's refusal to testify, it wanted to be fair to both sides and that it didn't want to confuse the jury. The circuit court therefore allowed Maryann to call Deputy Sheriff Cayetano as a

witness. Deputy Sheriff Cayetano then testified that a subpoena was issued and served on William, William was transported to the courthouse to testify, William was informed that he was subpoenaed to testify as a witness, but that William was refusing to testify.

In these circumstances, Maryann was neither denied her right to compulsory process nor her right to a fair trial. The circuit court explicitly recognized Maryann's right to compulsory process, but concluded that having a team of law enforcement officers extract William from the courthouse cellblock and transport him to the courtroom solely to have him refuse to testify on the witness stand would not have resulted in "any gain" and "wouldn't [have been] helpful for the jury." We agree. As noted above, "unless the witness denied to [the] defendant could have produced relevant and material testimony benefiting the defense, there exists no constitutional violation." Mitake, 64 Haw. at 224, 638 P.2d at 329. Here, the record is clear that William would not have produced "relevant and material testimony benefiting the defense" because he refused to testify. Moreover, the circuit court allowed Maryann to call Deputy Sheriff Cayetano to testify that William was served with a subpoena, he was transported to the courthouse to testify, but that he was refusing to do so. Maryann also reminded the jury of William's refusal to testify during her closing argument. Specifically, Maryann argued that:

> Under oath, William told the California parole board twice, in 1991 and 1994, that he shot and killed Arauza and Hasker. But, oh, wait a minute. That didn't count, because it wasn't in court, because court is sacred. Court is like a church.
>
> But, if court is so sacred, then why did he, when called to return to church this past Friday, refuse to come to church?
>
> He flipped off the court, which he considers sacred. He flipped you off by refusing to testify.
>
> Is that who you would place your unquestioned, beyond-a-reasonable-doubt belief in?

In these circumstances, the purpose of compulsory process — i.e., to produce testimony for the defendant — would not have been served by having William physically extracted from the courthouse cellblock and placed on the witness stand in front of the jury. See Roberts, 503 F.2d at 600, Bizzard, 559 F. Supp. at 510. Thus, Maryann was not entitled to have William refuse to testify in front of the jury. See, e.g., Sale, 110 Hawaiʻi at 392-94, 133 P.3d at 821-23. The circuit court therefore did not abuse its discretion in denying Maryann's request to have William extracted from his cell.[15]

Maryann now argues that the circuit court should have addressed William personally to inform him that he had been subpoenaed to testify, and that if he refused to testify "he could be held in contempt of court and imprisoned until he complied." However, those arguments are untimely and

[15] The dissent contends that the circuit court "refusal to allow re-examination of William as part of Maryann's case-in-chief" amounted to a denial of her right to compulsory process. Dissenting opinion at 16. Respectfully, the circuit court did not refuse to allow Maryann's re-examination of William. Indeed, William was transported to the courthouse for the express purpose of being recalled by Maryann. Once William was transported to court and refused to testify, Maryann's compulsory process rights were satisfied. See, e.g., Griffin, 66 F.3d at 70.

unpersuasive. First, at no point during the discussion regarding how the court should handle William's refusal to testify did Maryann request the circuit court to address William personally. Moreover, there is no suggestion in the record that such an exchange would have persuaded William to testify. Indeed, upon learning of William's refusal, the parties focused exclusively on whether William should be forced to refuse to testify in front of the jury. And Deputy Sheriff Cayetano testified under oath that William was informed of why he was brought to the courthouse and that he had been subpoenaed to testify. In these circumstances, the circuit court did not abuse its discretion in not personally addressing William sua sponte.

Maryann's assertion that the circuit court should have informed William that he could be held in contempt of court and imprisoned is equally unavailing. In many cases, a trial court may be able to compel an uncooperative witness to testify through its power to hold a witness in contempt of court. See, e.g., LeMay v. Leander, 92 Hawaiʻi 614, 621, 994 P.2d 546, 553 (2000) ("[T]he constitutional courts of Hawaiʻi possess the inherent power of contempt."). Here, however, as the circuit court recognized when it observed that, "There's not much I can do 'cause he's doing life," William's life sentence effectively prevented the court from compelling William's testimony. See, e.g., Griffin, 66 F.3d at 70 n.1 ("[Witnesses's] life sentence prevented the court from doing anything more to compel him to

testify."). In the unique circumstances of this case, therefore, the circuit court did not abuse its discretion in not personally informing William that he could be held in contempt of court and imprisoned if he refused to testify.

Our conclusion that the circuit court did not abuse its discretion in denying Maryann's request to have William extracted is further buttressed by the "broad discretion" bestowed on the circuit court pursuant to Hawaiʻi Rules of Evidence Rule 611(a) in controlling the mode of interrogating witnesses. That rule provides:

> Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrasment.

HRE Rule 611(a).

As the commentary to the rule makes clear, HRE Rule 611(a) "states the common-law principle allowing the court broad discretion in determining order and mode of interrogation" and is intended to "define broad objectives and to leave the attainment of those objectives to the discretion of the court." HRE Rule 611(a), cmt. (citations omitted) (emphasis added). Trial courts are therefore afforded broad discretion in determinating whether to recall a prosecution witness during the defense's case when that witness was extensively cross-examined during the

prosecution's case-in-chief.[16] As explained below, the circuit court's denial of Maryann's request to extract William is consistent with the court's broad discretion in controlling the mode of interrogating witnesses.

First, Maryann's offers of proof demonstrate that she sought to recall William solely to impeach his credibility. Specifically, Maryann sought to elicit testimony from William that he was a cooperating witness in four murder cases, that he received preferential treatment as a result of this cooperation, that he would again seek preferential treatment for his

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[16] Other jurisdictions have recognized the broad discretion granted to trial courts in such circumstances. See United States v. Blackwood, 456 F.2d 526, 529 (2d Cir. 1972) ("[T]he trial court is the governor of the trial with the duty to assure its proper conduct and the limits of cross-examination necessarily lie within its discretion. And we should not overrule the exercise of that discretion unless we are convinced that the ruling of the court was prejudicial."); United States v. Somers, 496 F.2d 723, 734 (3d Cir. 1974) ("A determination as to whether or not a witness should be recalled for further cross-examination is a matter for the discretion of the [trial] court, reviewable only upon a determination of an abuse of that discretion."); United States v. Kenny, 462 F.2d 1205, 1226 (3d Cir. 1972) (affirming the refusal of a trial judge to recall a witness when the purpose of the recall was shown: (1) not to introduce substantive evidence, but rather was to further impeach the credibility of an already impeached witness; and (2) the documents upon which the requested examination would have been based were available at the time of the original cross-examination); People v. Saddler, 219 A.D.2d 796, 797 (N.Y. App. Div. 1995) ("There is no merit to the contention of defendant that he was denied his constitutional rights of confrontation and compulsory process by the trial court's refusal to permit a prosecution witness to be recalled, after the prosecution had rested, for further cross-examination. The determination whether to reopen a case for further testimony is addressed to the reasonable discretion of the trial court and it cannot be said that, under the circumstances of this case, the trial court abused that discretion." (citing People v. Frieson, 103 A.D.2d 1009 (N.Y. App. Div. 1984))); 28 Charles Alan Wright and Victor James Gold, Federal Practice & Procedure § 6164, at 374-76 (1993) ("Deciding whether to permit a witness to be recalled often requires balancing the values identified by Rule 611(a) as pertinent to determining the order of proof. . . . Because the question is one of balancing conflicting values, appellate courts afford trial courts broad discretion to resolve these issues."); 3A Wigmore on Evidence § 1036, at 1041 (Chadbourn Ed. 1970) ("Where the impeacher is in danger of losing the use of his evidence by not having asked the preliminary question on cross-examination, the witness may of course be recalled in order to be asked. But this recall, like all others is in the discretion of the trial court[.]").

cooperation in this case, and that it was not possible for UCLA law students to have contacted William while he was in protective custody. However, defense counsel had already elicited substantial evidence for the jury to consider in evaluating William's credibility, and in assessing any of his potential biases or motives, while cross-examining William extensively over the course of three days during the State's case-in-chief.

It is well settled that the right of cross-examination protected by the Confrontation Clause of the Sixth Amendment is satisfied where sufficient information is elicited to allow the jury to gauge adequately a witness's credibility and to assess the witness's motives or possible biases. See State v. Balisbisana, 83 Hawaiʻi 109, 114, 924 P.2d 1215, 1220 (1996); State v. Birano, 109 Hawaiʻi 314, 324, 126 P.3d 357, 367 (2006); DeCenso, 5 Haw. App. at 133, 681 P.2d at 578-79. Accordingly, the trial court does not abuse its discretion in excluding evidence tending to impeach a witness, as long as the jury has in its possession sufficient information to appraise the biases and motivations of the witness. Balisbisana, 83 Hawaiʻi at 114, 924 P.2d at 1220.

Here, William was extensively cross-examined by defense counsel, who elicited numerous inconsistences in William's testimony that directly affected his credibility as a witness. There was also sufficient testimony from which the jury could fairly determine William's motive for testifying. William

specifically stated that: he would lie in order to obtain favorable treatment, he would lie under oath, there was no objective way to judge if he was telling the truth, he reported the Hasker murder to divert suspicion away from him as being the shooter in the Arauza incident, he lied to Detective Ahn, he was a convict and that convicts do not tell the truth, he lies to police and prosecutors, and when he talks to police it is usually to improve his legal situation. Maryann was also able to elicit testimony that William stated, under oath, to the California Parole Board that he shot Hasker and Arauza, and that Maryann had nothing to do with those shootings. In sum, defense counsel was able to elicit substantial testimony during the State's case-in-chief that undermined William's credibility and established his potential motives and biases.[17]

Second, William's concern for his safety if he were called to testify regarding his informant activities provided an additional reason not to put William on the witness stand after he refused to testify. Specifically, William's concern was supported by his declaration in which he stated that he provided California authorities with "highly sensitive information" and

[17] The dissent argues that William's right to confrontation was violated because, absent William's testimony as part of the defense's case-in-chief, "the jury would not have 'had sufficient information for which to make an informed appraisal of [the complainant's] motives and bias.'" Dissenting opinion at 35 (alteration in original) (quoting Balisbisana, 83 Hawaiʻi at 116, 924 P.2d at 1222. Respectfully, however, for all the reasons set forth above, it is plain that the jury had substantial information from which to make an informed appraisal of William's potential motives and biases.

that "other inmates in the prison system, and their friends and family outside of the system, have singled [him] out for retribution as a result of [his] cooperation with the State of California." As a result, his life was in "substantial danger because [of] threats and attempts." The record also contains a letter from California authorities "emphasiz[ing] the importance of protecting the identity of [] William" insomuch as he had "provided the Department of Corrections and Rehabilitation with highly sensitive information." The circuit court recognized this concern when it orally granted William's motion prohibiting video, photographic or sketch art images of William.

Third, although the circuit court denied Maryann's request to have William extracted, it allowed Maryann to call Deputy Sheriff Cayetano to testify in front of the jury that William had refused to testify. Deputy Sheriff Cayetano's testimony was damaging to the prosecution's case. Indeed, as noted above, during closing argument Maryann capitalized on William's failure to testify. Specifically, Maryann argued that William "flipped [the jury] off by refusing to testify," and asked whether "that [was] who [the jury] would place [their] unquestioned, beyond-a-reasonable-doubt belief in."

Maryann nevertheless argues that Deputy Sheriff Cayetano's testimony was not an adequate substitute for the evidence she sought to elicit through William's testimony. However, because William refused to testify, the circuit court

was not presented with the option of presenting William's testimony to the jury.

For these reasons, the circuit court did not abuse its discretion in denying Maryann's request to extract William so that he could refuse to testify in front of the jury, and Maryann's rights to compulsory process, to present a defense, and to a fair trial were not violated.

E. The jury instructions on murder and accomplice liability were not prejudicially insufficient, erroneous, inconsistent, or misleading

Maryann argues that the jury instructions regarding murder and accomplice liability were erroneous. She argues that because the indictment charged her with "shooting" Hasker, the State was required to prove the "shooting" as an element of the offense, i.e., it was required to prove that she was the principal in the murder and not an accomplice. Thus, Maryann argues that the circuit court erred in giving the jury an instruction on accomplice liability. Similarly, Maryann argues that the murder instruction was erroneous because it failed to require the jury to find that she shot Hasker. As discussed further below, the circuit court's instructions on murder and accomplice liability were not prejudicially insufficient, erroneous, inconsistent, or misleading.

The jury was given the following instructions on murder and accomplice liability:

> A person commits the offense of Murder if she intentionally or knowingly causes the death of another person.
>
> There are two material elements of the offense of Murder, each of which the prosecution must prove beyond a reasonable doubt.
>
> These two elements are:
>
> 1. That on or about the 18th day of June 1978, through and including the 20th day of June 1978, in the City and County of Honolulu, State of Hawaii, the Defendant intentionally or knowingly engaged in conduct; and
> 2. That by engaging in that conduct, the Defendant intentionally or knowingly caused the death of [] Hasker.
>
> A person charged with committing the offense of murder may be guilty because she was an accomplice of another person in the commission of that offense. The prosecution must prove accomplice liability beyond a reasonable doubt.
>
> A person is an accomplice of another in the commission of the offense of murder if, with the intent to promote or facilitate the commission of that offense, she, A, solicits the other person to commit it; or B, aids or agrees or attempts to aid the other person in the planning or commission of that offense.
>
> Mere presence at the scene of an offense or knowledge that an offense is being committed, without more, does not make a person an accomplice to that offense. However, if a person plans or participates in the commission of that offense with the intent to promote or facilitate that offense, she is an accomplice to the commission of that offense.

First, the instruction on accomplice liability was not erroneous. It is well settled that "one who is charged as a principal can be convicted as an accomplice without accomplice allegations being made in the indictment." State v. Fukusaku, 85 Hawaiʻi 462, 486, 946 P.2d 32, 56 (1997) (citation and internal quotation marks omitted) (emphasis added); State v. Albano, 67 Haw. 398, 405, 688 P.2d 1152, 1157 (1984); State v. Rullman, 78 Hawaiʻi 488, 490, 896 P.2d 944, 946 (App. 1995).

Maryann acknowledges that she could be subject to accomplice liability pursuant to this court's holding in

Fukusaku, but argues, without further support, that Fukusaku should be overruled because "it fails to require the State to prove what it charged." Based on Fukusaku, however, the jury is not required to find "shooting" by Maryann in order to convict Maryann based on accomplice liability. 85 Hawaiʻi at 486, 946 P.2d at 56. Moreover, Maryann does not provide a compelling reason or legal basis to overrule Fukusaku. See State v. Garcia, 96 Hawaiʻi 200, 207, 29 P.3d 919, 926 (2001) (holding that the prosecution failed to provide a "compelling justification" for departing from the doctrine of stare decisis) (citing Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991)). Thus, the instruction on accomplice liability was warranted in this case.

Second, the murder instruction was not erroneous for failing to require the jury to find that she shot Hasker. HRS § 707-701, provided, in relevant part: "a person commits the offense of murder if he intentionally or knowingly causes the death of another person." Shooting a person with a firearm is not required by statute to prove murder, and as such does not constitute an essential element of the offense of murder.

Moreover, the inclusion of the "shooting" language in the indictment gave Maryann notice that she was subject to a mandatory minimum sentence if she was convicted as a principal. State v. Apao, 59 Haw. 625, 635-36, 586 P.2d 250, 257-58 (1978). In Apao, the defendant was charged with the murder of an individual that was a witness in a murder prosecution, thus,

making the defendant eligible for enhanced sentencing. Id. at 627, 633-34, 586 P.2d at 253, 257. On appeal to this court, the defendant argued, inter alia, that the indictment was defective because of the inclusion of language that the defendant knew the victim was a witness in a murder prosecution, which was not an element of the murder charge. Id. at 633, 586 P.2d at 257. This court noted that "the victim's status as a witness in a murder prosecution was not an essential element of the crime of murder[.]" Id. at 634, 586 P.2d at 257. However, this court determined that by including the allegation that the victim was a prosecution witness in another murder case, the defendant was given "fair notice of the charges against [him]." Id. at 636, 586 P.2d at 258.

Similarly, here, the indictment gave Maryann "fair notice" that she could be facing a mandatory minimum term of imprisonment if she was convicted as a principal. See Garringer v. State, 80 Hawaiʻi 327, 333-34, 909 P.2d 1142, 1148-49 (1996) (holding that the imposition of a mandatory minimum term of imprisonment due to a firearm enhancement is limited to those defendants who "personally possess, threaten to use, or use a firearm while engaged in the commission of [a] felony").

Moreover, it appears that Maryann was not found guilty as a principal for the murder of Hasker. Although found guilty of murder, the jury determined in a special interrogatory that the State failed to prove that Maryann "actually possessed, used,

or threatened to use a pistol" during the commission of Hasker's murder. Thus, it appears that Maryann was not convicted as a principal, but rather as an accomplice. For these reasons, the murder instruction was not erroneous for failing to include "shooting" language.

Accordingly, the jury instructions on murder and accomplice liability were not prejudicially insufficient, erroneous, inconsistent, or misleading.

F. The circuit court did not commit multiple errors warranting retrial

Citing State v. Sanchez, 82 Hawaiʻi 517, 923 P.2d 934 (App. 1996), Maryann argues that the cumulative effect of the circuit court's multiple instances of error violated her right to a fair trial. Because Maryann's arguments regarding the alleged errors at her retrial are without merit, it cannot be said that Maryann was denied the right to a fair trial.

IV. Conclusion

For the foregoing reasons, the circuit court's judgment is affirmed.

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for petitioner

Brandon H. Ito
for respondent

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Edwin C. Nacino