CONCURRING OPINION BY NAKAMURA, C.J.

I concur in the result reached by the majority. I write separately to explain my analysis regarding the claim of Defendant-Appellant Alfred W.K. Combes (Combes) that the circuit court committed plain error in allowing hearsay evidence to which Combes did not object.

I.

Under our adversary system, a party has the obligation to object if it challenges the admission of evidence. If no objection is raised, the general rule is that the evidence "may properly be considered by the trier of fact and its admission will not constitute grounds for reversal." State v. Samuel, 74 Haw. 141, 147, 838 P.2d 1374, 1378 (1992).

Principles of judicial economy, practicality, and fairness underlie this rule. In a criminal case, if the defense does not object to evidence or the form in which the evidence is offered by the prosecution, the prosecution, judge, and jury are entitled to rely on that decision. Certainly, the defense can insist that the prosecution satisfy all the requirements for the admission of evidence by objecting to evidence that fails to meet such requirements. But if the defense does not object, it would waste time and judicial resources, and would unduly prolong trials, to require the prosecution to nevertheless comply with all evidentiary requirements. For example, evidence for which no foundation or an incomplete foundation has been laid is frequently admitted at trial where there is no objection, including documentary evidence, hearsay evidence, photographs, and expert testimony. The defense may not object to such evidence because it knows that the prosecution can lay a proper foundation, it does not believe the evidence is harmful, it believes the prosecution can prove the same point by other means, or it decides not to challenge the evidence or the inadequate foundation for the evidence for strategic reasons. Laying a proper foundation for unobjected-to evidence may be tedious, may require calling additional witnesses, and will result in the

consumption of more trial time. Why should anything more be required if the defense does not object to the evidence?

It is unfair to penalize the prosecution for relying on the defense's failure to object by permitting the defense to challenge unobjected-to evidence on appeal. The prosecution may have been able to satisfy all the requirements for admitting the evidence, but refrained from doing so because the defense did not object. For example, the prosecution may have decided not to call the declarant because the defense did not object to the admission of hearsay evidence. The prosecution may also have stopped short of laying an adequate foundation because there was no objection to the offered evidence. The lack of an objection deprives the prosecution and the trial court of notice of and the opportunity to cure an alleged defect regarding the offered evidence.

II.

In my view, if the defense does not object to evidence, even evidence that is otherwise inadmissible due to lack of a proper foundation or because it constitutes hearsay, the admission of that evidence should generally not be subject to plain error review. In State v. Metcalfe, 129 Hawai'i 206, 225, 297 P.3d 1062, 1081 (2013), the Hawai'i Supreme Court stated that "objections to the admission of incompetent evidence, which a party failed to raise at trial, are generally not subject to plain error review." As noted, there are many valid reasons why the defense may choose not to object to evidence that is inadmissible when offered.

Allowing plain error review on appeal of unobjected-to evidence erodes the ability of the prosecution and the trial court to rely on the defense's decision not to object. If the prosecution cannot rely on the defense's failure to object, then the prosecution in every case will be induced to introduce more evidence, including repetitive and cumulative evidence, for fear that the admission of unobjected-to evidence will be second-guessed on appeal. If the trial court cannot rely on a

defendant's failure to object, then the trial court may demand that all evidentiary requirements, even for unchallenged evidence, be satisfied.

Allowing plain error review on appeal of unobjected-to evidence also raises significant questions of fairness. As noted, the prosecution may have been fully capable of laying a proper foundation for the unobjected-to evidence, but refrained from doing so because there was no objection. The prosecution may also have refrained from offering alternative admissible evidence because the evidence it offered was admitted without objection.[1/] The trial court may have been able to take curative measures to alleviate any substantial prejudice resulting from the unobjected-to evidence if an objection had been raised.

III.

For these reasons, I believe that the general rule that unobjected-to evidence is not subject to plain error review, Metcalfe, 129 Hawai'i at 225, 297 P.3d at 1081, should only be subject to very limited exceptions. In my view, to establish an exception, the defense at minimum must show that the prosecution could not have cured the alleged defect in the admissibility of the unobjected-to evidence or introduced the substance of the unobjected-to evidence through other means. For example, in the context of unobjected-to hearsay evidence, the defense must show that the prosecution could not have called the declarant or established the content of the hearsay evidence through other

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[1/] The unfairness of allowing plain error review of unobjected-to evidence would be compounded if unobjected-to evidence subsequently found inadmissible on appeal was not considered in determining the sufficiency of evidence. Unlike other jurisdictions, Hawai'i does not review the sufficiency of the evidence on appeal for double jeopardy purposes based on all the evidence admitted at trial, but instead conducts such review "based only on the evidence that was properly admitted at trial." State v. Wallace, 80 Hawai'i 382, 414 n.30, 910 P.2d 695, 727 n.30 (1996) (emphasis omitted). In my view, given the concerns for fairness, evidence admitted at trial without objection should be considered "evidence that was properly admitted at trial" for double jeopardy purposes. Otherwise, the State of Hawai'i could be barred from retrying a defendant in situations where it could have, and would have, introduced sufficient evidence at trial (without considering the unobjected-to evidence found inadmissible on appeal) had the defense properly objected at trial to the evidence challenged for the first time on appeal.

admissible evidence. Clearly, if the prosecution could have overcome any hearsay problem by calling the declarant, but refrained from doing so because the declarant's testimony was rendered unnecessary by the admission of the unobjected-to hearsay evidence, it would unfair to allow the defense to claim on appeal that the admission of the hearsay constituted prejudicial error.

In this case, Combes seeks plain error review of the unobjected-to hearsay testimony of Deputy Sheriff Chester Dasalla (Deputy Sheriff Dasalla) that his neighbor, Lisa Winkelspecht (Winkelspect), told him that her "house got broken into" and that she called the police to report the burglary. Prior to trial, the prosecution indicated that it did not plan to call Winkelspect as a trial witness and thus Combes arguably has shown that the prosecution could not have called the hearsay declarant. However, in my view, Combes has not met his burden of showing that the prosecution could not have established the content of the hearsay evidence through other means. Deputy Sheriff Dasalla testified that: (1) he lived four houses away from Winkelspecht; (2) he saw a suspicious car parked near Winkelspecht's house and spoke to the person sitting in the driver's seat (Combes' alleged accomplice); (3) he talked to Winkelspecht later that day after the suspicious car had left; (4) Winkelspecht was "really shaken up and very startled about what had happened"; (5) he went inside Winkelspecht's house and saw that it "[w]as really in a disarray, it was a mess[,]" with things thrown on the ground, drawers open, items that appeared to be off the shelves on the floor, and items scattered throughout the house; (6) he was familiar with the normal condition of Winkelspecht's house, as he had been inside many times before, and the house was normally "really well kept" and neat, with everything kept in its proper place; (7) he observed a window screen pried open and Winkelspecht showed him a shoeprint next to the window; (8) he advised Winkelspecht that she could remove her dog from the house but to leave everything else "as is until the police came and processed . . . the house

itself" because "you don't want to contaminate the scene itself"; and (9) the Honolulu Police Department arrived later that day and he gave them information on what he had observed.

On appeal, Combes contends that the admission of Deputy Sheriff Dasalla's unobjected-to hearsay evidence constituted plain error because it helped prove the unlawful-entry element required to prove burglary.[2/] However, the record shows that the State of Hawai'i (State) offered ample non-hearsay testimony to show that Combes' entry into Winkelspecht's house was unauthorized and unlawful. Given Deputy Sheriff Dasalla's intimate involvement in the case, it would appear that the prosecution could have elicited even more details from Deputy Sheriff Dasalla to show that Combes' entry into the house was unauthorized and unlawful if the defense had objected to the hearsay evidence it now challenges on appeal. In my view, Combes has failed to satisfy his threshold burden of showing that the prosecution could not have established the substance of the unobjected-to hearsay evidence through other means, and he therefore is not entitled to plain error review of this hearsay evidence.[3/]

[2/] In his opening statement, Combes did not dispute that Winkelspecht's home had been burglarized, but claimed that his co-defendant, Jolynn Silva, whom the State's planned to call as its witness, was "the one that is guilty for burglarizing the residence." Deputy Sheriff Dasalla's unobjected-to hearsay testimony about what Winkelspecht told him only tended to show that Winkelspecht's home had been burglarized, and not who had committed the burglary.

[3/] Even without plain error review of unobjected-to evidence, a defendant can raise a claim that his or her counsel's failure to object to evidence constituted ineffective assistance of counsel. With respect to an ineffective assistance of counsel claim, the defendant has the burden of showing: "1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998). If the State could have proven the substance of the unobjected-to evidence through other available evidence if the defendant had objected, then the defendant presumably would not be able to show that his or her counsel's failure to object resulted in the withdrawal or substantial impairment of a potentially meritorious defense.

IV.

In any event, even if Combes' request for plain error review is not barred, I agree with the majority that the admission of the unobjected-to hearsay evidence did not constitute plain error. As the majority concludes, the unobjected-to hearsay evidence challenged on appeal was cumulative of other evidence presented at trial and the admission of the challenged evidence did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Craig H. Nakamura