Dissenting Opinion by Ginoza, Chief Judge

I respectfully dissent. Even if the Circuit Court of the First Circuit (**Circuit Court**) erred in precluding the testimony of CA as to whether she believed Defendant-Appellant Jaylord Parras (**Parras**) was a peaceful, non-violent person, it was harmless error given the totality of the record in this case. Further, with regard to Parras's second point of error, I conclude the Circuit Court did not plainly err in sentencing Parras to consecutive terms of imprisonment.

The Indictment charged Parras with: Sexual Assault in the First Degree in violation of HRS § 707-730(1)(b) (2014) (**Count 1**);[1/] Sexual Assault in the Third Degree, in violation of HRS § 707-732(1)(b) (2014) (**Count 2**);[2/] two counts of Sexual Assault in the First Degree in violation of HRS § 707-730(1)(c) (**Counts 3 and 4**),[3/] and Sexual Assault in the Second Degree in

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[1/] HRS § 707-730(1)(b) provides:

> (1) A person commits the offense of sexual assault in the first degree if:
>
> . . . .
>
> (b) The person knowingly engages in sexual penetration with another person who is less than fourteen years old[.]

[2/] HRS § 707-732(1)(b) provides:

> A person commits the offense of sexual assault in the third degree if:
>
> . . . .
>
> (b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person[.]

[3/] HRS § 707-730(1)(c) provides:

> (1) A person commits the offense of sexual assault in the first degree if:
>
> . . . .
>
> (c) The person knowingly engages in sexual penetration with a person who is at least fourteen years old but less than sixteen years old; provided that:

(continued...)

violation of HRS § 707-731(1)(b) (2014) (**Count 5**).[4/] Thus, the charged offenses, respectively, involve knowing conduct, either sexual penetration or sexual contact, and the attendant circumstance that the Complaining Witness (who is Parras's half-sister) was a certain age, a certain age as compared to Parras, or mentally incapacitated or physically helpless.

Given the offenses charged, there is no element of compulsion or strong compulsion involved in any offense. However, Hawaii cases dealing with sex assault charges have apparently recognized that a defendant should be allowed to present evidence of the defendant's peaceful and nonviolent character. State v. Iosefa, 77 Hawaiʻi 177, 186, 880 P.2d 1224, 1233 (App. 1994) ("Defendant claims that the Reverend Aivao would have testified that Defendant was a peaceful, non-violent person, evidence directly related to whether he would have sexually assaulted a young girl. . . . We agree that under HRE Rule 404(a)(1) and the Rule 404 Commentary, testimony of Defendant's good and peaceful character would be admissible." (citations omitted));[5/] State v. Rivera, 62 Haw. 120, 126-28, 612 P.2d 526,

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[3/](...continued)

> (i) The person is not less than five years older than the minor; and
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> (ii) The person is not legally married to the minor[.]

[4/] HRS § 707-731(1)(b) states:

> (1) A person commits the offense of sexual assault in the second degree if:
>
> . . . .
>
> (b) The person knowingly subjects to sexual penetration another person who is mentally incapacitated or physically helpless[.]

Count 5 was dismissed after the State rested its case.

[5/] In Iosefa, the defendant was charged with a sexual assault offense requiring proof of strong compulsion. However, in ruling that evidence of the defendant's good and peaceful character was admissible, this court did not rest its holding on the fact that strong compulsion was an element of the offense.

531-32 (1980) (addressing whether defendant's wife could testify to his character for, *inter alia*, peacefulness and nonviolence where defendant was charged with kidnapping and rape). Therefore, for different reasons, I agree with the majority that the Circuit Court should have allowed CA, Parras's ex-girlfriend, to testify whether in her view Parras was a peaceful, nonviolent person.

Considering the entire record in this case, however, I conclude that it was harmless error to preclude CA's subject testimony.

> [E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction.

State v. Haili, 103 Hawaiʻi 89, 100, 79 P.3d 1263, 1274 (2003) (citation omitted).

The Complaining Witness testified that the first incident occurred in November 2007, when she was thirteen years old and living in Waipahu with her mother, Erene, and her step-father, Roger. The Complaining Witness testified that Parras, who had been living with CA, showed up at the Waipahu house, appeared to be crying, said he had broken up with CA, and moved into the Waipahu house for a time. According to the Complaining Witness, the night Parras came over to the Waipahu house, she went to talk to him in a storage room where he was staying, and that night is when the first incident occurred. This incident is charged in Counts 1 and 2.

The Complaining Witness further testified that, after the family house in Waipahu was renovated in 2008, Parras officially moved in at the house. The Complaining Witness testified that one evening when they were home alone, another incident occurred when she was fourteen or fifteen years old, when Parras approached her from behind in the kitchen, began to tickle her, and they ended up on the floor. This incident is charged in Counts 3 and 4.

CA was Parras's girlfriend for several years, and they

have a child together. CA testified that she became Parras's girlfriend in 2004, when she was a junior in high school, and they were together until approximately December 2008. CA further testified that Parras moved in with her at her parent's house in about March 2006, when she was pregnant with their son, and that until December 2008, they had no break-ups and no nights apart. During her direct examination by defense counsel, CA was precluded from testifying as to whether Parras was peaceful or non-violent. Later, in defense counsel's redirect examination, the Circuit Court similarly precluded testimony whether Parras was peaceful or violent, but permitted CA to testify that Parras was not "aggressive." The following occurred during defense counsel's redirect examination of CA:

> Q. State just asked you if you guys would fight during your relationship?
>
> A. Yes.
>
> Q. Given your knowledge of Jay, would you say that you could form an opinion about whether he's **peaceful or violent?**
>
> MS. YAMAMOTO: Objection, Your Honor. Relevance.
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> THE COURT: Sustained.
>
> (By Mr. Giventer) Did he -- was he ever -- **was he ever aggressive or violent with you?**
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> MS. YAMAMOTO: Same objection, Your Honor.
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> THE COURT: **I'll allow aggressive.**
>
> THE WITNESS: **No.**

Later in the trial, Parras's wife, JP, testified. JP testified that she met Parras in the early summer of 2009. They have two children together. JP further testified as follows during her direct examination by defense counsel:

Q. So would you say you know Jay pretty well?

A. I know Jaylord very well.

Q. Based on everything you know about him, can you form an opinion about whether he's a **sexually aggressive person?**

A. **No.**

MS. YAMAMOTO: Objection, Your Honor.

THE COURT: Overruled. The answer will stand. Next question.

MR. GIVENTER: Okay.

(By Mr. Giventer) Just so -- what was your answer?

A. **He's peaceful.**

Q. **The question was is he sexually aggressive?**

A. **No.**

Q. At any point in your relationship with him, with Jay, **did he ever force you to have sexual contact** with --

A. **Never.**

Q . -- him?

A. **Never did.**

THE COURT: Wait till he finishes the question.

THE WITNESS: Sorry.

(By Mr. Giventer) In your relationship with Jay, **has he ever forced you to have sexual contact with him?**

A. **No.**

Given the testimony by JP, and CA's testimony that Parras was never aggressive with her, the precluded testimony by CA is cumulative. See State v. Birano, 109 Hawaiʻi 314, 324-26, 126 P.3d 357, 367-69 (2006) (analyzing whether erroneous preclusion of witness questioning was harmless error, including whether evidence was cumulative); State v. Mars, 116 Hawaiʻi 125, 138-39, 170 P.3d 861, 874-75 (App. 2007); Kekua v. Kaiser Found. Hosp., 61 Haw. 208, 219, 601 P.2d 364, 371 (1979) ("Courts have consistently held that the improper exclusion of competent testimony constitutes harmless error where essentially the same

evidence is established by the testimony of other witnesses or by other means." (citations omitted)).

Additionally, contrary to Parras's assertion that this case was a swearing contest between the Complaining Witness and Parras, it was instead a case where the jury had to resolve the credibility of the Complaining Witness against the credibility of Parras, CA, Erlene and Roger, particularly with regard to whether Parras was even present in the Waipahu house when the Complaining Witness asserts the incidents occurred. In short, the defense in this case was that the Complaining Witness was an untruthful person who had lied about the alleged incidents and that Parras was not even at the Waipahu house when the incidents are alleged to have occurred. Parras's character was, at most, a subordinate issue.

With regard to the two incidents for which Parras was convicted (charged in Counts 1 through 4), the Complaining Witness testified that the first incident occurred in November 2007 and the second incident occurred sometime after the Waipahu house was renovated in 2008. As noted above, CA testified that between March 2006, until December 2008, she and Parras had no break-ups and no nights apart. Erlene, mother to both the Complaining Witness and Parras, testified that in November 2007 (when the Complaining Witness asserts the first incident occurred), Parras never came to their house crying and saying that he had broken up with CA. Erlene also testified that, before Parras and CA broke up in December 2008, there had not been a time when they had broken up and then got back together. Roger, in turn, testified that Parras moved out "around 2005" and that there was no period when Parras came home to live for a little while. Finally, Parras testified and when asked if he had sexually assaulted his little sister, he responded: "No, I did not, never happen, never will, is all a lie." Parras testified that he moved out of his parents' house "around 2005" to live with CA, and that he lived with CA until December 2008. Parras also testified that after breaking up with CA, he lived with a friend for a few months before meeting JP, and then he lived with

JP. Parras testified he and JP later moved in at his mother's house in the middle of 2012, after they had a child (which is long after the Complaining Witness alleged the incidents had occurred).

Based on the record in this case, it is my view that the Circuit Court's error in precluding the subject testimony from CA was harmless error. Given the evidence and the arguments of both the State and Parras, precluding CA from testifying whether she believed Parras is a peaceful or non-violent person was harmless beyond a reasonable doubt.

I would therefore reach Parras's second point of error, in which he asserts the Circuit Court "plainly erred in sentencing [him] to consecutive terms of imprisonment based in part on his parents' mistreatment of [the Complaining Witness]." Parras's argument on appeal is based on the Circuit Court's statement during sentencing that: "Given what the defendant did in this case, as [the deputy prosecutor] points out, to his own sister, enabled, I would point out, by his family -- shame on them – I think mandates a consecutive term sentence in this case." (Emphasis added).

Notwithstanding Parras's argument, a fair reading of the Circuit Court's statement in the context of the full sentencing record does not indicate that the Circuit Court punished Parras for the conduct of his parents. Pursuant to HRS § 706-668.5 (2) (2014), "[t]he court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider the factors set forth in section 706-606." Here, the Circuit Court sentenced Parras to twenty years for Counts 1, 3, and 4, to be served concurrently, and also five-years for Count 2, to be served consecutive to Counts 1, 3, and 4.

"[A]bsent clear evidence to the contrary, it is presumed that a sentencing court will have considered all factors before imposing concurrent or consecutive terms of imprisonment

under HRS § 706-606[ ]."[6/] See State v. Hussein, 122 Hawaiʻi 495, 503, 229 P.3d 313, 321 (2010) (some brackets in original) (citations and internal quotation marks omitted). Here, the record shows the Circuit Court specifically noted that it needed to consider the factors in HRS § 706-606. The Circuit Court further articulated that its job was to "pick a sentence which reflects the seriousness of the offenses in this case, to promote respect for the law, and especially to provide just punishment. And the facts of this case are absolutely egregious in my view."

Contrary to Parras's assertion, the record does not reflect that the Circuit Court imposed consecutive sentencing because Parras's parents mistreated the Complaining Witness. I conclude the Circuit Court did not plainly err in sentencing Parras.

Based on the foregoing, I respectfully dissent and would affirm Parras's conviction.

/s/ Lisa M. Ginoza
Chief Judge

[6/] HRS § 706-606 (2014) provides:

> **HRS § 706-606. Factors to be considered in imposing a sentence.** The court, in determining the particular sentence to be imposed, shall consider:
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> (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
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> (2) The need for the sentence imposed:
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> (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
>
> (b) To afford adequate deterrence to criminal conduct;
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> (c) To protect the public from further crimes of the defendant; and
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> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) The kinds of sentences available; and
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> (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.