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NO. CAAP-24-0000826

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

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STATE OF HAWAII, Plaintiff-Appellee,
v.
CODY PRESTI, Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CASE NO. 1CPC-23-0000969)

AUGUST 31, 2026

HIRAOKA, PRESIDING JUDGE, MCCULLEN AND GUIDRY, JJ.

OPINION OF THE COURT BY MCCULLEN, J.

Self-represented Defendant-Appellant Cody **Presti** appeals from the Circuit Court of the First Circuit's November 21, 2024 "Judgment of Conviction and Sentence as to Count 2."¹ Presti was indicted for Attempted Sexual Assault in the First Degree and Kidnapping, but convicted by a jury of the

¹ The Honorable Paul B.K. Wong presided.

included offense of Unlawful Imprisonment in the Second Degree, a misdemeanor, in violation of Hawai'i Revised Statutes (**HRS**) § 707-722(1) (2014 and Supp. 2015) for conduct alleged by the complaining witness (**CW**) on July 28, 2023.

We affirm.

I. BACKGROUND

Presti met CW, a thirty-six-year-old citizen of the Philippines, on Bumble, an online dating platform, while CW was visiting O'ahu on a tourist visa. After approximately one week of texting on Bumble, CW agreed to go on a date with Presti on the evening of July 28. After dinner and fireworks, CW asked Presti to drive her home; however, Presti instead drove CW to Round Top Drive on Pu'u'ōhi'a,² allegedly to stargaze.

CW testified that when Presti stopped his car, she got out of the car and ran down the road. Presti, who is 5'11", chased CW, who is 5'4" and weighs approximately 120 pounds,³ picked her up, and carried her "like a baby" back to his car. Presti then pinned CW against the passenger-side door of his car and tried to remove her romper. CW felt Presti's erection press

² Pu'u'ōhi'a is the mountain behind Honolulu popularly known as Tantalus.

³ CW testified that she weighed 54 kilograms, which is approximately 120 pounds.

against her vagina through their clothing. CW bit Presti on the left side of the chest and ran back down the road.

A passing driver stopped to aid CW. CW went to the driver's home, where she called the police and gave a statement.

On August 2, CW gave a second statement to a Honolulu Police Department (**HPD**) detective, describing the events of July 28.

CW identified Presti in a blind sequential photographic lineup containing an enlargement of Presti's driver's license photograph and five other filler mug shots from a police database. Presti's driver's license photograph was used because he was not in the HPD database. The photographs, all in greyscale, were selected by one HPD officer and the lineup was administered by a second HPD officer, who was unfamiliar with the case and did not know that Presti was a suspect.

Based on CW's positive identification, Presti was arrested later that day on suspicion of Kidnapping and Attempted Sexual Assault in the First Degree.

Presti was indicted by grand jury on one count of Attempted Sexual Assault in the First Degree in violation of HRS §§ 705-500 (2014) and 707-730(1)(a) (Supp. 2021) (**Count 1**) and one count of Kidnapping in violation of HRS § 707-720(1)(d) (2014) (**Count 2**). The circuit court set bail at \$200,000.00.

Presti, who testified in his own defense, denied pinning CW to the side of his car.

After a four-day jury trial,⁴ the jury returned a unanimous verdict. The jury acquitted Presti on Count 1 and convicted Presti of the included offense of Unlawful Imprisonment in the Second Degree on Count 2. The same day, the circuit court entered its Judgment of Acquittal as to Count 1 and its Judgment of Conviction and Sentence as to Count 2. Presti was sentenced to a one-year term of imprisonment, with credit for time already served.

Presti timely appealed to this court.

II. DISCUSSION

As discernible on appeal, Presti presents ten points of error (**POE**), challenging: the photographic lineup (POE 1); the admission of evidence (POE 3); the constitutionality of the Hawai'i Attempt statute, Sexual Assault statute, and Kidnapping statute (POE 4 and 5); alleged "overcharging" (POE 2, 6, 7, and 8); denial of a request for a bill of particulars (POE 6);

⁴ Before the circuit court, Presti was initially represented by counsel from the Office of the Public Defender; however, Presti elected to proceed self-represented on May 7, 2024. Presti later moved for appointment of new standby counsel, which the circuit court granted.

denial of a request for a jury instruction on Harassment as an included offense (POE 9); and the setting of bail (POE 10).⁵

But we first address deficiencies in Presti's briefing before reaching the merits of his appeal.

⁵ As presented in his Opening Brief, Presti's ten POE are:

1 Due process violations from suggestive photographic lineup resulting in tainted arrest leading to improper witness testimony.

2 Indictment containing numerous misrepresentations allowed to stand after challenged.

3 Improper testimony by initial responding officer.

4 Kidnapping statute is unconstitutionally vague as Trial Court allowed it to be arbitrarily charged against Defendant.

5 Attempted Sexual Assault statute is unconstitutionally vague as Trial Court allowed it to be arbitrarily charged against Defendant.

6 Prosecutorial practices of overcharging and denying bill of particulars deprived Defendant of his Due Process rights.

7 Unchecked prosecutorial discretion in charging allows systemic overcharging, coerces pleas, and operates without pre-appellate oversight in violation of Due Process Principles.

8 Duplicative prosecution resulting in multiplicitous charges in violation of Due Process and H.R.S. 701-109(1) (e) [.]

9 Trial Court erred in refusing to give jury instruction for harassment as lesser included offense of unlawful imprisonment in the second degree.

10 Trial Court erred by increasing bail without rationale, refusing to decrease bail for overly broad reasons, and keeping bail at an amount unattainable to a [sic] indigent Defendant.

(Some formatting altered.)

A. Briefing Deficiencies

Upon careful review by this court, Presti relies upon ninety-five different cases to support the various contentions in his Opening Brief. Of these, Presti provides some form of citation for only forty-one cases from which this court could reliably identify the relied-upon authority.⁶ Thus, fewer than half of the cases relied upon by Presti contain sufficient citations to be reliably identified by this court. Of the remaining fifty-four cases that Presti relied upon, this court was able, after significant time invested, to identify forty-three cases upon which Presti may have relied through some combination of the case name and a state, year, and quotation or from context. The remaining eleven cases either do not exist or lacked sufficient indicia for this court to locate the authority.

For example, a Westlaw search for "State V Johnson," cited at page 15 of the Opening Brief, returns over ten thousand results. Similarly, "Wilson V State (Ala.)," cited on pages 26-27 of the Opening Brief, returns hundreds of results.

Conversely, a Westlaw search of "State V. Ah Mook Sang," cited on page 24 of the Opening Brief, returns zero cases

⁶ In this instance, "some form of citation" means a reporter and volume number corresponding with the case name cited. For example, "long 721 P.2D at 493," cited at page 5 of the Opening Brief, is reliably identifiable as State v. Long, 721 P.2d 483 (Utah 1986).

in any jurisdiction, state or federal. Likewise, "Stroud V people (Colo.)," cited on page 26 of the Opening Brief, return zero appellate opinions from that jurisdiction.

Additionally, a Westlaw search of "Huihui (2024)," cited twice on page 33 of the Opening Brief, returns approximately fifteen state and federal cases containing "Huihui" as a party's name, but zero from the cited year. Presti variably cites the case as "State V.Huihui (2024)" in his "Table of contents," which narrows the results to approximately five Hawai'i cases, none of which are from 2024, and none of which appear to support the proposition for which it was cited.

Of the eleven cases this court was unable to locate, six cases include citations that indicate a volume and reporter that correspond with a different case entirely:

- On page 8 of the Opening Brief, Presti relies on "State V. Alves, 45. Haw.296," but that citation leads to an unrelated case, State v. Pokini, 45 Haw. 295, 367 P.2d 499 (1961).
- On page 17 of the Opening Brief, Presti relies on "State v. Bonds, 592 N.W.2d 262 (Minn. 1999)," but that citation leads to an unrelated case in another jurisdiction, Jackson v. DeWitt, 592 N.W.2d 262 (Wis. Ct. App. 1999).

- On pages 28-29 of the Opening Brief, Presti relies on "State v. Pune, 94 Hawai'i 200 (2000)," but that citation leads to a table of fourteen unreported opinions that does not include State v. Pune. A Westlaw search of "State v. Pune" returns zero results in any jurisdiction.
- On page 29 of the Opening Brief, Presti relies on "State v. Eichman, 74 Wash. App. 479, 874 P.2d 646 (1994)," but that citation leads to either an unrelated case in another jurisdiction, McVay v. Rich, 874 P.2d 641 (Kan. 1994), or a different unrelated case, Jones v. King County, 874 P.2d 853 (Wash. Ct. App. 1994), which was reported in 74 Wash. App. 467.
- On page 29 of the Opening Brief, Presti relies on "State v. Washington, 125 Or. App. 406, 865 P.2d 474 (1993)," but that citation leads to an unrelated case, State v. Nilsen, 865 P.2d 474 (Or. Ct. App. 1993), which was reported in 125 Or. App. 402.
- On page 29 of the Opening Brief, Presti relies on "People v. Babich, 192 Cal. App. 4th 1423 (2011)," but that citation leads to an unrelated case, County of Los Angeles v. Los Angeles County Employee Relations Commission, 122 Cal. Rptr. 3d 464 (Cal. Ct.

App. 2011), rev'd, 301 P.3d 1102 (Cal. 2013), which was previously reported in 192 Cal. App. 4th 1409.

In these instances, the relied upon authority simply does not exist.

What is more, in some instances the proposition purportedly supported by the citation appears contradicted by controlling law from that jurisdiction. For example, on page 29 of the Opening Brief, Presti asserts that "In Oregon, the court in *State v. Washington*, 125 Or. App. 406, 865 P.2d 474 (1993) acknowledged the spectrum of restraint related offenses and upheld harassment as a valid alternative to false imprisonment in ambiguous cases." However, Oregon courts have held that harassment is not an included offense of kidnapping. E.g., State v. Branch, 636 P.2d 421, 421 (Or. Ct. App. 1981) (per curiam) (holding "defendant's conviction for a 'lesser included offense' of harassment (he was originally charged with kidnapping) was not proper").

We pause to note that Presti's Opening Brief is just the next example of the alarming rise of citations to fake cases by attorneys and self-represented litigants in this jurisdiction and nationally. See Stewart Yerton, AI in the Courtroom? Complaints About Misuse by Hawai'i Lawyers Growing, Honolulu Civ. Beat (July 30, 2025), <https://www.civilbeat.org/2025/07/ai-in-the-courtroom-complaints-about-misuse-by-hawaii-lawyers-growing>

[<https://perma.cc/8SPS-ESCE>]; see generally AI Hallucination Cases, Damien Charlotin, <https://www.damiencharlotin.com/hallucinations/> [<https://perma.cc/43MV-5EU7>] (last visited Aug. 11, 2026) (aggregating AI hallucination cases internationally).

This court has recently sanctioned attorneys and self-represented appellants in civil cases for citing nonexistent authority under Hawai'i Rules of Civil Procedure (**HRCP**) Rule 11(b) (2), made applicable through Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 2.1(a),⁷ and pursuant to which citation to nonexistent authority is sanctionable conduct under HRCP Rule 11(c):

(b) Representations to court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

. . . .

(2) the claims, defenses, and other legal contentions therein are warranted by existing law[.]

HRCP Rule 11(b) (2).

⁷ HRAP Rule 2.1(a), "Applicability of other court rules," provides:

The Hawai'i Rules of Civil Procedure, the Hawai'i Rules of Penal Procedure, the District Court Rules of Civil Procedure, the Rules of Circuit Courts, Hawai'i Family Court Rules, Rules of the Land Court, Rules of the Tax Appeal Court, Rules Governing Court Reporting, the Hawai'i Appellate Conference Program Rules, and other rules of court that may be adopted by the supreme court from time to time are hereby adopted as part of these rules whenever applicable.

For example, in Keaau Development Partnership LLC v. Lawrence, this court sanctioned an attorney \$100.00 for citing a single, nonexistent case "without first attempting to read it to confirm his contention of its holding." 156 Hawai'i 179, 181, 571 P.3d 958, 960 (App. 2025). There, this court explained that "[a] fake opinion is not 'existing law'":

"A fake opinion is not 'existing law' An attempt to persuade a court or oppose an adversary by relying on fake opinions is an abuse of the adversary system." Mata v. Avianca, Inc., 678 F.Supp.3d 443, 461 (S.D.N.Y. 2023) (footnote omitted). "Thus, using a fake opinion to support an argument is a violation of [Fed. R. Civ. P.] Rule 11(b)(2)." Wadsworth v. Walmart Inc., 348 F.R.D. 489, 495 (D. Wyo. 2025).

Id. at 180, 571 P.3d at 959 (footnote omitted).

We decline to make HRCF Rule 11 applicable to direct appeals of a criminal matter – particularly where the criminal defendant is self-represented – as it may intrude upon a criminal defendant's rights under the Hawai'i Constitution, including the privilege against self-incrimination under article I, section 10; the right to a meaningful opportunity to present a complete defense as assured under article I, section 14; and the due process clause of article I, section 5.

However, in declining to make this civil rule applicable in the direct appeal of this criminal matter, we do not hold that the citation to nonexistent authority by a criminal defendant is constitutionally protected as a matter of state law. A criminal defendant has the right to receive "a

meaningful opportunity to present a complete defense," which includes "the constitutional right to present any and all competent evidence in [their] defense." State v. Abion, 148 Hawai'i 445, 448, 478 P.3d 270, 273 (2020) (emphasis added) (first quoting State v. Matafeo, 71 Haw. 183, 185, 787 P.2d 671, 672 (1990); then quoting State v. Acker, 133 Hawai'i 253, 301, 327 P.3d 931, 979 (2014)). But that right does not authorize a defendant to cite to nonexistent authority that cannot aid their ability to present a "complete defense."

Citation to nonexistent authority undermines the integrity of the judicial system and wastes limited judicial resources:

Including fabricated citations . . . undermines the integrity of the court by introducing false material into a process grounded in truth, verified facts, and actual legal precedent. Such conduct wastes the opposing party's time and resources in investigating and exposing the inaccuracies, diverting attention from the merits of the case.^[8] It also wastes judicial resources by requiring judges and court staff to verify citations and address misconduct, thereby reducing the time available to address other matters.

Bryan v. Child Support Enf't Agency, No. SCPW-26-0000169, 2026 WL 866894, at *2 (Mar. 30, 2026) (order) (reviewing fabricated citations under Rule 11 of the Hawai'i Family Court Rules).

Beyond the HRCP, Hawai'i appellate courts have authority to impose sanctions under HRAP Rules 30 and 51 in both

⁸ We note that, in the instant case, Plaintiff-Appellee State of Hawai'i did not bring Presti's reliance on nonexistent authority to the court's attention in its Answering Brief.

criminal and civil cases. HRAP Rule 30 empowers an appellate court to sanction a party for failure to comply with the HRAP after a meaningful opportunity to be heard:

When the brief of an appellant is otherwise not in conformity with these Rules, the appeal may be dismissed or the brief stricken and monetary or other sanctions may be levied by the appellate court. . . . When a brief is filed, an appellate court shall not dismiss an appeal, . . . impose a monetary sanction, or strike a brief without an opportunity to resubmit an amended brief, without prior notice to the affected party, and without a meaningful opportunity to be heard.

Similarly, HRAP Rule 51 authorizes this court to sanction a party or their attorney for failure to comply with the HRAP or the court's order:

Any attorney of record or party in a case, who fails to comply with any of the provisions of the [HRAP], the Hawai'i Electronic Filing and Service Rules, or any order of the court shall be subject to monetary or other sanctions by the appellate court before which such case is pending, such sanctions to be levied by order of the appellate court or by order of any judge or justice thereof.

And HRAP Rule 28(b)(7) requires an argument to contain the contentions on points presented with reasons and "citations to the authorities, statutes and parts of the record relied on":

The argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived.

(Emphases added.)

The requirement that argument be presented "with citation to the authorities . . . relied on" undoubtedly requires citation to authorities that actually exist.

"Attorneys and pro se parties are deemed to be aware of, and are expected to comply with, all of the provisions of these rules." HRAP Rule 1(d).

Thus, each citation to nonexistent authority constitutes a basis for sanction under HRAP Rules 30 and 51.

There can be no doubt that Presti's Opening Brief does not comply with HRAP Rule 28(b) in multiple respects, and this court could invoke HRAP Rules 30 and 51 to possibly sanction Presti.⁹ Nonetheless, we believe the better approach under the circumstances here is to resolve this case as any other, with recourse to ordinary principles of appellate review.¹⁰

⁹ Regarding HRAP Rule 28(b), Presti's Opening Brief does not include, among other things, a subject matter index or a complete table of authorities as required under subsection (1), record citations as required under subsection (3), or a "Standard of Review" section as required under subsection (5).

Similarly, the points of error asserted in Presti's Opening Brief do not readily comply with the requirements of subsection (4), in particular the requirements to provide "where in the record the alleged error occurred" and "where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency." HRAP Rule 28(b)(4) cautions: "Points not presented in accordance with this section will be disregarded."

However, while noncompliance with HRAP Rule 28(b)(4) can alone be sufficient to affirm the lower court's judgment, we endeavor to afford "litigants the opportunity to have their cases heard on the merits, where possible." Marvin v. Pflueger, 127 Hawai'i 490, 496, 280 P.3d 88, 94 (2012) (citation modified).

¹⁰ In this regard, we find well-reasoned the approach taken by the California Court of Appeal in JPMorgan Chase Bank, N.A. v. Buenzli, No. C102530, 2025 WL 3675150, at *3-4 (Cal. Ct. App. Dec. 18, 2025) (resolving case on ordinary principles of appellate review and concluding that citation to nonexistent authority does not constitute argument overcoming the appellant's burden against the presumption of correctness ordinarily ascribed to a trial court judgment).

It is well-settled that an appellant bears the burden of overcoming the presumption of correctness and regularity to which a trial court's judgment is entitled:

Notwithstanding a party's right to appeal, generally there is a presumption that a judgment by a trial court is valid. Stafford v. Dickison, 46 Haw. 52, 62, 374 P.2d 665, 671 (1962). Moreover, appellant bears the burden of demonstrating his "allegations of error against the presumption of correctness and regularity that attend the decision of the lower court." Ala Moana Boat Owners' Ass'n v. State, 50 Haw. 156, 158, 434 P.2d 516, 518 (1967). Where an appealing party fails to raise and argue a point of error, the point may be deemed waived by the reviewing court. [HRAP] Rule 28(b)(7) (2000).

Moyle v. Y & Y Hyup Shin Corp., 116 Hawai'i 388, 395, 173 P.3d 535, 542 (App. 2007), vacated on other grounds, 118 Hawai'i 385, 191 P.3d 1062 (2008); Territory v. Kobayashi, 25 Haw. 762, 766 (Haw. Terr. 1921) ("We necessarily approach a case with the assumption that no error has been committed upon the trial and until this assumption has been overcome by a positive showing the prevailing party is entitled to an affirmance.").

To this end, it is axiomatic that this court will "disregard a particular contention if the appellant makes no discernable argument in support of that position." In re KAHEA, 150 Hawai'i 43, 50 n.9, 497 P.3d 58, 65 n.9 (2021) (quoting Kaho'ohanohano ex rel Kaho'ohanohano v. Dep't Hum. Servs., 117 Hawai'i 262, 297 n.37, 178 P.3d 538, 573 n.37 (2008)); State v. Bui, 104 Hawai'i 462, 464 n.2, 92 P.3d 471, 473 n.2 (2004) ("Inasmuch as Defendant presents no discernable argument in support of this contention, it is our prerogative to disregard

this claim." (citation modified)); Citicorp Mortg., Inc. v. Bartolome, 94 Hawai'i 422, 433, 16 P.3d 827, 838 (2000) ("An appellate court does not have to address matters for which the appellant has failed to present discernible argument."), overruled on other grounds by Mālama Kakanilua v. Dir. of Dep't of Pub. Works, 157 Hawai'i 280, 576 P.3d 793 (2025).

As this court has explained, straying beyond the arguments presented by an appellant impermissibly places the court in the dual role of advocate and judge:

"It is not the obligation of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel." Sanchez v. Miller, 792 F.2d 694, 703 (7th Cir. 1986). "To do so would not only strain judicial resources . . . but would also transform the [] court from its legitimate advisory role to the improper role of an advocate seeking out the strongest arguments and most successful strategies for a party." Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985).

State v. Kahanaoi, No. CAAP-12-0000021, 2012 WL 5359188, at *2 (App. Oct. 31, 2012) (SDO); Kaho'ohanohano, 117 Hawai'i at 308, 178 P.3d at 584 (quoting State v. Pettit, 492 N.W.2d 633, 647 (Wis. Ct. App. 1992) (explaining courts will decline to address portions of a brief "so lacking in organization and substance that for [the court] to decide [the] issues, [it] would first have to develop them[,] . . . [and] serve as both advocate and judge"))).

Conclusory arguments unsupported by legal authority are generally insufficient to warrant vacating the lower court's decision. See Taomae v. Lingle, 108 Hawai'i 245, 257, 118 P.3d 1188, 1200 (2005) ("This argument does not contain any reasoning, supported by citations to case law or authority to constitute a discernible argument; thus we decline to decide the issue."); Kienker v. Bauer, 110 Hawai'i 97, 104 n.12, 129 P.3d 1125, 1132 n.12 (2006) ("This argument consists of one paragraph and neither cites law nor contains cites to the record. The appellate courts are not obligated to search the record to crystallize the parties' arguments. Accordingly, this argument is not considered." (citation omitted)).

Thus, as one appellate court has stated, "It should go without saying that one cannot 'support claims of error with meaningful argument and citation to authority' by citing cases that do not exist or that do not stand for the propositions for which they are cited." JPMorgan Chase Bank, N.A. v. Buenzli, No. C102530, 2025 WL 3675150, at *4 (Cal. Ct. App. Dec. 18, 2025) (quoting Allen v. City of Sacramento, 183 Cal. Rptr. 3d 654, 664 (Cal. Ct. App. 2015)).

Therefore, to the extent Presti's arguments are supported by nonexistent authority, we consider those arguments waived. We address Presti's remaining arguments to the extent those arguments are discernible.

B. Photographic Lineup (POE 1)

Presti argues the photographic lineup in which CW identified him was impermissibly suggestive because it contained "three identifiable factors" when compared with the five filler photographs: (1) "the defendant photo had the lightest color background out of all six photos used"; (2) "the defendant photo was the only photo that featured sunglasses on the defendant[']s head"; and (3) "the defendant photo was taken from a significantly closer angle than the other five photos making that defendant appear significantly larger than the five people inside the filler photos." As such, Presti asserts that the procedure used did not comply with HRS § 801K-2(b) (2) (Supp. 2019), which provides, "In a photo lineup, there shall be no characteristics of the photographs themselves or the background context in which they are placed that makes any of the photographs unduly stand out." (Emphasis added.) Presti further asserts that because the identification led to his arrest, any evidence obtained therefrom should have been excluded as fruit of the poisonous tree.

Here, CW identified Presti in a blind sequential photographic lineup containing an enlargement of Presti's driver's license photograph and five other filler mug shots from a police database. Presti's driver's license photograph was used because he was not in the HPD database. The photographs,

which were all in greyscale, were selected by one HPD officer and the lineup was administered by a second HPD officer, who was unfamiliar with the case and did not know that Presti was a suspect.

When the defendant challenges admissibility of eyewitness identification on the grounds of impermissibly suggestive pre-trial identification procedure, he or she has the burden of proof, and the court, trial or appellate, is faced with two questions: (1) whether the procedure was impermissibly or unnecessarily suggestive; and (2) if so, whether, upon viewing the totality of the circumstances, such as opportunity to view at the time of the crime, the degree of attention, and the elapsed time, the witness's identification is deemed sufficiently reliable so that it is worthy of presentation to and consideration by the jury.

State v. Walton, 133 Hawai'i 66, 83, 324 P.3d 876, 893 (2014) (quoting State v. Araki, 82 Hawai'i 474, 484, 923 P.2d 891, 901 (1996)).

A photographic lineup does not require each photograph to be identical; the nature of – and indeed the very premise behind – a photographic lineup is that each individual is distinctive enough that the perpetrator may be identified by the victim. A photographic lineup is not impermissibly suggestive under HRS § 801K-2(b)(2) unless "any of the photographs unduly stand out." (Emphasis added.)

Here, the blind sequential photographic lineup was not impermissibly suggestive. See Walton, 133 Hawai'i at 83, 324 P.3d at 893. First, although the background of Presti's image is lighter than the filler images, the filler images' backgrounds vary in darkness such that, when viewed in context,

Presti's image does not "unduly stand out." See HRS § 801K-2(b)(2). Second, the presence of sunglasses does not make Presti's image "unduly stand out" when viewed in context because the glasses are barely visible and are otherwise indistinguishable from Presti's hair as the image quality is low and is presented in grayscale. See id. Third, although Presti's head is noticeably larger than those in the filler images, the filler images include heads that are not centered on the camera or are tilted slightly such that, taken in context, Presti's photograph does not "unduly stand out." See id.

Because Presti's driver's license photograph did not "unduly stand out" from the filler photographs, the photographic lineup was not impermissibly suggestive. See id.; Walton, 133 Hawai'i at 83, 324 P.3d at 893. Accordingly, we do not reach Presti's argument regarding fruit of the poisonous tree.

C. Admission of Evidence Without Sufficient Foundation (POE 3)

Presti challenges the circuit court's admission, over objection, of body-worn camera footage from CW's July 28 statement to the police and HPD Officer Ryan Ariola's (**Officer Ariola**) testimony regarding the classification of the case.

Regarding the body-worn camera footage, Presti contends the video should not have been admitted because the video was "another officer[']s body cam footage."

"When a question arises regarding the necessary foundation for the introduction of evidence, the determination of whether proper foundation has been established lies within the discretion of the trial court, and its determination will not be overturned absent a showing of clear abuse." State v. Eid, 126 Hawai'i 430, 440, 272 P.3d 1197, 1207 (2012) (quoting State v. Assaye, 121 Hawai'i 204, 210, 216 P.3d 1227, 1233 (2009)).

It appears that the basis for Presti's contention that the body-worn camera did not belong to Officer Ariola was that the State's Exhibit List identified Exhibit 17 as "BWC (Muniz)." However, Officer Ariola testified that the recording originated from his own body-worn camera and that he uploaded it himself to HPD's secure servers. Because Presti's argument is unsupported by the record, the circuit court did not abuse its discretion when it admitted the recording. See id.

Regarding the classification of the case, Presti asserts that Officer Ariola was impermissibly permitted to testify about whether the case should be properly classified as Harassment or Attempted Sexual Assault on the basis that it constituted an expert opinion.

We note that Presti's argument is one paragraph long and contains neither citations to authority nor to the record. See Kienker, 110 Hawai'i at 104 n.12, 129 P.3d at 1132 n.12

("This argument consists of one paragraph and neither cites law nor contains cites to the record. The appellate courts are not obligated to search the record to crystallize the parties' arguments. Accordingly, this argument is not considered."
(citation omitted)).

In any event, nothing in Hawai'i Rules of Evidence (HRE) Rule 702, which governs the admissibility of expert opinions, requires the trial court to "formally qualify a witness as an expert in front of the jury before the witness's testimony can properly be admitted." State v. Metcalfe, 129 Hawai'i 206, 225, 297 P.3d 1062, 1081 (2013). Instead, the Hawai'i Supreme Court has recognized that "nothing in the HRE would preclude the trial court from declining to qualify a witness as an expert in front of the jury, so long as the requisite foundation for the witness's testimony is established." Id. at 226, 297 P.3d at 1082.

Presti points to nothing in the record to support his contention that Officer Ariola's testimony was not supported by the requisite foundation. Cnty. of Hawai'i v. C & J Coupe Fam. Ltd. P'ship, 119 Hawai'i 352, 357 n.6, 198 P.3d 615, 620 n.6 (2008) (quoting Lanai Co. v. Land Use Comm'n, 105 Hawai'i 296, 309 n.31, 97 P.3d 372, 385 n.31 (2004) (explaining that this court "is not obligated to sift through the voluminous record to verify an appellant's inadequately documented contentions").

D. Constitutionality of Hawai'i Attempt, Sexual Assault, and Kidnapping Statutes (POE 4 & 5)

Presti challenges the constitutionality of HRS §§ 707-720 (Kidnapping), 707-730 (Sexual Assault in the First Degree), and 705-500 (Criminal Attempt), arguing that the statutes are unconstitutionally vague. We do not reach the merits of Presti's contentions because this court lacks appellate jurisdiction over Presti's challenge.

"Appellate jurisdiction 'in a criminal case is purely statutory and exists only when given by some constitutional or statutory provision.'" State v. Baxley, 102 Hawai'i 130, 133, 73 P.3d 668, 671 (2003) (quoting State v. Kalani, 87 Hawai'i 260, 261, 953 P.2d 1358, 1359 (1998)).

HRS § 641-11 (2016), which provides the statutory basis upon which a criminal defendant may appeal from a judgment of the circuit court, provides, in relevant part, that "[a]ny party aggrieved by the judgment of a circuit court in a criminal matter may appeal to the intermediate appellate court." (Emphasis added.)

"An aggrieved party has been defined by this court in a civil context as 'one who is affected or prejudiced by the appealable order.'" Baxley, 102 Hawai'i at 134, 73 P.3d at 672 (quoting Waikiki Malia Hotel, Inc. v. Kinkai Props. Ltd. P'ship, 75 Haw. 370, 393, 862 P.2d 1048, 1061 (1993)). Further, under HRS § 701-110(1) (2014) and controlling caselaw,

[A] defendant who has been convicted of a lesser included offense than that charged is deemed to have been acquitted of the greater charge. Thus[,] a defendant may not be retried for any offense of which he has been acquitted, whether expressly or impliedly, notwithstanding a subsequent reversal of the judgment on appeal.

State v. Sing, 154 Hawai'i 377, 387, 550 P.3d 1235, 1245 (2024) (quoting State v. Feliciano, 62 Haw. 637, 644, 618 P.2d 306, 311 (1980)); accord, e.g., State v. Bojorquez, 538 P.2d 796, 798-99 (N.M. Ct. App. 1975) (holding defendant convicted of included offense lacked standing to challenge statute under which the defendant was originally charged).

Because Presti fails to show that he was prejudiced by virtue of his acquittal of all charges under the challenged statutes, this court is without jurisdiction to address the substance of his arguments. See Baxley, 102 Hawai'i at 134, 73 P.3d at 672.

E. Indictment (POE 2, 6, 7, and 8)

Presti asserts multiple challenges to his indictment, including that the indictment was obtained through "false testimony" (POE 2); that the indictment "overcharged" him based on the facts alleged (POE 6); that the prosecution exceeded its discretion when charging him under the circumstances of this case (POE 7); and that the indictment improperly charged multiple offenses arising from the same continuing course of conduct (POE 8). It appears that the gravamen of Presti's contentions is that the charges alleged in the indictment –

Attempted Sexual Assault in the First Degree and Kidnapping – were not supported by the facts of the case because there were no allegations of sexual penetration or that sexual penetration was possible under the circumstances.

It is well-settled that "the State has wide discretion in bringing criminal charges." State v. Yokota, 143 Hawai'i 200, 206, 426 P.3d 424, 430 (2018). And, as this court has explained, "[t]he prosecutor not only has complete discretion as to whether to charge, he also has complete discretion as to when charges will be filed, what charges will be filed, how many charges will be filed, and under what statutes the charges will be made." Naluai v. Naluai, 99 Hawai'i 363, 368, 55 P.3d 856, 861 (App. 2002) (quoting State v. Radcliffe, 9 Haw. App. 628, 640, 859 P.2d 925, 932 (App. 1993)); accord Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

First, as the Hawai'i Supreme Court explained in In re Doe, "absent unusual circumstances, any defects in a pretrial determination of probable cause are rendered moot, or are without any effective remedy, which is much the same thing, by a subsequent conviction." 102 Hawai'i 75, 78, 73 P.3d 29, 32

(2003) (footnote omitted). Because the jury convicted Presti of Unlawful Imprisonment in the Second Degree and acquitted him of Attempted Sexual Assault in the First Degree and Kidnapping, the issue is moot. See id.

Next, to the extent that Presti challenges his indictment based on alleged "overcharging," the Hawai'i Supreme Court recognized in State v. Modica that "[s]tatutes may on occasion overlap, depending on the facts of a particular case, but it is generally no defense to an indictment under one statute that the accused might have been charged under another. Under those circumstances, the matter is necessarily and traditionally subject to the prosecuting attorney's discretion." 58 Haw. 249, 251, 567 P.2d 420, 422 (1977) (citations omitted).

The record shows that CW alleged that, on the evening of July 28, CW asked Presti to take her home, but he instead took her up Pu'u'ōhi'a, where he tried to rape her. On these allegations, as found by the grand jury,¹¹ Presti could properly

¹¹ No transcript of the grand jury testimony appears in the record on appeal. See HRAP Rules 10(b)(1)(A) (requiring the appellant to request transcripts "[w]hen an appellant desires to raise any point on appeal that requires consideration of the oral proceedings before the court appealed from"), 11(a) ("It is the responsibility of each appellant to provide a record, as defined in Rule 10 of these Rules and the Hawai'i Court Records Rules, that is sufficient to review the points asserted and to pursue appropriate proceedings in the court or agency appealed from to correct any omission.").

"The burden is upon appellant in an appeal to show error by reference to matters in the record, and he [or she] has the responsibility of providing

(continued . . .)

be charged with Attempted Sexual Assault in the First Degree and Kidnapping. See HRS §§ 705-500, 707-730(1)(a), 707-720(1)(d). That he could also have been charged with lesser offenses, such as Unlawful Imprisonment in the Second Degree or Harassment, as argued by Presti, does not mean that the State abused its prosecutorial discretion when it sought an indictment against Presti for the charged offenses. See Modica, 58 Haw. at 251, 567 P.2d at 422.

Finally, to the extent Presti challenges his indictment because "the entire case was based upon one continuing course of conduct as such the prosecution should have never been allowed to charge multiple offenses," the argument is without basis in law. HRS § 701-109(1) (2014) "explicitly provide[s] that a defendant may be charged with multiple offenses arising from the same conduct even when he or she cannot be convicted of more than one offense." Yokota, 143 Hawai'i at 207, 426 P.3d at 431. The State could properly charge Presti with both Attempted Sexual Assault in the First Degree and Kidnapping, even if those charges arose from the same continuing course of conduct. See id.

(. . . continued)

an adequate transcript." Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995) (quoting Union Bldg. Materials Corp. v. Kakaako Corp., 5 Haw. App. 146, 151, 682 P.2d 82, 87 (App. 1984)).

Based on the foregoing, the State did not abuse its discretion when charging Presti, and the circuit court did not abuse its discretion by denying Presti's motion to dismiss the indictment thereupon. See Naluai, 99 Hawai'i at 368, 55 P.3d at 861.

F. Bill of Particulars (POE 6)

Presti argues the circuit court abused its discretion when it denied his requests for a bill of particulars because the denial violated his right to be sufficiently informed to prepare for trial.

The denial of a request for a bill of particulars is reviewed for abuse of discretion. See State v. Masuda-Mercado, 157 Hawai'i 116, 125, 575 P.3d 749, 758 (2025) (citing State v. Valenzona, 92 Hawai'i 449, 452, 992 P.2d 718, 721 (App. 1999)).

A bill of particulars is "a 'formal, detailed statement of the claims or charges brought by a . . . prosecutor'" that "[m]uch like an indictment . . . provides notice and 'is designed to enable the defendant to prepare for trial and prevent surprise.'" Id. (first quoting Bill of Particulars, Black's Law Dictionary (12th ed. 2024); then quoting State v. Reed, 77 Hawai'i 72, 78, 881 P.2d 1218, 1224 (1994), overruled on other grounds by State v. Balanza, 93 Hawai'i 279, 1 P.3d 281 (2000)).

When a trial court "is of the opinion that the accused in any criminal case has been actually misled and prejudiced in the accused's defense" by the charging document, HRS § 806-47 (2014) permits the court to order the prosecution to file a bill of particulars on "matters in regard to which the court finds the defendant should be informed."

Id.

Presti moved pro se for a bill of particulars on May 10, 2024, over eight months after his August 28, 2023 arraignment.¹² Presti does not show he was prejudiced by an unfair surprise or otherwise show that his defense was impeded by a lack of information. Instead, the record shows, and Presti does not appear to contest, that Presti "ha[d] the benefit of both discovery and prior testimony of the witnesses that detail the facts underlying the offenses charged against him." "A bill of particulars is not required if the information requested by the defendant has been provided in some other satisfactory form." State v. Corder, 121 Hawai'i 451, 454, 220 P.3d 1032, 1035 (2009) (citing Reed, 77 Hawai'i at 78, 881 P.2d at 1224).

Accordingly, the circuit court did not abuse its discretion when it determined that Presti had received the requested information in a satisfactory form. See id.

¹² Hawai'i Rules of Penal Procedure Rule 7(g) provides in relevant part: "The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days after arraignment or at such other later time as the court may permit."

G. Jury Instructions (POE 9)

Presti argues the circuit court improperly denied his request for a jury instruction on Harassment under HRS § 711-1106 (2014) as an included offense of Unlawful Imprisonment in the Second Degree "where the restraint is momentary, lacking violence, threats, or prolonged holding." This argument is without basis in law.

Presti relies on three cases from other jurisdictions to show that those jurisdictions have recognized Harassment as an included offense of other restraint-based crimes such as Unlawful or False Imprisonment: "State v. Eichman, 74 Wash. App. 479, 874 P.2d 646 (1994)"; "State v. Washington, 125 Or. App. 406, 865 P.2d 474 (1993)"; and "People v. Babich, 192 Cal. App. 4th 1423 (2011)."

As explained above, those cases do not exist; further, the "supported" propositions of law appear erroneous. E.g., Branch, 636 P.2d at 421 ("[D]efendant's conviction for a 'lesser included offense' of harassment (he was originally charged with kidnapping) was not proper."). Accordingly, we disregard as waived Presti's arguments to the extent they are supported by nonexistent authority and only address his remaining arguments to the extent those arguments are discernible.

An offense is an included offense, and a criminal defendant may be convicted thereof, if:

- (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
- (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
- (c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

HRS § 701-109(4) (Supp. 2018). Presti has not shown that any of these subsections apply.

In particular, we note that an offense may not be an included offense under HRS § 701-109(4) (c) if it requires a "mental state greater than or different from that which is required for the charged offense." State v. Kaeo, 132 Hawai'i 451, 461, 323 P.3d 95, 105 (2014) (internal quotation marks omitted) (quoting State v. Alston, 75 Haw. 517, 534, 865 P.2d 157, 166 (1994)). A conviction for Unlawful Imprisonment in the Second Degree requires proof that the criminal defendant "knowingly restrain[ed] another person." HRS § 707-722(1). A conviction for Harassment requires proof of "intent to harass, annoy, or alarm any other person" through statutorily defined conduct. HRS § 711-1106(1).

Harassment is not an included offense of Unlawful Imprisonment in the Second Degree under HRS § 701-109(4)(c), because intent, which is required for a Harassment conviction, is a greater mental state than knowing, which is required for a conviction for Unlawful Imprisonment in the Second Degree. HRS §§ 702-204 (2014), -208 (2014); see State v. Kupau, 63 Haw. 1, 6, 620 P.2d 250, 253 (1980) (holding "harassment has a greater mental state than assault in the third degree" because "[h]arassment requires a state of mind that has the intent to harass, annoy or alarm, while assault requires a mental state that is intentional, knowing or reckless"); State v. Burdett, 70 Haw. 85, 88-89, 762 P.2d 164, 166-67 (1988) (holding harassment "has a more culpable mental state than terroristic threatening in the first degree" because the latter "requires a mental state that is intentional or reckless").

Because Presti was not entitled to a jury instruction on Harassment as an included offense of a charged crime, the circuit court's denial of Presti's request was not error.

H. Excessive Bail (POE 10)

Finally, Presti challenges the imposition of bail in the amount of \$200,000.00, arguing the circuit court "failed to consider [his] inability to pay, his familial ties to the island, his having employment available outside of jail, his having housing available outside of jail, and the fact that the

prosecution failed to show the fair likelihood of conviction." The State acknowledges that the circuit court "failed to adequately analyze Presti's financial circumstances" but asserts that, while remand for a redetermination of bail would have been appropriate under this court's recent opinion in State v. Carter, 154 Hawai'i 96, 104, 546 P.3d 1210, 1218 (App. 2024), "there is no meaningful remedy at this point, because Presti is no longer in custody for this case."

In Carter, this court explained that where the trial court found that bail could be properly denied but nonetheless "decided to set cash bail as an alternative, it was required to exercise its discretion in accordance with the law governing setting the amount of cash bail, i.e. HRS § 804-9 [(Supp. 2019)] and its requirement that the amount be 'reasonable.'" Id. Because the circuit court did not adequately consider the financial circumstances of the defendant, which is "a key component of setting cash bail under HRS § 804-9," the circuit court abused its discretion. Id. at 102, 104, 546 P.3d at 1216, 1218.

Here, although it appears that the circuit court did not consider Presti's financial circumstances, which would be reversible error under Carter, see id., we do not reach the issue because Presti's contentions as to pre-trial bail are moot as Presti has been convicted and has served the full term of his

sentence, see Murphy v. Hunt, 455 U.S. 478, 481-82 (1982) ("It would seem clear that under this general rule [the criminal defendant]'s claim to pretrial bail was moot once he was convicted. The question was no longer live because even a favorable decision on it would not have entitled [the criminal defendant] to bail. For the same reason, [the convicted defendant] no longer had a legally cognizable interest in the result in this case." (footnote omitted)).

As a matter of Hawai'i law, "there is no independent basis for dismissing the criminal charges against [a criminal defendant] based on his claim of excessive bail." State v. Visintin, 142 Hawai'i 126, 143, 414 P.3d 178, 195 (App. 2018), aff'd in part and vacated in part, 143 Hawai'i 143, 426 P.3d 367 (2018); accord White v. Wilson, 399 F.2d 596, 598 (9th Cir. 1968) (recognizing that "it has not been held that [excessive bail] is a constitutional basis for invalidation of a conviction" under the Eighth and Fourteenth Amendments of the United States Constitution).

Accordingly, Presti's excessive bail claim is moot because it "has lost its character as a present, live controversy" and "the reviewing court can no longer grant

effective relief." See Kaho'ohanohano, 114 Hawai'i at 332, 162 P.3d at 726 (citation modified).

III. CONCLUSION

Based on the foregoing, we affirm the circuit court's November 21, 2024 "Judgment of Conviction and Sentence as to Count 2."

On the briefs:

/s/ Keith K. Hiraoka
Presiding Judge

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/s/ Sonja M.P. McCullen
Associate Judge

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