NO. 23133

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAII, Plaintiff-Appellee, v.
CAROL RUTH BALBERDI-LOPEZ, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 99-0366(1))

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Carol Ruth Balberdi-Lopez (Balberdi-Lopez) appeals the January 24, 2000 judgment of the circuit court of the second circuit, the Honorable Artemio Baxa, judge presiding, that convicted her of (Count One) robbery in the first degree, in violation of Hawaii Revised Statutes (HRS) § 708-840(1)(b)(ii) (1993); (Count Two) carrying or use of a firearm in the commission of a separate felony, in violation of HRS § 134-6(a) (1993 & Supp. 2000); and (Count Three) prohibited possession of firearm ammunition, in violation of HRS § 134-7(b) (1993 & Supp. 2000). The same judgment convicted her of four traffic offenses: (Count Four) speeding, (Count Six) failure to keep registration in the vehicle, (Count Eight) fraudulent license plates, and (Count Nine) false safety check. Balberdi-Lopez does not appeal her convictions and sentences for those four traffic offenses. Two other traffic charges in the

nine-count indictment, (Count Five) driving without a license and (Count Seven) driving without no-fault insurance, were dismissed with prejudice pursuant to a motion filed by the State.

With respect to the first three counts of the indictment, Balberdi-Lopez was sentenced to an extended term of life imprisonment with the possibility of parole in each of Counts One and Two, and to an extended term of twenty years of imprisonment in Count Three, all prison terms to run concurrently.

On appeal, Balberdi-Lopez contends that the circuit court erred by (1) denying her motion to dismiss the grand jury indictment; (2) admitting at trial evidence of prior bad acts; (3) providing improper jury instructions; and (4) failing to dismiss the robbery charge, because it was an included offense of the charge of carrying or use of a firearm in the commission of a separate felony.

Because Balberdi-Lopez does not appeal her convictions and sentences for Counts Four, Six, Eight and Nine of the indictment, we affirm them. For the following reasons, we vacate her convictions and sentences for Counts One through Three of the indictment and remand for a new trial.

I. Background.

A. Factual History.

On July 17, 1999, just after seven p.m., Balberdi-Lopez dropped her boyfriend, Antonio Lomeli Ramirez (Ramirez), off at the Paʻia Pit Stop (Pit Stop), then drove down the street a ways before turning around. As Balberdi-Lopez drove away, Ramirez walked into the Pit Stop and robbed the store.

In the course of the robbery, Ramirez threatened the store's owner, Patricia Cabanting (Patricia), with a gun -- cocking it in an attempt to inspire her to empty the cash register faster. After determining that he had most of the money from the register, Ramirez walked out of the store's front door, toward the street.

While Ramirez was robbing the Pit Stop, Balberdi-Lopez had turned her white BMW around and was driving very slowly back toward the Pit Stop. A witness testified that the car looked like it was "creeping up" the road. Without pulling over to the side of the road, Balberdi-Lopez stopped the car in the street fronting the Pit Stop.

Witnesses then saw Ramirez leave the store in a crouching position, approach the car, and jump into it. The car did not, however, speed off after collecting its passenger. Instead, it started up the street as though its occupants had done nothing wrong.

Shortly thereafter, Balberdi-Lopez spotted a police vehicle and sped up. She then led the police on a high speed chase through Paʻia's narrow, winding roads, until she was faced with a police roadblock and was forced to stop. Balberdi-Lopez and Ramirez left the car upon police command, and were taken into custody.

Immediately after taking the couple into custody, the police searched the white BMW, with Balberdi-Lopez's consent. In the back seat, the police recovered a floral print cloth bag containing rubber gloves, an ammunition tray and forty-nine rounds of .380 caliber ammunition, brand name "CCI." The police also found Balberdi-Lopez's name printed by hand in permanent ink on an interior pocket of the cloth bag.

While in custody at the scene, Balberdi-Lopez told the police that they had the wrong people. Balberdi-Lopez explained that as she and Ramirez were driving along, they were stopped by a stranger in the road, who threatened them with a gun, jumped into their car and ordered them to take him away from the store he had robbed. According to Balberdi-Lopez, the mystery man jumped out of the car sometime before the white BMW commenced its high speed flight from the police.

The police searched the roadside of the street Balberdi-Lopez had driven after retrieving Ramirez from the Pit Stop. The items recovered included, among other things, the bag

containing the stolen money, a Walther PPK semiautomatic pistol loaded with CCI .380 caliber ammunition, and a blue-green flannel shirt that matched witnesses' description of the robber's shirt. At trial, Balberdi-Lopez's daughter, Mycis, testified that the flannel shirt belonged to her mother.

Three days after the Pit Stop robbery, the police searched the house Balberdi-Lopez shared with Ramirez and Mycis. During this search, the police seized drug paraphernalia from the bedroom used by Balberdi-Lopez and Ramirez and a display tray holding an assortment of rings -- with the store tags still attached -- from Mycis's bedroom. The police also learned that Balberdi-Lopez sometimes stored items in her daughter's room.

On July 23, 1999, Balberdi-Lopez was indicted for robbery in the first degree, carrying or use of a firearm in the commission of a separate felony, and possession of firearm ammunition by a convicted felon, among other charges.

B. Procedural History.

1. Grand jury proceedings.

On November 3, 1999, Balberdi-Lopez moved to "dismiss [the] indictment due to the incompetency of the evidence before the grand jury, and prosecutorial misconduct[.]" In relevant part, Balberdi-Lopez claimed that the grand jury was not fair and impartial in returning its indictment because of the following

comments made by a grand juror before the presentation of evidence:

> A GRAND JUROR: Wait a minute. I may know a Carol Lopez.
>
> Is she -- I used to work in the prison, and was she a sentenced felon? Because I was her counselor, if this is the same one.
>
> . . . .
>
> A GRAND JUROR: Yeah. I knew her before. Last summer I worked at Maui -- MCCC.
>
> . . . .
>
> STATE: Do you feel that you can fairly and impartially continue to sit on this matter?
>
> A GRAND JUROR: Probably. There was an incident where she called our home, and I was kind of concerned because of Mafia ties, so I would rather be excused.

The prosecutor excused the grand juror.

Balberdi-Lopez took specific issue with the continuation of the grand jury proceedings, despite the grand juror's comments. In short, she argued that "the State of Hawai'i either knew, or should have known the comments by the grand juror . . . caused a situation where the grand jury panel could not be fair and impartial."

On November 12, 1999, after hearing argument on the motion to dismiss, the circuit court denied the motion, ruling, in pertinent part, that "perhaps it might as well the juror, because of what she knew, excused herself, and I do not see any prejudice in that." The court found that the charges were supported by "ample" evidence, and that "there is no basis for the dismissal."

2. Evidentiary issues at trial.

In the defense case, Ramirez testified that Balberdi-Lopez had no idea he intended to rob the Pit Stop: "She don't have anything to do with it." He also testified that he took her bag from their bedroom that day and used it to carry the ammunition. He told the jury that he made up the story Balberdi-Lopez told the police immediately after her arrest, that "I told her what to say." Ramirez professed his love for Balberdi-Lopez: "Did you say love her? Yes, I do."

The State thereupon sought to prove Balberdi-Lopez's knowledge and intent regarding the Pit Stop robbery by introducing rebuttal evidence of other crimes in which she was an alleged co-conspirator with Ramirez. Specifically, the State sought admission of evidence showing that on February 21, 1999, the couple had worked together to steal refund money from Kmart for two television sets and two pillows, and that Balberdi-Lopez had been convicted for her role in that theft.[1] In addition, the State sought to adduce evidence of a suspected July 2, 1999 jewelry store burglary that netted the still-tagged rings recovered from Mycis's bedroom. At the time of trial, the burglary was still under investigation, and neither Ramirez nor Balberdi-Lopez had been charged with the crime.

[1/] Balberdi-Lopez was convicted in October 1999 for her role in the February 21, 1999 theft of the refund money from Kmart. Her partner, Antonio Lomeli Ramirez (Ramirez), was awaiting trial for the Kmart theft at the time of Balberdi-Lopez's trial for the Pit Stop robbery.

Over Balberdi-Lopez's objection, the circuit court decided:

> Okay. I will, however, rule that in view of the fact that the witness now, [Ramirez], has testified to the effect that -- to the effect that he has exonerated [Balberdi-Lopez] for the robbery and any related firearms offense in this case, and that the defense has made [Balberdi-Lopez's] intent and knowledge as primary issues in this case, the State must now show facts from which the jury may infer that [Balberdi-Lopez] knew of Ramirez's criminal activities, and that she and [Ramirez] were co-conspirators in the felonies.
>
> Because of the total exoneration that the witness has made of [Balberdi-Lopez] in this case, there appears to be strong need now for the evidence -- for the State to show that in fact [Balberdi-Lopez] knew of what was happening at the time of the offenses presently against [Balberdi-Lopez] and [Ramirez].
>
> So in that case, the Court is going to allow the presecution in rebuttal to be able to show that [Balberdi-Lopez] and [Ramirez] were co-participants or conspirators on the cases that have been argued upon that -- I am referring to the alleged burglary and the theft at Kmart.
>
> This is to show not only intent and knowledge and so on, but also to show that there had in fact been a conspiracy going on between [Balberdi-Lopez] and [Ramirez].
>
> As is stated in the -- as stated by the Court in the case of [State v.] Renon[,] [73 Haw. 23, 828 P.2d 1266 (1992)] cited by the State in its memorandum, it says:
>
> > "Even where the acts are those of the defendant himself and are not within the specifications of the indictment, admissibility can still be justified on the ground that the evidence is offered to prove the operation of the conspiracy, not to prove the character of the accused. In other words, the explanatory construct is not the one whose use is forbidden by [Hawaii Rules of Evidence (HRE)] Rule 404(b)."

In conclusion, the court stated, "There is no question that there is prejudice, but that is not the issue. The question is whether

the need for the evidence is here, whether the need for it overweighs the prejudice." Whereupon the prosecutor asked, "[I]s the Court finding also that when you indicate that need strongly overweighs the prejudice, are you also making the finding that the probative value outweighs the prejudicial?" The court responded, "Yes. I have not said that, but I -- that is my -- that is my decision. . . . And I have done the proper balancing here." Hence, the State was allowed to question Ramirez and Balberdi-Lopez about their theft from Kmart and her conviction of that crime, and about the rings seized during the search of their house.[2] Further, the State called in rebuttal a Kmart employee to testify about the Kmart theft, and two police officers to testify about the jewelry store burglary and its proceeds -- the stolen rings.

[2/] We observe that the State adduced evidence, in its case-in-chief, of Ramirez's and Balberdi-Lopez's alleged use of illegal drugs in the form of police testimony about the seizure of a residue-laden glass pipe from the couple's bedroom. Balberdi-Lopez did not object to the admission of this evidence.

The State premised its argument for the admission of the previous crimes -- the Kmart theft and the jewelry store burglary -- on the theory that these were part of a conspiracy to support the couple's drug habit. See infra. The admission of the evidence about the drug paraphernalia is not, however, a point on appeal.

3. Jury instructions.

The circuit court gave the following jury instructions regarding HRS §§ 134-6(a)[3] and 134-7(b),[4] respectively. In pertinent part:

INSTRUCTION NO. 21

A person commits the offense of Carrying Or Use of a Firearm While Engaged in the Commission of a Separate Felony if he/she knowingly carries on his/her person or knowingly has within his/her immediate control or intentionally uses or intentionally threatens to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether it was operable or not.

There are three material elements of the offense of Carrying Or Use of a Firearm While Engaged in the Commission of a Separate Felony, each of which the prosecution must prove beyond a reasonable doubt.

These three elements are:

1. That on or about July 17, 1999 in the County of Maui, State of Hawaii, [Balberdi-Lopez], as a principal and/or accomplice with [Ramirez], carried on

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[3/] Hawaii Revised Statutes (HRS) § 134-6(a) (1993 & Supp. 2000)) provides, in relevant part:

> **Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty.** (a) It shall be unlawful for a person to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not[.]

[4/] HRS § 134-7(b) (1993 & Supp. 2000) provides:

> **Ownership or possession prohibited, when; penalty. . . .**
>
> (b) No person who is under indictment for, or has waived indictment for, or has been bound over to the circuit court for, or has been convicted in this State or elsewhere of having committed a felony, or any crime of violence, or an illegal sale of any drug shall own, possess, or control any firearm or ammunition therefor.

his/her person or had within his/her immediate control or used or threatened to use a firearm, to wit, a semi-automatic pistol, whether the firearm was loaded or not, and whether operable or not; and

2. That [Balberdi-Lopez] did so while engaged in the commission of the separate felony of Robbery in the First Degree;

3. That [Balberdi-Lopez] did so knowingly, in the case of carrying on his/her person or having within his or her immediate control or intentionally, in the case of using or threatening to use the firearm.

INSTRUCTION NO. 24

A person commits the offense of Prohibited Possession of Firearm Ammunition if, having been previously convicted of a felony, he/she intentionally, knowingly, or recklessly owns, possesses or controls any firearm ammunition.

There are three material elements of the offense of Prohibited Possession of Firearm Ammunition, each of which the prosecution must prove beyond a reasonable doubt.

These three elements are:

1. That on or about the [(sic)] April 15, 1993, in the County of Maui, State of Hawaii, [Balberdi-Lopez] was convicted of committing a felony; and

2. That [Balberdi-Lopez] thereafter, on July 17, 1999, owned, possessed or controlled firearm ammunition; and

3. That [Balberdi-Lopez] did so intentionally, knowingly or recklessly.

The court did not give an included offense instruction for the robbery in the first degree charge. Balberdi-Lopez did not object to the instructions provided by the court.

On November 24, 1999, the jury found Balberdi-Lopez guilty as charged on all seven counts under its consideration, including robbery in the first degree, use of a firearm in the commission of a separate felony, and prohibited possession of

firearm ammunition by a convicted felon. On January 24, 2000, the circuit court entered its judgment. Thereafter, Balberdi-Lopez timely filed notice of this appeal.

II. Issues Presented.

On appeal, Balberdi-Lopez argues that the circuit court committed four reversible errors, two of which she claims were plain error. First, that the court erroneously denied her motion to dismiss the grand jury indictment because the grand jury was unfairly prejudiced by comments of a grand juror. Next, that the court erred in permitting the State to elicit and adduce evidence of her and Ramirez's prior bad acts. Further, that the court's jury instructions on HRS §§ 134-6(a) and 134-7(b), and its omission of instructions regarding the included offense of robbery in the second degree, constituted plain error. Finally, that the court erred in failing to dismiss the robbery in the first degree charge, because it was an included offense of the charge of use of a firearm in the commission of a separate felony.

We conclude that, although the circuit court did not abuse its discretion in denying Balberdi-Lopez's motion to dismiss the grand jury indictment, it committed reversible error in admitting the prior bad acts evidence. Although our conclusion regarding the latter issue is outcome dispositive in

this appeal, we address some of the remaining contentions in order to provide guidance to the parties and the court on remand.

III. Standards Of Review.

A. Motion to Dismiss the Grand Jury Indictment.

"A trial court's ruling on a motion to dismiss an indictment is reviewed for an abuse of discretion." State v. Mendonca, 68 Haw. 280, 283, 711 P.2d 731, 734 (1985) (citation omitted). "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. Furutani, 76 Hawai'i 172, 179, 873 P.2d 51, 58 (1994) (citations and internal quotation marks omitted).

B. Admission of Prior Bad Acts Evidence.

Under HRE Rule 403 (1993) and Rule 404(b) (Supp. 2000), prior bad act evidence is admissible when "it is 1) relevant and 2) more probative than prejudicial." State v. Maelega, 80 Hawai'i 172, 183, 907 P.2d 758, 769 (1995) (citations and internal quotation marks omitted). A trial court's determination whether evidence is relevant within the meaning of HRE Rule 401 (1993) is reviewed under the right/wrong standard. 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 an abuse of discretion. State v. Pulse, 83 Hawai'i 229, 247, 925 P.2d 797, 815 (1996)

C. Jury Instructions.

It is well-settled that "[w]hen 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." State v. Kelekolio, 74 Haw. 479, 514-515, 849 P.2d 58, 74 (1993) (citation omitted).

IV. Discussion.

A. The Grand Jury Indictment.

Balberdi-Lopez asserts that the grand jury "might not have returned a true bill" but for the grand juror's comment about her call to the juror's home and her alleged "Mafia ties." Balberdi-Lopez argues that "[s]uch statements by a fellow grand juror clearly infringed upon the grand jury' [(sic)] decision making function."

Balberdi-Lopez cites State v. Joao, 53 Haw. 226, 491 P.2d 1089 (1971) for the proposition that,

> The test, as set forth in Joao, is whether, absent the conduct complained of, the Grand Jury "might not have returned the [sic] indictment." The defense need not prove that the Grand Jury was in fact so influenced. [Joao, 53 Haw. at 228, 491 P.2d at 1090]. However, the conduct must be extreme, clearly infringing on the Grand Jury's decision-making function. State v. Pulawa, 62 Haw. 209, 614 P.2d 373 (1980).

Balberdi-Lopez's assumption that Joao is the controlling precedent notwithstanding, we determine that the facts of Joao and those of the instant case are distinguishable.

In Joao, the conduct complained of was that of the prosecutor. Thus, the Hawai‘i Supreme Court held that

> [a] tendency to prejudice may be presumed when, in presenting cases to the grand jury, the trial court finds that the prosecutor or his deputies have engaged in
>
> > words or conduct that will invade the province of the grand jury or tend to induce action other than that which the jurors in their uninfluenced judgment deem warranted on the evidence fairly presented before them.

Joao, 53 Haw. at 229, 491 P.2d at 1091 (citations omitted). That this rule pertains strictly to the conduct of the prosecutor, or that of his or her deputies, was made patent by the Hawai‘i Supreme Court in State v. Chong, 86 Hawai‘i 282, 949 P.2d 122 (1997). In Chong, the supreme court examined the "refinements of -- and elaborations on -- the *Joao* analysis," and thereupon concluded that "it is not surprising that this court has not cited to the decision when the circumstances presented on appeal have not involved prosecutorial overreaching or deceit." Id. at 288, 949 P.2d at 128 (citations omitted).

Here, the conduct complained of is an unsolicited comment made by a grand juror, not by the prosecutor or his or her deputies. Joao is therefore inapposite. Instead, we determine that, based upon the facts of this case, State v. Scotland, 58 Haw. 474, 572 P.2d 497 (1977), is applicable by analogy.

At issue in Scotland was an improper statement made by a witness while testifying before the grand jury. Id. at 475, 572 P.2d at 498. The trial court quashed the indictment based on its finding that the subject statement "had a tendency to prejudice the [defendant] before the grand jury[.]" Id. In reversing the trial court's ruling, the supreme court initially observed:

> We have held that where sufficient legal and competent evidence is presented to a grand jury, the reception of illegal or incompetent evidence would not authorize the court to set aside an indictment if the remaining legal evidence, considered as a whole, is sufficient to warrant the indictment.

Id. at 476, 572 P.2d at 498 (citations omitted). The supreme court then held that

> in proceedings determining the validity of an indictment, the state does not have the burden of proving that the alleged illegal or improper testimony is not prejudicial; it is the duty of the defendant to come forward and present a case proving prejudice. "[I]n the absence of proof, the court will not assume or conjecture, as a matter of fact, that the grand jury deliberations were so infected as to invalidate the indictment." *United States v. Hoffa*, 205 F.Supp. 710 (S.D.Fl. 1962), *cert. denied sub nom. Hoffa v. Lieb*, 371 U.S. 892 (1962). "We rule that a specific showing of prejudice is necessary to make erroneous the action of the trial judge in refusing to dismiss the indictment." *Beck v. United States*, 298 F.2d 622, 627 (2d Cir. 1962), *cert. denied* 370 U.S. 919 (1962); *United States v. Hoffa*, *supra*.
>
> If the illegal or improper testimony clearly appears to have improperly influenced the grand jurors despite the presence of sufficient evidence amounting to probable cause to indict the defendant, he would be entitled to a dismissal. *People v. Barbour*, 152 Misc. 39, 273 N.Y.S. 788 (1934); *see State v. Joao*, 53 Haw. 226, 491 P.2d 1089 (1971).

Scotland, 58 Haw. at 476-477, 572 P.2d at 499.

Hence, Scotland requires an examination of the controversial statement in the context of the grand jury record in order to determine whether the statement "could tend to prejudice the [defendant] in the eyes of the grand jury to the extent that without such a statement the grand jury would not have returned the indictment." Id. at 477-478, 572 P.2d at 499 (citation omitted).

Although the statement in Scotland was made by a witness testifying before the grand jury, we believe the rule of Scotland applies likewise to the comment of the grand juror in this case. Balberdi-Lopez argues that "[t]he prejudicial comments painted Balberdi-Lopez as a person who took matters into her own hands and who was dangerous because of Mafia ties." In Scotland, the court determined that the statement at issue was simply "a bare conclusion on the part of the witness, which would be subject to a motion to strike by defense counsel if it were elicited at trial." Id. at 477, 572 P.2d at 499 (citations omitted). Here, it is similarly sheer speculation that the grand juror's comment improperly influenced the other jurors' impression of Balberdi-Lopez, let alone their decision.

Furthermore, our review of the grand jury transcript indicates that the allegedly prejudicial comments did not have any apparent effect on the other grand jurors. None of the deliberating grand jurors expressed any concern or questions regarding the comment of the excused grand juror. The prosecutor

called four witnesses who testified to the events of the robbery, and a final witness whose testimony verified Balberdi-Lopez's prior conviction as a felon. Hence, because "sufficient legal and competent evidence [was] presented to [the] grand jury," id. at 476, 572 P.2d at 498 (citation omitted), "it will be presumed that the indictment was found as the law directs." State v. Apao, 59 Haw. 625, 638, 586 P.2d 250, 259 (1978) (citing State v. Layton, 53 Haw. 513, 516, 497 P.2d 559, 561-62 (1972)).

Balberdi-Lopez also asserts that the absence of any "cautionary instruction" from either the prosecutor or the independent grand jury counsel constituted reversible error. She fails, however, to provide any argument for this assertion. Thus, we are not obligated to address this assertion. Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7) ("Points not argued may be deemed waived."). Still, assuming *arguendo* that Balberdi-Lopez presented a modicum of argument, we conclude that her assertion is baseless. Cf. Scotland, 58 Haw. at 478, 572 P.2d at 500 ("We know of no rule of law that mandates the prosecutor to give to the grand jury an instruction to disregard improper testimony in a case such as the one before us.").

Balberdi-Lopez further contends that the "grand jury might not have returned a true bill as it did express some concern over the sufficiency of the evidence." She points to a juror's comment during the grand jury proceeding: "We went

through all of that. We talked about all the different testimony, and the only problem we have with this robbery charge is the gun. We saw -- nobody -- only one person saw the gun, and that person is not on Maui. She is in the Phillipines." In response to this comment, however, the prosecutor recalled the police detective who recovered the gun to testify about the location and circumstances of his discovery of the discarded weapon. After this testimony, the prosecutor asked the grand jury whether it had any further questions, and there were none.

Clearly, the sole concern expressed by the grand jury was allayed by further testimony. In any event, we fail to see how the grand jury's concern about the strength of the evidence of the gun demonstrates, as the law requires, that the grand jury was prejudiced against Balberdi-Lopez by reason of the excused juror's comment.

Although we determine that no reversible error occurred during the grand jury proceedings, the same is not true for the proceedings at trial.

B. Admissibility of Prior Bad Acts.

Balberdi-Lopez argues that she was denied a fair trial when the circuit court allowed the jury to hear evidence of the Kmart theft and her conviction for that theft, and evidence of her alleged involvement in the jewelry store burglary. We agree.

Our analysis is first directed by HRE Rule 404(b), which governs admission of evidence of "other crimes, wrongs, or acts[.]" In pertinent part:

> 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.

Id. Accordingly,

> to assess the validity of Defendant's claim, we must first determine, *de novo*, whether the identified bad acts were relevant. If we conclude that the evidence was relevant, we must then decide whether the circuit court abused its discretion in determining that the evidence was more probative than prejudicial. *State v. Maelega*, 80 Hawai'i [172,] 183, 907 P.2d [758,] 769 (1995).

State v. Torres, 85 Hawai'i 417, 422, 945 P.2d 849, 854 (App. 1997). The latter inquiry involves HRE Rule 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The supreme court has explained the factors pertinent to the latter inquiry:

> "[i]n deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters must be considered, 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."

State v. Castro, 69 Haw. 633, 644, 756 P.2d 1033, 1041 (1988) (quoting E.W. Cleary, McCormick on Evidence § 190 (3d ed. 1984) (footnote omitted)) (internal block quote format omitted; brackets in the original).

Here, the court ruled that the prior bad acts were admissible evidence because they were relevant to proof of Balberdi-Lopez's knowledge and intent, and to proof of the existence of a conspiracy in which Balberdi-Lopez and Ramirez conspired to maintain their drug habits and lifestyle through thievery. The court also held that the probative value of the evidence outweighed its prejudicial impact.

The other crimes at issue in this case consisted of Balberdi-Lopez's participation in, and subsequent conviction of, the Kmart theft; and her alleged involvement in the jewelry store burglary, that was evidenced solely by the stolen rings recovered from Mycis's bedroom.

However, neither of these acts was significantly probative of whether Balberdi-Lopez knew Ramirez intended to rob the Pit Stop, or whether she intended to aid and abet him in that particular instance. Moreover, it is less than arguable that the prior bad acts were relevant on the ground that they showed a conspiracy encompassing the two previous crimes and the Pit Stop robbery.

Because Balberdi-Lopez was tried as an accomplice in the robbery and in the use of the gun in the commission of that

robbery, the question whether she intended to aid and abet Ramirez was certainly a fact of consequence. HRS § 702-222(1)(b) (1993) ("A person is an accomplice of another person in the commission of an offense if: (1) With the intention of promoting or facilitating the commission of the offense, the person: . . . (b) Aids or agrees or attempts to aid the other person in planning or committing it[.]"). Moreover, Ramirez's testimony claiming that Balberdi-Lopez had no idea that he intended to rob the Pit Stop placed her knowledge of his criminal intent squarely at issue.

In admitting evidence of the previous crimes, the court reasoned that the State should be able to use the evidence to show that Balberdi-Lopez and Ramirez were co-conspirators in the alleged jewelry store burglary and in the Kmart theft, thereby proving by inference the former's knowledge and intent in the Pit Stop robbery. Therein lies the court's error. Insofar as a conspiracy contemplates the existence of a criminal enterprise, the State offered no plausible evidence or argument demonstrating that the three crimes were commonly connected in any way to an overall plan. Absent such a connection, the State was left with what were three discrete crimes, and the only significant probative value of the previous two was to show Balberdi-Lopez's propensity to steal, "the very inference [HRE] Rule 404 was meant to prohibit." State v. Pemberton, 71 Haw. 466, 473, 796 P.2d 80, 83 (1990) (concluding that the admission of the defendant's prior

bad act "was not relevant for any purpose permissible under [HRE Rule] 404(b) and could only prejudice Defendant by showing Defendant's propensity towards provoking fights with a knife"). Id.

However, assuming *arguendo* that evidence of the previous crimes had incremental relevance for purposes other than to show propensity, HRE Rule 403 poses an insurmountable hurdle for the State, because

> the introduction of such evidence can hardly be justified on the basis of need or the inefficacy of alternative proof. For there was much more from which an inference of intentional conduct could be drawn in the evidence of the offense for which the defendant was being tried.

Castro, 69 Haw. at 644, 756 P.2d at 1042. The State, in fact, summed up the evidence adduced in its case-in-chief during the hearing on the admissibility of the prior bad acts, thus:

> [Ramirez] had to put clothes on, put her clothes on. He had to get his -- her floral bag and put stuff in there, and presumably get it into the car somehow, get her to drive the car, get her to drive the car to Paia, drive up the street, down the street, stop the car, get out, wait for some -- for the place to be clear, go in, do the deed, come out, get in the car, drive up the hill, engage in a high speed chase, throw away evidence, and then finally tell a lie to the police.

Hence, notwithstanding the State's strenuous argument that Ramirez's testimony gave rise to a great need for the other crimes evidence in order to show Balberdi-Lopez's knowledge and intent, and the circuit court's apparent acceptance of that argument, the argument is belied by the record.

Worse, the strength of the evidence connecting Balberdi-Lopez to the jewelry store burglary was tenuous at best. The stolen rings were found in Mycis's bedroom. That Balberdi-Lopez used the room for storage on occasion does not necessarily link her, directly or inferentially, to the rings, let alone the burglary, without more. In addition, aside from the act of theft, the similarities between the burglary and the robbery are few and far between: there is no indication whatsoever that Balberdi-Lopez schemed with Ramirez, or assisted, in the burglary of the jewelry store, and there is also no indication that a gun was involved.

Of course, her conviction for the Kmart theft leaves no doubt about Balberdi-Lopez's participation, with Ramirez, in that crime. However, her participation with Ramirez in the Kmart theft has a mere incremental relevance to this case that is virtually indistinguishable from propensity.

We conclude that the prejudice engendered by admission of evidence of the previous crimes clearly substantially outweighed its probative value, HRE Rule 403, and that the circuit court abused its discretion in admitting it.

C. Harmless Error.

Balberdi-Lopez contends that vacatur of her convictions is warranted because of the erroneous admission of the other crimes evidence. Inasmuch as we conclude, supra, that the

circuit court erred in admitting the evidence, we must determine whether admission of the evidence was harmless beyond a reasonable doubt. If it was not, we must vacate the convictions.

> [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. Heard, 64 Haw. 193, 194, 638 P.2d 307, 308 (1981) (citations omitted). "If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside." Pulse, 83 Hawai'i at 248, 925 P.2d at 816 (citations and internal block quote format omitted).

Upon review of the entire record, we are not convinced that the error in this case was harmless beyond a reasonable doubt. The circuit court's error allowed the State to wield the "evidential harpoon" of "irrelevant references to prior arrests, convictions, or imprisonment[.]"[5] State v. Kahinu, 53 Haw. 536, 549, 498 P.2d 635, 643 (1972) (citations omitted). And wield it the State did. The State not only cross-examined Balberdi-Lopez about the other crimes, but it called as rebuttal witnesses the

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[5/] The adverse ruling forced Balberdi-Lopez to take the unusual step of acknowledging, during direct examination, that Ramirez had given Mycis the rings, and that she was convicted for her role in the Kmart theft, in order to blunt the effect of the "evidential harpoon."

Kmart loss control manager, the police officer who seized the rings from Mycis's bedroom, and the police detective investigating the jewelry store burglary. The witnesses were called for the sole purpose of testifying about the Kmart theft and the jewelry store burglary. Further, the other crimes evidence figured largely in the State's closing argument.

It hardly taxes the imagination to envision the jurors retiring to deliberate, with the notion sunk deep in their minds, that "if she did it before, she did it again." Hence, there was more than a reasonable possibility that the erroneously admitted evidence allowed the jury to consider the impermissible -- Balberdi-Lopez's propensity to act in conformance with her bad character, thereby contributing to her convictions. Accordingly, we cannot say that the admission of the evidence was harmless beyond a reasonable doubt, and we must therefore vacate Balberdi-Lopez's convictions and sentences in the first three counts of the indictment and remand for a new trial thereon.

D. Other Matters.

We address several of the other points on appeal in order to provide guidance to the circuit court and the parties on remand.

The circuit court's jury instructions on the material elements of HRS § 134-6(a) (carrying or use of a firearm in the commission of a separate felony) were not erroneous. The

alternative possessory offense was modified by a generally applicable knowing state of mind which, while not in strict compliance with State v. Jenkins, 93 Hawai‘i 87, 110 & 111-12, 997 P.2d 13, 37 & 38-39 (2000), was nevertheless not prejudicial to Balberdi-Lopez. Id. (the act of possession or carrying requires, at the very least, a knowing state of mind).

By the same token, the State concedes, Amended Answering Brief at 32, and we agree, that the court's jury instructions on the material elements of HRS § 134-7(b) (prohibited possession of a firearm by a convicted felon) were erroneous, and therefore reversible error, because they modified the act of possession with a reckless state of mind, something only permissible with respect to the attendant circumstance of the nature of the object. Jenkins, 93 Hawai‘i at 110 & 111-12, 997 P.2d at 37 & 38-39.

Finally, the court was not required to *sua sponte* dismiss the robbery in the first degree charge. It was not an included offense of the charge of carrying or use of a firearm in the commission of a separate felony. Balberdi-Lopez relies on State v. Vanstory, 91 Hawai‘i 33, 48-49, 979 P.2d 1059, 1074-75 (1999), for the proposition that "when Robbery in the First Degree is the separate felony alleged in a Carrying or Use of Firearm in the Commission of a Separate Felony charge, upon conviction, the Robbery in the First Degree charge must be

dismissed." However, the State correctly points out that Vanstory has been effectively overruled by 1999 Haw. Sess. L. Act 12, that amended HRS § 134-6(e) to read, in relevant part, as follows:

> **Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty**. . . .
>
> . . . .
>
> (e) A conviction and sentence under subsection (a) or (b) shall be in addition to and not in lieu of any conviction and sentence for the separate felony; provided that the sentence imposed under subsection (a) or (b) may run concurrently or consecutively with the sentence for the separate felony.

The crimes charged in this case occurred on July 17, 1999. Act 12 took effect on April 13, 1999, and is therefore controlling. Thus, Balberdi-Lopez was properly convicted of and sentenced for both offenses.

V. Conclusion.

For the forgoing reasons, we affirm in part and vacate in part the January 24, 2000 judgment. We affirm the convictions and sentences under Counts Four, Six, Eight and Nine of the indictment. We vacate the convictions and sentences under Counts

One through Three of the indictment and remand those counts for a new trial, consistent with this opinion.

DATED: Honolulu, Hawaii, August 10, 2001

On the briefs:

Keith S. Shigetomi, for defendant-appellant.

Chief Judge

Simone C. Polak, Deputy Prosecuting Attorney, for plaintiff-appellee.

Associate Judge

Associate Judge