

DISSENTING OPINION BY NAKAMURA, C.J.

I respectfully dissent. In my view, the Circuit Court of the First Circuit (Circuit Court) abused its discretion in concluding that manifest necessity existed for a mistrial. Accordingly, I would hold that the retrial of Defendant-Appellant Royce C. Gouveia (Gouveia) is barred by the protection against double jeopardy.

I.

The Circuit Court received two communications from the jury after the jury had completed its deliberations. The first communication informed the Circuit Court that the jury had reached a verdict. The second communication, signed four minutes later, stated: "Concern. This morning on prosecutor's side of crtroom [sic] there was a man, shaved head, glaring and whistling at defendant. We have concern for our safety as jurors."

It is clear that the jurors knew what their verdict was when they submitted the second communication expressing concern for their safety as jurors. This is confirmed by the time on the second communication, which is four minutes after the time on the communication announcing that the jurors had reached a verdict. It is further confirmed by the jurors' testimony, in which they acknowledged that the decision to send the second communication expressing concern for their safety came after the verdict was reached.

The second communication revealed that the jurors' safety concerns stemmed from a man displaying a hostile attitude toward Gouveia. It referred to the man as being on the "prosecutor's side" of the courtroom and "glaring and whistling" at Gouveia. The jurors' view that the man was hostile to Gouveia was confirmed by the jurors' testimony, which described the incident as involving a man displaying an angry and hostile attitude toward Gouveia.

II.

The jurors' expression of concern for their safety based on a man displaying a hostile attitude toward Gouveia raised the possibility of prejudice to Gouveia. The jury might have been influenced to find Gouveia guilty to avoid possible retaliation by a man hostile to Gouveia. The sequence of the communications, however, strongly indicated that the incident had not adversely affected Gouveia. The jury's decision to submit the second communication came after the verdict had been reached, which showed that their safety concerns persisted after they had reached a verdict. The jurors' expression of post-verdict concern for their safety would logically mean that they had acquitted Gouveia -- why else would the jurors have concern for their safety as the result of a man who was hostile to Gouveia?

In any event, after the questioning of the jurors was completed, Gouveia informed the Circuit Court that he did not want a mistrial and that he wanted the Circuit Court to take the verdict. Accordingly, Gouveia waived any prejudice resulting from the incident and any claim of error arising from the failure to declare a mistrial.

III.

The incident also raised the possibility of prejudice to the prosecution. As the prosecutor argued, the jury associated the man in the gallery with the prosecution and decedent's side and could have viewed the man's aggressive behavior as supporting Gouveia's self-defense claim that the decedent had been the first aggressor. However, the Circuit Court's findings and statements on the record show that it did not base its decision on possible prejudice to the prosecution. The Circuit Court's decision to declare a mistrial was based on its finding that "the concern for personal safety as expressed by the jurors had an impact on the jurors' decisions based on the totality of the circumstances present[,]" and not on any

prejudice to the prosecution's efforts to negate Gouveia's claim of self-defense.

Indeed, the Circuit Court's statements on the record demonstrate that it did not render its decision based on possible prejudice to the prosecution, but rather viewed the jurors' expression of concern for their safety due to the incident as requiring a mistrial *per se*. When the prosecutor initially attempted to argue that the incident may have prejudiced the prosecution with respect to Gouveia's self-defense claim, the Circuit Court made clear that it was not relying on this argument:

THE COURT: Yeah. Okay. All right. So how does that [(the incident)] taint the verdict, Ms. [prosecutor]? Spell it out for me. Let's make a complete record.

[PROSECUTOR]: Well, your honor, in this case it's an issue of self defense and first aggressor and there were testimony that the --

THE COURT: Doesn't matter, I mean, does it even matter what the facts or what's in dispute? Isn't it -- don't you think it's per se an inappropriate extraneous circumstance that if the jurors have concerns for personal safety based on something they observed in the courtroom being done by somebody in the gallery, that if it entered their discussions and had an impact on any of them, that it would taint the verdict?

[PROSECUTOR]: Yes, your honor. I'm sorry, I thought the court was asking how it would play in with the facts. But, yes, that is correct, your honor.

(Emphasis added.)

#### IV.

The record shows that the Circuit Court's finding of manifest necessity was not based on its determination of possible prejudice from the incident to the prosecution. Instead, the record shows that the Circuit Court assumed that the jurors' expression of concern for their personal safety due to the incident necessarily established, on a *per se* basis, manifest necessity for a mistrial and that the verdict was tainted.

In my view, this assumption was incorrect. The jurors' expression of concern for their personal safety due to the incident did not automatically or necessarily mean that the

jurors would be incapable of rendering a fair and impartial decision. See State v. Napulou, 85 Hawai'i 49, 56, 936 P.2d 1297, 1304 (App. 1997) (upholding the trial court's denial of a motion for mistrial that was made after jurors expressed concern for their safety). It would appear that jurors' concern for their safety due to an external incident is an issue that frequently arises in criminal trials, and yet a mistrial is not the mandated remedy in every case. See United States v. Allen, 736 F.Supp. 914, 922 (N.D. Ill. 1990) (noting that few criminal trials could be successfully completed if the potential for an implicitly threatening atmosphere or a single threat created an irrebuttable presumption that the jury was prejudiced).

I believe the Circuit Court's finding of manifest necessity was based on its erroneous view that such finding was *per se* required as the result of the jurors' expression of concern for their safety. I also believe that the circumstances surrounding the incident and the jurors' expression of concern for their safety did not prevent the jury from being able to reach "a fair result based upon the evidence" and did not demonstrate manifest necessity for a mistrial. State v. Wilmer, 97 Hawai'i 238, 244, 35 P.3d 755, 761 (2001) (internal quotation marks and citation omitted).<sup>1</sup>

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<sup>1</sup>As the majority indicates, it appears that under Hawai'i Rules of Evidence (HRE) Rule 606(b) (1993), the Circuit Court should not have permitted the jurors to be questioned, and should not have considered their testimony, about whether the incident affected their decision. With respect to inquiry into the validity of a verdict, the Hawai'i Supreme Court has construed HRE Rule 606(b) to mean that "the court 'cannot consider the jurors' testimony as to the effect of the [outside influence] upon them.' The court 'can only consider whether such [outside influence was present], and whether, given that [outside influence], . . . [the defendant] had a trial before an impartial jury.'" State v. Kim, 103 Hawai'i 285, 291, 81 P.3d 1200, 1206 (2003) (citations omitted).

However, as the majority notes, Gouveia has waived any claim of error based on HRE Rule 606(b). Moreover, the record indicates that the Circuit Court would have reached the same decision under the limitations imposed by HRE Rule 606(b). Therefore, I do not consider HRE Rule 606(b) in my analysis of whether the Circuit Court abused its discretion in concluding that manifest necessity existed for a mistrial.

In my view, the Circuit Court abused its discretion and erred in finding manifest necessity, granting the mistrial, and denying Gouveia's motion to bar continued prosecution on double jeopardy grounds. I would hold that Gouveia's retrial is barred by the protection against double jeopardy.