

DISSENTING OPINION BY NAKAMURA, C.J.

I respectfully dissent. The majority refers to the rule that "[p]rosecutors . . . must refrain from expressing their personal views as to the credibility of witnesses." I do not regard the prosecutor's argument that the police officers would not jeopardize their careers by lying as an expression of the prosecutor's personal view of the officers' credibility. The prosecutor did not suggest that she had a close relationship with the officers or an intimate or specialized knowledge of their character.

Any impropriety in the prosecutor's argument would stem from the lack of evidence admitted at trial to support it. In my view, assuming that the prosecutor's argument constituted error,<sup>1</sup> it was harmless beyond a reasonable doubt and did not contribute to the conviction of Defendant-Appellant Lyle Shawn Benson (Benson). See State v. Maluia, 107 Hawai'i 20, 24, 108 P.3d 974, 978 (2005) (stating that "[a]llegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard").

I.

The jury represents the wisdom of the community. We should not presume that the jury is unsophisticated or gullible, that it will ignore the court's instructions, or that it is unable to distinguish a good argument from a bad one. Nor should we presume that the jury will be unduly influenced by arguments made by a prosecutor that are unsupported by the evidence.

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<sup>1</sup> I do not endorse the prosecutor's argument. Some courts, however, have held that similar remarks made by a prosecutor in closing argument were not improper. See People v. Michigan, 678 N.W.2d 631, 636 (Mich. Ct. App. 2004) (concluding that prosecutor's argument that "lying on the stand would cost the officer his career and position with the Executive Protection Unit" was not improper); Williams v. Trombley, No. 07-CV-12318, 2009 WL 1689477, at \*11-12 (E.D. Mich. June 16, 2009) (concluding that prosecutor's argument-- "Where is there any evidence to suggest that a Sergeant with the Detroit Police Department would jeopardize her career for someone that she doesn't even know? . . . For what benefit was it for Sergeant ElHage to lie, to come to court and lie on [the defendant]??" --was not improper).

From observing the trial proceedings, the jury understands that the trial is an adversarial proceeding and that the prosecutor is not a neutral actor in the trial. It is apparent that jurors do not uncritically accept or believe as true everything that a prosecutor says in closing argument. Otherwise, there would be virtually no acquittals since it is indeed a rare case in which the prosecutor does not stand up in closing argument and say that the evidence has established the defendant's guilt beyond a reasonable doubt.

The jurors in this case were instructed that they were the ones responsible for determining the credibility of the witnesses. The jurors were instructed: "It is your exclusive right to determine whether and to what extent a witness should be believed and to give weight to his or her testimony accordingly." (Emphasis added.) The jurors were also instructed that "[s]tatements or remarks of counsel are not evidence" and that they were "not bound by [the attorneys'] recollections and interpretations of the evidence" in closing argument.

The prosecutor's argument that the officers would not jeopardize their careers by lying was a brief comment made during the twenty-five minutes she was allotted for closing argument. It was made after the jury had listened to three days of testimony and extensive cross-examination of the officers by the defense. It was a generic, superficial argument, unsupported by any evidence presented at trial.

The prosecution presented ample evidence of Benson's guilt, including Benson's profanity-laced 911 call, which reflected his hostile demeanor; Benson's admission and other evidence that he had been drinking; and the testimony of four police officers that Benson punched Officer Michael Hale in the face. The trial court's instructions that it is the jurors' exclusive right to determine the credibility of witnesses and that the remarks of counsel are not evidence served to diminish any prejudice flowing from the prosecutor's argument. See State v. Haanio, 94 Hawai'i 405, 415, 16 P.3d 246, 256 (2001) (stating

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that "jurors are presumed to follow the court's instructions") . In my view, under these circumstances, the prosecutor's alleged misconduct in closing argument was harmless beyond a reasonable doubt and does not warrant overturning Benson's conviction. See State v. Valdivia, 95 Hawai'i 465, 483-84, 24 P.3d 661, 679-80 (2001) (concluding that prosecutor's improper remarks during closing argument were harmless beyond a reasonable doubt); Maluia, 107 Hawai'i 20, 27, 108 P.3d 974, 981 (2005) (concluding that prosecutor's improper questioning of defendant during trial was harmless beyond a reasonable doubt).