IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Petitioner/Plaintiff-Appellee

vs.

TIMOTHY A. WALSH, Respondent/Defendant-Appellant

NO. 29790

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CR. NO. 08-1-0418(3))

AUGUST 23, 2011

RECKTENWALD, C.J., JOINED BY
NAKAYAMA, J., CONCURRING IN THE RESULT

I concur in the result. I agree with the majority that the prosecutor's statement that respondent/defendant-appellant Timothy Walsh "benefitted from seeing all [the] witnesses" was an improper generic accusation of tailoring, and that Walsh's conviction must accordingly be vacated. However, I respectfully disagree with the majority's conclusion that the prosecutor's additional comments regarding Walsh's presence during voir dire also were improper. Finally, I believe that an "unfavorable inference" instruction relating to the defendant's presence at trial should be given only when the defense requests it, rather than in all cases in which the defendant testifies.

The State charged Walsh with Assault in the Second Degree, in violation of HRS § 707-711(1)(b). The charge was based on Walsh's involvement in a physical altercation with several men outside of a night club, where he punched and severely injured Kapena Kramer (Kapena). At trial, Walsh admitted punching Kapena, but argued he did so in self-defense. During closing argument, the prosecutor, after discussing the credibility and trial demeanor of Walsh's sister Stephanie, went on to say:

> Some of you during voir dire and jury selection were asked about what you would look at, and the defense went into great detail. Remember one thing that was asked by me to [Walsh]? You know, [Walsh], first of all, is entitled, since he's on trial here, is entitled to hear and see all the witnesses. But with that becomes [sic] the facts [sic] that he's benefitted from seeing all these witnesses. Before he got up on that stand, he saw each and every one of the witnesses, heard what they were going to say.
>
> What's important about that is not only that, he heard the voir-diring your questions, which some of you had mentioned, I believe you said, well, you know, if they looked me in the eye. Okay, so he gets up here and looks each one of you in the eye. See how sincere I am? Does that mean you're sincere? Well, what about, you know, Kepa got up there, and he was nervous. Remember Iokepa and Kapena, they had never been in trouble before and never testified before. They get up here. They were nervous. Yeah, think about it. You have to come up here for the first time in this kind of atmosphere, you're going to be nervous.
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> . . . .
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> But the fact of the matter is it is important that when the Court has read you those instructions about, I believe it's Instruction Number 7, about the credibility of witnesses, yes, you take into consideration all those items such as their appearance and demeanor, their manner of testifying, the intelligence, candor and frankness, the lack thereof, the interest in bias and motives for testifying, the opportunity for acquiring information, the probability or improbability of the witness' testimony, the extent to which a witness is supported or contradicted by other evidence and supported the extent to which a witness gave contradictory statements and whether at

> trial or at other times and all other circumstances surrounding it.
>
> But don't get fooled into a position where because somebody can look you in the eye, they must be telling the truth. If you know how to look somebody in the eye, you still can lie. If we look at the independent witnesses John Cooprider, what axe did he have to grind? What does he tell you? It corroborates everybody's testimony, even corroborates even [Walsh's] own testimony. What does John say? He's sitting there. He watches [Walsh], not, oh, crawling on the ground getting up. I'm sorry if you think, well, why is she making light of that. Because this evidence doesn't support it. Because that's a story. That's exactly what it is. It's [Walsh's] story, because he wants to try to make you believe he was out of his mind and doesn't know what he was doing and he just blindly reached out.

The defense did not object, and did not respond directly to the remarks during its own closing. The prosecutor did not mention Walsh's presence at trial during the rebuttal closing.

I agree with the majority that the reference to Walsh having "benefitted from seeing all these witnesses" was an improper generic tailoring accusation, State v. Mattson, 122 Hawaiʻi 312, 226 P.3d 482 (2010), and that the error was not harmless. Accordingly, Walsh's conviction must be vacated and the case remanded for a new trial.

Because that issue is dispositive, the court need not reach the prosecutor's comments regarding voir dire. In any event, the remarks did not constitute an improper generic tailoring argument under Mattson, and were not otherwise improper. Thus, I respectfully disagree with the majority's analysis of that issue.

The comments were made in the context of a larger

argument regarding the credibility of the witnesses, and in particular, their demeanor while testifying. The prosecutor noted that some of the jurors stated during voir dire that they would consider whether a witness looked them in the eye in determining whether that witness was credible.[1] The prosecutor further argued that Walsh looked at the jurors during his testimony, and then sought to dispel the notion that the jurors should accordingly find Walsh's testimony credible, by (1) suggesting that Walsh may have testified in that manner in order to appear sincere, and (2) comparing Walsh's demeanor on the stand to that of the State's witnesses. In particular, the

[1] The record does not contain the transcript of the voir dire. The majority suggests that because there was no transcript, there is "no verification of what was said by potential jurors with respect to eye contact," and the prosecutor therefore impermissibly commented on matters outside the record. Majority Opinion at 39-40. Respectfully, the absence of the transcripts cannot support that conclusion, since the responsibility of providing the voir dire transcripts rested with Walsh, the appellant. Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 10(b)(1)(A) ("When an appellant desires to raise any point on appeal that requires consideration of the oral proceedings before the court or agency appealed from, the appellant shall file with the appellate clerk . . . a request or requests to prepare a reporter's transcript of such parts of the proceedings as the appellant deems necessary that are not already on file."); Ek v. Boggs, 102 Hawaiʻi 289, 292 n.3, 75 P.3d 1180, 1183 n.3 (2003) ("Inasmuch as Ek has failed to include transcripts of the February 3, 1999 evidentiary hearing regarding the prefiling order, we will not address any contention regarding the lack of evidence supporting the order.") (citing HRAP 10(b)(1)(A)). Walsh did not provide the requisite transcripts for the appellate record. In any event, in his appellate briefing, Walsh did not dispute the State's characterization of the statements made during the voir dire proceedings.

The majority concludes that Walsh was not responsible for providing the transcripts of the voir dire because Walsh contended at the ICA that they were not "necessary" to him on appeal. Majority Opinion at 39-40 n.32 (quoting HRAP Rule 10(b)(1)(A)). However, to the extent Walsh deemed the transcripts unnecessary, it was because, as he acknowledged in his reply brief to the ICA, he did not dispute the DPA's description of the voir dire: "Walsh is not contesting 'the factual basis for the prosecutor's comments' that some jurors said they would look at whether a witness looked them in the eye in judging his or her credibility." Thus, the majority's position that "there is no verification of what was said by potential jurors[,]" Majority Opinion at 39-40, is contrary to Walsh's own position.

prosecutor contrasted Walsh's demeanor with those of prosecution witnesses Kapena and his brother Iokepa Kramer, whom she characterized as understandably nervous.

This portion of the prosecutor's closing was proper and did not constitute the type of generic tailoring accusation that was prohibited by Mattson. Rather than undercutting the jury's truth-seeking function, the argument furthered that function by properly focusing the jury's attention on an aspect of the defendant's demeanor (his looking at the jurors as he testified) and providing an explanation that was based on more than his mere presence at trial. For his part, the defendant could rebut that argument during his own closing, by suggesting that his demeanor was in fact sincere, by contrasting it to the demeanor of other witnesses, or otherwise. Respectfully, I believe that the jury's truth-seeking function is furthered, rather than hindered, by this adversarial testing, and that the defendant's right to be present during trial is not unduly burdened as a result.

In reaching that conclusion, three questions must be answered: 1) whether, as a general matter, prosecutors are entitled in closing to discuss the demeanor of a testifying defendant; 2) whether, in closing argument, prosecutors may refer to statements made during voir dire; and 3) whether the comments here nevertheless constituted an improper generic tailoring accusation prohibited by Mattson.

As to the first issue, the starting point is the basic

proposition that jurors may consider a witness's manner and demeanor on the stand in assessing his or her credibility. State v. Apilando, 79 Hawaiʻi 128, 131, 900 P.2d 135, 138 (1995) ("'The right of confrontation affords the accused both the opportunity to challenge the credibility and veracity of the prosecution's witnesses and an occasion for the jury to weigh the demeanor of those witnesses.'") (citation omitted) (emphasis in original); Hawaiʻi Pattern Jury Instructions--Criminal, Instr. 3.09. The jury here was so instructed. Instructions to the Jury at #7, State v. Walsh, Cr. No. 08-1-0418(3) (Hawaiʻi 2d Cir. Jan. 26, 2009) ("In evaluating the weight and credibility of a witness's testimony, you may consider the witness's appearance and demeanor; the witness's manner of testifying . . . .").

Although Hawaiʻi courts have not decided, in a published opinion, whether counsel may comment on a criminal defendant's demeanor while on the stand, other jurisdictions have answered the question in the affirmative. E.g., People v. Edelbacher, 766 P.2d 1, 30 (Cal. 1989) ("Comment on a defendant's demeanor as a witness is clearly proper[.]"); see also Patty v. State, 6 So. 2d 399, 400 (Ala. 1942) (holding that the prosecutor's characterization of the defendant as a "hard man to get along with" and "a man of high temper and bad disposition" was proper comment on the defendant's manner of testifying); State v. Fogg, 119 A. 799, 801 (N.H. 1923) ("The respondent's appearance on the witness stand and manner of testifying were

legitimate matters for the consideration of the jury, bearing on his credibility, and therefore proper subjects of comment."); Commonwealth v. Parente, 440 A.2d 549, 554 (Pa. Super. Ct. 1982) ("[T]he reference of the prosecution to the arrogance of appellant was not reversible error in that this comment referred solely to the demeanor of appellant on the stand."); Good v. State, 723 S.W.2d 734, 736 (Tex. Crim. App. 1986) ("During jury argument, a party may allude to a testifying witness' demeanor if the jury had an equal opportunity to observe the witness.") (emphasis in original).

The majority notes that "there is nothing in the record with respect to [Walsh's] demeanor during his testimony, or any confirmation that [Walsh] looked the jurors 'in the eye' or, if he did, the nature of his gaze." Majority Opinion at 43. However, the defendant's demeanor on the stand is information which both the jury and counsel were able to observe at trial and which the jury can appropriately consider as evidence in its deliberations. As the Court of Criminal Appeals of Texas aptly observed:

> [The defendant's] demeanor during his own testimony was properly in evidence by the mere fact that it was a part of his sworn testimony. We can presume that the jury had an equal opportunity to observe his demeanor. Therefore, [defendant's] testimonial demeanor could be alluded to by the State in final argument on guilt.

Good, 723 S.W.2d at 736-37 (emphasis added).

Likewise, many other jurisdictions characterize non-verbal conduct on the witness stand as "evidence." United States

v. Modica, 663 F.2d 1173, 1180 (2d Cir. 1981) ("A prosecutor is free to comment upon the evidence, including demeanor."), cert. denied, 456 U.S. 989 (1982); Chan v. Yates, No. CV 07-729-DSF (OP), 2010 WL 517906, at *10 (C.D. Cal. Feb. 8, 2010) ("[T]he prosecutor's comments neither mischaracterized nor assumed facts not in evidence, but merely commented on the evidence—in this case the demeanor of the two testifying witnesses—and made permissible inferences from their demeanor.") (emphasis added) (citing Allen v. Woodford, 366 F.3d 823, 841 (9th Cir. 2004), amended and superseded on other grounds by, 395 F.3d 979 (9th Cir. 2005)); Florez v. United States, No. 07-CV-4965 (CPS), 2009 WL 2228121, at *19 (E.D.N.Y. July 24, 2009) ("[The prosecutor's] comment on a witness's demeanor and conduct during his examination is hardly based on extraneous evidence."); United States v. Carroll, 34 M.J. 843, 845 (A.C.M.R. 1992) ("However, a witness' demeanor is evidence. United States v. Felton, 31 M.J. 526, 534 (A.C.M.R. 1990). As such, it is not an improper subject of comment. Here, the trial counsel's remarks reflected an incident during [the appellant's] cross-examination[.]") (emphasis added); State v. Gilberto L., 972 A.2d 205, 219-20 (Conn. 2009) (holding that prosecutorial comment on a complaining witness's demeanor was proper because her "behavior while she was testifying was not only visible to the jurors but was properly before them as evidence of her credibility.") (emphasis added); People v. Nitz, 572 N.E.2d 895, 912 (Ill. 1991)

("[I]t is a fair comment on the evidence to argue that a witness is believable because of her demeanor while testifying and because her testimony was corroborated.") (emphasis added); Watkins v. Commonwealth, No. 2008-SC-000177-MR, 2009 WL 4251785, at *5 (Ky. Nov. 25, 2009) ("Although the prosecutor certainly strayed onto thin ice by [stating that the complaining witness told the jurors the truth], . . . given the emphasis the prosecutor placed on the comment's evidentiary basis, i.e., [the complaining witness's] demeanor on the witness stand, we cannot say that the comment amounted to a palpable error rendering Watkins's trial manifestly unjust.") (emphasis added); People v. Wesson, No. 204305, 1999 WL 33453956, at *2 (Mich. Ct. App. Feb. 23, 1999) ("[T]he prosecutor's comments about the credibility and demeanor of one of its witnesses was permissible argument based on the evidence.") (emphasis added); Dodd v. State, 100 P.3d 1017, 1044 (Okla. Crim. App. 2004) ("[The prosecutor's] comment on the confrontational demeanor of Appellant's former cellmate as a witness, his references to the crime-scene photographs, and his implication of Appellant in the burglary of the victims' apartment, these were all reasonable inferences from the guilt-stage evidence, and were not objected to by the defense.") (emphasis added). Non-verbal conduct on the witness stand, therefore, can properly be the basis of closing argument.

The majority acknowledges that "comment on testimonial demeanor is entirely proper", Majority Opinion at 43 n.36, but

appears to propose that counsel should note testimonial demeanor on the record if counsel plans to use it in a tailoring accusation "which predictably may be raised on appeal[,]" Majority Opinion at 45 n. 38; see also Majority Opinion at 46 n.39 (distinguishing cases which held that comments on testimonial demeanor are proper on the grounds that these cases did not involve arguments linking the defendant's demeanor to his presence during trial). Respectfully, such a rule is unduly restrictive. Trial lawyers will be compelled to ask the court, in the midst of testimony, to note observations of demeanor which may possibly be useful in summation. Moreover, such descriptions are likely to be met with objections and counter-descriptions from opposing counsel. Finally, even disregarding the additional interruptions, some non-verbal cues, such as distinctly uncomfortable appearance, are not susceptible to verbal description.

In the instant case, the prosecutor commented on Walsh maintaining eye contact with the jury during his testimony. Walsh has not objected to this characterization of his demeanor on the stand. Although Walsh's eye contact was not noted by the court in the record, it was testimonial conduct that occurred on the witness stand, and that all of the jurors and counsel had the opportunity to observe. Thus, it was evidence in the case and the prosecutor was entitled to discuss it during summation.

The next inquiry is whether, in commenting on the

defendant's testimonial demeanor, prosecutors may refer to statements made during voir dire. I agree with the majority that statements made in voir dire are not "evidence" in the sense that the State may not rely on such statements in place of providing factual proof during the evidentiary phase of the trial. However, the use in summation of analogies, illustrations, and the jurors' common experience to make the legal and factual concepts at trial understandable to a lay jury can be appropriate even though such matters are not in evidence. U.S. v. Biasucci, 786 F.2d 504, 513 (2d Cir. 1986) (holding that the prosecutor's use of an "iceberg" metaphor was proper where it was used to describe the "structure of the loansharking operation: the 'tip' of the 'iceberg' being the business front, and the submerged segment, concealed from view, representing the rest of the enterprise"); Scott v. Shelton, 295 F. Supp. 2d 1244, 1252-53 (D. Kan. 2003) ("The prosecutor merely suggested that the jury use its common experience to consider what impact (if any) the trauma [resulting from sexual abuse] might have had [on the complaining witness's memory]."); State v. Jones, 4 P.3d 345, 361 (Ariz. 2000) ("The prosecutor, by referring to famous serial killers[, Ted Bundy and John Wayne Gacy], did not introduce evidence completely outside the realm of the trial, but rather drew an analogy between [the defendant's politeness] at trial and that of [the] well-known murderers [to indicate that politeness did not indicate innocence]."); People v. Friend, 211 P.3d 520, 549 (Cal.

2009) ("The prosecutor's use of the golf analogy in his rebuttal was permissible. As we have held, prosecutors are entitled during summation to state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history, or literature.") (footnotes, internal brackets and quotation marks, and citation omitted); State v. Kell, 61 P.3d 1019, 1033, 1033 n.11 (Utah 2002) ("While it is true that a prosecutor is not permitted in a closing argument to allude 'to matters not introduced as evidence at trial,' [the prosecutor's recounting of childhood stories] in this case [was] offered not as new factual matter, but simply as illustrations to make a conceptual point.") (citation omitted).

Such arguments are improper when they go beyond the common experience of the jury and, for example, misstate the law or purport to establish factual matters which are part of the State's burden of proof. See, e.g., People v. Katzenberger, 101 Cal. Rptr. 3d 122, 128 (Ct. App. 2009) (holding that the prosecutor's use of a jigsaw puzzle illustration to explain the concept of reasonable doubt was improper, inter alia, because it likely misled the jury into believing that reasonable doubt is a quantitative inquiry and that the jury may find guilt where the state made a 75% showing); Hamilton v. State, 152 P.2d 291, 294, 295-96 (Okla. Crim. App. 1944) (holding that the prosecutor in a horse theft case could not state in closing that the testimony in that case and in two related cases which were not in the record

indicated that the defendants in the three cases alternately blamed each other for theft); cf. State v. Simmons, --- P.3d ----, 2011 WL 2652335, at *5-7 (Kan. 2011) (holding that the prosecutor improperly told the prospective jurors during jury selection to view the kidnapping and rape case "in light of the Stockholm Syndrome[,]" because 1) there was no evidence regarding the syndrome in general, 2) the jury may have been mislead into believing that the syndrome is a recognized medical term with a settled meaning, and 3) the comment implied that the prosecutor "was an authority on the Stockholm Syndrome and was capable of diagnosing [it]").

Consistent with these general principles, where statements in voir dire reflect the common experience of the jurors, prosecutors are entitled to refer to the statements in summation. Glymph v. U.S., 490 A.2d 1157, 1161 (D.C. 1985) (the prosecutor did not engage in misconduct when she referred in summation to the fact that none of the jurors in voir dire responded in the affirmative to her question whether physical violence should be expected in an intimate relationship); State v. Danback, 886 S.W.2d 204, 209 (Mo. App. 1994) (the prosecutor properly drew on the "common experiences" of the jurors by referring in closing to a number of women having stated during voir dire that they either have been raped or knew someone who was raped and that these instances were not reported); State v. Davis, 880 N.E.2d 31, 50-51, 84-85 (Ohio 2008) (holding that the

prosecutor permissibly referred to a hypothetical which the prosecutor used in voir dire, where the reference in summation was "a means of explaining that the jury should give little weight to [the defendant's disadvantaged] background").[2]

Similarly, the DPA here referred to jurors' statements which reflected their common experience and knowledge. According to the DPA, some jurors indicated that eye contact would be an indicia of credibility. The use of eye contact as a measure of credibility derives from common knowledge and experience. It is something to which all jurors can relate and which cannot be characterized as misleading.[3] Significantly, the DPA was not attempting to use the voir dire to establish a factual point which the State had to prove at trial. Cf. Hamilton, 152 P.2d at

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[2] Georgia courts have held that remarks in closing argument regarding voir dire are generally improper. Sterling v. State, 477 S.E.2d 807, 812 (Ga. 1996) (holding that the prosecutor improperly argued matters outside of the evidence by stating in closing that the defendant's question in voir dire regarding whether venire persons believed that sometimes the guilty must go free was a concession of guilt, but holding that the remark was harmless); Joseph v. State, 498 S.E.2d 808, 811 (Ga. App. 1998) (holding that the prosecutor improperly commented on matters outside of the evidence by arguing that the case was not about race and that defense counsel brought race into the case during voir dire, but holding that the remark was harmless). These cases, however, did not deal with voir dire statements which derived from the jurors' common experience and knowledge.

[3] Although reasonable people may disagree as to whether some propositions derive from common experience, e.g., compare Danback, 886 S.W.2d by referring in closing to a number of women having stated during voir that they either have been raped or knew someone who was raped and that these instances were not reported) with People v. Pitts , 273 Cal. Rptr. 757, 816 (App. 1990) (holding that the prosecutor could not discuss in closing argument some prospective jurors' statements in voir dire about the frequency with which sexual abuse was reported in schools) and United States v. Bettenhausen, 499 F.2d 1223, 1233 (10th Cir. 1974) (in a case charging defendants with making false statements on tax returns, holding that the prosecutor improperly referred in summation to prospective jurors' having indicated during voir dire that their experience with the Internal Revenue Service was not unpleasant), the use of eye contact as a measure of credibility is not such a proposition.

294, 295-96 (holding that the prosecutor in a horse theft case could not state in closing that defendants in two related cases, which were not in the record, indicated that the present defendant engaged in theft). Thus, this is not the type of information which the DPA should have to enter into evidence before using in summation.

Therefore, the majority's position that the DPA's comment regarding what occurred at voir dire was improper cannot be justified by the proposition that statements in voir dire are not evidence. Majority Opinion at 39-43. Respectfully, the decisions cited by the majority are inapplicable in this case because none of them dealt with what counsel are allowed to discuss in closing argument. See, e.g., United States v. Khoury, 901 F.2d 948, 955 (11th Cir. 1990) (holding that defendants were not entitled to have the entire jury panel struck where one juror said that her son had been charged with a crime and murdered in a drug-related incident and began to cry in the presence of the panel but where the trial court struck the juror for cause and instructed the remaining jurors that statements made during voir dire were not evidence and had nothing to do with the case).

Lastly, I consider whether the comment was improper because it was tied to Walsh's presence at trial. This final inquiry is governed by this court's decision in Mattson. In that case, this court struck a balance between the protection of criminal defendants' constitutional rights and the avoidance of

undue burdens on criminal prosecutions. See id. at 326-27, 226 P.3d at 496-97 (placing a "moderate and warranted" restriction on "general" tailoring accusations, while permitting "specific" accusations). Mattson set out a test to identify proper tailoring accusations from improper ones. Id. We noted that accusations which are "based only on a defendant's presence throughout the trial[,]" i.e., generic tailoring accusations, are improper. Id. at 326, 226 P.3d at 496. The prosecuting attorney's tailoring argument in Mattson was not generic, since the prosecutor referred to several pieces of information which supported the tailoring accusation. See id. at 327, 226 P.3d at 497. Namely, the prosecutor relied on Mattson's pre-trial statement which was inconsistent with his testimony at trial, as well as a 911 tape and the statements by two witnesses which also contradicted Mattson's testimony. Id. We held that the prosecutor's reference to this evidence "in addition to referring to Mattson's presence at trial" meant that the accusation was not "based solely on his presence at trial" and, therefore, was not improper.[4] Id. (emphasis in original).

[4] Although in Mattson we relied on the fact that the prosecutor pointed to other "evidence" of tailoring in the closing, we did not decide the question presented here, i.e., whether a prosecutor may use the jurors' common experience in support of a tailoring accusation. Mattson, 122 Hawaiʻi at 327, 226 P.3d at 497. Moreover, we did not state that only evidence which is noted in the record can be used to make a proper tailoring argument. Id. The prohibition was against accusations which relied "solely" on presence at trial. Id. at 326, 226 P.3d at 496. As discussed supra, non-verbal demeanor on the witness stand constitutes evidence. Moreover, prohibiting references to non-verbal testimonial communications would not advance the purpose of the prohibition against generic tailoring accusations. See id. ("[G]eneric accusations of tailoring do not aid the jury in any way in determining whether a defendant has tailored his testimony or simply related a true version of the (continued...)

Thus, on the one hand, we prohibited prosecutors from accusing criminal defendants of tailoring without reference to any facts supporting such an accusation. Id. at 326, 226 P.3d at 496. On the other hand, we clarified that, where the prosecutor supports a tailoring accusation with facts other than mere presence at trial, such an accusation will not be held improper. Id. at 327, 226 P.3d at 497. In the instant case, the voir dire remark is similar to the argument that we permitted in Mattson. As in Mattson, the prosecutor's argument here was not a bare accusation buttressed only by the fact that Walsh observed the voir dire. The argument was not of the form "He was here, therefore he tailored" which we prohibited in Mattson.

Rather, the prosecutor relied on two facts wholly separate from Walsh's mere presence: 1) that some jurors mentioned during the voir dire that eye contact would be an indicia of trustworthiness; and 2) that Walsh maintained eye contact during his testimony. Specifically, the DPA stated: "[S]ome of you had mentioned, I believe you said, well, you know, if they looked me in the eye. Okay, so he gets up here and looks each one of you in the eye." The jurors were present during Walsh's testimony, and could therefore assess whether the prosecutor's characterization matched their own recollection. They could also determine whether Walsh's demeanor on the stand -- including any efforts on his part to make eye contact with

[4](...continued)
events.") (emphasis in original).

them -- was indicative of sincerity or pandering. In short, a reasonable juror could find this information useful in assessing Walsh's credibility.

Respectfully, precluding the prosecutor from making that argument does not advance the purpose of the prohibition against generic tailoring accusations. See id. at 326, 226 P.3d at 496 ("[G]eneric accusations of tailoring do not aid the jury in any way in determining whether a defendant has tailored his testimony or simply related a true version of the events.") (emphasis in original). Indeed, the Majority Opinion undercuts the basic principle of Mattson by preventing prosecutors from aiding the jury in its "truth-seeking" function. Id. at 326, 226 P.3d at 496. Whereas "every defendant who testifies is 'equally susceptible'" to "a comment that is related only to the defendant's presence in the courtroom and not to his actual testimony[,]" the voir dire remark in the instant case instead referred to Walsh's actual testimony. See id. at 325, 226 P.3d at 495 (emphasis in original). As discussed supra, the remark could have aided a reasonable juror in assessing Walsh's credibility by providing an explanation for Walsh's demeanor on the stand. In sum, the accusation at issue here is not improper under Mattson because the prosecutor supported it by reference to matters other than Walsh's mere presence which the jury observed and was entitled to consider.

Moreover, this is not a case where the defendant had no

opportunity to respond to the tailoring accusation. In Mattson, we expressed concern about allowing generic accusations "at a time when the defendant cannot respond" to them. Id. at 326, 226 P.3d at 496. In the instant case, since the voir dire remark came during the prosecutor's initial closing, defense counsel could have rebutted the argument in her own closing by disputing the prosecutor's characterization or by pointing, for instance, to aspects of Walsh's demeanor on the stand which supported trustworthiness, his testimony admitting unfavorable facts, or corroboration of his testimony by other evidence. Indeed, as the majority acknowledges, Majority Opinion at 12, defense counsel did respond in her closing, arguing that Walsh was "upfront" about "having been drinking" and urging the jury not to "speculat[e]" or reach a verdict by "looking at [Walsh] and thinking . . . [that] the Kramer brothers looked a lot nicer[.]"

Finally, I believe that requiring the "unfavorable inference" instruction to be given in all cases where the defendant testifies, Majority Opinion at 49-50, may be counterproductive. Assuming the prosecutor avoids tailoring arguments, the instruction would needlessly emphasize to the jury that the defendant's presence at trial creates a tactical advantage. Accordingly, such an instruction should be given only if the defense requests it.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama