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SCWC-11-0000705

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Respondent/Plaintiff-Appellee,

vs.

BARABBAS DIETRICH, Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000705; CR. NO. 10-1-2075)

DISSENT BY ACOBA, J., WITH WHOM POLLACK, J., JOINS

I respectfully dissent to the rejection of the certiorari application. It is well established that the burden is on Respondent/Plaintiff-Appellee the State of Hawai‘i (the State or the prosecution) to disprove beyond a reasonable doubt any non-affirmative defense raised by Petitioner/Defendant-Appellant Barabbas Dietrich (Dietrich). State v. Gabrillo, 10 Haw. App. 448, 456, 877 P.2d 891, 895 (1994). Here, in a prosecution for robbery, Dietrich raised the defense that no robbery took place, and that the complaining witness, Joel Pedro (Pedro), voluntarily gave him the money.

In closing argument, the prosecutor suggested that Dietrich did not call two other witnesses because their testimony

would have been harmful to Dietrich. By telling the jury, in effect, that Dietrich needed to call the two witnesses to establish his defense, the prosecution improperly shifted the burden to Dietrich of proving he was not guilty rather than proving Dietrich was guilty beyond a reasonable doubt. State v. Mainaupo, 117 Hawai'i 235, 259, 178 P.3d 1, 25 (2008) (Acoba, J., concurring and dissenting).

Further, there was no evidence demonstrating that the testimony of either witness would have been adverse to Dietrich. Had the prosecution believed that the testimony of either witness would have been favorable to its position, as the prosecution intimated, it could have sought to locate those witnesses and called them to testify. Instead the prosecutor argued, without a basis evident in the record, that those witnesses could have been called by Dietrich. Because these assertions were raised in closing argument, Dietrich was unable to respond with any evidence.

Finally, the prosecutor's statement infringed on Dietrich's constitutionally guaranteed right to testify in his own defense. By using Dietrich's testimony to impose a burden on Dietrich to prove his defense, the prosecutor would have compelled Dietrich to choose between foregoing his right to testify in his own defense or having the jury incorrectly believe that he had a burden to call further witnesses to prove his innocence.

In sum, the prosecutor's closing argument appears to have shifted the burden of proof to Dietrich to produce additional witnesses and undermined Dietrich's credibility without any evidence in the record for doing so, based on the prosecutor's speculation about what the witnesses might have testified to. Thus, Dietrich was denied a fair trial. This error would not be harmless. First, the case turned on the jury's evaluation of the credibility of Dietrich and Pedro. The prosecutor's assertions regarding the testimony of other witnesses would have undermined Dietrich's credibility. Thus, there is a reasonable possibility that the prosecutor's speculation as to the testimony of the absent witnesses could have contributed to Dietrich's conviction. See State v. Walsh, 125 Hawai'i 271, 290, 260 P.3d 350, 369 (2011) (emphasis in original) (internal quotation marks omitted).

Second, there is a reasonable probability that the jury would have interpreted the prosecutor's closing argument to mean that the jurors should not have acquitted Dietrich unless he presented further evidence. Mainaupo, 117 Hawai'i at 261, 178 P.3d at 27 (Acoba, J., concurring and dissenting). Such a belief also may have contributed to Dietrich's conviction. Id. Because the ICA affirmed Dietrich's conviction under these circumstances, I would accept certiorari to subject the case to a second review.

I.

A.

At trial, Pedro testified that after finishing work, he

went to "Anna Miller's" restaurant at around 11:30 p.m. Before he entered the restaurant, he paused to smoke a cigarette while standing next to the passenger side of his car. While smoking the cigarette, Dietrich's car parked in the stall next to Pedro. Dietrich exited his car, approached Pedro, and asked him for a cigarette. According to Pedro, Dietrich then asked him if he had twenty dollars. When Dietrich asked about the money, he "was standing right in front of [Pedro]" and "looked mad." Pedro responded that he did not have any money, and Dietrich then told Pedro "Oh, you like me lick you right now?" Dietrich asked Pedro to see his pockets, and when Pedro showed him that there wasn't anything in his pocket, he asked to see his wallet as well.

Pedro then took out his wallet and gave Dietrich twenty dollars. Dietrich then asked if Pedro had any more money. After Pedro told him that he did not have any more money, Dietrich again said "Like me lick you? Take out your wallet. I want to see you wallet." Pedro showed Dietrich his wallet but attempted to hide a fifty dollar bill that was inside. However, after Dietrich saw the money, Pedro gave him the money because he didn't "want to get hurt" or "beaten up."

Dietrich, on the other hand, testified that he was at Anna Miller's to sell his "Xbox 360." Dietrich had posted an ad to sell the Xbox on craigslist, and Justin Castillo had offered to purchase the Xbox and suggested they meet at Anna Miller's. However, Castillo was not at Anna Miller's and did not respond to Dietrich's calls. Dietrich wanted a cigarette, but did not want

to go to the store to buy one because he didn't want to miss Castillo. Dietrich then saw Pedro, and approached him and asked for a cigarette.

After Pedro gave him a cigarette, Pedro offered Dietrich twenty dollars. Dietrich related that he thought Pedro gave him the money because Pedro was "interested" in Dietrich and found him "attractive." Pedro began to smoke another cigarette. Dietrich asked if he had another cigarette, and Pedro told him that he was out, but that he would give him five dollars to buy a pack. Dietrich responded that he smoked Newports, which cost more than five dollars. Pedro then gave him two five dollar bills. Pedro then gave him twenty more dollars for "protection" against "Micronesians." Dietrich recounted that during their conversation, "Bronson" was in his car playing music.

Dietrich related that he spoke with Pedro for approximately twenty minutes, at which point Pedro left Anna Miller's. After Pedro left, Dietrich and Bronson then learned that Castillo was in Mililani, and went to meet him there. Dietrich sold the Xbox to Castillo for either \$210 or \$220. After completing the sale, Dietrich was stopped by the police for speeding. Dietrich had \$282 when he was pulled over.

B.

During its closing argument, the State asserted that Dietrich's testimony was not credible because he had not called any corroborating witnesses, such as Castillo or Bronson:

Look at your instructions on page I think it's 11 -- no, I'm sorry, before that where it talks about credibility,

weight of testimony. Defendant took the stand in this case. He is to be treated like any other witness. So you look at the manner in which he testified, the way in which he testified. You look at whether or not his story makes sense. You look at whether or not it's corroborated by any other evidence, which parts of it are, the parts that Joel Pedro told you happened. Parts of it aren't. He talks to you about this friend Justin Castillo. Now, they don't have a burden, but if that's where he got all the money from, where is Justin? He talks about his friend Bronson who is in the car with him when he's pulled over by the police who should actually have all of this information, but we're not going to hear from Bronson.

They don't have a burden, ladies and gentlemen, but there's absolutely no corroboration for anything the defendant has told you other than what coincides with what Joel Pedro has already told you.

The fact of the matter is, ladies and gentlemen, if you believe Joel Pedro, then we're done. Both of the two -- both of the elements the State is required to prove have been proven, and they've been proven beyond a reasonable doubt.

. . .

You know what happened in this case, and you heard in from Joel Pedro. Under the facts as you know it to be at this time, on December 12th, 2010, [Dietrich] was in the court of committing theft Joel Pedro wasn't going to give [the money] to him. He needed to threaten him to get him to comply.

(Emphases added.) Following deliberation, the jury found Dietrich guilty of robbery in the second degree.

II.

It has been said that "the government may comment on a defendant's failure to call witnesses to support his [or her] factual theories[.]'" Mainaanupo, 117 Hawai'i at 256, 178 P.3d at 23 (quoting United States v. Bautista, 23 F.3d 726, 733 (2d Cir. 1994)). The Mainaanupo majority may have erred in relying on Bautista inasmuch as Bautista relied on the federal standard for evaluating improper prosecutorial comments. Bautista, 23 F.3d at 732. Under the federal standard, the defendant must demonstrate "that the remarks, taken in the context of the entire

trial, resulted in substantial prejudice.” Id. On the other hand, under Hawai‘i law, a defendant must only demonstrate that “there is a reasonable possibility that the misconduct contributed to the conviction.” Walsh, 125 Hawai‘i at 296, 260 P.3d at 375.

The prosecutor may not imply that specific witnesses must be called by a defendant to raise a reasonable doubt as to his innocence. See Mainaupo, 117 Hawai‘i at 260, 178 P.3d at 26 (Acoba, J., concurring and dissenting). Unlike in Bautista, where the prosecutor did not identify any witnesses that the defense failed to call, see 23 F.3d at 733, in this case the prosecutor specifically pointed to the absence of testimony from Castillo and Bronson as testimony that would have been required for Dietrich to establish his innocence. Plainly, the prosecutor “may not ‘suggest that the defendant has the burden of producing evidence.’” Id. (quoting United States v. Bautista, 23 F.3d 726, 733 (2d Cir. 1994)).

“It is axiomatic that the prosecution is charged with the burden of proving all elements of a charged crime beyond a reasonable doubt in order to obtain a conviction.” Id. at 260-61, 178 P.3d at 25-26 (citing State v. Iosefa, 77 Hawai‘i 177, 182, 880 P.2d 1224, 1229 (App. 1994)). Hence, “[a] defendant may secure his or her acquittal simply by casting reasonable doubt on the existence of any element of the charged crime.” Id. Any defense, except an affirmative defense raised by the defendant,

must be disproved by the prosecution beyond a reasonable doubt. Gabrillo, 10 Haw. App. at 456, 877 P.2d at 895.

In the instant case, the prosecutor's references to the absence of Castillo and Bronson at trial seemingly indicated to the jury that Dietrich needed to introduce their testimony for the jury to believe Dietrich's testimony. When referring to Castillo, the prosecutor stated that "if that's where he got the money from, where is Castillo?" Thus, the prosecutor suggested to the jury that it could not believe Dietrich's testimony that he had obtained the money in his possession from the sale of the Xbox without Castillo's testimony.

Similarly, with regard to Bronson, the prosecutor told the jury that Bronson "should have all of this information," but that "we're not going to hear from him[.]" Thus, the prosecutor's argument indicated that, if Dietrich's testimony was truthful, Bronson also would have testified.

These statements were reinforced by the prosecutor's next remark. The prosecutor reiterated that "there's no corroboration for anything that [Dietrich] has told you," and then stated that "if you believe [] Pedro, we're done."

Hence, the prosecutor's closing argument maintained that because Dietrich had not called Castillo or Bronson, the jury could not accept his testimony that Pedro had given him the money voluntarily. The "inescapable inference [that would be] left with the jury" from these remarks was that testimony from Castillo and Bronson was necessary for the jury to believe

Dietrich's version of events as opposed to Pedro's version. Mainaapu, 117 Hawai'i at 260, 178 P.3d at 26 (Acoba, J., concurring and dissenting). Because Dietrich had not called Castillo and Bronson, only Pedro's testimony of the events was believable, and therefore the case was "done."

The prosecutor did state that Dietrich did not have a burden. This comment repeated the court's instruction that "the defense has no duty or obligation to call any witnesses or produce any evidence." However, the statement was followed by the prosecutor's insinuation that if Dietrich were innocent he would have produced the witnesses. Thus, the prosecutor undercut his own statement -- and the court's instruction -- that Dietrich did not have a burden by telling the jury that because Dietrich did not call Castillo and Bronson, the case was "done." Neither the court's instruction nor the prosecutor's "no burden statement" did anything to mask the prosecutor's invitation to the jury to require Dietrich to produce the two witnesses to prove he was innocent of the charge.

State v. Espiritu, 117 Hawai'i 127, 176 P.3d 885 (2008), is instructive in this regard. In Espiritu, the prosecutor's closing argument regarding the defense of Extreme Mental and Emotional Disturbance (EMED) misstated the law because it "placed on [the defendant] a burden of proving a special relationship between the Complaint and [the defendant] and an immediacy in the event that the law did not require." Id. at 143, 176 P.3d at 901. This court noted that "a prosecutor's

statements in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments[.]” Id. (internal quotation marks omitted). Thus, “[w]hile the court did properly instruct the jury on the elements of the EMED defense,” the instruction “could not cure [the prosecutor’s] misstatements of law[] where no specific curative instruction relating to the misstatements was given.” Id. Similarly, here, no specific curative instructions were given that would “disabuse” the jury of the erroneous suggestion that Dietrich should have called Castillo and Bronson to prove his credibility and thus his innocence. See id.

In sum, “[i]n advising the jury that [Dietrich] should have brought in such evidence, the prosecution in effect told the jurors it was [Dietrich’s] burden to produce such evidence before they could return a verdict of not guilty.” Id. However, to reiterate, the prosecution was required to prove its case beyond a reasonable doubt, essentially requiring it to disprove Dietrich’s version of events, i.e., that Pedro gave him money voluntarily, beyond a reasonable doubt. Dietrich was not required to submit evidence to prove his innocence. Hence, the prosecutor’s remarks “‘suggest[ed] that the defendant has the burden of producing evidence,’” and were improper. Mainaupo, 117 Hawai‘i at 260-61, 178 P.3d at 26-27 (Acoba, J., concurring and dissenting) (quoting Bautista, 23 F.2d at 733) (internal brackets omitted).

III.

Furthermore, the prosecutor's comments on the absence of Castillo and Bronson were impermissible, and infringed on Dietrich's right to a fair trial. In closing argument, "[a] prosecutor is allowed to state, discuss, and comment on the evidence as well as to draw all reasonable inferences from the evidence." Walsh, 125 Hawai'i at 290, 260 P.3d at 369 (emphasis in original) (internal quotation marks omitted). "A prosecutor's comments on matters outside the evidence is improper." Id. (internal quotation marks omitted). Further, "'it is not enough'" that the prosecutor's statements are "'based on testimony in evidence[,] [the prosecutor's] comments must also be legitimate.'" Id. (quoting Mainaapu, 117 Hawai'i at 253, 178 P.3d at 19 (majority opinion)).

The prosecutor's statements regarding Castillo and Bronson would lead the jury to infer that Dietrich did not call either Castillo or Bronson because their testimony would have been adverse to Dietrich's case. To reiterate, as to Castillo, the prosecutor stated that "if that's where he got all the money from, where is Justin?" Similarly, as to Bronson, the prosecutor stated that Bronson "should actually have all this information," and then noted that "we're not going to hear from him." The clear implication of the prosecutor's statements was that Castillo and Bronson were not called because their testimony would not have supported Dietrich.

However, nothing in the evidence established why Castillo and Bronson were not called. No facts established that Dietrich chose not to call them to the stand because their testimony would incriminate him. In any particular case, it may be that witnesses are not called because they cannot be located or are unavailable. Thus, also, the prosecutor's statement was not a "reasonable inference[] from the evidence." Walsh, 125 Hawai'i at 290, 260 P.3d at 369. Despite the absence of anything in the record demonstrating why Castillo and Bronson were not called, the prosecutor commented on their absence, implying to the jury that the witnesses were absent because their testimony would have been adverse to Dietrich. But there is nothing in the evidence to indicate this. Plainly, the prosecutor's comments were not based in the evidence, nor could they be deemed to be reasonable inferences from the evidence, but rested simply on speculation.

Such speculation as to what Castillo and Bronson would have testified to was especially egregious because those witnesses were also available to the prosecution. To reiterate, it was the prosecution's burden to prove its case, and therefore disprove Dietrich's version of events, beyond a reasonable doubt. Had the State believed that Castillo and Bronson would have refuted Dietrich's testimony, it could have sought to call those witnesses to testify. The State possesses superior resources and would be more likely to locate witnesses and present them at trial. See Wardius v. Oregon, 412 U.S. 470, 476 n.9 (1973)

(holding that the State has “inherent information-gathering advantages” in a criminal trial); see also State v. Valeros, 126 Hawai‘i 370, 378 n.13, 271 P.3d 665, 673 n.13 (2012) (holding that “the prosecution has greater financial and personnel resources with which to investigate and scientifically analyze evidence, in addition to a number of other tactical advantages”). Instead of carrying its burden to disprove the defense, the prosecution reverted to shifting the burden of proof to Dietrich.

Finally, the prosecutor’s assertions in closing argument seemed especially damaging to Dietrich because he was unable at that point to introduce evidence rebutting the prosecutor’s suggestion that Castillo and Bronson would have refuted his testimony. Cf. State v. Mattson, 122 Hawai‘i 312, 339, 226 P.3d 482, 509 (2010) (Acoba, J., dissenting) (noting that a prosecutor’s comment on the defendant’s presence at trial was especially damaging if “this innuendo was introduced in conclusory form during rebuttal argument, without evidentiary support in the record, and at a point when the defendant could not respond other than by an objection”) (quoting State v. Hemingway, 528 A.2d 746, 748 (Vt. 1987)). Once the prosecutor suggested during closing argument that Dietrich did not call Castillo and Bronson because he would not have benefitted from their testimony, it was too late for Dietrich to procure their testimony or to attempt to establish a reason for their absence. Thus, such commentary did not appear to be a “legitimate” comment

on the evidence. Mainaapu, 117 Hawai'i at 253, 178 P.3d at 19 (majority opinion).

IV.

Additionally, the prosecutor's assertions placed a burden on Dietrich's right to testify. "It is established that a defendant's right to testify in his or her own defense is guaranteed by the constitutions of the United States and Hawai'i and by [] Hawai'i Statute." State v. Chong Hung Han, --- Hawai'i ---, 306 P.3d 128, 132 (2013) (internal quotation marks and brackets omitted). "Three separate amendments of the United States Constitution guarantee such a right." Id. First, a defendant's right to testify in his or her own defense is guaranteed by the Fourteenth Amendment as "essential to due process of law in a fair adversary process[.]" Id. (internal quotation marks omitted). Second, the right to testify is guaranteed by the compulsory process clause of the Sixth Amendment. Id. Finally, under the Fifth Amendment, "every criminal defendant is privileged to testify in his or her defense." Id. (internal quotation marks and brackets omitted). "The Hawai'i Constitution also guarantees the right to testify in the provisions that parallel the fourteenth, fifth, and sixth amendments to the United States Constitution." Id.

The prosecutor in effect implied that Dietrich's defense could not be accepted unless two additional witnesses were called. In other words, the prosecutor used Dietrich's testimony to assert that Dietrich needed to call the two

witnesses when in fact no such burden existed. Gabrillo, 10 Haw. App. at 456, 877 P.2d at 895. The prosecutor's summation would in effect compel a defendant to choose between not testifying at all or testifying and carrying the burden of proving himself or herself not guilty. The implication of the prosecutor's closing argument was that Dietrich's testimony, on its own, was incapable of raising a reasonable doubt as to his guilt and that the defense in effect had to disprove guilt, rather than raise a reasonable doubt.

V.

Because Dietrich did not object to the prosecutor's comments at trial, plain error applies. Hawai'i Rules of Penal Procedure Rule 52. "This court has held that it will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Miller, 122 Hawai'i 92, 100, 223 P.3d 157, 185 (2010). Here, to reiterate, the prosecutor's comments in closing argument seemingly denied Dietrich his right to a fair trial. Such errors would plainly affect the fairness and integrity of the trial proceedings. Under such circumstances, further review serves the ends of justice by ensuring that the defendant's conviction was fair. Hence, plain error applies here.

VI.

Last, "[p]rosecutorial errors such as improper

summation are reviewed under the harmless beyond a reasonable doubt standard, which inquires as to 'whether there is a reasonable possibility that the error complained of might have contributed to the conviction.'" Mainaauo, 117 Hawai'i at 260-61, 178 P.3d at 26-27 (Acoba, J., concurring and dissenting) (quoting State v. McElroy, 105 Hawai'i 379, 386, 98 P.3d 250, 257 (App. 2004)). "To determine whether there is a reasonable possibility that [prosecutorial] misconduct contributed to [a] conviction, this court considers (1) the nature of the conduct, (2) the promptness of a curative instruction, and (3) the strength or weakness of the evidence against the defendant." Walsh, 125 Hawai'i at 296, 260 P.3d at 375.

As to the first factor, "[w]hen the misconduct attacks the credibility of the defendant, this factor has been weighed in favor of remanding for a new trial." Id. Here, the prosecutor's comments directly attacked the credibility of Dietrich by suggesting that the testimony of Castillo and Bronson would have contradicted his version of events. To reiterate, because the statements were made in closing argument, Dietrich "could not respond with any evidence" to rehabilitate his credibility. Id. at 297, 260 P.3d at 376. Thus, it would seem "this factor plainly weighs in favor of [Dietrich]." Id.

Further, as explained supra, the prosecutor's statements shifted the burden of proof to Dietrich and "counseled the jury that [Dietrich's] own testimony was not sufficient to justify a not guilty verdict[.]" Mainaauo, 117 Hawai'i at 260-

61, 178 P.3d at 26-27 (Acoba, J., concurring and dissenting). Consequently, "there is a 'reasonable possibility' that the jury may have believed that [Dietrich] was required to present additional evidence to prove his defense." Id. Such belief "might have contributed to his conviction." McElroy, 105 Hawai'i at 386, 178 P.3d at 257.

As to the second factor, the nature of the curative instruction, no curative instruction was issued as to the propriety of the prosecutor's argument. Thus, this factor also weighs in Dietrich's favor. Id.

As to the third factor, the strength or weakness of the evidence against the defendant, "when [the] prosecution's case is not overwhelming but turns on the credibility of the defendant, it is likely that the error might have contributed to the conviction." Id. Here, the issue of whether Dietrich or Pedro was more credible was dispositive. In closing argument, the State maintained that "if you believe [] Pedro, then we're done" because "both of the elements the State is required to prove have been proven[.]"

Defense counsel, on the other hand, maintained in closing that Dietrich was a more credible witness than Pedro because, inter alia, his testimony was more detailed, whereas Pedro was "trying to sell [the jury] something." But for "the prosecutor's improper attack on his credibility" suggesting, without a basis in the evidence or by a reasonable inference, that the testimony of Castillo and Bronson would be adverse to

Dietrich, the jury may have found Dietrich's testimony credible. See Walsh, 125 Hawai'i at 299, 260 P.3d at 378. Hence, apparently all three factors suggest the reasonable possibility that the improper comments contributed to Dietirch's conviction.

VII.

Based on the foregoing, I respectfully dissent.

DATED: Honolulu, Hawai'i, September 25, 2013.

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack

