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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee,

vs.

MICHAEL W. BASHAM,
Petitioner/Defendant-Appellant,

and

ALIIKEA BASHAM,
aka Aliikea I. Basham, Defendant.

SCWC-11-0000758

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000758; CR. NO. 10-1-0663)

FEBRUARY 6, 2014

DISSENTING OPINION BY NAKAYAMA, J.
IN WHICH RECKTENWALD, C.J., JOINS

I respectfully dissent from the majority's holding that the prosecutor's statements regarding accomplice liability

constituted non-harmless prosecutorial misconduct. I further disagree with the majority's conclusion that the prosecutor engaged in misconduct by stating that Basham lied to the police or by commenting upon the credibility of the witnesses.

"Allegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of 'whether there is a reasonable possibility that the error complained of might have contributed to the conviction.'" State v. Hauge, 103 Hawaiʻi 38, 47, 79 P.3d 131, 140 (2003) (quoting State v. Balisbisana, 83 Hawaiʻi 109, 114, 924 P.2d 1215, 1220 (1996)). We will consider: "(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." State v. Tuua, 125 Hawaiʻi 10, 13, 250 P.3d 273, 276 (2011) (quoting State v. Rogan, 91 Hawaiʻi 405, 412, 984 P.2d 1231, 1238 (1999)). Where defense counsel did not object at trial to the prosecutor's statements, on appeal we review the statements for plain error. State v. Wakisaka, 102 Hawaiʻi 504, 513, 78 P.3d 317, 326 (2003). "[U]nder Hawaii's plain error doctrine, if Petitioner's substantial rights or the integrity of the proceedings were affected, then plain error review is appropriate." State v. Miller, 122 Hawaiʻi 92, 100, 223 P.3d 157, 165 (2010).

I. The prosecutor's statements regarding accomplice liability did not constitute prosecutorial misconduct

During closing argument, the prosecutor discussed the jury instructions regarding accomplice liability as follows:

> [T]he concept of accomplice liability was explained to you. A person is an accomplice of another if in the commission of Assault in the First Degree, with intent to promote or facilitate the commission of Assault in the First Degree, the person aids or agrees or attempts to aid the person in the planning or the commission of the offense.
>
> Let's define a couple of those words and put it in everyday English that we can understand.
>
> A person is an accomplice if with intent to promote -- what does "promote" mean? It simply means for our purposes to encourage, the desire to bring about.
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> . . .
>
> . . . The term "promote" means to encourage.
>
> What does the word "facilitate" mean? Using your everyday life experience, that's a rather big word, to facilitate. How about to bring about, that's what facilitate means. Facilitate, for those of you who studied Latin, might be based in the root of facile. What does facile mean? Easy or to make easy or to bring about.

The defense objected at trial stating:

> [T]he words "intent to promote" is used in very narrow circumstances, meaning that with regard to accomplice liability proof must be had beyond a reasonable doubt that the defendant had the intent to promote the commission of the particular offense. And [the prosecutor's] use of it is a far cry from what the legal definition is under the Hawaiʻi case law and intent has to be construed in terms of the intentional state of mind that the court has given. So his current argument is highly misleading and prejudicial if you let it stand.

The court overruled the objection.

Before the ICA, on application for writ of certiorari to this court, and during oral argument before this court, Basham

maintained that he had no objection to the State's definitions of the words promote and facilitate; his objection concerned the purported de-emphasizing of the intent element of accomplice liability. Specifically, in his application for writ of certiorari to this court, Basham argued that "[b]y taking the terms 'promote' and 'facilitate' out of its statutory context, defining them separate and apart from the whole phrase 'intent to promote or facilitate the commission of the offense,' the prosecutor merged the state-of-mind element with the conduct element for accomplice liability." (Emphasis added).

The majority opinion does not address this argument. Indeed, Basham's contention that providing these definitions de-emphasized the necessary finding of intent and constituted a misstatement of the law is unpersuasive because immediately before providing the definitions, the prosecutor correctly stated the requisite intent under the theory of accomplice liability. Instead, the majority concludes that the State committed prosecutorial misconduct by essentially amending the jury instructions and misdefining "promote" and "facilitate." Majority at 25-28.

The majority correctly summarizes the rules regarding jury instructions. Majority at 27-28. The court may, upon agreement of the parties, instruct the jury on the law of the

case, but the court may not orally "qualify, modify or explain" these instructions once given. Majority at 27 (emphasis omitted) (quoting Hawaiʻi Rules of Penal Procedure (HRPP) Rule 30(e)). Conversely, "each party shall be allowed to fully and fairly state the party's theory of the case and the reasons that entitle the party to a verdict." HRPP Rule 24.1(b). But, the parties "shall not assume to instruct the jury upon the law, in such manner as to encroach upon the function of the court to so instruct the jury." Rules of the Circuit Courts of the State of Hawaiʻi (RCCH) Rule 17(b).

In this case, it is unclear whether the State's brief "everyday English" definitions encroached upon the court's role in instructing the jury on the law. In closing arguments, it is common for parties to use simplified language and to draw analogies to explain to the jury how to apply the law to the facts of the case. Basham defined the legal term "conscious object," from the jury instruction regarding "intent," as "whenever [Basham] did something it was in his mind." Basham then explained that "proof beyond a reasonable doubt is this[:] At the end of the day you got to -- you got to be able to say eh, no question in my mind, this is the only way it could have happened." In this context, the State's definitions of "promote" and "facilitate" appear to be analogous examples of parties'

routine rephrasing of the law during arguments to the jury.

However, even if we were to conclude that the State erroneously assumed the court's role in instructing the jury, this only constitutes reversible prosecutorial misconduct if it was not harmless beyond a reasonable doubt. Here, because the State did not materially alter the court's jury instruction on accomplice liability, there is no possibility that any misconduct on the part of the prosecution contributed to the conviction. As the majority notes, the accomplice liability instruction and the statute from which it was derived do not provide definitions of the words "promote" and "facilitate." See Majority at 24 (citing HRS § 702-222). However, the majority directs us to the commentary on the Model Penal Code for guidance that "makes clear that 'intent to promote or facilitate' means to have the conscious objective of bringing about the commission of the offense." Majority at 25 (emphasis in original).

During its closing, the State defined "promote" as "to encourage, the desire to bring about" and "facilitate" as "to bring about."[1] There is no meaningful difference between "having the intent to encourage or the desire to bring about" and "having

[1] Contrary to the majority's contention, the State did not define "facilitate" as "to make easy," but instead merely explained that "facilitate" derived from the latin "facile," meaning "to make easy or to bring about." See Majority at 25-26.

the conscious objective of bringing about." The State's definition did not reduce the "culpability necessary to satisfy the statutory definition of an accomplice," as the majority contends. Majority at 28. Because there is no reasonable possibility that the State's definitions may have contributed to Basham's conviction, the majority errs in vacating Basham's conviction and remanding this case for a new trial. The failure of the circuit court to sua sponte, with no objection from defense counsel, interrupt the closing argument of the prosecutor was not plain error.

2. The trial court did not plainly err by not sua sponte interrupting the prosecutor's argument that Petitioner lied to the police

During closing argument, the prosecutor stated:

> You know that Defendant Michael Basham lied to the police. How do you know that? When Officer Keola Kopa, the second police officer who testified, he had the suit and the -- the stubble, he told you his only job at the scene was to document the minor motor vehicle collision. And whom did he identify as the operators; Steven Bloom, Michael Basham. Who could the only source of that information be? Not Steven Bloom who had been knocked unconscious. Michael Basham. In other words, he took the role of his son as the driver and thus lied to the police.

(Emphasis added). The defense did not object to this statement at trial, but alleged for the first time on appeal to the ICA that the prosecutor committed misconduct by stating that Basham had lied.

"During closing argument, a prosecutor 'is permitted to

draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence.'" Tuua, 125 Hawaiʻi at 14, 250 P.3d at 277 (quoting State v. Clark, 83 Hawaiʻi 289, 304, 926 P.2d 194, 209 (1996)). "'[T]he prosecutor as well as defense counsel has a right to present his [or her] impressions from the evidence, if reasonable and may argue every legitimate inference.'" Clark, 83 Hawaiʻi at 305, 926 P.2d at 210 (quoting Ex parte Waldrop, 459 So. 2d 959, 961 (Ala. 1984)). In the past, this court has approved of prosecutorial commentary on evidence including:

> (1) arguing that the defendant, as well as some of his witnesses, were testifying falsely whereas the prosecution's witnesses were not; (2) "highlighting the fact that the evidence adduced at trial did not comport with defense counsel's assertions during opening statements," and (3) "comment[ing] during closing argument that, '[w]hen the defendant comes in here and tells you that he was not on cocaine . . . it's a cockamamie story and it's asking you [(i.e., the jury)] to take yourselves as fools.'"

Hauge, 103 Hawaiʻi at 56, 79 P.3d at 149 (alterations in original) (internal citations omitted). This court has also approved of a prosecutor's "questions and remarks regarding [a defendant's] failure to 'explain away' the DNA evidence." Id.

Here, the prosecutor commented that, because Officer Kopa concluded that Basham was the driver, Basham must have lied and told Officer Kopa that he was the driver. Although this was not the only possible conclusion, it was a reasonable inference. It constituted a legitimate conclusion based on the evidence.

The majority seems to contend that the Hawaiʻi Rules of Evidence (HRE), and specifically HRE Rules 403 and 404 apply to limit the range of permissible arguments during closing arguments. See Majority at 37-40. The majority states that because evidence of Basham's purported lies may have been inadmissible under the HRE, it was impermissible for the State to raise this argument during its closing argument. Majority at 40.

The majority's attempt to extend the HRE to closing argument is incorrect. Neither party may introduce new evidence during its closing argument to the jury. The parties must instead make arguments and draw inferences from the evidence already on the record. Where a party is not attempting to introduce new evidence, the HRE does not apply. Here, the State's arguments were reasonable inferences and not an attempt to sidestep the HRE and impermissibly introduce new evidence. Basham was not unfairly prejudiced by the inference because he had the opportunity to respond during his own closing argument.

3. The Prosecutor's statements regarding Aliikea's credibility should not be recognized sua sponte as plain error by this court

The majority states, sua sponte, that the prosecutor impermissibly expressed his personal opinion regarding the credibility of the State's witnesses and defendant Aliikea. The

majority concludes that the following statements from the prosecution are objectionable:

> On behalf of the prosecution, I adamantly state to you, that Mr. and Mrs. Bloom have been completely credible witnesses, that they are worthy of your belief. They have no axe to grind, no revenge to be had. They did not know the Defendants Basham [and Aliikea] before this incident. They have absolutely no reason to fabricate or otherwise make up the accounts that they have recited to you in explicit detail.
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> Defendant Aliikea . . . on the other hand, has decided to testify, which is his right. When a defendant testifies, his credibility is to be weighed as any other witness. But you need to keep something in mind. Defendant Aliikea . . . has absolutely no reason to tell you the truth. So the selection or the choice before you in weighing the credibility of the witness is this. Your willingness to believe two people who have no reason to lie to you versus one person who has no reason to tell you the truth.

(Emphasis added). Defense counsel failed to object to these statements at trial, on appeal to the ICA, or before this court and therefore they must be reviewed for plain error.

This court must exercise restraint when noticing plain error sua sponte. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." HRPP Rule 52(b). The plain error standard of review will be applied 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 Hawaiʻi 92, 100, 223 P.3d 157, 165 (2010) (emphasis omitted) (quoting State v. Sawyer, 88 Hawaiʻi 325, 330, 966 P.2d 637, 642

(1998)). Although the power to notice plain error is discretionary, "our power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system -- that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes." State v. Nichols, 111 Hawaiʻi 327, 336, 141 P.3d 974, 983 (2006) (quoting State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993)). While we have occasionally recognized plain error sua sponte, "it is only appropriate to do so in extraordinary circumstances." State v. Miller, 122 Hawaiʻi 92, 141-42, 223 P.3d 157, 206-07 (2010) (Dissent, Nakayama, J.). Here, even if the prosecutor's statements regarding the credibility of the witnesses rose to the level of misconduct, they were not so grave as to warrant sua sponte plain error review.

While the State is barred from expressing "personal views," it is free to present arguments regarding the credibility of witnesses drawn from reasonable inferences. Clark, 83 Hawaiʻi at 304, 926 P.2d at 210. In State v. Nakoa, 72 Haw. 360, 817 P.2d 1060 (1991), we concluded that a prosecutor did not express impermissible personal beliefs when she stated, "I think . . . the police officers who testified are trying their best to be as accurate as they could in their recollection of the incident that

occurred." 72 Haw. at 371, 817 P.2d at 1066. Similarly, this court has approved a prosecutor's comments that invite the jury to determine whether a defendant was telling the truth. See State v. Ganal, 81 Hawaiʻi 358, 376, 917 P.2d 370, 388 (1996). This court has also held that "arguing that the defendant, as well as some of his witnesses, were testifying falsely whereas the prosecution's witnesses were not," was acceptable conduct. State v. Hauge, 103 Hawaiʻi 38, 56, 79 P.3d 131, 149 (citing State v. Cordeiro, 99 Hawaiʻi 390, 425, 56 P.3d 692, 727 (2002)).

Here, the prosecutor did not express his personal views, but instead made general statements regarding the credibility of the witnesses. During his closing the prosecutor repeatedly used the phrases "On behalf of the prosecution" and "I adamantly state to you" as introductory phrases and rhetorical devices. In the declaration at issue, the prosecutor stated that the State's witnesses "are worthy of your belief." The emphasis of the statement was that the credibility of the witnesses was to be determined by the jury.

The prosecution's statements also do not constitute an impermissible generic tailoring argument. A generic tailoring argument only occurs if, despite the lack of evidence to support the proposition, the prosecution argues that due to the defendant's presence during the trial the defendant had the

opportunity to shape his or her testimony. State v. Walsh, 125 Hawaiʻi 271, 282, 260 P.3d 350, 361 (2011). The majority contends that the prosecution is also barred from alleging that the defendant lacks credibility solely because he or she is a defendant. Majority at 50. If such an argument were based solely on the defendant's status, it would be impermissible because it is not reasonable to infer that all defendants lie. However, "'[w]here the evidence presents two conflicting versions of the same events, a party may reasonably infer, and thus, argue, that the other side is lying.'" Clark, 83 Hawaiʻi at 305, 929 P.2d at 210 (internal citations omitted) (quoting State v. Abeyta, 901 P.2d 164, 177-78 (1995)). Here, the prosecution did not allege that Aliikea was being untruthful simply because he was the defendant. The prosecution alleged that Aliikea was lying because his testimony regarding his and Basham's conduct conflicted with the testimony of the State's witnesses. There is nothing improper about such an argument and it does not rise to the level of seriousness to warrant sua sponte plain error review.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama