

CONCURRING AND DISSENTING OPINION BY GINOZA, J.

I agree with the majority that Plaintiff-Appellee State of Hawai'i (State) presented sufficient evidence to support the conviction of Defendant-Appellant Lawrence L. Bruce (Bruce) for the offense of Promoting Prostitution in the Second Degree. I also agree that the circuit court did not err by allowing the testimony of Detective Derek Stigerts or by deciding not to compel a potential witness to testify on Bruce's behalf when the witness asserted her Fifth Amendment right not to testify.

With regard to Bruce's claims of prosecutorial misconduct, I agree with the majority that there was no misconduct when: the deputy prosecuting attorney (DPA), in closing argument, used the phrase "sex trafficking" in describing the case; and the DPA stated "it's as if this all happened, like back in the 1700's, 1800's, where we owned people, where people were owned and disrespected and made to do things that they didn't want to do." However, I respectfully dissent from the majority's ruling that the DPA committed misconduct by stating the following during rebuttal closing argument in reference to the complaining witness (CW): "But she's not a piece of property. I mean, she's somebody's daughter, she's somebody's friend, she's a mother, she's a woman, she is a person, and she deserves to be treated properly[.]"

In this case,<sup>1</sup> Bruce was found guilty of Promoting Prostitution in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 712-1203 (2014), which provides in pertinent part that "[a] person commits the offense of promoting prostitution in the second degree if the person knowingly

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<sup>1</sup> Bruce was tried together with co-defendant Justin McKinley (McKinley). McKinley was found guilty of Promoting Prostitution in the First Degree and not guilty of Sexual Assault in the First Degree. The State's closing argument applied to both Bruce and McKinley. Bruce and McKinley each appealed their convictions. On August 31, 2016, this court issued a memorandum opinion addressing McKinley's appeal. See State v. McKinley, No. CAAP-15-0000477, 2016 WL 4542020 (Haw. App. August 31, 2016).

advances or profits from prostitution."<sup>2</sup>

In State v. Rogan, the Hawai'i Supreme Court expressed the following with regard to the role of the prosecution in a criminal case:

This court has repeatedly noted that the prosecution has a duty to seek justice, to exercise the highest good faith in the interest of the public and to avoid even the appearance of unfair advantage over the accused. The American Bar Association (ABA) Prosecution Function Standard 3-1.2(c) (3d ed.1993) states that the duty of the prosecutor is to seek justice, not merely to convict.

With regard to the prosecution's closing argument, a prosecutor is permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence. It is also within the bounds of legitimate argument for prosecutors to state, discuss, and comment on the evidence as well as to draw all reasonable inferences from the evidence. In other words, closing argument affords the prosecution (as well as the defense) the opportunity to persuade the jury that its theory of the case is valid, based upon the evidence adduced and all reasonable inferences that can be drawn therefrom.

91 Hawai'i 405, 412-13, 984 P.2d 1231, 1238-39 (1999) (citations, internal quotation marks, and brackets omitted) (emphasis added). Bruce acknowledges in his opening brief that he did not object to the DPA's statements during the closing argument, and thus asserts that this court should review for plain error. See State v. Iuli, 101 Hawai'i 196, 204, 65 P.3d 143, 151 (2003) ("Where a defendant fails to object to a prosecutor's statement during closing argument, appellate review is limited to a determination of whether the prosecutor's alleged misconduct amounted to plain error.").

It is appropriate in this case to view the entire closing argument in context. See State v. Mars, 116 Hawai'i 125,

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<sup>2</sup> Bruce was indicted on two charges: Promoting Prostitution in the First Degree in violation of HRS § 712-1202(1)(a) (2014); and Sexual Assault in the First Degree in violation of HRS § 707-730(1)(a) (2014). After presentation of the State's case, the circuit court granted Bruce's motion for judgment of acquittal as to the charged offenses, but ruled that there was sufficient evidence for the included offense of Promoting Prostitution in the Second Degree, which was considered by the jury.

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142, 170 P.3d 861, 878 (App. 2007) (considering prosecutor's challenged statements in the context of defense counsel's closing argument and the entire rebuttal argument). In doing so, it is clear that the instances of alleged misconduct (comments about "sex trafficking" and about a time when "people were owned," and then the statement that the CW was not a piece of property, but somebody's daughter, somebody's friend, a mother, a woman, a person) are not isolated statements, but rather are part of the larger theme or theory by the prosecution in this case given the evidence. Just as the first two challenged statements were not improper, I would conclude that the third challenged statement is likewise not improper.

The evidence presented by the State, based primarily on the testimony of the CW, was that, *inter alia*, the CW worked as a prostitute in Hawai'i for Bruce and then McKinley, she gave them the money she made, they controlled her in various ways, and they treated her like their property. The CW testified that an individual named Lando had been her pimp in San Diego, and that he bought her an airline ticket to come to Hawai'i, where she could make more money in prostitution. According to the CW, Lando told her how to find Bruce and upon arriving in Hawai'i she caught a shuttle from the airport to Bruce's hostel. The CW testified that Bruce set the prices that she charged and told her what acts to do during her "dates." She also testified that she initially lived with Bruce, his son, and his "baby mama" at a hostel. The CW testified that she had sex with Bruce because "[i]t's a way of initiating that you're somebody's girl now" and after intercourse with him, Bruce told her she was "his girl now." While working for Bruce, the CW testified that Bruce, among other things, "reposted" an ad for her on an internet site called "Backpage," collected the money she made from "dates," and held her identification and social security cards so she "wouldn't be able to go nowhere." The CW testified that she felt

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like Bruce's property in that "he had that pimp demeanor. . . . As in you do something wrong, you're going to get beat, or you're just out here making money for me and giving it to him." The CW further testified that she later became McKinley's "property" when, after staying at a Best Western hotel with Bruce, McKinley, and McKinley's girlfriend (Keshawn), Bruce left for a couple of days and did not return. According to the CW, McKinley called Bruce and said that the CW was now McKinley's "girl" because Bruce was gone and had left her behind. That same day, according to the CW, Bruce gave McKinley the CW's identification and social security card.

The CW testified that she stayed at the Best Western for about two weeks, during which she and Keshawn were prostituting. During this time she felt like McKinley's property, explaining that "I couldn't do nothing. I mean, I was just making money for him and giving it to him, so just property." According to the CW, after she stayed at the Best Western for about two weeks, she, McKinley and Keshawn moved to the Pagoda hotel. The CW testified that, while at the Pagoda hotel, there was an incident in which McKinley beat her, hitting her in the face and legs, choking her, and then making her strip down. The CW testified that she saw Bruce recording the incident. The CW remained with McKinley and Keshawn for several days after the beating, but eventually she went to a hospital because she was not feeling well. At the hospital, she was told she was three months pregnant. The CW testified she then spoke with a social worker and was later placed in a safe house.

Keshawn and Bruce testified for the defense and both contested the CW's version of events. Keshawn testified that she and the CW did engage in prostitution, but that Bruce and McKinley had nothing to do with it. According to Keshawn, she had invited the CW to stay with her and McKinley while they were at the Best Western, and Bruce never stayed with them. Bruce, in

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turn, testified that he was not the CW's pimp, he never had sex with her, he did not post any ads for her services, he never lived with her at a hostel, he did not manage her as a prostitute, and he never set prices for her. Bruce testified that he met the CW through her boyfriend, Lando, when Lando and the CW were both in Hawai'i. Bruce asserted that the CW had tried to "come on" to him the first time they met, that he later told Lando about her actions, and that Bruce and Lando almost ended up fighting as a result. Bruce admits that he used a cell phone to video record the incident when McKinley assaulted the CW at the Pagoda hotel. According to Bruce, McKinley had been drinking and was upset because Keshawn kept nagging him that her money "keeps coming up missing" and apparently blaming the CW. Bruce testified that he took the video of the incident to show Lando, testifying that "I just felt there was an opportunity for me to show Lando what was going on, what he was dealing with, even if he was still dealing with her."

The State's theory of the case was that the CW was treated like a piece of property. From the beginning of closing argument, the DPA argued that the case was about sex trafficking or "forced prostitution." The DPA noted that the CW admitted to facts that the jurors may find distasteful and that put her in an unfavorable light,

[b]ut nonetheless, [the CW] is a person, and again, we are not asking you to like her or dislike her, to be friends with her or to not. What we're asking for you to do is to look at the evidence in this case despite how you may feel about her and to look at the conduct. . . . It is, again, about looking at the evidence and looking at the conduct of these two Defendants[.]

In response, the defense for both Bruce and McKinley argued, among other things, that the CW is not credible and that her testimony should not be believed. As asserted by Bruce's counsel during closing argument, "I will give you a handful of

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reasons of why you should not believe [the CW], you should not believe just about anything that comes out of her mouth."

In rebuttal closing argument, the DPA challenged Bruce's testimony and then argued as follows:

The reasonable inference that you can draw from the facts of this case is that they were passing her around like a piece of property. They were trying to make money off of her, and she wasn't doing her job. She was getting lazy, she was pregnant, she was sleeping too much, feeling a little tired, and they were pissed, and the video was shown to Lando because they needed to show him that they took care of business, that she was sent a message loud and clear that she'd better get her butt working or she was going to suffer another beat-down. That is why the video was taken, that is why it was shown to Lando, because he's the one who started it off. All of these guys moved in line, and they passed her around like a piece of property.

. . . . .

So this whole thing about her lying and can't be believed, well, the only people who can't be believed was [Keshawn] and Mr. Bruce. The fact of the matter is that they treated [CW] like she was property. And the odd thing about it is that it's as if this all happened, like, back in the 1700's, 1800's, where we owned people, where people were owned and disrespected and made to do things that they didn't want to do.

But this crime happened in 2014, 2014, and we, as a society, have evolved, you would think, but not to these two gentlemen here. They didn't see her as anything more than a piece of property to pass around, to mistreat, to humiliate, intimidate, beat, and force. That is how they viewed her, that is how they treated her. But she's not a piece of property. I mean, she's somebody's daughter, she's somebody's friend, she's a mother, she's a woman, she is a person, and she deserves to be treated properly[.]

(Emphasis added.)

As explained above, the CW testified that she felt like she was the property of Bruce and McKinley. From the start of closing argument, the DPA argued that the CW is a person and not property, and that regardless of whether the jury agreed with the CW's actions, she "is a person." The DPA then referred to the defendants as treating the CW like property throughout rebuttal argument, asserting that they passed her around like property, treated her like property, and saw her as a piece of property.

The DPA concluded with the statements: "But she's not a piece of property. I mean, she's somebody's daughter, she's somebody's friend, she's a mother, she's a woman, she is a person, and she deserves to be treated properly[.]" This statement, like the DPA's statements about "sex trafficking" and about a time when "people were owned" -- all taken in context -- supports the State's overall theme or theory that the CW is a person, but the defendants treated her like a piece of property from whom they derived financial gain. There is no dispute that the statement in question is supported by evidence in the record. Given that the State has wide latitude in discussing the evidence, that the prosecutor can draw all reasonable inferences from the evidence, and that closing argument affords the parties the opportunity to persuade the jury of their respective theories of the case, the statement in question was not improper.

This case is also distinguishable from Rogan. In Rogan, the Hawai'i Supreme Court first concluded that the deputy prosecutor's reference to the defendant as a "black, military guy" "was an improper emotional appeal that could foreseeably have inflamed the jury." Rogan, 91 Hawai'i at 414, 984 P.2d at 1240. The supreme court further concluded that:

[t]he deputy prosecutor's inflammatory reference to Rogan's race was further compounded by the statement that the incident was "every mother's nightmare," which was a blatantly improper plea to evoke sympathy for the Complainant's mother and represented an implied invitation to the jury to put themselves in her position. Like the deputy prosecutor's reference to [the defendant's] race, the "every mother's nightmare" comment was not relevant for purposes of considering whether [the defendant] committed the acts charged.

Id. (emphasis added).

In this case, however, there was no "inflammatory" statement based on race or any other discriminatory basis. Rather, the statement that the CW is a daughter, friend, mother, and woman, was couched between the statements that she is not

property and that she is a person. Given the evidence in the record and the context of the entire closing arguments, the challenged statement was not an emotional appeal or an invitation to the jury to put themselves in CW's position. Rather, the statement underscored the State's theme, based on evidence, that the defendants treated the CW like property to gain financially, but that she was not property. Thus, the DPA's comments in this case are unlike the statements found to be improper in Rogan.

"Prosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a fair trial." State v. McGriff, 76 Hawai'i 148, 158, 871 P.2d 782, 792 (1994); see also Mars, 116 Hawai'i at 142-43, 170 P.3d at 878-79 (holding that even a statement problematic in the abstract was not plain error given the context of the entire closing argument). Here, the DPA's challenged statement did not prejudice Bruce's right to a fair trial.

For these reasons, I would affirm the "Judgment of Conviction and Sentence" entered against Bruce in this case.

*Jim McHenry*