

CONCURRING OPINION BY FUJISE, J.

Today, we apply the rule adopted by the Hawaii Supreme Court in State v. Mattson, 122 Hawai'i 312, 226 P.3d 482 (2010) to a case of generic testimony tailoring. While I concur in the opinion of the court that the deputy prosecutor did make a generic testimony tailoring argument, I write separately to distinguish between what, in my view, were proper and improper arguments by the deputy prosecutor.

The Mattson rule, based on article I, section 14 of the Hawai'i Constitution, states that it is improper for the prosecution "to make generic accusations during closing argument that a defendant tailored his testimony based solely on the defendant's exercise of his constitutional right to be present during the trial." 122 Hawai'i at 326, 226 P.3d at 496. Mattson himself did not benefit from this rule, as the majority of the court there concluded that the deputy prosecutor did not make a generic accusation of tailoring. Mattson, 122 Hawai'i at 328, 226 P.3d at 498.

Here, the deputy prosecutor stated in her closing argument that Walsh "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."¹ While the deputy

¹ This was not a case of gamesmanship, a concern expressed by the Mattson majority and Justice Ginsberg's dissent relied upon by the Mattson majority. See Mattson, 122 Hawai'i at 326, 226 P.3d at 496 ("We also agree that 'allowing a prosecutor, at a time when the defendant cannot respond, to invite the jury to convict on the basis of conduct as consistent with innocence as with guilt[.]'" (quoting Portuondo v. Agard, 529 U.S. 61, 79 (2000) (Ginsberg, J., dissenting)) (emphasis added)). In her cross-examination of Walsh, the deputy prosecutor also made the same point:

Q. By the way, you had the opportunity to sit here and listen to Iokepa Kramer's testimony, right?

A. Yes, I did.

Q. You had the opportunity to hear and listen to Kapena Kramer's testimony, right?

A. Yes.

Q. And you had the opportunity to sit here and listen to Dr. Earl Hasegawa's testimony?

(continued...)

prosecutor did not explicitly accuse Walsh of tailoring his testimony, as Justice Scalia observed in Portuondo, "[d]rawing the line between pointing out the availability of the inference and inviting the inference would be neither useful nor practicable." Portuondo, 529 U.S. at 68 n.1.

Nevertheless, this argument was not premised on any evidence presented during trial to support the inference that Walsh had tailored his testimony based on what he had heard. Thus, I agree that the deputy prosecutor's argument in this regard amounted to the generic accusation of tailoring prohibited by the rule announced in Mattson.

However, I would distinguish this argument from the subsequent argument challenged by Walsh:

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?

In this latter argument, the deputy prosecutor made a separate point, that Walsh, having heard some of the jurors state that they took eye contact as indicative of truthfulness actually took their cue and looked at the jurors during his testimony.

While the transcript of the jury selection is not before us, Walsh does not argue that these representations made by the deputy prosecutor were inaccurate. Assuming then, that

¹(...continued)

A. Yes.

Q. And the both of the officers' testimony?

A. Yes.

Q. And you had the opportunity to sit here and hear your sister Stephanie Walsh testify, correct?

A. Yes.

Q. As well as you friend and her friend Lucy Mapson, correct?

A. Yes.

these comments were made by at least some of the jurors and that Walsh did, in fact deliver his testimony in such a manner, the deputy prosecutor's subsequent argument was not merely a generic accusation of tailoring, but was based on Walsh's actions after he witnessed the juror's comments. See People v. Edelbacher, 766 P.2d 1, 30 (Cal. 1989) ("prosecutorial comment in argument on an accused's courtroom demeanor . . . [was not prohibited where] the defendant has testified and put his credibility in issue.")

The jurors heard the responses given during voir dire and witnessed Walsh's trial testimony themselves. As such, they were in the best position to judge whether Walsh tailored his comportment to their comments. As I view this argument by the deputy prosecutor as merely a request that the jury consider matters before them, I conclude that this argument was not improper.