

DISSENTING OPINION BY NAKAMURA, C.J.

I respectfully dissent.

I believe it was prosecutorial misconduct for the prosecutor in rebuttal closing argument to refer to evidence that had not been introduced at trial -- namely, the statement of the complaining witness (CW) to the police that at the time of the incident, she "was afraid and call the police." The prosecutor twice referred to the CW's statement that she was afraid before offering to read the statement. Although defense counsel did not object to the prosecutor's subsequent reading of the CW's statement, it was error for the District Court to receive and consider this evidence, which had not been admitted at trial.

The prosecutor attempted to justify his reference to the non-admitted evidence by stating that he was doing so "in fairness to the defense." However, contrary to the prosecutor's suggestion, the CW's statement to the police that she was afraid was not helpful to the defense. Rather, it supported the prosecution's theory that Defendant-Appellant Jamal McGhee (McGhee) had terroristically threatened the CW. It also contradicted testimony elicited by the defense on cross-examination of the CW that suggested that the CW had not been afraid of McGee, which the defense used to impeach the CW's direct-examination testimony that she felt threatened.<sup>1</sup> For the

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<sup>1</sup> The defense elicited the following testimony during its cross-examination of the CW:

Q. Okay. And you -- at that time you didn't -- at the time when you heard supposedly, allegedly, Mr. McGhee yelling, you didn't call the police at that time?

A. Well, I thought I can calm him down or Vanessa could calm him down.

. . . .

Q. So you felt like you could go outside and calm him down?

A. Yeah. And Vanessa could.

. . . .

Q. All right. Okay. So you -- despite him yelling outside, sort of screaming like you describe it, you felt okay to go outside?

A. Yeah. I mean, I'm almost 70. I'm not afraid to be -- if he wants to kill me, kill me.

same reason, the CW's statement to the police was beneficial to the prosecution because it served to blunt the effect of the defense's cross-examination by injecting into the trial proceedings non-admitted evidence consistent with the CW's direct-examination testimony that she felt threatened.

The case turned on the credibility of the only two witnesses who testified at trial -- the CW and McGhee. The improper injection of the non-admitted evidence of the CW's statement to the police served to bolster the CW's credibility and prejudicially affected McGhee's substantial rights. Under the circumstances presented, I would vacate McGhee's conviction and remand the case for a new trial.

*Craig H. Nakamura*