NO. CAAP-12-0000537

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
SEAN CONROY, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 11-1-0355)

SUMMARY DISPOSITION ORDER
(By: Leonard, Presiding Judge, and Reifurth and Ginoza, JJ.)

On July 8, 2011, Defendant-Appellant Sean Conroy was indicted for Assault in the First Degree, in violation of Hawaii Revised Statutes ("HRS") § 707-710(1) (1993). On March 7, 2012, a jury found Conroy guilty of the lesser-included offense of Assault in the Second Degree, in violation of HRS § 707-711 (Supp. 2010). Conroy appeals from the subsequent Judgment; Conviction and Probation Sentence; Notice of Entry ("Judgment"), which the Circuit Court of the Second Circuit ("Circuit Court") entered on May 2, 2012.[1/]

In his points of error on appeal, Conroy addresses three specific statements by the deputy prosecuting attorney ("Prosecutor") in his closing and rebuttal-closing arguments, but he contends more broadly that "[t]he Government engaged in prosecutorial misconduct when improper arguments and insinuations were made to the jury during closing argument. . . . The entire closing argument contains a stream of characterizations offered to raise and inflame the passions of the jury, and not based upon the evidence adduced at trial." In the legal argument that follows, Conroy addresses ten of the Prosecutor's statements.

[1/] The Honorable Richard T. Bissen, Jr., presided.

Specifically, Conroy contends that the following statements constituted prosecutorial misconduct:

> [Statement 1] You can see and you heard from the evidence the Defendant is immensely larger than [the complaining witness ("CW"),] but she was just trying to get him to leave her alone. At that point, the Defendant retaliated with all his six-foot-five-inch or plus 250-pound power, he punched the nine -- five-foot-nine, 120-pound [CW] in the face. At that point, I would submit he's finally unleashing all of the anger, the frustration, the jealousy, the rage that he had because she no longer wanted to be with him.
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> [Statement 2] Their marriage was going down. [CW] no longer gave the Defendant nature's smile, so he was going to make sure that she didn't give that smile to any other man, and she won't. She can't.
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> [Statement 3] He was going to teach her a lesson, a lesson that she would never, could never forget, a lesson she would remember every time she looked in a mirror. Look at [CW]'s eyes. What do you see in those eyes? Resignation, defeat, a woman that's learned her lesson. We should teach her a new lesson. I say we teach her that there is justice in the world. I say we teach her that there can be justice in this[.]
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> [Statement 4] Consider that, you know, when Defendant broke [CW]'s face, when you look at the way she testified, consider her demeanor, the pictures of her after the scene. He broke something inside of her as well.
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> [Statement 5] We all want [CW]'s spirit to heal even if her face won't. But in order for that to happen, there has to be justice done.
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> [Statement 6] [H]ow does a man who has [allegedly] been kicked directly on his right testicle [and who is allegedly] bent over in excruciating pain deliver two power punches strong enough to break [CW]'s left cheek, shatter her nose and send her 120-pound body flying onto the hood of the Camaro? Explain that. Explain also why there were no tears on the Defendant's face when he was testifying.
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> [Statement 7] You break my heart, I break your face. That's what this case is about.
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> [Statement 8] Anyway, I defy anyone to show that two quick jabs are going to cause the kind of injuries that we saw in the evidence in this case.
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> [Statement 9] Now, the defense says that the Defendant's testimony was more credible, that he had no duty to testify, but he did to tell you what happened. But I would submit that he had to.
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> [Statement 10] The statement itself, you'll behold as far as credibility, you can consider the probability or improbability of a person's statement. . . . If it was a kick to his right testicle and he was bent over in excruciating pain, he would not have been able to hit anybody. I think that's part of, certainly for the guys here[.]

(Formatting altered.)

"In order to 'determine whether reversal is required under [Hawai'i Rules of Penal Procedure] Rule 52(a) because of improper remarks by a prosecutor which could affect Defendant's right to a fair trial, we apply the harmless beyond a reasonable doubt standard of review.'" *State v. Espiritu*, 117 Hawai'i 127, 140-41, 176 P.3d 885, 898-99 (2008) (footnote and original brackets omitted) (quoting *State v. Sanchez*, 82 Hawai'i 517, 528, 923 P.2d 934, 945 (App. 1996)). "This standard [of review] '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. Kekona*, 120 Hawai'i 420, 445, 209 P.3d 1234, 1259 (App. 2009) (quoting *Espiritu*, 117 Hawai'i at 141, 176 P.3d at 899).

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments they advance and the issues they raise, we resolve Conroy's points of error as follows, and affirm.

I. Discussion

In order to evaluate Conroy's claims, we will make a threshold determination as to whether prosecutorial misconduct occurred, and then, if any statements qualify, we will determine whether any of those rise to the level of reversible error by employing a three-prong harmless-error analysis. *See State v. Tuua*, 125 Hawai'i 10, 14, 250 P.3d 273, 277 (2011).

A. Whether Any of the Prosecutor's Comments Constituted Misconduct.

"[C]losing 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." *State v. Basham*, 132 Hawai'i 97, 118, 319 P.3d 1105, 1126 (2014) (quoting *State v. Rogan*, 91 Hawai'i 405, 413, 984 P.2d 1231, 1239 (1999)). "Although a prosecutor has wide latitude in commenting on the evidence during closing argument, it is not enough that . . . his comments are based on testimony 'in evidence'; his comments must also be 'legitimate.'" *Tuua*, 125 Hawai'i at 14, 250 P.3d at 277

(quoting *State v. Mainaaupo*, 117 Hawai'i 235, 253, 178 P.3d 1, 19 (2008)). "A prosecutor's comments are legitimate when they draw 'reasonable' inferences from the evidence." *Id.* (quoting *Mainaaupo*, 117 Hawai'i at 253-54, 178 P.3d at 19-20).

Here, Conroy's objections to the Prosecutor's closing- and rebuttal-closing arguments fall into three categories.[2/] First, Conroy asserts that, in Statements 1 and 2, the Prosecutor improperly argued facts not in evidence. Second, Conroy contends that the Prosecutor sought to improperly inflame the jury and to cause the jury to render a verdict based on "passion and prejudice" via Statements 3, 4, 5, and 7. Third, Conroy argues that Statements 6, 8, 9, and 10 represent improper assertions of the Prosecutor's personal opinion. Based on the following analysis, we find that Statement 7 arguably qualifies as "prosecutorial misconduct" and warrants harmless-error review.

(1 & 2) Conroy asserts that Statements 1 and 2 represent the Prosecutor's attempt "to emphasize a claim of jealousy and rage in [Conroy and CW's] relationship," which "is not supported by the evidence." Because defense counsel did not object to either of these statements at trial, we consider whether their utterance "amounted to plain error which affected the substantial rights of the defendant." *State v. Klinge*, 92 Hawai'i 577, 592, 994 P.2d 509, 524 (2000) (citations omitted); Haw. R. Pen. P. 52(b). We disagree with Conroy and conclude that both statements are based on "'reasonable' inferences from the evidence," *Tuua*, 125 Hawai'i at 14, 250 P.3d at 277, and that Conroy had a fair opportunity to respond to the evidence on which Statements 1 and 2 are based. Thus, their inclusion in the

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[2/] Conroy's opening brief fails to comply with the requirements of Hawai'i Rules of Appellate Procedure ("HRAP") Rule 28 insofar as it neither articulates precisely *why* Statements 3, 7, 8, 9 and 10 are allegedly improper nor provides any authority in support of that general contention. Haw. R. App. P. 28(b)(7). This court may "disregard a particular contention if the appellant makes no discernible argument in support of that position." *Kakinami v. Kakinami*, 127 Hawai'i 126, 144 n.16, 276 P.3d 695, 713 n.16 (2012) (quoting *In re Guardianship of Carlsmith*, 113 Hawai'i 236, 246, 151 P.3d 717, 727 (2007) (internal quotation marks omitted)); *see* Haw. R. App. P. 28(b)(7). Due to our policy of "affording litigants the opportunity 'to have their cases heard on the merits, where possible,'" however, we nonetheless proceed on the merits insofar as we can discern them. *Marvin v. Pflueger*, 127 Hawai'i 490, 496, 280 P.3d 88, 94 (2012) (quoting *Morgan v. Planning Dep't*, 104 Hawai'i 173, 180-81, 86 P.3d 982, 989-90 (2004)).

Prosecutor's closing argument was reasonable and did not prejudicially affect Conroy's substantial rights. *See State v. Acker*, 133 Hawai'i 253, 280, 327 P.3d 931, 958 (2014) (finding no prosecutorial misconduct where "there was a basis in the evidence for the [Prosecutor]'s argument, and the [Prosecutor]'s comments were permissible comments on the evidence." (quoting *Rogan*, 91 Hawai'i at 412, 984 P.2d at 1238 (internal quotation marks and brackets omitted))).

(3 & 5) Conroy alleges that the Prosecutor's closing argument contained several statements intended "to anger the jury and draw out their sympathies," which, according to Conroy, constitutes an improper attempt to inflame the jury's passions. Specifically, Conroy contends that Statements 3 and 5 appealed to the jury's sense of justice by improperly encouraging the jury to view its forthcoming verdict as a means to send a message rather than to view its duties as a jury to decide the case only based on the specific evidence presented.[3/]

Here, in the send-a-message portions of Statements 3 and 5, the Prosecutor invited the jury to consider the potential impact of its verdict on the alleged victim (CW) and the perpetrator (Conroy), rather than on other criminals or on society in general. In so doing, the Prosecutor did not encourage the jury to base its verdict on considerations beyond the evidence. *See State v. Florence*, No. CAAP-11-0000608, 2012 WL 5897465, at *3 (Hawai'i App. Nov. 23, 2012) ("The prosecutor's statement to the jury that 'you need to hold [the defendant] fully responsible for everything he's done and not giv[e] him any breaks, which they are asking for' was not improper because the prosecutor was commenting on the evidence and presenting reasonable conclusions to be drawn from the evidence." (original brackets omitted)), *cert. rejected*, 2013 WL 811443 (Hawai'i Mar. 4, 2013). That is, the Prosecutor's calls for justice occurred within the context of his comment on the evidence and his

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[3/] The court sustained defense counsel's objection to Statement 3 for "passion, prejudice." However, when defense counsel objected to Statement 5 for the same reason, the court merely stated: "So noted, Counsel." Defense counsel did not request that the court strike either of these statements from the record, and the court did not do so *sua sponte*.

presentation of conclusions that could be drawn from that evidence. *Compare United States v. Sanchez*, 659 F.3d, 1252, 1256-57 (9th Cir. 2011) (holding the prosecutor's request that the jury "send a memo" to other drug traffickers impermissibly urged the jury to convict for reasons unrelated to the individual defendant's culpability); *with Florence*, 2012 WL 5897465, at *3.

Conroy has not provided any authority suggesting that such a justice-based argument constitutes prosecutorial misconduct, and without more, we cannot hold that either Statement 5, or the portion of Statement 3 in which the Prosecutor urged the jury to teach Conroy a lesson about justice, were improper. *See Kakinami*, 127 Hawai'i at 144 n.16, 276 P.3d at 713 n.16 (citations omitted); *accord* Haw. R. App. P. 28(b)(7).

Although the portion of Statement 3 where the Prosecutor speculated as to CW's state-of-mind after the assault presents a close case, we hold that it also does not rise to the level of "prosecutorial misconduct." *See generally United States v. Moore*, 651 F.3d 30, 53 (D.C. Cir. 2011) ("Because the line between permissible and impermissible arguments will not always be clear, the inquiry is necessarily contextual.").

In that statement, which occurred during the State's closing argument, the Prosecutor interpreted the look in CW's eyes for the jury as showing "[r]esignation, defeat, [indicative of] a woman [who]'s learned her lesson." Admittedly, the evidentiary support for such an interpretation is both somewhat scant and indirect. Thus, the Prosecutor arguably offered an unsworn statement of his own opinion that could have "intruded on the jurors' role as fact-finders" in this portion of Statement 3. *Id.* at 1243-44.

Although arguably close to the line, the Prosecutor's conduct did not cross it. Here, the relevant portion of Statement 3 involves a remark about the *CW*'s demeanor and the emotion behind the "look in [one's] eyes"—especially when there is a photo of the CW in evidence taken shortly after the incident—is arguably the kind of "self-evident proposition well within the common understanding of lay jurors" that would not generally require expert testimony in support, *Thompson*, 318 P.3d

at 1245. Thus, on balance, we hold that Statement 3 was not improper.[4/]

(4 & 7) Conroy also argues that the Prosecutor improperly appealed to the jury's emotions in Statement 4. With those remarks, the Prosecutor asked each member of the jury to assess CW's credibility as a witness. He urged the jurors not to forget about their personal observations of the witnesses who testified and other evidence admitted at trial-including "the way [CW] testified, . . . her demeanor, [and] the pictures of her after the scene." Such a request permissibly evokes the jury's legal responsibility, as "the fact finder[,] to assess the credibility of witnesses and to resolve all questions of fact[.]" *State v. Clark*, 83 Hawai'i 289, 303-04, 926 P.2d 194, 208-09 (1996) (ellipsis omitted) (quoting *State v. Eastman*, 81 Hawai'i 131, 139, 913 P.2d 57, 65 (1996)).[5/] Accordingly, the demeanor-highlighting aspect of Statement 4 is not improper.

The Prosecutor's reference to the incident as "when Defendant broke [CW]'s face" in Statement 4 was also not misconduct because it is amply supported by undisputed evidence of CW's multiple facial fractures, and Conroy's admission that he punched CW twice in the face. Moreover, the Prosecutor's claim that Conroy "broke something inside of [CW] as well" is arguably supported by evidence in the record.[6/] *See id.* at 306, 926 P.2d at 211.

[4/] Furthermore, even if we assume for the sake of argument that this portion of Statement 3 was improper, it is still unquestionably harmless beyond a reasonable doubt and thus does not warrant a different outcome. First, the Prosecutor's questionable characterization of the look in CW's eyes is logically supported, albeit indirectly, by a few facts in the record. Second, the court sustained defense counsel's objection to Statement 3. And finally, the evidence supporting Conroy's conviction was overwhelming. Thus, even if we were to conclude that Statement 3 qualified as "prosecutorial misconduct," it was certainly harmless beyond a reasonable doubt.

[5/] Indeed, the court's instruction number seven to the jury at the close of trial explained how to accomplish this: "In evaluating the weight and credibility of a witness's testimony, [the jury] may consider the witness's appearance and demeanor; the witness's manner of testifying; . . . [and] the extent to which the witness is supported or contradicted by other evidence . . . ."

[6/] The transcripts contain repeated witness descriptions of CW as "dazed" and "out of it" after the incident, and the parties engaged in much discussion about the permanency of CW's (in)ability to smile the way she did before the assault.

Conroy argues that Statement 7 was an improper attempt to encourage the jury to make its decision on the basis of passion and prejudice. Although, Statement 7 is rhetorically similar to Statement 4 and thematically similar to Statement 1, both of which we conclude were *not* improper, Statement 7 is distinguishable in two important ways that make it improper.

First, unlike Statement 4, which also referred to metaphorical "breaks" in addition to CW's physical bone fractures, Statement 7 is phrased in the "first person point of view," thereby arguably placing words that were never spoken at trial into Conroy's mouth. *Cf., generally, Berger*, 295 U.S. at 84 (holding that the prosecuting attorney was guilty of misconduct because, among other things, he "misstat[ed] the facts in his cross examination of witnesses" and "put[] into the mouths of such witnesses things which they had not said . . . ."). Not only does this raise constitutional issues such as encroaching on the defendant's Fifth-Amendment rights at trial, but, as a false assertion that Conroy made certain statements that he did not in fact make, it cannot be said to reasonably follow from the evidence at trial.

And second, although there was sufficient testimony to support the Prosecutor's assertion of a *jealousy*-based motive in Statement 1, Statement 7 is problematic because neither party elicited specific testimony from Conroy from which a reasonable juror might infer that Conroy was suffering from a broken heart—i.e., neither party questioned Conroy about his specific, emotional reaction to his ending marriage with CW, nor did any other witness suggest that the couple's break was non-mutual or unexpected. Thus, unlike the Prosecutor's bare reference to CW's emotional injuries, which, as explained above, was likely permissible, the prosecutor improperly exaggerated his arguments with respect to Conroy's state of mind. *See Moore*, 651 F.3d at 53 ("Sensationalization, loosely drawn from facts presented during the trial, is still a 'statement[] of fact to the jury not supported by proper evidence introduced during trial,' clearly 'designed to inflame the passions of the jury.'" (internal citations omitted)). In so doing, the Prosecutor encouraged the

jury to base their verdict on passion, rather than the relevant facts and law at hand. Accordingly, the Prosecutor improperly sensationalized the evidence in Statement 7 and offered unsupported conclusions about Conroy's state of mind.

(6, 8, 9 & 10) Conroy challenges Statements 6, 8, 9, and 10, in which the Prosecutor implicated Conroy's credibility as a defendant-witness. "It is well-established 'under Hawai‘i case law that prosecutors are bound to refrain from expressing their personal views as to a defendant's guilt or the credibility of witnesses'" in statements before the jury. *Basham*, 132 Hawai‘i at 115, 319 P.3d at 1123 (quoting *Clark*, 83 Hawai‘i at 304, 926 P.2d at 209); *accord Tuua*, 125 Hawai‘i at 14, 250 P.3d at 277 (quoting *State v. Cordeiro*, 99 Hawai‘i 390, 424-25, 56 P.3d 692, 726-27 (2002)). Such a prohibition helps to maintain the distinction between argument and evidence and seeks to avoid the special weight juries often afford to the State's comments. *See State v. Marsh*, 68 Haw. 659, 660-61, 728 P.2d 1301, 1302 (1986); *e.g.*, *State v. Pacheco*, 96 Hawai‘i 83, 95, 26 P.3d 572, 584 (2001) (overturning a conviction where the [prosecutor] "characteriz[ed] . . . Pacheco as an 'asshole[,]' [which] strongly conveyed his personal opinion and could only have been calculated to inflame the passions of the jurors and to divert them . . . from their duty to decide the case on the evidence").

Pursuant to the foregoing discussion, we conclude that even though the Prosecutor couched many of his credibility arguments in language suggesting that he could have been sharing his own beliefs on the matter, Statements 6, 8, and 9 represent permissible commentary on both the evidence in the record-whether conflicting or otherwise-and also the credibility of witnesses who offered that evidence. As such, those statements were not improper. Furthermore, when taken in context, it is clear that the Prosecutor intended Statement 10 to direct the jury's attention to a "self-evident" fact within the "common understanding" of lay persons—i.e., that when a man is kicked in the groin, the immediate effects can be debilitating. *Thompson*, 318 P.3d at 1245. Moreover, evidence was adduced at trial that, at least for Maui Police Department Officer William Melton,

"[a]nytime a guy gets kicked in the groin, that's an attention grabber," supports such a reading. Based on Officer Melton's statement and Conroy's testimony regarding the precise way in which he was bent in pain after being allegedly kicked in the groin, it is unlikely that Statement 10 served to direct the jury's attention to facts outside of the evidence in the case.[7/] Thus, Statement 10 was also not improper.

B. Whether the Improper Statement Was Harmless Beyond a Reasonable Doubt.

We have concluded that Statement 7 was improper. This conclusion, however, does not end our inquiry. Rather, "[p]rosecutorial 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. Carvalho*, 106 Hawai'i 13, 16 n.7, 100 P.3d 607, 610 n.7 (App. 2004) (quoting *State v. McGriff*, 76 Hawai'i 148, 158, 871 P.2d 782, 792 (1994)). To determine whether the error was harmless beyond a reasonable doubt, we consider "whether there is a reasonable possibility that the error complained of might have contributed to [Conroy's] conviction." *Kekona*, 120 Hawai'i at 445, 209 P.3d at 1259 (quoting *Espiritu*, 117 Hawai'i at 141, 176 P.3d at 899). The following three factors are relevant to this determination: "(1) the nature of the conduct; (2) the promptness [or lack] of a curative instruction; and (3) the strength or weakness of the evidence

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[7/] Although the second part of Statement 10 arguably takes the form of an improper "Golden-Rule" argument in that the Prosecutor effectively urged the jurors to abandon their impartial role and instead find facts from Conroy's more interested viewpoint, *see Thompson* 318 P.3d at 1244-45 (explaining that certain improper statements made by the prosecutor affected the objective detachment required of fact finders), we know of no authority extending the argument to situations in which the prosecutor asks the jurors to put themselves in the *offender/defendant*'s place, rather than in the place of the victim or her family. *See Ditto v. McCurdy*, 86 Hawai'i 93, 127, 947 P.2d 961, 995 (App. 1997) (citing *Black's Law Dictionary*, 623 (5th ed. 1979)), *aff'd in part, rev'd on other grounds*, 86 Hawai'i 84, 947 P.2d 952 (1997). *E.g.*, *Rogan*, 91 Hawai'i at 414, 984 P.2d at 1240 (noting that a prosecutor's characterization of "the incident as 'every mother's nightmare,' . . . 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); *see also Sechrest v. Baker*, 603 Fed. Appx. 548, 551 (9th Cir. 2015) ("[T]he statements in which the prosecutor called on the jurors to imagine the state of mind of the victims were . . . improper." (citing another source))).

against the defendant." *State v. Schnabel*, 127 Hawai'i 432, 453, 279 P.3d 1237, 1258 (2012) (quoting *Mainaaupo*, 117 Hawai'i at 252, 178 P.3d at 18) (internal quotation marks omitted). Below, we consider Statement 7 in relation to each of the three factors.

As to the first factor, Conroy argues on appeal that the "nature" of the above-excerpted portions of the State's closing arguments

> show[] repeated purposeful conduct where the government prosecutor s[ought] to inflame the passions of the jury in an improper manner. By inference and innuendo, the prosecutor s[ought] to suggest a concerted, calculated and planned effort on the part of the defendant, when the record was devoid of such evidence. His argument [was, in effect,] telling the jury to feel sorry for the scope of the injury to the complainant and convict Conroy on that basis. Such a tactic is improper.

In order to assess whether the first factor weighs in favor of holding Statement 7 to be harmless, we "evaluate the severity of the conduct" and its ultimate effect on the proceedings. *Tuua*, 125 Hawai'i at 16, 250 P.3d at 279.

Statement 7 was a dramatic, one-line summary of the State's theory of the case. By referring to Conroy's act of punching CW in the face, which caused her several facial fractures, as the time *when Conroy broke CW's face*, the Prosecutor tied in the rhetoric of his previously delivered initial closing argument (which stated, for example, that "when Defendant broke [CW]'s face, . . . [h]e broke something inside of her as well") and, as a result, made the State's entire argument more cohesive.

The nature of the statement was improper, however, because it was phrased in the first-person point of view—*You break my heart, I break your face*—as though Conroy either spoke those words or had this thought at some time. Yet Conroy never testified that he intended to hurt CW; he was not asked, and did not disclose, his emotions regarding the divorce or ending relationship, nor did he tell the jury anything to support an inference that his actions were premeditated (although other witnesses seemed to attribute that type of sentiment to him). Accordingly, it might be said that "the statement[] diverted the jury from its duty to decide the instant case on the evidence" before it. *Walsh*, 125 Hawai'i at 297, 260 P.3d at 376 (quoting

Mattson, 122 Hawai'i at 326, 226 P.3d at 496). Moreover, by figuratively putting words in Conroy's mouth, the Prosecutor indirectly implicated Conroy's Fifth-Amendment rights. Accordingly, the first factor weighs in favor of finding that Statement 7 was not harmless. *See Schnabel*, 127 Hawai'i at 449-50, 279 P.3d at 1254-55 (explaining that improper statements of this kind are usually not harmless when they implicate the defendant's constitutional rights).

Factor 2 augurs in favor of harmlessness because Conroy objected to Statement 7, and the trial court sustained the objection, and because defense counsel followed up its objection to Statement 7 with an oral motion to strike, which the court granted before instructing the jury to disregard the remarks. *Cf., e.g., Pacheco*, 96 Hawai'i at 96, 26 P.3d at 585 ("[B]y overruling defense counsel's objection, the circuit court, at least tacitly, placed its imprimatur upon the [Prosecutor's improper statement], thereby risking the implication that it, too believed [the statement] and inviting the jury to share in that belief."). *See generally State v. Wakisaka*, 102 Hawai'i 504, 516, 78 P.3d 317, 329 (2003) ("Generally we consider a curative instruction sufficient to cure prosecutorial misconduct because we presume that the jury heeds the court's instruction to disregard improper prosecution comments." (citing *Rogan*, 91 Hawai'i at 415, 984 P.2d at 1241)).

As to the third factor, Conroy concludes that, "given the inconsistencies of the government witnesses and the context of the chaotic nature of the event, the evidence was by no means clearly in favor of the Government." We disagree.

In order to convict Conroy of Assault in the Second Degree, the State was required to prove each element of the offense, and the state of mind required for each element, beyond a reasonable doubt. Haw. Rev. Stat. § 701-114 (1993); *see also* Haw. Rev. Stat. § 702-205 (1993). Section 707-711(1) of the HRS defines the offense at issue and provides that "[a] person commits the offense of assault in the second degree if: (a) The person intentionally or knowingly causes substantial bodily injury to another; [or] (b) The person recklessly causes

. . . substantial bodily injury to another[.]" Furthermore, "[s]ubstantial bodily injury" is defined, in relevant part, as "bodily injury which causes . . . [a] bone fracture . . . ." Haw. Rev. Stat. § 707-700 (Supp. 2010).

Here, it is undisputed that CW suffered multiple fractures of her facial bones as a result of the incident. Moreover, it is undisputed that Conroy caused these injuries. Thus, Conroy caused CW "substantial bodily injury" in the form of multiple bone fractures within the meaning of the statute. *See* Haw. Rev. Stat. § 707-700. Therefore, regardless of any improper statements by the Prosecutor, the undisputed evidence clearly supports the result-of-conduct element of Conroy's conviction.

Moreover, even if we were to accept Conroy's version of events as true, the evidence adduced at trial compels the conclusion that Conroy's conduct in punching CW, was, at the very least, reckless. The degree of culpability required to commit Assault in the Second Degree is either "intentionally," "knowingly," or "recklessly." Haw. Rev. Stat. § 707-711(a) and (b). Because these terms "are [listed] in a descending order of culpability, [HRS § 702-208 (1993)] establishes that 'it is only necessary [for the State] to articulate the minimal basis of liability[, i.e., recklessness,] for the more serious bases to be implied.'" Haw. Rev. Stat. § 702-208 cmt. (citing Model Penal Code, Tentative Draft No. 4, comments at 129 (1955)); *see Eastman*, 81 Hawai'i at 140, 913 P.2d at 66 ("[T]he prosecution needs only to prove the lowest of the three alternative levels of culpability, i.e., recklessness, in order to satisfy the state of mind requirement [for this offense]."). Under HRS § 702-206(3) (1993):

> (c) A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.
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> (d) A risk is substantial and unjustifiable within the meaning of this section if, considering the nature and purpose of the person's conduct and the circumstances known to him, *the disregard of the risk involves a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation.*

Haw. Rev. Stat. § 702-206(3)(c) and (d) (emphasis added).

Here, with regard to the issue of intent, Conroy testified both that he acted reflexively in response to being kicked in the groin and also that he had not been aiming for CW's face. However, Conroy outweighed CW by more than 100 pounds at the time of the assault, and he is at least eight inches taller than her. Moreover, Conroy punched CW with sufficient force to fracture her nose and cheekbone. Assuming for the sake of argument, then, that Conroy's testimony was true, the jury could still have found that he consciously disregarded the risk that his conduct presented to CW, and that his disregard constitutes a gross deviation from the ordinary person's standard of conduct. Haw. Rev. Stat. § 702-206(3)(c) and (d). Indeed, Conroy did not argue that he was mistaken as to the identity of his alleged assailant, nor was he unfamiliar with CW's strength and size, and he was at least aware that he was punching CW. *See In re Doe*, 107 Hawai'i 12, 19, 108 P.3d 966, 973 (2005). Accordingly, Conroy should have been aware of his far superior size and strength, and it is likely that an ordinary, law abiding individual with similar attributes would have exercised a greater degree of care when confronted with minor physical confrontation by a much smaller individual. Haw. Rev. Stat. § 702-206(3)(d). Thus, the State presented overwhelming evidence of recklessness.

Finally, Conroy urges us to "focus on the claim of self defense," which, he asserts, the State failed to disprove beyond a reasonable doubt.[8/] The Hawai'i Supreme Court has explained, however, that: "As to whether the prosecution disproved [a defendant]'s claim of self defense beyond a reasonable doubt, 'essentially, the prosecution does this when the trier of fact believes its case and disbelieves the defense.'" *Doe*, 107 Hawai'i at 19, 108 P.3d at 973 (original brackets omitted)

[8/] In Conroy's words, the evidence supporting his claim of self-defense included:

> Conroy's [testimony] that he was kicked in the groin and punched in the head "before" he lashed out. There were multiple incidents where CW attacked and injured Conroy in the past. She hit him with a TV remote control in his head and knocked out a tooth. CW also kicked his hand and broke a finger in a prior incident[, and] CW admitted she struck Conroy first in this incident.

(quoting *State v. Pavao*, 81 Hawai'i 142, 146, 913 P.2d 553, 557 (App. 1996)). Therefore, Conroy has failed to offer any authority or demonstrate any facts that would compel an alternative result.

In sum, although the first factor arguably weighs against a finding of harmlessness as to Statement 7, factors two and three both weigh *in favor* of a determination that those remarks were, in fact, harmless. Moreover, the third factor is frequently found to be the decisive factor in such a harmless-error analysis. *See Schnabel*, 127 Hawai'i at 456 n.48, 279 P.3d at 1261 n.18. On balance, then, any error associated with Statement 7 appears to be harmless beyond a reasonable doubt.

II. Conclusion

Pursuant to the foregoing, we conclude that the bulk of the challenged statements do not reflect misconduct, and any misconduct associated with Statement 7 was harmless. Therefore, the May 2, 2012 Judgment is affirmed.

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Presiding Judge

Associate Judge

Associate Judge