NO. CAAP-15-0000477

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,
v.
JUSTIN MCKINLEY, Defendant-Appellant,
and
LAWRENCE L. BRUCE, Defendant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CRIMINAL NO. 14-1-0987)

MEMORANDUM OPINION
(By: Foley, Presiding J. and Fujise, J.
with Reifurth, J. concurring and dissenting)

Defendant-Appellant Justin McKinley (**McKinley**) appeals from the "Judgment of Conviction and Sentence" and "Mittimus; Warrant of Commitment to Jail" both entered on May 5, 2015 in the Circuit Court of the First Circuit[1] (**circuit court**).

On appeal, McKinley contends (1) the circuit court abused its discretion when it allowed Detective Derek Stigerts (**Stigerts**) of the Sacramento Police Department to testify as an expert on the commercial sexual exploitation of women and (2) that Plaintiff-Appellee State of Hawaiʻi (**State**) committed prosecutorial misconduct during its closing arguments that violated McKinley's constitutional right to a fair trial.

I. BACKGROUND

On June 17, 2014, the State indicted McKinley on one

[1] The Honorable Paul B.K. Wong presided unless otherwise indicated.

count of promoting prostitution in the first degree in violation of Hawaii Revised Statutes (**HRS**) § 712-1202(1)(a) (2014 Repl.); two counts of sexual assault in the first degree in violation of HRS § 707-730(1)(a) (2014 Repl.); and one count of kidnapping in violation of HRS § 707-720(1)(d) (2014 Repl.). The charge of promoting prostitution in the first degree[2] stated:

> COUNT 3: On or between April 13, 2014 to and including May 13, 2014, in the City and County of Honolulu, State of Hawaiʻi, [McKinley] did knowingly advance prostitution by compelling or inducing [the Complaining Witness (**CW**)] by force, threat, fraud, or intimidation to engage in prostitution, and/or did knowingly profit from such conduct by another, thereby committing the offense of [p]romoting [p]rostitution in the [f]irst [d]egree, in violation of [HRS § 712-1202(1)(a)].

On December 24, 2014, the State filed a motion in limine to introduce Stigerts as its expert witness "in the area of sex trafficking, sexual exploitation of women and the dynamics of the pimp-prostitute relationship." In response, on January 2, 2015, McKinley filed a motion in limine to exclude Stigerts from testifying. McKinley's motion in limine argued that "[Stigerts'] proposed testimony fails to meet the requirements for

---

[2] HRS § 712-1202 provides:

> **§712-1202 Promoting prostitution in the first degree.** (1) A person commits the offense of promoting prostitution in the first degree if the person knowingly:
>
> (a) Advances prostitution by compelling or inducing a person by force, threat, fraud, or intimidation to engage in prostitution, or profits from such conduct by another; or
>
> (b) Advances or profits from prostitution of a person less than eighteen years old.
>
> (2) Promoting prostitution in the first degree is a class A felony.
>
> (3) As used in this section:
>
> "Fraud" means making material false statements, misstatements, or omissions.
>
> "Threat" means any of the actions listed in section 707-764(1).

admissibility under [Hawaiʻi Rules of Evidence (**HRE**)] Rule[s] 702 [(1993)], 401 [(1993)], and 403 [(1993)] as outlined in [State v. Batangan, 71 Haw. 552, 799 P.2d 48 (1990)]" and that the testimony would not help the jury's understanding of the pimp-prostitute dynamic.

On January 5, 2015, the circuit court held a hearing on the various motions in limine, including the State's motion in limine to introduce, as well as McKinley's motion in limine to exclude, Stigerts as an expert witness.[3] At the close of the hearing, the circuit court stated:

> Well, based on the hearing that we just had concluded, the Court under [HRE Rule 702] will allow [Stigerts] to testify as an expert. The Court finds that based on his experience and training and his prior qualification as to commercial sexual exploitation of not only children but adults, he does possess knowledge in regards to the field of prostitution that is not possessed by the average trier of fact, and it is based on his training and experience.
>
> The Court further finds that it is relevant because the time period in which [CW] allegedly was associated in this case was from April 1st of 2014 through May 13, 2014, so it would explain—his testimony would assist the jurors to understand the circumstances and explain why perhaps the [CW] remained in the situation that she was in. So I will allow [Stigerts] to testify as an expert.

Between January 12 and January 23, 2015, the circuit court held a jury trial for McKinley and co-defendant Lawrence L. Bruce (**Bruce**).[4] Stigerts was the first witness the State called to testify. Stigerts testified about his experience investigating commercial sexual exploitation cases as a police detective for the Sacramento Police Department's Vice Unit, including his work with the Federal Bureau of Investigation's Child Exploitation Task Force. The State moved to qualify Stigerts as an expert in the "area of commercial sexual exploitation of women and children[.]" McKinley objected, and the circuit court sustained the objection on that basis that the State needed to better clarify Stigerts' qualifications to

[3] The Honorable Randal K.O. Lee presided.

[4] Bruce was charged with one count of promoting prostitution in the first degree and one count of sexual assault in the first degree.

testify as an expert in the commercial sexual exploitation of women.

Stigerts then testified more specifically about his experience investigating adult prostitution cases and the "crossover" between adult and child prostitution cases. The State then again moved to qualify Stigerts as an expert in the area of commercial sexual exploitation of women. McKinley objected on the basis of lack of foundation and was given the opportunity to conduct a voir dire of Stigerts on his qualifications. At the end of voir dire, McKinley reasserted his objection to qualifying Stigerts as an expert witness. Over McKinley's objection, the circuit court qualified Stigerts as an expert in the area of the "commercial sexual exploitation of women." Stigerts then continued to testify on what he referred to as the "prostitution-pimp subculture."

After Stigerts testified, the State called CW to testify against McKinley. CW testified that McKinley, whom she knew as "Jojo," was a pimp and that she was forced to prostitute as his "property" or risk getting "beat up." CW testified that she did not want to prostitute but that she was too afraid of McKinley to protest and was trying to make money to "go back home to Alaska." CW testified that once she became McKinley's "property," he held her identification card and her social security card and only got them back from McKinley when she had to go to court following her arrest for prostitution. As McKinley's "property," all the money that CW made from prostituting went to him.

CW also testified that while staying at the Pagoda Hotel, McKinley beat her, choked her, and forced her to take off her clothes to shower while Bruce was present. During her testimony, the State questioned her about a video the State had her watch prior to the trial. CW testified that the video was of McKinley "beating [CW] up" and her "stripping" on May 9. She also testified that only she and McKinley were in the video and that the video accurately reflected the events that occurred on

that day.[5] CW also testified that she could hear McKinley's voice in the video, but she did not recall whether she heard her own.

The State then played the video for the jury:

> MALE SPEAKER: (Indiscernible) fuck (indiscernible).
>
> FEMALE SPEAKER: It came from my —
>
> MALE SPEAKER: Bitch, you (indiscernible). Huh? Huh? 'Cause you bad luck.
>
> FEMALE SPEAKER: No.
>
> MALE SPEAKER: Huh? You costing everybody money. You costing my nigga money. You costing me money with your games. Huh? What you going do? You going make your mind up, or you going (indiscernible) this money, or, bitch, you going pack your shit and leave. What the fuck you going do? Huh?
>
> FEMALE SPEAKER: (Indiscernible.)
>
> MALE SPEAKER: What are you going do?
>
> FEMALE SPEAKER: Get money.
>
> MALE SPEAKER: Get money by all means necessary; right? Bitch (indiscernible) everything today (indiscernible) shit (indiscernible) naked. You heard me? 'Cause I'm not playing with you. I'm not playing with you. I'm not going for it. Do you understand what I'm saying?
>
> FEMALE SPEAKER: (Indiscernible.)
>
> MALE SPEAKER: (Indiscernible.) Bitch. Bitch. Strip. Get naked. Take all this shit off. Get naked. Hurry up. You ain't moving fast enough. You're not moving fast enough. Faster. What you think this is? (Indiscernible) sitting here, sleep all day (indiscernible) word. Three? Three? Huh? (Indiscernible.) You want to sleep; right?
>
> FEMALE SPEAKER: Yeah.
>
> MALE SPEAKER: (Indiscernible) do all this shit (indiscernible) but, bitch, you want to get money, or you want to play games? Which one you wanna do?
>
> FEMALE SPEAKER: (Indiscernible) money.
>
> MALE SPEAKER: 'Cause you can go now. (Indiscernible) another motha fucka (indiscernible) call your phone (indiscernible), I'm going beat your brains (indiscernible). You understand what I'm saying?
>
> FEMALE SPEAKER: Yeah.
>
> MALE SPEAKER: Or you can simply just go. 'Cause it

[5] The circuit court accepted the exhibit containing the video footage into evidence without objection from McKinley.

> don't make me no nevermind. I'm past this stage. Used to beat bitches a long time ago. You can go. If I gotta put my hands on you. My bitch give money. We give money, bitch. You chose me; right?
>
> FEMALE SPEAKER: (Inaudible.)
>
> MALE SPEAKER: What?
>
> FEMALE SPEAKER: Yes.
>
> MALE SPEAKER: I don't hear you.
>
> FEMALE SPEAKER: Yes.
>
> MALE SPEAKER: In the shower, man.

CW testified that while being hit by McKinley she was "just trying to protect [her]self" and that she received bruises to her neck and leg as a result. CW testified that she did not know why McKinley hit her that day, but also testified that when McKinley referred to calls going to voicemail in the video, he was likely referring to calls from clients that CW did not answer. CW testified that she stopped answering client calls because she "didn't want to prostitute no more." She testified that after the incident with McKinley, she likely went on one more date with a client but that she "really [did not] remember." CW disagreed with the defense counsel's suggestion that the reason McKinley beat her up was because she had stolen items or because she did not help pay for the hotel rooms that she, McKinley, and Keshawn Stewart (**Stewart**) were living in.

After the State rested, McKinley moved for a judgment of acquittal, which the circuit court granted in respect to McKinley's kidnapping charge, but denied as to all other charges against him.[6]

[6] The circuit court entered its written Judgment of Acquittal on January 26, 2015. We note that Bruce also moved for a judgment of acquittal for his charges of promoting prostitution in the first degree and sexual assault in the first degree. The circuit court granted the judgment of acquittal on both charges based on insufficient evidence, but found that there still remained sufficient evidence to proceed on a charge for promoting prostitution in the second degree. The circuit court entered a written Judgment of Acquittal on January 26, 2015 that acquitted Bruce of his promoting prostitution in the first degree and sexual assault in the first degree charges, but added promoting prostitution in the second degree as a charged offense against Bruce.

Next, McKinley called Stewart to testify and her testimony refuted most of CW's testimony. Stewart testified that McKinley was her boyfriend, not her pimp, and that she lived and sometimes prostituted with CW without McKinley encouraging or benefitting from their prostitution activities. Stewart testified that she and CW kept the money that they received from prostituting and could do with the money as they wished, although CW would sometimes give Stewart money to help pay for the hotel rooms that they shared. Stewart further testified that she told McKinley that she was an escort,[7] not a prostitute, and testified that she did not want to tell McKinley that she was a prostitute because having sex with other men was akin to "cheating" on McKinley. Stewart acknowledged that McKinley had hit the CW, but testified that he did it "trying to defend" Stewart because she was "complaining to [McKinley] over and over" that CW was not helping to pay for the hotel rooms they were renting, that CW was lazy, and that some of Stewart's money had gone missing. Stewart testified that she was not there when the incident occurred, but that CW called her after proclaiming that she did not steal Stewart's money.

Next, Bruce testified on his own behalf. Bruce testified that he did not know CW was engaged in prostitution. Bruce testified that the incident between McKinley and CW occurred because Stewart, who Bruce identified as McKinley's girlfriend, was "nagging" McKinley about CW taking her money. He testified that he heard McKinley yelling at CW and decided to video tape the incident to show to CW's ex-boyfriend.

The defense rested, and the State presented its closing arguments repeatedly characterizing the case as a "sex trafficking" case without objection from McKinley.

The State also stated:

> So this whole thing about her lying and can't be believed, well, the only people who can't be believed was [Stewart] and [Bruce]. The fact of the matter is that they

[7] Stewart testified that an escort would go on dates with men and get paid only for her time and were not paid to have sexual intercourse with the men.

> treated her 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[.]

McKinley objected on the basis that the prosecutor's statements were "a little bit far beyond arguing the evidence." The circuit court overruled McKinley's objection.

On January 26, 2015, the jury returned a verdict finding McKinley guilty of promoting prostitution in the first degree, but not guilty of sexual assault in the first degree. The circuit court entered its Judgment of Conviction and Sentence on May 5, 2015, sentencing McKinley to twenty years of incarceration. The circuit court also entered its Mittimus on May 5, 2015.

On June 22, 2015, McKinley filed his notice of appeal.

II. STANDARD OF REVIEW

A. Expert Testimony

> Whether expert testimony should be admitted at trial rests within the sound discretion of the trial court and will not be overturned unless there is a clear abuse of discretion. An abuse of discretion occurs when the decisionmaker exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party.

State v. Fukagawa, 100 Hawaiʻi 498, 503, 60 P.3d 899, 904 (2002) (citations and internal quotation marks omitted).

B. Prosecutorial Misconduct

> 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. Factors to consider are: (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. Rogan, 91 Hawaiʻi 405, 412, 984 P.2d 1231, 1238 (1999)

(citations and internal quotation marks omitted) (quoting State v. Sawyer, 88 Hawaiʻi 325, 329 n.6, 966 P.2d 637, 641 n.6 (1998)).

III. DISCUSSION

A. Expert Testimony

McKinley argues that (1) the circuit court erred in qualifying Stigerts as an expert in the area of "commercial sexual exploitation of women" because the State failed to set a proper foundation pursuant to HRE Rule 702; (2) Stigerts' testimony "did not assist the jury in comprehending or understanding something not commonly known or understood;" and (3) Stigerts' testimony improperly bolstered the credibility of CW.

HRE Rule 702 governs the admission of expert testimony at trial and provides:

> **Rule 702 Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

"Thus, a witness may qualify as an expert if he or she possesses a background in any one of the five areas contemplated by HRE Rule 702: knowledge, skill, experience, training, or education." Fukagawa, 100 Hawaiʻi at 511, 60 P.3d at 912.

The Hawaiʻi Supreme Court has identified three determinations that the trial court must make before admitting expert testimony into evidence:

> (1) the witness is in fact an expert; (2) the subject matter of the inquiry is of such a character that only persons of skill, education, or experience in it are capable of a correct judgment as to any facts connected therewith; and (3) the expert testimony will aid the trier of fact to understand the evidence or determine a fact in issue.

State v. Toyomura, 80 Hawaiʻi 8, 26 n.19, 904 P.2d 893, 911 n.19 (1995) (emphasis and brackets omitted) (citing Larsen v. State Sav. & Loan Ass'n, 64 Haw. 302, 304, 640 P.2d 286, 288 (1982)).

1. Expert witness qualifications

With respect to determining whether a witness is an expert in a pertinent field, the supreme court has maintained:

> It is not necessary that the expert witness have the highest possible qualifications to testify about a particular matter, but the expert witness must have such skill, knowledge, or experience in the field in question as to make it appear that his opinion or inference-drawing would probably aid the trier of fact in arriving at the truth. Once the basic requisite qualifications are established, the extent of an expert's knowledge of the subject matter goes to the weight rather than the admissibility of the testimony.

Fukagawa, 100 Hawaiʻi at 504, 60 P.3d at 905 (ellipses omitted) (quoting Toyomura, 80 Hawaiʻi at 26 n.19, 904 P.2d at 911 n.19).

Stigerts testified that he had a bachelor's of science degree in criminal justice from California State University, Sacramento; had been with the Sacramento Police Department in California since 1991; became a detective with the police department in 2005; and began investigating adult and child prostitution cases in 2006 through his work with the police department's vice unit and with the Federal Bureau of Investigation's Child Exploitation Task Force. Stigerts testified that he has been involved in "well over 150" cases concerning commercial sexual exploitation, with approximately thirty-five of those cases with solely adults and thirty cases with both adults and children. Stigerts conducted "over 250" interviews with prostitutes, with "[w]ell over a hundred" interview with prostitutes that were eighteen years old or older, constituting adult prostitutes.[8] Stigerts also testified that, as a police detective, he took classes on the subject of commercial sexual exploitation of children, which he stated was relevant to adult prostitution cases because the classes taught about the general "pimp-prostitute subculture."

McKinley argues that any experience and expertise that

[8] In addition, Stigerts stated that when "an arrest is made of a pimp, slash, exploiter" one of the things the vice unit or task force does is "interview that subject." Stigerts testified that the vice unit and task force has had several post-conviction interviews with pimps who agreed to speak about the way the prostitution sub-culture operates. Stigerts indicated that he talked to pimps about how the sub-culture operates "at least 20 times."

Stigerts had in adult prostitution was only "incidental to his primary work in the exploitation of children[,]" and therefore he was not an expert in the sexual exploitation of women. However, Stigerts' work involving child prostitutes does not nullify his work with adult prostitutes.

In addition to Stigerts' extensive testimony about his experience investigating adult and child prostitution cases separately, he testified to how the two types of prostitution were indistinguishable and that the classification of a "child" prostitute versus an "adult" prostitute was legal fiction without considerable differences in real life. Stigerts testified that there was considerable "crossover" between the sexual exploitation of women and children. When the State asked Stigerts, "Is there a separate subculture that involves only children as prostitutes, or are they intermixed with adults?", Stigerts responded:

> It's all intermixed. It all works pretty much the same. There are a [sic] little differences when you're talking about children, especially the younger that [sic] they are. Again, when you're talking about adult commercial trafficking and [an] underaged [sic] juvenile, it's all the same, pretty much. Everything that I had found from talking to either the adult -- the adult girls or the underaged [sic] girls, whether it's the methods of recruitment, the methods of control, the manipulation, it's all pretty much the same whether it's a child or an adult. And, again, I mean, we talk about if it's 17 and 300 days old, that's a child in the legal definition, what we deal with. And, you know, six months later, that's an adult. But the things don't change on the way that she works as a prostitute.

Based on the supreme court's standard, Stigerts' testimony was sufficient to establish himself as an expert in the field of commercial sexual exploitation of women. See Fukagawa, 100 Hawaiʻi at 504, 60 P.3d at 905; see also United States v. Brooks, 610 F.3d 1186, 1195-96 (9th Cir. 2010) (holding that a detective's experience and training in child prostitution qualified her as an "expert on the business of prostitution and the relationships between pimps and prostitute"). Because the State established that Stigerts satisfies the basic requisite qualifications to testify as an expert, McKinley's challenges to the extent of Stigerts' knowledge of the subject area goes to the

weight, rather than the admissibility, of his testimony. See Fukagawa, 100 Hawaiʻi at 504, 60 P.3d at 905. Therefore, the circuit court did not abuse its discretion by qualifying Stigerts as an expert in "the area of commercial sexual exploitation of women."

2. Scope of expert testimony

McKinley argues that "the public's perception of the pimp-prostitute subculture had changed within the last ten years due to education of the communities and law enforcement, hence the subject was not 'outside the ken or ordinary laity' that would require an expert on the topic." McKinley appears to base his contention on the fact that the public has access to some of the resources Stigerts references in his line of work.[9] McKinley's argument is without merit.

Expert testimony is meant to assist the trier of fact by providing "a resource for ascertaining truth in relevant areas outside the ken of ordinary laity." State v. Clark, 83 Hawaiʻi 289, 298, 926 P.2d 194, 203 (1996) (quoting Batangan, 71 Haw. at 556, 799 P.2d at 51). The Hawaiʻi Supreme Court has previously held "[t]he common experience of a jury, in most cases, provides a sufficient basis for assessment of a witness' credibility[,]" thus making expert testimony on a witness' credibility inappropriate. Batangan, 71 Haw. at 556, 799 P.2d at 51. The court recognized an exception, however, in cases of sexual abuse of children because child sexual abuse "is a particularly mysterious phenomenon and the common experience of the jury may represent a less than adequate foundation for assessing the credibility of a young child who complains of sexual abuse." Id. at 557, 799 P.2d at 51 (citations and internal quotation marks omitted). The supreme court maintained that "[c]hild victims of sexual abuse have exhibited some patterns of behavior which are seemingly inconsistent with behavioral norms of other victims of

[9] During trial, Stigerts testified that he learned about the "pimp-prostitute subculture" from various resources that are available to the general public, including books, such as "Pimpology: The 48 Laws of the Game", and films, such as "Pimps Up, Ho's Down" and "American Pimp."

assault" and noted:

> While jurors may be capable of personalizing the emotions of victims of physical assault generally, and of assessing witness credibility accordingly, tensions unique to trauma experienced by a child sexually abused by a family member have remained largely unknown to the public. The routine indicia of witness credibility—consistency, willingness to aid the prosecution, straight forward rendition of the facts—may, for good reason be lacking. As a result jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion.

Id. at 557, 799 P.2d at 51 (ellipsis and brackets omitted) (quoting State v. Moran, 728 P.2d 248, 251 (Ariz. 1986)).

This court has since applied the rationale in Batangan to uphold use of expert testimony to explain a possible reason for a complaining witness's recantation in cases involving abuse of a family member. See State v. Cababag, 9 Haw. App. 496, 507, 850 P.2d 716, 722 (1993) (holding that the family court did not abuse its discretion in permitting the use of an expert witness to testify that "at the trial of an alleged male batterer of a woman with whom he is living, where the woman recants her pretrial accusations that she was battered by the male, one reasonable explanation for the recantation is the battered housemate/spouse syndrome").

Similarly, expert testimony is appropriate in cases involving the commercial sexual exploitation of women. In the case at hand, Stigerts testified about the various ways pimps control the women that work for them and explained that women who prostitute may behave in counterintuitive ways. Stigerts explained the women often do not seek or accept help from law enforcement because they fear getting in trouble, as they are themselves engaged in the illegal activities. Stigerts testified that a lot of times the women who engage in prostitution do not have anyone to turn to for help and stay in the subculture because they have become isolated in an unfamiliar city or state. Stigerts also explained that a woman who prostitutes often fears that if she seeks help from law enforcement, her pimp or those associated with her pimp may see her as a "snitch" and seek retribution against her or her family. Stigerts testified that

even when women begin prostituting voluntarily, a lot of times force, fraud, or coercion "comes into play" at some point.

Like cases of child sexual assault and abuse of household members, the common experience of the jury represents a less than adequate foundation for assessing the credibility of a witness who either currently is or previously was a part of the "pimp-prostitute subculture." In fact, other jurisdictions have recognized that "the relationship between prostitutes and pimps is not the subject of common knowledge" and, therefore, it was appropriate for an expert to provide insight into the subculture aiding the jury's assessment of witnesses' credibility. Brooks, 610 F.3d at 1196 (quoting United States v. Taylor, 239 F.3d 994, 998 (9th Cir. 2001)). Given the nature of commercial sexual exploitation of women, the circuit court did not err in allowing Stigerts to testify as an expert witness.

3. Bolstering the credibility of CW

McKinley argues that Stigerts' testimony impermissibly bolstered the credibility of CW. Specifically, McKinley argues that "[b]y informing the jurors of what Stigerts believed were the typical behaviors of pimps and prostitutes, he implicitly vouched for [CW's] credibility in every instance where her claimed behavior or her claims as to the actions of McKinley was consistent with Stigerts' testimony."

In Batangan, the Hawaiʻi Supreme Court recognized that expert testimony on any subject "carries the potential of bolstering the credibility of one witness and conversely refuting the credibility of another[,]" but maintained that "[s]uch testimony, by itself, does not render the evidence inadmissible." Batangan, 71 Haw. at 558, 799 P.2d at 52. Instead, "[t]he pertinent consideration is whether the expert testimony will assist the jury without unduly prejudicing the defendant." Id. The supreme court held:

> [W]hile expert testimony explaining 'seemingly bizarre' behavior of child sex abuse victims is helpful to the jury and should be admitted, conclusory opinions that abuse did occur and that the child victim's report of abuse is truthful and believable is of no assistance to the jury, and therefore, should not be admitted.

Id.

Furthermore, as this court noted in State v. Mars, 116 Hawaiʻi 125, 170 P.3d 861 (App. 2007), in the context of a child sex abuse case:

> [T]here is absolutely nothing wrong with expert opinion testimony that bolster's [sic] the credibility of the indicted allegations of sexual abuse, e.g., the victim's physical examination showed injury consistent with sexual abuse, or the victim's psychological evaluation was consistent with sexual abuse. Establishing the credibility of the indicted acts of sexual abuse is what the State's case is all about and is the purpose for such expert testimony in the first place; the fact that such testimony may also indirectly, though necessarily, involve the child's credibility does not render it inadmissible.
>
> What is forbidden is expert opinion testimony that "directly addresses the credibility of the victim," i.e., "I believe the victim; I think the victim is telling the truth,"• or expert opinion testimony that implicitly goes to the ultimate issue to be decided by the jury, when such issue is not beyond the "ken"• of the average juror, i.e., "In my opinion, the victim was sexually abused." Although the distinction may seem fine to a layman, there is a world of legal difference between expert testimony that "in my opinion, the victim's psychological exam was consistent with sexual abuse,"•and expert testimony that "in my opinion, the victim was sexually abused." In the first situation, the expert leaves the ultimate issue/conclusion for the jury to decide; in the second, the weight of the expert is put behind a factual conclusion which invades the province of the jury by providing a direct answer to the ultimate issue: was the victim sexually abused?

116 Hawaiʻi at 140, 170 P.3d at 876 (emphases added) (quoting Odom v. State, 531 S.E.2d 207, 208-09 (Ga. Ct. App. 2000)).

Here, unlike in Batangan, Stigerts' testimony did not usurp the function of the jury or exceed the scope of permissible expert testimony. During McKinley's trial, Stigerts did not testify to the believability of CW nor did he testify about McKinley's culpability. Stigerts' testimony was based on his own expertise and experiences, and his testimony provided general background information about the nature of the "pimp-prostitute subculture", thus leaving the ultimate conclusions for the jury to determine. Stigerts' testimony was admitted to help the jury judge the credibility of CW and was not unduly prejudicial against McKinley, therefore, Stigerts' testimony was permissible.

B. Prosecutorial Misconduct

McKinley argues that his conviction should be reversed

because the State committed prosecutorial misconduct during its closing argument by "(1) using the inflammatory and prejudicial term 'sex trafficking' to describe McKinley's alleged conduct; (2) comparing the actions of McKinley to slavery; and (3) telling the jurors to consider that [CW] was 'somebody's daughter, she's somebody's friend, she's a mother, she's a woman, she is a person . . .'"

> 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."

Rogan, 91 Hawaiʻi at 412, 984 P.2d at 1238 (quoting State v. Quitog, 85 Hawaiʻi 128, 145, 938 P.2d 559, 576 (1997)).

1. Characterizing case as a "sex trafficking" case

McKinley argues that by characterizing the case as a "sex trafficking" case, the State misstated the law and misled the jury into believing that "McKinley was involved in acts beyond the conduct allegedly supporting the promoting prostitute charge." McKinley argues that the term "'sex trafficking' includes prostitution, but also [includes] other types of conduct such as pornography or sexual performances that were not at issue in this case."

During closing arguments, the State stated:

> So essentially what this case is about, this case is about sex trafficking. Sex trafficking is alive and well in Hawaii. Many of you probably haven't heard much of it, but this case was really an opportunity to hear about a very different part of the community, which is the pimp prostitution or the pimp prostitute world.
>
> Aside from what we already know about prostitution -- I think most people would think about streetwalkers or they think about escort services, maybe even massage parlors. I mean, that is the general concept that I think most people have when we talk about prostitution, but this case really is so much more than that. It is far more than just what we see, what we may have common knowledge of, because it gave us a glimpse into the world of prostitution and really what happens behind the scenes with the people that are involved in it -- the pimps, the prostitutes, and the people that they associate with.
>
> Really, when we talk about sex trafficking, we're talking about forced prostitution. I think what we all heard from the expert was generally that it can come in two

> forms, yeah. With an adult, it involves forced prostitution, and it also can involve prostitution of persons under the age of 18, which is not our case at all, so really what we're talking about is forced prostitution in this case.
>
> . . . .
>
> So sex trafficking is, generally speaking, it is codified in our penal code under very specific sections. It is called advancing prostitution or promoting prostitution, and you read all the instructions that the judge gave you, but I'm just going to go through these really quickly.

(Emphases added.)

The State then went on to describe the legal elements of promoting prostitution, while characterizing the offenses as "form[s] of sex trafficking":

> Promoting Prostitution in the First Degree. A person commits the offense of Promoting Prostitution in the First Degree if he knowingly advances by compelling or inducing a person by force, threat, fraud, or intimidation, to engage in prostitution; or it can be profits from the advancement of prostitution by another who compels or induces another by force, fraud, intimidation, to engage in prostitution.
>
> Promoting Prostitution in the Second Degree, another form of sex trafficking, a person commits the offense of Second Degree Promoting Prostitution if he knowingly advances or profits from prostitution.
>
> Now, here, it's really important for you to realize that the difference between Promoting I and Promoting II is the coersive [sic] element. Promoting I requires force, fraud, threat, or intimidation. Promoting Prostitution in the Second Degree does not require that, so you should not consider that if you're looking at Promoting Prostitution in the Second Degree, and that is specifically to [Bruce].[10] So that is a really important distinction to make between the two offenses.
>
> Advancing prostitution, the definition is out there. Really, ultimately, what you need to know is that a person causes or aids a person to commit or engage in prostitution. All you have to do is cause or aid. You can go through the rest of the definition, but causing or aiding someone to engage in prostitution. Doesn't require being a manager or having somebody employed. It really is just aiding them or causing them to engage in prostitution.
>
> Profits from prostitution, essentially, you just profit from the proceeds of prostitution. That's what the

---

[10] Although the State directed its promoting prostitution in the second degree remarks towards Bruce alone, we note that the State's remarks were also relevant to McKinley. Before closing arguments began, the circuit court instructed the jury that, if they found McKinley not guilty of promoting prostitution in the first degree, they remained tasked with determining whether he was guilty of the lesser included offense of promoting prostitution in the second degree.

> definition is. That's what you should go through.
>
> So these are very important, but the distinction really is in Promoting I and Promoting II and the coercive element in it.

Because McKinley did not object to the State's repeated use of the term "sex trafficking" at trial, we review the alleged errors for plain error. See State v. Wakisaka, 102 Hawaiʻi 504, 513, 78 P.3d 317, 326 (2003) ("If defense counsel does not object at trial to prosecutorial misconduct, this court may nevertheless recognize such misconduct if plainly erroneous."). "[Appellate courts] may recognize plain error when the error committed affects substantial rights of the defendant." Id. (quoting State v. Cordeiro, 99 Hawaiʻi 390, 405, 56 P.3d 692, 707 (2002)). Misstatements of the law during closing arguments may constitute prosecutorial misconduct if prejudicial. See State v. Espiritu, 117 Hawaiʻi 127, 142-44, 176 P.3d 885, 900-02 (2008).

In its answering brief, the State argues that the term "sex trafficking" is interchangeable with the applicable offense of "promoting prostitution" because, based on its plain meaning, the definition for "sex trafficking" and the legal definition of "promoting prostitution" have similar meanings. The term "sex trafficking" is a term of art with differing legal definitions based on one's jurisdictions. Compare N.Y. Penal Law § 230.34 (McKinney 2007) (listing a number of acts that constitute "sex trafficking," including intentionally advancing or profiting from prostitution by "unlawfully providing to a person who is patronized, with intent to impair said person's judgment . . . a narcotic drug or a narcotic preparation") with Minn. Stat. § 609.321 (2011) (defining "sex trafficking" as "(1) receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of the individual; or (2) receiving profit or anything of value, knowing or having reason to know it is derived from an act described in clause (1)"); see also G.A. Res. 55/25, annex II, "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against

Transnational Organized Crime" (Jan. 8, 2001) ("'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation."). Black's law dictionary defines "sex trafficking" as "[t]he act or practice of recruiting, harboring, transporting, providing, or procuring a person, or inducing a person by fraud, force, or coercion, to perform a sex act for pay." Black's Law Dictionary 1584 (10th ed. 2014).

During the time of McKinley's trial, Hawaiʻi courts had not defined "sex trafficking" nor did the Hawaii Revised Statutes contain a "sex trafficking" offense. Nevertheless, Hawaiʻi law and case law contained references to the term "sex trafficking" or "human trafficking" in the context of "promoting prostitution" offenses, much like how the State used the term during its closing argument. See State v. Vaimili, 135 Hawaiʻi 492, 494, 353 P.3d 1034, 1036 (2015) (describing the case as arising from defendant's "convictions for sex trafficking related crimes based on his conduct as a pimp for the complaining witness" where the defendant was charged with kidnapping, terroristic threatening in the first degree, promoting prostitution in the first degree, and carrying or use of a firearm in the commission of a separate felony); see also HRS § 706-650.5(3) (2014 Repl.) (establishing a "human trafficking victim services fund" to provide services to "victims of trafficking related to crimes under part I of chapter 712[,]" which is the "Prostitution and Promoting Prostitution" statute). Given that Hawaiʻi had not defined "sex trafficking" at the time of McKinley's trial[11] and that common use indicates

[11] In 2016, the governor of Hawaiʻi signed into law Act 206, which defined "sex trafficking" as having the same meaning as the definition of promoting prostitution in the first degree, as defined under HRS § 712-1202. H.B. 1902, H.D. 2, S.D. 1, C.D. 1, 28th Leg., Reg. Sess. (2016).

that the term is generally related to "promoting prostitution," we decline to view the State's use of the term as plain error.

Furthermore, even if assuming arguendo the State's use of the term "sex trafficking" was erroneous, McKinley's prosecutorial misconduct argument is still without merit. The nature of the State's conduct indicates that, notwithstanding the alleged erroneous use of the term "sex trafficking," the state asserted the correct legal elements of the promoting prostitution in the first degree offense. Furthermore, the State repeatedly asserted its belief that the term "sex trafficking" meant "forced prostitution" and that under Hawaiʻi law "sex trafficking" was referred to as "promoting prostitution." In fact, McKinley's own defense counsel used the term "sex trafficking" during closing remarks in reference to McKinley being "in charge" of CW, as opposed to CW acting as an "independent prostitute," which places the term "sex trafficking" within the proper analytical framework for Promoting prostitution in the first degree:

> Ladies and gentlemen, the State wants you to believe, they stood right here and they said this is about sex trafficking with [McKinley] in charge. It's not about sex trafficking by [McKinley]. It's about independent prostitutes, an independent prostitute who is telling you lies for whatever reason.

In addition, the circuit court's jury instructions included the correct elements of promoting prostitution in the first degree, further supporting a conclusion that the jury was not misled by the alleged error. See State v. Mahoe, 89 Hawaiʻi 284, 290, 972 P.2d 287, 293 (1998) ("Arguments of counsel generally carry less weight with a jury than do instructions from the court." (quoting Boyde v. California, 494 U.S. 370, 384 (1990))). Given the context of the State and McKinley's congruous use of the term "sex trafficking," the circuit court's correct recitation of the elements of promoting prostitution in the first degree, and the State's case against McKinley, even if assuming arguendo use of the term "sex trafficking" was erroneous, the State's use was harmless.

2. Comments about a time "where people were owned"

McKinley contends the State committed prosecutorial misconduct when it stated:

> The fact of the matter is that they treated her 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.

McKinley argues that the State's comments "were an obvious reference to slavery, which took place in America in the 18th and 19th centuries." Furthermore, McKinley argues that "[g]iven the history of slavery and the atrocities associated with it, the [State's] comparison of McKinley's actions to the systematic subjugation of an entire race of people was highly inflammatory and prejudicial."

"[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." Rogan, 91 Hawaiʻi at 413, 984 P.2d at 1239 (citing Quitog, 85 Hawaiʻi at 145, 938 P.2d at 576). The State's theory of the case was that McKinley used the threat of violence to force CW to continue prostituting against her will and treated CW as his "property," a characterization that CW introduced herself. The State's comments may have alluded to the practice of slavery but they did not highlight racial differences, cf. State v. Shabazz, 98 Hawaiʻi 358, 379-82, 48 P.3d 605, 626-29 (App. 2002) (holding that the State committed prosecutorial misconduct when it repeatedly referred to the complaining witness as a "young local woman" and the defendants as "six African-American males" where race was not a relevant factor), nor did they appeal to the racial prejudices of the jury; cf. Rogan, 91 Hawaiʻi at 412-15, 984 P.2d at 1238-41 (holding that the State's comments that the defendant was as a "black, military guy was an improper

emotional appeal that could foreseeably have inflamed the jury"). Instead, the State's comments were meant to characterize the nature of McKinley's alleged acts based on the evidence the State presented in support of its theory of the case and in a manner that was relevant to McKinley's charge of promoting prostitution in the first degree. In fact, the Ninth Circuit Court of Appeal has acknowledged the similarities between forced prostitution and slavery. See Coyote Pub., Inc. v. Miller, 598 F.3d 592, 600 (9th Cir. 2010) ("The federal government acknowledges the link between prostitution and trafficking in women and children, a form of modern day slavery."). The State's suggestion that McKinley's treatment of CW was akin to a form of modern day slavery was not erroneous and, therefore, did not constitute prosecutorial misconduct. See State v. Kiakona, 110 Hawaiʻi 450, 458, 134 P.3d 616, 624 (App. 2006) (holding that because the prosecutor's comments were not improper, there was no prosecutorial misconduct); see also State v. Schnabel, 127 Hawaiʻi 432, 452, 279 P.3d 1237, 1257 (2012) (determining whether the prosecutor's statements amounted to misconduct before determining whether the misconduct was harmless).

3. Referring to CW as "somebody's daughter, . . . somebody's friend, . . . a mother, . . . a woman, . . . a person"

McKinley also contends the State committed prosecutorial misconduct when it stated:

> 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.) Citing to Rogan, McKinley argues the State's comment impermissibly "induced the jurors to render a verdict based on their sympathy or emotions[,]" instead of the evidence and the law.

In Rogan, Rogan was charged with three counts of sexual assault in the first degree and five counts of sexual assault in the third degree. Rogan, 91 Hawaiʻi at 409, 984 P.2d at 1235. The twelve-year-old complaining witness testified she invited Rogan, who was twenty-one on the day in question, to her family home while her mother and stepfather were away. Id. She alleged that Rogan subjected to her to various acts of sexual contact and penetration until the complaining witness's mother came home and interrupted Rogan. Id. Rogan's testimony paralleled the complaining witness's, except he denied that any sexual contact or penetration took place. Id. at 410-11, 984 P.2d at 1236-37. During rebuttal argument, the prosecutor told the jury:

> There was one thing [that defense counsel mentioned] about, you know, it was the parents who wanted the conviction and somehow [the complaining witness] was coached. Yeah, you can bet the parents wanted a conviction. This is every mother's nightmare. Leave your daughter for an hour and a half, and you walk back in, and here's some black, military guy on top of your daughter.

Id. at 412, 984 P.2d at 1238 (emphasis added). Rogan moved for a mistrial based on prosecutorial misconduct, which the circuit court denied. Id. at 411, 984 P.2d at 1237. Rogan was convicted of four counts of unlawful sexual contact, either as charged or as lesser included offenses. Id.

On appeal, the Hawaiʻi Supreme Court noted in Rogan, that:

> Arguments that rely on racial, religious, ethnic, political, economic, or other prejudices of the jurors introduce into the trial elements of irrelevance and irrationality that cannot be tolerated. Of course, the mere mention of the status of the accused as shown by the record may not be improper if it has a legitimate bearing on some issue in the case, such as identification by race. But where the jury's predisposition against some particular segment of society is exploited to stigmatize the accused or the accused witnesses, such argument clearly trespasses the bounds of reasonable inference of fair comment on the evidence. Accordingly, many courts have denounced such appeals to prejudice as inconsistent with the requirement that the defendant be judged solely on the evidence.

Rogan, 91 Hawaiʻi at 413, 984 P.2d at 1239 (quoting the 1979 Commentary, ABA Prosecution Function Standard 3-5.8(c) (3d ed. 1993)). The supreme court held that "Rogan's race was not a

legitimate area of inquiry inasmuch as race was irrelevant to the determination of whether Rogan committed the acts charged" and, therefore, "the deputy prosecutor's reference to Rogan as a 'black, military guy' was an improper emotional appeal that could foreseeably have inflamed the jury." Rogan, 91 Hawaiʻi at 414, 984 P.2d at 1240. The supreme court also addressed the prosecutor's characterization of Rogan's alleged conduct as "every mother's nightmare":

> The 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 Rogan's race, the "every mother's nightmare" comment was not relevant for purposes of considering whether Rogan committed the acts charged.

Id.

Based on the supreme court's holding in Rogan, we hold that the State's reference to CW as "somebody's daughter, . . . somebody's friend, . . . a mother, . . . a woman," while perhaps true and supported by the evidence, was not a legitimate area of inquiry and thus constituted an improper plea that could have inflamed the jury. See id. CW's status as a daughter, friend, mother, and woman was not a disputed fact at trial and was not relevant to whether McKinley was guilty of promoting prostitution in the first degree. Cf. Kiakona, 110 Hawaiʻi at 459, 134 P.3d at 625 (holding that a prosecutor's references to "turf," "locals" and "haole tourists" during closing remarks were relevant to the defendant's motive and, therefore, did not constitute prosecutorial misconduct).

Like the prosecutor's comments in Rogan, the State's comment on CW's status represented an implied invitation for the jury to place themselves in CW's position evoking sympathy for her, thus enticing the jury to render a decision based on irrelevant facts. See Rogan, 91 Hawaiʻi at 414, 984 P.2d at 1240; see also Doe v. McCurdy, 86 Hawaiʻi 93, 127, 947 P.2d 961, 995 (App. 1997) (noting that arguments urging jurors "to place themselves or members of their families or friends in the place

of a person who has been offended and to render the verdict as if they or either of them or a member of their families or friends were similarly situated" are considered improper (brackets and internal quotation mark omitted), rev'd in part on other grounds, Ditto v. McCurdy, 86 Hawaiʻi 84, 947 P.2d 952 (1997)). Because the State's remark invited the jury to render a verdict based on facts irrelevant to whether McKinley was guilty or innocent of the offenses charged, the State's comment was improper and constituted prosecutorial misconduct. Cf. State v. Pacheco, 96 Hawaiʻi 83, 95-97, 26 P.3d 572, 584-86 (2001) (holding that the prosecutor's characterization of the defendant as an "asshole" constituted prosecutorial misconduct because it was irrelevant to his guilt and "could only have been calculated to inflame the passions of the jurors and to divert them, by injecting an issue wholly unrelated to [the defendant's] guilt or innocence into their deliberations, from their duty to decide the case of the evidence.").

Considering the context of the State's improper remark, the first factor in our harmless analysis, the "nature of the conduct," weighs in favor of McKinley. See Rogan, 91 Hawaiʻi at 414, 984 P.2d at 1240; cf. Schnabel, 127 Hawaiʻi at 452, 279 P.3d at 1257 (considering the context of the prosecutor's use of the term "mumbo jumbo" to determine that the prosecutor committed prosecutorial misconduct during closing arguments); State v. Meyer, 99 Hawaiʻi 168, 172, 53 P.3d 307, 311 (App. 2002) (holding that the prosecutor's reference to a law school professor during closing arguments, which the defendant argued exploited the prosecutor's personal knowledge, was "trivial and insignificant in the context of this case").

As to the second factor, "a prosecutor's improper remarks are generally considered cured by the court's instructions to the jury, because it is presumed that the jury abided by the court's admonition to disregard the statement." Rogan, 91 Hawaiʻi at 415, 984 P.2d at 1241 (quoting State v. McGriff, 76 Hawaiʻi 148, 160, 871 P.2d 782, 794 (1994)). Although McKinley objected to the State's comments, the circuit

court overruled his objection and did not give a curative instruction. Therefore, this factor also weighs heavily in favor of McKinley. See Rogan, 91 Hawaiʻi at 415, 984 P.2d at 1241.

The last factor that we must consider in determining whether the error was harmless is the strength/weakness of the evidence against McKinley. See Rogan, 91 Hawaiʻi at 415, 984 P.2d at 1241. Some factors that appellate courts have considered when determining the strength of conviction is the number of witnesses who testified against the defendant and the forensic evidence supporting prosecution. See id. (citing State v. Ganal, 81 Hawaiʻi 358, 377, 917 P.2d 370, 389 (1996)).

Here, the main witnesses called to testify to McKinley's culpability were CW, called by the State; Stewart, another female who engaged in prostitution with CW, called by McKinley; and Bruce, who testified on his own behalf. CW and Stewart gave conflicting testimonies, with CW testifying that she was forced to prostitute out of fear of physical harm from McKinley and Stewart essentially testifying that CW engaged in prostitution on her own volition, with no encouragement from or benefit to McKinley. Furthermore, the State's video of McKinley hitting CW does not conclusively implicate McKinley on his promoting prostitution in the first degree charge. CW could not testify to what motivated McKinley to do what he did, although the State's line of questioning suggested that McKinley was upset because CW did not respond to clients looking for a prostitute, and Bruce and Stewart both testified that the incident occurred because Stewart believed CW was taking her money. Therefore, like in Rogan, we cannot say that the State's evidence was so overwhelming as to outweigh the inflammatory effect of the State's comments during closing argument. See Rogan, 91 Hawaiʻi at 415, 984 P.2d at 1241.

Because the relevant factors for our prosecutorial misconduct analysis weigh heavily against the State and in favor of McKinley, we hold the State's remarks could possibly have contributed to McKinley's conviction and, therefore, were not

harmless beyond a reasonable doubt.

C. Double Jeopardy

Once an appellate court determines that the State's prosecutorial misconduct was not harmless, the appellate court must determine whether the double jeopardy clause of the Hawaiʻi Constitution bars reprosecution of the defendant. Rogan, 91 Hawaiʻi at 416, 984 P.2d at 1242. In Rogan, the Hawaiʻi Supreme Court held:

> Accordingly, we hold, under the double jeopardy clause of article I, section 10 of the Hawaiʻi Constitution, that reprosecution of a defendant after a mistrial or reversal on appeal as a result of prosecutorial misconduct is barred where the prosecutorial misconduct is so egregious that, from an objective standpoint, it clearly denied a defendant his or her right to a fair trial. In other words, we hold that reprosecution is barred where, in the face of egregious prosecutorial misconduct, it cannot be said beyond a reasonable doubt that the defendant received a fair trial.

Id. at 423, 984 P.2d at 1249 (footnotes omitted).

The Rogan court noted and emphasized:

> [T]he standard adopted for purposes of determining whether double jeopardy principles bar a retrial caused by prosecutorial misconduct requires a much higher standard than that used to determine whether a defendant is entitled to a new trial as a result of prosecutorial misconduct. Double jeopardy principles will bar reprosecution that is caused by prosecutorial misconduct only where there is a highly prejudicial error affecting a defendant's right to a fair trial and will be applied only in exceptional circumstances such as the instant case. By contrast, prosecutorial misconduct will entitle the defendant to a new trial where there is a reasonable possibility that the error complained of might have contributed to the conviction (i.e., the error was not "harmless beyond a reasonable doubt").

Id. at 423 n.11, 984 P.2d at 1249 n.11 (emphasis and citation omitted). Here, the State's remarks were not harmless beyond a reasonable doubt, but they also did not constitute an "exceptional circumstance." Because the State's comments did not rise to the level of egregiousness necessary for double jeopardy to bar the reprosecution of McKinley, we vacate and remand his case for a new trial consistent with this opinion. Cf. Shabazz, 98 Hawaiʻi at 383, 48 P.3d at 630 (holding that the prosecution's statements referring to the complaining witness as a "young local woman" and the defendants as "six African-

American males" did not "r[i]se to that pinnacle of egregiousness that bars reprosecution"); Rogan, 91 Hawaiʻi at 424, 984 P.2d at 1250 (holding that the prosecution's statement that "it was 'every mother's nightmare' to find 'some black, military guy on top of your daughter'" was so egregious that double jeopardy barred reprosecution of Rogan).

IV. CONCLUSION

Therefore, the May 5, 2015 "Judgment of Conviction and Sentence" and the May 5, 2015 "Mittimus; Warrant of Commitment to Jail" both entered in the Circuit Court of the First Circuit are vacated and this case is remanded for a new trial consistent with this opinion.

DATED: Honolulu, Hawaiʻi, August 31, 2016.

On the briefs:

Benjamin R.C. Ignacio
(Hawk, Sing & Ignacio)
for Defendant-Appellant.

Presiding Judge

Sonja P. McCullen
Deputy Prosecuting Attorney
City and County of Honolulu
for Plaintiff-appellee.

Associate Judge