IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,
Plaintiff-Appellee,

vs.

GERALD L. AUSTIN,
Defendant-Appellant.

SCAP-14-0000935

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-14-0000935; CR. NO. 12-1-0127)

JUNE 29, 2018

OPINION OF THE COURT AS TO PART I AND OPINION CONCURRING IN JUDGMENT AS TO PART II* BY POLLACK, J.

Although the prosecutor's statements in closing argument in this case were harmless beyond a reasonable doubt, assertions by a prosecutor that a defendant or witness lied when testifying should not be permitted during closing argument. Such comments raise a significant risk of unfair prejudice to a

* McKenna, J., joins this opinion in its entirety, and Wilson, J., joins this opinion as to Part I.

defendant's right to a fair trial while providing little or no valid assistance to a jury in discharging its responsibilities.

During Austin's trial, the prosecutor employed variations of the word "lie" twenty times in closing argument. He argued to the jury during his initial closing that Austin "not only lied to you yesterday, but to the police back on January 20th, 2012." The prosecutor asserted that Austin "flat out lied to [the police]" and described Austin's denials as "clear evidence that he lied to police." The prosecutor then asked, "Why would [Austin] lie about something so obvious to the police?" and stated that police "let him talk because they knew he was lying." The prosecutor went on to play recorded segments of Austin's police interview, at various points asserting "[t]hat's obviously a lie," "[h]e's lying to the police repeatedly," and "the defendant lied to the police again."

After playing the recording, the prosecutor again stated to the jury that Austin "lied to police two years ago, but he's persisted in these lies when he spoke to you yesterday." The prosecutor claimed Austin altered his testimony because "[h]e's already lied to police" before reiterating once more that "he lied to police; and he lied to you." The prosecutor used the phrase "lied to you" once more and characterized Austin's account as "lies" two additional times in his initial closing.

In rebuttal closing, the prosecutor again stated that Austin "straight-up lied to the police" and reiterated that "when confronted and given an opportunity to explain himself, he lied to the police." The prosecutor then twice more told the jury that Austin "lied to you" before urging the jurors to "vote quickly because justice in this case has waited for too long."

I. The Term "Lie" and Its Derivatives, When Applied to Witness Testimony, are Potentially Extremely Prejudicial

Courts across the country have recognized that the word "lie" and its derivatives are emotionally charged terms that may inject unfair prejudice into a proceeding when utilized by the prosecution in reference to a witness's testimony. See, e.g., Wend v. People, 235 P.3d 1089, 1096 (Colo. 2010) (en banc) ("[W]e again emphasize that a prosecutor acts improperly when using any form of the word 'lie' in reference to a witness's or defendant's veracity."); State v. Graves, 668 N.W.2d 860, 876 (Iowa 2003) ("We conclude from these cases that Iowa follows the rule that it is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments."); State v. Davis, 275 Kan. 107, 121 (2003) ("It is improper for a prosecutor to accuse a defendant of lying."); Williams v. State, 803 A.2d 927, 930 (Del. 2002) ("Furthermore, the prosecutor's continued characterization of [the defendant] as 'lying' was both inflammatory and patently

improper."); State v. Locklear, 294 N.C. 210, 217 (1978) ("It is improper for a lawyer to assert his opinion that a witness is lying. 'He can argue to the jury that they should not believe a witness, but he should not call him a liar.'" (quoting State v. Miller, 271 N.C. 646, 659 (1967))); Lewis v. State, 569 P.2d 486, 488 (Okla. Crim. App. 1977) ("Throughout his closing argument the prosecuting attorney repeatedly stated that the defendant had lied. This argument was highly improper and should have been stopped by the trial judge and the jury advised to disregard it."); see also State v. Rehkop, 180 Vt. 228, 242 (2006) ("The prosecutor's representation that he would have considered charging the defense witnesses with perjury went beyond the 'limits of fair and temperate discussion,' by stating blatantly his opinion that the defense witnesses lied under oath when they testified.").

The dangers posed by the term are multifold, but they share a common root. The word "lie" carries with it severe negative associations beyond a simple expression of factual inaccuracy. It denotes an intentional, wrongful act by the speaker to actively deceive the listener. "Lie" is conventionally defined as "an assertion of something known or believed by the speaker or writer to be untrue with intent to deceive." See Lie, Merriam-Webster (2018), https://www.merriam-

webster.com/dictionary/lie.[1] Thus, asserting that testimony is a lie makes three factual contentions: the witness is stating something untrue, the witness knows that it is untrue, and the witness is trying to deceive the listener.

The term, however, also includes a significant emotional component apart from its factual meaning. The word's strongly pejorative tone conveys the speaker's subjective disapproval that the witness would taint the judicial process with dishonesty, effectively coupling an assertion of the speaker's opinion with the factual contentions that are innate in the word "lie." Indeed, the subjective overtones conveyed by the word "lie" are so strong that this court has suggested that the term may invariably amount to an assertion of the prosecutor's personal opinion as to the dishonest character of a witness. State v. Basham, 132 Hawai'i 97, 113, 319 P.3d 1105, 1121 (2014) ("The word 'lie' is such a strong expression that it necessarily reflects the personal opinion of the speaker." (quoting Domingo-Gomez v. People, 125 P.3d 1043, 1050 (Colo. 2005))).

[1] Accord Lie, Dictionary.com Unabridged (2018), http://www.dictionary.com/browse/lie ("A false statement made with deliberate intent to deceive; an intentional untruth; . . . ."); Lie, Cambridge Dictionary (2018), https://dictionary.cambridge.org/us/dictionary/english/lie ("To say or write something that is not true in order to deceive someone.").

This is to say that the prosecutor's statement that Austin "lied to you" was functionally equivalent to "I think Austin lied to you" because it inherently involved a degree of personal, judgmental evaluation. Cf. State v. Pacheco, 96 Hawaiʻi 83, 95, 26 P.3d 572, 584 (2001) ("[T]he [prosecutor]'s characterization of Pacheco as an 'asshole' strongly conveyed his personal opinion . . . ."). Thus, the jury was likely to infer that it was the prosecutor's opinion without it needing to be explicitly stated.

Under our trial court system, counsel are prohibited from expressing personal opinions because such statements are equivalent to unsworn testimony that is not subject to cross-examination or evidentiary requirements. State v. Marsh, 68 Haw. 659, 660, 728 P.2d 1301, 1302 (1986); see also Hawaiʻi Rules of Professional Conduct (HRPC) Rule 3.4(g) (2014).[2] Allowing an advocate to express a personal opinion is also counter to

[2] HRPC Rule 3.4(g) provides as follows:

> Rule 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL.
>
> A lawyer shall not:
>
> . . .
>
> (g) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused[.]

principles of professionalism within the legal field because it "undermine[s] the objective detachment that should separate a lawyer from the cause being argued." Marsh, 68 Haw. at 660, 728 at 1302 (quoting Commentary to American Bar Association (ABA) Standards for Criminal Justice Standard 3.89 (1980)).

Further, a personal opinion, inferential or otherwise, as to the veracity of a witness's testimony impermissibly "invades the province of the jury by usurping its power to make credibility determinations." State v. Calara, 132 Hawai'i 391, 400, 322 P.3d 931, 940 (2014). Such an opinion is at best unhelpful to the factfinder because it "merely tell[s] the jury what result to reach." State v. Batangan, 71 Haw. 552, 559, 799 P.2d 48, 52 (1990) (quoting Commentary to Hawaii Rules of Evidence Rule 704 (1980)). "The jury is fully capable, on its own, of making the connections to the facts of the particular case before them and drawing inferences and conclusions therefrom," and conclusory opinions regarding a witness's credibility are accordingly inadmissible. Id. at 558, 799 P.2d at 52.

When it is a prosecutor who inferentially expresses an opinion about witness credibility, it is particularly problematic because, as we have often stated, a jury is likely to "give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office,

but also because of the fact-finding facilities presumably available to the office." State v. Klinge, 92 Hawaiʻi 577, 592, 994 P.2d 509, 524 (2000) (quoting Commentary to ABA Prosecution Function Standard 3-5.8 (1993)[3]); see also Hodge v. Hurley, 426 F.3d 368, 378 (6th Cir. 2005) ("It is patently improper for a prosecutor . . . to express a personal belief that a particular witness is lying."). A prosecutor's statement that a witness lied may "imply special or secret knowledge of the truth or of witness credibility" beyond what has been presented at trial.[4]

[3] Updated and recodified in 2015, the ABA Prosecution Function Standard provides in relevant part as follows:

> **Standard 3-6.8 Closing Arguments to the Trier of Fact**
>
> (a) In closing argument to a jury (or to a judge sitting as trier of fact), the prosecutor should present arguments and a fair summary of the evidence that proves the defendant guilty beyond reasonable doubt. The prosecutor may argue all reasonable inferences from the evidence in the record, unless the prosecutor knows an inference to be false. . . .
>
> (b) The prosecutor should not argue in terms of counsel's personal opinion, and should not imply special or secret knowledge of the truth or of witness credibility.
>
> (c) The prosecutor should not make arguments calculated to appeal to improper prejudices of the trier of fact. The prosecutor should make only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty.

ABA Prosecution Function Standard 3-6.8 (2015) (emphasis added).

[4] The prosecutor in this case may have even reinforced an impression that the opinion was based on personal knowledge by asserting to the jury that police "let [Austin] talk" during a police interview "because they knew he was lying." No evidence was adduced at trial as to the police's motivation in continuing the interview, but a juror could well infer that the

(continued . . .)

ABA Prosecution Function Standard 3-6.8(b) (2015); accord Klinge, 92 Hawaiʻi at 592, 994 P.2d at 524; Marsh, 68 Haw. at 661, 728 P.2d at 1302.

And, even when this is not the case, "the prosecutor's opinion carries with it the imprimatur of the Government," lending credence to such statements beyond what is afforded to the average person. United States v. Young, 470 U.S. 1, 18 (1985). Additionally, the prosecutor is "an individual, properly and highly respected by the members of the jury for his [or her] integrity, fairness, and impartiality." United States v. Wilson, 149 F.3d 1298, 1303 (11th Cir. 1998) (quoting Hall v. United States, 419 F.2d 582, 588 (5th Cir. 1969)). "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed." Berger v. United States, 295 U.S. 78, 88 (1935). Thus, "[a] prosecuting attorney's improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Marsh, 68 Haw. at 661, 728 P.2d at 1302 (quoting Berger,

(. . . continued)

prosecutor had inside information due to the special relationship between the prosecutor's office and law enforcement.

295 U.S. at 88). Accordingly, assertions that a witness has lied "may induce the jury to trust the Government's judgment rather than its own view of the evidence." Young, 470 U.S. at 18-19.

Regardless of whether it is characterized as an opinion or a factual inference, stating that a witness "lied" is an inflammatory accusation. The reprehensible nature of lying is deeply ingrained in most people from early childhood, and the average person is likely to have a strong emotional reaction when authoritatively told that he or she has been lied to. See Wend, 235 P.3d at 1096 (en banc) (holding that prosecutors are prohibited from using the term "simply because the word 'lie' is an inflammatory term, likely (whether or not actually designed) to evoke strong and negative emotional reactions against the witness" (quoting Crider v. People, 186 P.3d 39, 41 (Colo. 2008))); cf. Pacheco, 96 Hawaiʻi at 95, 26 P.3d at 584 (holding that the prosecutor's disparaging characterization of the defendant "could only have been calculated to inflame the passions of the jurors").

Further, the assertion of lying is unnecessarily inflammatory because much of what is conveyed by the term has little if any relevance to the resolution of the case. Whether a defendant or other witness's testimony is delivered with deceptive intent--considered separately from its factual

accuracy--is generally immaterial to the factfinder's determination. Put another way, the factfinder's ultimate concern when considering testimony is not whether the witness knew his or her testimony was false or whether the witness delivered it with the intent to deceive the factfinder. Thus, the properly considered aspects of an assertion that a witness lied can generally be conveyed by stating that the individual's words were false, untrue, or inconsistent with the evidence, or by using a host of other phrases that are not unfairly prejudicial.[5]

Saying that a defendant lied to the jury may also be viewed as an accusation that the defendant performed a separate wrongful act independent of the charged offense, which "has the dangerous potential of swaying the jury from their duty to determine the accused's guilt or innocence on the evidence properly presented at trial."[6] Basham, 132 Hawai'i at 113, 319 P.3d at 1121 (quoting Domingo-Gomez, 125 P.3d at 1050). This is

[5] In the context of this case, the prosecutor's claim that Austin had previously lied to police was inextricably intertwined with the prosecutor's repeated improper assertions that Austin's testimony at trial was a lie. In light of this close connection and the sheer number of times the term was employed, we do not address whether reference to Austin's alleged lies to police would have been improper had it occurred without being entangled with similar assertions regarding Austin's testimony.

[6] Hawaii Revised Statutes § 710-1066(1) (2014) provides that no prosecution shall be brought based on a false statement that amounts to a denial of guilt for an offense for which the defendant is separately prosecuted. Thus, even assuming that a defendant lies about the subject of a charged offense, it is typically not prosecutable as a separate crime.

a particular concern when, as here, the prosecutor repeatedly stresses to the jurors that the defendant lied to them. Such a statement is likely to engender resentment in the jurors that the defendant would presume to deceive them--a matter largely unrelated to whether the defendant's past conduct satisfied the elements of the charged offense. Cf. Pacheco, 96 Hawai'i at 95, 26 P.3d at 584 (holding that the prosecutor's derogatory description of the defendant was intended "to divert [the jurors], by injecting an issue wholly unrelated to [the defendant]'s guilt or innocence into their deliberations, from their duty to decide the case on the evidence.").

Each of these considerations is compounded when the prosecution makes constant, repeated use of "lie" and its derivatives. Conversely, each subsequent use of the word lessens any arguable value it might offer, rendering the term needlessly cumulative in addition to extremely prejudicial. Indeed, even some courts that have held that it is permissible to characterize disputed testimony as a "lie" expressly provide an exception when "such use is excessive or is likely to be inflammatory." United States v. Peterson, 808 F.2d 969, 977 (2d Cir. 1987). Here, where the term was employed twenty times, the impropriety is manifest.

In sum, an assertion by a prosecutor that a defendant or other witness has lied is potentially extremely prejudicial.

It is likely to be construed by one or more members of the jury as an expression of the prosecutor's personal knowledge or opinion regarding the veracity of the witness's testimony, which a juror is apt to afford undue weight due to the prestige and fact-finding resources available to the prosecutor's office. Such statements are at best unhelpful, and they impermissibly invade the province of the factfinder to determine witness credibility. Further, even if considered as a factual inference, a claim that a witness lied is inherently disparaging and inflammatory and thus has the potential to sway the jury from the proper focus of its determination. It also conveys irrelevant information that is likely to appeal to a factfinder's animus toward the witness's asserted deception and possesses no significant probative value over more neutral alternatives. In this context, these negatives far outweigh any minimal utility the word may offer.

The separate opinion cites cases from other jurisdictions to argue that courts across the nation have adopted the view that a prosecutor's use of the word "lie" and its variants is not improper when such an assertion is supported by evidence. As a threshold matter, many of these decisions address issues not raised or decided in the present case; they involve instances in which a defendant or witness has admitted

to lying,[7] the term was applied solely to out-of-court statements,[8] a defendant argued on appeal that the unobjected-to use of "lie" amounted to plain error,[9] or other circumstances applied that are not here present.[10] Further, several of the courts in the cited cases have suggested that such commentary is acceptable as statements of the prosecutor's own personal views regarding witness credibility[11]--a practice that is prohibited by HRPC Rule 3.4(g) and that this court has soundly rejected on

[7] E.g., State v. Lankford, 399 P.3d 804, 827-28 (Idaho 2017).

[8] E.g., People v. Mastowski, 155 A.D.3d 1624, 1625 (N.Y. App. Div. 2017).

[9] E.g., Duke v. State, 99 P.3d 928, 957 (Wyo. 2004); People v. Edelbacher, 766 P.2d 1, 29 (Cal. 1989) (in bank); Rogers v. State, 280 P.3d 582, 589 (Alaska Ct. App. 2012).

[10] E.g., Commonwealth v. Sanchez, 623 Pa. 253, 317 (2013) (holding prosecutor's use of "lie" was not improper where it "was in response to, and was commensurate with" defense counsel's own repeated use of the term in reference to witness testimony); State v. McKenzie, 157 Wash. 2d 44, 59 (2006) (en banc) ("In the instances McKenzie cited, the deputy prosecutor actually never used the epithet 'liar'; rather, she suggested that McKenzie was 'lying to himself,' . . . ."); People v. Starks, 451 N.E.2d 1298, 1305 (Ill. App. Ct. 1983) (holding "assertions that defense counsel is engaging in trickery or misrepresentation in order to win an acquittal for his client" were improper (emphasis added)).

[11] E.g., State v. Gonzales, 884 N.W.2d 102, 118 (Neb. 2016) (holding the prosecutor's statement that the defendant lied did not constitute misconduct because the remark "was nothing more than commentary on what the prosecutor believed the evidence showed" (emphasis added)); Cooper v. State, 854 N.E.2d 831, 835-36 (Ind. 2006) ("[T]he prosecutor gave personal opinions as to the truthfulness of witnesses." (quoting Hobson v. State, 675 N.E.2d 1090, 1095 (Ind. 1996))); Davis v. State, 698 So. 2d 1182, 1190 (Fla. 1997) ("It was for the jury to decide what conclusion to draw from the evidence and the prosecutor was merely submitting his view of the evidence to them for consideration." (emphasis added)).

numerous occasions. See, e.g., Calara, 132 Hawaiʻi at 400, 322 P.3d at 940; Batangan, 71 Haw. at 559, 799 P.2d at 52.

More importantly, however, those courts that have adopted the separate opinion's position have often done so over deep uneasiness regarding a prosecutor's use of the term, noting the fine line between acceptable commentary and inflammatory personal opinion. E.g., State v. Lankford, 399 P.3d 804, 827-28 (Idaho 2017) (holding that "although the repeated use of the term 'liar' and its various grammatical forms is troubling and ill-advised, it did not rise to the level of prosecutorial misconduct" (emphasis added)); State v. Pedro S., 87 Conn. App. 183, 198 (2005) ("The issue is whether the prosecutor's argument . . . reflected merely the prosecutor's personal opinion of the defendant's credibility. . . . '[E]ven though it is unprofessional, a prosecutor can argue that a defendant is a 'liar' if such an argument is supported by the evidence." (emphasis added) (quoting State v. Spyke, 68 Conn. App. 97, 113 (2002))); see also State v. Lindberg, 347 Mont. 76, 87 (2008) ("'[A]ny trial counsel who invades the province of the jury by characterizing a party or a witness as a liar or his testimony as lies, is treading on thin ice, indeed.' . . . Such comments are unnecessary, unprofessional and run the risk of undermining the fundamental fairness of the judicial process." (quoting State v. Arlington, 265 Mont. 127, 158 (1994))); Commonwealth v.

Waite, 422 Mass. 792, 801 (1996) ("Also, we are troubled by the prosecutor's bald assertion to the jury that the defendant was 'a liar.' To argue to the jury in this manner was clear error."); United States v. Moore, 710 F.2d 157, 159 (4th Cir. 1983) (stating prosecutor's argument that defense witness insulted the jury by lying to them "strayed close to, if not beyond, the outer limits of proper argument"); Harris v. United States, 402 F.2d 656, 659 (D.C. Cir. 1968) (characterizing prosecutor's comments that, inter alia, defendant's testimony was "a lie" as "disturbingly close" to violating professional canons and lamenting the frequency with which prosecutors used such tactics, which are "at best boring irrelevancies and a distasteful cliche type argument").

Indeed, the nebulous nature of the purported distinction between the use of "lie" as a permissible inference and employment of the term as an inflammatory personal opinion is demonstrated by the vigorous dissents that holdings applying such a differentiation frequently inspire. See, e.g., State v. McKenzie, 134 P.3d 221, 231 (Wash. 2006) (en banc) (Sanders, J., dissenting) (arguing the prosecutor's "inflammatory comments were" a statement of personal opinion and "a deliberate appeal to the jury's passion and prejudice" (internal quotes omitted)); Hull v. State, 687 So. 2d 708, 733 (Miss. 1996) (Sullivan, P.J., dissenting) ("The prosecution's comments characterizing Hull as

a liar further denigrated Hull's presumption of innocence."). And some courts that have declined to uniformly prohibit the term's use in closing argument have reasoned that the word may also convey an inflammatory personal opinion when used during other parts of a trial. See, e.g., Commonwealth v. Potter, 445 Pa. 284, 287, 285 A.2d 492, 493 (1971) (holding that "branding appellant's testimony as a 'malicious lie'" during cross-examination was improper not only because it "exceeded the permissible bounds of cross-examination," but also because it "injected [a] highly prejudicial personal opinion of appellant's credibility into evidence, thereby clearly and improperly intruding upon the jury's exclusive function of evaluating the credibility of witnesses").

In short, courts have widely recognized that a prosecutor's accusation that a witness or defendant lied while testifying is at best problematic, and even those courts that permit such comments in closing are not in complete agreement as to how to delineate them from improper argument. Compare, e.g., McKenzie, 134 P.3d at 229 (holding argument is permitted when "other evidence contradicts a defendant's testimony"), with Commonwealth v. Coren, 774 N.E.2d 623, 631 n.9 (Mass. 2002) (stating argument is permitted "where the evidence clearly supports the inference that the defendant is lying" (emphasis added)). Thus, even were we to accept the separate opinion's

implicit argument that the term "lie" is not inherently an inflammatory expression of a prosecutor's personal opinion when applied to testimony, a prohibition could still be viewed as a necessary prophylactic.[12] Proscribing the use of the term and its variants in this context not only protects a defendant's right to a fair trial, but it also allays the uncertainty of counsel and trial courts otherwise tasked with determining when the use of the term crosses the line from "troubling," "ill-

[12] We have previously held that it is also improper for a prosecutor to argue to a jury that a defendant is lying based solely on the fact that he or she is a defendant. See State v. Basham, 132 Hawaiʻi 97, 116, 319 P.3d 1105, 1124 (2014). Such generic arguments call upon the jury to assume that a defendant is motivated to lie to avoid punishment. Because such an argument can be asserted indiscriminately as to any defendant, regardless of the evidence, it is completely unhelpful to the finder of fact. Moreover, arguing that the testimony of defendants should inherently be doubted contradicts the presumption of innocence--a foundation of our criminal justice system. That is, a contention that defendants are inherently motivated to lie effectively places the burden on defendants to prove they are testifying truthfully, which also has a chilling effect on the constitutional right to testify. We therefore reaffirm our decision in Basham and specifically note that it overrules any prior precedents to the extent they are in conflict, and we express our disapproval of those portions of the Intermediate Court of Appeal's recent opinion in State v. Magbulos that misapprehend and mischaracterize our holding in Basham. See 141 Hawaiʻi 483, 495-98, 413 P.3d 387, 399-402 (App. 2018) (arguing, inter alia, that Basham is contrary to the rule that defendants may be impeached in the same manner as other witnesses). Our holding today, which prohibits a prosecutor from referring to a defendant's testimony as a lie, will have the additional benefit of discouraging improper generic arguments regarding a defendant's credibility and of encouraging prosecutors to "make only those arguments that are consistent with the trier's duty to decide the case on the evidence." ABA Prosecution Function Standard 3-6.8(c).

We also reject any implication in Magbulos that an appellate court does not have the duty to rectify a prosecutor's improper arguments that prejudice a defendant simply because "[n]o trial is perfect." 141 Hawaiʻi at 492, 413 P.3d at 396. All appellate courts have a responsibility to ensure the fundamental fairness of the criminal proceedings they review, including appropriate consideration of opening statements and closing arguments that risk depriving a defendant of a fair trial. See State v. Rogan, 91 Hawaiʻi 405, 416, 984 P.2d 1231, 1242 (1999).

advised," and "unprofessional" into actual impropriety.[13] Lankford, 399 P.3d at 827-28; Pedro S., 87 Conn. App. at 198.

In light of these considerations and the extremely minimal utility the term "lie" and its derivatives have over more neutral alternatives, we have little trouble determining that the balance of factors weighs in favor of prohibition. Accordingly, we now hold that a prosecutor's assertion that a defendant or witness lied to the jury is improper and should not be permitted.[14]

II. On the Strength of the Evidentiary Record, the Improper Remarks are Harmless

Notwithstanding the foregoing, I do not believe there is a reasonable possibility in this case that the prosecutor's improper statements contributed to Austin's conviction. Where evidence of guilt is so overwhelming as to outweigh the inflammatory effect of improper comments, this court has held the error harmless beyond a reasonable doubt and has declined to

[13] Appellate courts attempting to articulate the standard trial courts are to employ in distinguishing between permissible and impermissible uses of "lie" have cited such amorphous factors as "context and tone." United States v. Dean, 55 F.3d 640, 665 (D.C. Cir. 1995). Logically, the list could be extended to include other ill-defined criteria like counsel's facial expression and body language. This know-it-when-you-see-it approach provides no concrete guidance to trial courts and virtually ensures exclusion will be applied from case to case in an arbitrary and inconsistent manner.

[14] The prosecutor's admonition to "vote quickly" was also improper in that an advocate should not urge the jury to hurry its deliberations or otherwise consider factors other than the evidence presented. See United States v. Polizzi, 801 F.2d 1543, 1558 (9th Cir. 1986).

vacate the defendant's conviction. See, e.g., State v. Ganal, 81 Hawaiʻi 358, 362-65, 917 P.2d 370, 374-77 (1996).

Given the strength of the evidentiary record in this case, particularly the DNA evidence conclusively tying Austin to the deceased and to the scene of the crime near the time the crime was committed, there is not a reasonable possibility that the jury would have reached a different verdict in the absence of the prosecutor's improper comments. The misconduct was therefore harmless beyond a reasonable doubt. Accordingly, I concur in this court's judgment.

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

I join in Part I of this opinion.

/s/ Michael D. Wilson