IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
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

DISSENTING OPINION OF WILSON, J., AND JOINING PART I OF THE OPINION OF POLLACK, J.

Defendant-Appellant Austin did not receive a fair trial. The lower court excluded entirely the exculpatory hearsay statements of an unavailable yet reliable witness whose testimony, if reasonably believed, would likely have exonerated

Defendant-Appellant. And, notwithstanding that credibility of the Defendant was the salient issue at trial, the prosecutor improperly opined repeatedly that the Defendant was "lying" and introduced evidence during closing argument that the police did not believe the Defendant's tape-recorded statements. Accordingly, I join Part I of Justice Pollack's opinion holding that it is improper for a prosecutor to state in closing argument that a defendant or witness lied while testifying. However, I do not agree the exclusion of exculpatory eye-witness evidence and the prejudice to Austin from this prosecutorial misconduct are "harmless" errors.

Austin was charged with murder in the second degree approximately twenty years after the decedent was found strangled and raped in her apartment. Though he did not recognize her from the picture shown to him by the investigating detectives, he did recall having consensual intercourse with a woman he met while visiting his grandmother who lived in the same apartment building. In support of his defense that he caused her no harm, he sought to introduce the testimony of Anne Wanous, a resident's daughter who happened to be in the walkway hours before the decedent was found dead in her apartment. As Ms. Wanous sat in front of the apartment adjacent to the decedent's apartment, she saw a black man exit the decedent's apartment. The defendant is Caucasian. She saw the black man

with two stuffed pillow cases. When the decedent was found dead in her apartment later that day, the pillows and pillow cases from her bed were gone, as were the sheets and other bed coverings.

Witness Wanous provided to the police her description of the black man with the pillows within a day of the time she saw him. The decedent was found dead on the afternoon of July 25, 1989. The next day, July 26, Ms. Wanous provided to police evidence corroborating Defendant Austin's defense that he did not murder her. She explained in a recorded interview that at 5:00 am, while she was sitting on a chair in the walkway outside her mother's apartment smoking a cigarette, she heard the sound of the stopper falling on the decedent's cat door. She looked in the direction of the apartment and watched a black man exit the apartment. He stood near the decedent's doorway for three to five seconds holding two stuffed white pillow cases. She observed specific details about the pillow cases. They were "standard size" and he held them by "the hem of the pillow case." During the time she was with him, he looked directly at her and she could see the "whites of his eyes." She was able to identify his approximate age. He was "about 19 to his mid-20's." She described his height: "about five foot eight." She was able to determine his build: "he was kind of on the slim side." She was able to observe the color of his hair: "dark

hair." Her observation of the man who exited the decedent's apartment was so complete that she noted the nature of his facial hair: "clean type, clean face." She was specific about his dress: "faded blue jeans", "short sleeve . . . blue . . . [s]hirt tucked in." She noted his dress was "neat." Her observations of his pants included a description of how they fitted: "you could see the shape of his legs." Ms. Wanous' observations also included seeing and hearing a car outside the apartment that left shortly after she watched him walk around the corner towards the elevator.

Witness Wanous was confident enough of her recollection to provide the detective a drawing she composed of the suspect's face. Due to her concern about the behavior of the black man with the pillows outside the decedent's apartment she told the detective "something kept telling me, sketch it, sketch it, sketch it." Her description of the suspect was further depicted in a composite sketch drawn by a police sketch artist; Ms. Wanous said the sketch matched her observations of the suspect's hair, eyes, and the shape of his face. Ms. Wanous also told her sister and niece that she had seen a black male exit the apartment carrying pillow cases.

It is beyond dispute that Witness Wanous' testimony is exculpatory evidence supporting Defendant-Appellant Austin's defense. It is also beyond dispute that he would have a

fundamental constitutional right to present Ms. Wanous' live testimony in support of his defense. Mr. Austin lost the opportunity to call Ms. Wanous as a witness due to her death prior to his arrest. Her demise does not, however, mean the demise of Mr. Austin's constitutional right to present Ms. Wanous' recorded exculpatory statement in his defense at trial.

Ms. Wanous' recorded statement is a reliable declaration that must be admitted in the interests of justice. Hawaii Rule of evidence 804(b)(8) specifically provides for the admission of a hearsay statement that has circumstantial guarantees of trustworthiness, is more probative on the point for which it is offered than any other evidence, and whose admission would best serve the interests of justice.[1] The

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[1] HRE Rule 804(b)(8) provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> . . . .
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> (8) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity

(. . . continued)

trustworthiness of her statement is self-evident. She provided a detailed description based on personal observation at close quarters during a time of great concern. She was sober, bearing no evidence of indecision regarding time, place or willingness to cooperate. Her description of seeing a black man coming from the apartment carrying pillows was reported within a day to her sister and niece.

The decision of the trial court excluding all evidence of Ms. Wanous' statements bares a strong misperception of the record. The trial court found her entire statement unreliable based primarily on the court's strong concern about the drawings made by the police sketch artist and Ms. Wanous. Specifically, the court noted that the sketch of the police artist wasn't "worthy even of the crime bulletin." The trial judge also deemed that Ms. Wanous' own drawing lacked credibility because she failed to include enough detail: "her own sketch was devoid of any detail". Curiously, the judge also cited as an important basis to exclude all Ms. Wanous' statements that her drawing was "the product of what Anne Wanous described as a 'feeling' that compelled her to draw the sketch." Why Ms. Wanous' feeling would render unreliable a drawing—made

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(continued . . .)
to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

independent of any police assistance—-of the man she saw exit the apartment within hours of the murder is unexplained. The lack of any explanation as to why Ms. Wanous' feeling renders her drawing and her entire recorded statement unreliable constitutes an abuse of discretion. The absence of any recognition of the myriad indicia of reliability of Ms. Wanous' statements in the record compounds the court's abuse of discretion. The court's decision contains no analysis of her sober, detailed observations of the suspect; the close proximity of her observations and her statement to the murder; the corroboration from the absence of pillows and bedsheets in the apartment; the lack of any personal bias or interest towards either the government, the defendant or his grandmother; the corroboration of her identification of the suspect as black and carrying pillow cases by her sister and niece.

Reliability is the sole criteria identified by the trial court as the basis for rejecting admission of Ms. Wanous' statements pursuant to HRE Rule 804(b)(8). However, based on the instant record, it is beyond cavil that the statements of Ms. Wanous, including her drawings, are more probative on the point for which they are offered—-namely that Mr. Austin was not the person who murdered the decedent—-than any other evidence which Mr. Austin could procure through reasonable efforts. He was not charged until over twenty years after the murder. He

had no evidence other than that from Ms. Wanous to corroborate his story.

Nor did the trial court address whether the general purposes of the rules of evidence and the interests of justice would be best served by the admission of Ms. Wanous' statements. The omission is telling. Mr. Austin was left without evidence corroborating the credibility of his statement that he did not rape and take the life of the decedent. There is no recognition of this circumstance in the trial court's decision excluding Ms. Wanous' statements.

The injustice inherent in the exclusion of evidence fundamental to Mr. Austin's defense is made apparent in Chambers v. Mississippi, 410 U.S. 284, 302 (1973). In Chambers, the United States Supreme Court found that the defendant's fundamental due process right to a fair trial under the Fourteenth Amendment was violated where he was prevented from introducing the hearsay testimony of witnesses who heard another witness confess to the charged offense of murder. 410 U.S. at 294-303. To deprive Chambers of witnesses who provided hearsay evidence exonerating him of murder deprived him of "testimony critical to the Chambers' defense." Id. at 300-302. The Court rejected a mechanistic application of the hearsay rule where to do so would "defeat the ends of justice":

> In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are

> implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Id. at 302. The trial court distinguished Chambers on the basis that, unlike the statements in Chambers, Ms. Wanous' statements were unreliable. As noted, the trial court's restricted view of the record, its unpersuasive reliance on the poor quality of the drawing of the police sketch artist and the lack of detail in Ms. Wanous' drawings, the finding that the statements were unreliable due to the feeling Ms. Wanous experienced as she drew her picture and the omission of facts strongly supporting reliability, constituted an abuse of discretion. Ms. Wanous' statements bore sufficient indicia of reliability to be admissible hearsay. The majority endorses the trial court's analysis of the reliability of Ms. Wanous' statements, with the added viewpoint that Ms. Wanous was influenced by the police to say the person she saw was black. Given the corroborating statements to the sister and niece identifying a black man before the police questioned her and the obviously clear recollection exhibited by the entire recorded statement, the position of the majority is unpersuasive. The majority also adopts the trial court's effort to distinguish the admission of the statements in Chambers on the basis that the statements of Ms. Wanous are less reliable. The fact that the witness in Chambers was available for cross examination is referenced by the majority to distinguish the statements of Ms. Wanous whose

death made her unavailable. However, the Chambers court cited the availability of the witness as a factor to be considered, not as a determinative requirement for admission. Id. at 300-301. The majority also notes that the statements in Chambers were against self-interest. Ms. Wanous' statements bear the indicia of reliability that a statement against interest demonstrates, namely there was no reason for her statement to be untruthful. She was an innocent bystander with no motive to seek to favor either the government or Mr. Austin. Significantly, the statements in Chambers were notably less reliable than Ms. Wanous' statement. They were the statements of an admitted liar who claimed to have murdered the decedent in the Chambers case, and subsequently recanted. Ms. Wanous had no history of claiming to have murdered the decedent, nor had she recanted such a statement – or any statement prior to the trial. Respectfully, it is a conclusion without a modicum of persuasive import that the statements of the proven prevaricator in Chambers who either murdered the decedent or lied about doing so would be more reliable that a law-abiding eyewitness with no history of untruthfulness or criminal activity. As in Chambers, exclusion of the statements critical to Mr. Austin's defense constituted a violation of his fundamental right under the Due

Process Clause of the Fourteenth Amendment to the United States Constitution to present evidence on his own behalf.[2]

Without the evidence critical to the corroboration of his credibility, Mr. Austin was subjected to repeated condemnation as a liar in the government's closing argument. Thirteen different times during his argument, the prosecutor declared Mr. Austin to have lied. At times, the prosecutor simply stated his opinion that Mr. Austin lied:

> Let's put this together. He had the opportunity: he has no alibi; he is left handed; the DNA evidence is conclusive; he lied to the police; and he lied to you.

As the prosecutor played the recording of Mr. Austin's statement to the police, he declared him a liar six times. The prosecutor also expressed his opinion that what Mr. Austin said to the police could not possibly be true: "He flat out lied to them with denials of things that couldn't possibly be true." The Supreme Court of Colorado recently found misconduct arising from the same argumentative technique employed by a prosecutor who repeatedly referred to the defendant's statements as lies. Wend v. People, 235 P.3d 1089, 1096 (Colo. 2010). Colorado employs an automatic rule prohibiting the use of "lie."[3] Id. The Court

[2] Mr. Austin's right under the companion provision of the Hawai'i State Constitution was similarly violated. Haw. Const. art. 1, § 5.

[3] "We have recently held that prosecutorial use of the word 'lie' and the various forms of 'lie' are categorically improper." Wend, 235 P.3d at 1096.

noted that the term reflects the personal opinion of the State's representative in the courtroom that the defendant is guilty:

> [T]he word "lie" is such a strong expression that it necessarily reflects the personal opinion of the speaker. When spoken by the State's representative in the courtroom, the word "lie" 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.

Id. The Colorado court was also concerned about the inflammatory nature of the term that could improperly appeal to the emotions of the jury:

> The word "lie" is prohibited not only because it poses a risk of communicating the lawyer's personal opinion about the veracity of a witness and implying that the lawyer is privy to information not before the jury, but also 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.[4]

Id.

The concern of the Wend court that the prosecutor's remarks would imply the prosecutor was aware of evidence not

[4] The majority declines to find misconduct unless the prosecutor literally expresses an opinion that the defendant is a liar by using the word "I". Respectfully, this Court did not apply the same requirement to its conclusion in State v. Pacheco, 96 Hawai'i 83, 26 P.3d 572, 584 (2001). Rather than find the prosecutor's description of the defendant as an "asshole" to be other than a personal opinion because the term "I" was not used, the Court held that "the [prosecution's] characterization of [the defendant] as an 'asshole' strongly conveyed his personal opinion 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 on the evidence." Id. at 95, 26 P.3d at 584. Pacheco is consistent with the Colorado Supreme Court's conclusion in Wend that by repeatedly calling the defendant a liar the prosecutor expresses an opinion that the defendant is a liar. To conclude that the prosecutor's claim--repeated thirteen times over--that Austin was lying does not reflect the personal opinion of the prosecutor because the term "I believe" was not used, is to make a distinction without a difference that is contrary to this Court's decision in Pacheco.

before the court is made apparent in Mr. Austin's case. The prosecutor introduced to the jury evidence as to what the police believed about Mr. Austin's credibility. The prosecutor stated that the police knew Mr. Austin was lying: "But they let him talk because they knew he was lying." No testimony was provided by any police officer that Mr. Austin was a liar, or that he was lying. Any such testimony is inadmissible as irrelevant. Nonetheless, the jury was invited by the prosecutor to consider that the police believed Mr. Austin was not telling the truth.

It is settled that prosecutors are bound to refrain from expressing their personal views as to a defendant's guilt or credibility of witnesses. United States v. Young, 470 U.S. 1 (1985); ABA Standards for Criminal Justice, Closing Arguments to the Trier of Fact § 3-6.8 (4th ed. 2015); State v. Marsh, 68 Haw. 659, 660, 728 P.2d 1301, 1302 (1986). To do so is to improperly add the stature and credibility of the prosecutor's office in support of the credibility of the government's evidence. In Marsh, the Court stated "expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." Marsh, 68 Haw. at 660-61, 728 P.2d at 1302 (quoting ABA Standards for Criminal Justice, Commentary § 3.89 (1980)). The prosecutor's statements

in Marsh to the jury during closing argument included: "I feel it is very clear and I hope you are convinced, too, that the person who committed this crime was none other than Christina Marsh" and "I'm sure she committed the crime." Id. at 660, 728 P.2d at 1302. In Marsh, as in the instant case, the prosecutor declared that the defendant was lying: "Use your common sense, ladies and gentlemen. That is not true. It's another lie. It's a lie, ladies and gentlemen, an out-and-out lie." Id. The Court in Marsh noted that "the prosecutor expressed on at least nine occasions her belief that defense witnesses had lied." Id. This compares to thirteen times in the present case that the prosecutor stated the defendant was lying. Expression by the prosecutor to a jury of personal knowledge unfairly prejudices the accused:

> The Supreme Court has observed that 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."

Id. at 661, 728 P.2d at 1302 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

The comments of the prosecutor introducing evidence that the police knew Mr. Austin was lying render the prejudice to Mr. Austin more significant than that caused by the prosecutor's statements in Marsh and Wend. In neither case was the opinion of police cited as evidence that the defendant was

not credible. In State v. Basham, we held that a prosecutor's comment during closing arguments that the defendant lied to the police bypassed evidentiary rules and was thus improper. State v. Basham, 132 Hawai'i 97, 114–15, 319 P.3d 1105, 1122–23 (2014). Here, the prosecutor went further to introduce a fact not in the trial record that the police believed the defendant lied in his statements to them about whether he committed the murder. By introducing the fact during closing argument, the prosecutor caused the violation of "fundamental rights" identified by the Basham court:

> In Klebig, the court determined that it was prejudicial error for a demonstration of physical evidence during the prosecutor's closing argument to allege new facts that had not been established during the trial. The Klebig court was concerned with preserving the defendant's fundamental rights.
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> [I]t is important . . . that the inference be reasonable not only to avoid abridging the defendant's right to cross-examine possibly untrue testimony but also to prevent a party from presenting to the jury in closing argument a fact that might have been ruled inadmissible at trial (or at least subject to a limiting instruction) simply by asserting in closing argument that the jury could infer it from the evidence that was presented and admitted.
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> . . . . That is, a defendant's fundamental rights to confront witnesses, test evidence, and to prevent the introduction of possibly inadmissible evidence may be compromised merely upon an assertion in closing argument that the jury could infer the fact from the evidence that was admitted. Closing arguments are not the place to introduce new evidence outside the safeguards of the Hawai'i Rules of Evidence.

Basham, 132 Hawai'i at 112–13, 319 P.3d at 1120–21 (internal citations omitted)(emphasis in original); cf. State v. Nofoa,

135 Hawai‘i 220, 230, 349 P.3d 327, 337 (2015) (holding that the introduction of evidence by the prosecutor during closing argument violated the defendant's right to confront the evidence).[5] Statements by the prosecutor in closing argument suggesting that jury members would be "fools" if they believed the "Defendant and percipient witnesses" were found to be prosecutorial misconduct by the Intermediate Court of Appeals in State v. Sanchez, 82 Hawai‘i 517, 533, 923 P.2d 934, 950 (App. 1996). Similar to the prosecutor's introduction of the unsubstantiated fact that the police witnesses did not believe

[5] The majority objects to this court's consideration of the prosecutor's statement of fact that the police did not believe the defendant. The majority's rationale for declining consideration of the prosecutor's misconduct is that it was not raised as an issue. To the contrary, the prosecutor's statement that the defendant lied to the police was raised in detail in defendant's opening brief and in the application for transfer to this court as prosecutorial misconduct. Nonetheless, as noted in the defendant's opening brief, it is the duty of this court to notice as plain error prosecutorial misconduct that has not been raised by the parties. It was so noticed in the case upon which the majority relies: State v. Marsh. 68 Haw. at 661, 728 P.2d at 1302. In Marsh, unlike the instant case, the misconduct of the prosecutor who called defendant Marsh a liar, was not raised by the defendant. Id. The Marsh court specifically noted its duty to address the prosecutor's conduct sua sponte as plain error:

> Since defense counsel did not object to the prosecutor's remarks, we must determine whether the prosecutor's misconduct constituted plain error which affected substantial rights of the defendant. Hawaii Rules of Penal Procedure, Rule 52(b).
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> We think the prosecutor's improper comments, taken as a whole, substantially prejudiced Marsh's right to a fair trial.

Id.; cf. State v. Deedy, 141 Hawai‘i 208, 234-36, 407 P.3d 164, 190-92 (2017) (Nakayama, J., dissenting) (relying on plain error to argue that the State was barred from retrying the defendant by judicial estoppel rather than collateral estoppel as the defendant maintained).

Defendant Austin, the prosecutor in Sanchez told the jury during closing argument that the Defendant and the percipient witnesses really didn't believe what they told the jury:

> The prosecutor argued that in the event of an acquittal, Defendant and the percipient witnesses would "get[ ] together again and they [sic] say, boy, it worked. We sure fooled that jury, didn't we?" Defendant contends that this argument was "outside the evidence at trial" and was an "emotional appeal" to the "passions and prejudices of the jurors." This argument improperly "direct[ed] the jury from its duty to decide the case on the evidence . . . by making predictions of the consequences of the jury's verdict." Standard 3-5.8(d), *ABA Standards, supra.* The prosecutor here argued, in effect, that an acquittal would brand the jury members as "fools."

Id. The Sanchez court found that the prosecutor's argument "improperly directed the jury from its duty to decide the case on the evidence." Id.

The prejudicial error committed when the prosecutor in closing argument introduced as a fact that the police did not believe Mr. Austin's denial of the murder is compounded by the improper exclusion of the only exculpatory evidence available to the defendant twenty years after the commission of the murder—- Ms. Wanous' statements. And in further violation of his right to a fair trial the prosecutor repeatedly told the jury that Mr. Austin was lying when he denied committing the murder. Thus, he was deprived of a fair trial in violation of his right to due process under the United States Constitution. The violation requires this court "to examine the record and determine whether there is a reasonable possibility that the error complained of

might have contributed to the conviction." State v. Kassebeer, 118 Hawai'i 493, 505, 193 P.3d 409, 421 (2008) (citation omitted). "If there is such a reasonable possibility . . . then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside." State v. Gano, 92 Hawai'i 161, 176, 988 P.2d 1153, 1168 (1999) (citation omitted).

As in Chambers, Basham, Marsh, Wend, and Sanchez, the errors were not harmless beyond a reasonable doubt. Reasonable possibility is an abiding understatement of the likelihood that the exclusion of Ms. Wanous' exculpatory eyewitness statement, the prosecutor's repeated assertions that Mr. Austin was a liar, and the improper introduction of incriminating evidence by the prosecutor during his closing argument might have contributed to the jury's finding of guilt. The errors gutted Mr. Austin's defense that he did not commit the murder. Mr. Austin's judgment of conviction should be vacated, and the case remanded for him to receive a fair trial.

/s/ Michael D. Wilson