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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,
Respondent/Plaintiff-Appellee,

vs.

JASON ENGELBY,
Petitioner/Defendant-Appellant.

SCWC-15-0000724

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-15-0000724; CR. NO. 12-1-1899)

June 12, 2020

DISSENTING OPINION BY WILSON, J.
IN WHICH POLLACK J., JOINS

Nearly thirty years ago, in State v. Batangan, 71 Haw. 552, 558, 799 P.2d 48, 52 (1990), this court held that expert testimony supporting a child sex assault complainant's credibility constitutes improper bolstering of the victim's testimony. In Batangan, we explicitly overruled our ruling in State v. Kim, 64 Haw. 598, 609, 645 P.2d 1330, 1339 (1982),

where we permitted the testimony of an expert witness who opined that the thirteen year old rape complainant was believable. As in Kim, the State in Batangan offered an expert to "implicitly" testify that the child victim was believable. 71 Haw. at 555, 799 P.2d at 50. In Batangan we overruled Kim to hold that expert testimony as to the credibility of the child sex abuse victim was "clearly prejudicial to Defendant" and "impermissible under [Hawai'i Rules of Evidence ("HRE") Rule] 702[.]"[1] Id. at 562, 799 P.2d at 54. Batangan acknowledged that multiple jurisdictions criticized the decision in Kim to permit expert testimony supporting the credibility of child complaining witnesses. In Batangan, this court identified the danger that expert opinion regarding the veracity of a child witness will unduly influence the trier of fact. We cautioned that "the trial court must keep in mind that an expert's opinion on the credibility of a victim is always suspect of bias and carries the danger of unduly influencing the triers of fact." Id. We held that "such testimony invades the province of the jury." Id. at 559, 799 P.2d at 52.

[1] At the time of the opinion in Batangan, HRE Rule 702 (1980) provided:

> 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 this case the State's expert Dr. Alexander Bivens' ("Dr. Bivens") testimony contravened the proscription in Batangan against expert opinion on the credibility of the child complaining witness. The effect of his testimony was "'the same as directly opining on the truthfulness of the complaining witness[.]'" Id. (quoting State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986)); see also State v. Klafta, 73 Haw. 109, 117, 831 P.2d 512, 517 (1992) (holding that expert testimony that is effectively testimony on the credibility of witnesses "is not admissible, and is of no help to the jury"). Dr. Bivens expert testimony, directly bolstered the child witness testimony.

Although Defendant Jason Engelby ("Engelby") directly objected to the introduction of Dr. Bivens' expert testimony in his pretrial motion in limine, the Majority concludes that his failure to specifically object during the trial precludes consideration of his appeal on that issue—and does not constitute plain error cognizable on appeal. Majority at 23. Respectfully, the record demonstrates timely, specific objection to Dr. Bivens' testimony, and even assuming that it did not, improper admission of expert testimony bolstering the credibility of the child complaining witness substantially affected Engelby's right to a fair trial.

I. DISCUSSION

A. The circuit court erred by admitting expert testimony that improperly bolstered the complaining witness's testimony by commenting on her credibility.

While testifying during the trial of Engelby, Dr. Bivens directly commented on the truthfulness of child witness testimony alleging sexual abuse. He did so after the State elicited his testimony on direct examination to explain distortions in recall and delayed recall by child witnesses subjected to sexual abuse. He was specifically asked by the State to explain "the phenomenon called 'tunnel memory[,]'" which he described as "a memory phenomenon related to the recall of a traumatic event" in which "the details of the traumatic incident itself tend to be magnified in the recaller's mind while peripheral details are recalled less well." On cross-examination, the defense sought to question Dr. Bivens about his opinions on compromised recall. To do so, defense counsel asked about a specific hypothetical scenario in which a child witness was told to lie in a divorce case. Dr. Bivens was asked to explain how one could determine that the child witness was lying, rather than suffering from compromised recall. In response to the defense's question, "[h]ow would you distinguish compromised recall from a situation where the child might be lying in the context of, say, a divorce where parties are

fighting and maybe a child is compelled to lie?", Dr. Bivens did not explain how one could distinguish a lie in a divorce case from compromised recall. Instead, he provided a nonresponsive answer in which he stated that there are certain kinds of lies which children are less likely to tell because those lies require "malicious qualities":

> There are certain kinds of lies that are much less common for children to tell, children are less likely to lie. If -- if there are known consequences or likely consequences that are going to befall somebody else that would require certain kinds of malicious qualities that tend to be rare.

(Emphasis added.) Only after providing this opinion did Dr. Bivens then address what he had been asked about in divorce cases:

> On the other hand -- well, so in the case -- in the cases that I've worked on where there were divorce problems, the child wasn't necessarily the source of the report. The reports were coming secondhand. So there are a number of factors that you can look at.

He did not explain how a lie is distinguished from compromised recall.

On redirect examination, the prosecution departed from the issue of compromised recall and requested that Dr. Bivens comment on the veracity of alleged child victims generally. The prosecution asked, "based upon your research and your clinical experience, are you familiar with, I guess, false reporting and -- and how often that occurs? . . . . Can you tell us a little bit about that?" In response to this open-ended question, Dr. Bivens first explained that getting a child to lie was an area

of "deep concern" to psychologists and one that they had studied and "knew a good bit about[.]" He testified that the easiest kind of lie to get a child to tell would be one requiring the child to withhold or deny having information, where nobody would get in trouble. He then testified that, conversely, it would be difficult to get a child to tell a lie that would result in "significant consequences for another person":

> The most difficult kind of lie to get a child to tell would be to get them to say something to -- to come out with something that's incorrect that didn't happen and when the child knows that there's going to be a significant consequence for another person. And so that's what -- that's what our research shows on a child lying.

He then went on to testify that children are not likely to make false allegations of sexual abuse:

> As far as false allegations of child sexual abuse goes, there's been a great deal of concern about this and there have been controversies in the scientific field as well. But all of the most recent research indicates that children independently are not likely to be sources of false allegations even in -- even in the context of divorce. We would be more likely to find a parent saying that a child said. But in terms of an independent report emanating from a child, those are very infrequently found.

(Emphasis added.)

Again, Dr. Bivens provided an opinion unrelated to the defense's original hypothetical question that asked about the distinction between compromised recall and compelled lying in the context of a divorce. Instead, Dr. Bivens opined that his profession, which knows a good deal about what causes a child to lie, believes it is difficult to induce a child to make a false allegation of sexual abuse. By any measure, Dr. Bivens'

testimony was a robust endorsement of the credibility of the child witness in this case who fit the criteria for truthfulness specified by Dr. Bivens: she was a child testifying about an incident of alleged sexual abuse that would have serious consequences for the perpetrator and, according to Dr. Bivens, it would be extremely difficult to get a child to lie about such an incident if it didn't happen. Additionally, Dr. Bivens told the jury that children are not likely to make false allegations about sexual abuse, and that cases of children independently making false allegations of abuse are very infrequent. This testimony of Dr. Bivens significantly and improperly bolstered the testimony of the child complaining witness whose testimony immediately followed that of Dr. Bivens.

B. The prejudicial nature of Dr. Bivens' testimony was magnified by an aura of special reliability resulting from his comments about his training and recent research and from the court's instructions to the jury.

In State v. Ryan, the ICA found that testimony that emphasized police officer witnesses' "training and experience in domestic violence cases served to give the officers an aura of being experts in evaluating the truthfulness of statements made by an alleged victim in domestic violence cases. This magnified the danger that the officers' testimony would have an undue influence on the jury." 112 Hawai'i 136, 141, 144 P.3d 584, 589

(App. 2006). This court has also recognized that "[s]cientific and expert testimony, with their aura of special reliability and trustworthiness, courts the danger that the triers of fact will abdicate their role of critical assessment, and surrender their own common sense in weighing testimony." Batangan, 71 Haw. at 556, 799 P.2d at 51 (internal quotation marks, citations, and brackets omitted).

Here, not only did the emphasis on Dr. Bivens' training and experience endow him with an aura of being an expert in determining the truthfulness of statements made by children alleging sexual abuse, but Dr. Bivens also explicitly linked his conclusions to "the most recent research[.]" In qualifying him as a witness, the State elicited from Dr. Bivens testimony that his Ph.D. dissertation was about men who had been convicted of molesting children, that he had treated hundreds of children for the effects of sexual abuse, such that it was an area of specialization for him, and that he lectured and trained extensively on child sex abuse and kept current with reliable research on child sexual abuse. Thus, his testimony that children infrequently lie about sexual abuse, and his assertion that this statement is supported by "all of the most recent research[,]" gave that opinion the weight of a scientific fact.

The aura of credibility of Dr. Bivens' testimony was also enhanced by the court with its instruction[2] to the jury that described the State's witness as an expert and emphasized that "[t]he law allows that person to state an opinion about matters in that field."[3]

The Majority contends that Dr. Bivens' testimony bore no relationship to the credibility of the complaining witness because Dr. Bivens was not familiar with her or the records in her case. Majority at 25-26. Respectfully, Batangan rejects the proposition that only direct testimony by an expert witness about the specific complaining witness can qualify as improper bolstering of the witness' credibility. In Batangan, though the clinical psychologist did not directly comment on the

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[2] With regard to Dr. Bivens' expert testimony, the jury was instructed as follows:

> During the trial you heard the testimony of one or more witnesses who were described as experts. Training and experience may make a person an expert in a particular field. The law allows that person to state an opinion about matters in that field.

[3] The Majority's reliance on State v. McDonnell, 141 Hawai'i 280, 293, 409 P.3d 684, 697 (2017), to conclude that the instruction diminished the significance of Dr. Bivens testimony is misplaced. See Majority at 26-27. Although the instruction to the jury in this case included language leaving to the jury the decision whether to accept Dr. Bivens' opinion, its purpose was to nonetheless identify the State's witness as an expert with training and experience that legally entitled Dr. Bivens to offer an opinion in the field of psychology as it pertained to the testimony of child victims of sexual abuse. In McDonnell, the expert did not offer an opinion that child witnesses are not likely to be sources of false allegations or that false allegations are infrequently found in their independent reports. McDonnell did not involve wholesale bolstering of the credibility of child witnesses alleging sexual abuse.

credibility of the child witness, the court nonetheless found the testimony supported the conclusion that the complainant was truthful:

> [W]hen Dr. Bond was asked to evaluate Complainant's credibility in her accusation of sexual abuse by Defendant, he did not explicitly say that Complainant was "truthful" or "believable", but there is no doubt in our minds that the jury was left with a clear indication of his conclusion that Complainant was truthful and believable.

71 Haw. at 562, 799 P.2d at 54. The extensive expert testimony in support of the complaining witness' testimony in this case similarly leaves no doubt that he opined she was truthful and believable.

C. This court is not precluded from recognizing the violation of Engelby's right to a fair trial arising from the improper expert testimony bolstering the credibility of the child witness.

The Majority also posits that, regardless of whether Dr. Bivens' testimony was improper bolstering, "Engelby did not properly preserve his claim about bolstering, and waived his ability to challenge the statements[.]" Majority at 23. The Majority holds that the defense's in limine challenge to Dr. Bivens' testimony during the HRE Rule 104 pretrial hearing was a general objection not sufficient to preserve his objection to Dr. Bivens' opinion bolstering the credibility of the complaining witness. Majority at 23-24. The motion and the trial court's ruling refute the Majority's position.

Prior to trial, in his second motion in limine, Engelby moved for a hearing under HRE Rule 104 to exclude Dr. Bivens' testimony. During the hearing, defense counsel stated that it was objecting to Dr. Bivens testifying for a number of reasons, including that his testimony would improperly bolster the credibility of the complaining witness:

> We are objecting that it would be unduly prejudicial to Mr. Engelby because it would be considered improper bolstering . . . .
>
> Also, we object that it would be usurping the function of the jury, that the jury can determine, from listening to witnesses, whether or not they choose to feel someone's credible or not, and it would violate my client's rights under the due process clause.

In response, the State argued for admission of Dr. Bivens' opinion, stating that "he's not going to be commenting on anyone's credibility or believability."

HRE Rule 103(a) provides that "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." "A trial court's ruling on a motion in limine is definitive when it 'leaves no question that the challenged evidence will or will not be admitted at trial[.]'" Kobashigawa v. Silva, 129 Hawai'i 313, 329, 300 P.3d 579, 595 (2013) (alteration in original) (quoting Quad City Bank & Trust v. Jim Kircher & Assocs., P.C., 804 N.W.2d 83, 90 (Iowa 2011)). Engelby did not, as the Majority states, make a "general

objection" to Dr. Bivens' testimony, Majority at 23-24, but presented specific objections at the HRE 104 hearing, including that Dr. Bivens' testimony would constitute improper bolstering.[4] The circuit court partially granted the defense's in limine motion. The court ruled Dr. Bivens' testimony was admissible only as to the issues of delayed reporting and tunnel vision. Once the court so ruled, defendant was not required to renew his objection. HRE 103(a). The State's expert witness violated the court's in limine order by opining as to the credibility of child witnesses, and the State compounded the violation of the court's order by asking Dr. Bivens to provide his opinion as to how often children lie.

Although Dr. Bivens, having previously been qualified as an expert witness in, by his estimation, more than sixty cases in state and federal court, failed to comply with the circuit court's order on the motion in limine, the prosecutor had the responsibility to not elicit evidence that violated the order. See People v. Warren, 754 P.2d 218, 224-25 (Cal. 1988) ("A prosecutor has the duty to guard against statements by his

[4] The Majority concludes that despite the defense's challenge to Dr. Bivens' testimony at the Rule 104 hearing, defense counsel failed to preserve Engelby's objection to Dr. Bivens' opinion as to the veracity of child testimony. Under the majority's analysis, including its analysis of defense counsel's cross-examination of Dr. Bivens, the failure to object or move to strike appears to establish a potential claim for ineffective assistance of counsel cognizable under Rule 40 of the Hawaii Rules of Penal Procedure. Majority at 24-25.

witnesses containing inadmissible evidence. If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement." (citations omitted)); Standards for Criminal Justice § 3-6.6(d) (Am. Bar Ass'n 2015) ("The prosecutor should not bring to the attention of the trier of fact matters that the prosecutor knows to be inadmissible, whether by offering or displaying inadmissible evidence, asking legally objectionable questions, or making impermissible comments or arguments.") This is especially true in this case, where the court issued its order following the prosecutor's representation that Dr. Bivens was "not going to be commenting on anyone's credibility or believability." The prosecutor violated this duty by asking Dr. Bivens to "tell [the court] a little bit about" false reporting and how often it occurred.

The Majority also bars appellate review of the admission of Dr. Bivens' opinion on the credibility of the child witness on the grounds that it did not substantially affect Engelby's right to a fair trial and therefore does not constitute plain error. Respectfully the view of the Majority that such testimony does not affect the substantial rights of Engelby rejects the common-sense conclusion in Batangan that expert testimony so constituted is violative of the constitutional right to a fair trial free of expert testimony on

the most important issue to the defense—the credibility of the complaining witness. "As in most child sexual abuse cases, where the only evidence consists of the victim's accusation and the defendant's denial, expert testimony on the question of who to believe is nothing more than advice to jurors on how to decide the case." Batangan, 71 Haw. at 559, 799 P.2d at 52 (internal quotations omitted).

> Unless the function of a jury is to find the truth, its role is devoid of substance. Often the jury can meet this obligation only by determining the credibility of witnesses. The jury system, with all its imperfections, has served society well. It has not been demonstrated that the art of psychiatry has yet developed into a science so exact as to warrant such a basic intrusion into the jury process.

Id. (quoting State v. Walgraeve, 243 Or. 328, 333, 413 P.2d 609, 609–610 (1966)).

The Majority's view that Dr. Bivens' expert testimony did not affect Engelby's substantial rights is also belied by the Batangan court's emphasis that in each Hawai'i case addressing testimony bolstering the credibility of a child witness, reversal was required. 71 Haw. At 561, 799 P.2d at 53. Indeed, in In the Interest of Doe, 70 Haw. 32, 761 P.2d 299 (1988), the bolstering testimony was from the mother of the

child complaining witness and thus did not bear the imprimatur of an expert witness and the court nonetheless reversed.[5]

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[5] The Batangan court explained:

> In Castro, supra, the defendant was accused of attempting to murder his girlfriend. The incident occurred in a bar where several witnesses were present. At trial, the defense attorney attempted to impugn the victim's credibility through cross-examination. The State, therefore, called a psychologist who gave opinion testimony about the victim's credibility. The trial court allowed the psychologist's testimony based on Kim. This court held that admission of such testimony constituted reversible error. The court explicitly limited the use of expert testimony regarding credibility to child sexual abuse cases. It reasoned that
>
> > child sexual abuse is a particularly mysterious phenomenon, often involving an unusual cast of characters who are involved in relationships that are seemingly inexplicable to most people. . . . [E]xpert testimony could reveal characteristics or conditions of the child victim of sexual abuse and further the jury's understanding of what in all likelihood was unfamiliar and mysterious.
>
> Castro, 69 Haw. at 648, 756 P.2d at 1044 (citations and internal quotation marks omitted).
>
> Shortly after Castro, this court decided in In the Interest of Doe, 70 Haw. 32, 761 P.2d 299 (1988), that testimony regarding the victim's credibility was erroneously admitted to the defendant's prejudice. In that case, a juvenile was accused of sexually abusing a 4-year-old child. The child complainant was unable to testify, but the child's mother and pre-school teacher testified as to what the child had related to them. The teacher was asked her opinion of the child's truthfulness. She responded that the child "wasn't lying." Even though the teacher was not an expert in the field of child sex abuse, as the State's witness, her opinion was elicited during direct examination prior to the alleged victim's credibility becoming an issue.
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> In both Castro and Doe, the prosecutor argued and the trial court agreed that Kim permitted the admission of testimony on a witness' credibility. This court disagreed.

Batangan, 71 Haw. at 560-61, 799 P.2d at 53 (citing State v. Castro, 69 Haw. 699, 648, 756, P.2d 1033, 1044 (1988)).

D. Dr. Bivens' comments on the complaining witness's veracity and credibility were not harmless.

"Under the harmless error standard, we must determine whether there is a reasonable possibility that the error complained of might have contributed to the conviction. If there is such a reasonable possibility, then the error is not harmless beyond a reasonable doubt, and the conviction must be set aside." State v. Nofoa, 135 Hawai'i 220, 229, 349 P.3d 327, 336 (2015) (internal quotation marks and citation omitted). "[E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled." State v. Heard, 64 Haw. 193, 194, 638 P.2d 307, 308 (1981). Here, the State's case hinged on the believability of the complaining witness's testimony.

In Ryan, as here, there was no independent eyewitness evidence of the defendant's guilt. "The case therefore turned on the jury's assessment of whether the [complaining witness] or Ryan was more credible on the question of whether Ryan had been the perpetrator." Ryan, 112 Hawai'i at 141, 144 P.3d at 589. Given that the case hinged on the complaining witness's credibility, the ICA held that testimony by police officers which directly opined on the truthfulness of the complaining witness affected Ryan's substantial rights. Id. Because the

court could not say that the error was harmless beyond a reasonable doubt, the defendant's convictions were vacated and the case was remanded for a new trial. Id.

Here too, as the State accurately noted in its closing argument, its case came down to a contest of credibility. The complaining witness was the only witness to the assaults, and Engelby denied being the perpetrator, or even being at her home on the night of the alleged assaults. Even if the jury believed the testimony of the complaining witness's mother and her mother's boyfriend that Engelby was in the house that night and in the same room as the complaining witness, their only basis for concluding that he assaulted her was the complaining witness's own testimony. Dr. Bivens' testimony constituted highly probative expert testimony supporting the testimony of a child victim who was the only eyewitness offered by the prosecution to contradict the defendant's testimony. The relative credibility to be afforded to the complaining witness's accusation and Engelby's denial constituted the central factual issue for the jury's consideration.

"As in most child sexual abuse cases, where 'the only evidence consists of the victim's accusation and the defendant's denial, expert testimony on the question of who to believe is nothing more than advice to jurors on how to decide the case.'" Batangan, 71 Haw. at 559, 799 P.2d at 52 (quoting State v.

Moran, 728 P.2d 248, 253 (Ariz. 1986)). Considering the totality of the circumstances, the error was not harmless beyond a reasonable doubt. The question of whether the complaining witness was likely to be telling the truth or to be lying was of paramount importance. Dr. Bivens testified that children are unlikely to lie when there will be consequences to another person and that children are generally not the source of false allegations of sexual abuse. His testimony was given additional credibility by his testimony regarding his background and qualifications, and his references to recent academic research on children and truthfulness. It is reasonably possible that having an expert in the dynamics of child sexual abuse testify that children are unlikely to tell consequential lies or make false allegations of abuse might have contributed to the jury's decision to endorse the credibility of the complaining witness and find Engelby guilty.

II. Conclusion

Our determination in Batangan that "even objective opinions of experts regarding a victim's credibility[,]" 71 Haw. at 562, 799 P.2d at 54, is testimony that "invades the province of the jury[,]" id. at 559, 799 P.2d at 52, is settled.[6] Dr.

[6] In so doing, the Majority has again adopted a position that renders Hawai'i an outlier among other jurisdictions. See Batangan, 71 Haw. at 559 n.1, 799 P.2d at 52 n.1 (collecting cases rejecting the holding in

(. . . continued)

Bivens' testimony, that children are not likely to make false allegations about sexual abuse and that cases of children making false allegations of abuse are very infrequent, invaded the province of the jury, and bore the court's jury-instructed imprimatur. Accordingly, Engelby must be afforded a new trial, without the admission of expert opinion informing the jury that it is unlikely children alleging sexual abuse are not telling the truth.

/s/ Richard W. Pollack

/s/ Michael D. Wilson

(continued. . .)

Kim); State v. Moran, 728 P.2d 248, 252 n.3 (Ariz. 1986); People v. Nelson, 561 N.E.2d 439, 443 (Ill. Ct. App. 1990); People v. Beckley, 456 N.W.2d 391, 398-99 (Mich. 1990); Ochs v. Martinez, 789 S.W.2d 949, 957 (Tex. Ct. App. 1990); State v. Rimmasch, 775 P.2d 388, 391-92 (Utah 1989).