IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee,

vs.

CARI SALAVEA also known as CARI CARVEIRO,
Petitioner/Defendant-Appellant.

SCWC-16-0000386

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-16-0000386; CR. NO. 15-1-0608)

JUNE 19, 2020

DISSENTING OPINION BY NAKAYAMA, J.
IN WHICH RECKTENWALD, C.J., JOINS

At issue in this case is the conduct of defense counsel and the Deputy Prosecuting Attorney (DPA). I do not agree with the Majority's holdings that Petitioner/Defendant-Appellant Cari Salavea's (Salavea) counsel was ineffective or that the DPA engaged in prosecutorial misconduct.

Salavea's trial counsel made a tactical decision not to adduce evidence of CW's alleged drug use in order to avoid

"opening the door" to the presentation of evidence of Salavea's own drug use. Because this decision was clearly tactical and not erroneous, we should not question defense counsel's competence in the first instance.

As to the Majority's conclusion that the DPA's statements during closing arguments amounted to prosecutorial misconduct, when read in context, those statements were supported by and rooted in the evidence adduced at trial and were not improper.

I dissent.

I. BACKGROUND

Salavea was charged with, and eventually convicted of Burglary in the First Degree in violation of Hawaiʻi Revised Statutes (HRS) § 708-810(1)(c) (2014).[1]

[1] HRS § 708-810 provides in relevant part:

> **Burglary in the first degree.** (1) A person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and:
>
> . . . .
>
> (c) The person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

A. Circuit Court Proceedings[2]

Prior to Salavea's trial, both Salavea and the State noticed their intent to use evidence of past acts. Salavea noticed intent to offer evidence that CW was using methamphetamine at the time of the incident. The State noticed its intention to present evidence of Salavea's: (1) gambling problem; (2) drug use in 2014 and 2015; and (3) theft from Macy's. The circuit court held a pretrial hearing regarding the admissibility of past acts by both CW and Salavea, including drug use on the day of the alleged burglary and in 2014 and 2015. During the hearing, the circuit court stated:

> THE COURT: Okay. Use of drugs by anybody, whether it be the Defendant or any witness, other witness, I think is legitimate under the case law because it goes to your ability to perceive and recall. It's up to the jury to decide whether there was an effect or not. So that's going to come in, but it's also a two-way sword, right?

The State contended that CW and Salavea had met at a rehabilitation program and had used drugs together previously, but that these facts were not relevant background to the case. Salavea's counsel countered that CW and Salavea's prior drug use was relevant to Salavea's defense. Salavea's counsel informed the circuit court that Salavea's defense was that on the date of the alleged burglary, "[Salavea] felt bad when she saw [CW] using the drugs and so it occasioned her to do something about it."

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[2] The Honorable Karen S.S. Ahn presided.

Salavea's counsel stated that Salavea saw "drugs at the [alleged burglary scene] and activity involving those drugs," but would not confirm what Salavea's testimony would be. Salavea's counsel agreed that she would not "attempt to expand beyond what my girl perceived the situation to be in that room." The following exchange took place:

> THE COURT: Okay. So I think the agreement is that the State's case, the State apparently has made a decision it's going to go on that event, and Cross is limited to Direct, okay.
>
> [DEFENSE COUNSEL]: Of course.
>
> THE COURT: And then when you put on your case, then we'll see what we're dealing with.
>
> [DEFENSE COUNSEL]: We can revisit it at that time.
>
> THE COURT: We have to, I think.
>
> [THE STATE]: Judge, I'd also like to point out -- I think I -- there's a portion of why I filed Notice of Intent. If it does come out and it's pretty much irreparable and the jury here hears Defendant's testimony about any kind of allegations of prior drug use or whatever that goes beyond the scope of that event, State should be allowed to question Defendant and bring it up that they were doing it together over that period of time.
>
> THE COURT: Oh, yeah, it's fair Cross. Both of you have a right to fair Cross, and credibility is always, obviously, an issue in addition to what happened that night or that day.

The circuit court next addressed the State's Notice that it intended to adduce, among other things, evidence of Salavea's prior drug use in 2014 and 2015 in the following exchange.

> THE COURT: Okay. Defendant's drug use in 2014 and 2015, is that something you still want at this

> point?
>
> [THE STATE]: Well, yes. If they open the door through bringing up the whole history and everything else, then it will go to -- it will go as follows. The relevance is this. CW was trying to get away from Defendant because she didn't want to gamble anymore, she didn't want to be in jeopardy with her Hope Probation because every time they met, she ended up using, so if Defense brings up the history of drug use and all of that, then State will be, in my position, entitled to expand on that and have basically an explanation why [CW] did not want to have anything to do with the Defendant anymore because it was screwing up her Hope Probation.
>
> THE COURT: Okay. So in other words, if it becomes relevant.
>
> [THE STATE]: Yeah.
>
> THE COURT: Okay, so [Defendant's drug use in 2014 and 2015] is on hold.
>
> . . . .
>
> THE COURT: . . . Have we exhausted the 404 matters on the part of Defendant?
>
> Gambling has been not objected to.
>
> Drug use if the door is opened.

(Emphasis added.)

The circuit court clarified that it was granting Salavea's Notice of Intent to present evidence that CW was using methamphetamine in her apartment at the time of the alleged burglary.

2. Trial Testimony

At trial the State called the following witnesses: CW, CW's parents, Detective Tai Nguyen (Detective Nguyen), and Michael Bryant and Ray Pavao, who both worked as security personnel at CW's apartment complex.

i. Bryant's Testimony

Michael Bryant (Bryant) testified that he was the security supervisor at the Moana Pacific, a two-tower residential complex, and its authorized representative and custodian of records. Bryant explained that surveillance cameras record all of the entrances to the buildings and inside the elevators and that the buildings are only accessible through fob[3] access doors. A fob is required to operate the elevator and each residence is allowed up to six fobs. The Moana Pacific has a computer system that records the date, time, and exact location of all fob activity on the property.

Bryant identified State's Exhibit 9 as a printout of fob usage for a fob assigned to CW for the period of March 1, 2015, to March 31, 2015. Bryant stated that the fob was used on March 27, 2015 at 1:25 p.m., 1:26 p.m., and 1:29 p.m. Bryant testified that CW had purchased another fob on June 27, 2014, but that there was no record that the original fob assigned to CW was ever deactivated.

Bryant testified that he reviewed the surveillance footage of the East Tower for March 27, 2015, between 1:18 p.m. and 2:30 p.m. at the request of the Honolulu Police Department (HPD). Bryant identified the video footage from the relevant

[3] A fob permits keyless entry to unlock doors. The fobs at the Moana Pacific are gray and teardrop shaped.

time period and testified that the footage showed someone using "Elevator 4" to go from the ground floor to the forty-third floor and then to the forty-fifth floor. According to Bryant, the footage also showed someone reentering Elevator 4 on the forty-fifth floor to go to the ground floor. Bryant testified that the footage corresponded with the fob usage records (State's Exhibit 9).[4]

ii. CW's Testimony

CW testified that on March 27, 2015, she lived with her parents and six-year-old daughter at the Moana Pacific. CW explained that she worked as a shift leader setting up for events at the Hawaii Convention Center and that she typically worked from 3:00 p.m. to midnight.

According to CW, she lost her fob for the Moana Pacific in June of 2014. CW purchased a new fob for $50, but did not deactivate the old one because she hoped to find it. CW was not concerned about someone using the fob to access her apartment because it did not identify the Moana Pacific or have any identifying features.

CW described her relationship with Salavea as a friendship that began six years prior. Salavea and CW would

[4] Bryant indicated that the time on the video footage was approximately eight minutes behind, so if the camera's time stamp was 1:18 p.m., the actual time would be 1:26 p.m.

occasionally meet and take their children to the pool at the Moana Pacific. According to CW, the two women were close, but CW "did [her] own thing," worked, and "had [her] own life."

When CW and Salavea spent time together without their children, they went gambling in non-public game rooms. CW explained that both she and Salavea had gambling problems, but that CW decided at the beginning of the year to stop gambling.

The last time that CW and Salavea "hung out" together before the date of the alleged burglary was on March 6, 2015, when the two women went out gambling together. CW won that night and shared a "little bit" of her gambling winnings with Salavea, but Salavea had wanted half. According to CW, this was the only time she met with Salavea in 2015. CW also recounted that one day about a week before the day of the incident, Salavea called CW at work and asked to borrow money, but CW refused and hung up. That was the last time that CW heard from Salavea prior to the alleged burglary.

CW testified that the week of March 27, 2015, she was home from work on a "workman's comp [sic]" injury because she had injured her foot at work. On the date of the alleged burglary, CW was at home alone, resting. CW's mother and father had left before 1:30 p.m. and CW's daughter was still at school. CW received a phone call from Salavea, which CW did not answer. Then CW received a text message from Salavea that just said

"bitch." CW ignored the message and went to sleep. CW placed her Samsung Galaxy 5 cell phone next to her pillow when she went to sleep that day.

CW testified that when she woke up, her cell phone was gone so she used the house phone to call it. At first, the cell phone rang, but then it went "straight to voicemail." CW used the home phone to call her mother, who was picking up CW's daughter from school, and asked if she had seen CW's cell phone. CW also noticed that her Samsung Galaxy tablet and blue Roxy brand backpack were gone, both of which had been in her bedroom near the bed. CW's backpack contained her wallet, work keys, driver's license, and work ID. CW's wallet contained her federal credit union bank card. CW never recovered any of her missing items.

According to CW, she initially could not understand "how her stuff come up missing when nobody was in my house." CW "finally kind of figured that it might be [Salavea]" because of the missing fob and the "bitch" text message. CW went to the Moana Pacific's security office and asked to see the video surveillance. CW testified that when she saw the security footage, she recognized Salavea.

The State showed CW the video surveillance footage (State's Exhibit 20) and published it. CW identified the loading dock area at the Moana Pacific and explained that the fob access

door from the loading dock to the hallway was propped open, as was common if someone was in the process of moving into the building. CW testified that she recognized Salavea on the video by her face, the tattoo on her back, and "the flower that she usually wears in her ear." CW also identified Salavea in the footage entering the elevator on the forty-third floor and exiting on the forty-fifth floor "by the way she walks," the flower, and her demeanor. In the final video, CW identified Salavea entering the elevator while carrying a Roxy backpack.

According to CW, after she viewed the security footage on March 27, 2015, she returned to her apartment and told her parents "what had happened and [that Salavea] had entered the apartment building."

CW testified that her Google wallet card was in the backpack Salavea took. CW explained that, like a prepaid debit card, the card was linked to her bank account and the funds could also be accessed through an application (app) that CW installed on her cell phone. CW testified that anyone in possession of her cell phone with the passcode to unlock her phone could use the app to make in-store purchases or transfer money to other people. According to CW, she had given Salavea her passcode one night when they were out gambling. CW testified that she received an email notification regarding an attempt to transfer $100 from CW's Google wallet to Salavea's email after March 27, 2015. CW

also learned of two other Google wallet transactions that she did not make – a 4:00 a.m. purchase at McDonald's and a $100 purchase at Sam's Club. After these transactions, CW cancelled both her Google wallet debit card and the $100 transfer transaction. CW also cancelled her HawaiiUSA bank card the following day.

CW testified that she never gave Salavea permission to enter her home on March 27, 2015, or to take her backpack or other property.

During cross-examination, CW testified that Salavea had occasionally borrowed CW's shoes in the past. Salavea wore a size 6 and CW wore a size 7, so CW seldom borrowed Salavea's shoes. CW testified that she and Salavea never traded clothes and that they were not the same size.

iii. Mother's Testimony

CW's Mother (Mother) testified that she lived at the Moana Pacific with her husband, daughter, and granddaughter. Mother testified that on March 27, 2015, CW was home from work because her foot was sore and she did not feel good. That day, Mother left the apartment to pick up her granddaughter from school and was gone from about 12:00 p.m. to 2:00 p.m. Mother received a phone call from CW on the land line while she was out.

According to Mother, when she returned home, CW told her, "[s]he say her friend call her many times. She no answer the phone. Must be she coming up here get my stuff, so I lose my

backpack and my phone." When asked if CW seemed coherent, Mother testified "Yeah, she speak okay." Mother stated that she did not notice anything unusual in the apartment.

iv. Pavao's Testimony

Ray Pavao (Pavao) testified that he was a security guard at Moana Pacific and was on duty on March 27, 2015. Pavao testified that CW reported to Moana Pacific security that someone had possibly entered her apartment and taken property. At CW's request, Pavao showed her the recorded camera footage at about 7:00 p.m. that evening. According to Pavao, CW was worried about her belongings but "look[ed] normal" and explained herself normally. He noticed nothing unusual about CW. Pavao showed CW the same video footage that was later provided to the HPD.

v. Detective Nguyen's Testimony

HPD Detective Nguyen testified that he was assigned to investigate a burglary at the Moana Pacific on March 27, 2015. During the course of his investigation, he obtained and reviewed the March 27, 2015 surveillance footage from the Moana Pacific and he obtained a printout of fob usage for the fob registered to CW. Detective Nguyen testified that the printout showed only three entries for the period of time between 1:00 p.m. and 1:29 p.m. on March 27, 2015, and that there was no other activity for that fob either before or after that.

After watching the video footage, Detective Nguyen confirmed with CW that she recognized the person in the video as Salavea.

vi. Salavea's Testimony

Salavea testified that she and CW were best friends for six years prior to the March 27, 2015 incident. According to Salavea, the two women "hung out every day, and then around 2013, 2014, we kind of did our own thing." Sometimes when CW worked, she loaned her keys to Salavea so that Salavea could take the children to the pool at the Moana Pacific.

Salavea testified that CW called her on March 6, 2015, and that CW said that she had money and wanted to go gambling. Salavea went to go meet her and the two women stayed out all night gambling. According to Salavea, "we both had money" that night. When Salavea was driving home after being out all night, CW called her to say that CW had left her keys in the center console of Salavea's car. Salavea told CW that she "was already on the freeway back to Waipahu . . . [so she] wasn't going to turn around" and that Salavea would call her the next time she returned to town. Salavea found CW's keys, a fob and front door key on a black keychain, when she cleaned her car a couple of weeks later. Salavea stated that "[CW] loses her keys all the time."

Salavea testified that she called CW on March 27, 2015, at around 12:00 p.m. and told CW that she would stop by CW's home and drop off the keys. According to Salavea, CW told her that her father was going for his daily walk and that Mother was going to pick up CW's daughter at school, so Salavea could "park in the stall and come upstairs." Salavea's friend was with her in the car and wanted to use the bathroom, so Salavea called CW from the parking stall to ask permission to bring her friend up. CW did not answer, so Salavea texted her "bitch" and went upstairs, leaving her friend in the car. Salavea used CW's keys to go up to the apartment.

Salavea attested that when she entered the apartment, CW was there and the two women talked in CW's room. Salavea returned the keys to CW and then "borrowed" CW's slippers and the Roxy backpack. Salavea stated that she had borrowed CW's footwear and backpacks in the past. Salavea did not stay long because her friend was waiting in the car. Salavea estimated that she was inside for "maybe fifteen minutes," before leaving the Moana Pacific.

The following exchange occurred during the direct examination regarding Salavea's taking of the backpack:

> [DEFENSE COUNSEL]: So did anything else occur before you left? You borrowed her sneakers, her backpack.
>
> [SALAVEA]: Well, she told me not to take her bag 'cause she was going to use it, so I told her that

> I wanted to use it and she can come to my house and get it when she's not out of it.
>
> [DEFENSE COUNSEL]: And did she seem alert on that occasion when you said "when she's not out of it"?
>
> [THE STATE]: Objection, Your Honor.
>
> [DEFENSE COUNSEL]: I'll rephrase.
>
> [THE STATE]: And I'm also objecting to the last answer.
>
> THE COURT: To the last answer?[] There was no answer.
>
> [THE STATE]: The basis is hearsay.
>
> THE COURT: Oh, to the last answer. All right. Well, it is hearsay. I'll strike that last answer by the witness, and the jury will disregard it.
>
> [DEFENSE COUNSEL]: I'm sorry. The portion that her friend said to her?
>
> THE COURT: This thing about "she didn't want me to use it."
>
> [THE STATE]: No, the last portion, the last portion of the answer, what Defendant is saying she told her. It's basically self-serving hearsay that is adduced by Defendant[.]
>
> THE COURT: And I'm striking it as hearsay, the whole answer.
>
> [THE STATE]: No, only starting with "I told her," so when she was not given permission to use the bag, I'm not asking to strike that.
>
> THE COURT: "She told me," everything after that in the last answer is stricken. Jury will disregard it.
>
> [DEFENSE COUNSEL]: Very well.

(Emphasis added.) Salavea explained that the Google debit card is like a debit card that is linked to a bank account, "and that's how we used to transfer money from my husband's Google card to gamble." Salavea testified that "we gambled $2,000 of

my husband's money."

On cross-examination, Salavea testified that she had not asked CW for money in the week prior to March 27, 2015, but had asked CW for money on the day of the incident. According to Salavea, when she called CW on March 27, 2015, Salavea had a conversation with CW. Salavea testified that she did not text CW "bitch" because she was upset with her, but because "[w]e call each other bitch."

Though Salavea admitted that CW told her not to take the backpack and that Salavea knew she did not have permission to take it, Salavea testified that she believed it was okay for her to take CW's backpack because Salavea had borrowed things from CW in the past and because CW had other bags. Salavea explained that, in the past, she had borrowed something from CW and then told CW after the fact. However, Salavea then admitted that she knew it was not okay to take the backpack and that it was actually theft in the following exchange:

> Q. Because you took this stuff from her before without an express permission, you thought it was okay to take this Roxy backpack now even though she expressly told you don't take it, so it made it okay?
> A. She was there. I mean - no.
> Q. So it wasn't okay to take it?
> A. No, it wasn't.
> Q. So it was a theft?
> A. Yeah.

Salavea also admitted using CW's fob to access the elevator in CW's building, but stated that she did not use the

fob for her initial entry to the building because the door was propped open. Salavea testified that she first exited the elevator on the forty-third floor because she "was on [her] phone, and [she] got off on the wrong floor." Salavea then used the fob again to go from the forty-third to the forty-fifth floor. After staying about ten minutes inside CW's apartment, Salavea used the fob to go down in the elevator.

Salavea denied trying to use CW's Google wallet to obtain money from CW's account after taking the backpack on March 27, 2015.

3. Closing Arguments

During closing arguments, the DPA made the following statements:

> [THE STATE]: . . . [CW] told you the truth. [CW's] testimony was credible.
>
> THE COURT: Well, the State submits.
>
> [THE STATE]: Thank you.
>
> The State submits that [CW's] testimony is credible because it is corroborated by other evidence, because it makes sense, and because you, as the judges of everybody's demeanor and looking at those factors that are given to you in the jury instructions, can assess for yourself whether it makes sense or not.
>
> Now, Defendant's testimony, on the other hand, State submits to you, is not credible, and why it's not credible? Because it doesn't make sense. When Defendant realized that [CW] was not going to give her the money voluntarily, Defendant used an opportunity of having [CW's] fob to go into [CW's] home and steal and take it on her own and basically to help herself. When [CW] would not give her money voluntarily and refused to give her money, Defendant was upset. She used the fob, she used the opportunity, the chance that she had, to help herself.

> Defendant's story that she had permission to go in and she had somehow thought it was okay and that [CW] cooperated with her and [CW] let her do all of that is not credible. It's not credible, it's a lie, because it doesn't make any sense. Defendant had a motive to go and commit a burglary, to burglarize [CW's] home to take the money, and it was two-fold. On the one hand, she needed the money. On the other hand, you heard about all the dynamics and all the background relationship. Her pride was hurt. She did not like the fact that [CW] was not responding to her phone call. She was upset. In addition to that, she did have [CW's] fob.
>
> What's really significant here -- and this is what you need to focus on and this is how the State submits to you that it's proven that Defendant's story doesn't add up -- is the whole story by Defendant that the fob was lost by [CW] on March 6th does not hold, does not hold up. That's a lie, and from there, it follows that she was concealing the fob, she was deliberately holding on to that fob secretly so she could go in her own time at her own convenience and take from [CW].
>
> [CW] told you and she was very frank with you, she explained in details what happened to her fob. She told you she lost that fob as far as almost a year prior to this incident in March, and that testimony was corroborated by [Pavao.] That testimony was corroborated by the records that she got an additional fob, she got the second fob.
>
> And what's significant, that fob was only used once -- well, three times, but, like, at one incident at 1:23 -- you'll have your exhibit -- 1:25, and then 1:29, which [] exactly corresponds to when Defendant went up to the 43rd floor, went up to the 45th floor, and went down. That was the fob that [CW] was not using because Defendant was in possession of it.
>
> What does that mean? That shows you that [CW] told you the truth. She told you she lost the fob and she got one on June 27th. The records show that she got her replacement fob on June 27th. That directly contradicts Defendant's story that [CW] lost it in the car, and from there, everything crumbles, everything the Defendant tells you is not true.

Salavea's counsel made the following statements as part of her closing argument:

> [DEFENSE COUNSEL]: This case, in effect, boils down to one woman's account of events as opposed to another woman's account of events. Both of them had a

gambling problem. They had different lives, they had different takes on things, but you have to ask yourself who was the most sophisticated, who was more likely to cook up something, to take a position that was sophisticated and complicated.

If I may leave you with a suggestion of evaluating the evidence in this case, it would be this. You recall that just before our lunch break, [Salavea] went on the witness stand, and the Deputy Prosecutor asked her whether she didn't take the Roxy bag without permission and whether that wasn't indeed theft, and [Salavea] broke down, she was in tears, and that's, I suggest --

[THE STATE]: Objection, Your Honor. This is not in evidence, and it's personal statement.

THE COURT: Overruled.

[DEFENSE COUNSEL]: And that's because it probably didn't even occur to her that that playful little act might be viewed by the law as a theft. Now, the Government would have you believe that [Salavea], being that type of person, would take all of her friend's valuables, and it's just not borne out by the evidence. Something occurred between these two women, but it wasn't a burglary.

Thank you.

Thereafter, in rebuttal, the State argued:

[THE STATE]: Ladies and gentlemen, what Defense Counsel was just doing was trying to appeal to your sense of pity or some kind of sense, you know, for Defendant, and that's improper. You are given an instruction[5] that you should not be influenced by that.

. . . .

[THE STATE]: . . . . Judge Ahn did read to you the multiple factors that you may consider in determining whether a person is telling the truth or not.

One of them is the witness' manner of testifying. That is significant. You saw how [CW] testified. I don't know if calling her sophisticated is kind of an overstatement. That's your judgment entirely. She may not have looked as sophisticated as

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[5] The circuit court had previously instructed the jury that: "You must not be influenced by pity for the Defendant or by passion or prejudice against the Defendant."

[Defense Counsel] is claiming, but she was very forthright, she was very forthright about how she felt.

And she also told you frankly that they were close friends. She was disappointed with how their relationship went, but she also did express no bias or no reason or no negativity towards Defendant even though I asked her hard questions. I was kind of asking her, you know, like, how did you feel, what was your, you know, what was your feeling towards relapsing, gambling every time you met with Defendant. She was very, she was very mild as far as when -

THE COURT: The State submits. The State submits.

. . . .

[THE STATE]: [CW] was also very frank and forthright how she described what happened to her when she discovered things were missing. She told you in details how she was trying to call her phone, and it went to ringing first, then voicemail. It took her a while to figure it out. Then she went downstairs and she started checking the video. If it happened the way Defendant is telling you it happened and they actually had these conversations and [CW] invited her to go up, why would [CW] go down and bother [Pavao] to review the video and check who was it that came?

And [Pavao] is [an] absolutely impartial witness. You heard his testimony. [Defense counsel] was asking him all these questions, whether he discussed it with someone else, whether he knew other people, and he told you he had no clue. He was just doing his job, and he saw this tenant who came down and told him that things were stolen from her and she wanted to see the video to figure it out who that was. She did have her suspicion because the last person who called her was Defendant. But why would she go to Ray and look at that video to try to figure it out if in fact it happened the way [Salavea] says it happened? [Salavea] is not a truthful witness.

Another factor is interest, if any, in the result of this case. Of course, every Defendant has a lot of interest in the result of the case, and that's natural, but you cannot disregard it. It's still there. There is interest and bias. Defendant has a lot of interest what's at stake, while [CW], why would [CW] go through all of this and why would [CW] go and make up a story if it was not what happened? There was no evidence by Defendant why is it that [CW] would do it, and there was no evidence from [CW], even though we pushed her, both of us, that she had any reason to tell this story. She told you the truth.

> THE COURT: Well, the State submits.
>
> [THE STATE]: State submits she told you the truth.
>
> THE COURT: Strike that "She told you the truth."
> What is your argument?
> Jury will disregard that part of the argument.

Salavea's counsel made no objections to any statements that the DPA made in closing argument.

The jury found Salavea guilty of first degree burglary. The circuit court sentenced Salavea to ten years' imprisonment, with a mandatory minimum term as a repeat offender of four years and six months.

The ICA rejected Salavea's three points of error and affirmed the circuit court's Judgment of Conviction and Sentence.

II. STANDARDS OF REVIEW

A. Ineffective Assistance of Counsel

When addressing claims of ineffective assistance of counsel, we assess whether, "viewed as a whole, the assistance provided was within the range of competence demanded of attorneys in criminal cases." Dan v. State, 76 Hawaiʻi 423, 427, 879 P.2d 528, 532 (1994) (internal quotation marks, citation, and brackets omitted).

> General claims of ineffectiveness are insufficient and every action or omission is not subject to inquiry. Specific actions or omissions alleged to be error but which had an obvious tactical basis for benefitting the defendant's case will not be subject to further scrutiny. If, however, the action or omission had no

> obvious basis for benefitting the defendant's case and it "resulted in the withdrawal or substantial impairment of a potentially meritorious defense," then it will be evaluated as information that an ordinary competent criminal attorney should have had.

Id. (ellipses and brackets omitted; emphasis in original) (quoting Briones v. State, 74 Haw. 442, 462-63, 848 P.2d 966, 976 (1993)). "[M]atters presumably within the judgment of counsel, like trial strategy, will rarely be second-guessed by judicial hindsight." State v. Richie, 88 Hawaiʻi 19, 39-40, 960 P.2d 1227, 1247-48 (1998) (internal citation and quotation marks omitted; emphasis in original).

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." State v. Rogan, 91 Hawaiʻi 405, 412, 984 P.2d 1231, 1238 (1999) (internal citation and quotation marks omitted).

III. DISCUSSION

A. Salavea's counsel was not ineffective.

Because I believe that the Majority disregards the obvious tactical benefit to defense counsel's supposed "error" and mischaracterizes the pertinent issues at trial, I dissent from the Majority's holding that Salavea received ineffective

assistance of counsel.

The Majority holds that defense counsel provided ineffective assistance when "defense counsel was pursuing elicitation of the CW's [alleged] use of methamphetamine during the incident but appears to have been confounded by the State's hearsay objection." Majority at 26. The Majority concludes that when defense counsel did not elicit testimony from Salavea about CW's alleged drug use it was not a tactical decision, as the ICA held, and that the omitted testimony "went to the heart of Salavea's defense" which, it asserts, turned on CW's credibility. Majority at 37.

Ineffective assistance of counsel occurs when: (1) "there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence;" and (2) "such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Wakisaka, 102 Hawaiʻi 504, 514, 78 P.3d 317, 327 (2003). However, "[g]eneral claims of ineffectiveness are insufficient and every action or omission is not subject to inquiry. Specific actions or omissions alleged to be error but which had an obvious tactical basis for benefitting the defendant's case will not be subject to further scrutiny." Briones, 74 Haw. at 462-63, 848 P.2d at 976 (emphasis in original).

I disagree with the Majority's opinion that there was

no obvious tactical basis for trial counsel's decision not to attempt to establish CW's drug use at the time of the alleged burglary. Defense counsel obviously did not wish to open the door to Salavea's history of drug abuse, and in declining to do so avoided allowing the State to attack Salavea's character and credibility. Moreover, even assuming, arguendo, that there was no tactical basis for trial counsel's decision, that decision did not result in "the withdrawal or substantial impairment of a potentially meritorious defense" because Salavea's defense did not, as the Majority claims, "turn[] on the credibility of CW's or Salavea's version of the events." Contra Majority at 23, 37; see Wakisaka, 102 Hawaiʻi at 514, 78 P.3d at 327.

First, contrary to the Majority's assertion, defense counsel likely elected to avoid questioning CW and Salavea about CW's alleged drug use on the day of the incident because it could have easily led to testimony about CW's past drug use. This testimony would have in turn "opened the door" to testimony about Salavea's own extensive drug use. "The 'opening the door' doctrine is essentially a rule of expanded relevancy . . . . Under this doctrine, when one party introduces inadmissible evidence, the opposing party may respond by introducing [] inadmissible evidence on the same issue." State v. Lavoie, 145 Hawaiʻi 409, 422, 453 P.3d 229, 242 (2019) (citations omitted,

brackets in original).[6]

When Salavea noticed her intention to proffer evidence of CW's drug use at the time of the incident, the State filed a Notice stating that it intended to offer evidence of Salavea's drug use in 2014 and 2015. During the hearing on motions in limine, the circuit court stated that use of drugs by any witness was relevant to the witness's perception and memory. The circuit court ruled that such evidence would be admitted, "but it's also a two way sword, right?" The circuit court also ruled that, if Salavea made any inadmissible allegations of CW's prior drug use during her testimony, the State would be allowed to cross-examine Salavea about the fact that she and CW had a history of using drugs together. Moreover, the DPA stated during the hearing that, if any evidence of CW's history of drug use was adduced, the State would offer evidence as to why CW was trying to

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[6] The 'opening the door' doctrine is widely recognized by state and federal courts. See Rivera v. Ring, No. 19-11053, 2020 WL 1970637, at *4 (11th Cir. April 24, 2020); Nguyen v. Southwest Leasing and Rental Inc., 282 F.3d 1061, 1067 (9th Cir. 2002); Harned v. Dura Corp., 665 P.2d 5, 9 (Ala. 1983); State v. Fuller, No. 2018-0423, 2019 WL 6999716, at *3 (N.H. Dec. 20, 2019); State v. Vance, 596 S.W.3d 229, 249-50 (Tenn. 2020). The Majority notes that we have never expressly adopted this doctrine. Majority at 27. However, as we have never rejected this doctrine, its use by the Hawaiʻi trial courts is well documented. See State v. Miranda, No. 17-0000660, 2020 WL 2988268, at *11 (Haw. June 4, 2020); Lavoie, 145 Hawaiʻi at 414, 453 P.3d at 234; State v. Fukusaku, 85 Hawaiʻi 462, 497, 946 P.2d 32, 67 (1997); State v. Schnabel, 127 Hawaiʻi 432, 439, 279 P.3d 1237, 1244 (2012); State v. Acker, 133 Hawaiʻi 253, 266-67, 327 P.3d 931, 944-45 (2014).

Indeed, here the DPA and the circuit court referenced this doctrine multiple times at a pretrial hearing and the circuit court ruled in reliance on the doctrine. That is to say, defense counsel had no reason to believe that the circuit court would not allow the DPA to employ the doctrine at trial and therefore considered this eventuality when making tactical decisions at trial.

distance herself from Salavea – because CW did not want to gamble anymore or jeopardize her [HOPE] Probation. The DPA explained that "every time [CW and Salavea] met, [CW] ended up using [drugs]," so "[CW] did not want to have anything to do with [Salavea] anymore because it was screwing up her HOPE Probation." Thus, though the circuit court ruled that evidence of CW's alleged drug use at the time of the alleged burglary was relevant and would not open the door to Salavea's past drug use, Salavea's trial counsel was on notice that adducing evidence of CW's past drug use risked opening the door to Salavea's own drug use.

The Majority's contention that defense counsel's decision not to question Salavea about CW's alleged drug use on the date of the incident was not tactical fails because that decision bolstered Salavea's credibility and avoided opening the door to Salavea's own drug use, the danger of which greatly outweighed the negligible benefit of potential testimony about CW's alleged drug use.

Salavea's credibility may have been damaged if she testified, in complete contradiction to the testimony of several witnesses, that CW had been using drugs that day. The DPA had already adduced testimony from two other witnesses that would have contradicted Salavea's potential testimony that CW was using "ice" on the afternoon of March 27, 2015. First, Mother testified that CW was sleeping when Mother left the apartment

about 12:00 p.m., but that when Mother returned home about 2:00 p.m., CW was "speak[ing] okay" and Mother noticed nothing unusual. Then, Pavao testified that CW "look[ed] normal," explained herself normally, and he noticed nothing unusual about CW a few hours after the alleged burglary.

Moreover, Salavea's defense counsel might have judged the negligible value of any testimony by Salavea as to CW's perception and memory as not worth the risk. By adducing testimony that CW was using drugs on the date of the incident, defense counsel risked eliciting testimony of CW's past drug use and thus opening the door to Salavea's past drug use and damaging Salavea's credibility in multiple ways.

For example, defense counsel stated in a pretrial hearing that Salavea would testify that she "felt bad when she saw [CW] using the drugs and so it occasioned her to do something about it." Salavea might have "felt bad" because she was disappointed that CW was using drugs or because she was angry that CW was using drugs without her. This testimony would have likely led to testimony that CW was on HOPE probation for drug use, which would have opened the door to testimony that Salavea, too, was on HOPE probation for drug use. Salavea's testimony also could have led to testimony that Salavea and CW met when they were both in a drug rehabilitation program. Despite the Majority's insistence that defense counsel could have safely

elicited testimony that CW was using drugs on the date of the incident, in practice Salavea's testimony about CW's alleged drug use would have led to testimony about Salavea's own drug use.

This risk far outweighed the minimal benefit to be gained by adducing evidence of CW's alleged drug use on the day of the incident, which testimony had already been contradicted by multiple other witnesses. As discussed infra, the testimony of multiple other State witnesses, Salavea's own testimony, and the video and fob-use evidence minimized the importance of CW's testimony, and therefore CW's credibility.

We cannot know why defense counsel declined to question Salavea about drug use. For this reason it is improper to second-guess on appeal an attorney's decision not to pursue a single line of questioning while examining a witness, which is more than likely a matter of trial strategy. See Richie, 88 Hawaiʻi at 39-40, 960 P.2d at 1247-48 ("[M]atters presumably within the judgment of counsel, like trial strategy, will rarely be second-guessed by judicial hindsight.") (Emphasis in original, quotations omitted.) It is obvious to me that defense counsel's decision not to question Salavea about CW's alleged drug use was a trial tactic and not an error. As such, Salavea's claim of ineffective assistance of counsel fails on the first prong.

Assuming, arguendo, that Salavea did satisfy the first prong, Salavea still failed to establish that she received

ineffective assistance of counsel because defense counsel's decision not to question Salvea about CW's alleged drug use did not result in "either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Aplaca, 74 Haw. 54, 67, 837 P.2d 1298, 1305 (1992). The jury found Salavea guilty of burglary in the first degree in violation of HRS § 708-810(1)(c) (2014). HRS § 708-810(1)(c) provides:

> (1) A person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and:
>
> . . . .
>
> (c) The person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

Salavea admitted at trial that she entered CW's home, that she knew on the day of the incident that she did not have permission to take CW's backpack, and that she knew it was wrong and amounted to theft.[7] The primary issue was Salavea's own

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[7] A close read of Salavea's trial testimony shows that Salavea knew at the time she took CW's backpack, that it "wasn't ok[.]"

> Q. Because you took this stuff from her before without an express permission, you thought it was okay to take this Roxy backpack now even though she expressly told you don't take it, so it made it okay?
> A. She was there. I mean - no.
> Q. So it wasn't okay to take it?
> A. No, it wasn't.

The DPA's phrasing of the question in the past tense, "you thought it was ok" and Salavea's ultimate response, "no" indicates that Salavea knew when she took CW's backpack that it was not ok.

(continued...)

subjective intent upon entering CW's apartment and taking CW's possessions. CW's recounting of the incident was relevant only to the issue of whether Salavea entered the building unlawfully. Overwhelming evidence corroborated CW's testimony that neither she nor her parents gave Salavea permission to enter the apartment. Security guard Bryant testified that CW's fob was used to enter the building. Detective Nguyen testified that the person captured by security footage entering the building with CW's fob was Salavea. CW's father testified that he never gave Salavea permission to enter his apartment. Mother testified that on the day of the incident, CW called her and asked if she had seen CW's phone. Mother also testified that CW told her that a

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[7](...continued)

The Majority minimizes the implications of Salavea's admission in her trial testimony that she knew she did not have permission to take CW's backpack and her agreement with the DPA that she had committed theft by taking the backpack without CW's permission. The Majority then contradicts Salavea's testimony that she did not have permission to take CW's backpack by importing an unexpressed implication that "CW would have spoken up if Salavea's borrowing of the backpack were not permitted." Majority at 34.

Salavea's admission that she stole from CW undermines Salavea's credibility and detracts from her contention that she let herself into CW's family's apartment with the sole intention of returning CW's fob (which she did not actually return). Because direct evidence of a person's subjective intent rarely exists, courts are able to use evidence of the person's subsequent actions to infer their intent. State v. Kiese, 126 Hawaiʻi 494, 502-03, 273 P.3d 1180, 1188-89 (2012) ("We have consistently held that since intent can rarely be proved by direct evidence, proof by circumstantial evidence and reasonable inferences arising from circumstances surrounding the act is sufficient to establish the requisite intent. Thus, the mind of an alleged offender may be read from his acts, conduct, and inferences fairly drawn from all the circumstances."). Here, Salavea claims that she intended to return CW's fob, but instead, by her own admission, entered CW's family's apartment, stole CW's backpack, and did not return the fob, instead using it to exit the building. Salavea's admission is of crucial importance because it supports the inference that she entered CW's home with the intent to steal, one of the ultimate issues at trial, and because it in turn renders less significant CW's testimony.

friend called her, but she did not answer the phone, and CW assumed the friend had taken her backpack and phone. Security guard Pavao testified that on the day of the incident, CW reported that someone had possibly entered her apartment and taken her property and then requested that Pavao show her recorded footage from that afternoon.

The Majority nevertheless avers that evidence of CW's drug use on the day in question "went to the heart of Salavea's defense, which turned on the credibility of the CW's or Salavea's version of events." Majority at 37. I strongly disagree with the Majority's characterization of Salavea's defense. Even if CW's testimony had been omitted from the trial evidence, Salavea's own testimony, combined with the testimony of the State's other witnesses and the video and fob-use evidence, incriminated her. The Majority therefore drastically overstates the relevance of CW's credibility and "the reliability of the CW's account." Contra Majority at 31.

CW's alleged use of methamphetamines on the day of the incident would provide no support for any possible defense by Salavea. Salavea does not meet the second prong of the test for ineffective assistance of counsel because there is no possibility that defense counsel's decision not to elicit testimony of CW's alleged drug use withdrew or substantially impaired a potentially meritorious defense. See State v. DeLeon, 131 Hawaiʻi 463, 479,

319 P.3d 382, 398 (2014); Contra Majority at 37.

In reframing the role of CW's credibility at trial, the Majority compares this case to our decision in State v. Aplaca, 74 Haw. 54, 837 P.2d 1298. The facts of Aplaca, which include multiple egregious omissions by defense counsel, can be readily distinguished from the facts of this case.

Aplaca involved an incident that transpired between two Adult Correctional Officers (ACO) at Waiawa Correctional Facility, in which Aplaca allegedly "rammed the left side of [the Complaining Witness's] body" while the two were walking down a hallway. Id. at 58, 837 P.2d at 1301. Before trial, defense counsel failed to conduct an investigation of the materials he received from the State, which included a report that Aplaca had passed a polygraph test, and failed to discover that the State had not provided full discovery, notably, a recorded interview of the CW in which the CW made statements inconsistent with those she made at trial. Id. at 69, 837 P.2d at 1306. Defense counsel also failed to investigate a list of potential witnesses Aplaca provided as well as witnesses who were made known to him through the discovery he received. Id. at 67-68, 837 P.2d at 1305. In support of her motion for a new trial, Aplaca provided affidavits from four witnesses whom defense counsel failed to interview which submitted that, had they been called at trial, the witnesses would have testified as follows: (1) Chief of Security

at Waiawa would have testified that "Aplaca was a truthful and peaceable person who should be believed under oath;" (2) the ACO who conducted an investigation of the incident for the Department of Corrections would have testified that he made a report concluding that no assault had taken place; (3) a fellow ACO would have testified that the CW "was not a truthful person, even if she were under oath;" and (4) a Waiawa administrator would have testified that CW was not a truthful person. Id. at 68, 837 P.2d at 1306. At trial, only Aplaca and CW testified and defense counsel failed to adequately cross-examine CW about a prior inconsistent statement. Id. at 59, 837 P.2d at 1302.

In determining that Aplaca received ineffective assistance of counsel, this court held that "the decision not to conduct a pretrial investigation of prospective defense witnesses" was not a tactical decision and that defense counsel's failure to do so "had a direct bearing on the ultimate outcome of the case." Id. at 71, 73, 837 P.2d at 1307, 1308. We observed that because only Aplaca and CW testified at trial, the case hinged on their respective credibility. Id. at 58, 837 P.2d at 1301 ("At trial, only two witnesses testified - [CW] and Aplaca. Hence, the outcome of the trial hinged on the credibility of the witnesses.").

Aplaca is distinct from this case because here numerous witnesses testified and because defense counsel's single omission

was a tactical choice that was significantly less prejudicial than Aplaca's counsel's multiple serious failures. First, in this case the State called six witnesses and presented video and fob-usage evidence that Salavea entered the building with CW's missing fob on the day of the incident. Unlike in Aplaca, in which virtually the only evidence proffered was the defendant and the CW's accounts of the physical altercation, here substantial evidence demonstrates that Salavea entered the building with CW's key and left with CW's possessions. Moreover, Aplaca's counsel completely failed to review the State's discovery materials or interview any potential defense witnesses, thereby failing to present both character and direct evidence that Aplaca did not assault the CW. By contrast, defense counsel in this case omitted a single line of questioning about CW's potential drug use on the day of the incident, which, as explained supra, was a tactical decision that did not substantially impair a potential defense. A close reading of Aplaca demonstrates that the Majority's comparison of this case to Aplaca is unavailing.

Furthermore, Aplaca exemplifies the level of clear incompetence we have required in the past to determine that an attorney provided ineffective assistance.[8] See Briones, 74

[8] The Majority disregards the numerous blatant failures of Aplaca's defense counsel - to review discovery from the State, to discover that the State had not provided full discovery, to investigate a list of witnesses provided by Aplaca, to call any of those witnesses at trial, and to cross-

(continued...)

Hawaiʻi at 457, 848 P.2d at 974 (holding that counsel's failure to object to factually inconsistent guilty verdicts for attempted first-degree murder and separate convictions for second-degree murder and attempted second-degree murder rendered assistance ineffective); Wakisaka, 102 Hawaiʻi at 516-17, 78 P.3d at 329-30 (defense counsel's failure to object to DPA's improper comment about defendant's failure to testify and defense counsel's intentional elicitation of testimony by detective that detective believed defendant murdered decedent and the evidence upon which this belief was based constituted ineffective assistance.).

The Majority contends that defense counsel's performance was "not within the range of competence demanded of attorneys in criminal cases." Majority at 38, citing Cordeiro, 99 Hawaiʻi at 405, 56 P.3d at 707. The Majority bases this opinion on the fact that defense counsel did not pursue a single

[8](...continued)
examine the CW about a prior inconsistent statement. In concert, these failures and omissions clearly impaired Aplaca's defense. The nature of the errors and the number thereof plainly impact this court's analysis of whether the errors or omissions "resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Aplaca, 74 Haw. at 66-67, 837 P.2d at 1305 ("[T]he question is: when viewed as a whole, [was] the assistance provided [to the defendant] within the range of competence demanded of attorneys in criminal cases[?]") (quoting State v. Smith, 68 Haw. 304, 309, 712 P.2d 496, 500 (1986) (emphasis added, internal quotation omitted, brackets in original)). Indeed, test's language employs plural nouns "errors or omissions," id., which indicates that this court envisioned that ineffective assistance require more than one serious error or omission. The Majority departs from our existing precedent by holding that the omission of a single line of testimony resulted in the substantial impairment of Salavea's defense. The Majority's comparison of Aplaca's counsel's numerous egregious failures to Salavea's counsel's decision not to elicit a single line of questioning from one witness is ill-suited.

line of questioning which, according to the Majority, could have impaired Salavea's defense. Majority at 32. By basing its conclusion on a single omission, especially where multiple obvious reasons exist for omitting that testimony, the Majority sets an impossibly high bar for attorney competence.

We have never before concluded that counsel was ineffective solely for failure to adduce testimony at trial. Indeed, courts generally do not hold that counsel provided ineffective assistance based on errors concerning the admission of testimony or evidence alone. See Johnson v. Lockhart, 921 F.2d 796 (8th Cir. 1990) (holding that defense counsel's performance was not ineffective despite presenting no physical, testimonial, or circumstantial evidence at trial); Haislip v. Attorney General, State of Kan., 992 F.2d 1085 (10th Cir. 1993) (murder defendant's counsel was not ineffective despite failing to seek admission of co-defendant's confession to committing the murder). This is so because trial attorneys must make tactical decisions based on the ever-shifting states of their cases at trial. It is not this court's role to label an attorney incompetent because we do not agree with a single such tactical decision. It is clear to me that defense counsel's assistance was not ineffective and was, in fact, well within the range of competence demanded of Hawaiʻi attorneys.

B. No prosecutorial misconduct occurred.

The Majority further holds that the DPA committed misconduct during the State's closing and rebuttal arguments. Defense counsel did not object to the DPA's closing argument or rebuttal arguments at trial.[9]

"Normally, an issue not preserved at trial is deemed to be waived. But where plain errors were committed and substantial rights were affected thereby, the errors may be noticed although they were not brought to the attention of the trial court." State v. Fagaragan, 115 Hawaiʻi 364, 367-68, 167 P.3d 739, 742-43 (2007) (internal quotation marks, citations, and brackets omitted). Accordingly, an alleged error may be corrected on appeal unless it was harmless beyond a reasonable doubt. See State v. Miller, 122 Hawaiʻi 92, 100, 223 P.3d 157, 165 (2010). We determine whether the prosecutor's actions were misconduct that amounted to harmful error by considering: "(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." Rogan, 91 Hawaiʻi at 412, 984 P.2d at 1238.

The Majority concludes that the DPA committed

[9] The Majority contends that defense counsel's lack of objection to the prosecutor's supposed misconduct during closing statements further evinces defense counsel's ineffectiveness. Majority at 39. I disagree, and note that as defense counsel appears to have correctly determined that the prosecutor's conduct was not improper, defense counsel did not demonstrate lack of care or skill when she did not object to the prosecutor's comments.

misconduct by: (1) expressing her personal opinion; (2) making a generic attack on Salavea's credibility; and (3) denigrating defense counsel. Majority at 39-57.

1. The DPA did not offer her personal opinion as to either CW's or Salavea's credibility.

The Majority reviews the following statements by the DPA during her closing argument:

> [THE STATE]: . . . [CW] told you the truth. [CW's] testimony was credible.
>
> THE COURT: Well, the State submits.
>
> [THE STATE]: Thank you.
>
> The State submits that [CW's] testimony is credible because it is corroborated by other evidence, because it makes sense, and because you, as the judges of everybody's demeanor and looking at those factors that are given to you in the jury instructions, can assess for yourself whether it makes sense or not.
>
> Now, Defendant's testimony, on the other hand, State submits to you, is not credible, and why it's not credible? Because it doesn't make sense. When Defendant realized that [CW] was not going to give her the money voluntarily, Defendant used an opportunity of having [CW's] fob to go into [CW's] home and steal and take it on her own and basically to help herself. When [CW] would not give her money voluntarily and refused to give her money, Defendant was upset. She used the fob, she used the opportunity, the chance that she had, to help herself.
>
> Defendant's story that she had permission to go in and she had somehow thought it was okay and that [CW] cooperated with her and [CW] let her do all of that is not credible. It's not credible, it's a lie, because it doesn't make any sense. . . .
>
> What's really significant here -- and this is what you need to focus on and this is how the State submits to you that it's proven that Defendant's story doesn't add up -- is the whole story by Defendant that the fob was lost by [CW] on March 6th does not hold, does not hold up. That's a lie, and from there, it follows that she was concealing the fob, she was deliberately holding on to that fob secretly so she

> could go in her own time at her own convenience and take from [CW].
>
> [CW] told you and she was very frank with you, she explained in details what happened to her fob. She told you she lost that fob as far as almost a year prior to this incident in March, and that testimony was corroborated by Ray Pavao. That testimony was corroborated by the records that she got an additional fob, she got the second fob.

The Majority also reviews the following statements by the DPA during her rebuttal argument:

> [THE STATE]: . . . . Judge Ahn did read to you the multiple factors that you may consider in determining whether a person is telling the truth or not.
>
> One of them is the witness' manner of testifying. That is significant. You saw how [CW] testified. I don't know if calling her sophisticated is kind of an overstatement. That's your judgment entirely. She may not have looked as sophisticated as [Defense Counsel] is claiming, but she was very forthright, she was very forthright about how she felt.
>
> And she also told you frankly that they were close friends. She was disappointed with how their relationship went, but she also did express no bias or no reason or no negativity towards Defendant even though I asked her hard questions. I was kind of asking her, you know, like, how did you feel, what was your, you know, what was your feeling towards relapsing, gambling every time you met with Defendant. She was very, she was very mild as far as when --
>
> THE COURT: The State submits. The State submits.
>
> . . . .
>
> [THE STATE]: [CW] was also very frank and forthright how she described what happened to her when she discovered things were missing. She told you in details how she was trying to call her phone, and it went to ringing first, then voicemail. It took her a while to figure it out. Then she went downstairs and she started checking the video. If it happened the way Defendant is telling you it happened and they actually had these conversations and [CW] invited her to go up, why would [CW] go down and bother Ray Pavao

> to review the video and check who was it that came?
>
> And [Pavao] is absolutely impartial witness. You heard his testimony. [Defense counsel] was asking him all these questions, whether he discussed it with someone else, whether he knew other people, and he told you he had no clue. He was just doing his job, and he saw this tenant who came down and told him that things were stolen from her and she wanted to see the video to figure it out who that was. She did have her suspicion because the last person who called her was Defendant. But why would she go to [Pavao] and look at that video to try to figure it out if in fact it happened the way [Salavea] says it happened? [Salavea] is not a truthful witness.
>
> Another factor is interest, if any, in the result of this case. Of course, every Defendant has a lot of interest in the result of the case, and that's natural, but you cannot disregard it. It's still there. There is interest and bias. Defendant has a lot of interest what's at stake, while [CW], why would [CW] go through all of this and why would [CW] go and make up a story if it was not what happened? There was no evidence by Defendant why is it that [CW] would do it, and there was no evidence from [CW], even though we pushed her, both of us, that she had any reason to tell this story. She told you the truth.
>
> THE COURT: Well, the State submits.
>
> [THE STATE]: State submits she told you the truth.
>
> THE COURT: Strike that "She told you the truth."
>
> What is your argument?
>
> Jury will disregard that part of the argument.

The Majority concludes that the DPA made two statements during closing argument that "bolstered the CW's credibility without any reference to the evidence supporting the assertion" and "attacked Salavea's credibility at least twice without prior reference to the evidence." Majority at 43-44. The Majority further takes issue with the DPA's comments during closing arguments that

Salavea lied. Majority at 45.

Considering the first Rogan factor, the nature of the conduct, the DPA's comments neither conveyed her personal opinion nor were they "calculated to inflame the passions of the jurors and to divert them . . . from their duty to decide the case on the evidence." See State v. Pacheco, 96 Hawaiʻi 83, 95, 26 P.3d 572, 584 (2001). See also Rogan, 91 Hawaiʻi at 412–15, 984 P.2d at 1238–41 (prosecutor's statements regarding defendant's race constituted an improper emotional appeal to sympathize with complainant's mother and risked inflaming the jury's prejudices against the defendant). Rather than diverting the jurors from their duty to decide the case, when reviewed in context the DPA's comments directed the jury to specific evidence adduced during the trial and invited the jury to decide for themselves whose account was more credible. In particular, the DPA pointed out how CW's testimony was corroborated by other evidence, including the fob usage printout, video footage, and Pavao's testimony. Conversely, Salavea's testimony that CW's fob was lost on March 6, 2015 was directly contradicted by the Moana Pacific's records and testimony of Pavao,[10] which established that CW lost the fob in June of 2014.

[10] The DPA referred to Pavao as testifying about the replacement fob purchased by CW in June of 2014, but it was actually Bryant, the Moana Pacific security supervisor who testified about the replacement fob.

As Salavea notes, this court disapproved of the word "lie" in closing statements in State v. Austin in 2018. 143 Hawaiʻi 18, 422 P.3d 18 (2018). However, because Salavea's trial occurred in 2015 and Austin applies prospectively, the fact that the prosecutor used the word "lie" or "lying" does not render her comments per se improper.[11] Moreover, here the DPA's assertion that Salavea lied was supported by the evidence adduced at trial. Id. at 44, 422 P.3d at 44 (Nakayama, J., writing separately) (observing that this court has "held that it is not improper for prosecutors to assert that a defendant's testimony is not credible in a variety of ways so long as such an inference is reasonably supported by the evidence."). Therefore, because the DPA's comments were rooted in the context of evidence and took place before our blanket ban on the use of the word "lie," the first factor does not indicate prosecutorial misconduct.

Although I conclude that the nature of the DPA's comments do not render them misconduct, I nevertheless address the second and third Rogan factors. Regarding the second factor, the circuit court gave prompt curative instructions ("the State submits"), struck the DPA's statement that "she told you the truth," and instructed the jury to "disregard that part of the argument." In

[11] A review of the transcript shows that the DPA used the word "lie" twice and "lying" once.

addition, the circuit court instructed the jury as follows before closing arguments began: "Statements or arguments made by lawyers are not evidence. You should consider their arguments to you, but you are not bound by their memory or interpretation of the evidence." Because we presume that the jury follows the circuit court's instructions, this factor weighs against Salavea. See State v. Pauline, 100 Hawaiʻi 356, 381, 60 P.3d 306, 331 (2002).

As to the final Rogan factor, the evidence against Salavea was overwhelming. Notwithstanding the Majority's repeated assertion that the entire case turned on whether the jury found CW or Salavea to be more credible, the State presented ample evidence against Salavea including: (1) the fob-usage records that disputed Salavea's account; (2) testimony of CW and other corroborating witnesses, including Mother who testified that CW called her looking for her cell phone; and (3) the surveillance footage of Salavea entering the building and leaving with CW's backpack. Furthermore, Salavea's own testimony inculpated her. Salavea admitted that she took the backpack without CW's permission and that she knew it was wrong and amounted to theft. Salavea also testified that she went to CW's apartment to return the keys but that she did not return the keys. Moreover, Salavea admitted that she actually used the key fob to access the elevator to leave the Moana Pacific. Thus, the

evidence against Salavea was overwhelming and not merely contradictory testimony.

Because the nature of the DPA's comments did not constitute misconduct, the circuit court gave prompt curative instructions, and ample evidence to supported the DPA's argument, I conclude that the DPA did not engage in prosecutorial misconduct.[12]

2. The DPA's argument that Salavea had a "lot of interest [sic] what's at stake" was not an improper generic argument, but was supported by the evidence adduced at trial.

Next, the Majority concludes that the DPA made a

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[12] The Majority also holds that the prosecutor "improperly suggested that Salavea had the burden of showing why the CW's testimony was not credible" (Majority at 55 n.35) when she made the following statement:

> [Salavea] has a lot of interest what's at stake, while [CW], why would [CW] go through all of this and why would [CW] go and make up a story if it was not what happened? There was no evidence by Defendant why is it that [CW] would do it, and there was no evidence from [CW], even though we pushed her, both of us, that she had any reason to tell this story.

(Emphasis added.) I disagree.

The DPA's statement was not improper because it did not shift the burden to Salavea. Placed in context, the DPA made this argument on rebuttal after Salavea's trial counsel argued that CW was "more sophisticated" and suggested that the jury should ask itself, "who was more likely to cook up something[.]" In her rebuttal argument, the DPA argued that "calling [CW] sophisticated is kind of an overstatement[,]" and said that it was for the jury to judge if CW "looked as sophisticated as [Salavea's counsel] is claiming[.]" In addition, the circuit court instructed the jury before closing arguments that Salavea was presumed innocent, that this presumption remained with Salavea throughout the trial, and that Salavea "[had] no duty or obligation to call any witnesses or produce any evidence." The ICA correctly concluded that the DPA did not improperly state that Salavea had the burden of proving that CW was lying. Rather, the "DPA was merely arguing that CW's credibility had not been impeached by any evidence of bias or motive to 'make up a story.'" State v. Salavea, No. 16-0000386, 2019 WL 763475, at *14 (App. Feb. 4, 2019) (mem.).

"generic attack on credibility" in violation of State v. Basham, 132 Hawaiʻi 97, 319 P.3 1105 (2014) by implying that Salavea had lied because she had a "lot of interest [sic] what's at stake." Majority at 48-49. In Basham, this court held that "it is improper for a prosecutor in summation to make generic arguments regarding credibility based solely upon the status of a defendant." 132 Hawaiʻi 97, 118, 319 P.3d 1105, 1126 (2014) (citing State v. Walsh, 125 Hawaiʻi 271, 285, 260 P.3d 350, 364 (2011)).

In Basham, a defendant challenged the prosecution's statements during closing argument as improper. 132 Hawaiʻi at 112, 319 P.3d at 1120. During closing arguments, the prosecutor argued that the sole issue in the case was witness credibility and that the complaining witness and his wife, who both testified, "have been completely credible witnesses" and "have absolutely no reason to fabricate or otherwise make up the accounts that they have recited to you in explicit detail." Id. at 104, 319 P.3d at 1112. The prosecutor also told the jury that the defendant, who testified at trial, had "absolutely no reason to tell you the truth." Id. As this court's opinion noted, "[a]t that point in the closing argument, the prosecutor had not discussed any of the testimony that had been presented during trial" and offered no evidence-based reason why the defendant

"would have no reason to tell the truth" other than his status as the defendant. Id. at 116, 319 P.3d at 1124. This court reasoned that, as with generic tailoring arguments, "[c]ategorical comments" asking a jury to "infer a defendant's lack of credibility based solely on the fact that he or she is a defendant" unfairly penalize the defendant and undermine the jury's function as fact finder. Id. at 117, 319 P.3d at 1125.

Analyzing Salavea's case in light of Basham, the DPA's comment that Salavea had a "lot of interest [sic] what's at stake" was not improper. This case is factually distinguishable from Basham for several reasons. First, here the DPA made the statement at issue during her rebuttal, after discussing the testimony and other evidence presented at trial in detail. Second, the DPA prefaced her statement by reminding the jury of the circuit court's instruction that one of the factors to consider in evaluating the credibility of a witness "is interest, if any, in the result of the case." Third, Salavea's case did not turn solely on the issue of the witnesses' credibility, as additional corroborating evidence was presented to the jury in the form of the video footage and the fob-usage printout. Thus, the DPA's argument that the jury should consider the witnesses' interest in the case as a factor in determining witness credibility was not an improper categorical comment that unfairly

penalized Salavea because she was a criminal defendant.

For these reasons, the DPA's comment was not an improper generic argument.

3. The DPA did not improperly attack opposing counsel's integrity by reminding the jury of the circuit court's instruction "not to be influenced by pity for the Defendant[.]"

Finally, the Majority determines that the DPA disparaged defense counsel when the DPA stated, at the start of her rebuttal:

> Ladies and gentlemen, what Defense Counsel was just doing was trying to appeal to your sense of pity or some kind of sense, you know, for Defendant, and that's improper. You are given an instruction that you should not be influenced by that.

(Emphasis added.) The Majority characterizes this statement as an "attack[] on the personal character of defense counsel" which "denigrate[d] the legal profession" and "undermine[d] the adversarial system." Majority at 52-53.

I disagree with the Majority's exaggerated characterization of the DPA's permissible comment and the Majority's conclusion that it constituted prosecutorial misconduct.

First, the DPA's comment was made in response to statements made by Salavea's counsel in closing argument reminding the jury that Salavea "broke down" while testifying and

"was in tears." Salavea's counsel then "suggest[ed]" that Salavea's tears were "because it probably didn't even occur to her that that playful little act [of taking CW's backpack] might be viewed by the law as theft." The comment was not, as the Majority states, merely a "comment on a witness's appearance and demeanor during [her] testimony[,]" but was a comment on Salavea's intent in taking CW's possessions, the primary issue at trial. Contra Majority at 54. The DPA was permitted to respond to defense counsel's statement regarding Salavea's intent. Contrary to the Majority's assertion, that the circuit court overruled the DPA's objection that defense counsel's statement was a personal statement that was not in evidence did not preclude the DPA from responding to defense counsel's argument regarding Salavea's intent nor did it indicate that defense counsel's statement was not an improper appeal to the jurors' emotions. Contra Majority at 53-54. Put differently, though the circuit court overruled the DPA's objection on one basis, it does not follow that any subsequent criticism of the objected-to statement was an improper personal attack on defense counsel.

Second, the DPA's statement here was not the kind of unsupported and uninvited personal attack that this court disapproved in State v.Klinge, 92 Hawaiʻi 577, 994 P.2d 509 (2000), where the prosecutor argued on rebuttal, "[t]he defense

lawyer did not tell you that like he's taking everything out of context like he's not going to give you the whole story. He's not going to give you the whole picture because he has a duty [to] get his client off." Id. at 583, 994 P.2d at 515. Here, the DPA's comment was invited by Salavea's counsel's closing argument and merely reminded the jury of the circuit court's instruction "not to be influenced by pity for the Defendant[.]"

The DPA's statement reminded the jury about the circuit court's instructions and justifiably commented on defense counsel's attempts to appeal to the jury's emotions. To characterize this statement as a "denigration" of defense counsel wildly exaggerates the nature of the statement and effectively broadens the scope of prosecutorial misconduct to any comment by a prosecutor which references defense counsel's arguments.

IV. CONCLUSION

I dissent. Having reviewed the record in its entirety, I find nothing in the conduct of defense counsel or the DPA which justifies vacating Salavea's Judgment of Conviction and Sentence. I would affirm the ICA's Judgment on Appeal.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama