IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

CHANSE HIRATA,
Petitioner/Defendant-Appellant.

SCWC-20-0000689

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-20-0000689; CASE NO. 1FFC-18-0000756)

OCTOBER 31, 2022

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

I. INTRODUCTION

I agree with the majority that the Deputy Prosecuting Attorney (DPA) engaged in prosecutorial misconduct when she characterized the defense witnesses, including defendant Chanse Hirata, as "hav[ing] a motive to lie." However, I respectfully disagree about the impact of that single reference on the

outcome of the trial. Unlike State v. Austin, where the prosecuting attorney referred to the defendant as a liar twenty times in closing argument, the DPA here used the term once, and moved on without even arguing what the motive to lie was. 143 Hawai'i 18, 54, 422 P.3d 18, 54 (2018) (concerns are "compounded when the prosecution makes constant, repeated use of 'lie' and its derivatives").

Moreover, suggesting that someone has a "motive to lie" – as opposed to accusing them of being a "liar" - implicates less strongly the concerns that motivated our decision in Austin. See, e.g., id. at 51 (prosecutor's argument that the defendant "lied to you" reflects a "personal, judgmental evaluation" that likely leads the jury to conclude it reflects the prosecutor's personal opinion). Indeed, other jurisdictions that prohibit prosecutors from referring to defendants as "liars" have found that arguments about a defendant's motive to lie are proper. State v. King, 288 Kan. 333, 352–53, 204 P.3d 585, 598 (Kan. 2009).

I also respectfully disagree with the majority's conclusion that the DPA's comment that the complaining witness's (CW) testimony was "consistent with a child who is traumatized" was improper. The prosecution's expert witness on child sex abuse, Dr. Alexander Bivens, testified about phenomena

consistent with the CW's behavior including delayed reporting by victims of child sex abuse, failure of victims to fully disclose when reports are made, and failure to recall surrounding details and the exact number of instances of abuse ("tunnel memory"). Dr. Bivens noted that "[t]unnel memory refers to a phenomenon we observe when children are recalling traumatic events." Dr. Bivens's testimony provided a fair basis for the DPA's argument.

While the evidence in this case was not overwhelming, nevertheless there was significant evidence that corroborated the CW's testimony. Her account of what happened was consistent, despite the memory and disclosure issues commonly associated with child victims of sex abuse. There was also testimony establishing that Hirata displayed unusual interest in having CW come to his house, where he had ample opportunity to be alone with her. Considering that evidence in light of the isolated nature of the misconduct, the misconduct was harmless beyond a reasonable doubt.

I also respectfully disagree with the majority's direction to our trial courts to excise from our pattern jury instructions any reference to a witness's "interest, if any, in the result of this case" when the defendant testifies. Majority at 4. Our current instructions are completely neutral and allow the jury to consider the defendant's interest on the same terms

as any other witness. We should refer this issue to our Standing Committee on Pattern Criminal Jury Instructions, which can consider other possible revisions to the instructions, evaluate approaches taken by other jurisdictions, and importantly, guard against unforeseen consequences.

Accordingly, I respectfully dissent.

II. BACKGROUND

The State charged Hirata with continuous sexual assault of a minor under the age of fourteen years, in violation of Hawaiʻi Revised Statutes (HRS) § 707-733.6 (2014). At trial, both Hirata and the CW testified. At the time of trial, CW was eleven years old; she testified that the abuse began when she was seven and continued until she was ten. The abuse allegedly occurred at the house where Hirata lived with CW's aunt (the "Waimānalo house"). The fact summary below highlights the evidence relevant to the issues on appeal.

A. Instruction to Jury as Sole Judge of Credibility

At the close of jury selection, the trial court informed the jury that they were the sole judge of credibility and further instructed them not to consider the lawyers' closing arguments as evidence.

B. Direct Examination of the CW's Mother

CW's mother testified that her sister, CW's aunt, was Hirata's girlfriend. CW's aunt and Hirata lived together in a house in Waimānalo, along with Hirata's mother, father, and brother. CW would go to the house when CW's mother needed babysitting, approximately every other weekend. Sometimes her mother sent her younger brother to the Waimānalo house for babysitting as well. When CW was around eight years old, she stopped coming to the Waimānalo house as frequently because she started cheerleading. When CW stopped coming to the Waimānalo house as frequently as before, Hirata began messaging CW's mother every weekend and asking if it would be okay if CW came over. Hirata did not ask if CW's brother could come over.

CW's mother also testified about CW's disclosure of the abuse by Hirata. She testified that CW was "hesitant and scared," and started crying as she spoke. After CW's disclosure, she called a sex abuse hotline, and she filed a police report the next day.

C. Direct and Cross-Examination of the CW

On direct examination, CW described how she would go to the Waimānalo house on weekends when her mother needed a babysitter. Sometimes her aunt and Hirata would watch her together, but sometimes Hirata would watch her alone. During

the day, she and Hirata would do activities such as going to the beach and walking around town.

The DPA then asked CW about the things Hirata did to her that she "didn't like," including where she was touched; how many times she was touched; how she felt when she was touched; whether Hirata used his tongue, fingers, or his "front private part"; whether Hirata touched her on the mouth, breasts, or her "back private area"; whether he touched her over her clothes or under her clothes; and whether it happened in the bedroom, living room, or bathrooms.

After a pause in the proceedings, the DPA continued her direct examination:

> [DPA]: Did you ever tell him that you didn't want him to do those things to you?
>
> [CW]: No.
>
> [DPA]: How come?
>
> [CW]: Because I got scared that if -- and I thought if I said anything about it, I might -- would've gotten hurt.
>
> [DPA]: When [Hirata] would do all the things that you just told us about this morning, did you tell an adult about what he was doing to you right away?
>
> [CW]: No.
>
> [DPA]: Did you tell any of your friends?
>
> [CW]: No.
>
> [DPA]: Why didn't you want to tell an adult or another person?
>
> [CW]: Because I got scared that if I told someone, I might have gotten -- I might or would've gotten hurt from him.

Immediately after, the defense counsel began his cross-examination. First, he asked the CW whether she felt like she was being "treated different from [her] brother," because they had "different daddies." Defense counsel drew attention to the fact that CW's half-brother often stayed "with [her] parents" while the CW "had to be with Uncle and Aunty." Then, he interrogated CW about all the "attention" she received after she told her story:

> [DEFENSE COUNSEL]: [T]ell me if this is fair: The attention you got, you liked it?
>
> [CW]: Yeah.
>
> [DEFENSE COUNSEL]: It's a lot more attention than you got before you told?
>
> [CW]: Yes.

Defense counsel questioned CW about the activities she and Hirata would do together and whether she enjoyed spending time with him. He asked whether Hirata was nice to her when she went over, and she responded, "Sometimes." He asked about how they would bike together and how Hirata had taught her to skateboard. He asked whether she liked going fishing with him and she said "Yeah." He then asked whether she was telling the truth about her allegations: "[DEFENSE COUNSEL]: Okay. So are you saying for real that all of this happened? [CW]: Yes."

Then, after extensive questioning into the possible inconsistencies in the CW's story, the CW became emotional and

defense counsel asked again whether "all of this never happened?" The exchange occurred as follows:

> [DEFENSE COUNSEL]: He put his front private area in your mouth?
>
> [CW]: Yes.
>
> [DEFENSE COUNSEL]: Plenty times, too many times to remember?
>
> [CW]: Yes.
>
> [DEFENSE COUNSEL]: Okay. Didn't you earlier say -- or not earlier before today -- say that it was just once or twice in the mouth?
>
> [CW]: No, but I remember.
>
> [DEFENSE COUNSEL]: Okay. Didn't you tell [the] Detective . . . it was just one time?
>
> [CW]: I don't remember.
>
> [DEFENSE COUNSEL]: Didn't you tell -- okay. You remember the -- in that room with the other prosecutor and that group of people, didn't you tell them it was one to two times?
>
> [CW]: Not that I remember.
>
> [DEFENSE COUNSEL] Okay. Okay. So let's talk about the time that you told the people in the room with the other prosecutor. Didn't you -- wasn't it asked of you about how many times he put his front private into your mouth? You remember being asked that question?
>
> [CW]: No.
>
> [DEFENSE COUNSEL]: Okay. You remember your response being, um, once or twice?
>
> [CW]: No, I don't remember.
>
> [DEFENSE COUNSEL]: Okay. If you saw -- if you saw the -- the print-out of your statement, do you think that would help your memory?
>
> [CW]: Overruled. (Pause.) I guess.
>
> [DEFENSE COUNSEL]: Okay. [CW], looks like you have something to tell us.
>
> [CW]: Me?

> [DEFENSE COUNSEL]: Yeah. Do you want to tell us the truth and that all of this never happened?
>
> [Objection by the DPA]
>
> [THE COURT]: (Pause.) [DPA], does your witness need a break?
>
> [DPA]: [CW], you want to take a break? No?
>
> [CW]: It all happened.

(Emphases added.)

D. Direct Examination of Dr. Bivens

Shortly after, the State called Dr. Bivens to testify about the dynamics of child sexual abuse. Dr. Bivens explained, in general terms, that "children have a difficult time talking about their experience of being sexually abused" and that in cases of child sexual abuse, "delayed disclosure is the rule, not the exception." He further stated that the primary reasons why children do not disclose immediately are because of shame, embarrassment, and the expectation that they would be blamed for the abuse.[1]

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[1] Dr. Bivens explained:

> Many children also talk about expecting to be blamed for the abuse, feeling like somehow it's their fault or that they've done something bad, sometimes that's something they've been told. Children also are often afraid of their abuser and worry that something might happen to their abuser. They're also often concerned that something might happen to their family members if the abuser is a part of their family or close to their family, they're worried about what the consequences of telling might be. And, again, sometimes they've been told things to lead them to believe that something will happen, other times they just have this sense that something bad will happen to their family if they disclose.

Dr. Bivens then explained that, often, children who have experienced sexual abuse will only partially disclose: "Sometimes the term testing the waters is used to describe how a child will disclose a part of something that's happening." Dr. Bivens discussed common memory problems observed in children who have experienced something "traumatic:"

> Tunnel memory refers to a phenomenon we observe when children are recalling traumatic events, including child sexual abuse, and it occurs because sexual abuse is an example of what we call a salient event, meaning something that's shocking or novel or unusual. Shocking, unusual events are much easier to remember than what clothes you were wearing on a particular day or necessarily what time of day it was. And so a shocking event is remembered better than these other kinds of details. So it is the case that when a child recalls child sexual abuse, is we often observe that they have good memory for the details of the event itself, the actual abuse that happened, but that the surrounding details are not remembered as well, and so we call it that tunnel memory.
>
> . . .
>
> We should also remember that for very unpleasant things, children will attempt to actually forget some of it, in other words to block it out, and so, you know, they may be doing damage to their own memory intentionally while they're keeping a secret to just, you know, try to forget about it and try to have a normal life.
>
> So I wouldn't say it's uncommon to not be able to come up with a good number.

(Emphasis added.)

E. Witnesses for the Defense

Defense counsel called Hirata as well as Hirata's mother, father, and girlfriend to testify. Hirata denied that he had any sexual contact with CW. Hirata's mother, father, and girlfriend all testified that they were present in the Waimānalo

house during the period of the alleged abuse, that CW liked coming to their house, that they had not noticed anything sexual between Hirata and CW, and that CW had not expressed any fear of Hirata to them.

F. DPA's Closing Argument

Prior to closing arguments, the court reinstructed the jury of their role as fact-finder as well as their obligation to "presume the defendant is innocent of the charge against him." The judge also instructed the jury to only consider "the evidence that has been presented to [them] in this case and inferences drawn from the evidence which are justified by reason and common sense."

The court further instructed the jury on credibility:

> You are the sole and exclusive judges of the effect and value of the evidence and of the credibility of the witnesses.
>
> It is your exclusive right to determine whether and to what extent a witness should be believed and to give weight to his or her testimony accordingly. In evaluating the weight and credibility of a witness's testimony, you may consider the witness's appearance and demeanor; the witness's manner of testifying; the witness's intelligence; the witness's candor or frankness or lack thereof; the witness's interest, if any, in the result of this case; the witness's relation, if any, to a party; the witness's temper, feeling, or bias, if any has been shown; the witness's means and opportunity of acquiring information; the probability or improbability of the witness's testimony; the extent to which the witness is supported or contradicted by other evidence; the extent to which the witness has made contradictory statements, whether in trial or at other times; and all other circumstances surrounding the witness and bearing upon his or her credibility.
>
> . . .

> The defendant in this case has testified. When a defendant testifies, his credibility is to be tested in the same manner as any other witness.

(Emphases added.)

The DPA, in her closing argument, also referred to the jury credibility instructions and then tied it to what the jury "saw" at trial.

> Now, the Court gave you the jury instructions that you all have in front of you, . . . there are a list of factors that you can consider when you deliberate to determine if a witness is credible. So you look at their demeanor, their candor, lack of motive, and if what they say makes sense.
>
> . . .
>
> So let's go through the factors of [CW's] credibility. Her appearance, demeanor, her manner of testifying. She came here last week. You saw her. She's 11 years old. She was nervous and understandably so. And she tried to be brave up there on the stand. She answered all of my questions. She answered all of the defense attorney's questions. Almost three hours up there.
>
> And then at the end of almost those three hours, she couldn't be brave anymore, and you saw her when she got emotional. She broke when the defense attorney continued to call -- to question her credibility and if she was making this up, and her answer to you was this really happened. It's consistent with a child who is traumatized.

(Emphases added.)

The DPA then turned to the defense witnesses' credibility: "So is the defense's story believable? We look at the same factors. They have bias. They have a motive to lie. What they said doesn't make sense, and at times, they even contradicted each other. The defense's story is not believable . . . ."

G. The Defense's Closing Argument

The defense argued in closing that CW had invented her allegations to seek attention from her mother and step-father, and that the attention she received from law enforcement and child welfare authorities had reinforced her false allegations. Defense counsel pointed out inconsistencies in CW's testimony, including the number of times Hirata had penetrated her vagina with his penis (CW told her doctor it happened one time, but stated on the stand it did not happen), and the number of instances of oral sex (CW told her mother and the doctor it occurred 1-2 times, and on the stand she said too many to count). Defense counsel also argued that CW's testimony was inconsistent because she never disclosed to her mother or police that her grandfather was present during the final incident, stating it for the first time on the stand.

H. DPA's Rebuttal Closing

During her rebuttal closing, the DPA recalled again for the jury, the CW's demeanor during her testimony:

> The defense wants you to believe that she was acting with her parents, fake tears, fake emotion, faking the scared. . . . [And she was acting] again . . . when she sat up here for three hours getting questioned by me and the defense attorney at 11 years old.
>
> If that was an act, then she deserves an Academy Award because you saw the true emotion. You saw the tears. She told you that it happened, and that she was telling the truth, no matter how many times [the defense counsel] called that into question.

> Now, child sexual abuse, I get it, doesn't make sense. There's things about it that don't make sense. That's what Dr. Bivens was here for, to talk about the things that happen when you have prolonged child sexual abuse, where somebody who's supposed to protect and care for you and somebody who your parents trust is hurting you.

(Emphases added.)

III. DISCUSSION

A. Stating the Defense Witnesses Had a "Motive to Lie" Was Harmless Error

While I agree that the DPA's use of the word "lie" was improper, I do not believe that it impacted the jury so significantly as to require a new trial. Majority at 20-21. The jury was presented with conflicting accounts from CW and Hirata, and had to decide what in fact happened. I do not believe that the DPA saying Hirata had "a motive to lie" made a meaningful impact on the jury's decision to believe CW over Hirata.

The single "motive to lie" remark here is clearly distinguishable from the improper closing argument made in Austin. In Austin, the prosecutor asserted that the defendant had lied to police or lied to the jury twenty separate times. Austin, 143 Hawai'i at 50, 422 P.3d at 50. The prosecutor repeatedly used the word "lie" and its derivatives in a

deliberately inflammatory way.[2] Id. Here, the DPA used the term once, and moved on without arguing what the motive to lie was. Austin, 143 Hawai'i at 54 (concerns are "compounded when the prosecution makes constant, repeated use of 'lie' and its derivatives"). Stating that someone "lied to you" or is a "liar" is much more likely to be interpreted by the jury as a prosecutor's personal opinion than stating that someone has a "motive to lie." See, e.g., id. at 51 (prosecutor's argument that the defendant "lied to you" reflects a "personal, judgmental evaluation" that likely leads the jury to conclude it reflects the prosecutor's personal opinion).

Indeed, other jurisdictions that prohibit prosecutors from referring to defendants as "liars" have found that arguments about a defendant's motive to lie are proper. See King, 288 Kan. at 352–53, 204 P.3d at 598. In King, the Kansas Supreme Court reasoned that while a prosecutor may not accuse a defendant of lying, a prosecutor may craft an argument "that when a case turns on which of two conflicting stories is true,

[2] State v. Salavea is also distinguishable. 147 Hawai'i 564, 465 P.3d 1011 (2020). There, unlike here, the prosecutor accused the defendant of lying or characterized her statements as lies four times in closing. Id. at 582-83, 465 P.3d at 1029-30. The prosecutor also explicitly highlighted defendant's status as a defendant as a source of bias, which we held was improper. Id. at 584, 465 P.3d at 1031 ("[E]very Defendant has a lot of interest in the result of the case, and that's natural, but you cannot disregard it. . . . [t]here is interest and bias.") The DPA's very specific argument in Salavea was less prejudicial than the brief "motive to lie" reference here, which the DPA made without further elaboration.

certain testimony is not believable." Id. at 352, 204 P.3d at 598 (quoting State v. Davis, 275 Kan. 107, 121, 61 P.3d 701 (Kan. 2003)).

While I agree that the evidence in this case is not overwhelming, the DPA's remark was harmless error. The motive to lie comment, while improper, was brief and less inflammatory than repeatedly calling the defendant a liar. CW's account of what happened was generally consistent across her disclosure to her mother, her police report, and her testimony at trial. The inconsistencies in her statements were attributable to typical memory and disclosure patterns in child victims of sexual abuse. There was also testimony establishing that Hirata specifically requested CW come to his house every weekend, and he did not pay the same attention to her brother. Weighing this evidence against the DPA's single "motive to lie" remark, the misconduct was harmless beyond a reasonable doubt.

B. The DPA Drew Reasonable Inferences From the Evidence in Arguing That the CW Testified "Consistent With a Child Who Is Traumatized"

The majority concludes that the DPA committed "serious prosecutorial misconduct" by stating that the CW testified "consistent with a child who is traumatized" because the jury heard no specific evidence that could legitimately support this remark. Majority at 13-14. I respectfully disagree.

"[I]t is well-established that prosecutors are afforded wide latitude in closing to discuss the evidence, and may 'state, discuss, and comment on the evidence as well as to draw all reasonable inferences from the evidence.'" State v. Udo, 145 Hawai'i 519, 536-37, 454 P.3d 460, 477-78 (2019) (quoting State v. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209 (1996)). When assessing whether a prosecutor's commentary is legitimate, this court may consider whether the inference asked to be drawn "cannot be justified as a fair comment on the evidence but instead is more akin to the presentation of wholly new evidence to the jury." State v. Basham, 132 Hawai'i 97, 112, 319 P.3d 1105, 1120 (2014) (emphasis and citations omitted).

When read in context of the jury instructions, the entire trial record, and the DPA's closing arguments, the DPA was not presenting new evidence to the jury. See State v. Marsh, 68 Haw. 659, 661, 728 P.2d 1301, 1302 (1986) (reviewing the entire trial context when assessing whether the prosecutor's improper comments substantially prejudiced the defendant's right to a fair trial).

The DPA did not communicate new evidence rising to the level of "unsworn" or "unchecked testimony." See id. at 660-61, 728 P.2d at 1302. Rather, the DPA sought to explain the inconsistencies in the CW's testimony when she noted that the

CW's testimony was "consistent with a child who is traumatized." That argument was clearly supported by the testimony of Dr. Bivens, who testified about why a child may delay disclosure, or may forget details surrounding instances of abuse:

> Tunnel memory refers to a phenomenon we observe when children are recalling traumatic events, including child sexual abuse, and it occurs because sexual abuse is an example of what we call a salient event, meaning something that's shocking or novel or unusual. Shocking, unusual events are much easier to remember than what clothes you were wearing on a particular day or necessarily what time of day it was. And so a shocking event is remembered better than these other kinds of details. So it is the case that when a child recalls child sexual abuse, is we often observe that they have good memory for the details of the event itself, the actual abuse that happened, but that the surrounding details are not remembered as well, and so we call it that tunnel memory.
>
> . . .
>
> We should also remember that for very unpleasant things, children will attempt to actually forget some of it, in other words to block it out, and so, you know, they may be doing damage to their own memory intentionally while they're keeping a secret to just, you know, try to forget about it and try to have a normal life. So I wouldn't say it's uncommon to not be able to come up with a good number.

(Emphasis added.)

Dr. Bivens also described "a primacy effect and a recency effect" where children recalling sexual abuse may only remember the first and last incident in detail, while the times in between blur together.

It was proper for the DPA to reference Dr. Bivens's testimony in closing, given that it explained that inconsistencies arise when a child recounts a traumatic event. She referred to Dr. Bivens once more on rebuttal, arguing that

his testimony helped explain things that "don't make sense" about the dynamics of child sexual abuse:

> Now, child sexual abuse, I get it, doesn't make sense. There's things about it that don't make sense. That's what Dr. Bivens was here for, to talk about the things that happen when you have prolonged child sexual abuse, where somebody who's supposed to protect and care for you and somebody who your parents trust is hurting you.

(Emphasis added.)

In sum, the DPA's argument that CW testified consistent with a "child who [was] traumatized" was not improper as it was based on Dr. Biven's testimony at trial.

C. We Should Not Prohibit Jury Instructions That Allow the Jury to Consider a Witness's "Interest, If Any, in the Outcome of the Case"

I respectfully disagree with the majority's direction to our trial courts to excise from our pattern jury instructions any reference to a witness's "interest, if any, in the result of this case" when the defendant testifies. Hawai'i Standard Jury Instructions, Criminal (HAWJIC) 3.09 (2000).

HAWJIC 3.09 must be read in conjunction with HAWJIC 3.15 (2012), which provides that when a defendant testifies, "his/her credibility is to be tested in the same manner as any other witness." Thus, our instructions do not unfairly suggest that the defendant is more likely than any other witness to testify falsely because of their interest in the outcome of the case, nor do they assume the guilt of the defendant. Rather,

they are neutral. Moreover, they indicate that the witness's interest, if any, in the outcome, is one of a non-exclusive list of eleven factors that the jury "may" consider. HAWJIC 3.09. Thus, the instructions provide some guidance to the jury in evaluating any interest of the witnesses, including the defendant, without unduly burdening a testifying defendant's exercise of their rights.

In any event, there are other potential ways in which the instructions could be modified without leaving the jury altogether at sea in assessing the interest of witnesses, including testifying defendants. At the very least, we should refer this issue to our Standing Committee on Pattern Criminal Jury Instructions for its consideration.

CONCLUSION

I agree with the majority that the DPA's remark that the defendant had a "motive to lie" was misconduct, but I respectfully disagree that the misconduct affected the outcome of the trial. Majority at 20-21. The evidence against the defendant, though not overwhelming, was strong enough that the "motive to lie" remark was harmless beyond a reasonable doubt.

Additionally, I disagree with the majority's holding that it was improper for the DPA to state that CW's testimony on cross-examination was "consistent with a child who is

traumatized." The DPA's statement referenced testimony by Dr. Bivens regarding how children who had experienced sexual abuse recall traumatic events.

For these reasons, I respectfully dissent, and would affirm the judgment of the ICA.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama