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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

ZETH BROWDER,
Petitioner/Defendant-Appellant.

SCWC-22-0000267

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-22-0000267; CASE NO. 3CPC-19-0000486)

JUNE 5, 2024

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

The issue before this court is whether a statement in closing argument by the deputy prosecuting attorney (**DPA**), after pointing to facts established by evidence in the record, constitutes prosecutorial misconduct. Specifically, Petitioner-Appellant Zeth Browder (**Browder**) challenges the DPA's statement

in the last sentence of this passage, referring to the complaining witness (CW):

She's 80 years old. She was nervous, shaking on the witness stand. She was emotional and crying. She was scared. She told you she was scared that morning. She was scared at the hospital. She was scared even a week and a half later, and she was still scared in court. This is consistent with someone who's been traumatized.

(Emphasis added.) Immediately after, the DPA discussed evidence in the record relevant to this statement.

The majority holds that, similar to State v. Hirata, 152 Hawai'i 27, 520 P.3d 225 (2022), the DPA's "traumatized" remark was prosecutorial misconduct because it added new evidence during closing argument and expressed a personal belief about the CW's credibility. In my view, this case is materially different than Hirata and therefore I respectfully dissent.

In the context of this case, it was well within the province of the jury to assess the evidence pointed out by the DPA and to determine whether it was consistent with the CW having been traumatized by the alleged sexual assault. As discussed in further detail by the DPA during closing argument, the evidence included the CW's testimony, the testimony of a person who assisted the CW the morning of the alleged incident, the testimony of two police officers who responded to the scene, the testimony of two detectives who interviewed the CW, and the testimony of a nurse who examined the CW after the alleged incident. The majority holds that "expert psychological

testimony" was needed in order to support the DPA's challenged statement. But the DPA did not use the term "traumatized" in a manner inferring a medical or psychological condition. Rather, a fair reading of the closing argument shows the term was used in its ordinary sense. The majority decision thus conflicts with this court's prior decisions holding that expert testimony is not required when the issues are within the common knowledge of the jury, and that in such cases the jurors should use their "general knowledge of how humans operate in the world." State v. David, 149 Hawai'i 469, 478, 494 P.3d 1202, 1211 (2021); see Brown v. Clark Equip. Co., 62 Haw. 530, 537, 618 P.2d 267, 272 (1980) ("[W]here the issues are within the common knowledge of the jurors, expert testimony is unnecessary.") (citation omitted); State v. Batangan, 71 Haw. 552, 556, 799 P.2d 48, 51 (1990) ("The common experience of a jury, in most cases, provides a sufficient basis for assessment of a witness' credibility.") (citation omitted); see also Schulz v. Pennsylvania R.R. Co., 350 U.S. 523, 526 (1956) ("Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.").

Hirata, on the other hand, involved the alleged sexual assault of a minor. This court has recognized that expert

testimony is helpful in child sex abuse cases in order to aid the jury in assessing the distinct dynamics and behavior of child sexual abuse victims, which is not within the common understanding of jurors. See Batangan, 71 Haw. at 558, 799 P.2d at 52 (concluding that certain "expert testimony explaining 'seemingly bizarre' behavior of child sex abuse victims is helpful to the jury and should be admitted"); State v. McDonnell, 141 Hawai'i 280, 409 P.3d 684 (2017); State v. Kony, 138 Hawai'i 1, 3, 375 P.3d 1239, 1241 (2016).

In Hirata, such an expert testified. The majority and dissenting opinions in that case disagreed as to whether the expert testimony supported the deputy prosecutor's "traumatized" comment there. Compare 152 Hawai'i at 33, 520 P.3d at 231 (3-2 decision) (stating the jury "heard no evidence that could legitimately support the prosecutor's claim that the CW testified consistent with a traumatized child. No witness testified about CW's mental health or psychological condition.") (footnote omitted), with 152 Hawai'i at 42-43, 520 P.3d at 240-41 (Recktenwald, C.J., dissenting) (concluding the deputy prosecutor's statement was supported by the expert testimony of Dr. Bivens, who testified "about why a child may delay disclosure, or may forget details surrounding instances of abuse[.]").

Here, the DPA's "traumatized" statement also addressed Browder's defense theory, that the CW was lying about the sexual assault, by pointing to contrary evidence. Unlike Hirata, the DPA in this case pointed to evidence about the CW at four different points in time - the morning of the alleged incident, at the hospital later that day, eleven days later when she was interviewed by a detective, and while testifying at trial. Moreover, the DPA pointed to evidence of the multiple physical injuries the CW sustained. The CW's physical injuries support the DPA's "traumatized" statement because it is reasonable to infer that the injuries are an underlying basis for why the CW was emotional and scared in the days and weeks following the incident, and when she had to recount the incident at trial. As an example, the CW testified that when being interviewed by a detective eleven days after the alleged incident, she was affected by the "trauma that was in [her] body from the attack." Considering the actual context in which the challenged statement was made in this case, it was proper for the DPA to address CW's credibility in this manner where the defense claimed she was lying.

Because of the material differences in this case, Hirata should not be extended to the circumstances here. The DPA's challenged comment was not improper and did not prejudice Browder's right to a fair trial.

I. Prosecutorial Misconduct Standards

"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. Austin, 143 Hawai'i 18, 28, 422 P.3d 18, 28 (2018) (citation omitted). "Prosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a fair trial." Id. at 39, 422 P.3d at 39 (citation omitted).

"It is generally recognized under Hawai'i case law that prosecutors are bound to refrain from expressing *their personal views* as to a defendant's guilt or the credibility of witnesses. However, a prosecutor, during closing argument, is permitted to draw reasonable inferences from *the evidence* and wide latitude is allowed in discussing *the evidence*." State v. Cordeiro, 99 Hawai'i 390, 424-25, 56 P.3d 692, 726-27 (2002) (citations omitted). This court has explained that "[a] statement about a witness's credibility that is made without reference to the evidence or facts supporting the assertion amounts to an expression of personal opinion" State v. Salavea, 147 Hawai'i 564, 582, 465 P.3d 1011, 1029 (2020) (emphasis added) (citation omitted). "[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, 454 P.3d 460, 477 (2019) (citation and internal quotation marks omitted).

II. Relevant Evidence in This Case

In order to analyze Browder's claim that the "traumatized" statement constitutes prosecutorial misconduct, we must examine the relevant parts of the record.

1. CW's Testimony

The CW testified that on June 15, 2019, Browder broke into her camping tent at Spencer's Beach Park and sexually assaulted her. CW was seventy-eight years old at the time. Browder was camping nearby and the CW testified she had multiple interactions with him in the days prior to the incident, including driving him to the store, having conversations with him, and driving him to his grandmother's home. The CW testified that on the day of the incident, she was awakened in the early morning hours by a large individual on top of her. She testified that the individual attempted to put a dark hood over her head, before placing his hands around her neck and ordering her to cover her eyes with her hand and keep it there or he would kill her. Based on the sound of the individual's voice and at one point being able to see his face, CW identified

the person in her tent as Browder. She testified in detail about being sexually assaulted in her tent and feeling scared and terrified that she was going to be killed.

In the early morning hours after her assailant left her tent, the CW went to the beach park restroom, did not see any other campers that were awake yet, and then heard Browder's voice ask her if she was leaving. CW answered in the negative, proceeded to the bathroom and while there she felt afraid that Browder would come after her and kill her. CW went to her car, called a friend in North Carolina, and testified she was still shaking. She did not call 911 or attempt to drive out of the beach park because the park gates were locked and she was shaking so much and did not know what to do next. Based on the advice of her friend, CW left her car and walked towards the campsite of a family camping nearby. CW attempted to wake up a camper in his tent, was unsuccessful, and waited nearby for other campers to awaken.

While CW waited, Browder approached CW and asked if she wanted to talk and if she was going back to her tent, to which she replied "no." During this interaction, CW testified she felt scared to death that Browder was going to kill her and that she was too shaky and frozen to do anything except wait for a nearby camper to wake up. When a female camper finally awoke, CW told her that she was raped. The female camper called 911.

Police officers arrived to the beach park and arrested Browder. CW went to the Kona Community Hospital that afternoon and was examined by a nurse. Following the date of the incident, CW met with a detective and identified Browder in a photographic lineup as the person who sexually assaulted her.

CW testified that during the assault, over the days, weeks, months, and years following the assault, "everytime she told about the whole incident[,]" or while recounting the assault in court, she felt "scared," "in shock," "anxious," "terrified," "frozen with fear;" and experienced "shaking." She also stated that when she talked with a detective eleven days after the incident, she was "still going over the trauma that was in [her] body from the attack." (Emphasis added.)

2. Witness Michael Demotta's Testimony

Michael Demotta (**Demotta**) testified that in mid-June 2019, she camped with her family at Spencer Beach Park. In the early morning hours of June 15, 2019, Demotta woke up in her tent from the sound of someone talking and observed CW sitting on a picnic table near Demotta's campsite, talking on the phone. Demotta left her tent and CW approached her and grabbed her arm. Demotta was asked not to say what the CW told her, but in describing the CW's demeanor Demotta testified the CW was "nervous, little shaken up" and "[l]ooked like she was crying[.]" Demotta also observed that the CW had a scratch on

her arm and what appeared to be "road rash" on her face. Demotta testified that "I guess [CW] was in shock," and after talking, Demotta called the police and waited with the CW until officers arrived.

3. Testimony of Officers Robert Ayau and Jonathan Kailiuli

On the morning of June 15, 2019, Officers Robert Ayau (**Officer Ayau**) and Jonathan Kailiuli (**Officer Kailiuli**) of the Hawai'i County Police Department (**HPD**) were dispatched to the beach park in response to CW's alleged sexual assault. Upon making initial contact with CW at the beach park, Officer Ayau observed that CW's demeanor was "sad . . . very emotional", "scared", and "crying." Officer Ayau also observed that CW had visible scratches on her cheek. Officer Kailiuli observed that CW's demeanor was "distraught, . . . under some stress and shaken up" and "afraid." Officer Kailiuli took a verbal statement from CW and noted that her demeanor remained distraught during the time that he spoke with her.

Based on the CW's allegations, Officers Ayau and Kailiuli identified Browder as the suspect in the alleged sex assault, located him in his campsite approximately fifty feet from CW's tent, and arrested him.

4. Nurse Misty Davis's Testimony

On June 15, 2019, starting at 12:30 p.m., a sexual assault examination was conducted on CW at the Kona Community Hospital. Misty Davis (**Nurse Davis**), a Sex Assault Nurse Examiner, conducted CW's examination. Nurse Davis testified that in addition to being a registered nurse, she had specialized training as a Sex Assault Nurse Examiner and training as a psychiatric nurse and managed care nurse. Nurse Davis provided testimony as a qualified expert in the general field of medicine with a further expertise in the examination and treatment of patients of alleged sexual abuse.

Nurse Davis observed the CW's demeanor as "very tearful and very shaky" while she provided Nurse Davis with her account of the sexual assault. Nurse Davis testified about what the CW reported to her about the sex assault. Nurse Davis also testified the CW noted symptoms including abdominal pain, pelvic pain, genital discomfort and pain, and reported that she may have lost consciousness and had vomited. During Nurse Davis's physical examination of the CW, Nurse Davis reported observing multiple abrasions to both sides of the CW's face, on the bridge of her nose, and her left eyebrow. The CW also reported pain to the back of her head and neck. Nurse Davis testified about observing "abrasion and blunt force trauma to [CW's] soft palate, the uvula and her hard palate . . . bruising and

abrasion to [CW's] extremities with a large bruise on her right hand, and her breast had some petechiae-like spots."¹

Nurse Davis was shown and further testified about pictures she took of the CW during the examination, which had been entered into evidence. Nurse Davis testified that based on pictures and her examination report, the CW had abrasions to her left and right cheek, an abrasion above her left eyebrow, dried blood above her lip, bruising and abrasion to her upper lip, and abrasions on the bridge of her nose and upper lip. Nurse Davis testified a photograph of inside the CW's mouth showed "a number of areas of . . . petechiae and trauma that lead to the hard palate, the soft palate and the uvula."² Nurse Davis also testified about photographs that showed a small abrasion to the CW's right shoulder, several areas of abrasion to the CW's right arm, a "fairly large bruise" on the back of the CW's right hand, areas of petechiae on CW's breast, bruising to CW's left hip, an abrasion to CW's right knee, and a bruise on CW's right thigh.

¹ Nurse Davis testified that "petechiae are small red or purple spots that are caused by bleeding into the skin[,] and that generally the causes of petechiae are "anything that might cause the small blood vessels to break." Nurse Davis testified that blunt-force trauma and suction could cause petechiae. She also testified that a bruise is also bleeding into the skin due to an injury or blunt-force trauma, that a bruise is larger than petechiae, and a bruise can be a variety of colors. She also testified that an abrasion is a breaking or scraping away of the skin.

² Nurse Davis described the uvula as "the little part that hangs down" in the mouth and that the picture of the CW's mouth showed "in the very back on the upper kind of as you see the archway there . . . that's where you see the red spots and petechiae."

Nurse Davis also examined CW's genitalia, which included examining the outer and inner areas of the genitalia. During this part of the examination, Nurse Davis observed CW's demeanor as "quiet and tearful and a little shaky." From the examination, Nurse Davis observed "general redness" to CW's labia majora; "redness, bruising and petechiae to the labia minora, introitus and the hymen"; a "tear . . . in the fold between the labia majora and the labia minora"; "bruising and a tear to the posterior fourchette and the fossa navicularis"; and petechiae on the cervix. Nurse Davis determined that based on her physical examination of CW, her findings were consistent with CW's patient history of alleged sexual assault.

5. Testimony of Detectives Clarence Acob and Calvin Delaries

On June 15, 2019, HPD detective Calvin Delaries (**Detective Delaries**) was assigned to investigate CW's alleged sexual assault. On June 25, 2019, HPD detective Clarence Acob (**Detective Acob**) was assigned to assist with the investigation of CW's alleged sexual assault.

On June 15 2019, Detective Delaries contacted CW at the Kona Community Hospital. Detective Delaries observed that CW began to "cry . . . visibly shake . . . [and] [h]er lips would quiver."

On June 26, 2019, Detective Acob interviewed CW. Detective Acob observed that as the interview progressed, CW's demeanor became "sad" and she began to cry. Following Detective Acob's interview of CW, he administered a photographic lineup wherein CW identified Browder as her assailant. Detective Acob observed that when CW saw Browder's photo in the lineup "she turned away and again [CW] started to tear[.]"

III. The DPA's "Traumatized" Statement Was Not Misconduct

The DPA's challenged statement in this case was immediately prefaced by noting CW's demeanor and appearance while testifying in court, the morning after the incident, at the hospital the day of the incident, and eleven days later when the CW spoke with Detective Acob. Further, immediately after the remark, the DPA specifically discussed relevant evidence pertinent to the remark. The DPA's closing argument, in relevant part, is as follows:

[DPA:] "Do what I say or I'm gonna kill you." "You have to want me." "I'm bigger. I can kill you with this rock." This is what [Browder] told [CW] in the early morning hours of June 15th, 2019.

Now, ladies and gentlemen, over the course of last week you heard from a number of witnesses and you saw a number of photographs, but ultimately this case comes to one question. Is [CW] believable?

Now, Judge Kim just read you a number of jury instructions, and on page 9 you'll find a number of credibility factors that you can use to determine the credibility of witnesses.

I'm not gonna reread everything again for you, but when you look at some of them like her demeanor, her candor, her lack of motive and is [sic] what she says makes

sense, then the State submits that, yes, the answer to this question is that [CW] is believable. And because [CW] is believable as stated on page 11 of your jury instructions, the testimony of even a single witness if believed is sufficient to prove a fact.

So now let's look a little bit closer at the credibility factors and the evidence that you heard over the last week.

So looking at [CW]'s appearance, demeanor, manner of testifying you saw her and you got to meet her over the course of two days of questioning.

She's 80 years old. She was nervous, shaking on the witness stand. She was emotional and crying. She was scared. She told you she was scared that morning. She was scared at the hospital. She was scared even a week and a half later, and she was still scared in court. This is consistent with someone who's been traumatized.

To the next factor, the extent to which [CW] is supported or contradicted by other witnesses.

First[,] we have the initial HPD officers, and they told you when they met [CW] a few hours after the vicious attack she was still emotional, crying, injured but was able to give a disclosure to them of how she had been violated and hurt in her tent.

They found [Browder] in his tent, informed him of [CW]'s report and then subsequently arrested him.

You also heard from Michael Demotta, the first person who saw [CW] after the attack, and she told you that [CW] gripped onto her arms. She was shaking, crying and most importantly she was now injured which was different from how she had looked the day before when Michael saw her.

Michael helped her call 911, and Michael also helped her go to the bathroom because she was still shaken up.

Then you heard from Detective Acob. A week and a half -- about a week and a half after the incident he met with [CW], and he told you how she was still emotional and crying when she had to describe the sex acts that [Browder] forced upon her. And when he showed her that photo lineup with [Browder]'s picture in it she again became emotional and looked away.

Then you heard from Detective Delaries who met [CW] a few hours after the incident at the Kona Hospital, and again she was emotional. She was shaky, crying.

. . .

Then you heard from Nurse Davis who documented the injuries to [CW]; the face injuries, the injuries on her hand, her legs, her -- her breasts, the inside of her mouth, and then her vaginal injuries, the bruising, the petechiae and the tear.

Then you also heard about that Nurse Davis said the - her injuries and what she documented in her examination were consistent with [CW]'s patient history.

(Emphases added.)

The DPA also discussed further evidence related to the CW's testimony:

She admitted she helped [Browder]. She admitted she complied with his demands in that tent to survive, and she also admitted that she made some mistakes in her statements initially to the police. She told you that she had mistaken the arm. That she couldn't remember some things.

She also admitted the things that she didn't do. She didn't scream. She didn't try to run away, and right after she couldn't call 911 and she told you all why. Because she was fighting to survive. She believed [Browder] was going to kill her.

She also admitted to you the things that she didn't remember. Under a long cross-examination by defense counsel she admitted that, yes, she didn't remember certain things she had told some of the initial officers or Detective Acob and that it was because she was in shock, and she couldn't remember word by word exactly what she told multiple people about this attack that she had just endured.

(Emphasis added.)

In Salavea this court explained that "[a] statement about a witness's credibility that is made without reference to the evidence or facts supporting the assertion amounts to an expression of personal opinion" and that "expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that

should separate an attorney from the cause being argued." 147 Hawai'i at 582, 465 P.3d at 1029 (emphasis added) (citing State v. Basham, 132 Hawai'i 97, 115, 118, 319 P.3d 1105, 1123, 1126 (2014)). Furthermore, this court has explained that prosecutors are prohibited from introducing new information or evidence during closing argument. See Basham, 132 Hawai'i at 113, 319 P.3d at 1121.

Here, the DPA's "traumatized" remark in reference to CW's trial testimony, as well as CW's fear and shock during and after the alleged sexual assault, was thoroughly supported by CW's own trial testimony, and the testimony of other trial witnesses. On numerous occasions in the CW's trial testimony alone, she stated that during the assault or at various points in the days, weeks, months, or years following the assault, including when she had to recount the incident, she felt "scared," "in shock," "anxious," "terrified," "frozen with fear;" and experienced "shaking." She also stated that eleven days after the incident, she was "still going over the trauma that was in [her] body from the attack." (Emphasis added.)

Other witnesses' testimony further corroborated the CW's testimony and supported the DPA's "traumatized" remark via first-hand observations of the CW at various points following the alleged sexual assault. Demotta testified that in the morning directly following the alleged sexual assault, she

observed CW as "nervous . . . shaken [sic] up" and "[l]ooked like she was crying[.]" Officer Ayau and Officer Kailiuli testified that when they responded to the scene at the beach park, they observed the CW's demeanor was "sad . . . very emotional," "scared," "crying," "distraught, . . . under some stress and shaken up [sic]" and "afraid." At the hospital, Nurse Davis testified that she observed CW's demeanor as "very tearful and very shaky[,]" and she also testified about the multiple physical injuries she observed during her examination of the CW. Also at the hospital, Detective Delaries testified that he observed CW begin to "cry . . . visibly shake . . . [and] [h]er lips would quiver[.]" Further, Detective Acob testified that eleven days after the alleged incident, he observed CW's demeanor become "sad" and she began to cry as he interviewed her. Hence, the DPA's "traumatized" remark was thoroughly supported by evidence adduced at trial and did not inject new evidence.

As noted, the DPA directly prefaced the "traumatized" remark with references to CW's demeanor and manner of testifying at trial,³ as well as evidence in the case. Directly following the "traumatized" remark, the DPA elaborated on the testimony

³ "Appearance," "demeanor," and "manner of testifying" are all credibility factors under the HAWJIC 3.09 (2000) "Credibility of Witness" jury instruction.

and evidence that had been presented in the trial, which further supported the challenged remark.

IV. Hirata involved the Sexual Assault of a Minor, Where Expert Testimony Was Appropriate

The factual circumstances in the present case involve the sexual assault of an adult, whereas Hirata involved sexual abuse of a child. The majority concludes that this distinction is "inconsequential." I respectfully disagree.

This court has recognized that expert testimony is helpful in child sexual abuse cases in order to aid the jury in assessing the distinct dynamics and behavior of child sexual abuse victims. Batangan, 71 Haw. at 558, 799 P.2d at 52 (concluding that "expert testimony explaining seemingly bizarre behavior of child sex abuse victims is helpful to the jury and should be admitted," but "conclusory opinions that abuse did occur and that the child victim's report of abuse is truthful and believable . . . should not be admitted") (internal quotation marks omitted); see also McDonnell, 141 Hawai'i at 292-93, 409 P.3d at 696-97 (holding that expert testimony regarding delayed reporting, tunnel or child memory, and incomplete disclosure was properly admitted in child sexual assault case); Kony, 138 Hawai'i at 3, 375 P.3d at 1241 (relying on Batangan and affirming "trial court's ruling as to the relevancy of the expert testimony in this case regarding the unique

characteristics of child sexual abuse victims admitted to assist the jury 'to comprehend something not commonly known or understood'—delayed reporting.")

In Batangan, a case dealing with child sexual abuse, this court explained:

The common experience of a jury, in most cases, provides a sufficient basis for assessment of a witness' credibility. Thus, expert testimony on a witness' credibility is inappropriate. However, sexual abuse of children is a particularly mysterious phenomenon, and the common experience of the jury may represent a less than adequate foundation for assessing the credibility of a young child who complains of sexual abuse[.]

71 Haw. at 556-57, 799 P.2d at 51 (emphasis added) (citations and internal quotation marks omitted). The Batangan court reasoned that the testimony needed to properly aid the jury in child sexual assault cases is unique and distinct from other assault cases:

While jurors may be capable of personalizing the emotions of victims of physical assault generally, and of assessing witness credibility accordingly, tensions unique to trauma experienced by a child sexually abused by a family member have remained largely unknown to the public. . . . The routine indicia of witness credibility—consistency, willingness to aid the prosecution, straight forward rendition of facts—may, for good reason be lacking. As a result jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion.

Child victims of sexual abuse have exhibited some patterns of behavior which are seemingly inconsistent with behavioral norms of other victims of assault. Two such types of behavior are delayed reporting of the offenses and recantation of allegations of abuse. Normally, such behavior would be attributed to inaccuracy or prevarication. In these situations it is helpful for the jury to know that many child victims of sexual abuse behave in the same manner. Expert testimony exposing jurors to the unique interpersonal dynamics involved in prosecutions for intrafamily child sexual abuse, may play a particularly

useful role by disabusing the jury of some widely held misconceptions . . . so that it may evaluate the evidence free of the constraints of popular myths[.]

We recognize that even this type of expert testimony carries the potential of bolstering the credibility of one witness and conversely refuting the credibility of another. Much expert testimony on any subject will tend to do this. Such testimony, by itself, does not render the evidence inadmissible. The pertinent consideration is whether the expert testimony will assist the jury without unduly prejudicing the defendant.

Id. at 557-58, 799 P.2d at 51-52 (emphases added) (citations, internal quotation marks, and brackets omitted).

Hirata dealt with the alleged sexual abuse of a child.

In that case, the majority determined:

Here, the jury heard the DPA opine that the [complaining witness] testified "consistent with a child who is traumatized." But it heard no evidence that could legitimately support the prosecutor's claim that the [complaining witness] testified consistent with a traumatized child. No witness testified about [complaining witness]'s mental health or psychological condition.

The DPA improperly expressed her personal belief about [complaining witness]'s credibility and injected new evidence by explaining to the jury that [complaining witness]'s testimony is "consistent with a child who is traumatized." Her unsupported comment invited the jury to infer that she had undisclosed information about [complaining witness]'s mental health, information that could corroborate a trauma-inducing event like the charged crime. We hold that the DPA's remarks constituted serious procedural misconduct.

152 Hawai'i at 33, 520 P.3d at 231 (footnotes omitted). The majority opinion in Hirata also stated:

The state's expert testified generally about delayed disclosure, "tunnel memory," and other dynamics of child sexual abuse. But the expert supplied no evidence about post-abuse "trauma" or how traumatized children act or testify in court. The expert was also unfamiliar with [complaining witness] or the case's factual scenario.

Id. at 33 n.14, 520 P.3d at 231 n.14.

The dissenting opinion in Hirata further elaborated about the testimony of the State's expert, Dr. Bivens, including that child sexual abuse victims commonly present with distinct responses to "traumatic" or "shocking" events, including "delayed disclosure" and "tunnel memory[.]" Id. at 39, 520 P.3d at 237 (Recktenwald, C.J., dissenting). The dissent in Hirata believed that the DPA's "traumatized" statement did not present new evidence, but rather was supported by the testimony of the child abuse expert, Dr. Bivens. Id. at 42-43, 520 P.3d at 240-41.

The instant case is distinguishable from Hirata because it deals with the alleged sex assault of an adult. Unlike the unique dynamics involved in child sex assaults, for which this court has recognized the propriety of general expert testimony, no expert was called or needed in this case to testify about unique dynamics involving adult victims of sex assault. Rule 702 of the Hawai'i Rules of Evidence provides, in relevant part, that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(Emphasis added.) The DPA in this case did not use the term "traumatized" in a scientific, technical or specialized manner. Instead, the DPA referred to evidence from the CW and multiple

witnesses who testified about CW's demeanor in the hours, days, and weeks following the alleged assault and recounted their observations of CW's behavior during their interactions with her, which lay persons are capable of doing.⁴ Moreover, both the CW and Nurse Davis testified to the physical trauma and injuries that the CW had sustained. In contrast to the distinct dynamics in a child sexual assault case where expert witness testimony may be necessary to help guide a jury's ability to assess witness credibility - like in Hirata - the present case is different. A lay person would have a common understanding and general knowledge to assess for themselves whether the evidence presented indicated the CW had been "traumatized."⁵

⁴ In State v. Tucker, 10 Haw. App. 73, 89-90, 861 P.2d 37, 46-47 (App. 1993), the ICA noted that trial testimony of two witnesses who testified about the defendant's emotional state as "lacking remorse" following the alleged murder of the defendant's baby "were based on personal observations which any lay person was capable of making and, hence, did not constitute expert opinions." (internal quotation marks omitted). The ICA concluded such testimony instead fell under Hawai'i Rules of Evidence (**HRE**) Rule 701, governing opinion testimony by lay witnesses. The court held that:

HRE Rule 701 thus sets forth a liberal standard for admitting lay opinions into evidence. As long as (1) the witness has personal knowledge of matter that forms the basis of the testimony; (2) the testimony is rationally based on the witness' perception; and (3) the opinion is 'helpful' to the jury (the principal test), the opinion testimony is admissible.

Id. at 91, 861 P.2d at 47 (citation omitted). The Tucker court ultimately concluded that applying the above-referenced standard, the trial court did not abuse its discretion when it allowed the witnesses to testify at trial regarding the defendant's "lack of remorse." Id.

⁵ "Traumatized" is defined as "affected by physical or emotional trauma[.]" Traumatized, Merriam-Webster, <https://www.merriam-webster.com/dictionary/traumatized> (last visited May 28, 2024)

This is consistent with how the court treated another issue deemed to be within the common knowledge of the jury. In David, 149 Hawai'i at 477-78, 494 P.3d at 1210-11, this court held that expert testimony was not necessary regarding blood alcohol content (**BAC**) and its behavioral effects on a person in order to admit BAC evidence. Rather, the court held these issues, including the alleged association between alcohol and violence, are "within jurors' common knowledge." Id. at 476-77, 494 P.3d at 1209-10.

In David, which involved a drunken altercation that ended in a fatality, the court explained that:

When the issues in the case are within jurors' common knowledge . . . "expert testimony is unnecessary." We conclude that alcohol and its association with violence fall into this category. Understanding the BAC evidence and alcohol's impact on [the decedent] is not beyond the firsthand personal experiences and secondhand information accumulated by typical jurors. The jury knows an individual's .252 BAC means that the individual is highly drunk; using the common knowledge about intoxication and its association with aggression, the jury can evaluate the BAC and its behavioral impact. So it was improper for the circuit court to make the defense hire an "expert" to explain the BAC evidence before the jury could hear that evidence.

.

Although alcohol's general behavioral impact could be an appropriate subject for expert testimony, we conclude that specialized knowledge testimony was not required to admit the BAC evidence. The link between excessive alcohol intake and increased aggression is not a "widely held misconception[]" or "constrain[ed] [by] popular myths." [citing McDonnell]

[<https://perma.cc/FE6H-T5C4>]. "Traumatized" is also defined as "severely shocked and upset in a way that causes lasting emotional pain[.]" Traumatized, Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/traumatized> (last visited May 28, 2024) [<https://perma.cc/9ZH2-VMKJ>].

This court has shared misgivings about an expert-centric approach to fact-finding. With experts' "aura of special reliability and trustworthiness," there is a danger that jurors will "abdicate their role of critical assessment" or "surrender their own common sense in weighing testimony." . . . These concerns do not undermine the value of expert testimony in assisting the jury with understanding evidence. But when the topic is familiar to the typical juror, conditioning admissibility on expert testimony devalues the collective wisdom of twelve citizens.

Jurors are expected to rely upon their general knowledge of how humans operate in the world.

Id. at 477-78, 494 P.3d at 1210-11 (emphases added) (citations and footnotes omitted).

Applying this reasoning to the present case, the average juror would be able to consider the evidence of CW's conduct after the alleged incident, consider the testimony of the CW and Nurse Davis about the physical trauma and injuries that the CW sustained -- including tears to her genitalia and abrasions, bruising and petechiae on multiple areas of her face and body -- and apply their "general knowledge of how humans operate in the world." Id. at 478, 494 P.3d at 1211. In short, based on the evidence in the record and argued by the DPA, the jury could properly consider whether the CW's conduct was "consistent with someone who's been traumatized."

The majority also asserts that "'Trauma' or 'Traumatized' doesn't always mean exactly one thing" and that victims of sexual violence may exhibit differing behaviors post-assault. However, rather than requiring expert testimony on the

subject, the defense would be free to make such an argument. Indeed, the same could be said regarding the issue in David, where it was concluded that "alcohol and its association with violence" is an issue within jurors' "common knowledge." 149 Hawai'i at 477, 494 P.3d at 1210. That is, it could be argued that intoxication "doesn't always mean one thing", nor does it always present or manifest in one type of behavior, for example, in aggressive or violent behavior. The David court nonetheless concluded that expert testimony was not required to admit the BAC evidence in that case. Likewise, here, expert testimony was not needed for the jury to assess and comprehend CW's credibility based on the evidence and testimony presented at trial, and based on jurors' common knowledge.

The majority also states that the DPA's use of the phrase "consistent with" is "expert-speak," such that an expert was needed to support the "traumatized" statement. Respectfully, I disagree. The phrase "consistent with" has a general common-sense meaning.⁶ The DPA used the phrase in such a common-sense fashion and did not suggest that it inferred scientific, technical or specialized knowledge. Further,

⁶ "Consistent" is defined as "marked by harmony, regularity, or steady continuity: free from variation or contradiction" or "marked by agreement: COMPATIBLE[,], usually used with *with*" or "showing steady conformity to character, profession, belief, or custom[.]" Consistent, Merriam-Webster, <https://www.merriam-webster.com/dictionary/consistent> (last visited May 28, 2024) [<https://perma.cc/5FHL-UK3R>].

construing the phrase "consistent with" as "expert-speak" incorrectly assumes that jurors are familiar with how the phrase might be used by legal counsel on occasion, and that jurors are familiar with trial practice. The record does not suggest that this was the case.

V. Based on the Evidence in the Record, the DPA Properly Responded to Defense Counsel's Attacks on the CW's Credibility

Browder's theory of the case - as set out in defense counsel's opening statement, cross-examination of the CW, and closing argument - turned on the contention that the CW fabricated the alleged sexual assault at the beach park. During opening statement, defense counsel asserted:

[Defense]: What I believe the evidence will show is that this is a case of fictitious claims of sexual assault by [CW], a rush to judgment by the Hawai'i Police Department and the wrongful arrest of an innocent teenager. With regards to the fictitious claims of assault by [CW] she gave two versions of this alleged assault on 6/15/2019, the early morning hours right after this allegedly happened And I'm not saying just different facts. I'm saying different accounts of how this alleged violation assault actually happened."

(Emphases added.)

During cross-examination of the CW, defense counsel questioned her extensively about her reporting of the alleged sex assault. Defense counsel asked if a statement she gave to Detective Acob was "a lie" to which she responded "[i]t was not a lie."

Then, during closing arguments, defense counsel argued:

[Defense]: "About a week ago, . . . I told you what this case would show, what the evidence would show. I told you the evidence would show fictitious cries of sexual assault by [CW] . . . and the evidence showed all of this.

[CW] first tells the police officer that first comes to Spencer Beach Park the morning of 6/15/2019 that she was viciously sexually assaulted while she was on her stomach . . .

Some hours later at the Kona hospital the assault changes drastically. She tells [the nurse] that she was flipped over onto her back, and that's how the alleged assault happened . . .

But how do you account for the different sexual assault, one being on your front and one being on your back, and just a few hours the story flip flops about the . . . whole issue in this case whether she was sexually assaulted? How do you get that wrong if you're telling the truth?

. . . .

These are important facts, but mostly how do you rectify these different types of assaults, the story changing? Is that someone telling the truth?

The truth doesn't change especially when you're talking about being raped. The truth can't change. You must examine the testimony.

. . . .

. . . [Y]ou have to analyze the stories changing in the way they did. The truth doesn't change. So that's the fictitious cries of rape, of sexual assault by [CW].

. . . .

I can't tell you why people lie. We've had presidents that lie. This country has a lot of lies. I don't know why, but it's not my job to tell you why she's lying, why she's making this up.

. . . .

Look it, [CW] told the nurse she met [Browder] the day before, homeless guy. . . I mean that was a lie. She met him the first day. She put her tent at his campsite. She's lying all over the place."

(Emphases added.)

In State v. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209 (1996), this court observed that:

[i]t is generally recognized under Hawai'i case law that prosecutors are bound to refrain from expressing their personal views as to a defendant's guilt or the credibility of witnesses.

. . . .

However, a prosecutor, during closing argument, is permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence.

(Emphasis added) (citations omitted); see also Cordeiro, 99 Hawai'i at 425, 56 P.3d at 727 (holding that it was not prosecutorial misconduct for a deputy prosecutor to suggest during closing argument that reliable evidence corroborated the testimony of certain witnesses).

Here, given defense counsel's emphasis in asserting that the CW's sexual assault allegation was "fictitious" and a "lie," it was appropriate for the DPA to address CW's credibility based on the evidence adduced at trial and reasonable inferences drawn therefrom. The DPA's remark that CW's conduct and demeanor after the assault was "consistent with someone who's been traumatized" is a reasonable inference based on the CW's testimony, the personal observations of the CW by witnesses after the alleged incident, and the evidence of extensive injuries found during the examination by Nurse Davis. The DPA's "traumatized" remark, in this context, is in direct response to defense counsel's multiple assertions made during

the trial commenting on CW's credibility and calling her a liar. It was appropriate for the DPA to address CW's credibility based on the evidence adduced at trial in this case. See Clark, 83 Hawai'i at 304, 926 P.2d at 209; Cordeiro, 99 Hawai'i at 425, 56 P.3d at 727.

VI. Conclusion

For these reasons, I respectfully dissent and would affirm the majority decision by the Intermediate Court of Appeals, which concluded that the DPA's "traumatized" remark did not constitute prosecutorial misconduct.

/s/ Mark E. Recktenwald

/s/ Lisa M. Ginoza

