

NO. 21562

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

STACY M. KAHAKAI, Defendant-Appellant

APPEAL FROM THE THIRD CIRCUIT COURT
(CR. NO. 97-056)

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, Nakayama, and Ramil, JJ.
and Circuit Judge Simms, assigned by reason of vacancy)

Defendant-appellant Stacy Kahakai (Stacy) appeals his conviction of and sentence for four counts of sexual assault in the first degree, in violation of Hawai'i Revised Statutes (HRS) § 707-730(1)(b) (1993),¹ and three counts of sexual assault in the third degree, in violation of HRS § 707-732(1)(b) (1993).² On appeal, Stacy argues that the trial court, the Honorable Riki May Amano presiding, erred in: (1) granting the prosecution's motion to consolidate his case with that of his brother, Zachary

¹ HRS § 707-730 provides in relevant part:

(1) A person commits the offense of sexual assault in the first degree if:

. . . .

(b) The person knowingly subjects to sexual penetration another person who is less than fourteen years old[.]

² HRS § 707-732 provides in relevant part:

(1) A person commits the offense of sexual assault in the third degree if:

. . . .

(b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person[.]

Kahakai (Zachary); (2) admitting the testimony of certain witnesses; (3) failing to take appropriate action when the prosecutor committed misconduct by making numerous prejudicial comments; (4) preventing his attorney from arguing that complainant's injuries could have arisen from recent sexual relations instead of from the alleged assaults; and (5) failing to prevent the prosecutor from repeatedly referencing to complainant as the "victim." Stacy also argues that the cumulative effect of the trial court's errors warrants a new trial. We hold that the trial court erred by allowing a prosecution witness to give improper testimony regarding the ultimate issue as to whether Stacy sexually assaulted the complainant. Therefore, we vacate Stacy's conviction and remand the case for a new trial.

I. BACKGROUND

In January 1991, Stacy became romantically involved with complainant's mother (Mother). Mother and complainant often spent the night at Stacy and Zachary's home in Hilo.

Sometime in late 1991, Stacy, Mother, the ten-year-old complainant, and complainant's sisters moved into a residence in the Hawaiian Beaches area of Puna. According to complainant, in 1991, at the Hawaiian Beaches home, she was first subjected to sexual intercourse, digital penetration, and other sexual contact by Stacy. Over the next two years, there were other incidents of

similar sexual contact between Stacy and complainant and Zachary and complainant at various residences in Hawaiian Beaches, Hilo, and Papa'ikou. Stacy and Zachary each made complainant promise not to tell anyone what had happened.

Shortly thereafter, in 1993, complainant was removed from the custody of her mother and placed in foster care. Complainant lived in several foster homes for the following two years until she was placed with her current foster family on O'ahu. Immediately prior to her placement on O'ahu, complainant was living with the Tabajunda family in Paradise Park on the Island of Hawai'i. On September 6, 1995, complainant told Ms. Tabajunda and one of the Tabajundas' neighbors that she had been assaulted by Stacy and Zachary. Ms. Tabajunda informed complainant's Child Protective Services (CPS)³ case manager, Ruth Kunimura, of complainant's disclosure. Kunimura spoke with complainant on September 12, 1995, and an investigation commenced on September 26, 1995. The sexual assaults were reported to Lieutenant Derek Pacheco of the Hawai'i Police Department (HPD).

On October 25, 1995, an examination of complainant was conducted at the Hilo Medical Center by Phoebe Lambeth, a registered nurse. By this time, complainant was about thirteen years old. Lambeth used a colposcope during the examination and took various pictures of complainant's vagina. Loretta Rao,

³ CPS is a division of the Department of Human Services (DHS).

M.D., examined the colposcope photographs. Lambeth and Dr. Rao both testified at trial about the injuries sustained by complainant.

On February 28, 1997, the grand jury indicted Stacy and Zachary on multiple counts of sexual assault. Stacy was indicted on four counts of sexual assault in the first degree and three counts of sexual assault in the third degree. Stacy's and Zachary's cases were consolidated for trial.

Prior to trial, Stacy and Zachary, through their defense attorneys, Michael Ebesugawa and David Kuwahara respectively, moved to admit evidence of complainant's past sexual behavior. The trial court granted the motion, but limited the evidence and questioning on this subject to three documents: (1) a letter from Stacy to complainant making reference to complainant having several boyfriends; (2) a letter from Dr. Rao stating her findings and conclusions from the photographs and her opinion that the injuries were "consistent with ongoing sexual assault"; and (3) a sexually explicit letter written by complainant, which defense counsel argued indicated that she may have been sexually active after the alleged assaults.

During trial, Kunimura testified that the CPS investigation confirmed sexual abuse of complainant. The trial court denied defense counsel's motions for a mistrial and to strike Kunimura's testimony.

Theresia Presbrey, Ph.D., complainant's psychologist, testified for the defense. During her direct examination, defense counsel focused on six of her sessions with complainant, during which complainant expressed hostility toward Stacy and resentment of Mother's relationship with him. During cross-examination, the prosecutor asked: "If we just look at those six sessions or entries, does that paint an accurate picture based upon your impressions of what [complainant] was -- was really like?" The trial court overruled defense counsel's objections and ordered Dr. Presbrey to answer. Dr. Presbrey stated that the six sessions highlighted during direct examination did not provide an accurate portrayal of complainant. Dr. Presbrey further added that complainant was "being moved from foster home to foster home due to her parent's failure to protect her[.]" Defense counsel objected, complaining that Dr. Presbrey was not qualified to offer such opinions. The trial court overruled the objections and allowed Dr. Presbrey's answers.

During the recross-examination of Lieutenant Pacheco, the prosecutor asked, "[b]ased upon the investigation that you completed, DHS completed, looking at the totality of the circumstances, were you satisfied in your mind as to the sufficiency of the evidence in cooperation [sic]"

(Emphasis added.) Defense counsel for Zachary objected on the basis of an "improper opinion," and defense counsel for Stacy

objected as to relevance. The trial court sustained the objections and issued the following curative instruction:

The jury has been instructed and will be instructed again and I instruct you now that comments made by counsel are not evidence. Evidence is testimony given under oath, and the jury has been instructed and will be instructed again that objections are necessary and, nevertheless, should not be, uh, there should not be any speculation as to what the answer might have been or what the question might have meant.

(Emphasis added.)

Referring to the pictures she had taken during her examination of complainant, Lambeth testified to the following injuries to complainant's vagina: (1) completely obliterated hymenal tissue that had no border, such that it was difficult to identify its edges; (2) a healed abrasion on the right side in the 7-6 o'clock area; (3) a healed avulsion on the right side in the 11-10 o'clock area; (4) a healed abrasion on the left hand side in the 2-3 o'clock area; (5) a thickened scar of a vertical laceration on the right hand side in the 9 o'clock area; (6) a severe and extended tear/laceration in the hymen that had healed without closing together; (7) smoothing, i.e., thinning, of tissue and healed abrasions including two healed divots;⁴ (8) several healed abrasions below the healed hymenal tear; (9) an abrasion, also below the tear, that had not yet healed; and (10) tissue that was later identified as possible early venereal warts.

⁴ Lambeth described these as being made "with a fingernail when you dig. Like, if any of you golf, when you hit the ball and you hit the ground instead of the ball, you leave a little mark there and that's about the same kind of principle."

In reviewing the photographs, Dr. Rao confirmed the injuries described by Lambeth and noted that she found the following injuries particularly significant: (1) a hymenal tear in the 6 o'clock, 6:30 position that had not healed adequately, indicating force and entry by blunt object; (2) a thickened scar on the right side in the 9 to 11 o'clock area, indicating a significant degree of trauma; and (3) a superficial abrasion with redness located on top of the scarred tissue. Dr. Rao opined that the hymenal tear and the scar were not recent injuries, but had changed due to time and puberty; the injuries were not the result of a single event, but multiple events. Dr. Rao could not give an opinion as to the date of these injuries, but testified that some of the injuries had not yet healed, and that the injuries were consistent with ongoing sexual assault. As for the superficial abrasion, Dr. Rao said that it was probably the result of vigorous cleaning, and was unlikely to have resulted from sexual abuse. When asked on direct examination if she had an opinion as to the cause of the injuries she observed, Dr. Rao responded,

I can say based on the photographic findings that the individual was exposed to a blunt trauma with some force, resulting in these injuries. And I would further like to state that according to my protocol as a medical examiner for sexual abuse, there are few findings that I can state -- categorically indicate that something of that nature can have occurred. But the type of injuries [complainant] has definitely fits into my protocol.

Stacy testified in his own defense and denied complainant's allegations.

During his opening statement and closing argument, the prosecutor commented that complainant was courageous enough to come forward and "break the conspiracy of silence," among Stacy, Zachary, and herself. During his closing argument, the prosecutor repeatedly commented on complainant's credibility, forcing the trial court to sustain numerous objections by defense counsel and to admonish the prosecutor to refrain from his improper comments. As a result, defense counsel made several motions for a mistrial, which were denied. The trial court stated that it believed the jury could still make a just decision, based on the evidence presented.

On January 12, 1998, Stacy was found guilty as charged. He was sentenced to four consecutive twenty-year terms of imprisonment, with a mandatory minimum term of six years and eight months, and three consecutive five-year terms of imprisonment, with a mandatory minimum term of one year and eight months. Stacy timely appealed.

II. STANDARDS OF REVIEW

A. Consolidation

A trial court's order consolidating cases for trial is reviewed under the abuse of discretion standard. In re Doe, 79 Hawai'i 265, 273, 900 P.2d 1332, 1340 (App. 1995).

B. Admission of evidence

Different standards of review must be applied to trial

court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard. Evidentiary decisions that require a judgment call on the part of the trial court are reviewed for an abuse of discretion. State v. Staley, 91 Hawai'i 275, 281, 982 P.2d 904, 910 (1999). "'An abuse of discretion occurs when the decisionmaker exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party.'" State v. Vliet, 95 Hawai'i 94, 108, 19 P.3d 42, 56 (2001) (quoting In re Water Use Permit Applications, 94 Hawai'i 97, 183, 9 P.3d 409, 495 (2000)) (citation and internal quotation marks omitted).

Whether expert testimony should be admitted at trial rests within the sound discretion of the trial court and will not be overturned unless there is a clear abuse of discretion. State v. Fukusaku, 85 Hawai'i 462, 472, 946 P.2d 32, 42 (1997) (quoting State v. Maelega, 80 Hawai'i 172, 180, 907 P.2d 758, 766 (1995)).

C. 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 Hawai'i [405,] 412, 984 P.2d [1231,] 1238 [(1999)]. "Factors to consider are: (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." Id.

State v. Klinge, 92 Hawai'i 577, 584, 994 P.2d 509, 516 (2000)

(some citations omitted).

III. DISCUSSION

A. The trial court did not err in consolidating the defendants' trials.

Stacy argues that the trial court reversibly erred in granting the prosecution's motion to consolidate the defendants' cases. Under Rule 13(a) (2000) of the Hawai'i Rules of Penal Procedure (HRPP), "[t]he court may order consolidation of two or more charges for trial if the offenses, and the defendants if there are more than one, could have been joined in a single charge." Joinder is governed by HRPP Rule 8 (2000), which states in pertinent part:

(b) Joinder of defendants. Two or more defendants may be joined in the same charge:

. . . .

(3) when, even if conspiracy is not charged and all of the defendants are not charged in each count, the several offenses charged:

. . . .

(ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

The instant case falls squarely within HRPP Rule 8(b)(3)(ii). Stacy and Zachary were not charged with conspiracy to commit an offense, nor were they charged jointly in the same counts. However, they were both charged with several instances of sexual assault of complainant during the same time period, at

the same locations. Moreover, HPD and DHS conducted a joint investigation into complainant's allegations against Stacy and Zachary. Finally, the same physical evidence and the same witnesses' testimonies were at issue for both Stacy and his brother. The trial court did not abuse its discretion in consolidating the two cases.

Although Stacy opposed the consolidation, the record on appeal contains no indication that he made a subsequent motion for severance under HRPP Rule 14 (2000).⁵ Because it is difficult to make a finding of prejudice before trial, the argument that Stacy was prejudiced by the consolidation is waived because he failed to move for severance at the close of the prosecution's case-in-chief or at the close of all evidence. See State v. Balanza, 93 Hawai'i 279, 288, 1 P.3d 281, 290 (2000). However, assuming arguendo that the argument was properly preserved for appeal, Stacy was not prejudiced by the consolidation.

An appellate court may not conclude that a defendant suffered prejudice from a joint trial unless it first concludes that the defendant was denied a fair trial. State v. Timas, 82

⁵ HRPP Rule 14 provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in a charge or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Hawai'i 499, 512, 923 P.2d 916, 929 (App. 1996). Joinder denies a defendant a fair trial where: (1) the core of one defendant's defense is in irreconcilable conflict with another's; (2) the defendant in question is prevented from introducing evidence that would have been admissible in a trial without the other defendant; and (3) evidence damaging to the defendant in question is admitted that would have been inadmissible in a trial without the other defendant. Id. at 511, 923 P.2d at 928.

In the present case, Stacy and Zachary both argued at trial that complainant's allegations were implausible, that her testimony was not credible because of her inconsistencies and her failure to remember certain details, and that the medical evidence did not support her allegations. Thus, the core of each of their defenses was the same; Stacy's defense was not in irreconcilable conflict with Zachary's. Further, Stacy does not argue that he was prevented from introducing evidence that would have been admissible in a separate trial, nor does he claim that evidence damaging to him was admitted that would have been otherwise inadmissible. Therefore, based upon the Timas criteria, the consolidation did not deny Stacy a fair trial.

The only prejudicial effects that Stacy alleges are that consolidation allowed: 1) the prosecution to argue that there was a "conspiracy of silence" among Stacy, Zachary, and complainant; and 2) the jury to infer that Stacy was "guilty by

association" because such behavior "runs in the family." These allegations are without merit. The prosecution could have made the "conspiracy of silence" argument even if Stacy and Zachary had separate trials. Further, the trial court instructed the jury that:

Each defendant is entitled to have his case decided solely on the evidence that applies to him. Some of the evidence in this case was limited to one of the defendants and cannot be considered in the case of the other. You must limit your consideration of that evidence to the defendant as to whom the evidence was admitted.

. . . .
You must give separate consideration to the evidence that applies to each individual defendant. Each defendant is charged separately in separate cases and you must consider separately each count charged in each case against each individual defendant.

Thus, the jury was instructed that it was not to consider the evidence against one brother as an indication of the guilt of the other. The jury is presumed to have followed the court's instructions. Klinge, 92 Hawai'i at 592, 994 P.2d at 524. Therefore, we hold that Stacy was not prejudiced by the consolidation.

B. The trial court erred in allowing Ruth Kunimura to testify on the ultimate issue.

Stacy contends that the trial court erred by allowing Kunimura, complainant's CPS case worker, to testify that the CPS investigation confirmed that complainant had been sexually abused by him. The statements in question occurred during the following line of questioning:

Q: Bottom line, Miss Kunimura, this -- as case manager, you were the -- by the way, you were the case manager up until the time this case was transferred to Casey on O'ahu?

A: Yes.

Q: Looking back now, bottom line, what were the problems -- what were the problems for this girl, [complainant]?

A: The problems were --

ZACHARY'S COUNSEL: Objection, Your Honor; calls for speculation

COURT: Overruled.

ZACHARY'S COUNSEL: Lack of foundation.

COURT: Overruled.

Q: You may answer the question.

A: The problems with [complainant] is she, um, unfortunately, did not have well, a mother who was exactly a real good role model. She had no -- her other two siblings at least had a particular family or particular person who took care of them on occasion when her -- their mother would kind of drop 'em off and leave 'em for a period of time. [Complainant] did not have that --

STACY'S COUNSEL: Your Honor --

A: -- sort of thing.

STACY'S COUNSEL: -- I'm objecting on the basis of lack of foundation, beyond the expertise. The witness is giving an opinion, improper opinion.

COURT: Overruled.

Q: You may go on.

A: Okay. Um, she didn't have somebody who was consistent in giving her limits, um, in an appropriate manner, um, but some, uh, people who would give her limits by physically abusing her or putting her in situations where she was at risk for physical --

ZACHARY'S COUNSEL: Your Honor, I'm going to object. May we approach?

COURT: You may lodge it at the time of the, uh, recess.

ZACHARY'S COUNSEL: Your Honor, I am objecting on the basis of lack of foundation. This witness is giving an opinion.

COURT: Overruled.

Q: How did Mr. Stacy -- go ahead. I'm sorry for interrupting you.

A: She had, unfortunately, experience of living with a mother who had, um, more than one partner, um, and at least one particular partner, um, you know, through our investigation we confirmed sexual abuse.

Q: And who is that?

ZACHARY'S COUNSEL: Objection, Your Honor.

STACY'S COUNSEL: Your Honor, objection.

COURT: Mr. Ebesugawa?

ZACHARY'S COUNSEL: Your Honor, may we, um, lodge our objections on the record before the Court?

COURT: Yes, you may just before the recess. What is the objection right now?

ZACHARY'S COUNSEL: Lack of foundation, Your Honor.

COURT: Mr. Kuwahara?

STACY'S COUNSEL: 403, Your, Honor.

COURT: Overruled.

Q: You may continue.

A: Okay. Um, she was placed in a home situation where a parental, um, uh, father figure, in essence, uh, breached trust.

Q: And who was that?

A: That was Mr. Kahakai. Stacy.

Stacy argues that this was improper testimony as to the ultimate issue on appeal, as well as improper expert testimony concerning complainant's veracity. We agree with Stacy's first contention.

Rule 704 (1993) of the Hawai'i Rules of Evidence (HRE) states: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704 abolished the common law rule disallowing all testimony on the ultimate issue of fact. See Commentary to HRE Rule 704.

"However, it is well settled that 'questions which would merely allow the witness to tell the [fact-finder] what result to reach are not permitted. Nor is the rule intended to allow a witness to give legal conclusions.'" State v. Vliet, 91 Hawai'i 288, 296-97, 983 P.2d 189, 197-98 (1999) (quoting State v. Pinero, 70 Haw. 509, 520-21, 778 P.2d 704, 712 (1989)) (alteration in original). Thus, the question, "Did the testator have the capacity to make a will?" would be improper, while the question, "Did the testator have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be proper. Commentary to HRE Rule 704; see also, e.g., Vliet, 91 Hawai'i at 298-99, 983 P.2d at 198-99 (stating that police officer in a DUI case may give an opinion as to the defendant's

sobriety but may not testify that defendant's "state of sobriety" was over the legal limit); Pinero, 70 Haw. at 520-21, 778 P.2d at 712 (stating that it was improper for medical examiner in a murder case to testify that the decedent's death was a homicide).

Kunimura testified that the CPS investigation had confirmed that complainant had been sexually abused. The prosecutor then asked Kunimura to identify the individual who had perpetrated the abuse and, after a series of defense objections, Kunimura responded that a "father figure" had breached complainant's trust. Kunimura identified Stacy as the father figure. Thus, Kunimura did in fact testify that Stacy sexually abused complainant.⁶ Stacy was charged with four counts of sexual assault in the first degree and three counts of sexual assault in the third degree. See HRS §§ 707-730(1)(b) ("knowingly subjects to sexual penetration another person who is less than fourteen years old") and 707-732(1)(b) ("knowingly subjects to sexual contact another person who is less than fourteen years old"). It was undisputed that complainant was under the age of fourteen at the time of the alleged assaults. Thus, Kunimura's testimony "as a whole" indicated to the jury

⁶ The trial court stated, "I did not believe that it went to the ultimate issue, which I would not have allowed in any event. . . . She did say the confirmed [sic] sexual abuse and, uh, did not otherwise say anything else, um, as it related to any of the defendants." Apparently, at that time, the court had a mistaken recollection of Kunimura's testimony. Stacy's attorney later renewed the motion for mistrial, providing the court with a certified copy of the transcripts. The court again ruled that Kunimura's testimony did not go to the ultimate issue, but instructed counsel that they could not argue that Kunimura had confirmed sexual abuse by either of the defendants.

what result to reach and was, therefore, improper. The trial court erred in failing to strike Kunimura's testimony.

However, allowing improper testimony as to the ultimate issue is not reversible error if it was harmless beyond a reasonable doubt. See Vliet, 91 Hawai'i at 298, 983 P.2d at 199. An error is not harmless beyond a reasonable doubt if there is a "reasonable possibility that [the] error may have contributed to [the] conviction." State v. Valentine, 93 Hawai'i 199, 204, 998 P.2d 479, 484 (2000) (citations omitted). In Vliet, this court held that the ultimate issue testimony was harmless beyond a reasonable doubt because the case involved a bench trial and there was substantial evidence supporting the conviction. 91 Hawai'i at 298, 983 P.2d at 199.

In contrast, the present case involved a jury trial. While the court in a bench trial "is presumed not to be influenced by incompetent evidence[,]'" id., the same cannot be said in a jury trial. In a different context, Stacy argues that, because of Kunimura's years of experience at CPS and her position as complainant's case worker, her testimony "carried as much weight and influence as any 'expert[,]'" even though she was not qualified as such by the trial court. Kunimura testified that she had been a CPS case worker for almost eight years, during which time she worked with over a hundred families and had other cases involving sexually abused children.

Kunimura was also actively involved in the CPS investigation into complainant's allegations. On September 8, 1995, complainant's disclosure of the alleged abuse was reported to Kunimura. On September 12, Kunimura first spoke with complainant on the telephone concerning the allegations of abuse. Kunimura testified that complainant was later referred to Dr. Presbrey, who had also conducted an earlier psychological evaluation of complainant, for counseling.

The joint investigation with the HPD commenced on September 26, 1995. Kunimura worked with Lieutenant Pacheco, who testified that he worked hand in hand with Kunimura in the investigation. On September 26, Kunimura conducted a videotaped interview of complainant at the Child Advocacy Center. Pacheco testified that he observed the interview behind a two-way mirror and was in contact with Kunimura through a radio. If there was anything that Kunimura omitted in her questions, Lieutenant Pacheco would direct her to ask other questions. Kunimura testified that complainant underwent the colposcope examination as part of the investigation. Complainant also had a gynecological examination because the colposcope exam indicated that she might have venereal warts.

As complainant's case worker, Kunimura was required to file status reports with the Family Court at least twice a year. In her March 12, 1996 report, Kunimura included information about

the status of the investigation.⁷ Thus, Kunimura would have been familiar with the progress of the investigation from its inception.

Based on Kunimura's extensive experience with CPS and active involvement in the investigation, it is likely that the jury was unduly influenced by her testimony on the ultimate issue of the case. Further, there was no curative instruction given regarding Kunimura's testimony that implied that Stacy had sexually abused complainant.⁸ There was a reasonable possibility that Kunimura's testimony contributed to his conviction. We hold that the trial court erred by allowing Kunimura to testify as to the ultimate issue and that the error was not harmless beyond a reasonable doubt. Therefore, Stacy is entitled to a new trial.⁹ Although this issue is dispositive of the appeal, we address

⁷ Complainant's CPS file, which included Kunimura's reports to the court, was marked as Defense exhibit 166 for purposes of identification but was not entered into evidence.

⁸ After the trial court denied the defense's motion for a mistrial, Stacy's attorney requested a curative instruction on Kunimura's testimony. The court instructed counsel to draft one and present it during the settlement of the jury instructions. Stacy's proposed jury instruction number 12 read: "The testimony of Ruth Kunimura regarding the conclusions reached by her of [sic] the alleged sexual abuse of [complainant] is stricken. You must disregard entirely this matter." However, the court refused the instruction.

⁹ Stacy also argues that the prosecutor committed misconduct by eliciting the improper testimony from Kunimura. Because we hold that Stacy is entitled to a new trial based on the admission of the improper testimony, it is unnecessary to reach the prosecutorial misconduct argument. Assuming arguendo that the prosecutor committed misconduct by eliciting the improper testimony, Stacy would only be entitled to a new trial unless the prosecutor's conduct was "so egregious that, from an objective standpoint, it clearly denied a defendant his or her right to a fair trial." Rogan, 91 Hawai'i at 423, 984 P.2d at 1249. The prosecutor's conduct does not rise to level of egregiousness contemplated by Rogan.

several of Stacy's remaining points of error in order to provide guidance to the trial court on remand. Cf. State v. Peralto, 95 Hawai'i 1, 7-8, 18 P.3d 203, 209-10 (2001).

C. The trial court did not err in allowing the following testimony.

1. Dr. Loretta Rao's testimony

Stacy alleges that it was plain error for the trial court to have allowed Dr. Rao to testify that, in her expert opinion as a sexual abuse medical examiner, complainant's injuries fit the "protocol" for sexual abuse. Stacy argues that this was an improper opinion as to the ultimate legal issue.

Dr. Rao testified in relevant part:

I can say based on the photographic findings that the individual was exposed to a blunt trauma with some force, resulting in these injuries.

And I would further like to state that according to my protocol as a medical examiner for sexual abuse, there are few findings that I can state -- categorically indicate that something of that nature can have occurred. But the type of injuries she has definitely fits into my protocol.

Dr. Rao was qualified as an expert in the area of child sex abuse. Generally, expert testimony must meet the following criteria: (1) the trial court must be satisfied that the witness is indeed an expert; (2) the expert's testimony must be relevant; and most importantly, (3) the testimony must be shown to assist the jury to comprehend something not commonly known or understood and not be opinions which in effect usurp the basic function of the jury. State v. Batangan, 71 Haw. 552, 562, 799 P.2d 48, 53-54 (1990).

The trial court was satisfied that Dr. Rao was qualified in the field of child sex abuse, and Stacy does not contest Dr. Rao's qualifications. Dr. Rao's testimony explained to the jury that the injuries complainant sustained were consistent with injuries that usually result from sexual abuse. This testimony was relevant and concerned a type of injury that is not commonly experienced or understood. Finally, Dr. Rao's testimony did not usurp the jury's function because Dr. Rao did not testify as to the ultimate legal issue. Although Dr. Rao testified that complainant's injuries were consistent with sexual abuse, she did not testify regarding the perpetrator of the abuse,¹⁰ when the abuse occurred, or the credibility of complainant. The trial court did not err in admitting Dr. Rao's testimony.

2. Complainant's testimony about her sisters

During the prosecutor's redirect examination, complainant testified as follows:

Q: [W]hat were some of the factors or things that you thought about right before you told?
. . . .
A: Uh, what I told, it was really - I just was really scared that what if something had happened to my sisters and then they, too, never or aren't saying anything.
Q: Your sisters? . . .
A: Yes.
Q: You're 15 now?
A: Yes.
Q: How old are they now?

¹⁰ At trial, both Stacy and Zachary argued that the medical evidence of complainant's sexual trauma, which was obtained almost two years after the alleged assaults, did not corroborate her allegations that Stacy and Zachary were the perpetrators of the alleged abuse.

A: They're 12 and 10.

Stacy argues that complainant's testimony implies that he and Zachary did abuse her sisters and, therefore, it was "clearly inadmissible character evidence of 'prior bad acts'" in violation of HRE Rule 404(b) (1993 & Supp. 2000).¹¹

However, complainant was merely describing her motivation for reporting the alleged abuse against her. It was the possibility that her sisters could have been abused which prompted complainant to come forward; complainant did not testify that Stacy and/or Zachary did in fact abuse them. On cross-examination, both defense attorneys attacked her credibility and questioned her motives for waiting for so long to report the alleged abuse. Thus, complainant's testimony regarding the possibility that her sisters had been abused was relevant and was not prior bad acts testimony.

Stacy argues that, even if HRE Rule 404(b) was not violated, the trial court should have excluded the testimony

¹¹ HRE Rule 404(b) provides:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

because the probative value was substantially outweighed by the danger of unfair prejudice. See HRE Rule 403 (1993).¹² This court has previously stated:

“[T]he determination of the admissibility of relevant evidence under HRE 403 is eminently suited to the trial court’s exercise of its discretion because it requires a ‘cost-benefit calculus’ and a ‘delicate balance between probative value and prejudicial effect[.]’” Sato [v. Tawata], 79 Hawai‘i [14,] 19, 897 P.2d [941,] 946 [(1995)] (citations omitted). Moreover, “[i]n weighing probative value versus prejudicial effect . . . [,] a variety of matters must be considered, including . . . the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence will probably rouse the jury to overmastering hostility.” State v. Renon, 73 Haw. 23, 38, 828 P.2d 1266, 1273 (1992).

State v. Bates, 84 Hawai‘i 211, 228, 933 P.2d 48, 65 (1997) (some internal signals omitted).

As Stacy argues, complainant’s testimony that she was afraid that her two younger sisters had been or might be abused by the defendants was potentially inflammatory. However, the testimony was necessary because the defense had attacked complainant’s reasons for not reporting her abuse earlier and complainant was the only witness who could explain her motives. The circuit court did not abuse its discretion in admitting this evidence.

3. Dr. Theresia Presbrey’s testimony

Stacy further argues that the trial court erred in admitting Dr. Presbrey’s testimony concerning her overall

¹² HRE 403 provides that, “[a]llthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

impression of complainant because it was irrelevant and prejudicial. Dr. Presbrey was complainant's psychologist and was called by counsel for Zachary. During her direct examination, Dr. Presby testified that she had twenty sessions with complainant prior to September 13, 1995. The direct examination focused upon six of those sessions, during which complainant expressed hostility toward Stacy and resentment of her mother's relationship with him. On cross-examination, the prosecutor elicited the following testimony from Dr. Presbrey:

Q: . . . If we just look at those six sessions or entries, does that paint an accurate picture based upon your impressions of what [complainant] was -- was really like?

. . . .
A: No. Um, there are many aspects to this, uh, child that were not touched upon.

Q: And may I ask what -- what those aspects were?

A: This child's tolerance for rejection and pain and being moved from foster home to foster home due to her parent's failure to protect her.

. . . .
But most often she was troubled and saddened by what she's seen as a loss of a mom. That her mom would choose someone over her children and, therefore, lost contact with them as due to the service plan.

Her profound sadness when she was told that mom had lost her parental rights due to her failure to comply to the service plan that CPS, uh, had set forth, um, was gut wrenching to watch.

Stacy argues that this testimony was irrelevant and highly prejudicial because it "created an overwhelming atmosphere of sympathy" for complainant.

Stacy's defense was premised on complainant's lack of credibility and the possibility that she fabricated the allegations because she resented Stacy's relationship with her mother. Dr. Presbrey's direct examination focused on sessions

where complainant expressed hostility toward Stacy. Therefore, Dr. Presbrey's testimony that the six sessions emphasized by defense counsel did not portray an accurate picture of complainant was relevant to the issue of complainant's credibility.

Dr. Presbrey's testimony was also not unduly prejudicial. Previous witnesses had already testified regarding complainant's multiple placements in various foster homes and her mother's loss of parental rights. Thus, Stacy was not prejudiced by Dr. Presbrey's references to these events. While Dr. Presbrey's testimony about complainant's emotional state could have aroused some amount of prejudice against Stacy, this was dispelled by the court's jury instructions. The trial court instructed the jury that:

You must not be influenced by pity for the defendants or by passion or prejudice against the defendants. Both the prosecution and the defendants have a right to demand, and they do demand and expect, that you will conscientiously and dispassionately consider and weigh all of the evidence and follow these instructions, and that you will reach a just verdict.

The jury is presumed to have followed the court's instructions. Klinge, 92 Hawai'i at 592, 994 P.2d at 524. The trial court did not commit reversible error by admitting Dr. Presbrey's testimony about her general observations of complainant.¹³

¹³ Stacy also argues that "Dr. Presbrey's assertion that [complainant] was moved into foster care 'due to her parent's failure to protect her' was highly improper opinion testimony vouching for [complainant's] accusations against Stacy." However, this statement did not constitute opinion testimony regarding the truth of complainant's accusations. Dr. Presbrey's testimony
(continued...)

D. There was no prosecutorial misconduct warranting a new trial.

Stacy next argues that the prosecutor committed misconduct by: (1) referring to a "conspiracy of silence" during his opening and closing statements; (2) improperly bolstering complainant's credibility; and (3) making several improper and inflammatory statements during closing arguments.

1. "Conspiracy of silence"

While the prosecutor's reference to a "conspiracy of silence" between the brothers and complainant may have been an inaccurate portrayal of the evidence, it does not rise to the level of prosecutorial misconduct.

Ordinarily, the scope and extent of the opening statement is left to the sound discretion of the trial judge. However, the trial court should exclude irrelevant facts and stop argument if it occurs. The State should only refer in the opening statement to evidence that it has a genuine good-faith belief will be produced at trial.

State v. Sanchez, 82 Hawai'i 517, 528, 923 P.2d 934, 945 (App. 1996) (internal citations and quotation marks omitted). The factors to consider when evaluating an allegation of prosecutorial misconduct are: (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. Klinge, 92 Hawai'i at 584, 994 P.2d at 516.

¹³(...continued)

merely described her impressions of complainant's emotional state, which she observed during complainant's sessions. Dr. Presbrey's statements described how complainant felt about her familial situation; they did not amount to an opinion as to the actual reason for complainant's placement in foster care.

During his opening statement, the prosecutor made several references to a "conspiracy of silence" between the defendants and complainant. Stacy's attorney did not object to the prosecution's statements. At trial, there was no evidence adduced that established a "conspiracy" -- criminal or otherwise -- involving the brothers and complainant. However, there was evidence that each of the brothers told complainant not to tell anyone about the sexual assaults. Complainant did not disclose the assaults until approximately two years after they occurred. Arguably, as the prosecution claims on appeal, the prosecutor's statements during closing argument referred to the two-year silence kept between complainant and each of the brothers respectively.¹⁴ Even in opening statements where the prosecutor's comment clearly referred to a conspiracy among all three,¹⁵ it was not necessarily improper because, at that point, the prosecutor could have had a good faith belief that they would be able to establish agreement between the brothers.

Because defense counsel did not object to the prosecutor's statements, there was no specific curative instruction. However, before opening statements, the trial court

¹⁴ For example, during closing arguments, the prosecutor stated: "And what this case is about, State of Hawaii versus Zachary Kahakai and State of Hawaii versus Stacy Kahakai -- what this case is about and what it represents is the courage that that little girl had to break that conspiracy of silence to tell about that abuse."

¹⁵ The prosecutor referred to "the conspiracy of silence for which [complainant] belonged with [Stacy] and his brother"

informed the jury that what the attorneys said was not evidence and that the purpose of opening statements is "to allow the attorneys to give you an outline of what they think the evidence will produce or will show in trial." In addition, during the final jury instructions, the trial court reminded the jury that statements by the attorneys were not evidence. Therefore, based on the evidence adduced at trial and the trial court's instructions to jury, the prosecutor's references to a "conspiracy of silence" did not constitute misconduct.

2. Bolstering complainant's credibility

Stacy further contends that the prosecution improperly attempted to bolster complainant's credibility during Lieutenant Pacheco's testimony. This contention is not supported by the record.

Stacy takes issue with the following question presented by the prosecutor on recross-examination: "And bottom line, Lieutenant Pacheco: Based upon the investigation that you completed, DHS completed, looking at the totality of the circumstances, were you satisfied in your mind as to the sufficiency of the evidence in cooperation . . . in this case?" The trial court sustained defense counsels' objection to the question. Upon defense counsels' request to have the question stricken, the trial court instructed the jury that:

The jury has been instructed and will be instructed again and I instruct you now that comments made by counsel are not evidence.

Evidence is testimony given under oath, and the jury has been instructed and will be instructed again that objections are necessary and, nevertheless, should not be, uh, there should not be any speculation as to what the answer might have been or what the question might have meant.

While the prosecutor attempted to ask an impermissible question, defense counsel promptly objected. More importantly, the trial court sustained the objection and properly instructed the jury to disregard the question and not to speculate about the answer. Therefore, any improper attempt to bolster complainant's testimony does not warrant a new trial.

3. The prosecutor's closing argument

Stacy also asserts that the prosecutor's closing and rebuttal arguments were "so replete with improper assertions which were calculated to arouse the jury's sympathy, or were not based on facts in evidence, or were improper attacks on the defense," that a reversal is warranted. After the prosecution's rebuttal argument, Stacy's attorney moved for a mistrial based on prosecutorial misconduct, but the motion was denied. On appeal, Stacy argues that the trial court erred in denying his motion for a mistrial and argues that, during closing argument, the prosecutor committed misconduct by: (1) attempting to invoke the jurors' sympathy for complainant by emphasizing the courage it took for her to testify; (2) stating that "the fact of the matter is kids do not tell right away"; (3) stating that complainant had to "put up with days of lengthy cross-examination"; and (4)

arguing that "every social worker, police officer, [and] Grand Jury believed complainant[.]" These statements were highly improper and constituted prosecutorial misconduct, but in each instance the trial court sustained defense counsels' objections. Further, the trial court instructed the jury that "[s]tatements or remarks made by counsels are not evidence. You should consider their arguments to you, but you are not bound by their recollections or interpretations of the evidence."

The final factor to be considered is the strength of the evidence. The colposcope photographs, as well as the testimony of Phoebe Lambeth, who conducted the colposcope examination, and Dr. Rao, who also reviewed the photographs, presented strong evidence that complainant had been sexually assaulted. Complainant testified that Stacy and Zachary were the perpetrators of the abuse.

In addition, Stacy's August 31, 1995 letter to complainant contained statements that could be construed as admissions of the alleged abuse. Stacy wrote:

I do blame myself for most of the bad memories that will always be held against me. I truly did put my drinking away. . . . I just still care for you, all the same way. And I believe that we can start all over again, not only in the mind, but physically too!

(emphasis in original). Stacy testified that the "bad memories" referred to complainant's witnessing Stacy physically and verbally abuse her mother, and starting over physically referred to his desire to be a family again with Mother, complainant, and

her sisters when he got out of jail.¹⁶ However, these statements could also be reasonably interpreted as referring to Stacy's sexual abuse of complainant. In light of the trial court's instructions and the strength of the evidence adduced at trial, the prosecutor's improper statements, inasmuch as they constituted harmless error, do not warrant a new trial.

Stacy also argues that the prosecutor committed misconduct by weaving a theme of "the defense world" throughout the closing argument.¹⁷ Defense counsels did not object to any of the prosecutor's references to "the defense world." This court has previously stated that:

With regard to the prosecution's closing argument, a prosecutor is permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence. It is also within the bounds of legitimate argument for prosecutors to state, discuss, and comment on the evidence as well as to draw all reasonable inferences from the evidence.

Rogan, 91 Hawai'i at 412, 984 P.2d at 1238. In essence, the prosecutor used the term "the defense world" to refer to the defense's theory of the case. It is certainly not improper for the prosecutor to discuss the defense's arguments and raise contrary points. Although the "the defense world" language

¹⁶ At the time, Stacy was incarcerated for an unrelated offense. He wrote the letter prior to complainant's disclosure of the alleged abuse.

¹⁷ For example, the prosecutor made the following statement:

Now, if the Defense world or the argument in the Defense world are to make sense, and this is some vindictive vendetta on her part to get back at Stacy, why not make the complaint right then? She knows she's not going back to mom. Even their argument in the simplest sense does not make sense.

carries a certain amount of negative innuendo, it is not improper per se. Further, any potential prejudice would have been effectively cured by the trial court's instructions to the jury. Further, as discussed supra, the strength of the evidence weighs against a finding of harmful prosecutorial misconduct. The prosecutor's references to "the defense world" did not warrant a new trial.

E. The trial court properly restricted defense counsel's closing argument to the facts in evidence.

Stacy next argues that the trial court violated his right to due process by preventing defense counsel from arguing that the evidence indicated that complainant may have had recent sexual relations with someone other than Stacy and Zachary, which could have provided an alternative explanation for the findings of sexual trauma. Initially, we note that it was Zachary's attorney, not Stacy's attorney, who attempted to argue complainant's other sexual activity. Therefore, arguably, Stacy did not properly preserve this point of error for appeal.¹⁸ However, assuming arguendo that Stacy properly raised this argument, it is without merit.

The opportunity for final summation is basic to the right of a defendant in a criminal trial to make his defense, and where is (sic) is represented by counsel, a denial of this opportunity deprives the accused of the

¹⁸ After defense counsels' closing arguments, Zachary's attorney moved for a mistrial because the trial court prohibited him from arguing that complainant's sexual trauma could have been caused by ongoing sexual activity after the alleged assaults. Stacy's attorney joined in the motion, but this did not occur until after the trial court denied the motion for mistrial.

assistance of counsel. Much latitude, however, is given the trial judge to control the duration and to limit the scope of closing arguments. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion.

State v. Adams, 61 Haw. 233, 233-34, 602 P.2d 520, 520-21 (1979) (quoting Herring v. New York, 422 U.S. 853, 862 (1975)) (emphasis added, internal quotation marks omitted). Similarly, the decision to exclude evidence, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence[,]” remains within the sole discretion of the trial court. HRE Rule 403 (1993).

During closing arguments, defense counsel attempted to argue that complainant's vaginal injuries were the result of ongoing sexual relations with someone other than the two defendants. Defense counsel also argued that the sexually suggestive letters written by complainant and Dr. Rao's testimony that the colposcope photographs showed evidence of old and recent trauma¹⁹ and possible venereal warts indicated that complainant had other sexual partners who could have caused her injuries. The trial court sustained the prosecution's objection and prohibited defense counsel from arguing that complainant's

¹⁹ The colposcope photographs were taken in October 1995, and the assaults were alleged to have occurred in 1993.

injuries were caused by someone other than the defendants.

At trial, both defense counsel had the opportunity to cross-examine complainant regarding a sexually suggestive letter she had written, whether certain persons were her boyfriends, and whether her statement to Pacheco that she had not had sex with anyone other than Stacy and Zachary was true. Although complainant testified that she did not remember making that statement to Pacheco, she testified that it was a true statement. Complainant testified that she was in the seventh grade when she wrote the letter. She testified that she did not remember who she wrote the letter to, but that she was not inviting sexual relations with that person. According to complainant, she copied part of the letter from another letter a friend had shown her and made up other parts of the letter. Defense counsel questioned complainant about two of the lines from the copied portion which read, "bless his tongue I love to French" and "bless the thickness of his sperm." Counsel asked complainant whether these were things she was familiar with at the time she wrote the letter, and she said that they were. While the sexually charged language of the letter suggests that complainant was sexually active, her testimony regarding the letter asserted that she was not sexually active when she wrote it and gave absolutely no indication that she was sexually active at the time of the alleged assaults.

Defense counsel asked complainant whether two particular persons were boyfriends of hers and she said that they were not. Further, Stacy's letter, which made reference to complainant having several boyfriends, was dated August 31, 1995, did not allege that complainant was sexually active with those boyfriends, and made no reference to any boyfriends she may have had at the time of the alleged assaults.

Dr. Rao testified that the colposcope examination, performed in 1995, showed recent injuries²⁰ in addition to older injuries which had healed. In particular, she testified that the most likely cause of the vertical abrasion over the healed scar was "pulling or minor traction or vigorous rubbing during hygiene." However, she conceded that it could have been caused by pulling or minor traction or vigorous rubbing outside of hygiene. That the abrasion could possibly have been caused by recent sexual activity is a reasonable inference from this testimony. However, the post-assault sexual activity, without more, is irrelevant.

The defense sought to introduce evidence of complainant's past sexual activity to establish that she had other sexual partners that caused the recent injuries and that,

²⁰ The prosecution did not allege that Stacy and Zachary inflicted the recent injuries reflected in the colposcope exam. The alleged assaults by Stacy and Zachary occurred two or three years prior to the exam. Thus, the cause of the recent injuries would only be relevant if it were also connected to the cause of the older injuries which the prosecution attributed to Stacy and Zachary.

therefore, those other partners could also have caused the older injuries allegedly inflicted by Stacy and Zachary. However, even assuming arguendo that complainant did have other subsequent partners, there was no evidence that complainant had sexual relations with anyone other than Stacy and Zachary during the time period of the alleged assaults. Defense counsel attempted to argue that Stacy and Zachary were not the ones who injured complainant because her injuries were the result of ongoing abuse, abuse extending from the time of the alleged assaults until roughly the time of the colposcope exam. While the recent abrasions could have been caused by post-assault sexual activity, there was no evidence supporting ongoing abuse of the type defense counsel sought to argue. While defense counsel could have argued that the injuries allegedly inflicted by Stacy and Zachary were inflicted by someone else,²¹ the prejudice associated with this evidence would have outweighed relevance; the ongoing sexual activity argument was not directly supported by the evidence and would have injected irrelevant and misleading issues into the jury's deliberations. Accordingly, the trial court did not abuse its discretion by foreclosing defense counsel

²¹ This is essentially what defense counsel argued. The medical evidence clearly established that complainant had been sexually abused at some point prior to the colposcope examination. Defense counsel argued that complainant's allegations that Stacy and Zachary had abused her were not credible because there were inconsistencies in her statements and because the story itself was implausible. For example, defense counsel argued that it was illogical that Stacy would abuse complainant while her mother was in the other room.

from making this argument during closing argument pursuant to HRE Rule 403.

F. References to complainant as the “victim” by the prosecution and its witnesses were not unduly prejudicial.

Stacy further argues that it was error for the trial court to deny his motion in limine to preclude the prosecutor and its witnesses from referring to complainant as the “victim,” because such a referral conveys to the jury the prosecutor’s and the witness’ personal belief that the complaining witness is a “victim,” and therefore, that the accusations are true. Stacy relies on State v. Nomura, 79 Hawai’i 413, 903 P.2d 718 (App.), cert. denied, 80 Hawai’i 187, 907 P.2d 773 (1995), for the proposition that the prosecutor and its witnesses are precluded from referring to the complaining witness as the “victim.” In Nomura, the Intermediate Court of Appeals (ICA) held:

that the reference to a complaining witness as “the victim” in criminal jury instructions is inaccurate and misleading where the jury must yet determine from the evidence whether the complaining witness was the object of the offense and whether the complaining witness was acted upon in the manner required under the statute to prove the offense charged.

79 Hawai’i at 417, 903 P.2d at 417 (emphasis added).²²

While there are instances in which the prosecution’s reference to the complaining witness as the “victim” may be improper, the trial court’s denial of Stacy’s motion was not erroneous under the totality of the circumstances. The trial

²² The ICA further held that the error was harmless when the jury instructions were read as a whole.

court correctly stated that the ruling in Nomura precludes only the court from referring to the complaining witness as the "victim" in its jury instructions, and that there is no case law that clearly prohibits the prosecutor and or its witnesses from doing so.

The rationale behind [HRE Rule 1102²³] is that judicial comment upon evidence risks placing the court in the role of an advocate. It is essential that the presiding judge endeavor at all times to maintain an attitude of fairness and impartiality. Consequently, it [is] improper for the court to instruct the jury that [a complaining witness is] a "victim."

Id. (emphasis added, citations, ellipse, and internal quotation marks omitted). This rationale does not apply to prosecutorial references to the complaining witness as "the victim." The trial court did not err in denying Stacy's motion in limine to preclude the prosecution from referring to complainant as "the victim."

²³ HRE Rule 1102 states: "The court shall instruct the jury regarding the law applicable to the facts of the case, but shall not comment upon the evidence. It shall also inform the jury that they are the exclusive judges of all questions of fact and the credibility of witnesses."

IV. CONCLUSION

Because the trial court erred by allowing Kunimura to testify as to the ultimate issue and because the error was not harmless beyond a reasonable doubt, we vacate Stacy's convictions and remand the case for a new trial.

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