NO. 23011

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

ROBERT EUGENE GENGE, Defendant-Appellant.

APPEAL FROM THE THIRD CIRCUIT COURT,
(CR. NO. 98-73K)

MEMORANDUM OPINION
(By: Levinson, Nakayama, Ramil, and Acoba, JJ.,
and Moon, C.J., Concurring separately)

The defendant-appellant Robert Eugene Genge appeals from the judgment of the third circuit court, the Honorable Ronald Ibarra presiding, convicting him of and sentencing him for one count of sexual assault in the third degree, pursuant to Hawai'i Revised Statutes (HRS) § 707-732(1)(b) (1993),[1] and four counts of sexual assault in the first degree, pursuant to HRS

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[1] HRS § 707-732 provides in relevant part:

> **Sexual assault in the third degree**. (1) A person commits the offense of sexual assault in the third degree if:
>
> (a) The person recklessly subjects another person to an act of sexual penetration by compulsion; [or]
>
> (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[.]
>
> . . . .
>
> (2) Sexual assault in the third degree is a class C felony.

§ 707-730 (1)(b) (1993).[2] On appeal, Genge contends that the circuit court erred in: (1) denying his motion for a new trial based upon several acts of prosecutorial misconduct at trial, because the cumulative effect of the prosecutor's deliberate and egregious misconduct denied Genge a fair trial; (2) declining to excuse two jurors for cause, the first after making statements that manifested actual bias against Genge and the second for implied bias based upon the juror's employment with the Kona Police Department; and (3) failing to correct several errors set forth in the jury instructions (to which Genge did not object at trial), which included, inter alia, allegedly impermissible commentary on the evidence by using obscene and inflammatory "catch-phrases," not included in the indictment, to differentiate the five counts submitted to the jury for a verdict. We agree that the cumulative effect of the prosecutorial misconduct denied Genge a fair trial. We do not believe, however, that the misconduct was so egregious as to impose a constitutional bar to reprosecution under article I, section 10 of the Hawai'i Constitution (1993).[3] Moreover, we believe that the jury instructions submitted to the jury did not impermissibly comment on the evidence adduced at trial in violation of Hawai'i Rules of

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[2] HRS § 707-730 provides in relevant part:

> **Sexual assault in the first degree.** (1) A person commits the offense of sexual assault in the first degree if:
>
> (a) The person knowingly subjects another person to an act of sexual penetration by strong compulsion;
>
> (b) The person knowingly subjects to sexual penetration another person who is less than fourteen years old. . . .
>
> (2) Sexual assault in the first degree is a class A felony.

[3] Article I, section 10 of the Hawai'i Constitution provides in relevant part that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy[.]"

Evidence (HRE) Rule 1102 (1993)[4] and, thus, were not plainly erroneous. Accordingly, we vacate the circuit court's judgment of conviction and sentence and remand this matter for a new trial.[5]

I. BACKGROUND

On April 15, 1998, Genge was charged by indictment with one count of sexual assault in the third degree, see supra note 1, and four counts of sexual assault in the first degree, see supra note 2, for knowingly subjecting his former eight-year-old stepdaughter [hereinafter "the complainant"] to sexual penetration and sexual contact. Genge's jury trial commenced on September 14, 1999, and on September 22, 1999, the jury returned a guilty verdict as to each count of sexual assault. On November 29, 1999, the circuit court sentenced Genge to concurrent, indeterminate twenty-year terms of imprisonment for each of the four counts of first degree sexual assault and a concurrent, indeterminate five-year prison term for the one count of third degree sexual assault. On December 1, 1999, Genge filed a timely notice of appeal.

For present purposes, we briefly summarize the relevant facts adduced at trial.[6] When the complainant was three-years-

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[4] HRE Rule 1102 provides:

> **Jury instructions; comment on evidence prohibited.** 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.

[5] In light of our disposition herein, we need not reach Genge's point of error with respect to jury selection.

[6] There was no conclusive physical evidence adduced at trial that the complainant had been abused; therefore, this case essentially turned on (continued...)

old, Meiling Englert (formerly, Meiling Genge), the complainant's mother, became involved with Genge after she divorced Ben Flores, the complainant's father. At first, the complainant and Genge's relationship was good, but the complainant testified that it changed when Genge and Englert had a child, Taeler, together. The complainant explained that Genge ceased playing with her and buying her presents and, instead, focused his time and energy on Taeler. After the complainant witnessed a school play, entitled "No More Secrets," which encouraged children to report incidents of molestation to the authorities or a parent, the complainant wrote Englert a letter, which stated in part:

> [Genge] has been touching me. You know what kind of touching, but it's not my fault. P.S., I love you.

Genge's testimony differed markedly from the complainant's. Specifically, Genge denied ever touching the complainant in an inappropriate manner. Genge testified that the complainant's allegations of sexual assault merely reflected her attempt to reunite her birth father with Englert. In addition, Genge contended that the complainant felt that he had neglected her after Taeler's birth, at which point the complainant exhibited disobedient behavior in order to seek attention from Genge and her mother.

A. Prosecutorial Misconduct

1. Closing argument

The issues raised on appeal with respect to prosecutorial misconduct stem from several statements made by the deputy prosecuting attorney (DPA) during her closing argument. Almost immediately after commencing her closing argument, the circuit court interrupted the DPA and requested that she approach

[6](...continued)
Genge's and the complainant's credibility.

the bench, remarking as follows:

> THE COURT: [DPA], I'm going to caution you. Closing arguments [are] what the evidence shows. It's not to turn the emotional passion of the jury. So you make your closing arguments based on the law and evidence.
> DPA: I will, Your Honor.
> THE COURT: Not to passion or prejudice. And, likewise, you, too, [defense counsel].

Thereafter, the circuit court sustained five objections raised by defense counsel to the DPA's argument. Specifically, defense counsel objected to the following as improper argument:

> DPA: [Genge] isn't here today just because he was cold and rejecting once his wife got pregnant with his daughter. He's not here just because he couldn't be the father that [the complainant] wanted, the father she needed; rather, he's here because he saw what she needed. He saw that she needed affection. And he preyed on that and took advantage of her need for affection to give her his own kind of attention, an attention no child should have to endure. The evidence shows that he treated [the complainant] as an object for his pleasure.
> DEFENSE COUNSEL: Object, Your Honor. I don't think this is proper argument.
> THE COURT: Sustained.

Immediately following the court's ruling, the DPA continued as follows:

> DPA: [Genge] substituted sex for the love that even he tells you in his testimony was gone once his daughter came into the picture and even before while his wife was pregnant. [Englert] testified that even when she became pregnant, [Genge] seemed to lose interest in [the complainant].
> He didn't seem to be able to treat her with appropriate love and affection. He stopped buying her presents although he would buy his daughter presents, so [Englert] would buy [the complainant] presents herself and [Genge] would go along with the myth that the presents were from both of them. [Genge] was totally in control here. He could do whatever he liked with this child, and the child would have no --
> DEFENSE COUNSEL: Objection, Your Honor.
> THE COURT: Objection sustained. Argue what the evidence shows, Counsel.

Virtually ignoring the circuit court's ruling, the DPA appealed to the jury's emotions and passions, thereby causing defense counsel to object twice:

> DPA: [Genge] did what he liked with [the complainant], ignored her when he chose, paid attention to her when he chose. [The complainant] managed and endured this, as she

told you, by shutting off her emotion. She tried to ignore and forget what was happening. While it was going on, she'd stare at that fan above the bed, trying to pretend nothing was happening.

And then she would try to blot it out with a rush of enjoyment -- going to the Fun Factory. And if she dared to question it, as she told you, the first time she questioned it, why he was doing it or mentioned that it hurt, his response was, "Oh, you'll get used to it," and she did get used to it.

Is it any wonder that[,] as she got used to it[,] she became even more and more desirous of having her real father back in the household[?]

DEFENSE COUNSEL: Your Honor, I think it is improper argument --

THE COURT: Objection sustained.

DPA: The evidence shows that during this period she repeatedly asked for her father. Worse than just having to put up with this, [the complainant] actually started to just go along with it.

DEFENSE COUNSEL: Your Honor, I'd object, not arguing the evidence, rather, to inflame the jury.

THE COURT: Sustained.

Finally, the DPA, addressing Genge's attack on the complainant's credibility, appealed to the jurors' personal feelings in her argument, at which point the circuit court admonished the DPA as follows:

DPA: And if you had a step grandmother who remembered for five years each of three small lies you told to get out of trouble over some minor infraction, chances are you wouldn't want to ever admit doing anything wrong in the presence of that grandmother either. Well, are there other people who have ever lied about their homework in this room? What is the --

THE COURT: Counsel, do not identify the jurors.

DPA: I wasn't referring to the jury, Your Honor.

2. Rebuttal argument

Defense counsel's closing argument essentially attacked the prosecution's failure to meet its burden of proof and pointed out the prosecution's failure to call Pat Sands,[7] a marriage and

[7] Child Protective Services (CPS) referred the complainant to Pat Sands for counseling on December 3, 1996. Sands and the complainant met approximately twenty-five times, through the end of July 1997, for therapy sessions, at which times the complainant, as part of her therapy, wrote "stories" (also referred to by defense counsel as the "book") about the alleged sexual assaults. It appears that someone typed selected portions of the complainant's writings; defense counsel directed the complainant to read from them at trial in an attempt to demonstrate inconsistencies between the complainant's testimony on direct examination and her "book" regarding the (continued...)

family therapist employed by Child and Family Service, as a witness to explain certain contradictions in the prosecution's case-in-chief. During rebuttal, the DPA responded to defense counsel's argument as follows:

> DPA: First of all, I'd like to start with what the defense ended with. The defense says the State didn't want to produce the evidence. Who objected to [the complainant's] stories coming in? Was it the State?
>
> DEFENSE COUNSEL: Objection, Your Honor.
>
> THE COURT: Objection sustained.
>
> DPA: The defense represents to you that [the complainant's] story with Pat Sands said he slapped her on the face. Was that the testimony? Or wasn't the testimony that he just slapped her a couple times real hard, and it didn't say on the face or the butt? Unfortunately, you never got to check for yourself.
>
> DEFENSE COUNSEL: Objection, Your Honor.
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> THE COURT: Objection sustained.
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> DEFENSE COUNSEL: That is grossly improper.
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> THE COURT: Approach the bench.
>
> . . . .
>
> . . . This is a bench conference, with the defendant present. [DPA], your arguments are improper.
>
> DPA: He said the State didn't want to produce the evidence. The State did want to produce the evidence.
>
> DEFENSE COUNSEL: No. I said they didn't produce Pat Sands.
>
> DPA: His argument was not proper.
>
> THE COURT: What you objected [to], it's covered by the jury instructions. I said that. But you don't have to say who should be producing the evidence, because you have the burden. These are evidentiary objections. This Court has ruled in certain areas.[8]
>
> DPA: I realize that, Your Honor. But he also should not have said that the State didn't want to produce the evidence, and that's exactly what he said.
>
> DEFENSE COUNSEL: The State didn't produce Pat Sands. They can do it. That's their choice. I didn't say the statement [that the State didn't want to produce evidence]. I said Ms. Sands. And that's their choice.
>
> THE COURT: But I said there's jury instructions that the State doesn't have to produce all the evidence.

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[7](...continued)
number of instances of alleged abuse.

[8] The prosecution objected to defense counsel's reference to the prosecution's decision not to call certain witnesses at trial. The circuit court overruled the objection, noting that the jury instructions expressly stated that "[t]he prosecution is not required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence."

The DPA continued her rebuttal, remarking on the prosecution's burden of proof with respect to motive, after which the circuit court gave the jury a cautionary instruction:

> DPA: The State, for one thing, doesn't have to prove motive. That's not a burden upon the State, to prove why he did this. Maybe only a sick mind would know why he did this.
>
> . . . .
>
> THE COURT: Ladies and Gentlemen, remember at the outset, and throughout the trial, I informed you that what the attorneys tell you is not evidence. And you're not to base a decision based on what they tell you in closing arguments, how they characterize the evidence. You're not to base your decision on sympathy, bias or prejudice against any party, any witness.
>
> . . . .
>
> . . . The record should reflect the jury has left the courtroom. The Court gave that cautionary instruction because the Court noticed in the DPA's rebuttal, the DPA referred to a "sick mind." And certainly there's no evidence of a sick mind as far as the reason [why Genge allegedly committed the sexual assaults].

Thereafter, defense counsel orally moved for a mistrial with prejudice, on the ground of prosecutorial misconduct, which the circuit court denied.

3. Motions for a new trial and to release Genge on bail pending appeal

On October 4, 1999, Genge filed a motion for a new trial, arguing, inter alia, that the DPA had intentionally referred to facts during closing argument that were irrelevant to the charged offenses, thereby inflaming the jury in an effort to secure a verdict based upon sympathy or prejudice. In addition, on October 20, 1999, Genge filed a motion to release him pending appeal. After hearing both motions, the circuit court denied the motion for a new trial, but granted the motion to release Genge pending appeal, remarking as follows:

> As to the Motion to Release [Genge] on Bail On Appeal, the Court finds[,] under 804b, that the Court is convinced by clear and convincing evidence that [Genge] will not flee or pose a substantial danger to members of the community.
>
> Secondly, the Court finds that there is a substantial question of law and fact which may be likely to result in . . . reversal on appeal, that being the prosecutorial

> misconduct. Throughout the trial, the Court, numerous times, directed the prosecution not to use emotional arguments; also, regarding questions, not to be argumentative. And I'll leave this to the Supreme Court or the Appellate Court to determine whether this would result in prosecutorial misconduct which may result in a new trial or reversal, but the record speaks for itself.
>
> And, certainly, the Court is certainly concerned about the reference to a "sick mind" made by the prosecution in her closing argument. I leave this to the appellate court to decide.

B. Jury Instructions

In her testimony -- both at the grand jury hearing and at trial -- the complainant was unable to remember the specific dates of the five alleged sexual assaults, the grade she was attending in school when the alleged molestations commenced, or how many times Genge touched her. The complainant, however, was able to narrow the relevant time frame from approximately August 1, 1994, when her mother and Genge moved into their residence located at Awakea Street, to approximately November 1, 1996, when Englert had traveled to Hilo for business. Based upon the complainant's grand jury testimony, the prosecution and defense counsel agreed to label the separate counts of sexual assault with "catch-phrases" at trial for identification purposes.[9] More specifically, the prosecution identified the five counts of sexual assault as follows: (1) "You'll get used to it," which referred to the first time that the complainant remembered engaging in penile penetration with Genge, (2) "Mom came home," which referred to an incident of penile penetration that was interrupted when Englert arrived home early from work, (3) "Mom

[9] On January 19, 1999, Genge filed a motion for a bill of particulars, demanding that the prosecution set forth the dates relating to the charged offenses. On February 24, 1999, the circuit court granted Genge's motion, directing the prosecution to narrow the time period during which the five incidents allegedly occurred and to identify the separate counts for the jury. After the filing of the bill of particulars, the prosecution and defense counsel agreed to use the five "catch-phrases." The prosecution referred to these "catch-phrases" throughout trial without objection by defense counsel.

out with friends," which referred to an incident of penile penetration at the residence, while Englert was celebrating with friends, after which Genge took the complainant to the Fun Factory to play, (4) "Having [the complainant] touch his penis," which referred to the only incident of masturbation at issue, and (5) "Trip from Hilo," which referred to an incident of digital penetration in an automobile on the way home from visiting Englert, who was in Hilo for job training.

The prosecution utilized the foregoing labels throughout trial. The labels also appeared on each verdict form, as well as in five of the circuit court's jury instructions. At no time prior to reading the jury instructions to the jury did defense counsel object to them. Upon inquiry by the circuit court, however, defense counsel and the prosecution agreed that the circuit court should include the following cautionary instruction, which was designed to inform the jury that the "catch-phrases" or labels were merely intended to identify the five counts and not as any indication or suggestion that the circuit court believed that the alleged events had actually occurred:

> The phrases, "You'll get used to it[,]" "Mom came home[,]" ["]Mom with friends[,]" "Having [the complainant] touch his penis[,]" and "Trip to Hilo[,]" in some of the jury instructions and in the verdict forms are present merely to permit the jury to distinguish the various counts and to permit the jury to correlate the counts with the allegations in the evidence. The court by including these phrases does not intend to influence your decision as to whether these events happened.

II. STANDARDS OF REVIEW

A. Prosecutorial Misconduct

> When prosecutorial misconduct is the basis for a motion for mistrial, a new trial is warranted only where "the actions of the prosecutor have caused prejudice to the defendant's right to a fair trial." State v. Kupihea, 80 Hawai'i 307, 316, 909 P.2d 1122,

> 1131 (1996) (quoting State v. McGriff, 76 Hawai'i 148, 158, 871 P.2d 782, 792 (1994)). "In order to determine whether the alleged prosecutorial misconduct reached the level of reversible error, [the reviewing court] consider[s] the nature of the alleged misconduct, the promptness or lack of a curative instruction, and the strength or weakness of the evidence against [the] defendant." Id. (quoting State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992)).
>
> State v. Loa, 83 Hawai'i 335, 348-49, 926 P.2d 1258, 1271-72 (1996) (alterations in original). A trial court's declaration of a mistrial is reviewed under the abuse of discretion standard. [State v.]Quitoq, 85 Hawai'i [128,] 142, 938 P.2d [559,] 573 [(1997)]. A determination of manifest necessity is likewise left to the sound discretion of the trial court. "'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).

State v. Wilmer, 97 Hawai'i 238, 243, 35 P.3d 755, 760 (2001) (some brackets added and some in original).

B. Double Jeopardy

> The issue whether a reprosecution is barred by double jeopardy is a question of constitutional law. We review questions of constitutional law "by exercising our own independent constitutional judgment based on the facts of the case." State v. Arceo, 84 Hawai'i 1, 11, 928 P.2d 843, 853 (1996) (quoting State v. Trainor, 83 Hawai'i 250, 255, 925 P.2d 818, 823 (1996), and State v. Lee, 83 Hawai'i 267, 273, 925 P.2d 1091, 1097 (1996)). Accordingly, we review questions of constitutional law de novo under the "right/wrong" standard. Whiting v. State, 88 Hawai'i 356, 358, 966 P.2d 1082, 1084 (1998) (citing State v. Quitoq, 85 Hawai'i 128, 139, 938 P.2d 559, 570 (1997), and State v. Toyomura, 80 Hawai'i 8, 15, 904 P.2d 893, 900 (1995) (citing State v. Higa, 79 Hawai'i 1, 3, 897 P.2d 928, 930, reconsideration denied, 79 Hawai'i 341, 902 P.2d 976 (1995))); see also State v. Mallan, 86 Hawai'i 440, 443, 950 P.2d 178, 181 (1998) (citation omitted).

State v. Rogan, 91 Hawai'i 405, 411-412, 984 P.2d 1231, 1237-1238 (1999).

C. Jury Instructions

> "'When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading.'" State v. Ortiz, 91 Hawai'i 181, 190, 981 P.2d 1127, 1136 (1999) (quoting State v. Kinnane, 79 Hawai'i 46,

> 49, 897 P.2d 973, 976 (1995) (quoting State v. Kelekolio, 74 Haw. 479, 514-15, 849 P.2d 58, 74 (1993) (citations omitted))). See also State v. Hoey, 77 Hawai‘i 17, 38, 881 P.2d 504, 525 (1994). "Erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial." State v. Sawyer, 88 Hawai‘i 325, 330, 966 P.2d 637, 642 (1998) (citing State v. Robinson, 82 Hawai‘i 304, 922 P.2d 358 (1996)).
>
> > [E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error may have contributed to the conviction.
>
> State v. Tabigne, 88 Hawai‘i 296, 302, 966 P.2d 608, 614 (1998) (citations omitted). If there is a reasonable possibility that error might have contributed to a conviction in a criminal case, then the error cannot be harmless beyond a reasonable doubt, and the conviction must be set aside. State v. Cullen, 86 Hawai‘i 1, 8, 946 P.2d 955, 962 (1997) (citations omitted).

State v. Klinge, 92 Hawai‘i 577, 583, 994 P.2d 509, 515 (2000).

D. Plain Error

> "We may recognize plain error when the error committed affects substantial rights of the defendant." Cullen, 86 Hawai‘i at 8, 946 P.2d at 962 (citations and internal quotation signals omitted). See also Hawai‘i Rules of Penal Procedure (HRPP) Rule 52(b) (1993) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

State v. Jenkins, 93 Hawai‘i 87, 101, 997 P.2d 13, 27 (2000) (quoting State v. Staley, 91 Hawai‘i 275, 282, 982 P.2d 904, 911 (1999) (quoting State v. Maumalanga, 90 Hawai‘i 58, 63, 976 P.2d 372, 377 (1998) (quoting State v. Davia, 87 Hawai‘i 249, 253, 953 P.2d 1347, 1351 (1998)))).

III. DISCUSSION

A. The Cumulative Effect Of The Prosecutor's Misconduct In The Present Matter Was Not Harmless Beyond A Reasonable Doubt.

On appeal, Genge contends that, during closing argument, the DPA deliberately inflamed the passions and prejudices of the jury with statements unsupported by the

evidence adduced at trial. Specifically, the DPA referred to Genge as having a sick mind, speculating that he was motivated by jealousy and revenge. Genge further contends that the DPA violated the "golden rule" -- by inviting the jury to consider whether they had ever lied during their childhood -- in an effort to undermine Genge's attack on the complainant's credibility. Genge argues that the DPA "signaled the jury that [Genge's] objections and the court's improper rulings were keeping crucial evidence from them, and suggested [that Genge] had the burden to disprove his guilt." Put simply, Genge maintains that the DPA's numerous acts of misconduct cumulatively prejudiced his right to a fair trial.

With respect to the circuit court's curative instruction, Genge contends that the volume and frequency of the DPA's misconduct rendered it unworkable for the circuit court to caution the jury at every instance of misconduct. Moreover, Genge argues that, while the circuit court cautioned the jury -- after the conclusion of the DPA's rebuttal argument -- against allowing "passion and sympathy" to play a role in their decision-making process, the circuit court did not specifically caution the jury with respect to the DPA's reference to Genge's "sick mind" or direct the jury to disregard the DPA's speculation regarding Genge being motivated by jealousy and revenge.

In addition, Genge urges that, inasmuch as the outcome of his trial, of necessity, turned on the jury's assessment of his credibility vis-a-vis that of the complainant, the evidence against Genge, by its very nature, could not be overwhelming; Genge therefore argues that the prosecutorial misconduct at issue denied him a fair trial. Finally, Genge urges that the DPA's misconduct during her closing argument was so egregious as to

impose a constitutional bar to reprosecution under article I, section 10 of the Hawai‘i Constitution, see supra note 3.

In its answering brief, the prosecution primarily contends that the DPA's challenged statements during closing argument amounted to no more than reasonable inferences from the evidence adduced at trial. More specifically, the prosecution argues that it may permissibly call attention to the defense's failure to produce evidence to support its theories and, likewise, that it may respond to a defense argument regarding the prosecution's non-production of evidence. The prosecution maintains that the DPA "did not refer to [Genge] having a sick mind, but responded to the defense statement [that the prosecution's] presentation of motive was 'schizophrenic' by arguing that it might take a 'sick mind' to understand why molestation occurred." (Emphasis deleted.) In the alternative, the prosecution contends that, even assuming that prosecutorial misconduct occurred during closing argument, the misconduct was harmless beyond a reasonable doubt. We disagree.

We review allegations of prosecutorial misconduct under the "harmless-beyond-a-reasonable-doubt" standard to determine whether "there is a reasonable probability that the misconduct complained of might have contributed to the conviction." Rogan, 91 Hawai‘i at 412, 984 P.2d at 1238 (citation omitted). Further to the foregoing determination, we consider the following factors: (1) the nature of the alleged prosecutorial misconduct; (2) the promptness or lack of a curative instruction; and (3) the strength or weakness of the evidence against the defendant. Id. (quoting State v. Sawyer, 88 Hawai‘i 325, 329 n.6, 966 P.2d 637, 641 n.6 (1998)); see also Wilmer, 97 Hawai‘i at 243, 35 P.3d at 760.

"[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. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209 (1996) (citation omitted). A prosecutor should not, however, "'intentionally misstate the evidence or mislead the jury as to the inferences it may draw'" or "'use arguments calculated to inflame the passions or prejudices of the jury.'" Rogan, 91 Hawai'i at 413, 984 P.2d at 1239 (quoting 1 ABA Standards for Criminal Justice, The Prosecution Function, Standard 3-5.8(a) and (c) (3d. ed. 1993)); see also State v. Apilando, 79 Hawai'i 128, 143, 900 P.2d 135, 150 (1995) (holding that "the prosecutor's plea that the jury send a message to the defendant that his conduct would not be tolerated by the community was improper"); State v. Marsh, 68 Haw. 659, 661, 728 P.2d 1301, 1302 (1986) (holding that the prosecutor's repeated expressions of her personal opinion regarding the defendant's guilt and the credibility of defense witnesses constituted plain error); State v. Smith, 91 Hawai'i 450, 461, 984 P.2d 1276, 1287 (App.) (holding that the prosecutor's improper comment regarding the defendant's exercise of his right to argue alternatively for a complete acquittal based on self-defense or a conviction of one of the lesser included offenses was not harmless beyond a reasonable doubt), cert. denied, 92 Hawai'i 632, 994 P.2d 564 (1999); State v. Sanchez, 82 Hawai'i 517, 534, 923 P.2d 934, 951 (App.) (concluding that "it would be 'unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record'") (quoting 1 ABA Standards for Criminal Justice, The Prosecution Function, Standard 3-5.9 (2d ed. 1986)), cert. denied, 84 Hawai'i 127, 930 P.2d 1015 (1996). Considering

the three factors in determining whether prosecutorial misconduct warrants a new trial, we believe that the cumulative effect of the DPA's conduct in the present matter was not harmless beyond a reasonable doubt.

1. Nature of the alleged misconduct

Although a single instance of prosecutorial misconduct may not substantially prejudice a defendant's right to a fair trial, the cumulative effect of numerous instances of misconduct may be so prejudicial so as to deny the defendant a fair trial. State v. Pemberton, 71 Haw. 466, 476, 796 P.2d 80, 84 (1990) ("[T]he cumulative weight of such errors may create 'an atmosphere of bias and prejudice which no remarks by the trial court could erase.'") (quoting State v. Kahalewai, 55 Haw. 127, 129, 516 P.2d 336, 338 (1973) (citation omitted)). In Pemberton, during cross-examination, the prosecution referred to inadmissible evidence over defense counsel's objection. Id. at 473, 796 P.2d at 84. On appeal, the defendant argued that, although the trial court repeatedly sustained defense counsel's objections and struck inadmissible testimony, the jury was nonetheless cognizant of the testimony and may have misinterpreted defense counsel's objections as an attempt to conceal damaging evidence. Id. This court vacated the defendant's conviction and remanded the case for a new trial based on the cumulative effect of the prosecutor's misconduct, remarking as follows:

> Although it is difficult to assess misconduct based on a series of actions and to assess the exact import of those actions in full, nevertheless, the number of instances and the tenor of the exchange between judge and counsel evince a premeditated pattern of improper questions and an effort to alert the jury to the existence of inadmissible evidence. . . . [A]lthough no single prosecutorial act deprived Defendant a fair trial, the cumulative effect of the prosecutor's improper conduct was so prejudicial as to deny him a fair trial.

Id. at 476, 796 P.2d at 85; see also State v. Soares, 72 Haw. 278, 283-84, 815 P.2d 428, 431 (1991) (concluding that the cumulative effect of numerous acts of misconduct, which included, inter alia, repeated attempts to introduce evidence previously excluded by a motion in limine and leading questions, was so prejudicial as to deny the defendant a fair trial); Sanchez, 82 Hawai‘i at 534, 923 P.2d at 951 ("In view of the multiple instances of improper comments and questions by the prosecutor, we cannot conclude beyond a reasonable doubt that the prosecutor's conduct would not have influenced the jury's verdict.") (citation omitted).

In the present matter, the DPA repeatedly made statements calculated to inflame the passions and prejudices of the jury. Indeed, the circuit court sustained five defense objections to the DPA's closing argument alone, during which the DPA referred to alleged facts not in evidence (either directly or circumstantially), invited the jurors to put themselves in the complainant's position, and attempted to inflame the jury's emotions. The DPA's improper comments included, inter alia, the following: (1) "[Genge's] here because he saw what she needed. . . . And he preyed on that and took advantage of her need for affection to give her his own kind of attention"; (2) "[Genge] substituted sex for love . . . . [Genge] could do whatever he liked with this child"; (3) "[Genge] did what he liked with [the complainant]. . . . Worse than just having to put up with this, [the complainant] actually started to just go along with it"; (4) "Well are there other people who have ever lied about their homework in this room?"; and (5) "Maybe only a sick mind would know why [Genge] did this."

The aforementioned misconduct precipitated several bench conferences with the circuit court, as well as a cautionary instruction regarding the DPA's reference to a "sick mind." During the hearing on Genge's motion for release on bail pending appeal, the circuit court expressed, on the record, its significant concern regarding the prejudicial effect of the DPA's reference to a "sick mind" and the numerous times that the court had deemed itself forced to warn the DPA not to advance emotional arguments or pose argumentative questions of witnesses. Ultimately, the circuit court granted Genge's motion for release on bail pending appeal because it found that the issue of prejudicial prosecutorial misconduct presented a substantial question of law and fact that could warrant reversal on appeal. **Id.** Based on the foregoing, we believe that the cumulative effect of the DPA's challenged behavior at trial, as well as the "tenor of the exchange between [the trial] judge and [the DPA]," see Pemberton, 71 Haw. at 476, 796 P.2d at 85, constituted prosecutorial misconduct, which, taken as a whole, substantially prejudiced Genge's right to a fair trial.

2. The promptness of a curative instruction

The prosecution contends that, by sustaining defense counsel's objections, repeatedly admonishing the jury that the arguments of counsel were not evidence, and giving a cautionary instruction to the jury, following the conclusion of the DPA's rebuttal, regarding the DPA reference to a "sick mind," the circuit court cured any prejudicial effect that the DPA's remarks may have had during closing argument.

Generally, the trial court's instructions to the jury cure a prosecutor's improper remarks, inasmuch as it is presumed "'that the jury abided by the court's admonition to disregard the

statement.'" Kahalewai, 55 Haw. at 129, 516 P.2d at 338 (quoting State v. Cavness, 46 Haw. 470, 473, 381 P.2d 685, 686-87 (1963)). We believe, however, that the numerous instances of misconduct in the present matter overcome the presumption that the circuit court's belated cautionary instruction to the jury rendered the DPA's misconduct harmless. See Marsh, 68 Haw. at 661, 728 P.2d at 1302-03 (concluding that, despite the trial court's repeated instructions to the jury that arguments of counsel are not evidence, the curative instruction did not overcome the effect of the prosecutor's prejudicial misconduct). That being the case, the second factor weighs in Genge's favor.

3. The strength/weakness of the evidence

Finally, we consider the third factor in determining the prejudicial effect of the DPA's misconduct. Both Genge and the prosecution acknowledge that the outcome of the trial essentially turned on the respective credibility of Genge and the complainant. As in many cases involving sexual assault, there were no percipient witnesses other than the complainant and the defendant; likewise, there was no conclusive physical evidence upon which the jury could rely. As in Rogan, the complainant's version of the alleged incidents was the crux of the prosecution's case-in-chief, and Genge, as did the defendant in Rogan, categorically denied having committed any of the acts for which he was indicted. See Rogan, 91 Hawai'i at 415, 984 P.2d at 1241. That being the case, we cannot conclude that the evidence of criminal conduct against Genge was so overwhelming as to outweigh the cumulative and prejudicial effect of the DPA's misconduct at trial.

Inasmuch as the three factors discussed above weigh against the prosecution and there is a reasonable probability that the DPA's misconduct might have contributed to Genge's conviction, we hold that the cumulative effect of the DPA's misconduct at trial was not harmless beyond a reasonable doubt.

B. The Double Jeopardy Clause Does Not Bar Genge's Reprosecution.

In light of our holding with respect to prosecutorial misconduct, the remaining question is whether the double jeopardy clause of the Hawai‘i Constitution bars the state from retrying Genge. "[R]eprosecution of a defendant after a mistrial or reversal on appeal as a result of prosecutorial misconduct is barred where the prosecutorial misconduct is 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. In Rogan, this court articulated the distinction underlying the determination whether prosecutorial misconduct merely warrants a new trial or completely bars the defendant's reprosecution:

> Double jeopardy principles will bar reprosecution that is caused by prosecutorial misconduct only where there is a highly prejudicial error affecting a defendant's right to a fair trial and will be applied only in exceptional circumstances . . . . By contrast, prosecutorial misconduct will entitle the defendant to a new trial where there is a reasonable probability that the error complained of might have contributed to the conviction (i.e., the error was not "harmless beyond a reasonable doubt").

Id. at 423 n.11, 984 P.2d at 1249 n.11 (citation omitted).

The present matter is distinguishable from Rogan. In Rogan, the prosecutor commented during rebuttal argument that "finding 'some black, military guy on top of your daughter' is 'every mother's nightmare.'" Id. at 411, 984 P.2d at 1237. By contrast, the DPA in the present matter improperly sought to

inflame the jury, argued facts not in evidence, and invited the jury to identify with the complainant during closing argument. We do not believe that the prosecutorial misconduct at issue in this case rises to the level of egregiousness contemplated in Rogan. See State v. Shabazz, Nos. 23571, 23575, 2002 WL 1017753, at *26 (Haw. App. 2002) (holding that the prosecutor's statement that "'six African-American males' 'attempted to gang rape a young local woman'" warranted a new trial but was not so egregious as to bar reprosecution under the double jeopardy clause). That being the case, we vacate Genge's convictions and remand this matter to the circuit court for a new trial.

C. The Jury Instructions Were Not Plainly Erroneous.

Genge next argues that the circuit court committed plain error by allowing the DPA to attack "obscene and inflammatory" identifying labels to the five counts of sexual assault in the jury instructions and verdict forms.[10] More specifically, Genge contends that the circuit court's use of five "obscene" phrases to identify the various acts of alleged sexual assault violates HRE Rule 1102, see supra note 4, by improperly commenting on the weight of the evidence at trial. We disagree.

[10] In his opening brief, Genge appears to raise an ineffective assistance of counsel claim, as well as an argument that the circuit court misstated the elements of the charged offenses in the jury instructions. Genge fails, however, to set forth an identifiable argument in his brief with respect to these points of error. Regarding the suggestion of ineffective assistance of counsel, Genge merely states in a footnote that, by failing to object to the five labels employed in the jury instructions, "[c]ounsel's omission showed a lack of diligence or skill that impaired [Genge's] assertion of a potentially meritorious defense, a denial of due process caused by inflammatory jury instructions." In addition, Genge contends that the jury instructions "make no sense" but does not allege any specific error. Inasmuch as "[p]oints not argued may be deemed waived," see Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7), we decline to address these issues on appeal.

We note from the onset that Genge agreed to label the charged offenses as set forth in the jury instructions and verdict forms. In fact, Genge filed a motion for a bill of particulars, see supra note 9, thereby inviting the court and counsel to agree on specific labels for identification purposes at trial and for purposes of unanimity, as required by our decision in Arceo, 84 Hawai‘i at 32-33, 928 P.2d at 874-75 (holding that the prosecution, at the close of its case-in-chief, must either elect the specific act on which it is relying to establish the "conduct" element of the charged offense or the court must give the jury a "specific unanimity" instruction). In addition, the trial court cautioned the jury that the labels were part of the instructions only to aid the jury in distinguishing among the various counts and not to influence the jury's decision as to whether the alleged incidents actually occurred. See supra at 11.

> Ordinarily, instructions to which no objection was made at trial may not be raised as error on appeal. (Citation omitted.) An appellate court may presume that an instruction correctly stated the law if no objection to the allegedly erroneous instruction was made at trial. . . . Where an erroneous instruction affected the substantial rights of a defendant, however, we may notice the error as "plain error" and remand for corrective action. (Citations omitted.)

State v. Pinero, 75 Haw. 282, 291-92, 859 P.2d 1369, 1374 (1993) (emphasis in original and footnote omitted).

In reviewing jury instructions, the standard is "'whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent or misleading.'" Klinge, 92 Hawai‘i at 583, 994 P.2d at 515 (citation omitted). Moreover, "'[e]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error

was not prejudicial.'" Id. (Citation omitted). In the present matter, the underlying purpose of the aforementioned labels or "catch-phrases" is self-evident. That is, the labels were strictly incorporated into the jury instructions to aid the jury in distinguishing among the five charged offenses. Thus, viewing the instructions in their entirety, we do not believe that the labels were prejudicial at all, much less plainly erroneous.

IV. CONCLUSION

In light of the foregoing analysis, we vacate the circuit court's judgment of conviction and sentence, filed on November 15, 1999, and remand this case for a new trial.

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