NO. 23197

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
ADOLFO H. VELARDE, also known as Rudolpho Velaroe,
Defendant-Appellant, and ALPHONSO PITOLO, Defendant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-0241)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Adolfo H. Velarde (Velarde) appeals the January 25, 2000 judgment of the circuit court of the first circuit, the Honorable Sandra A. Simms, judge presiding, that convicted him of robbery in the first degree.

Velarde avers that the deputy prosecuting attorney (the DPA) committed prosecutorial misconduct by making improper comments in two instances during *voir dire*, and that the court abused its discretion in countenancing them. Velarde argues that the DPA's comment, on the extent of the State's resources in criminal prosecutions, unfairly exploited the influence of the prosecutor's office, and that the DPA's remark, that Velarde's appearance and courtroom demeanor "doesn't matter[,]" invaded the jury's province to determine the credibility of witnesses.

Both instances appear to have been taken out of context and mischaracterized by Velarde on appeal. We believe that the DPA's comments did not constitute prosecutorial misconduct and hence, that the court did not abuse its discretion by allowing them. We therefore decline to notice these purported plain errors, and affirm.

I. Background.

On February 8, 1999, the State filed a complaint against Velarde and his co-defendant, Alphonso Pitolo (Pitolo):

> Count I: On or about the 29th day of January, 1999, in the City and County of Honolulu, State of Hawaii, ALPHONSO PITOLO, did intentionally or knowingly enter or remain unlawfully in a motor vehicle of Ronald Hermoso, with the intent to commit a crime against a person or against property rights, thereby committing the offense of Unauthorized Entry into Motor Vehicle, in violation of Section 708-836.5 of the Hawaii Revised Statutes.[1]
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> Count II: On or about the 29th day of January, 1999, in the City and County of Honolulu, State of Hawaii, ADOLFO H. VELARDE, while in the course of committing a theft from, and while armed with a dangerous instrument, did threaten the imminent use of force against Ronald Hermoso, a person who was present with intent to compel acquiescence to the taking of or escaping with the property, thereby committing the offense of Robbery in the First Degree, in violation of Section 708-804(1)(b)(ii) of the Hawaii Revised Statutes.[2]

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1 Hawaii Revised Statutes (HRS) § 708-836.5(1) (Supp. 2001) provides that "[a] person commits the offense of unauthorized entry into motor vehicle if the person intentionally or knowingly enters or remains unlawfully in a motor vehicle with the intent to commit a crime against a person or against property rights."

2 HRS § 708-840(1)(b)(ii) (1993 & Supp. 2001) provides that "[a] person commits the offense of robbery in the first degree if, in the course of committing theft: . . . . The person is armed with a dangerous instrument and: . . . The person threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or

(Footnotes supplied; capitalization and underlining in the original.) Before trial, Pitolo pled guilty as charged, pursuant to a plea agreement with the State.

Velarde's jury trial began on August 25, 1999. The State called four witnesses -- the complaining witness, Ronald Hermoso (Hermoso); his uncle, Jose Valdez (Valdez); and the two police officers who were called to the scene of the crime.

Hermoso testified that he had been employed at the Waikiki Beachcomber Hotel in housekeeping for three years, working the 4:00 p.m. to 10:00 p.m. shift, and drove a two-seat, 1990 Nissan 300 ZX automobile. He said that he often helped his uncle, Valdez, in Valdez's business at the Kam Drive Inn swap meet.

Hermoso remembered that on January 28, 1999, he left work at 10:00 p.m., spent an hour at 24 Hour Fitness in Waikiki, and while driving home, received a page from Valdez. Valdez, the State's first witness, had corroborated Hermoso's testimony by stating that Hermoso often helped him load his truck for the swap meet, and that he did indeed page Hermoso on the night and at the approximate time in question.

Hermoso recalled that he stopped his car at North Kukui and River streets to use a pay phone to call Valdez. He

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escaping with the property."

retrieved his wallet from his athletic bag in order to get some coins for the pay phone. As Hermoso was counting coins, a man, Pitolo, who "looked like a girl[,]" "wearing . . . shorts with long hair[,]" approached him and asked if he wanted a "date." Hermoso ignored Pitolo. At this point, Pitolo called Velarde over, then grabbed Hermoso's wallet from the passenger seat through the car's open T-top, removable roof. Pitolo passed the wallet to Velarde, who was on a bicycle.

Hermoso got out of his car and said to Velarde, "Hey brah, return my wallet. How come you take my wallet[?]" Velarde brandished a knife and replied, "F.U. brah. Back off." Hermoso backed off. After Velarde pedaled away on his bicycle, Hermoso secured his car and called 911. The police arrived about fifteen-to-twenty minutes later, at about 12:30 a.m. on January 29, 1999. The police detained Pitolo near the scene. Velarde was apprehended the following day. Hermoso positively identified both suspects.

The next witness, Honolulu Police Department (HPD) Officer Zane Hamrick (Officer Hamrick), testified that he was dispatched to respond to Hermoso's 911 drop call. When Officer Hamrick arrived at the pay phone, Hermoso waved him down and told him that "a female had taken his wallet and she was around the corner." Hermoso then pointed out "a female wearing shorts and

about to enter the [taxicab] and said that's the female getting into the cab." Officer Hamrick detained "the female, who later turned out to be a male," Pitolo, as a suspect.

Officer Hamrick also recalled that Pitolo protested, upon being detained, that he didn't do anything, that Hermoso had stopped him to ask if he was "dating" and had offered him ten dollars for a "date." According to Officer Hamrick, Pitolo also said that "the kid took [Hermoso's wallet] . . . that he only knew the kid as J.R. He also said good for [Hermoso], something to that effect. That's what he gets."

Hermoso gave Officer Hamrick a description of the second suspect. The next day, Officer Hamrick and HPD Officer Michael Tamashiro (Officer Tamashiro) picked up a suspect matching the description and called Hermoso in to identify him. Hermoso identified the suspect, Velarde, as the man on the bicycle who had taken his wallet and threatened him with a knife.

Officer Tamashiro's testimony matched Officer Hamrick's description of events. He, like Officer Hamrick, stated that he did not see a four-way tire iron in Hermoso's car and that Hermoso did not mention a four-way tire iron, moving his car or chasing anyone with his car.

Following Officer Tamashiro's testimony, the State rested. Velarde's motion for judgment of acquittal was denied by

the court.

The defense called two witnesses, Pitolo and Velarde. Pitolo, who preferred to be called "Lani," testified that on the night of the incident, he was walking along River Street when Hermoso "pulled over and stopped me[,]" and "offered me ten dollars for a date." In other words, Pitolo clarified, Hermoso "offered me ten dollars for a blow job." The DPA asked Pitolo, "So that's for some sort of sexual conduct?" Pitolo answered, "Yes."

Continuing with his testimony, Pitolo remembered that he then asked Hermoso if that was all the money he had. Hermoso responded affirmatively. Pitolo asked to see Hermoso's wallet. Hermoso "grabbed the money out of the wallet and showed it to me. Then he threw the wallet on the passenger's side where I was standing." Pitolo said that he was "kind of upset at that time because of this person approaching me and ask[ing] me this kind this stuff. When he was ready to burn rubber, that's when I reached in the car and grabbed his wallet." Thereupon, Hermoso got out of the car and approached Pitolo. Pitolo got scared and threw the wallet to Velarde, whom he had called over just before grabbing Hermoso's wallet. Pitolo knew Velarde -- a "friend's friend" -- as "junior or J-R[.]"

Hermoso chased Velarde on foot as Velarde bicycled

away. Then Hermoso returned to his car and "grabbed some kind of metal out of his trunk," which he used to threatened Velarde. Velarde dropped his bicycle and put up his hands in an attempt to fend Hermoso off. Pitolo maintained that Velarde was unarmed. Velarde was able to get away again on his bicycle, whereupon Hermoso "jumped in his car and chased after him." At that point, Pitolo walked away. Pitolo claimed that as he was looking for a taxicab home, Hermoso approached him: "Telling me to tell my friend to give back the wallet. That's all he ever wanted was the wallet. I had nothing to do with it. Why don't you go get it yourself."

Velarde's testimony essentially corroborated Pitolo's. There were, however, a few discrepancies; for example, with respect to the question of whom Hermoso initially confronted. Velarde testified that Hermoso thought he had taken the wallet out of the car, and as a result had confronted Velarde first and demanded return of the wallet. Pitolo, on the other hand, testified that after he grabbed Hermoso's wallet, Hermoso got out of his car and accosted Pitolo to demand his wallet back. Pitolo then got scared and threw the wallet to Velarde.

The testimonies of Pitolo and Velarde also differed over the exact order of events. Pitolo remembered that Hermoso first chased Velarde around the area on foot, then threatened him

with a tire iron, and then chased him with the car. Velarde related that Hermoso first threatened him with a four-way tire iron, then chased him with the car. In this connection, Velarde did not mention Hermoso chasing him on foot. Velarde later testified, however, that Hermoso first chased him on foot and then by car, and in this latter instance Velarde failed to mention that Hermoso had threatened him with a four-way tire iron. Pitolo and Velarde did agree that Velarde did not threaten Hermoso with any kind of weapon.

After the defense rested, Velarde renewed his motion for judgment of acquittal, which was denied by the court.

On August 31, 1999, the jury found Velarde guilty as charged of robbery in the first degree. The court sentenced him to an indeterminate term of imprisonment of eight years. Judgment was entered on January 25, 2000. Velarde filed a timely notice of this appeal on February 23, 2000.

II. Issues on Appeal.

1. While conducting *voir dire* of a prospective juror on the State's burden of proof and the presumption of innocence, the DPA commented on the abundant personnel and resources supporting his office. Velarde argues on appeal that the DPA's comment on the "extent of personnel and resources in [his] office and that of law enforcement" constituted prosecutorial

misconduct, and that the court abused its discretion by allowing it. Such comment, Velarde contends, unfairly and prejudicially "exploited the influence of the Prosecutor's office . . . . and subverted [Velarde's] right to trial by an impartial jury as guaranteed by the sixth amendment to the United States Constitution and article I, §14 of the Hawai'i Constitution."

2. During *voir dire* of a prospective alternate juror, the DPA remarked that Velarde was a "young, good looking young man. He's probably well behaved in the courtroom. That doesn't matter." Velarde asserts on appeal that the DPA's remark, that Velarde's appearance and courtroom demeanor did not matter, constituted prosecutorial misconduct, and that the court abused its discretion in countenancing it. Such comment, Velarde avers, "invaded, undermined, and misled the jury as to their exclusive authority to consider [Velarde]'s appearance and demeanor in assessing his credibility."

III. Standards of Review.

A. Plain Error.

"As a threshold matter, because [the defendant] did not object at trial to [the prosecutor's allegedly improper statements], we must first determine whether the prosecutor's alleged misconduct in making those statements constituted plain error that affected [the defendant's] substantial rights." State

v. Ganal, 81 Hawai‘i 358, 376, 917 P.2d 370, 388 (1996) (citations omitted). See also Hawai‘i Rules of Penal Procedure Rule 52(b) (1999) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). To be plain error, "[t]he conduct complained of must affirmatively appear to be of such a nature that substantial rights of the accused were prejudicially affected. If any such conduct, however, implicates a defendant's constitutional rights, an appellate court must reverse a resulting conviction unless it can conscientiously conclude that in the setting of the particular case the error is so unimportant and insignificant that it may be deemed harmless." Ganal, 81 Hawai‘i at 376, 917 P.2d at 388 (brackets, ellipsis, citations and internal quotation marks omitted).

B. Prosecutorial Misconduct.

"Misconduct of a prosecutor may form the basis for setting aside a guilty verdict. However, that remedy is only appropriate where the actions of the prosecutor have deprived the defendant of a fair and impartial trial. The conduct complained of must affirmatively appear to be of such a nature that substantial rights of the accused were prejudicially affected." State v. Johnson, 3 Haw. App. 472, 484, 653 P.2d 428, 436 (1982) (citations omitted). "Allegations of prosecutorial misconduct

are reviewed under a 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. 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." State v. Rogan, 91 Hawai'i 405, 412, 984 P.2d 1231, 1238 (1999) (citations and internal quotation marks and block quote format omitted).

C. Voir Dire.

"The law is well established in this jurisdiction that the trial court is vested with discretion to regulate voir dire examination so as to keep the questioning by counsel within reasonable bounds and to confine it to assisting in the impaneling of an impartial jury. Absent abuse of that discretion and a showing that the rights of the accused have been substantially prejudiced thereby, the trial judge's rulings as to the scope and content of voir dire will not be disturbed on appeal." State v. Churchill, 4 Haw. App. 276, 279, 664 P.2d 757, 760 (1983) (citations omitted). "The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." Ganal, 81 Hawai'i at

373, 917 P.2d at 385 (citation and internal quotation marks omitted).

IV. The Pertinent Record.

In this appeal, it is essential to read the pertinent record in its full context.

The full context of Velarde's first point on appeal is as follows. At the outset of jury selection, the court informed the jury panel that Velarde was charged with robbery in the first degree. After explaining that the purpose of *voir dire* is to select "a jury composed of persons who can be fair and impartial[,]" the court stated the following:

> So, we'll need to know things such as if you have any knowledge about this particular case, if you have any strongly preconceived opinions that you cannot put aside in order to decide the case, if you've had experience in your personal or family life that has caused you to be biased for or against either side.
>
> So that's why the questions are being asked so we can be certain that everyone is assured that the jury is indeed persons who can fairly and impartially make the decision about Mr. Velarde.

In the course of the ensuing *voir dire* of the jury panel, several of the prospective jurors stated that they had been victims of or witness to burglaries or thefts. Further on in jury selection, Lola Nakamura (Nakamura) and Randy Masaki (Masaki) were among the prospective jurors called to the jury panel to replace jurors who had been excused.

Nakamura stated, "I've been a victim of theft." Her

car had been stolen from her residence, "totalled" and "stripped[.]" The defendant in her case initially pled not guilty but later changed his plea. Nakamura expressed some bewilderment that "this person who was caught with my car in such a condition who ran from the police . . . . was pleading not guilty." Nakamura had to purchase a new car as a result of the crime. A few months after the defendant in her case pled guilty, Nakamura received ten dollars in restitution for the theft. Other than the ten dollar check, Nakamura was not notified of the outcome of the theft case or otherwise kept abreast of developments in the case. Nakamura stated that she felt "victimized" and "helpless" as a result. The court excused her after she demurred when asked, "So would you . . . be able to be fair and impartial in rendering a decision about Mr. Velarde if you were called upon to serve as a juror in this case?"

Shortly after the court excused Nakamura, the DPA questioned Masaki:

> Q. Mr. Masaki, good afternoon?
> A. Good afternoon.
> Q. You heard the woman that is seated to your left, Miss Nakamura, she seemed to be a little puzzled as to why, I guess, the gist of it that I got was that somebody had obviously stolen her car would go to court and plead not guilty. You remember when she said that?
> A. Yes.
> Q. We haven't talked about that. I'd like to talk about that a little bit.
> Do you know why the government has the burden of proof in a criminal prosecution? Can you guess? Can

you think of any reasons?

A. What is your question again?

Q. Why does the government have the burden of proof? Why does the government have to prove Mr. Velarde guilty instead of Mr. Velarde proving he's not guilty?

A. Committed a crime so you have to take all the facts together and show that he is guilty.

Q. But do you know why the system is set up that way?

A. He's not guilty until proven guilty.

Q. That's the presumption of innocence. You can't see it but behind me is an office with a hundred attorneys, fifty paralegals, two hundred staff. Behind them is over a thousand police officers, law enforcement people.

We have the ability to investigate, we have the ability to take an accusation, look at it from all different angles, see if it justifies prosecution. If we think it does, we bring an accusation. If we bring an accusation, who do you think ought to prove it?

Would it be fair to make Mr. Velarde prove he's innocent?

No, it wouldn't be right.

Okay, so there are certain absolute rights that anybody has whose [(sic)] accused of a crime. And one of them is the right to put the government to its proof. And that's why we have the burden of proof.

I think if you guys think about it, we wouldn't want it any other way. In some countries if you're accused of something, you have the burden of proving you're innocent. Think how hard that would be.

So, if you think about it, this is the correct way to do it. It's right that the government has the burden.

So, are you okay with that Mr. Masaki?

A. Yes.

Q. Do you think you can be fair to both sides?

A. Yes.

Q. When I say fair, you not only commit to, you know, trying to be fair, as you're listening to the evidence, keep an open mind. It also means you honor the presumption of innocence and that you don't favor either party[,] not for the government or for the defense going into it. Kind of the playing field is level?

A. Yes.

Q. You can do that?

A. Yes.

Velarde did not object below to the foregoing *voir dire*. Masaki remained as a juror.

The full context of Velarde's second point on appeal is as follows. Flora Shea (Shea) was called as a prospective alternate juror. The DPA initially posed only two general questions to her and passed her for cause. However, during *voir dire* by Velarde's counsel, Shea stated that it would be very difficult for her to decide Velarde's case: "In all honesty, I would -- I look at the young man and I would have a very difficult time if I had to decide his . . . . I, you know, I have a young son too so it would be very difficult for me." After Velarde's counsel passed Shea for cause, the DPA received permission to reopen the *voir dire* of Shea:

> Q. Miss Shea, I just have a concern about what you said.
> A. Uh-huh.
> Q. Now, I guess we all have family members. It sounds like you have a family member might be the same age as Mr. Velarde approximately.
> A. Yes.
> Q. One of the things that the judge will tell you is sympathy can play no part in your deliberations. It's almost like closing the door, consciously closing the door on that side.
> A. Uh-huh.
> Q. You have to look at the evidence, see if the facts that come out in evidence fit the definition of the material elements of the defense [(sic)] and decide with your fellow jurors whether the government has proven those elements beyond a reasonable doubt.
> And, you may feel some sympathy for Mr. Velarde or for the complaining witness or for some other witness, but you have to put that out of your mind.
> Can you do that?
> A. Yes, I can.

Neither side asked the court to excuse Shea, so she remained as an alternate juror.

Elia Agbayani (Agbayani) was the next prospective alternate juror examined. Following the same line of reasoning he employed with Shea, the DPA's *voir dire* of Agbayani went as follows:

> Q. Okay, Agbayani, let me ask you the same question. It's about sympathy. You know, when the judge puts on the black robe when she's appointed to the bench, she took an oath. And one of the things in the oath that goes with her job is that she has to deal out what's called impartial justice. That's why if you see the image of justice it's the lady with the blindfold holding the scales. And the reason for the blindfold is is [(sic)] that appearances don't mean much. You can't judge a book by the cover. You've heard that.
>
> Would you be -- now, if by some mishap two of the jurors have to come out and you have to slide in, would you be able to put aside any sympathy that you might feel for Mr. Velarde? It's obvious, you know, he's young, good looking young man. He's probably well behaved in the courtroom. That doesn't matter.
>
> A. (Nodding.)
>
> Q. Would you be able to do that?
>
> A. Yes.
>
> Q. Okay. Try your best to be fair to both sides, to the government and to Mr. Velarde?
>
> Q. Yes.

Agbayani remained as an alternate juror. Velarde did not object below to the foregoing *voir dire*.

V. Discussion.

In determining whether prejudicial prosecutorial misconduct has occurred, "[f]actors 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." Rogan, 91 Hawai'i at 412, 984 P.2d at 1238 (citations and internal quotation marks and block quote

format omitted). It is axiomatic, however, that first there must be misconduct.

The DPA's comments on the extent of the State's resources in criminal prosecutions, when taken in context, helped to explain why the State has the burden of proof in a criminal case and why the jury must honor the presumption of innocence until the State meets its burden of proving the accused guilty beyond a reasonable doubt. Although "[i]t is not the function of voir dire to indoctrinate the jury or to instruct it in matters of law[,]" Churchill, 4 Haw. App. at 280, 664 P.2d at 761 (citation omitted), this *voir dire* was particularly appropriate in light of the preceding example, of Nakamura's presumption of guilt. Id. (*voir dire* on matters of law may be appropriate where there is a "real" or "substantial" likelihood that such questioning "might reveal a bias or prejudice of the jurors against accepting or agreeing with certain basic propositions of law"). This was not prosecutorial misconduct.

Similarly, the DPA's remarks concerning Velarde's appearance and courtroom demeanor, when taken in context, also appear to have been within reasonable bounds. The DPA was simply inquiring into Agbayani's ability to look to the evidence and not take into account any sympathy she might feel for the defendant, the complaining witness, or anyone else. Such *voir dire* was

particularly germane after the preceding juror, Shea, admitted that she was sympathetically affected by the fact that she had a son about the same age as Velarde. Id. This was not prosecutorial misconduct, either. In this connection, we also observe that the DPA was referring to Velarde's nontestimonial appearance and demeanor.

By taking the DPA's remarks out of their contexts, Velarde mischaracterizes their nature. Viewing the *voir dire* in its entirety, it is apparent the DPA's remarks did not accord the State any undue influence, or undermine the jury's determinations of credibility in any way. Rather, the DPA's *voir dire* tended to emphasize basic concepts such as the burden of proof and the presumption of innocence, and the basic principle that the jurors must base their decisions on the evidence presented at trial and not allow any sympathy or prejudice to affect their decision. The prior *voir dire* of prospective jurors like Nakamura and Shea raised a real and substantial likelihood that the *voir dire* in question "might reveal a bias or prejudice of the jurors against accepting or agreeing with certain basic propositions of law[.]" Id.

After a careful examination of the record, we are convinced that the DPA's comments did not constitute prosecutorial misconduct and that the court did not abuse its

discretion in countenancing them. Hence, there was no impairment of any of Velarde's substantial rights and thus, no plain error that we may notice.

VI. Conclusion.

Accordingly, we affirm the January 25, 2000 judgment.

DATED: Honolulu, Hawaii, July 5, 2002.

On the briefs:

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for defendant-appellant.

Chief Judge

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Associate Judge

Associate Judge