NO. 24456

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
CHARLES TIMOTHY CLUTE, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CR. NO. 00-01-0069K)

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

Defendant-Appellant Charles Timothy Clute (Clute) appeals from the Judgment entered by Judge Ronald Ibarra on June 8, 2001 (June 8, 2001 Judgment), convicting Clute of one count of Sexual Assault in the Second Degree, Hawaii Revised Statutes (HRS) § 707-731(1)(a) (Supp. 2001)[1], and sentencing him to probation for a term of five years. A condition of probation was

> incarceration for a period of ONE (1) YEAR, with all but six months being suspended. Should you obtain full time verifiable employment within 60 days from 6-7-2001, you may be allowed to serve this period on an intermittent basis. If you are not employed full time within 60 days, you shall serve straight time.

Clute presents the following three points on appeal:

1. He was the victim of prosecutorial misconduct and plain error when the deputy prosecuting attorney (DPA) made a statement in her opening statement she knew or should have known was inadmissible as evidence.

[1/] Hawaii Revised Statutes (HRS) § 707-731(1)(a) (Supp. 2001) provides, in relevant part, as follows: "A person commits the offense of sexual assault in the second degree if: . . . [t]he person knowingly subjects another person to an act of sexual penetration by compulsion[.]"

2. He received the ineffective assistance of trial counsel when his trial counsel failed to object to statements and arguments made by the DPA in her opening statement.

3. He received the ineffective assistance of trial counsel when his trial counsel failed to "call a witness who would have testified that the complaining witness [(CW)] confided to her that she, [CW], used a vibrator for sexual satisfaction before the incident complained of, which may have helped explain injuries to [CW] as testified to by [a] sex assault nurse examiner[.]"

We affirm the June 8, 2001 Judgment.

BACKGROUND

A.

On February 11, 2000, Clute was charged, by Complaint, as follows:

Count I: Sexual Assault in the Second Degree, HRS § 707-731(1)(a), for having, on February 2, 2000, "knowingly subjected another person, [CW], to digital penetration of [her] genitalia without consent."

Count II: Sexual Assault in the Second Degree, HRS § 707-731(1)(a), for having, on February 2, 2000, "knowingly subjected another person, [CW], to an act of sexual penetration by compulsion."

Count III: Sexual Assault in the Fourth Degree, HRS § 707-733(1)(a)[2], on February 2, 2000, for "knowingly touching [CW's] sexual or other intimate parts . . . with his hand and tongue without consent.

Count IV: Sexual Assault in the Fourth Degree, HRS § 707-733(1)(a), "between July 12, 1997 and July 12, 1998," when he "did knowingly subject [CW] to sexual contact by compulsion, or caused [CW] to have sexual contact with him by compulsion, by knowingly touching [CW's] breasts and/or genitalia without consent[.]"

The Amended Complaint filed on March 23, 2000 (Amended Complaint) amended count IV from "between July 12, 1997 and July 12, 1998" to "between June 1, 1998 and August 31, 1998[.]" The language contained in the other three counts remained unchanged.

On September 5, 2000, following a jury trial, Clute was convicted of all four counts charged in the Amended Complaint. On September 12, 2000, (a) the time for filing a motion for new trial was extended to October 9, 2000, and (b) deputy public defender Peter Bresciani (DPD) filed a "Motion to Have Public Defender

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[2] HRS § 707-733(1)(a) (1993) provides, in relevant part, as follows: "A person commits the offense of sexual assault in the fourth degree if: . . . [t]he person knowingly subjects another person to sexual contact by compulsion or causes another person to have sexual contact with the actor by compulsion."

Relieved as Counsel and to Appoint New Counsel" on the following grounds:

> 2. During the course of the investigation and preparation of [Clute's] case, [DPD] was told that [CW] had a prior sexual assault complaint. As a result of this information, [DPD] requested discovery from [Plaintiff-Appellee State of Hawai'i (State)] on this information; and any police reports. The State provided [DPD] with an alpha check indicating the name of the suspect . . . and a police report number . . . .
>
> 3. [DPD] forgot about this matter and did not follow up on obtaining this information after receiving this information from the State.
>
> . . . .
>
> 9. There are three issues/areas in which the information from this [prior] case would have been relevant at the trial of this matter.
>
> . . . .
>
> 11. It would be a [sic] inappropriate for counsel who made the error to be the one arguing the relevancy of the evidence for a new trial. Therefore [DPD] must withdraw and new counsel appointed.

On October 9, 2000, DPD filed Clute's "Motion for New Trial" asserting that (1) the State failed to prove its case beyond a reasonable doubt and (2) there had been an unauthorized jury communication.[3]

On November 9, 2000, following "an in-chambers status conference on October 31, 2000[,]" Judge Ibarra entered an "Order Permitting Public Defender to Withdraw and Appointing Successor Counsel." This order removed DPD as counsel in Clute's case, appointed attorney Frank Miller (Attorney Miller) to represent

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[3/] In an October 5, 2000 declaration, a juror stated that "the foreman asked the bailiff if the jury had access to the transcripts of the witnesses' testimony" and "[t]he bailiff replied that the jury did not have access to the transcripts and that the transcripts would not be prepared for days."

Clute in subsequent proceedings, and scheduled a new trial for February 6, 2001.

On November 14, 2000, after a hearing on October 25, 2000, Judge Ibarra entered the "Order Granting Defendant's Motion for New Trial" (NT Order) stating, in relevant part, as follows:

> The assistance provided by trial counsel was below the range of competence demanded of attorneys in criminal cases. Trial counsel did not pursue an area of investigation through which he could have found strong, powerful materials with which to impeach the credibility of [CW]. He could have pursued as a line of cross examination the inconsistent statements made at the preliminary hearing and at trial. Even if a Hawaii Rules of Evidence Rule 412 motion had been filed and denied, trial counsel could have been able to question the witness about the prior sexual contact because the State, in its direct examination of [CW] at trial, had opened the door on prior sexual contacts.
>
> Furthermore, the Court finds substantial similarity between the incidents for which [Clute] was on trial and the prior sexual contact with the juvenile in that they both included contact with [CW's] breasts.

In a handwritten comment at the end of the NT Order, Judge Ibarra wrote, "Credibility of [CW] and [Clute] determined the outcome of the case. The defense is the sexual contact [between the two] was consensual."

A new trial for Clute began on April 17, 2001.

B.

At the time of the alleged sexual assault, CW was sixteen years old and lived next to Clute in Miloliʻi Village on the island of Hawaiʻi. CW testified that, on or about February 2, 2000, at approximately 10:00 p.m., she decided to return home from visiting Clute's wife. As she was walking down the stairs from Clute's lanai, she saw Clute at the bottom of the stairs. Clute allegedly

told her to go to the back of the house. After she did, "[Clute] started taking off" her clothes and kissing her from her "head down to [her] breast area." Somehow, they ended up on the ground where Clute allegedly forced CW to have sexual intercourse. Clute purportedly said, "[Y]ou're giving me something that my wife don't give me." CW testified, "I was trying to push him off of me, you know, telling him stop, leave me alone, you know, I want to go home."

After Clute got off of her, CW "jumped up," put on her clothes, and ran to her house. In the bathroom, CW cleaned herself, rinsed the blood out of her panties, and threw them in the wash. She stated she was not menstruating at the time of the alleged sexual assault.

The next day (Thursday), because she was scared, CW did not tell anyone about the alleged sexual assault. The following day, Friday, she told her aunt. After speaking to her aunt, CW went home and disconnected the telephone to prevent her aunt from calling CW's mother because CW was worried the news might adversely affect her mother's health. "She has high blood pressure and stuff, and always her chest aches. So I didn't want her to get all hyped up and end up in the hospital," CW said.

CW's aunt testified that on Friday, February 4, 2000, CW approached her and seemed nervous. After CW's aunt spoke to CW, CW's aunt advised CW to talk to her mother. When CW's aunt

attempted to call CW's mother later that evening, no one answered. The next day, Saturday, CW's aunt paged CW's mother.

CW's mother testified she did not notice anything unusual about CW in the days following the alleged sexual assault until she received a page from CW's aunt. When CW heard who it was, she "started yelling at [CW's mother] to give her the phone." When CW's mother gave CW the phone, CW "started to go hysterical." At that point, CW's mother retrieved the phone and was told what had happened.

Subsequently, the police were called and CW was taken to the Hilo Medical Center where Catherine Stevens (Stevens), a Sexual Assault Nurse Examiner, conducted a forensic examination of CW. Stevens found scratches on CW's upper back that were healing as well as healing tears in the posterior fourchette and fossa navicularis of the hymen, and redness and bleeding between the three o'clock and nine o'clock positions of the cervix. Stevens testified that the

> appearance of the injuries are consistent, were consistent with the time frame of [CW's] history. And also -- if you're looking at particularly these types of injuries, consistent with the position that she was in, and also it's consistent within that area that we would look at between 3:00 and 9 o'clock. It's consistent with a blunt force penetrating type of injury, mounting injury.

Stevens estimated the injuries occurred "within three to five days" of the examination and that they were painful when suffered. She also stated that the possible onset of CW's menstrual period was an alternative explanation for the bleeding observed.

On cross-examination, defense counsel asked whether CW had answered "no" when asked if "any finger ever penetrated her vagina[.]" Stevens replied, "That's correct." Stevens also admitted that the report she filed after the examination described some of the injuries in the area of the hymen as healed and that cervicitis was a possible cause of the redness of CW's cervix. However, when asked whether the injuries were consistent with consensual sexual activity, as well as non-consensual sexual activity, she answered, as follows:

> In my opinion, no. Usually in injuries found in consentual [sic] type of activity, sexual activity, would not be as traumatic as the type of injuries that are documented on the photographs. And having that type of extensive injury, I would suspect that a patient or a person would have a lot of pain.

Stevens did agree that consensual sexual activity "could result in transections of the hymen."

In related testimony, when the DPA asked CW if she told Stevens "everything about what had happened[,]" CW replied as follows:

> A No, not really.
>
> Q And why did you not tell her everything?
>
> A You know, it's kind of gross to tell everything, scared, you know.
>
> Q She was asking you about what had happened on February 2nd?
>
> A Yes.
>
> Q And what did you leave out?
>
> . . . .
>
> [CW]: She asked me if any other part of his body was in me and -- like his fingers and stuff. And I said no.

> Q . . . Were there any -- was there any other part of his body that went into your vagina?
>
> A Yes. His fingers.

CW also testified that, on or about February 8, 2000, she had a videotaped interview with Detective Donna Springer (Springer). Although CW told Springer about the February 2, 2000 incident and another incident where Clute allegedly molested her while giving her a ride home from her aunt's house, CW said she did not tell Springer "everything that had been happening between [her] and [Clute] from the summer of 1998 all the way through February 2nd[,]" including prior instances of harassment at a friend's house where Clute invited her to come over to his house or to meet him. CW stated that on one occasion, Clute pulled down his pants and exposed "his private area."

On February 10, 2000, Springer interviewed Clute. She testified that after informing Clute of his rights, Clute agreed to talk and told her that

> [h]e thought that he probably got home at about 7 p.m. That he had gone upstairs, and that [CW] was there, his wife, his daughter, and [CW's] brother and sister, I believe; that they were on the porch talking story. And that he was probably upstairs for ten minutes, and went to get a towel, because he wanted to go and shower. After getting the towel, he went downstairs and he did shower.
>
> He also said that when he was finished taking a shower, he was approached by [CW] while he was downstairs, and that she grabbed him and led him to an area behind the house, and that at that point she was the one who was taking off her clothes.
>
> [DPA:] Did he specify what he meant by she grabbed him?
>
> A He told me that she grabbed him by his private parts.
>
> . . . .

Q And did he say whether or not [CW] said anything to him when she allegedly grabbed him by his privates?

A He told me that [CW] had said that she was ready.

Q Then what did he say happened?

A That they were out in the back and they were both standing up, and that he told her that this -- he no can, or he couldn't; and somehow [CW] was on the ground, and he was on top of her; that it wasn't happening. And I tried to clear that up, and I asked if his penis wasn't hard; and he said that it was, but it just wasn't happening, and that [CW] masturbated him and he shot on her stomach.

. . . .

Q Did he say anything about whether or not he placed his fingers inside of [CW's] vagina?

A He told me he never inserted his fingers or his penis into [CW's] vagina; that he may have fondled her, but that was about it.

The prosecution rested on April 20, 2001. Later that same day, Clute testified for the defense, in relevant part, as follows:

Q Mr. Clute, on February 2nd, 2000, what time did you come home that night?

A I was pau about quarter to seven, seven o'clock, around there.

Q And do you remember what you did at first when you came home?

A I noticed everyone sitting outside on top of the stairwell -- I mean the lanai area above the stairwell. So I just walked up and joined them.

. . . .

Q What happened when you were out there?

A Stargazing, watching stars and talking story, talking about the stars that night.

Q And in this talking, did you have any conversation at all with [CW]?

A Yes. She in particular was showing me one particular star that was supposedly been moving across the sky or something like that.

. . . .

Q How close was she to you when she pointed it out to you?

A She was right on the side of me, pointing -- not really pressing, kind of close, pressing.

Q You guys were touching, you mean?

A Yes.

. . . .

Q And so what happened then?

A Well, I changed into my shorts. . . . I went downstairs and proceeded to take a shower.

. . . .

Q So what happened after you took a shower?

. . . .

A I started going upstairs. As I reached the bottom of the stairwell, I noticed [CW] coming down the stairwell.

Q And what happened there on the stairs?

A We came face to face, and you know --

. . . .

Q What happened?

A Well, I placed my hand on her. She held me back. We kissed again.

Q On the stairs?

A Yes.

Q And what happened after that?

A Well, we fondled -- I fondled her breasts, and we was pretty intimate this time holding each other, kissing. I grabbed onto her breasts. And you know, she touched my crotch. And at that point I told her that, you know, we couldn't do it here and -- not here. So she said to me, let's go in the back.

Q Okay. And so --

A So we left the stairwell.

Q You went down the rest of the stairs?

A Went down. She went around the right side of the house over there, and I waited kind of a few seconds -- or, you know, just contemplating. And I went around to the left side of the house.

. . . .

Q -- meet up with her?

A I came, met her on this side of the [water] tank.

Q Anything happen on that side?

A Yes. We embraced and kissed. At that point it was kind of in view of the other house, so we walked towards the back of the tank.

. . . .

Q And what happened at that point?

A Well, we kissed. And I lifted her shirt. We -- I fondled her and felt her hand on my crotch, you know. I put my hand on her crotch and found out that her pants was already pulled down -- I mean, was down by her knees at that point.

Q You saw her do that herself?

A No. I didn't see it.

Q Did you pull her pants down?

A No. I didn't.

. . . .

Q . . . . So what happened then?

A So as we was standing up, you know, I kind of pulled my short down. And we tried to make love.

. . . .

Q And how did you try to do that?

A Well, I tried to insert into her. And you know, her legs was still kind of closed because of her pants, yeah. Because it wasn't going in. It wasn't -- you know, nothing was happening.

Q Okay. So what happened then?

A So she motioned that she would lie down. So she -- at that point she sat on the ground and laid down, and I got over her.

. . . .

Q And then she laid back?

A At that point. And her pants had fallen, I believe, around her ankles. But it was still around her legs.

. . . .

Q What happened when you -- you said she got down. She laid back, and you got over her?

A I got over her. I tried to insert it again. We fooled around. I was kind of thrusting, trying to put it into her.

. . . .

Q What was she doing at that point?

A She was laying down. At that point she grabbed for my penis and tried to insert it into her. But for some reason we really couldn't penetrate too good because I believe her pants was -- you know, she couldn't. Her legs couldn't spread open because of her pants, yeah.

. . . .

Q What happened then?

A I just got up, you know, kind of lifted up already. And you know, she held onto my penis, you know, kind of stroked it awhile. And I just told her to stop. I mean, after I ejaculated I just got up and helped her up.

. . . .

Q . . . On that night, February 2nd, that she -- did [CW] say or do anything to make you think that she didn't want those things to be happening?

A No. We was consenting. She was with it all the way.

On cross-examination, the following testimony was given:

[DPA:] And you testify you did not enter her vagina with your penis?

A We tried. I don't know if it entered. I really couldn't tell. So I believe that it didn't enter.

Q You do not believe that you entered her vagina with your penis?

A I don't know.

Q You're not sure?

A I'm not sure.

Q You could have?

A I don't know.

> Q You deny that you entered her vagina with your fingers?
>
> A Yes. I never inserted my fingers.

On April 25, 2001, the jury found Clute guilty of Count II (sexual intercourse without consent) and not guilty of the other three counts. The June 8, 2001 Judgment followed. Clute did not file a motion for a new trial. On July 6, 2001, Judge Ibarra issued an "Order Extending Time to File Notice of Appeal," thereby granting Clute's July 2, 2001 "Ex Parte Motion to Extend Time to File Notice of Appeal" and extending the time for appeal to August 6, 2001.

On July 26, 2001, Attorney Miller filed a "Motion to Withdraw as Counsel and to Appoint Substitute Counsel." In an accompanying Declaration of Counsel, Attorney Miller stated as follows:

> 1. I, . . . , have had several discussions with [Clute] regarding his right to appeal and the possible grounds for appeal.
>
> . . . .
>
> 3. One of the grounds raised in our discussions has to do with a witness not called to testify and evidence not presented on [Clute's] behalf.
>
> a. According to a conversation I had with [DPD] when he represented [Clute] at his first trial, [DPD] had spoken to the witness but had made a strategic judgment call not to call the witness at trial.
>
> b. [Clute] lost that first trial and I was appointed to defend him at his new trial; in discussing the case with [DPD], I was told about this witness; I inquired of [Clute] about the witness; I learned she had moved to the mainland; and, based on [DPD's] stance and the logistics of getting the witness back to Hawaii, I also made a decision not to pursue her as a witness.
>
> c. On the last day of taking evidence at the [second] trial from rebuttal witnesses, the witness from the mainland appeared at the courthouse and was willing to submit

> herself as a witness, but I declined to try to get her on the stand and claimed that it was too late, that her testimony would be denied because I had not even named her as a witness, nor had I disclosed the substance of her testimony to the State.
>
> d. The witness would have testified that [CW] confided in her that she had used a vibrator for sexual satisfaction prior to the incident for which [Clute] was convicted, and this evidence would have helped explain injuries testified about by [Stevens] at the trial which the State attributed to [Clute's] actions.

On August 2, 2001, Attorney Miller filed Clute's Notice of Appeal.

STANDARDS OF REVIEW

Ineffective Assistance of Counsel

"In assessing claims of ineffective assistance of counsel, the applicable standard is whether, viewed as a whole, the assistance provided [was] within the range of competence, demanded of attorneys in criminal cases." Dan v. State, 76 Hawaiʻi 425, 427, 879 P.2d 528, 532 (1994) (internal quotation marks and citation omitted).

> [T]he defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.

State v. Richie, 88 Hawaiʻi 19, 39, 960 P.2d 1227, 1247 (1998) (citation omitted).

"Determining whether a defense is potentially meritorious requires an evaluation of the possible, rather than the probable, effect of the defense on the decision maker. . . . Accordingly, no showing of actual prejudice is required to prove ineffective

assistance of counsel." Barnett v. State, 91 Hawaiʻi 20, 27, 979 P.2d 1046, 1052-53 (1999)(ellipsis in original, citations and internal quotation omitted).

Plain Error

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court below. State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 676 (1988); Hawaiʻi Rules of Penal Procedure Rule 52(b). This court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights. State v. Sawyer, 88 Hawaiʻi 325, 330, 966 P.2d 637, 642 (1998).

> This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system—that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes. Nevertheless, where plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial court.

State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993).

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

Hawaiʻi 405, 412, 984 P.2d 1231, 1238 (1999) (citations and internal quotation marks omitted).

"Prosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a fair trial." State v. McGriff, 76 Hawaiʻi 148, 158, 871 P.2d 782, 792 (1994) (citations omitted). "In order to determine whether the alleged prosecutorial misconduct reached the level of reversible error, we consider the nature of the alleged misconduct, the promptness or lack of a curative instruction, and the strength or weakness of the evidence against defendant." State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992) (citation omitted).

Duty of Defense Counsel

In a criminal trial, "[a] primary requirement is that counsel must 'conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order that [counsel] may make informed decisions on his client's behalf[.]'" State v. Aplaca, 74 Haw. 54, 70, 837 P.2d 1298, 1307 (1992) (citing State v. Kahalewai, 54 Haw. 28, 30-31, 501 P.2d 977, 979-80 (1972) (citations omitted)). In Aplaca, the Hawaiʻi Supreme Court stated as follows:

> "[T]he decision whether to call witnesses in a criminal trial is normally a matter within the judgment of counsel and, accordingly, will rarely be second-guessed by judicial hindsight." State v. Onishi, 64 Haw. 62, 64, 636 P.2d 742, 744 (1981) (citations

> omitted). Nonetheless, absent [in Aplaca] is a foundation factual predicate upon which an informed decision whether to call a witness to testify must be based. We agree with the Supreme Court of Utah, which stated:
>
> > If counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel's performance cannot fall within the "wide range of reasonable professional assistance." This is because a decision not to investigate cannot be considered a tactical decision. It is only after an adequate inquiry has been made that counsel can make a reasonable decision to call or not to call particular witnesses for tactical reasons.
>
> State v. Templin, 805 P.2d 182, 188 (Utah 1990) (footnote omitted). Thus the decision not to conduct a pretrial investigation of prospective defense witnesses cannot be classified as a tactical decision or trial strategy.

Aplaca, 74 Haw. at 71, 837 P.2d at 1307.

DISCUSSION

1. and 2.

Clute contends that prosecutorial misconduct, ineffective assistance of counsel, and plain error occurred when the DPA made the following improper statements during her opening remarks: "Defendant told [CW] to meet him behind the house"; "[Clute] was having sexual intercourse with [CW]"; "[CW] told her auntie that she had had sex. . . . [W]hen the auntie tried to get more details . . . , Auntie knew that this was not just sex, but it's sexual assault"; "but that it was [CW] who said, 'Follow me'"; "[CW] wanted to have sex with [Clute]"; and "[CW] was all over him." We disagree.

> 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. If improper remarks are made during the opening statement, "[t]he test for determining the existence of prosecutorial misconduct in [the] opening statement is whether the improper remarks prejudicially affected the defendant's substantive rights."

State v. Sanchez, 82 Hawaiʻi 517, 528, 923 P.2d 934, 945 (1996) (citations omitted).

The only statement made by the DPA in opening statement that was improper was that "Auntie knew that this was not just sex, but it's sexual assault[.]" However, this statement does not rise to the level of misconduct discussed in Sanchez.

Moreover, at the beginning of the trial, Judge Ibarra instructed the jury as follows:

> What the lawyers say is not evidence. Keep that in mind. Opening statements is [sic] not evidence. The closing statement is not evidence. The objections raised by the lawyers are not evidence. The only evidence you should consider is the witness's testimony or any other exhibits which the Court allows you to review.

As part of the court's instructions to "the jury on the law to apply in the case," Judge Ibarra said, "Statements or remarks made by counsel are not evidence. You should consider their arguments to you, but you are not bound by their recollections or interpretations of the evidence. You must also disregard any remark I may have made unless the remark was an instruction to you."

At the conclusion of the trial, Judge Ibarra instructed the jury as follows:

> At this time, the next phase is the attorneys will be giving you their closing arguments. And as I said previously, the closing argument is what they believe the evidence now shows. Their closing arguments, like all other statements by the lawyers, are not evidence. If their arguments differ from your recollections, follow your own collective memory.

Considering the insignificance of the DPA's error in the light of these instructions, we decide that the error in the DPA's opening statement was harmless beyond a reasonable doubt.

3.

Noting that credibility was the key issue during his trial, Clute argues that he received the ineffective assistance of trial counsel when Attorney Miller failed to call a witness (Vibrator Witness) "who would have testified that [CW] confided to her that she, [CW], used a vibrator for sexual satisfaction before the incident complained of, which may have helped explain injuries to [CW] as testified to by [a] sex assault nurse examiner[.]" Clute insists that had the Vibrator Witness testified,

> [Clute's] credibility and his case would have been bolstered, while at the same time the victim's [sic] credibility and the state's case would have been diminished. [Attorney Miller's] failure in these respects, which seriously eviscerated [Clute's] case, is lucidly evident, given how close [Clute] came to winning an acquittal on all four courts against him.

As noted above, the jury rendered its verdict on April 25, 2001, the circuit court entered the June 8, 2001 Judgment, the circuit court extended the time for appeal to August 6, 2001, and Attorney Miller filed Clute's notice of appeal on August 2, 2001, at 9:00 a.m. The alleged facts regarding the

Vibrator Witness are contained in a declaration by Attorney Miller attached to Attorney Miller's "Motion to Withdraw as Counsel and to Appoint Substitute Counsel," which was filed on July 26, 2001. This motion was scheduled for hearing on August 2, 2001, at 8:30 a.m. There is no record of its having been heard. Considering that (1) Attorney Miller filed Clute's notice of appeal on August 2, 2001, one-half hour after this motion was scheduled for a hearing, and (2) the filing of a valid notice of appeal divests the trial court of jurisdiction over the appealed case, State v. Ontiveros, 82 Hawai‘i 446, 448-49, 923 P.2d 388, 390-91 (1996), this is understandable.

Consequently, the only evidence that Attorney Miller's assistance was ineffective is Attorney Miller's declaration attached to his July 26, 2001 "Motion to Withdraw as Counsel and to Appoint Substitute Counsel" and there is no record that this motion was decided or heard. Clute asks this court to vacate the June 8, 2001 Judgment solely on the basis that, as a matter of law, Attorney Miller's declaration establishes that Attorney Miller's assistance to Clute was ineffective. We disagree.

"[T]he decision of whether or not to call a witness in a criminal trial is normally a matter within the judgment of counsel and, accordingly, will rarely be second guessed by judicial hindsight." State v. McNulty, 60 Haw. 259, 270, 588 P.2d 438, 446

(1978), cert. denied, 441 U.S. 961, 99 S. Ct. 2406, 60 L.Ed. 2d 1066 (1979) (citations omitted). "The calling of witnesses is a strategic decision that is generally left to defense counsel."[4] Richie, 88 Hawai'i at 39, 960 P.2d at 1247.

> [T]he defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.

Richie, 88 Hawai'i at 39, 960 P.2d at 1247 (citation omitted).

Attorney Miller's declaration attached to Attorney Miller's "Motion to Withdraw as Counsel and to Appoint Substitute Counsel" is insufficient to motivate the circuit court to any further action. As noted in State v. Reed, 77 Hawai'i 72, 84, 881 P.2d 1218, 1230 (1994),

> [o]ther than his own uncorroborated assertions, Reed points to no evidence in the record indicating what the officers would have testified to if called as witnesses. In the absence of sworn statements from the police officers verifying that, had they been called as witnesses at trial, they would have testified as Reed claims they would, Reed's characterization of their potential testimony amounts to nothing more than speculation and, therefore, is insufficient to meet his burden of proving that his trial counsel's failure to subpoena the police officers as witnesses constituted constitutionally ineffective assistance of counsel. See United States v. Ashimi, 932 F.2d 643, 650 (7th Cir.1991) ("evidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or on affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim" (footnotes omitted))[.]

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[4] "However, when the failure to call a witness is the result of a failure to conduct a minimal investigation, it cannot be deemed a strategic decision." State v. Richie, 88 Hawai'i 19, 40 n.16, 960 P.2d 1227, 1248 n.16 (1998).

CONCLUSION

Accordingly, we affirm the June 8, 2001 Judgment.

DATED: Honolulu, Hawaiʻi, April 29, 2003.

On the briefs:

Alfred P. Lerma, Jr.,
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Chief Judge

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Deputy Prosecuting Attorney,
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for Plaintiff-Appellee.

Associate Judge

Associate Judge