DISSENTING OPINION BY NAKAMURA, J.

I agree with the majority's distinction between prosecutorial misconduct and prosecutorial error. Trial lawyers are required to make countless judgment calls under the stress and pressure of trial. A judgment call that we later determine on appeal to have been made in error should not be labeled "misconduct" simply because it was made by a prosecutor.[1] Instead, as this opinion properly recognizes, the label of "prosecutorial misconduct," with its attendant disciplinary repercussions, should be limited to dishonest and deceitful acts made in bad faith.

I also agree with the majority's determination that the Deputy Prosecuting Attorney did not engage in prosecutorial misconduct. The record shows that the prosecutor did not deliberately or intentionally attempt to elicit evidence linking the defendant to prior criminal activity.

Where I part company with the majority is its conclusion that the prosecutor must shoulder the blame for the disclosure of the improper evidence. Both the prosecutor and the defendant played a role in the jury's exposure to this evidence. In my view, it was the defendant who was primarily responsible for the disclosure. I would therefore treat the improper

[1] Appellate courts do not routinely characterize trial errors made by civil litigants, criminal defense lawyers, or trial judges as "misconduct."

evidence as being volunteered by the defendant and affirm the trial court's refusal to order a mistrial.

A. The Defendant Was Primarily Responsible for the Disclosure of His Prior Bad Conduct

Prior to trial, the court granted the defendant's motion in limine to exclude evidence relating to any prior criminal or bad acts by the defendant.[2] Therefore the defendant and his attorney knew that if they stayed away from subjects related to the defendant's prior conduct and background, they could safely avoid the risk of any prior bad acts being exposed. Nevertheless, in the course of attempting to portray himself in a positive light, the defendant strayed into the subject of his prior conduct and background during his direct examination.

> Q. Why did you join the Navy?
>
> A. Because to make my family proud. And I was doing bad and I wanted to change and stuff like that.

Defendant went on to testify that he joined the Navy because it would help him "[g]o to college and see the world and just learn something new."

On cross-examination, the prosecutor sought to clarify the defendant's direct testimony that he joined the Navy "to

[2] As the majority notes, both the defendant's motion and the court's order were unspecific and failed to describe the prior alleged criminal or bad acts being precluded. The motion and order, therefore, provided little notice to the prosecutor of what particular matters he should avoid.

change" by asking, "Change from what?" In response, the defendant testified, "Well, when I was back home, I was doing bad. Well, I was hanging with the wrong people -- drugs and gang-banging and stuff like that. And I got tired of doing that."[3]

The prosecutor's question was a reasonable follow-up to the defendant's direct testimony that he had joined the Navy "to change." A prosecutor is entitled to develop and clarify matters broached by a defendant on direct examination. State v. Palisbo, 93 Hawai‘i 344, 360, 3 P.3d 510, 526 (App. 2000) ("Cross-examination includes 'full development of matters broached on direct examination, including facts reasonably related to matters touched on direct.'"); Lambert v. State, 448 N.E.2d 288, 292 (Ind. 1983) (holding that it was proper for the prosecutor to ask questions to clarify matters raised by the defendant on direct examination, even though the questions prompted the defendant to reveal his prior criminal activity); People v. Briggman, 316 N.E.2d 121, 127 (Ill. App. Ct. 1974) (finding that it was proper

[3] From the defendant's answer it is not clear whether he had been engaged in "drugs and gang-banging" or whether he was simply tired of "hanging with" others, i.e., the wrong crowd of people, who were engaged in those activities. However, in either event, I agree with the majority that the jury should not have been exposed to this information.

for the prosecutor to pursue a line of questioning which was initiated by the defendant).[4]

The prosecutor neither intended nor expected his question to elicit the defendant's response. The most compelling support for this conclusion comes from the actions and statements of the defendant's own attorney. First, the defendant's attorney did not object to the prosecutor's "[c]hange from what?" question. Then, after the defendant disclosed the information linking himself to past criminal activity, the defendant's lawyer told the judge at side bar, "Well, Judge, I have to move for a mistrial. I did not anticipate that answer from [the defendant]." (Emphasis added.)

Certainly, the defendant's lawyer knew more about the details of his client's background, including any past criminal behavior, than the prosecutor. If the defendant's own lawyer did not anticipate that the prosecutor's question would elicit the defendant's response, I find it difficult to blame the prosecutor for not anticipating that response. The trial judge, who had a "front row seat" from which to assess the context of the prosecutor's question, also did not attribute any blame to the prosecutor. Instead, both the defendant's lawyer and the trial

[4] The defendant's testimony on direct that, "I was doing bad and I wanted to change and stuff like that," was ambiguous. "Doing bad" could mean many things, including being unemployed, being lazy, being in poor physical shape, or could simply be an expression of general dissatisfaction with one's progress or station in life. It does not equate to prior criminal acts.

judge accepted the prosecutor's explanation that he was simply following up on the defendant's direct testimony and did not expect the defendant's answer.

I find it particularly significant that it was the defendant himself who disclosed the unfavorable information. Unlike most other witnesses, a prosecutor does not have pretrial access to a defendant. A prosecutor cannot interview a defendant before trial to determine how he or she is likely to respond to certain questions. Instead, it is a defendant's lawyer who is able to obtain details regarding a defendant's background, anticipate a defendant's response to questions, and caution a defendant against straying into subjects or providing answers that will result in the disclosure of inadmissible evidence. A prosecutor should not be penalized for failing to read a defendant's mind.

The prosecutor's general question, "Change from what?", did not call for nor require the defendant to answer that he had been "hanging with" people engaged in "drugs and gang-banging." The defendant could have given a truthful answer that did not reveal these unfavorable details. Commonwealth v. Roderick, 707 N.E.2d 1065, 1068 (Mass. 1999) (finding that the prosecutor did not violate the court's in limine order where the defendant could have truthfully answered the question without disclosing the evidence precluded by the order). For example, the defendant

could have answered that he wanted to change from not living up to his potential or from engaging in unproductive activities. He could have truthfully answered in numerous other ways without disclosing details protected by the in limine order. Instead, the defendant volunteered the unfavorable details that he now claims entitled him to a mistrial. State v. Stills, 957 P.2d 51, 62 (N.M. 1998) (rejecting a claim of prosecutorial misconduct where the defendant could have answered the prosecutor's question without disclosing details precluded by the trial court's in limine order).

On balance, I believe it was the defendant, and not the prosecutor, who was primarily responsible for the disclosure of the defendant's prior bad conduct. In my view, the defendant's unexpected disclosure of this information should be analyzed as being volunteered by the defendant, rather than as the product of prosecutorial error.

B. The Trial Court Did Not Abuse Its Discretion in Refusing to Order a Mistrial

The denial of a motion for a mistrial is reviewed under the abuse of discretion standard. State v. Loa, 83 Hawai‘i 335, 349, 926 P.2d 1258, 1272 (1996). A trial court does not abuse its discretion unless it "clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." State v. Ganal, 81

Hawai‘i 358, 373, 917 P.2d 370, 385 (1996) (quoting State v. Furutani, 76 Hawai‘i 172, 179, 873 P.2d 51, 58 (1994).

As the majority correctly notes, damaging statements volunteered by a defendant generally are not grounds for declaring a mistrial. E.g., Commonwealth v. Fahy, 516 A.2d 689, 696-97 (Pa. 1986) (affirming the denial of a mistrial where the defendant volunteered that "he could have been locked up," in response to a question regarding how many months he had lived at a particular residence); People v. Kirkwood, 160 N.E.2d 766, 771 (Ill. 1959) (affirming the denial of a mistrial where the defendant volunteered information regarding his prior arrest in response to a question concerning whether he had been attending school). Courts have upheld the denial of mistrials even when a prosecution witness disclosed the damaging information, where the answer, although responsive to the prosecutor's question, was not expected. E.g., State v. Barragan, 34 P.3d 1157, 1167-68 (N.M. Ct. App. 2001) (testimony that the defendant would be recognized by officers at the detention center); People v. Mims, 717 N.Y.S.2d 446, 447 (N.Y. App. Div. 2000) (testimony that the defendant was notorious for selling crack cocaine); State v. Sorina, 499 So.2d 376, 378-79 (La. Ct. App. 1986) (testimony that the defendant had been arrested on another charge); People v. McQueen, 271 N.W.2d 231, 232 (Mich. Ct. App. 1978) (testimony alluding to the defendant's past incarceration).

In this case, the defendant's reference to his prior bad conduct was brief. The trial court immediately struck the defendant's answer and gave a strong curative instruction advising the jury to "disregard" as "not relevant" anything the defendant did prior to joining the Navy. This curative instruction was reinforced when the court again instructed the jury prior to its deliberation to "disregard entirely any matter which the court has ordered stricken." The defendant's prior bad conduct testimony was not exploited by the prosecution nor further mentioned during the trial. Under these circumstances, the trial court did not abuse its discretion in denying the defendant's motion for mistrial.

C. Conclusion

I believe that the defendant was primarily responsible for the disclosure of the details regarding his own prior bad conduct, and that the trial court did not abuse its discretion in refusing to order a mistrial. I would affirm the defendant's conviction. Accordingly, I respectfully dissent.