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NO. 25278

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
LINO PATUBO, JR., Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 00-1-0514)

MEMORANDUM OPINION

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

Defendant-Appellant Lino Patubo, Jr. (Patubo or Defendant) appeals from the July 23, 2002 Judgment, entered in the Circuit Court of the First Circuit, Judge Sandra A. Simms presiding, convicting him of two counts of Unauthorized Control of Propelled Vehicle, Hawaii Revised Statutes (HRS) § 708-836 (1993);<sup>1</sup> one count of Promoting Dangerous Drug in the Second Degree, HRS § 712-1242(1)(b)(i) (1993);<sup>2</sup> and one count of

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<sup>1</sup> Hawaii Revised Statutes (HRS) § 708-836 (1993) states, in relevant part, as follows:

**Unauthorized control of Propelled Vehicle.** (1) A person commits the offense of unauthorized control of a propelled vehicle if the person intentionally exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent or by changing the identity of the vehicle without the owner's consent.

<sup>2</sup> HRS § 712-1242 (1993) states, in relevant part, as follows:

**Promoting a dangerous drug in the second degree.** (1) A person commits the offense of promoting a dangerous drug in the second degree if the person knowingly:

- (a) Possesses twenty-five or more capsules, tablets, ampules, dosage units, or syrettes, containing one or

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Unlawful Use of Drug Paraphernalia, HRS § 329-43.5(a) (1993);<sup>3</sup> and sentencing him to concurrent five (5) year terms of probation for each count and to pay a \$400 Crime Victim Compensation Fee and \$500 for a Drug Demand Reduction Assessment.

On appeal, Patubo asserts the following points of error:

- (1) at the motion to suppress hearing, the circuit court made erroneous findings of facts in FOF 15, 17, 18, 19 and 20;
- (2) the court made an erroneous conclusion of law in Conclusion of Law #1;
- (3) at trial, the prosecutor made reference to an illegal, unlicensed business; and thus deprived Patubo of a fair trial; and
- (4) the prosecutor improperly asked Patubo whether prosecution witnesses were lying and therefore, deprived Patubo of a fair trial.

We affirm.

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- (b) more dangerous drugs; or Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of:
    - (i) One-eight ounce or more, containing metamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, or salt of isomers; or
    - (ii) One-fourth ounce or more, containing any dangerous drug; or
  - (c) Distributes any dangerous drug in any amount.
- (2) Promoting a dangerous drug in the second degree is a class B felony.

<sup>3</sup> HRS § 329-43.5(a) (1993) states as follows:

**Prohibited acts related to drug paraphernalia.** (a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. Any person who violates this section is guilty of a class C felony and upon conviction may be imprisoned pursuant to section 706-660 and, if appropriate as provided in section 706-641, fined pursuant to section 706-640.

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### BACKGROUND

#### A. Factual Background

On January 21, 1999, Police Officer Ron Pinho-Goldman (Officer Pinho-Goldman) was patrolling his area at around 1:41 p.m. when he noticed that a "red four-door Toyota Camry was parked facing the wrong direction and blocking a fire hydrant, and . . . what appeared to be a garden hose sticking out of the gas tank." When Officer Pinho-Goldman ran a check on the red Toyota's license plate, which was "FPU 263", he was informed the license plate belonged to "an '85 Ford multipurpose vehicle, blue." He noticed that the ignition had been "punched"<sup>4</sup> and made a call requesting back up. He also called in the vehicle identification number (VIN) that was on the red Toyota and was informed that the vehicle with that VIN had been reported stolen. While he was waiting for other officers to appear, he noticed another passenger vehicle parked down the street fronting the driveway. It was a white Mazda four-door and it also was facing the wrong direction in traffic. The license plate on the white Mazda should have been on a brown Mazda. Officer Pinho-Goldman checked for a VIN plate in order to run the VIN number but saw that the VIN plate was missing. Soon thereafter, police officers Keaka Atkinson (Officer Atkinson), Charles Skaggs (Officer

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<sup>4</sup> Police Officer Ron Pinho-Goldman (Officer Pinho-Goldman) explained that "punched" is a police term indicating signs that the car has been "hotwired" or started and operated without a key.

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Skaggs) and Mark Tom (Officer Tom) arrived.<sup>5</sup> Officer Atkinson noted that a third automobile, a Bronco parked between the red Toyota and the white Mazda, had a "punched" ignition and an interior that looked as if it had been dismantled. The white Mazda was parked in front of the driveway of Patubo's residence. Officer Pinho-Goldman went up to that residence to determine if anyone may have "witnessed the vehicle being dropped off over there, or if they knew who it belonged to." Patubo answered the door and explained that the white Mazda "belonged to a friend of his, and [Patubo's] daughter had dropped it off over there." Officer Pinho-Goldman then asked Patubo whether there was anyone else in the house and Patubo replied that "nobody else was in the house."<sup>6</sup> When Officer Pinho-Goldman explained that he needed to

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<sup>5</sup> At trial, Police Officer Charles Skaggs (Officer Skaggs) testified that he, and not Police Officer Keaka Atkinson (Officer Atkinson), was the second officer to arrive at the scene.

<sup>6</sup> A factual dispute arose as to what Defendant-Appellant Lino Patubo, Jr. (Patubo) said in response to whether there were other people in the house. Patubo's friend, Vincent Cabellero (Cabellero), testified at trial that he was at the house to pick up his son and was sitting in the back of the house watching television when Officer Pinho-Goldman knocked. Patubo responded that he had some friends in the back. Cabellero was called to the front room where Officer Pinho-Goldman and Patubo were standing. Cabellero was asked who else was in the back, and he replied "my son and Delaney and Russell." Cabellero then grabbed his son, and Officer Pinho-Goldman made them stand outside in the garage. Officer Pinho-Goldman asked Cabellero "if -- you know, do you realize that this was a chop shop, and [Cabellero] said no." Officer Pinho-Goldman "told [Cabellero], you know, if he -- if I didn't tell him you know, what -- what else I knew about Lino, about what he was doing and stuff that, you know, he would have my child taken away, you know, and have CPS take my child away from me." There were "already police officers walking in and out of the house . . . before [Cabellero] came out with his son."

With respect to this alleged incident, Officer Atkinson testified that he did not see anyone come out of Patubo's house. He did not see a man with a young child or a young woman come out of the house. Officer Pinho-Goldman also testified that he did not "recall seeing a little boy." However, he did see another male, and only asked him for identification. Officer Pinho-Goldman stated that he wasn't concerned about what Cabellero knew about any of the

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verify the identity of the vehicle, Patubo responded that he had the keys. Officer Atkinson testified that when Patubo went into his house to obtain those keys, and subsequently when Patubo went into his house to obtain his wallet containing his identification, Officer Atkinson accompanied Patubo "[p]rimarily to make sure [Patubo] didn't come out with any weapons or anything that could injure other officers."

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vehicles because "he's not a resident of the house." Officer Pinho-Goldman testified that he was uncertain as to why Cabellero was involved in the case. With respect to his encounter with Cabellero, Officer Pinho-Goldman testified as follows:

Q: Did you ask Patubo to go call somebody to come out of the house?

A: No sir, I never did that.

Q: Did somebody else do that in your presence?

A: Not in my presence, sir.

Q: This fellow just walked out of the house?

A: I don't know. He ended [sic] coming out of the house, sir.

Q: You saw him, though, didn't you?

A: I saw him in the carport area. I don't recall where he came from.

Q: And you went over to talk to him?

A: Yes, sir.

Q: And how long did you stay with him?

A: I don't recall how long I was with him, sir.

Q: And he was visibly shaken?

A: What do you mean by visibly shaken?

Q: Was he all excited and worried about what you wanted?

A: No, sir, as far as I recall, he wasn't.

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With the keys provided by Patubo, Officer Pinho-Goldman obtained access to the white Mazda. The VIN plate on its door was missing, but Officer Pinho-Goldman eventually found the VIN on the "firewall inside the engine compartment." Dispatch told Officer Pinho-Goldman that there was no record of that VIN. Officer Pinho-Goldman described Patubo's overall demeanor as being "very cooperative" and "calm" and denied making or hearing any threats or promises to Patubo if he did or did not cooperate with the police.

While Officer Pinho-Goldman was talking to Patubo, Officer Skaggs was observing Patubo. He noted that Patubo's behavior was normal. He overheard Patubo telling Officer Pinho-Goldman that there was no one in the house. As Patubo and Officer Pinho-Goldman were walking towards the car port, Officer Skaggs heard a "large crash" that "sounded like it came from the back side of the house 'cause if it was by the front door, I would have seen something fall down." The noise sounded as if "somebody was moving around in the house." Officer Skaggs testified that he again asked Patubo, "Is there anyone else in the house that we need to know about?" Patubo replied, "No." Officer Skaggs then asked whether "it would be all right if I went to the house, look around, make sure no one's in the house." Patubo gave him a blank look and "didn't say yes, didn't say no." Nonetheless, Officer Skaggs entered the house "to secure the area to make sure there's no one else in the house, and if there was,

we weren't in any threat." Officer Skaggs entered all the rooms that had unlocked doors. In the living room, he saw what "looks like books on the ground from somebody passing by banging on the stand." On the living room couch, Officer Skaggs observed license plate "HRT 803" and he obtained possession of it. That was the license plate for the red Toyota. Officer Skaggs did not see anyone else in the house. When he came out of the house, he gave Officer Pinho-Goldman the HRT 803 license plate.

After the other officers arrived, Sergeant Clayton Chung (Sergeant Chung) arrived at around 2:51 p.m. When Detective Jeffrey Bruchal (Detective Bruchal) subsequently arrived, Officer Pinho-Goldman and Sergeant Chung briefed him of the situation. A decision was made for Detective Bruchal to ask Patubo for consent to search his house.<sup>7</sup> Detective Bruchal testified that he followed standard procedures including

writ[ing] . . . on the form, the address, and . . . all the things that we would be looking for in the his area. We had suspected that there was a stolen vehicle, and possibly a defacing of serial numbers of vehicles going on at that particular address, so I would indicate that on the form, and the things I would be looking for would be license plates, vehicle identification of plates, tools that would be used to commit auto theft or defacing of serial numbers.

And in this particular case, there was some belief that in addition to auto theft or defacing of serial numbers, perhaps, maybe burglary or theft, some evidence of that might be found at the residence also, so that was also included on the form. . . . [I] would "usually go over the form with the person, and I explain to the person why -- why this consent is being asked of them, and what we'd be looking for and who would be doing the searching of the residence . . . [and] that was done with [Patubo].

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<sup>7</sup> The conversation between Detective Jeffrey Bruchal (Detective Bruchal) and Patubo was tape recorded, and the tape was played for the jury and received into evidence.

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Detective Bruchal noted that Patubo's demeanor at the time was "very quiet and calm and seemed to be cooperative." An Intoxilyzer test revealed that Patubo had no alcohol in his system. Sergeant Chung, who had "training and experience in dealing with people who may be intoxicated on substances other than alcohol[,] " testified that he did not notice any indicia of Patubo's substance intoxication when he was dealing with Patubo. Although Patubo was wearing glasses at trial, Detective Bruchal noted that Patubo did not at any time express a need for glasses. According to Detective Bruchal, Patubo was "read[ing] along the form as I read it to him out loud[.]" After Detective Bruchal explained Patubo's rights and what he wanted Patubo's consent to search for, Patubo had no questions. When asked if he understood what had just been told to him, Patubo's response was that he understood. When Patubo was asked if he wanted an attorney, he stated no. Patubo verbally consented to a search of his residence. He also signed a form "WRITTEN CONSENT TO SEARCH" and wrote on it his address, the date, and the time. This form consent stated, in relevant part as follows:

I understand that the Police are searching for evidence of the crime of auto theft, defaced serial number, more specifically (robbery, burglary, etc.) burglary, theft

VIN plates, license placards, tools & equipment used to commit auto theft & deface serial number.

I understand that I have a constitutional right to refuse to allow this search and I hereby waive this right.

I understand that I have a right to consult with an attorney before allowing this search, and I hereby waive this right.



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I am fully aware that any property found which is the fruit (stolen property) or instrumentality of a crime (weapons, etc.), or contraband (property which cannot be legally possessed) may be used against me in a criminal prosecution in a court of law.

I am not presently under the influence of drugs or intoxicating beverage and am not mentally unstable.

I give my consent voluntarily and have not been threatened, coerced, or intimidated in any manner, nor have any promises been made to me in return for my giving my consent to this search.

Emphasis in original.

In contrast, Patubo testified, in relevant part, as follows:

Q You signed some form? Were you able to read them?

A No, sir.

Q Why not?

A 'Cause I didn't have my glasses.

Q Where were they?

A They were in the house.

Q And why didn't you go get them?

A They wouldn't let me go in.

Q Did you try?

A Well, I asked them if I could get my glasses, but they just ignored me.

Q Who did you ask?

A Um, Detective Bruchal and Officer Goldman.

Q And they wouldn't let you?

A No, sir.

. . . .

Q Did you have any glasses when you were talking with Bruchal?

A No, sir.

Q You're wearing them today. Why weren't you wearing them that day?

A Uh, I don't use the glasses all the time. It just

happened that day I didn't have that with me.

In one of the bedrooms, the officers found (a) contraband in closed containers and (b) a man hiding under a large pile of clothing. The man was Russell Yamaguchi. The items recovered from the search included: "car keys and lock keys, a computer-chip device apparently used for disabling car alarms, a 16 inch screwdriver, a homemade tool which could be used to force entry into motor-vehicles, crystal methamphetamine, marijuana, drug paraphernalia, and items of identification belonging to [Patubo]."

B. Procedural Background

On March 2, 2001, Patubo filed a Motion to Suppress Evidence (a) procured during the search of 920 Paaaina Street, Paarl City and (b) arising out of his arrest for drug-related offenses because (1) his consent was coerced, (2) the search went beyond the scope of the illegally obtained Consent to Search Form as well as that justified by probable cause, (3) the search of a number of closed containers in which drugs and drug-related materials were found by Officer Tom in bedroom number three without his consent and without a warrant was violative of his rights to privacy and freedom from unreasonable searches and seizures because the closed containers could not have held items which the police were searching for and there were no exigent circumstances justifying a warrantless search. A hearing on this motion was held on May 15, 2001, with further hearings on June 5,

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2001, July 24, 2001, August 28, 2001, and August 30, 2001. On October 3, 2001, the court entered its Findings of Fact, Conclusions of Law and Order Denying Motion to Suppress Evidence, in relevant part, as follows:

**FINDINGS OF FACT**

. . . .

5. While on routine patrol, Honolulu Police officer Ronald Pinho-Goldman (Pinho-Goldman) came upon an unusually positioned red Toyota Camry, displaying Hawaii license plate FPU 263, on the street in front of the Defendant's home -- its interior was stripped and wires hung from the ignition.

6. On running a check, Pinho-Goldman learned it was stolen and had the wrong plates on it. Several other cars were parked in the area in front of and in the residence driveway and curtilage.

7. A white Mazda automobile, parked in front of the Defendant's driveway, bore license plates belonging to another vehicle, and its vehicle identification number (VIN) had been removed.

8. Pinho-Goldman then approached the residence to inquire.

9. Answering Pinho-Goldman's knock and inquiry, the Defendant stated he had no knowledge of the red Camry, but that his daughter used the white Mazda.

10. In the meantime, Pinho-Goldman had called for back-up officers who had begun to arrive.

11. Officers were able to glean through lawful observations that several of the vehicles in the defendant's driveway had missing license plates and/or VIN numbers. Car parts were also lying about.

12. Detective Jeffrey Bruchal (Bruchal) came onto the scene and asked the Defendant for his consent to search the residence pertaining to auto theft, VIN numbers, license plates, tools and other equipment usable in the theft of motor vehicles.

13. The court finds Bruchal to have been very credible on the process used to obtain the defendant's consent to search the residence: Bruchal read the entire form to the Defendant while the Defendant read along.

14. The consent to search form HPD-393 used by Bruchal adequately informed the Defendant of his rights and specifically informed the Defendant that any contraband found during the search could be seized and used against him.

15. The Defendant signed the consent to search form

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knowingly and voluntarily. Accordingly, the search and recovery of all items was valid.

16. With regard to the entry of the home by Officer Charles Skaggs (Skaggs), there is some dispute as to the basis for his entry into the home prior to the defendant giving his consent to search.

17. Nonetheless, the court finds it was not unreasonable for Skaggs to enter the house when he believed he heard loud crashing sounds from inside, whether or not the defendant gave him permission to enter.

18. Given the scenario developing outside the residence with numerous police officers present, stolen and altered vehicles strewn about, and some discrepancy as to whether there was anyone else in the residence, concern for officer safety was legitimate.

19. On these facts, it was proper for Skaggs to briefly enter the residence for the limited purpose of making sure there was no threat to officers, occupants, or evidence.

20. The court finds it more credible that the license plate belonging to the stolen red Camry, HRT 803, was in plain view on the sofa in the defendant's home and therefore properly recovered by Skaggs when he noticed the plate on his way out of the house.

### **CONCLUSIONS OF LAW**

1. Because the consent to search was properly obtained, there is no constitutional violation.

2. Accordingly, suppression of the evidence is unwarranted.

(Citations omitted.)

A seven-day jury trial began on February 27, 2002 and ended on March 12, 2002. The jury found Patubo guilty as charged on all four counts. Judgment was entered on July 23, 2002. Patubo filed a notice of appeal on August 22, 2002. This appeal was assigned to this court on June 18, 2003.

### **STANDARDS OF REVIEW**

#### 1. Findings of Fact and Conclusions of Law Deciding a Motion to Suppress Evidence

Appellate review of factual determinations made by the trial court deciding pretrial motions in a criminal case is governed by the clearly erroneous standard. A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to

support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is left with a definite and firm conviction that a mistake has been made. The circuit court's conclusions of law are reviewed under the right/wrong standard. Furthermore . . . the proponent of a motion to suppress has the burden of establishing not only that the evidence sought to be excluded was unlawfully secured, but also, that his own Fourth Amendment rights were violated by the search and seizure sought to be challenged. The proponent of the motion to suppress must satisfy this burden of proof by a preponderance of the evidence.

State v. Balberdi, 90 Hawai'i 16, 20-21, 975 P.2d 773, 777-78 (App. 1999) (quoting State v. Anderson, 84 Hawai'i 462, 466-67, 935 P.2d 1007, 1011-12 (1997)).

Consequently, a trial court's ruling on a motion to suppress is reviewed de novo to determine whether the ruling was right or wrong as a matter of law. State v. Kauhi, 86 Hawai'i 195, 197, 948 P.2d 1036, 1038 (1997) (citation omitted).

[W]hen a defendant's motion to suppress evidence is denied prior to trial, the defendant need not object at trial to the introduction of the evidence to preserve his or her right to appeal the pretrial denial of his or her motion to suppress and the introduction of the evidence at trial.

State v. Kong, 77 Hawai'i 264, 266, 883 P.2d 686, 688 (App. 1994) (citations omitted).

[W]hen the defendant's pretrial motion to suppress is denied and the evidence is subsequently introduced at trial, the defendant's appeal of the denial of the motion to suppress is actually an appeal of the introduction of the evidence at trial. Consequently, when deciding an appeal of the pretrial denial of the defendant's motion to suppress, the appellate court considers both the record of the hearing on the motion to suppress and the record of the trial.

Kong, 77 Hawai'i at 266, 883 P.2d at 688 (citations omitted).

## 2. Plain error

Hawai'i Rules of Penal Procedure Rule 52(b) states that "[p]lain errors or defects affecting substantial rights may be

noticed although they were not brought to the attention of the court." Therefore, an appellate court "may recognize plain error when the error committed affects substantial rights of the defendant." State v. Davia, 87 Hawai'i 249, 253, 953 P.2d 1347, 1351 (1998) (internal quotation marks and citation omitted).

The appellate 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. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999) (internal quotation marks and citation omitted).

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.

Id. at 42, 979 P.2d at 1068 (quoting State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993)).

### 3. Prosecutorial Misconduct

"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. Mara, 98 Hawai'i 1, 16, 41 P.3d 157, 172 (2002) (quoting State v. McGriff, 76 Hawai'i 148, 158, 871 P.2d 782, 792 (1994)). Misconduct "when applied to an act of an attorney, implies a dishonest act or an attempt to persuade the

court or jury by use of deceptive or reprehensible methods." State v. Palabay, 9 Haw.App. 414, 429, 844 P.2d 1, 9 (1993) (citations omitted).

Prosecutorial misconduct is "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. St. Clair, 101 Hawai'i 280, 286, 67 P.3d 779, 785 (2003) (citations and internal quotation marks omitted). The prosecution bears the burden of showing that the misconduct was harmless beyond a reasonable doubt. State v. Smith, 91 Hawai'i 450, 461, 984 P.2d 1276, 1285 (App. 1999). Factors to consider are: (1) the nature of the prosecutorial misconduct; (2) the promptness or lack of a curative instruction; and (3) the strength or weakness of the evidence against the defendant. State v. Wakisaka, 102 Hawai'i 504, 515, 789 P.3d 317, 328 (2003). Under the Hawai'i Constitution, "reprosecution is barred where, in the face of egregious prosecutorial misconduct, it cannot be said beyond a reasonable doubt that the defendant received a fair trial." St. Clair, 101 Hawai'i at 287 (citation omitted).

#### DISCUSSION

##### A. Findings of Facts and Conclusions of Law

Patubo challenges findings of fact (FsOF) nos. 15, 17, 18, 19, and 20 and conclusion of law (COL) no. 1.

Regarding FsOF nos. 17, 18, and 19, Patubo challenges the legality (a) of Officer Skagg's entry into the residence and (b) of Officer Atkinson's entries into the residence.

Although the fourth amendment to the United States Constitution and article I, section 7 of the Hawai'i Constitution "ensure that an individual's legitimate expectations of privacy will not be subjected to unreasonable governmental intrusions", there are a few "specifically established and well-delineated exceptions." State v. Meyer, 78 Hawai'i 308, 312, 893 P.2d 159, 163 (1995) (internal citations omitted). "These exceptions provide for those cases where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate." Id.

While "the term 'exigent circumstances' is incapable of precise definition, [g]enerally speaking . . . [it] may be said to exist when the demands of the occasion reasonably call for an immediate police response." More specifically it includes situations presenting an immediate danger to life or of serious injury or an immediate threatened removal or destruction of evidence. However, "[t]he burden, of course, is upon the government to prove the justification . . . , and whether the requisite conditions exist is to be measured from the totality of the circumstances." And, in seeking to meet this burden, "[t]he police must be able to point to specific and articulable facts from which it may be determined that the action they took was necessitated by the exigencies of the situation."

State v. Clark, 65 Haw. 488, 494, 654 P.2d 355, 360 (1982)  
(citations omitted).

There being sufficient support in the record for the finding and conclusion that Officer Skaggs reasonably entered the residence "for the limited purpose of making sure there was no



threat to officers, occupants, or evidence[,]” we affirm FsOF nos. 17, 18, and 19 and COL no. 1.

The requirements for a legitimate plain view observation are "(1) prior justification for the intrusion; (2) inadvertent discovery; and (3) probable cause to believe the item is evidence of a crime or contraband." Meyers, 78 Hawai'i at 314, 893 P.2d at 165; State v. Tangalin, 79 Hawai'i 92, 98, 898 P.2d 604, 610 (App. 1995) (internal citations omitted). In light of the evidence, the finding of fact part of FOF no. 20 is not clearly erroneous, and in light of the facts, the conclusion of law part of FOF no. 20 is right.<sup>8</sup>

No search having occurred when Officer Atkinson accompanied Patubo when Patubo went into his house to obtain the keys, and subsequently when Patubo went into his house to obtain his wallet containing his identification, Patubo's challenges of Officer Atkinson's entries into the residence have no merit.

Patubo contends that FOF no. 15 is

[e]rroneous because it only considered Patubo's actions with respect to [Bruchal's] actions and not with respect to Patubo's entire encounter with the police.

Patubo could not reasonably have believed that the police would respect his Constitutional rights where they had been going in and out of his house without consent as such, it is reasonable to assume that any consent which was later received was a product of the three prior illegal searches. . . .

Patubo was in police custody at the time the "consent" was obtained, as a reasonable defendant would not believe [he was] free to leave, where there are several officers on the property,

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<sup>8</sup> Officer Skaggs testified that the license plates "were the same plates that were supposed to be on the car that was read out through dispatch" and that he knew what they were when he laid eyes on them.

going in and out of his home and threatening to arrest him if he does not consent to a search.

There being no evidence that Patubo was not able to read the consent form and no facts to support the conclusion that Patubo could not reasonably have believed that the police would respect his constitutional rights where they had been going in and out of his house without his consent, and there being substantial evidence supporting FOF no. 15, we affirm it.

B. Prosecutorial Misconduct

Defense counsel did not object at trial to the following acts of alleged prosecutorial misconduct. On appeal, Patubo argues that,

[t]he following acts constituted plain error and should be reviewed by the court. Appellate courts, in the public interest, may on their own motion notice errors to which no exception has been taken if the errors are obvious, and if the errors otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. (internal citations omitted)

1. Veracity of the Witnesses

Patubo argues that it was improper for the prosecutor during cross-examination to ask Patubo whether certain prosecution witnesses were "lying". The relevant questions and answers are as follows:

Q: Okay. So back then you indicated Sergeant Chung came out with two sets, told you he was gonna take em, made you sign papers; right?

A: Yes.

Q: And now you're telling us that all four sets were gone; right?

A: Yes.

Q: You didn't say anything about that last August; right? You only talked about two sets last August.

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A: Yes.

Q: Why didn't you mention all four sets last August?

A: I don't know.

Q: Could it be that you're not telling the truth sir?

A: No, sir, I'm telling the truth.

Q: And you heard Officer Linda D'Aquila come in here and say, no, there was no talk about search warrants; right? You heard that testimony?<sup>9</sup>

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<sup>9</sup> In his opening brief, Patubo stated that "an argument occurred between Linda [D'Aquila] and Chung, [D'Aquila] did not get a search warrant." On August 30, 2001, the court heard the Motion to Suppress. Printed below is Patubo's testimony regarding the circumstances leading to his allegedly "unwilling" consent.

Q: You remember Linda [D'Aquila]?

A: Yes.

. . .

A: They told me they were waiting for her.

Q: Who told you what?

A: Officer Chung told me they were waiting for two people to come to search the house.

Q: What do you mean two people to search the house.

A: He said they were going search and they were waiting for two more people and when they came, he introduced me to Linda . . . and he said these are two that were going to search the house.

Q: Did they mention a search warrant?

A: Later I heard -- oh, in fact, Officer Chung told me when they came, to wait. Then they went into the house. Then Linda left and when she left, Officer Chung told me oh, they waiting for Linda to come back. She went to go get a search warrant.

Q: Did she come back?

A: She came back, yes.

Q: Did she have a search warrant?

A: No. When she came back, they were kind of like arguing and

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A: Yes.

Q: And then you're telling this jury, oh, there was, she was talking about a search warrant; right?

A: Um, Officer Chung and -- I mean, Sergeant Chung and Detective Bruchal, they both told me that they weren't going into the house yet until Linda comes back with the search warrant.

Q: Okay. And you heard her deny that there was ever any talk about getting a search warrant; right?

A: Yes.

Q: And you heard Detective Bruchal indicate that a search warrant was an option, but only if you didn't consent to search, which you did; right? You remember him saying that?

A: Yes.

Q: Okay. So is it fair to say that either Detective Bruchal and Linda D'Aquila are lying or you're lying? Right?

A: I'm not lying.

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then Linda left.

Q: Arguing with whom?

A: With Officer Chung.

Q: About what?

A: Something about forgetting the search warrant and she just left.

At trial, Police Detective Linda D'Aquila testified, in relevant part, as follows:

Q: Well, at any time did you have a discussion with Detective Bruchal about obtaining a search warrant?

A: No, sir, I did not.

Q: Did you go at any time to consider a search warrant at the station?

A: Oh, no, sir, I did not.

Q: Was there any discussion among the officers present about obtaining a search warrant?

A: Um, no, sir. I don't recall anything like that.

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Q: But that's the alternative; right?

A: Okay.

Q: It's either one or the other.

A: Yes.

Patubo argues that "the prejudice was heightened because [Patubo] was forced to characterize a [sic] police officers Detective Bruchal and [Officer] D'Aquila as a [sic] liars in order to maintain his innocen[c]e." In support of his argument, Patubo cites precedent that "[c]ross examination intended to compel a defendant to call police witnesses liars constitutes prosecutorial misconduct. Asking a witness to judge whether or not another witness is lying invades the province of the jury." Washington v. Suarez-Bravo, 72 Wash. App. 259, 864 P.2d 426 (1994). Other state courts generally agree that this type of conduct constitutes prosecutorial misconduct. See e.g., State of New York v. Montgomery, 103 A.D.2d 622, 481 N.Y.S.2d 532 (1984) ("In light of the vast number of published judicial decisions criticizing this prosecutorial tactic, it is inconceivable that any prosecutor would be unaware of the impropriety of such conduct."); State v. Graves, 668 N.W.2d 860 (Iowa 2003); Brokenbrough v. State, 522 A.2d 851 (Del. 1987).

The State argues that

contrary to Patubo's depiction of the exchange between himself and the trial DPA, the trial DPA never asked [Patubo] whether Bruchal and D'Aquila were lying or forced him to characterize them as liars. The record indicates that the trial DPA was merely contrasting Bruchal's and D'Aquila's testimonies with [Patubo's] testimony regarding an

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alleged discussion by the police relative to a search warrant,  
leaving it up to the jury to decide whom to believe.

We disagree. The State forced Patubo to admit that if he was not lying, Detective Bruchal and Police Detective Linda D'Aquila were lying.

However, "[w]here a defendant fails to object to a prosecutor's statement . . . , appellate review is limited to a determination of whether the prosecutor's alleged misconduct amounted to plain error." State v. Iuli, 101 Hawai'i 196, 204, 65 P.3d 143, 151 (2003). Based on the strength of the evidence against Patubo, we conclude that this prosecutorial misconduct had no reasonable possibility of altering the outcome of the trial and was thus harmless beyond a reasonable doubt. The evidence includes (1) Patubo's admission that the white Mazda with the wrong license plates and a missing VIN plate belonged to his "daughter"; (2) the location of license plate FPU 263 missing from the red Toyota parked in front of Patubo's residence on a couch in the living room of Patubo's residence; (3) the drugs and drug paraphernalia found in the bedrooms of Patubo's residence; and (4) Patubo's admission that the drugs found in the residence belonged to him.<sup>10</sup>

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<sup>10</sup> At trial, Patubo testified that he didn't know who the drugs actually belonged to, and that he agreed that it was his only after Sergeant Chung allegedly turned off the tape and said "it's your house so it must be yours." He stated that he put himself "in harm's way . . . because [he] didn't want to get [his] friends in trouble."

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2. Alleged Bad Acts

Patubo argues that the Prosecutor improperly alleged that Patubo was involved in "uncharged illegal activities with respect to his hobby of fixing cars." The relevant testimony is as follows:<sup>11</sup>

Q: Do you have a license to run a car business?

A: No, sir.

Q: So you're running an unlicensed, illegal car business out of your house; right?

A: No, sir.

Q: Do you have a license or not?

A: No, I don't have a license.

Q: So you're running an unlicensed, illegal car business; are you, sir?

A: Are you talking about a state mechanic license?

Q: No. I'm talking about a license to fix and sell cars at your residence.

A: Uh, no.

Q: Would you agree with me that's a business?

A: Um, I don't sell that much cars.

Q: We had all kinds of people come in here, your own friends testify that's what you do for a living, you fix cars and sell em [sic]. All I'm asking is did you have a license to do that?

A: No, sir.

Q: And were you paying any excise tax?

A: No, sir.

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<sup>11</sup> HRS Chapter 437 (2003) is Hawai'i's Motor Vehicle Industry Licensing Act.

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The State argues that this topic was appropriate for cross-examination because Patubo testified that he fixes and sells cars for a living, and two of his friends also testified that Patubo fixes cars for a living.

We agree with Patubo that it was prejudicial to emphasize the fact that Patubo was running an illegal, unlicensed car business. However, given the fact that (1) defense counsel did not object to this testimony and (2) the nature of the alleged misconduct and the strength of the evidence against the defendant, we conclude that this prosecutorial misconduct was harmless beyond a reasonable doubt.

CONCLUSION

Accordingly, we affirm the July 23, 2002 Judgment of the Circuit Court of the First Circuit convicting Defendant-Appellant Lino Patubo, Jr., of two counts of Unauthorized Control of Propelled Vehicle, HRS § 708-836 (1993); one count of Promoting Dangerous Drug in the Second Degree, HRS § 712-1242(1)(b)(i) (1993); and one count of Unlawful Use of Drug Paraphernalia, HRS § 329-43.5(a) (1993); and sentencing him to concurrent five (5) year terms of probation for each count and to



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pay a \$400 Crime Victim Compensation Fee and \$500 for a Drug Demand Reduction Assessment.

DATED: Honolulu, Hawai'i, March 22, 2004.

On the briefs:

T. Stephen Leong  
for Defendant-Appellant.

Chief Judge

Daniel H. Shimizu,  
Deputy Prosecuting Attorney,  
City and Couynty of Honolulu,  
for Plaintiff-Appellee.

Associate Judge

Associate Judge