

CONCURRING OPINION BY NAKAMURA, J.

I join in the majority's decision. I write separately, however, to explain my analysis regarding the improper comment by the Deputy Prosecuting Attorney (DPA) on the post-arrest silence of Defendant-Appellant/Cross-Appellee Sandra Gonzalez (Gonzalez) and to express my views on certain of the trial court's evidentiary rulings.

I.

A.

In my view, there is a distinction between 1) a prosecutor's permissible use of questions and comments aimed at impeaching a defendant who has made a post-arrest statement to the police but has omitted significant details and 2) the prosecutor's impermissible reference to a defendant's post-arrest silence to infer guilt from the defendant's exercise of the right to remain silent.

In Doyle v. Ohio, 426 U.S. 610, 619-20 (1976), the United States Supreme Court held that the prosecutor's use of the petitioners' silence, at the time of arrest and after receiving Miranda warnings, to impeach petitioners' exculpatory version of events at trial, violated the Due Process Clause of the Fourteenth Amendment. The petitioners, who were charged with selling drugs to a government informant, were arrested and given Miranda warnings. Id. at 611-12. Separate trials were held in which each petitioner testified that he had been framed by the informant. Id. at 612-13. The prosecutor was permitted, over objection, to ask each petitioner why he had not told the frameup story to the arresting agent and to argue the petitioners' post-arrest silence to the jury. Id. at 613-14 & n.5.

In Anderson v. Charles, 447 U.S. 404, 408 (1980), the Court distinguished between the use of a defendant's post-Miranda silence to infer guilt, which was prohibited by Doyle, and the use of a defendant's post-Miranda statements to the police to impeach the defendant's trial testimony. The Court held that the use of the defendant's post-Miranda statements to the police that were inconsistent with the defendant's trial testimony for

impeachment was permissible:

Doyle bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

Id.

The Court concluded that the prosecutor's questions were permissible because they were "not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." Id. at 409. The Court explained: "Each of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version. But *Doyle* does not require any such formalistic understanding of 'silence,' and we find no reason to adopt such a view in this case." Id.

B.

In State v. Mainaupo, 117 Hawai'i 235, 252, 178 P.3d 1 (2008), the Hawai'i Supreme Court extended the Doyle rule, which applies to post-arrest, post-Miranda silence, to prohibit the prosecution from commenting on a defendant's post-arrest silence to infer guilt regardless of whether Miranda warnings had been given. In Mainaupo, the prosecution introduced evidence of what defendant Lopez¹ did not say to a police officer after the defense apparently opened the door to such testimony by asking the officer what Lopez did say. Id. at 253, 178 P.3d at 19. On appeal, Lopez did not contest the admissibility of the evidence of what he did not say, but argued that the manner in which the prosecutor commented on the evidence in closing and rebuttal argument was improper. Id. The prosecutor's arguments focused on what "an innocent person" would have told the officer -- information that Lopez had not provided. Id. The court held

¹ In Mainaupo, 117 Hawai'i at 239, 178 P.3d at 5, the Hawai'i Supreme Court consolidated the cases of Defendant-Appellant-Petitioner William Mainaupo, Jr. and Defendant-Appellant-Petitioner Mark K. Lopez.

that it was improper for the prosecutor to argue "the unreasonable inference that Lopez was guilty in light of his post-arrest silence." Id. at 254, 178 P.3d at 20. By arguing that Lopez's failure to disclose information to the police "may be equated with guilt," the prosecutor violated Lopez's constitutional right to remain silent. Id.

The Hawai'i Supreme Court, however, has permitted the prosecution to refer to a defendant's post-arrest silence when relevant to impeach a defendant's trial testimony. For example, in State v. Alo, 57 Haw. 418, 558 P.2d 1012 (1976), the defendant, who was accused of shooting his girlfriend, was arrested by Officer Lupenui and then taken to the police station, where the defendant declined to make a statement after receiving Miranda warnings from Detective Springer. Id. at 421, 558 P.2d at 1014. The defendant, on direct examination at trial, denied any knowledge of or involvement in the shooting and "claimed to have told the arresting officer (whose name he could not recall) that he did not know what had happened to his girl friend, the victim, and that he had just come back from a walk." Id. at 423, 558 P.2d at 1015. On cross-examination, the prosecutor was permitted to ask the defendant whether he had told the exculpatory "story" he presented at trial 1) to any police officer before talking to Detective Springer, 2) to Detective Springer, or 3) to any police officer after talking to Detective Springer, to which the defendant replied that he had not or did not recall. Id. at 422, 558 P.2d at 1012. The court held that there was no error in the prosecutor's cross-examination. Id. The court concluded:

The questions asked on cross-examination were a natural and logical sequel to the defendant's testimony on direct examination. Objectively appraised, the thrust of the prosecution's examination was not calculated to penalize the defendant for his silence in the face of custodial interrogation after he had been given the Miranda warnings.

Id. at 424, 558 P.2d 1012. To similar effect is State v. Rodrigues, 113 Hawai'i 41, 51, 147 P.3d 825, 835 (2006), in which the court stated that "[t]he prosecution may properly inquire on

cross-examination into a defendant's earlier invocation of the right to remain silent if the defendant has created, through testimony at trial, the impression that he or she fully cooperated with the police."

C.

Other courts have drawn the distinction between permissible impeachment of a defendant who has chosen to speak to the police based on what the defendant did not say and prohibited comment on the defendant's exercise of the right to remain silent to infer guilt. E.g., Pitts v. Anderson, 122 F.3d 275 (5th Cir. 1997); Smith v. Cadagin, 902 F.2d 553 (7th Cir. 1990).

[P]rosecutorial statements that are either intended to or have the necessary effect of raising a negative inference simply because of the defendant's exercise of his right to remain silent are prohibited. However, where a prosecutor's questions and comments are aimed at eliciting an explanation for an arguably prior inconsistent statement, no *Doyle* violation occurs.

Pitts, 122 F.3d at 280.

Where 1) the defendant's post-arrest statement and trial testimony concern the same subject matter and 2) the defendant failed in the post-arrest statement to mention a significant detail that was contained in the defendant's trial testimony, then the omission of that detail makes the post-arrest statement inconsistent with the defendant's trial testimony and the proper subject for impeachment. Id. at 281. For example, if the defendant gave the police a post-arrest statement in which he claimed self-defense but made no mention of the other person's being armed with a dangerous weapon, that omission may properly be used to impeach the defendant's trial testimony that he acted in self-defense because the other person brandished a knife. In this circumstance, the prosecution may argue in closing that the defendant's failure to mention the knife in his post-arrest statement renders that statement inconsistent with the defendant's trial testimony and shows that the trial testimony was false. The prosecution, however, may not argue that an innocent person would have told the police about the knife in a

manner that asks the jury to infer guilt from the defendant's exercise of his right to remain silent.

In Pitts, the United States Court of Appeal for the Fifth Circuit analyzed when a prosecutor's questions and comments about what a defendant failed to say in a post-arrest statement to the police are permissible. The court held:

We agree with the near uniform approach of our sister circuits and hold that where a defendant's post-arrest statement addresses the same subject matter as his trial testimony and is arguably inconsistent with that testimony, a prosecutor's questions and comments designed to highlight the inconsistency do not violate *Doyle*. Such questions are simply not designed to cause the jury to infer guilt because of the defendant's exercise of his Fifth Amendment rights. Rather they are intended to probe and explain the defendant's post-arrest statement and the circumstances under which it was made. Because a defendant has not remained silent as to the subject matter of his post-arrest statements, *Charles*, 447 U.S. at 408, 100 S.Ct. at 2182[,] such questions do not use a defendant's government-induced silence against him and, thus, do not fall within the purview of *Doyle*.

Id. at 282.

The court explained that while the distinction between what is permissible and what is prohibited may at times be subtle, "evaluating the prosecutor's comments in the context of the entire record resolves most cases." Id. at 280. The court applied the following test:

The alternative tests for determining whether a prosecutor's or witness's remarks constitute comment on a defendant's silence are whether the "manifest intent" was to comment on the defendant's silence or, alternatively, whether the character of the remark was such that the jury would "naturally and necessarily" construe it as a comment on the defendant's silence. Both the intent of the prosecutor and the character of the remarks are determined by reviewing the context in which they occur, and the burden of proving such intent is on the defendant.

Id. at 280.

Hawaii likewise uses a similar test in determining whether a prosecutor's closing argument constitutes an improper comment on a defendant's exercise of his or her right to remain silent. In State v. Wakisaka, 102 Hawaii 504, 515, 78 P.3d 317, 328-29 (2003), the court stated that "[t]he prosecution's comment on a defendant's failure to testify will be deemed improper if that comment was 'manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'"

D.

In this case, Gonazles was charged with in abusing her boyfriend Juan Reyes (Reyes), the complaining witness. The DPA's comments in closing argument regarding Gonzalez's failure to tell the police that Reyes's injures were an accident were not made in the context of arguing that Gonzalez's trial testimony had been impeached by a prior inconsistent statement.² Rather, the DPA's comments expressed the impermissible argument that the jury should infer Gonzalez's guilt from her exercise of the right to remain silent. The DPA argued:

Wouldn't you expect that that would be the first thing out of her mouth when she saw the police, it was an accident? But yet she told you she never said that. Certainly a person who hasn't committed a crime, wouldn't you expect that person to cooperate with the police, to give them information to allow them to do their job so they could come to the conclusion immediately that there had no crime - there was no crime taking place?

I agree with the majority that "[t]he character of the DPA's remarks was such that the jury would 'naturally and necessarily' construe it as an attempt to equate the Gonzalez's [post-arrest] silence with her guilt" and that "the DPA's comments were similar in character to those held improper by the Hawai'i Supreme Court in Mainaauo." Majority opinion at 4 (citations omitted).

II.

A.

In my view, the family court erred in excluding evidence that prior to the alleged physical abuse, Gonzalez and Reyes had been arguing about Reyes's infecting Gonzalez with the Human Papillomavirus (HPV). Gonzalez argues that she sought to introduce that evidence in support of her defense that "Reyes was upset at Gonzales for incessantly bringing up the fact that he had transmitted the virus to her, and that Reyes reacted to her

² The prosecution did not effectively distinguish between Gonzalez's pre-arrest and post-arrest communication with the police in cross-examining Gonzalez or in its closing argument. I therefore assume that the prosecution's comments in closing argument encompassed Gonzalez's post-arrest contact with the police.

complaining by grabbing her and throwing her against the wall, and by lying to the police to get her in trouble and get her out of the house."

I believe that the evidence was relevant to explain the context for the argument between Gonzalez and Reyes; to explain why Gonzalez may have been distraught, emotional, and uncooperative when the police arrived; and to provide the backdrop for Reyes's possible motive for falsely accusing Gonzalez. Gonzalez did not offer the evidence that Reyes had infected her with the HPV to prove Reyes's bad character "in order to show he acted in conformity therewith." Hawaii Rules of Evidence (HRE) Rule 404(b) (Supp. 2007). In other words, the evidence was not offered to prove that Reyes had the propensity to infect people with sexually transmitted diseases. Thus the evidence was not excludable under HRE 404(b).

In this case, the context of the argument between Gonzalez and Reyes was critical to understanding Gonzalez's explanation for their respective behavior and to understanding Gonzalez's defense. In my view, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice and the family court erred in excluding it under HRE Rule 403 (1993).

B.

I also believe that the family court should not have precluded Gonzalez from cross-examining Reyes about specific incidents in which Reyes lied to Gonzalez. The proffered cross-examination was authorized under HRE Rule 608(b) (1993), which permits inquiry into specific instances of conduct of a witness, if probative of untruthfulness, for the purpose of attacking the witness's credibility. The proffered cross-examination was not validly precluded under HRE Rule 404 as improper evidence of Reyes's propensity to lie. The general prohibition against character-propensity evidence under HRE Rule 404 does not apply to evidence of a witness's character for untruthfulness under HRE 608. See HRE Rule 404(a) (3) (Supp. 2007).

Certainly, evidence that Reyes held the character trait of untruthfulness was a double-edged sword. Such evidence would support the defense claim that Reyes's prior statement to the police (alleging that Gonzalez had abused him) was false, but it would also support the prosecution's claim that Reyes's trial testimony (recanting the allegations of abuse) was false. In my view, however, the evidence of Reyes's character for untruthfulness was admissible and the defense should have been given the choice of whether to use it.

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