* * * **FOR PUBLICATION** * * *

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Respondent-Plaintiff-Appellee,

vs.

SAPATUMOEESE MALUIA, Petitioner-Defendant-Appellant.

NO. 25689

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CR. NO. 00-1-2154)

MARCH 24, 2005

LEVINSON, ACOBA, AND DUFFY, JJ.;
WITH ACOBA, J., CONCURRING SEPARATELY; AND
NAKAYAMA, J., CONCURRING SEPARATELY AND
DISSENTING, WITH WHOM MOON, C.J., JOINS

OPINION OF THE COURT BY DUFFY, J.

Following a jury trial in the Circuit Court of the First Circuit, the Honorable Richard Perkins presiding, petitioner-defendant-appellant Sapatumoeese Maluia was found guilty of murder in the second degree in violation of Hawai'i Revised Statutes (HRS) § 707-701.5 (1993).[1] On November 29, 2004, the Intermediate Court of Appeals (ICA) issued a summary

[1] HRS § 707-701.5, entitled "Murder in the second degree," provides:

> (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.
>
> (2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656.

disposition order (SDO) affirming the circuit court's February 12, 2003 judgment. State v. Maluia, No. 25689 (Haw. App. November 29, 2004) [hereinafter, the ICA's SDO]. Maluia subsequently applied for a writ of certiorari to review the ICA's SDO.

We granted Maluia's application for a writ of certiorari for the sole purpose of addressing the following issue of first impression in this jurisdiction: whether the prosecution may ask a defendant to comment on the veracity of another witness. For the reasons discussed infra, we agree with Maluia that the prosecution may not ask a defendant to comment on another witness's veracity. Nevertheless, based on the record presented, we hold that this error was harmless beyond a reasonable doubt and therefore affirm the ICA's SDO.

I. BACKGROUND

At approximately 8:30 p.m. on October 12, 2000, at Ke'ehi Lagoon Park, Maluia repeatedly hit Feao Tupuola, Jr. with a baseball bat. Tupuola was pronounced dead at 9:31 p.m. On October 18, 2000, an O'ahu grand jury indicted Maluia for second degree murder.

At trial, the prosecution presented Eugene Kepa, Jr. and Deidra Ahakuelo as witnesses. Kepa and Ahakuelo were at Ke'ehi Lagoon Park having dinner with their children on October 12, 2000. Kepa did not know either Maluia or Tupuola

before this incident.[2] Kepa testified that Maluia was sitting in his car when Tupuola approached the car, carrying a knapsack and two plate lunches; Maluia was in the driver's seat, then got out of the car and got back in the car on the passenger side. Tupuola got in the driver's seat and put the car in reverse. He then put the car back in park and got out of the car quickly, after which he moved to the front of the car and tripped over the curb. According to Kepa, Maluia retrieved a baseball bat from the back seat of the car as he got out of the car. Maluia approached Tupuola, holding the bat in such a way that Tupuola could not have seen the bat. Maluia then hit Tupuola's hands with the bat several times, after which Maluia hit Tupuola in the head repeatedly and forcefully. Kepa did not see Tupuola try to hurt Maluia in any way, nor did Kepa see Tupuola with any weapons. Kepa testified that Maluia twice left Tupuola to wash his bat at a faucet on the other side of the parking lot, and that when Maluia returned to Tupuola he continued to hit him with the bat. When Maluia stopped, he hugged Tupuola, laid him down on the ground, and then got in his car and drove away. Ahakuelo (Kepa's girlfriend) also testified that Maluia hit Tupuola repeatedly with a baseball bat, that he rinsed off his bat at the faucet, and that he continued to hit Tupuola after returning from

[2] Ahakuelo did not specifically testify as to whether she knew Maluia or Tupuola before this incident.

the faucet. Ahakuelo further testified that Maluia put his arms around Tupuola at the end of the incident.

Maluia testified that he and Tupuola used to socialize at Ke'ehi Lagoon Park, but that, leading up to the incident on October 12, 2000, Tupuola had become increasingly hostile towards him. Maluia speculated that Tupuola had become infatuated with Maluia's friend, Lisa Masseth, and that Tupuola became upset when he saw Maluia speaking with Masseth.

Maluia testified that, shortly after he arrived at the park on October 12, 2000, Tupuola assaulted him (specifically, that Tupuola "falsecracked" him). Another friend of Maluia's, Jessie Tupua, told Maluia that Tupuola was drunk and that he (Maluia) should not worry about the assault; Tupua (Maluia's friend) then escorted Maluia back to Maluia's car. Maluia testified that "as far as I was concerned that thing is pau[3] already." (Tupua testified that he saw a group of people separate Maluia from Tupuola, but that he did not see Tupuola assault Maluia; in fact, none of the defense's witnesses (other than Maluia) testified as to the alleged assault.)

Maluia then testified that, approximately twenty minutes later (while he was still in his car), Tupuola rushed up to Maluia's car and said, "'Fuck you, old man. Now I'm gonna

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[3] "Pau" means, among other things, "finished" or "ended." M.K. Pukui & S.H. Elbert, Hawaiian Dictionary 319 (rev. ed. 1986).

finish what I started out to do.'" Maluia stated that he was afraid and that he started to leave in his car, but that he decided to stay because his friends were there and because he had to return to the park the next day. As he started to get out of his car, Maluia stated, Tupuola "made a move with his hand, a real quick move under his shirt." Maluia thought that Tupuola was reaching for some kind of weapon, so Maluia went back to his car and pulled out a bat. Maluia stated that Tupuola then charged him, so he started swinging the bat at Tupuola's hands to knock whatever weapon he had out of his hands. Maluia believed that Tupuola was trying to get the bat away from him, and he was afraid that if Tupuola got the bat he would begin hitting Maluia with it. Maluia testified that he hit Tupuola, breaking his bat and knocking Tupuola down. Maluia then started to leave, at which point Tupuola got up and ran towards his knapsack. Maluia was concerned that Tupuola might have a weapon because, prior to this incident, Tupuola had shown Maluia a knife with a four- to six-inch blade and had discussed his knowledge of guns with Maluia. Maluia then got another bat out of his car. Maluia testified that Tupuola was still looking through his knapsack, and Maluia said, "'What are you doing? What are you doing?'" Maluia then started hitting Tupuola again because he was afraid of what Tupuola would retrieve from his knapsack. Maluia testified that "I kept swinging. I kept swinging. And I just

lost it, you know. I just lost it. And I -- I lost it." Maluia testified that he did not really remember what happened after that.

Maluia was arrested at 9:32 p.m. on October 12, 2000. Maluia's Blood Alcohol Content (BAC) was 0.131.[4] Tupuola's BAC (according to the forensic pathologist) was 0.195.

During the cross-examination of Maluia, the prosecution asked, "Do you know whether [Kepa and Ahakuelo] would have any reason to make up a story against you . . . that you can think of?" Maluia's counsel objected to the question, and the circuit court overruled the objection. Maluia testified that he could not think of any reason. On redirect examination, the circuit court refused to allow Maluia's counsel to question him regarding this statement.

On September 30, 2002 (approximately three hours after the circuit court finished instructing the jury), the jury found Maluia guilty of second degree murder. The circuit court sentenced Maluia to an indeterminate maximum term of imprisonment for life with the possibility of parole. The circuit court also ordered Maluia to pay restitution in the amount of $433.41 in addition to a fee of $2,200.00 to the Crime Victim Compensation Fund.

[4] The Honolulu Police Department Officer who administered the test did not testify as to the time at which he administered the test.

Maluia appealed, and on March 17, 2004, the case was assigned to the ICA. On appeal to the ICA, Maluia argued that he was entitled to a new trial because of prosecutorial misconduct and because the circuit court improperly instructed the jury on extreme mental or emotional disturbance (EMED). On November 29, 2004, the ICA issued its SDO affirming the judgment of conviction and sentence.

Maluia filed an application for a writ of certiorari on December 29, 2004. In his Application, Maluia does not contest the ICA's conclusion with respect to the EMED instruction, but he does contest the ICA's conclusion with respect to his allegations of prosecutorial misconduct. Specifically, Maluia alleges that the following four actions constituted prosecutorial misconduct: (1) during cross-examination of Maluia, the prosecution improperly required Maluia to assess the veracity of witnesses Kepa and Ahakuelo; (2) during closing argument, the prosecution improperly commented on Maluia's theories of his defense by arguing that Maluia's two defenses -- self-defense and EMED -- were inconsistent; (3) during closing argument and rebuttal, the prosecution argued that Maluia fabricated his testimony; and (4) during rebuttal, the prosecution improperly shifted the burden of proof to the defendant by implying that, had Tupuola actually assaulted Maluia, Maluia would have had a witness to testify to that fact. The ICA responded to these arguments by

concluding: "In each instance [of alleged prosecutorial misconduct], either (1) the prosecutor did not express or imply what Maluia charges the prosecutor expressed or implied; or (2) the prosecutor did not commit prosecutorial misconduct; or (3) the utterances were harmless beyond a reasonable doubt; or (4) a combination thereof." (Citations omitted.)

We granted Maluia's Application on January 10, 2005, and we affirm the ICA's SDO. On the record presented, we agree with the ICA's conclusions with respect to Maluia's claims of prosecutorial misconduct in closing and rebuttal arguments. The ICA did not, however, specifically address the issue of whether the prosecution acted improperly in asking Maluia to comment on the veracity of prosecution witnesses Kepa and Ahakuelo. As this is an issue of first impression for this court, we will now address it.

II. STANDARD OF REVIEW

> 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. Factors considered are: (1) the nature of the conduct; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant.

State v. Sawyer, 88 Hawai'i 325, 329 n.6, 966 P.2d 637, 641 n.6 (1998) (citations and internal quotation signals omitted).

III. DISCUSSION

A. The Prosecution's Question Constituted Prosecutorial Misconduct.

1. The prosecution's question was improper.

We hold that the prosecution may not ask a defendant to comment on another witness's veracity. Such questions, referred to as "were-they-lying" questions, are improper for the following reasons: (1) they invade the province of the jury, as determinations of credibility are for the jury; (2) they are argumentative and have no probative value; (3) they create a risk that the jury may conclude that, in order to acquit the defendant, it must find that a contradictory witness has lied; (4) they are inherently unfair, as it is possible that neither the defendant nor the contradictory witness has deliberately misrepresented the truth; and (5) they create a "no-win" situation for the defendant: if the defendant states that a contradictory witness is not lying, the inference is that the defendant is lying, whereas if the defendant states that the witness is lying, the defendant risks alienating the jury (particularly if the contradictory witness is a law enforcement officer). See, e.g., United States v. Boyd, 54 F.3d 868, 871 (D.C. Cir. 1995) ("Determinations of credibility are for the jury, not for witnesses. It is therefore error for a prosecutor to induce a witness to testify that another witness, and in

particular a government agent, has lied on the stand." (Citations and internal quotation signals omitted.)); State v. Singh, 793 A.2d 226, 236-37 (Conn. 2002) (holding that "were-they-lying" questions are improper because they invade the province of the jury, have no probative value, are argumentative, and "create the risk that the jury may conclude that, in order to acquit the defendant, it must find that the witness has lied"); State v. Graves, 668 N.W.2d 860, 872-73 (Iowa 2003) (holding that "were-they-lying" questions are improper because they put the defendant in a no-win situation and because "[i]t is unjust to make the defendant give an opinion as to who is lying when, in fact, it is possible that neither witness has deliberately misrepresented the truth"); State v. Emmett, 839 P.2d 781, 787 (Utah 1992) ("The question . . . is argumentative and seeks information beyond the witness's competence. . . . [I]t suggests to the jury that a witness is committing perjury even though there are other explanations for the inconsistency. In addition, it puts the defendant in the untenable position of commenting on the character and motivations of another witness who may appear sympathetic to the jury." (Footnote omitted.)).

In the instant case, the prosecution did not directly ask Maluia whether Kepa and Ahakuelo were lying; instead, the prosecution asked: "Do you know whether [Kepa and Ahakuelo] would have any reason to make up a story against you . . . that

you can think of?" While the question directly asked whether Maluia knew of any motivation for the prosecution's witnesses to lie, the practical effect was that Maluia was asked to comment on the veracity of the prosecution's witnesses. Therefore, the prosecution's question was improper and the circuit court erred in requiring Maluia to answer the question.[5]

2. The improper question constitutes prosecutorial misconduct.

The term "prosecutorial misconduct" is a legal term of art that refers to any improper action committed by a prosecutor, however harmless or unintentional. Therefore, our conclusion that the prosecution's question was improper compels us to apply the label "prosecutorial misconduct."

Recently, the ICA suggested that we create a separate label for prosecutorial conduct that, while improper, was relatively minor. As the ICA stated, "there is a difference between advocacy involving a prosecutorial mistake/error and advocacy involving prosecutorial misconduct." State v. McElroy, 105 Hawai'i 379, 386 n.7, 98 P.3d 250, 257 n.7 (App. 2004) [hereinafter McElroy (ICA)], reversed, 105 Hawai'i 352, 97 P.3d

[5] Our holding does not impair the prosecution's right to ask a defendant foundational questions regarding the nature, extent, or absence of a relationship between the defendant and a witness. Indeed, all of the foundational questions presented in the dissent are legitimate; it is only the conclusory "were-they-lying" question that is improper. Furthermore, our holding does not thwart counsel's right to draw reasonable inferences when arguing to the jury. We hold only that an attorney may not ask the defendant to offer opinions as to whether and why another witness is lying.

1004 (2004). Judge Nakamura, while dissenting from the majority's opinion, agreed with this point and explained:

> 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. Instead, as [the majority] properly recognizes, the label of "prosecutorial misconduct," with its attendant disciplinary repercussions, should be limited to dishonest and deceitful acts made in bad faith.

McElroy (ICA) at 392, 98 P.3d at 263 (Nakamura, J., dissenting) (footnote omitted). In reviewing the ICA's opinion, we impliedly accepted the ICA's suggestion that there is, in fact, a distinction between "prosecutorial error" and "prosecutorial misconduct" when we stated that "[a] mistake or error by the prosecution is reviewed under the harmless beyond a reasonable doubt standard applied to prosecutorial misconduct." McElroy, 105 Hawai'i at 356, 97 P.3d at 1008.

We agree that there are varying degrees of prosecutorial misconduct. We also recognize that most cases presenting allegations of "prosecutorial misconduct" to this court do not involve prosecutors who intend to eviscerate the defendant's constitutional and statutory rights; instead, they involve situations, like the instant case, in which the law is not entirely clear and where the prosecutor makes a judgment call as to whether a particular question or argument is proper. We share Judge Nakamura's concerns regarding the possibility of

disciplinary sanctions for this type of conduct: where the propriety of a prosecutor's argument or question is unclear, such that reasonable appellate judges may reach different conclusions as to whether that conduct is proper, a prosecutor should not face disciplinary action for that conduct.

Nevertheless, we decline to create a separate category of prosecutorial "mistake" or "error." There are three reasons why we believe that our current method of analysis -- in which all improper conduct is labeled "prosecutorial misconduct" -- is more appropriate.

First, there is no need to create separate categories because this court already distinguishes innocuous prosecutorial misconduct from more serious deceitful behavior: where the improper conduct is so egregious that the defendant was denied her or his right to a fair trial, we reverse the defendant's conviction and prohibit reprosecution based on the double jeopardy clause (article I, section 10 of the Hawai'i Constitution), see State v. Rogan, 91 Hawai'i 405, 424, 984 P.2d 1231, 1250 (1999) (barring reprosecution where the prosecutor's appeal to racial prejudice "was so egregious, from an objective standpoint, that the inference is inescapable that the remark clearly denied [the defendant] his right to a fair trial"); where the improper conduct is less serious, we either affirm the conviction (if the misconduct was harmless beyond a reasonable

doubt, see State v. Valdivia, 95 Hawai'i 465, 483-84, 24 P.3d 661, 679-80 (2001) (holding that the prosecutorial misconduct was harmless beyond a reasonable doubt)) or vacate the conviction and remand for a new trial (if the misconduct was not harmless beyond a reasonable doubt, see State v. Wakisaka, 102 Hawai'i 504, 516, 78 P.3d 317, 329 (2003) ("[W]hile the prosecutorial misconduct reached the level of reversible error, the misconduct was not so egregious that double jeopardy should attach to prevent retrial.")). In sum, whenever a defendant alleges prosecutorial misconduct, this court must decide: (1) whether the conduct was improper; (2) if the conduct was improper, whether the misconduct was harmless beyond a reasonable doubt; and (3) if the misconduct was not harmless, whether the misconduct was so egregious as to bar reprosecution. In the course of making these three determinations, the seriousness of the misconduct becomes evident, and we need not attach a separate label for our disposition to be clear. Consequently, a separate label for "misconduct" cases and "error" cases is unnecessary.

Second, a finding of "prosecutorial misconduct" is not equivalent to a finding of "professional misconduct" pursuant to the Hawai'i Rules of Professional Conduct (HRPC), and a prosecutor need not face disciplinary sanctions merely because we have used the term "prosecutorial misconduct." The Rules of the Supreme Court of the State of Hawai'i (RSCH) do not provide the Disciplinary

Board of the Hawai'i Supreme Court (the Disciplinary Board) with authority to investigate a prosecutor merely because this court has applied that label; on the contrary, the Disciplinary Board may only investigate an attorney where the attorney has allegedly violated the HRPC. RSCH 2.2 (2004). Given that the seriousness of the prosecutorial misconduct is evident in our dispositions, we believe that the Disciplinary Board is capable of distinguishing between those cases where the prosecutor should face disciplinary action and those cases where the prosecution has made a good faith mistake (including those cases, like the instant case, where the impropriety of the conduct has not previously been clearly established).

Third, we believe that separate nomenclature for different types of prosecutorial misconduct would lead to protracted litigation over semantics; this would place an additional burden on our courts with no corresponding benefit. Our primary goal when analyzing a defendant's appeal is to balance the defendant's right to a fair trial against the public's need for effective enforcement of our criminal laws, see Rogan, 91 Hawai'i at 417, 984 P.2d at 1243, and separate labels will not assist us in making these substantive decisions.

We are aware, as the dissent makes clear, that a finding of "prosecutorial misconduct" may be misunderstood by some to automatically connote "a rebuke of [the prosecutor's]

professionalism, trustworthiness, or competence." Dissent at 9. We again emphasize, however, that "prosecutorial misconduct" is a legal term of art, and, absent any further action by the Disciplinary Board or this court, should not be reflexively construed as a "stain to [the prosecutor's] reputation." Dissent at 9. Instead, each case of "prosecutorial misconduct" must be evaluated on its own specific facts. With this in mind, we will continue to apply the term "prosecutorial misconduct" to all prosecutorial improprieties, regardless of whether the error at issue was a trivial oversight or a flagrant abuse of prosecutorial power.

B. The Prosecutorial Misconduct Was Harmless Beyond A Reasonable Doubt.

We have repeatedly held that we will not overturn a defendant's conviction if the prosecution's misconduct was harmless beyond a reasonable doubt. "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); see also State v. Bunch, 853 A.2d 238, 246 (N.J. 2004) (holding that the prosecution should not have asked the defendant to comment on other witnesses' credibility but that the misconduct

did not warrant a new trial in light of the substantial evidence against the defendant).

After considering these three factors, we conclude that the prosecutorial misconduct in the instant case was harmless beyond a reasonable doubt. Although the prosecution's question was improper, the conduct was less egregious than that presented in those cases where we vacated the defendants' convictions and remanded for new trials. See, e.g., State v. Wakisaka, 102 Hawai'i 504, 78 P.3d 317 (2003) (vacating and remanding where the prosecution improperly commented on the defendant's failure to testify); State v. Pacheco, 96 Hawai'i 83, 95, 26 P.3d 572, 584 (2001) (vacating and remanding where "the [prosecution's] characterization of [the defendant] as an 'asshole' strongly conveyed his personal opinion and could only have been calculated to inflame the passions of the jurors and to divert them, by injecting an issue wholly unrelated to [the defendant's] guilt or innocence into their deliberations, from their duty to decide the case on the evidence"); State v. Marsh, 68 Haw. 659, 728 P.2d 1301 (1986) (vacating and remanding where the prosecutor, in closing, repeatedly stated her personal belief that the defendant was guilty). Consequently, the first factor (the nature of the misconduct) weighs against Maluia. The second factor (the promptness or lack of a curative instruction), on the other hand, weighs in favor of Maluia: the circuit court not only failed to

issue a curative instruction, but also prevented Maluia's counsel from questioning Maluia about his answer on redirect examination. The third and final factor (the strength or weakness of the evidence against the defendant), however, convinces us that the prosecutorial misconduct in the instant case was harmless beyond a reasonable doubt. The evidence against the defendant included two eyewitness accounts from witnesses unconnected to the defendant or the victim. The evidence also showed that the defendant's BAC was 0.131, raising additional doubts as to the defendant's credibility. Therefore, the prosecutorial misconduct was harmless beyond a reasonable doubt.

IV. CONCLUSION

Based on the foregoing, we affirm the ICA's November 29, 2004 Summary Disposition Order affirming the February 12, 2003 judgment of the circuit court.

Joyce K. Matsumori-Hoshijo,
Deputy Public Defender
for petitioner-defendant-
appellant Sapatumoeese Maluia
on the writ