CONCURRING AND DISSENTING OPINION
BY NAKAYAMA, J., IN WHICH MOON, C.J., JOINS

We are once again called upon to determine whether a prosecutor's pointed cross-examination of a defendant oversteps the bounds of permissible advocacy in a criminal proceeding. At issue is the following exchange between the prosecution and defendant-appellant Sapatumoeese Maluia (Maluia):

> [DEPUTY PROSECUTING ATTORNEY (DPA):] Now let me ask you this, Mr. [Maluia]. Had you ever seen Mr. Eugene Kepa [(Kepa)] before he came into court the other day?
> [MALUIA:] Never have.
> [DPA:] Okay. You never saw him there on Thursday nights by the tennis courts with his family?
> [MALUIA:] Never have.
> [DPA:] And had you ever seen his wife before she came into court yesterday morning?
> [MALUIA:] Yesterday I saw her.
> [DPA:] Okay. But is that the first time you've ever seen her?
> [MALUIA:] Yes.
> [DPA:] Okay. So you don't know Eugene Kepa; right?
> [MALUIA:] Don't know him.
> [DPA:] And you don't know his girlfriend Deidra Ahakuelo [(Ahakuelo)]; is that correct?
> [MALUIA:] That's correct.
> [DPA:] All right. And as far as you know -- well, let me ask you this. Do you know whether they would have any reason to make up a story against you --
> [DEPUTY PUBLIC DEFENDER (DPD):] Judge --
> [DPA:] -- that you can think of?
> [DPD:] Objection. Form of the question. Speculation. Argumentative.
> [DPA:] I'm asking if he knows.
> [DPD:] He doesn't know them, Judge.
> THE COURT: Well, I'll allow it.
> [DPA:] Can you think of any reason, Mr. Maluia?
> [MALUIA:] I can't think of any reason.

The majority contends that the prosecutor in the instant case committed misconduct by asking Maluia whether prosecution witnesses Kepa and Akahuelo "would have any reason to make up a story against you . . . that you can think of?" I cannot concur that the question was improper, much less that the prosecutor committed misconduct by cross-examining Maluia as he did. Accordingly, I must dissent.

I. THE PROSECUTOR COMMITTED NO ERROR

A. Characterizing the Question

The majority contends that the prosecutor's question was "improper" because it was analogous to the "were-they-lying" questions held impermissible in other jurisdictions.

A "were-they-lying" question generally unfolds as follows:

> Typically, the prosecutor will first ask the defendant if he heard the testimony of one or more of the state's witnesses. Then the prosecutor will ask the defendant if the witnesses' testimony was accurate. If the defendant states that the witnesses' testimony was not accurate, the prosecutor will ask the defendant to comment on the veracity of the witnesses' testimony by asking the defendant, "Were they lying?"

State v. Pilot, 595 N.W.2d 511, 516 n.1 (Minn. 1999).

I disagree with the majority's central hypothesis that the question put to Maluia is comparable to one which asks a defendant whether the prosecution's witnesses have lied. A plain reading of the inquiry here confirms that the prosecutor's question was confined to plumbing Maluia's personal knowledge for facts or circumstances bearing on the credibility of the prosecution's percipient witnesses to the crime. In no event was Maluia cornered into accusing those who previously took the stand of perjuring themselves before the jury.

In contending otherwise, the majority is blind to the distinction between the "were-they-lying" questions typified in Pilot, and questions phrased to elicit extrinsic evidence of another witness's bias. Those of the latter type are distinguishable because they strive to illuminate facts -- as opposed to mere opinion -- from which the jury may independently

adduce whether a witness's testimony is free of fabrication. See United States v. Akitoye, 923 F.2d 221, 223-225 (1st Cir. 1991) (whether defendant "kn[ew] of any reason why Mr. Aina would lie about you?" "inquired into the existence of any known basis for bias on the part of a key witness," and was therefore not a "were-they-lying" question); United States v. Cole, 41 F.3d 303, 309 (7th Cir. 1994) (holding as "valid [those] questions that ask the testifying witness if he or she knows of biases or motives of another witness"). The majority's effort to exclude the prosecutor's question[1] simply ignores the commonsense meaning of the words actually employed.[2]

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[1] As the issue is not presented in this appeal, I express no opinion concerning the propriety of a bona fide "were-they-lying" question.

I do note, however, that the majority neglects to mention the profound split of authority concerning whether this method of cross-examination is appropriate. While many courts adhere to the majority's position that "were-they-lying" questions are per se impermissible, a number of other jurisdictions either unconditionally permit such questions, see Fisher v. State, 736 A.2d 1125, 1161-1164 (Md. Ct. Spec. App. 1999); Whatley v. State, 509 S.E.2d 45, 51-52 (Ga. 1998), or allow them on a case-by-case basis, see, e.g., State v. Johnson, 681 N.W.2d 901, 909-910 (Wis. 2004); State v. Morales, 10 P.3d 630, 633 (Ariz. Ct. App. 2000); State v. Hart, 15 P.3d 917, 923-924 (Mont. 2000); State v. Pilot, 595 N.W.2d 511, 518 (Minn. 1999); People v. Overlee, 666 N.Y.S.2d 572, 575-577 (N.Y. App. Div. 1997).

[2] The majority's emphasis on the "practical effect" of the prosecutor's question is a dubious departure from our prior practice. Tellingly, we recently declined to speculate on the "practical effect" of cross-examination questions in State v. Hauge, where the following exchange was presented for our review:

> [DPA:] When you earlier testified that you don't think or you don't believe it was your blood in that hotel room and in the Ordway suitcases, that does not comport with what the D.N.A. expert testified earlier today. You heard her testify, isn't that true?
>
> [DEFENDANT:] Yes.
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> [DPA:] She testified that your D.N.A. was a perfect match. Your blood D.N.A. was a perfect match to the evidence recovered from inside the Ordway suitcases and inside Room 714, right? You heard that?
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> [DEFENDANT:] Yes.

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B. Matters of Evidence

The question remains whether the prosecutor's inquiry and Maluia's response -- when correctly characterized as solicitous of evidence relating to Kepa's and Ahakuelo's possible bias -- were proper and admissible. I conclude that they were.

1. Maluia's testimony was admissible.

Rules 401, 402 and 403 of the Hawai'i Rules of Evidence (HRE) govern the admissibility of Maluia's testimonial evidence. Our starting point is the foundational concept of "relevance" defined in HRE Rule 401:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Guided by that definition, HRE Rule 402 demarcates general guidelines for the admissibility of relevant evidence:

> All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawai'i, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

Finally, HRE Rule 403 accords the trial courts broad

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103 Hawai'i 38, 54, 79 P.3d 131, 147 (2003).

On appeal, the defendant in Hauge cited United States v. Boyd, 54 F.3d 868 (D.C. Cir. 1995) -- an opinion relied on by the majority in this case -- to support his claim that the prosecutor's questioning "impermissibly infringed on the jury's right to evaluate the credibility of the [prosecution's] DNA expert." 103 Hawai'i at 54, 79 P.3d at 147. In essence, the defendant argued, as Maluia does here, that the "practical effect" of confronting him with contradictory testimony required him to comment on the expert witness's veracity.

Rather than adopt the defendant's position, we instead took the colloquy at face value. We therefore rejected the defendant's argument as "missing the mark," inasmuch as "the DPA did not seek Hauge's evaluation of the DNA expert's credibility . . . , but merely invited him to confirm that he had 'heard' the testimony." Id. at 57, 79 P.3d at 150. Thus, in contrast with today's majority, we refrained in Hauge from examining the challenged questions beyond the literal meaning of the words used.

discretion to exclude relevant evidence after balancing competing considerations of probity, economy, and fairness:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

For the reasons that follow, I believe that Maluia's testimonial evidence was properly placed before the jury under the aforementioned principles of relevance and admissibility.

a. Maluia's testimony was relevant under HRE Rule 401.

Maluia's testimony that he knew of no reason why Kepa and Ahakuelo would "make up a story against [him]" satisfied the relevancy requirement of HRE Rule 401. We uniformly recognize that "[t]he credibility of a prosecuting witness in a criminal case is always relevant," State v. Okumura, 78 Hawai'i 383, 399, 894 P.2d 80, 96 (1995) (quoting State v. Liuafi, 1 Haw. App. 625, 630, 623 P.2d 1271, 1275 (1981)), insofar as evidence of bias, interest, or motive has at least some tendency to aid the jury in "assessing the probative value of the [witness's] testimony." 1 McCormick on Evidence § 29, at 109 (John W. Strong ed., 5th ed. 1999). Such was the case here, as Maluia's testimony was reflective of Kepa's and Ahakuelo's credibility, and made their eyewitness accounts of the crime more probable of belief.

b. Maluia's testimony was admissible under HRE Rule 402.

Because Maluia's testimony was relevant, the circuit court was correct in adjudging the evidence admissible under HRE Rule 402. In this regard, I perceive no constitutional,

statutory, or rule-based mandate that would require the statement's exclusion.

c. The circuit court did not abuse its discretion in admitting Maluia's testimony under HRE Rule 403.

Finally, the circuit court's decision to admit Maluia's testimony passes muster under HRE Rule 403. Acknowledging that "'the delicate balance between probative value and prejudicial effect,' . . . 'lies largely within the discretion of the trial court,'" Kaeo v. Davis, 68 Haw. 447, 454, 719 P.2d 387, 392 (1986) (quoting State v. Iaukea, 56 Haw. 343, 349, 537 P.2d 724, 729 (1975)), I perceive no abuse in striking the balance to favor admissibility here. Given the circumstances, the nominal prejudice inuring from Maluia's testimony did not "substantially outweigh" its probative value in assisting the jury's weighing of Kepa's and Ahakuelo's rendition of events.

2. Maluia's cross-examination was permissible in scope.

As Maluia's testimony arose on cross-examination, the scope of the prosecutor's questions must have complied with HRE Rule 611(b). The Rule provides:

> Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

Because cross-examination is essential to satisfying the basic truth-seeking function of a trial, we accord the trial courts broad discretion in administering HRE Rule 611(b). State v. Balisbisana, 83 Hawai'i 109, 114, 924 P.2d 1215, 1220 (1996) ("The scope of cross-examination is generally within the sound discretion of the trial court."); see also State v. Pokini, 57

Haw. 17, 22, 548 P.2d 1397, 1400 (1976) (same).

That discretion is not abused when a trial court subjects a defendant who testifies in his own defense "to cross-examination as to any matter pertinent to, or having a logical connection with the specific offense for which he is being tried." State v. Culkin, 97 Hawai'i 206, 220-221, 35 P.3d 233, 247-248 (2001) (quoting Pokini, 57 Haw. at 22, 548 P.2d at 1400).

Nor does a court exceed its authority by granting counsel leeway in framing their questions on cross. See HRE R. 611(b) ("The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."). The latitude accorded those questions stems from the nature of cross-examination. Specifically,

> [c]ounsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. Knapp v. Wing, 72 Vt. 334, 340, 47 A. 1075; Martin v. Elden, 32 Ohio St. 282, 289. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what fact a reasonable cross-examination might develop.

Alford v. United States, 282 U.S. 687, 692 (1931).

In this case, the prosecutor sought to develop information on Kepa's and Ahakuelo's credibility -- a matter made relevant by their testimony at Maluia's trial. Because the issue was "pertinent to" and had "a logical connection with" the offense for which Maluia was charged, see Culkin, 97 Hawai'i at 220-221, 35 P.3d at 247-248, the circuit court did not abuse its discretion in permitting Maluia to be examined on that topic.

II. THE ERROR, IF ANY, WAS NOT MISCONDUCT

I also disagree with the majority's conclusion that the prosecutor committed "misconduct" when questioning Maluia.

In State v. McElroy, 105 Hawai'i 352, 97 P.3d 1004 (2004), we recognized "prosecutorial mistake or error" as a form of improper advocacy that was distinguishable from "prosecutorial misconduct." Particularly, we stated:

> A mistake or error by the prosecution is reviewed under the harmless beyond a reasonable doubt standard applied to prosecutorial misconduct. Thus, an appellate court examines the record to determine whether there is a reasonable possibility that the error complained of may have contributed to the defendant's conviction.

Id. at 356, 97 P.3d at 1008.

The majority's abandonment of the distinction set out in McElroy is ill advised. Implicit in McElroy was our acknowledgment that prosecutorial "misconduct" was qualitatively different from prosecutorial "mistake." The basis for that difference lies in the opprobrium associated with the former term, the pejorative connotations of which are enforced by the word's use in judicial decisions,[3] professional codes of conduct,[4] and everyday speech[5] to describe unethical behavior or

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[3] See, e.g., State v. Rogan, 91 Hawai'i 405, 411, 415, 984 P.2d 1231, 1237, 1241 (1999) (prosecutor's statement that "finding 'some black, military guy on top of your daughter' is 'every mother's nightmare'" was a "particularly egregious form of prosecutorial misconduct" that appealed to racial prejudice).

[4] The Hawai'i Rules of Professional Conduct (HRPC), for example, instructs that it is "professional misconduct" for a lawyer to:

> (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
> (b) commit a criminal act that reflects adversely on

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egregious prosecutorial overreaching.

I readily endorse the use of this court's supervisory power[6] to protect our adversary system from prosecutorial conduct that impedes the efficacy of the truth-seeking process. In exercising our authority, however, we must be mindful that words pregnant with meaning carry repercussions beyond the pale of the case at hand. The public face of the prosecutor -- and her service to a broad community of interests -- ensures that her actions will be scrutinized by those who are bound to misinterpret her "misconduct" in court as an automatic rebuke of her professionalism, trustworthiness, or competence. The stain to her reputation will come regardless of whether the taint was deserved.

In sum, I emphasize that McElroy in no way hinders the

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> the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
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> (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
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> (d) fail to cooperate during the course of an ethics investigation or disciplinary proceedings;
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> (e) state or imply an ability to influence improperly a government agency or official; or
>
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

HRPC Rule 8.4 (2004).

[5] "Misconduct" is often used in common parlance to connote "intentional wrongdoing" or a "deliberate violation of a rule of law or standard of behavior." Webster's Third New International Dictionary of the English Language Unabridged 1443 (Philip Babcock Gove ed., 1967).

[6] See HRS § 602-4 (1993) ("The supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law.").

majority's effort to prohibit prosecutors from asking questions of the sort at issue here.[7] If error is therefore to be assigned in this case, it should be called what it clearly was: a mere "mistake."

III. CONCLUSION

I reiterate that the questions posed by the prosecutor on Maluia's cross-examination were neither improper nor amounted to misconduct. I would affirm Maluia's conviction on the grounds that Maluia's testimony was admissible evidence pertaining to the credibility of the prosecution's witnesses.

[7] The majority believes that McElroy's distinction between "misconduct" and "mistake" has no "benefit," and will instead invite "protracted litigation over semantics." As argued above, the "benefit" of differentiating the terms lies in protecting the prosecutor's reputation from undeserved blemish. Nor will litigation be any more "protracted," since both "misconduct" and "mistake" involve improper prosecutorial conduct that is subject to harmless error analysis on appeal.