

CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I concur, except I believe that the comments by Plaintiff-Appellee-Respondent State of Hawai'i (the prosecution) in closing argument did impermissibly shift the burden of proof in the case of Defendant-Appellant-Petitioner Mark K. Lopez (Lopez) even under the rule set forth in United States v. Bautista, 23 F.3d 726, 733 (2d Cir. 1994), (noting that while "the government may comment on a defendant's failure to call witnesses to support his factual theories[,]" it "may not . . . go further and suggest that the defendant has the burden of producing evidence" (citations omitted)) adopted by the majority. See majority opinion at 46 (holding that "[t]he [prosecution's] comments on Lopez's failure to call [Greg Ramba (Ramba)] and Ramba's potentially unfavorable testimony did not, however, shift the burden of proof" (citation omitted)).

Whatever the nature of the instructional dispute concerning the mistake of fact defense, Lopez did present testimony that he believed Ramba was the rightful owner of the stolen vehicle and the prosecution attacked the credibility of this testimony. Taken as a whole, the prosecution's comments suggested that in order to obtain an acquittal, Lopez was required to produce evidence proving that he did not possess the requisite mental state to commit Unauthorized Control of a Propelled Vehicle. Because Lopez's case is remanded, I believe it would be prejudicial if a similar argument were made on

remand. Thus, I respectfully disagree with the majority's conclusion on this issue.

I.

The challenged portion of the prosecution's rebuttal argument, to which Lopez objected at trial, attempted to discredit Lopez's defense by emphasizing the absence of testimony by Ramba to the effect that Ramba had loaned Lopez the stolen vehicle. The prosecution argued that Lopez's testimony of his purported belief that he had the owner's permission to use the car was insufficient and that Lopez should have produced Ramba as a witness for the jury to hear before the prosecutor himself, presumably in his own mind, would "probably vote not guilty."

All you have on this, his testimony that he borrowed the car, that he didn't know it was stolen, et cetera. There's not one single bit of corroboration for what he told you in this case, not a single bit.

. And, by the way, this [Ramba] -- now it's true, you know the defense doesn't have a burden, he [presumably, Lopez] didn't have to testify, he doesn't have to call witnesses. But he has a right to do so and he can put on any evidence he wants. As I said, the evidence for his story is just that, his story. Zero corroboration. Wouldn't you have liked to have heard from [Ramba]?

. Wouldn't you have liked to have heard from [Ramba]? [Lopez] says [Ramba is] a local boy, lives in Makakilo with his family. You know, would it have been so hard to get him in here to court to tell you guys[, "Y]eah, I lent him the car, I told him it was ok, and I neva [sic] know it was stolen either["]? [Lopez] himself said [Ramba] is a [sic] law abiding, honest, his friend. You know, don't you think his friend would come in? And all he would have to say is[, "Y]eah, I lent him the car.["] I would probably vote not guilty maybe at that point.

Why didn't he do that? I suggest to you one of two possibilities: There is no [Ramba] or [Ramba] would have come in here if [Lopez] called him and said something very different from what he would have wanted [Ramba] to say.

(Some emphases added.)

Simply pointing out that the defendant's testimony is uncorroborated is permissible comment on the state of the evidence. See State v. Hauge, 103 Hawai'i 38, 55, 79 P.3d 131, 148 (2003) (explaining that "the prosecution may 'comment on the state of the evidence, the defendant's failure to call logical witnesses, and/or to present material evidence . . . without shifting the burden of proof to the defendant'" (quoting State v. Napolu, 85 Hawai'i 49, 59, 936 P.2d 1297, 1307 (App. 1997) (brackets omitted) (ellipsis in original))). However, Bautista explained, as noted previously, that although the prosecutor "may comment on a defendant's failure to call witnesses to support his factual theories," he may not "suggest that the defendant has the burden of producing evidence." Bautista, 23 F.3d at 733 (citations omitted). In Bautista, the Second Circuit Court of Appeals held that the following portion of the prosecutor's summation did not constitute prosecutorial misconduct: "The defense does not have a burden of proving anything to you but when they do make an argument to you ... you don't have to accept it. At that point they are obligated to come forward with evidence." Id. (emphasis added). It explained that "[t]he challenged statement, although inapt, when considered in context would not have been understood by a reasonable jury as anything more than an argument that the jury need not believe uncorroborated defense theories." Id. (footnote omitted) (emphasis added).

II.

It is axiomatic that the prosecution is charged with the burden of proving all elements of a charged crime beyond a reasonable doubt in order to obtain a conviction. State v. Iosefa, 77 Hawai'i 177, 182, 880 P.2d 1224, 1229 (App. 1994) (noting that "[i]t is . . . well-settled that the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution protects an accused against a conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged'" (quoting In re Winship, 397 U.S. 358, 364 (1970))). A defendant may secure his or her acquittal simply by casting reasonable doubt on the existence of any element of the charged crime. Hence, any defense, except an affirmative defense raised by the defendant, must be disproved by the prosecution beyond a reasonable doubt. See State v. Davalos, 113 Hawai'i 385, 387 n.6, 153 P.3d 456, 458 n.6 (2007) (explaining that where the criminal defense is not an affirmative defense, the "'defendant need only raise a reasonable doubt as to his guilt'" (quoting State v. Gabrilillo, 10 Haw. App. 448, 456, 877 P.2d 891, 895 (1994) (quoting Commentary to HRS § 701-115 (1993))).

In arguing that "all [Ramba] would have to say is, 'Yeah, I lent him the car,' I would probably vote not guilty maybe at that point," the prosecution plainly told the jury that such evidence was necessary for a "not guilty" vote. This was

more than merely the interjection of a prosecutor's personal opinion of the defendant's guilt as the majority implies. Majority opinion at 48 (noting that, by informing the jury of "how he would vote if he were a juror," the prosecutor "interject[ed] his personal opinion on Lopez's guilt"). Closing argument is "the opportunity afforded the parties to sum up their cases, to establish the relevancy of the evidence to the law and to persuade the jurors as to their theory of the case." State v. Yamada, 108 Hawai'i 474, 482, 122 P.3d 254, 262 (2005) (Acoba, J., dissenting).

Thus, in so addressing the jurors there can be no doubt that the prosecution sought to persuade the jurors that in order for them to return a not guilty verdict they should have been provided with Ramba's testimony. According to the prosecution, such evidence would have proved Lopez did borrow the car ("And all he would have to say is[, 'Yeah, I lent him the car.[']"). Because the jurors were not presented with such evidence, ("Wouldn't you have liked to have heard from [Ramba]? [Lopez] says [Ramba is] a local boy . . . would it have been so hard to get him in here to court to tell you guys . . . ?"), the inescapable inference left with the jury is that it should vote "guilty."

In advising the jury that Lopez should have brought in such evidence, the prosecution in effect told the jurors it was Lopez's burden to produce such evidence before they could return

a verdict of not guilty. But Lopez was not required to produce evidence to prove he borrowed the vehicle. As noted before, "where the criminal defense is not an affirmative defense, the 'defendant need only raise a reasonable doubt as to his guilt.'" Gabrillo, 10 Haw. App. at 456, 877 P.2d at 895 (quoting Commentary on HRS § 701-115). Rather, the burden was on the prosecution to disprove any defense raised beyond a reasonable doubt or, correlatively, to prove its case beyond a reasonable doubt. Id. ("The burden on the prosecution was to 'prove beyond a reasonable doubt facts negating the defense[,]'" which it accomplishes "'when the jury believes its case and disbelieves the defense.'" (Quoting Commentary to HRS § 701-115.) (Ellipsis points in original.))

Consequently, in declaring that Lopez needed the favorable testimony of Ramba as a basis for a not guilty verdict, the prosecution shifted the burden to Lopez to prove his innocence, rather than carrying its own burden of disproving the defense raised. The subject arguments by the prosecution were objected to but overruled by the court. Accordingly, "[b]ecause [Lopez's] counsel's objections to these arguments were overruled, the jury would reasonably perceive that the misstatement of the law [by the prosecution] was not incorrect." See State v. Espiritu, --- Hawai'i ---, ---, --- P.3d ---, --- (2008), No. 27354, 2008 WL 217725 at *15 (Jan. 28, 2008). Unlike the statement challenged in Bautista, when considered in context, the

statements at issue herein could "have been understood by a reasonable jury as . . . more than an argument that the jury need not believe uncorroborated defense theories," but one that "suggest[ed] that the defendant has the burden of producing evidence." Bautista, 23 F.3d at 733 (citation omitted) (emphasis added). In effect, the prosecution was telling the jury that in order for it to render a not guilty verdict, it should have evidence that would prove Lopez had borrowed the car. In so arguing to the jury, the prosecution indicated that it was Lopez's duty to produce such evidence before the jurors could return a not guilty verdict.

III.

Having concluded that the prosecution's comments during closing argument were improper, I next consider whether the statements require vacation of Lopez's conviction. Prosecutorial errors such as improper summation are reviewed under the harmless beyond a reasonable doubt standard, which inquires as to "whether there is a reasonable possibility that the error complained of might have contributed to the conviction.'" State v. McElroy, 105 Hawai'i 379, 386, 98 P.3d 250, 257 (App. 2004) (quoting State v. St. Clair, 101 Hawai'i 280, 286, 67 P.3d 779, 785 (2003) (citations and internal quotation marks omitted)). In this case, there is certainly a "reasonable possibility" that the improper shifting of the burden of proof to Lopez "might have contributed to [his] conviction." Id.

As mentioned previously, Lopez testified in his own defense that Ramba, who Lopez purportedly believed to be the owner of the car, gave Lopez permission to use the vehicle. The prosecution's improper statements, which shifted the burden of proof to Lopez, counseled the jury that Lopez's own testimony was insufficient to justify a not guilty verdict by informing them that Lopez was required to provide additional proof that he had the owner's permission to use the car. Thus, there is a "reasonable possibility" that the jury may have believed that Lopez was required to present additional evidence to prove his defense and that such belief "might have contributed to [his] conviction." Id. As such, the error was not harmless beyond a reasonable doubt. See Espiritu, --- Hawai'i at ---, --- P.3d at ---, 2008 WL 217725 at *16 ("[T]he [court's] failure to correct misstatements of law by a prosecutor [in final argument] may result in reversal of a defendant's conviction." (Citation omitted.)).

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