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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

JOSEPH MATTSON, III, Petitioner/Defendant-Appellant.

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NO. 29170

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CR. NO. 07-1-1984)

MARCH 18, 2010

MOON, C.J., NAKAYAMA, and RECKTENWALD, JJ.; ACOBA, J.,  
DISSENTING, WITH WHOM DUFFY, J., JOINS

OPINION OF THE COURT BY MOON, C.J.

On October 14, 2009, this court accepted a timely application for a writ of certiorari, filed on September 9, 2009, by petitioner/defendant-appellant Joseph Mattson, III, seeking review of the Intermediate Court of Appeals' (ICA) June 12, 2009 judgment on appeal, entered pursuant to its May 21, 2009, summary disposition order (SDO). Therein, the ICA affirmed the Circuit Court of the First Circuit's<sup>1</sup> April 22, 2008 judgment, convicting Mattson of and sentencing him for one count of terroristic threatening in the first degree, in violation of HRS §§ 707-715

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<sup>1</sup> The Honorable Randal K.O. Lee presided.

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(1993)<sup>2</sup> and 707-716(1)(e) (Supp. 2008).<sup>3</sup> Oral argument was held on December 3, 2009.

Briefly stated, Mattson was arrested and charged based on an incident that occurred between Mattson and his son, Joey Hayashi, on the night of October 13, 2007. During the three-day jury trial, the witnesses testified to conflicting versions of the events that occurred on the night in question, including Mattson, who testified on his own behalf. During its closing argument, respondent/plaintiff-appellant State of Hawai'i (the prosecution) commented on the fact that Mattson had a chance to sit through all of the evidence presented at trial prior to testifying and argued that Mattson knew he had to "make his story gibe [sic]" with the evidence. Mattson was convicted and subsequently appealed, arguing, *inter alia*, that the prosecution's comments during its closing argument violated his federal and state constitutional rights to be present at trial and to testify on his own behalf. The ICA held that the prosecutor's comments were not improper under the federal and state constitutions and affirmed Mattson's conviction.

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<sup>2</sup> HRS § 707-715 provides in relevant part that:

A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony:

- (1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person[.]

<sup>3</sup> HRS § 707-716(1)(e) provides that "[a] person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening . . . [w]ith the use of a dangerous instrument."

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On application, Mattson contends that the ICA erred in holding that the prosecutor's remarks were not improper under the Hawai'i Constitution. Mattson maintains that such remarks constituted a direct and impermissible attack on his constitutional right to be present at trial and to testify on his own behalf guaranteed by the confrontation clause of the Hawai'i Constitution. Mattson further contends that the ICA erred in concluding that the trial court did not commit plain error when it failed to instruct the jury that Mattson "had a constitutional right to be present throughout the trial and [that] the jury must not draw any unfavorable inference regarding Mattson's credibility simply on the basis of his presence at trial." Based on the discussion below, we adopt the reasoning of the dissent in Portuondo v. Agard, 529 U.S. 61 (2000), and hold that it would be improper, under article I, section 14 of the Hawai'i Constitution for a prosecutor to make generic accusations during closing argument that a defendant has tailored his or her testimony based solely on the defendant's exercise of his or her constitutional right to be present at trial. Accordingly, we also hold that, inasmuch as the prosecutor's closing argument in the instant case did not constitute a "generic accusation" of tailoring based solely on Mattson's presence at trial, the prosecutor's comments were not improper under the Hawai'i Constitution. Consequently, we affirm the ICA's judgment on appeal that, in turn, affirmed the trial court's judgment of conviction and sentence.

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I. BACKGROUND

A. Trial Court Proceedings

On October 24, 2007, Mattson was charged -- via complaint -- with one count of terroristic threatening in the first degree and one count of abuse of family or household members, in violation of HRS § 709-906(1) and (5) (Supp. 2008), arising out of an incident that occurred between Mattson and his adult-son, Hayashi, on the night of October 13, 2007. A jury trial commenced on January 9, 2008 and lasted three days, until January 11, 2008. The following evidence was adduced at trial.

**1. Prosecution's Case in Chief**

a. testimony of Hayashi

Hayashi testified that, around the time of the incident, he had been staying at Mattson's apartment in Wahiawa for about two weeks in order to do a short-term construction job in nearby Haleiwa. Hayashi indicated that, during that time, he was borrowing Mattson's cell phone because he had left his own cell phone at his house in Waianae.

Hayashi stated that, on October 13, 2007, he got off work, went back to Mattson's apartment, and consumed at least two vodka and soda cocktails. When Mattson came home, he and Hayashi watched television while Hayashi waited for his friend, "Josh," to pick him up. Hayashi indicated that Mattson's roommate, Valerie Kumia, was also at the apartment and that, by 9:00 or 9:30 p.m., he, Mattson, and Kumia had all "had a drink or two."

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Hayashi explained that, at some point during the evening, Mattson's cell phone rang, but the caller hung up when Mattson answered. The caller identification (ID) on Mattson's cell phone indicated the call was from Hayashi's friend, Josh. Because Mattson apparently heard the sound of a female talking when he answered the phone, Mattson assumed that Josh had a girl with him. At that point, Mattson started yelling and swearing at Hayashi, saying "vulgar" things about his friend, apparently because he believed Josh had hung up on him. Hayashi suspected that it was his girlfriend who had called and that Josh's number appeared because they had called at the same time. Hayashi then grabbed the phone from Mattson and tried to call Josh to determine whether he had called and hung up, but Mattson took the phone away from Hayashi. Hayashi tried to take the phone back when a "scuffle" ensued. Hayashi put Mattson in a headlock. Mattson then screamed for Kumia to come and help him. Kumia came into the room, yelled at Hayashi to let go of Mattson, and Hayashi complied.

According to Hayashi, Mattson then got up, ran to a table behind Hayashi, and grabbed a knife. Mattson opened the knife, came toward Hayashi, and "started slashing it" at him. As Hayashi started backing away from Mattson, he tripped and fell over something on the floor. Mattson swung the knife at Hayashi and missed, stabbing some cardboard behind Hayashi. Mattson continued to swing the knife in front of him and toward Hayashi's

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legs, coming within a few inches of Hayashi's body. Hayashi testified that, while Mattson was wielding the knife, he swore and said things like, "You tried to kill me, and I'm going to kill you now." Hayashi tried to defend himself and told Mattson to drop the knife and "fight him like a man." At one point, Hayashi grabbed Mattson's arm that was holding the knife, and Mattson punched Hayashi in the face with his free hand.

At that point, Mattson's cell phone rang again, and the caller ID indicated that it was Hayashi's girlfriend. Mattson threw the phone at Hayashi, who answered it, but Mattson continued to stand over him, swearing and saying threatening things about Josh. Just then, the headlights of a vehicle appeared through the window. Mattson stepped away from Hayashi and walked toward the door. Hayashi got up and tried to stop him, believing it was Josh who was outside, but Mattson swung the knife at him again, so Hayashi backed off. Mattson then walked outside. Hayashi looked out the window, noticed that it was not Josh's car, and closed and locked the front door while Mattson was still outside.

Hayashi then ran to Kumia and told her to call the police and lock the back door. Hayashi went into Kumia's room and saw Mattson reaching through an open window with the knife in his hand. According to Hayashi, Mattson had cut the window screen and was attempting to pull out the louvers of the jalousie windows so he could get into the apartment. Kumia came into the

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room and tried to close the window, but Mattson slashed the knife at her. Hayashi tried to help Kumia, but Mattson continued to slash the knife at both of them.

Hayashi went to the living room and grabbed a gun that he knew was not loaded. He testified that he did not load the gun because he was only trying to scare Mattson and did not intend to hurt or injure him. He also picked up a hatchet before going back to Kumia's room. Once near the open window, Hayashi pointed the gun at Mattson and told him to get away from the window, but Mattson just laughed at Hayashi, telling him he was going to get arrested for using a gun. Hayashi put the gun down and walked to the window to help Kumia close it, but Mattson continued to swing his knife at them. Hayashi then took the hatchet and started hitting Mattson's hand with the back of the hatchet. After being hit by the hatchet, Mattson pounded on the window, demanding to be let in. Hayashi ran to the living room, and, at that point, the police arrived and placed Mattson under arrest.

On cross-examination, Hayashi admitted that he spoke to Honolulu Police Department (HPD) officers Ashley Gormley and Theodore Merrill, but did not tell them that he had brandished a gun. Hayashi additionally testified that, in a telephone interview with HPD Detective Thomas Smith, he told Detective Smith about the argument with Mattson, the knife, and Mattson's threatening remarks, but did not mention his use of the gun.

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Hayashi admitted that he did not mention that a gun was involved until he received a second phone call from Detective Smith, specifically asking him if he had pointed a gun at Mattson.

Hayashi also admitted on cross-examination that, on the night in question, he was involved in a heated argument with Mattson about the cell phone and that he had used "vulgar" and "hurtful" words toward Mattson. Further, although he initially testified that Mattson did not ask him to leave at any point that evening, he later admitted that Mattson, prior to using the knife, had asked him to leave and that he had refused.

b. Kumia's testimony

Kumia testified that she lived in a one-bedroom apartment with Mattson and that, in October 2007, Hayashi stayed with them for about two weeks. According to Kumia, at around 3:15 p.m. on October 13, 2007, she came into the living room of the apartment and observed Hayashi to be intoxicated, stating that his speech was slurred and he was unsteady on his feet. She also indicated that she did not see Mattson have anything to drink that day.

Kumia testified that, on the night in question, she was outside on the porch smoking a cigarette while Mattson and Hayashi watched television in the living room. Kumia heard Mattson call her name, but she ignored it. She heard Mattson call her name a second time and, because he sounded desperate, she went running into the living room. Once there, she saw



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Hayashi bent over Mattson, choking him. She started yelling at Hayashi to get off of Mattson. Eventually, Hayashi freed Mattson; however, it took a few seconds before Mattson could move from his bent over position. Upon standing, Mattson walked to a table in the living room and grabbed a pocket knife. He then turned and walked toward Hayashi. Kumia testified that Mattson was holding the knife at his side and that "[i]t wasn't open." However, upon further questioning, she stated, "I did not see it open," but admitted that it could have been open. As Mattson continued to walk toward Hayashi, Kumia observed Hayashi back away from him and fall into the corner of the living room. After Hayashi fell, Mattson continued to stand over him. Kumia observed Hayashi try to get up and yell, "Dad, don't cut me." Kumia testified that, while she was in the room, she did not see Mattson swing the knife at Hayashi.

Kumia stated that, at that point, she left the room and went into her bedroom to call 911 because she wanted to "diffuse the situation."<sup>4</sup> While in her bedroom, she heard loud yelling

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<sup>4</sup> The 911 tape, which was admitted into evidence, was played for the jury at trial, but was not simultaneously transcribed into the record. Although a written transcript of the call is also not contained in the record, our review of the audio tape reveals that the following conversation transpired between the 911 operator and Kumia:

911 OPERATOR: Police Emergency. Hello this is Police.

KUMIA: I need a police officer, 231C Lehua Street in Wahiawa now.

911 OPERATOR: What's going on?

KUMIA: Um, my roommate pulling [sic] a knife on his son.

911 OPERATOR: Where are they at?

(continued...)

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from both Mattson and Hayashi and specifically heard Mattson yell, "What? You want to choke me out?" As she finished the 911 call, she heard the front door slam. She walked into the living room and heard Mattson outside yelling, "Now you're going to lock me out of my own house?" and asking for his keys and his cell phone.

According to Kumia, Hayashi then told her to lock the back door, and she complied. She testified that she also closed one of the back windows in her bedroom, but Mattson tried to enter through another window in her room. Kumia stated that she noticed that Mattson had cut the screen, but indicated that she

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<sup>4</sup>(...continued)

KUMIA: They are in my living room.  
911 OPERATOR: What kind of knife?  
KUMIA: Um, a pocket knife. I don't know what kind of knife it is.  
911 OPERATOR: Stay on the line with me, okay?  
KUMIA: Alright. Knock it off Joe [(referring to Mattson)]! Joe!  
911 OPERATOR: Is his name Joe?  
KUMIA: Yes.  
911 OPERATOR: Okay, what is your name?  
KUMIA: Val.  
911 OPERATOR: What is your last name, Val?  
KUMIA: Kumia.  
911 OPERATOR: What's Joe's last name?  
KUMIA: Mattson.  
911 OPERATOR: He still has the knife right?  
KUMIA: Yes.  
911 OPERATOR: What's the son's name?  
KUMIA: Joey.  
911 OPERATOR: Same last name, right?  
KUMIA: Hayashi.  
911 OPERATOR: Okay, and you are in apartment Charlie?  
KUMIA: Yes.  
911 OPERATOR: Okay. Has Joey been injured at all?  
Do you need an ambulance?  
KUMIA: Um no, I don't think so. They are still arguing.  
911 OPERATOR: Alright, officers are on the way.  
KUMIA: Okay, thank you.  
911 OPERATOR: Thank you.  
KUMIA: Bye.

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did not see him cut it. Kumia explained that she tried to close the window, but Mattson was sticking his arm through the window with the knife in his hand, trying to take out the louvers. As she was trying to close the window, Kumia heard Hayashi in the living room yelling, "Dad, I'm getting my gun. I'm going to shoot you." Kumia also heard Hayashi say that he was loading his gun and testified that, at some point, she went into the living room and saw Hayashi load the gun. Kumia stated that the gun belonged to her, but that the ammunition did not.

After seeing Hayashi load the gun, Kumia went back to her bedroom to, again, try to close the window. Kumia testified that Mattson continued to ask for his keys and his cell phone through the window. At that point, Hayashi came in and pointed the gun at Mattson, but did not fire. Hayashi then approached the window with a hatchet in one hand and the gun in the other and started hitting Mattson's hands with the back of the hatchet. Mattson pulled his hands out of the window, and Kumia and Hayashi were able to close it. Kumia heard the police coming and heard Hayashi say, "There, dad, there. Now they're coming. Now you're going down."

As previously indicated, Kumia testified on direct examination that she did not see Mattson swing the knife at Hayashi. She admitted, however, that her statement contained in the police report indicates that she saw Mattson swinging the knife at Hayashi and that Mattson was threatening Hayashi while

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holding the knife. On cross-examination, Kumia testified that, while she was preparing her written statement, the police were "coaching her" and explained that the police interviewed Hayashi and her at the same time. Kumia explained that the differences between her written statement and her testimony at trial resulted from the coaching by the police and having heard Hayashi's version of the events immediately prior to writing the statement.

c. testimonies of Officers Gormley and Merrill

HPD Officers Gormley and Merrill both testified that, on the night of October 13, 2007, they were dispatched to Mattson's home, after being advised that there was an argument and a possible suspect with a knife. Upon arriving at Mattson's apartment, Officer Gormley observed Hayashi come out the front door yelling, "He's got a knife, he's got a knife." Officer Merrill testified that he heard Hayashi say, "He tried to stab me." Both officers testified that, after Hayashi came out of the apartment, they saw Mattson come around the corner of the building without the knife. Officer Gormley ordered Mattson to stop, and Officer Merrill pulled out his duty pistol and pointed it at Mattson. Officer Merrill instructed Mattson to lie down; Mattson complied and was thereafter detained.

Officer Gormley testified that Hayashi was upset and "shaken up." After calming Hayashi down, she interviewed him about what happened and then interviewed Kumia. Officer Gormley indicated that Hayashi and Kumia also provided written

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statements. When asked what instructions were given to them regarding the preparation of their written statements, Officer Gormley stated:

I said basically write everything that you just told me, you got to write it in story form. So you can start like on today's date at about what time. And then you're going to write down in chronological order everything that happened. What was said, what was stated, how you felt, everything.

When asked, "Do you at any time tell them exactly what to write[,]" Officer Gormley responded, "No, ma'am."

Officer Gormley further testified, that while she took statements, Officer Merrill went to search for the knife. He subsequently recovered the knife that Mattson had used, stating that it was partially hidden underneath the corner of a washing machine on the rear lanai of Mattson's apartment. Thereafter, the officers arrested Mattson and transported him to the hospital because he had complained of pain and cuts on his hands and fingers.

d. testimony of HPD Detective Smith

Detective Smith testified that, on October 14, 2007, he interviewed Mattson regarding the incident that occurred on October 13, 2007. He further testified that he had recorded the interview and identified the compact disc that contained the interview. Thereafter, Detective Smith's interview with Mattson was played for the jury.

In relevant part, Mattson stated during the interview that, at around 8:00 p.m. on October 13, 2007, he and Hayashi

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were relaxing and watching television when Mattson's cell phone rang. Because the phone call was from Hayashi's girlfriend, Mattson gave Hayashi the phone. Hayashi argued with the girl on the phone and hung up. The phone rang a couple more times, and Hayashi continued to argue with the person on the phone and started getting "snappy" with Mattson. Mattson told him that if he did not stop being disrespectful, he would have to leave. Mattson stood up and tried to walk past Hayashi to get his roommate, but Hayashi pulled him sideways and placed him in a chokehold. Mattson then yelled for his roommate and felt himself blackout for a few seconds. Mattson stated that, after Hayashi released him, he walked to a table in the living room, grabbed his lighter, and walked back over to Hayashi and yelled at him. He and Hayashi continued to yell at each other, and Mattson again told Hayashi to leave. Mattson explained that he grabbed a lighter from the table in the apartment because, due the commotion of the argument, he mistook his lighter for his keys.

Mattson then saw a car pull up, so he went outside, thinking it was Hayashi's friend coming to pick him up. After Mattson stepped outside, Hayashi locked him out of the apartment. Mattson explained that he intended to leave, but needed his keys and cell phone. He, therefore, went around to the side of the apartment where there was an open window. Mattson explained that he saw a knife outside, picked it up, and started cutting the screen on the open window to try and get inside. After a

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confrontation with Hayashi where Hayashi hit Mattson's hand, threatened to chop off his fingers, and pointed a gun at him, Mattson gave up and came around the corner of the apartment, where he encountered police who told him to get down on the ground.

**2. Defendant's Case**

Mattson -- the sole witness for the defense -- testified on his own behalf. He testified that, on October 13, 2007, he arrived at his apartment around 5:00 p.m. with cigarettes for himself, Hayashi, and Kumia. He noticed that Hayashi had been drinking and admitted that he started to drink as well. Mattson testified that he and Hayashi were relaxing and watching television and, at some point, Hayashi passed out next to him. Mattson explained that the cell phone he had loaned to Hayashi rang three separate times. Two of the phone calls were from Hayashi's girlfriend, and, each time Mattson gave Hayashi the phone, Hayashi raised his voice, argued and swore at the girl, and threw the phone on the ground. Mattson stated that, each time Hayashi threw down the phone, he warned Hayashi not to use bad language and told him not to disrespect Mattson's property by throwing the phone on the ground. Hayashi then asked Mattson if he could call his friend, Josh, who was supposed to pick him up. Mattson gave the phone to Hayashi, who called Josh and asked him why he was not there yet. Mattson testified that,

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after Hayashi hung up the phone, he returned it "nicely," with no anger or aggression.

Mattson stated that, when the phone rang a third time, Hayashi grabbed for it, but Mattson answered it. Mattson heard a girl on the other end, but the girl did not say anything, so he hung up. According to Mattson, Hayashi became angry with him, yanked the phone out of his hand, and yelled at him for hanging up the phone because he thought it was Josh calling to come pick him up. Hayashi started swearing and calling Mattson a "liar" and other names. Mattson also began to raise his voice and, at some point, told Hayashi to leave the apartment. Hayashi began acting aggressively toward Mattson by standing up, making fighting gestures, and calling him bad names. Hayashi then bent over Mattson and put him in a choke hold, pulling on his neck and squeezing his throat. Mattson yelled for Kumia several times and felt himself blackout for a few seconds. Mattson testified that he did not see Kumia enter the room, and, when he awoke, he saw Hayashi standing over him, still looking "pissed off."

Mattson explained that he thought Hayashi would attempt to jump on him again, so he leaned towards a nearby table (from a kneeling position) and grabbed a knife. He then stood up, yelled at Hayashi, and told him to leave the apartment. Mattson testified that he did not open the knife or swing it at Hayashi. Hayashi continued calling Mattson names and, at some point, lunged forward at Mattson. Mattson started to walk towards



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Hayashi, but Hayashi backed away from Mattson and ended up tripping over stuff on the floor. Mattson yelled at Hayashi for breaking his stuff and for disrespecting him. He then walked over to where Hayashi had fallen and reached out to Hayashi to try to help him up. Hayashi was screaming at Mattson not to stab him and flailed his arms and legs so that Mattson was unable to help him up. Mattson again stated that the knife was not open at any time and indicated that, when he was trying to help Hayashi get up from the floor, the knife was closed and in his pocket.

At that point, Mattson saw the headlights of a car and, believing it to be Hayashi's friend, headed towards the front door. Because he thought Hayashi would run outside and make a scene, he told Hayashi to shut up and stay inside. He then walked outside, but realized that the car did not belong to Hayashi's friend. Mattson turned around to go back inside and discovered that Hayashi had locked the front door. He yelled through the door for someone to give him his keys and cell phone so that he could leave.

Mattson testified that, when no one answered, he walked around the back of the building to an open window and again yelled for his keys and cell phone. In an attempt to get inside, Mattson used the knife in his pocket to cut the window screen and reach the louvres to pull them out. Mattson then saw Kumia come to the window, and he repeated his request for his keys and cell phone, but she told him to go away and tried to close it.

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Mattson closed the knife, but kept his hands in the window area to prevent Kumia from closing it. Mattson stated that, at some point, Hayashi came into the room and told Mattson to go away or he would chop his fingers off. Although Mattson did not see what Hayashi was using, he felt a hard metal object banging on his fingers. Mattson indicated that, as he pulled his hands slightly back from the window, he noticed that Hayashi had a gun pointed at him. He further indicated that he saw Hayashi pull back the hammer of the gun. He claimed that he did not remember whether he told Hayashi that he would get arrested for using a gun. Mattson eventually gave up and walked back around to the front of the apartment. At that point, he encountered the police, who told him to get down on the ground and handcuffed him.

On cross-examination, Mattson admitted to telling a different version of the story during his interview with Detective Smith. Among other discrepancies, he admitted that he told Detective Smith that he did not have a knife inside the apartment, only a lighter. He also indicated that he "made up" some of the story he told Detective Smith because, at that time, he "only wanted to make the statement that help[ed him]." Also on cross-examination, the prosecution drew attention to the fact that Mattson had the opportunity to sit through the evidence presented at trial. Mattson's counsel objected to this portion of the cross-examination on the basis that such questioning

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violated Mattson's constitutional rights, but the court overruled the objection.<sup>5</sup>

**3. Closing Argument**

During its closing argument, the prosecution commented on the fact that Mattson had the opportunity to sit through all of the evidence presented at trial. More specifically, the prosecution stated:

He told you he lied before. He had a chance to sit through the evidence. He had to make his story gibe [sic] with what you've heard. What is in evidence. What [Kumia] even had to admit to, because she -- . . . He sat through the evidence. There is a 911 tape. [Kumia's] statement. [Hayashi's] statement. Based on all that, he is not telling the truth. All of a sudden he remembered that he grabbed that knife.

This case is about credibility. In order to believe the defendant, you have to be able to answer why didn't [Kumia] just give him the key? Why did [Kumia] lock him out of the house that night? Why lie the day after the event?

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<sup>5</sup> Specifically, Mattson testified as follows:

Q [By the prosecution] Your memory of what happened, would you agree with me, was better the day after it happened than it is today?

A [By Mattson] Yes and no.

Q How is it not better?

A I didn't get no sleep.

Q Okay. Or is it that you had an opportunity to see what the state does have in evidence?

A No.

Q So you haven't had an opportunity to see what the state has in evidence?

A Only until the [c]ourt.

Q Okay. And you have had the opportunity to sit through the evidence that's been presented?

[By defense counsel]: Objection, Your Honor. That's going into Maluia.

THE COURT: Overruled.

Q [By the prosecution] You had the opportunity to sit through the evidence that's been presented?

A [By Mattson] Yes.

Q And you're now testifying in court, right?

A Yes, ma'am.

Q Okay.

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(Emphases added.) Mattson objected to this portion of the prosecution's closing argument, indicating that such statements constituted burden shifting.

**4. Jury's Verdict and Sentencing**

The jury returned its verdict on January 14, 2008, finding Mattson guilty of one count of terroristic threatening in the first degree and acquitting Mattson of the remaining charge of abuse of family or household members. On April 22, 2008, Mattson was sentenced to a five-year open term of imprisonment, and the trial court filed the judgment of conviction and sentence on the same day. On May 20, 2008, Mattson timely filed a notice of appeal.

**B. Appeal Before the ICA**

On direct appeal, Mattson argued that the prosecutor's remark that Mattson had "the unique opportunity to tailor his testimony to match the evidence because he was present in the courtroom during the entire trial" during closing argument "impermissibly infringed" upon his: (1) constitutional right to be present at trial and to testify on his own behalf guaranteed by the Hawai'i Constitution; and (2) federal and state constitutional rights to due process and a fair trial.<sup>6</sup> In his opening brief, Mattson acknowledged that the United States

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<sup>6</sup> We observe that Mattson also argued before the ICA that the prosecutor's line of cross-examination regarding Mattson's presence at trial also infringed upon his constitutional rights. However, Mattson does not assert such argument on application and, as such, we do not further address it here.

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Supreme Court, in Portuondo v. Agard, 529 U.S. 61 (2000), held that a prosecutor's comments regarding a defendant's ability to tailor his testimony based on his presence at trial did not violate a defendant's federal constitutional rights, but argued -- as he does on application -- that the reasoning of the Portuondo dissent is persuasive and should be adopted by this court in order to give criminal defendants greater protection than that afforded under the federal constitution. Additionally, Mattson argued that, "[b]ecause the prosecutor was permitted to imply . . . that Mattson's presence during trial permitted Mattson to tailor his testimony to match the evidence," the trial court plainly erred in failing to instruct the jury that Mattson had a constitutional right to be present throughout the whole trial and that the jury must not draw any unfavorable inference regarding Mattson's credibility on the basis of his presence at trial.

In response, the prosecution argued that the Portuondo majority should be followed by this court and that, under Portuondo, the prosecutor's remarks during closing argument did not violate Mattson's constitutional rights because such remarks were "based entirely upon the evidence" and "reflected [the prosecutor's] legitimate attempt to draw attention to the incredibility of [Mattson's] version of the incident against the testimony of all of the other witnesses." The prosecution recognized that this court is "free to give broader protection

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under the Hawai'i Constitution than that given by the federal constitution" (citing State v. Viglielmo, 105 Hawai'i 197, 211, 95 P.3d 952, 966 (2004), but argued that Mattson "has not shown in this case that additional protection is warranted." The prosecution further argued that, even assuming the Portuondo dissent is adopted, the prosecutor's comments were not improper because they were "narrowly tailored to the specific evidence adduced at trial, including the 911 call[], the other witnesses' statements[,] and even [Mattson's] own conflicting statements." With respect to the jury instructions, the prosecution argued that the trial court did not plainly err in failing to give an additional instruction regarding Mattson's right to be present at trial because the instructions given in the instant case, "when read and considered as a whole, were not prejudicially insufficient, erroneous, inconsistent, or misleading."

The ICA rejected all of Mattson's contentions and held that:

(1) The United States Supreme Court's decision in Portuondo v. Agard, 529 U.S. 61 (2000), forecloses Mattson's claim that the prosecutor's argument violated his rights under the U.S. Constitution.

(2) The prosecutor's argument in this case was not improper under the Hawai'i Constitution. See State v. Apilando, 79 Hawai'i 128, 142, 900 P.2d 135, 149 (1995) (holding that "when a defendant takes the stand to testify, his or her credibility can be tested in the same manner as any other witness," and therefore, it was not improper for the prosecutor to comment that "because [the defendant] had the highest stake in the outcome of the case, he had the greatest motive to lie").

(3) We decline to conclude that the circuit court committed plain error in failing to instruct the jury, sua sponte, that Mattson had a constitutional right to be present throughout trial and the jury must not draw any

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unfavorable inference regarding Mattson's credibility simply on the basis of his presence at trial.

SDO at 2-3 (brackets in original). Consequently, the ICA affirmed the trial court's judgment of conviction and sentence. Id. at 3.

The ICA filed its judgment on appeal on June 12, 2009. Thereafter, this court accepted Mattson's application on October 14, 2009 and heard oral argument on December 3, 2009.

II. STANDARD OF REVIEW

"[This court] review[s] questions of constitutional law de novo, under the 'right/wrong' standard" and, thus, "exercises [its] own independent constitutional judgment based on the facts of the case." State v. Jenkins, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000) (citation omitted).

III. DISCUSSION

As previously stated, Mattson contends on application that the ICA erred in holding that the prosecutor's remarks during closing argument were not improper under the Hawai'i Constitution because the statement that Mattson's presence during trial enabled him to tailor his testimony to match the evidence constituted an impermissible and direct attack on Mattson's state constitutional right to be present at trial and to testify on his own behalf. As Mattson recognized on appeal to the ICA, his argument that his constitutional rights were violated hinges entirely on this court's approval and adoption of the reasoning

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in the Portuondo dissent. Indeed, it is clear that, if this court were to follow the holding of the Portuondo majority -- which held that, because all testifying witnesses should be treated the same, the prosecutor's comments regarding a defendant's ability to tailor his testimony based on his presence throughout trial did not violate a defendant's constitutional rights, Portuondo, 529 U.S. at 73, -- then Mattson's argument would be wholly without merit. Consequently, we now turn to examine Portuondo.

In Portuondo, the prosecutor commented on the defendant's presence at trial during closing argument, stating in relevant part that,

unlike all the other witnesses in this case[,] the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies. . . . That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?

529 U.S. at 63-64 (internal quotation marks omitted) (ellipses in original) (format altered). The defense counsel objected, claiming that such comments violated the defendant's constitutional right to be present at trial, but the trial court for the state of New York rejected such argument and concluded that the defendant's "presence during the entire trial, and the advantage that this afforded him, may fairly be commented on." Id. at 64 (citation and internal quotation marks omitted). Following his conviction, the defendant filed a petition for



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habeas corpus, arguing that the prosecutor's comments violated his Fifth and Sixth Amendment rights to be present at trial and confront his accusers, as well as his Fourteenth Amendment right to due process. Id. at 64-65. The United States District Court for the Eastern District of New York denied his petition in an unpublished order. Id. at 65. On appeal from the denial, a divided panel of the United States Court of Appeals for the Second Circuit (Second Circuit) reversed his conviction, holding that the prosecutor's comments violated the defendant's Fifth, Sixth, and Fourteenth Amendment rights. Id.

The Supreme Court granted certiorari and concluded that: (1) the defendant's claims "ha[d] no historical foundation," id. at 65; and (2) "lacking any historical support for the constitutional rights that he asserts, [the defendant] must rely entirely upon our opinion in Griffin [v. California], 380 U.S. 609 (1965) (holding that a prosecutor's comments about a defendant's refusal to testify were improper and unconstitutional)], which "is a poor analogue . . . for several reasons." Id. at 67. The Portuondo majority went on to distinguish Griffin, differentiating between a prosecutor's comment on a defendant's refusal to testify, which the majority determined would impermissibly result in the jury's counting the defendant's silence at trial against him, and a prosecutor's comment on the defendant's presence at trial, which the majority stated would merely result in the jury evaluating the credibility

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of the defendant as a witness -- an evaluation that the majority stated was both "natural and irresistible" for the jury to make. Id. at 67-68. The majority further distinguished Griffin, stating that "Griffin prohibited comments that suggest a defendant's silence is evidence of guilt," id. at 69 (emphasis in original) (citations and internal quotation marks omitted), and, by contrast, "the prosecutor's comments in this case . . . . concerned [the defendant's] credibility as a witness, and were therefore in accord with our longstanding rule that[, ] when a defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness.'" Id. (quoting Brown v. United States, 356 U.S. 148, 154 (1958)) (emphasis in original). As a result, the Portuondo majority concluded that

the principle [the defendant] asks us to adopt here[, i.e., that the prosecution is precluded from commenting on the defendant's presence at trial,] differs from what we adopted in Griffin in one or the other of the following respects: It either prohibits inviting the jury to do what the jury is perfectly entitled to do; or it requires the jury to do what is practically impossible.

Id. at 68 (emphasis added) (footnote omitted).

The majority additionally rejected the defendant's contention that the prosecutor's comments were impermissible because they were "generic" rather than based upon any specific indication of tailoring, concluding that "this Court has approved of such 'generic' comment before." Id. at 71 (citing Reagan v. United States, 157 U.S. 301 (1895)). Consequently, the majority

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declined to extend the reasoning in Griffin to the defendant's case and ultimately held that:

In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate -- and[,] indeed, given the inability to sequester the defendant, sometimes essential -- to the central function of the trial, which is to discover the truth.<sup>7]</sup>

Id. at 73. Accordingly, the majority reversed the judgment of the Second Circuit. Id. at 75. In a concurring opinion, Justice Stevens, although agreeing with the majority that the prosecutor's comments "survived constitutional scrutiny," "register[ed] his disagreement with the [majority's] implicit endorsement" of the prosecutor's closing argument. Id. at 76 (Stevens, J., concurring, joined by Breyer, J.). Inasmuch as the concurrence fundamentally disapproved of the prosecutor's comments, it stressed that the majority's final conclusion did not "deprive [s]tates or trial judges of the power either to prevent such argument entirely or to provide juries with instructions that explain the necessity, and the justifications, for the defendant's attendance at trial." Id.

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<sup>7</sup> The Court also addressed the issue whether the prosecutor's comments violated the defendant's Fourteenth Amendment right to due process. Portuondo, 529 U.S. at 74. However, such issue was based on a state statute that the defendant argued required him to be present at trial. Id. at 74-75. Although we acknowledge that Mattson asserted during oral argument that he was required to be present at trial, there is no statute in this jurisdiction that compels the attendance of criminal defendants at trial. Consequently, we do not further discuss the majority's reasoning regarding the Fourteenth Amendment right to due process.

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The dissent in Portuondo disapproved of the majority's holding, asserting that "[t]he [majority] today transforms a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility." Id. at 76 (Ginsburg, J., dissenting, with whom Souter, J., joined). The dissent characterized the majority's attempt to distinguish Griffin as "unconvincing," id. at 84, and instead opined that both Griffin and Doyle v. Ohio, 426 U.S. 610 (1976) (holding that a defendant's silence after receiving Miranda warnings did not warrant a prosecutor's attack on his credibility) were analagous to the case before it. Id. at 77. More specifically, the dissent stated that Griffin and Doyle "stem from the principle that where the exercise of a constitutional right is 'insolubly ambiguous' as between innocence and guilt, a prosecutor may not unfairly encumber those rights by urging the jury to construe the ambiguity against the defendant" and argued, contrary to the majority's view, that "the same principle should decide [the defendant's] case." Id. (internal citation omitted).

Examining the facts in Portuondo, the dissent reasoned:

[The defendant] attended his trial, as was his constitutional right and his statutory duty, and he testified in a manner consistent with other evidence in the case. One evident explanation for the coherence of his testimony cannot be ruled out: [the defendant] may have been telling the truth. It is no more possible to know whether [the defendant] used his presence at trial to figure out how to tell potent lies from the witness stand than it is to know whether an accused who remains silent had no exculpatory story to tell.

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Id. The dissent further reasoned that "every defendant who testifies is equally susceptible to a generic accusation about his opportunity for tailoring" and "the prosecutorial comment at issue, tied only to the defendant's presence in the courtroom and not to his actual testimony, tarnishes the innocent no less than the guilty." Id. at 77-78. As a result, the dissent concluded that

the interests of truth are not advanced by allowing a prosecutor, at a time when the defendant cannot respond, to invite the jury to convict on the basis of conduct as consistent with innocence as with guilt. Where burdening a constitutional right will not yield a compensating benefit, as in the present case, there is no justification for imposing the burden.

Id. at 79. In other words, the dissent espoused the belief that a generic accusation of tailoring based solely on a defendant's presence at trial would burden the constitutional right of a defendant to be present throughout his or her trial.

The dissent further disapproved of the majority's holding that to prohibit generic accusations of tailoring at summation would "prohibit[] prosecutors from inviting the jury to do what the jury is perfectly entitled to do." Id. at 86 (citation and internal quotation marks omitted). More specifically, the dissent pointed out that the majority "offer[ed] no prior authority . . . for the proposition that a jury may constitutionally draw the inference now at issue," i.e., infer that a defendant who is present at trial tailored his testimony to match the evidence presented, and argued that, "even

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if juries were permitted to draw the inference in question, it would not follow that prosecutors could urge juries to draw it."

Id. (emphasis added).

Ultimately, the dissent concluded that the majority's holding produced a "prosecutorial practice that burdens the constitutional rights of defendants, that cannot be justified by reference to the trial's aim of sorting guilty defendants from innocent ones, and that is not supported by our case law." Id. at 88. Consequently, the dissent endorsed the reasoning of the Second Circuit and concluded that:

The restriction that the [Second Circuit] placed on generic accusations of tailoring is both moderate and warranted. That court declared it permissible for the prosecutor to comment on what the defendant testified to regarding pertinent events -- the fit between the testimony of the defendant and other witnesses. What is impermissible, the Second Circuit held, is simply and only a summation bolstering the prosecution witnesses' credibility vis-a-vis the defendant's based solely on the defendant's exercise of a constitutional right to be present during the trial.

Id. (emphases added) (citation, internal quotations marks, and ellipsis omitted).

On application, Mattson argues that, "[i]n rendering its decision, the ICA failed to address the Portuondo dissent's persuasive arguments and this [c]ourt's long-standing principle that the Hawai'i Constitution may afford the people of the State of Hawai'i more protection than by the federal constitution." More specifically, Mattson points to the rationale from the Portuondo dissent that the majority's holding "transform[s] a defendant's presence at trial from a Sixth Amendment right into

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an automatic burden on his credibility" (citing Portuondo, 529 U.S. at 76 (Ginsburg, J., dissenting, with whom Souter, J., joined)) and argues that the Portuondo dissent more adequately protects the constitutional rights of defendants. Accordingly, Mattson argues that this court "should reject the Portuondo majority, as its reasoning does not adequately preserve the right to confrontation guaranteed under article I, section 14 of the Hawai'i Constitution, or the right to testify under various state constitutional guarantees." Consequently, Mattson urges this court to adopt the reasoning set forth in the Portuondo dissent and hold that "a prosecutor's generic accusation during summation that a defendant tailored testimony to evidence presented [i]s improper and unconstitutional."

In its answering brief, the prosecution essentially contended that the Portuondo majority is well-reasoned and should be followed and that, under Portuondo, it is clear that the prosecutor's remarks during closing argument did not violate Mattson's constitutional rights. Although acknowledging that this court has often given broader protection under the Hawai'i Constitution than that given by the federal constitution, the prosecution argued that Mattson "has not shown in this case that additional protection is warranted."

As acknowledged by the parties, we have consistently stated that, "as the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai'i

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Constitution," this court is free to "give broader protection under the Hawai'i Constitution than that given by the federal constitution." State v. Arceo, 84 Hawai'i 1, 28, 928 P.2d 843, 870 (1996) (quoting State v. Wallace, 80 Hawai'i 382, 397 n.14, 910 P.2d 695, 710 n.14 (1996)) (internal quotation marks omitted). We have also previously concluded that, "when the United States Supreme Court's interpretation of a provision present in both the United States and Hawai'i Constitutions does not adequately preserve the rights and interests sought to be protected, we will not hesitate to recognize the appropriate protections as a matter of state constitutional law." State v. Bowe, 77 Hawai'i 51, 57, 881 P.2d 538, 544 (1994) (citations, internal quotation marks, and original brackets omitted).

Upon careful consideration of the reasoning set forth in Portuondo and the arguments of the parties, we believe that the holding of the Portuondo majority does not provide adequate protection of defendant's rights under article I, section 14 of the Hawai'i Constitution, i.e., the confrontation clause. It is well-settled that upholding a defendant's rights under the confrontation clause is essential to providing a defendant with a fair trial. See State v. Peseti, 101 Hawai'i 172, 180, 65 P.3d 119, 127 (2003) (stating that the confrontation clause "provides two types of protections for a criminal defendant: the right physically to face those who testify against him [or her], and the right to conduct cross-examination" (brackets in original));



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see also Apilando, 79 Hawai'i at 131, 900 P.2d at 138 (stating that "[t]he confrontation right provides the criminal defendant with the opportunity to defend himself [or herself] through our adversary system by prohibiting ex parte trials, granting the defendant an opportunity to test the evidence in front of the jury, and guaranteeing the right to face-to-face confrontation" (quoting O. Weinstein, Coy v. Iowa: Reconciling a Defendant's Right to Confrontation with a Child-Witness' Interest in Avoiding Undue Psychological Trauma, 23 Loy. L.A. L. Rev. 415, 437 (1989) (brackets in original)). Further, although this court has previously allowed the prosecution wide latitude when making closing remarks, we have also concluded that a prosecutor's comments may not infringe on a defendant's constitutional rights. For example, in State v. Wakisaka, 102 Hawai'i 504, 78 P.3d 317 (2003), this court held that it is "a bedrock principle of the Hawai'i Constitution" that "the prosecution cannot comment on the defendant's failure to testify because this infringes on the defendant's right not to be a witness against her - or himself." Id. at 515, 78 P.3d at 328.

As aptly observed by the Portuondo dissent, the holding of the Portuondo majority "transforms a defendant's presence at trial from a [constitutional] right into an automatic burden on his credibility." Portuondo, 529 U.S. at 76 (Ginsburg, J., dissenting, with whom Souter, J., joined). Indeed, under the reasoning of the majority, the prosecution can permissibly make a

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comment that is related only to the defendant's presence in the courtroom and not to his actual testimony. Id. at 73. As a result, every defendant who testifies is "equally susceptible" to such a generic accusation that he or she has tailored his or her testimony, regardless of the content of the testimony. Id. at 77 (Ginsburg, J., dissenting, with whom Souter, J., joined). Thus, we believe -- as also observed by the Portuondo dissent -- that applying the majority's reasoning would produce a "prosecutorial practice that burdens the constitutional rights of defendants, that cannot be justified by reference to the trial's aim of sorting guilty defendants from innocent ones[.]" Id. at 88.

We are instead persuaded by the reasoning of the Portuondo dissent. More specifically, we agree that a restriction placed on the prosecutor's ability to make generic accusations of tailoring during closing argument is "both moderate and warranted," id. at 88, because such accusations "cannot sort those who tailor their testimony from those who do not, much less the guilty from the innocent." Id. at 78. We also agree that "allowing a prosecutor, at a time when the defendant cannot respond, to invite the jury to convict on the basis of conduct as consistent with innocence as with guilt," id. at 79, would not only be improper, but would also disregard the truth-seeking purpose of a trial inasmuch as generic accusations of tailoring do not aid the jury in any way in determining whether a defendant has tailored his testimony or simply related

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a true version of the events. Consequently, we agree with the Portuondo dissent, as indicated above, that generic accusations of tailoring during closing argument that are based only on a defendant's presence throughout the trial burden the defendant's constitutional right to be present at trial and could discourage a defendant from exercising his constitutional right to testify on his own behalf. Accordingly, we adopt the reasoning of the Portuondo dissent and conclude that it would be improper, under article I, section 14 of the Hawai'i Constitution, for the prosecution to make generic accusations during closing argument that a defendant tailored his testimony based solely on the defendant's exercise of his constitutional right to be present during the trial. We now turn to examine whether the prosecutor's remarks in the instant case were constitutionally improper.

Mattson contends on application that the prosecutor in the present case made the very kind of "generic accusation during summation" that the Hawai'i Constitution prohibits. More specifically, Mattson argues:

The prosecutor did not indicate that Mattson's opportunity to tailor his statements was in any way evidenced by Mattson's testimony or connected to its cross-examination of Mattson. The prosecutor did not connect any accusation to specific evidence of tailoring at trial, but instead, made a general accusation resting not on evidentiary support, but only innuendo. This kind of argument invited the jury to infer that any consistency in Mattson's testimony with the testimony of other witnesses derived from Mattson's presence at trial, rather than allowing the jury to weigh the evidence and credibility of the testimony on the merits. Consequently, the prosecutor's comments violated Mattson's

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right to be present at trial for the purpose of confronting witnesses and to testify in his defense.

In its answering brief, the prosecution argued that, even assuming this court adopts the rationale of the Portuondo dissent, the prosecutor's comments did not violate Mattson's constitutional rights because "the prosecutor's remark[s], based entirely upon the evidence, reflected [her] legitimate attempt to draw attention to the incredibility of [Mattson's] version of the incident against the testimony of all of the other witnesses." The prosecution further argued that such comments were clearly "narrowly tailored to the specific evidence adduced at trial, including the 911 call[], the other witnesses' statements[,] and even [Mattson's] own conflicting statements."

As previously indicated, the prosecutor, during closing argument, stated:

He told you he lied before. He had a chance to sit through the evidence. He had to make his story gibe with what you've heard. What is in evidence. What [Kumia] even had to admit to, because she --. . . He sat through the evidence. There is a 911 tape. [Kumia's] statement. [Hayashi's] statement. Based on all that, he is not telling the truth. All of a sudden he remembered that he grabbed that knife.

This case is about credibility. In order to believe the defendant, you have to be able to answer why didn't [Kumia] just give him the key? Why did [Kumia] lock him out of the house that night? Why lie the day after the event? Thank you.

(Emphases added.) We first acknowledge that the prosecutor, in making the above-quoted argument: (1) clearly drew attention to Mattson's presence throughout the trial when she argued that "[h]e had a chance to sit through the evidence" and later repeated that "he sat through the evidence"; and (2) specifically

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made an accusation that Mattson tailored his testimony to the evidence presented when she argued that "[h]e had to make his story gibe [sic] with what you've heard." However, the prosecutor also referred to specific evidence adduced at trial that was directly contradictory to Mattson's testimony.

Specifically, the prosecutor referenced the 911 tape that was played for the jury, Kumia's statement, and Hayashi's statement. As previously indicated, the 911 tape included evidence that Mattson was threatening Hayashi with a knife on October 13, 2007. See supra note 4. Additionally, Kumia's and Hayashi's statements established that, on the night in question, Mattson grabbed a knife, swung it at Hayashi, and threatened him with it. The aforementioned evidence directly contradicted Mattson's own testimony that the knife was closed and that he did not threaten Hayashi with it.

The prosecutor also relied on the fact that Mattson's testimony at trial conflicted with the interview he gave Detective Smith on October 14, 2007. More specifically, the prosecutor referenced the fact that Mattson told the jury that he "lied before." Such an argument logically refers to Mattson's admission at trial that he "made up" parts of the interview with Detective Smith because he "only wanted to make the statement that help[ed him]." Additionally, the prosecution specifically highlighted the fact that Mattson "[a]ll of a sudden . . . remembered that he grabbed that knife." It is reasonable to

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infer that the prosecutor was referring to the inconsistency between Mattson's interview with Detective Smith, at which time he stated that he never had a knife inside the apartment, and his version of the events after he heard the evidence presented at trial, i.e., his testimony that he grabbed a knife on a table in his apartment but did not open it.

Based on the foregoing, it is evident that, in addition to citing the fact that Mattson was present at trial and heard testimony of other witnesses, the prosecutor identified and relied upon specific evidence adduced at trial that demonstrated the inconsistencies between Mattson's testimony at trial and Kumia's 911 call, Kumia's statement, Hayashi's statement, and Mattson's own prior statements. Because the prosecution referred to specific evidence presented at trial in addition to referring to Mattson's presence at trial, it cannot be said that the prosecutor's remarks during closing argument constituted a "generic accusation" that Mattson tailored his testimony based solely on his presence at trial. Consequently, given these circumstances, we conclude that the prosecutor's comments did not violate Mattson's constitutional right to be present at trial under article I, section 14 of the Hawai'i Constitution. It, therefore, follows that the prosecutor's comments did not constitute prosecutorial misconduct.

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Inasmuch the prosecutor's comments did not violate Mattson's constitutional rights, it was not necessary for the trial court to sua sponte instruct the jury regarding Mattson's constitutional right to be present at trial. Accordingly, there is no need to address Mattson's remaining argument that the trial court committed plain error in failing to instruct the jury that Mattson "had a constitutional right to be present throughout the trial and the jury must not draw any unfavorable inference regarding Mattson's credibility simply on the basis of his presence at trial."

IV. CONCLUSION

Based on the foregoing, we adopt the reasoning of the dissent in Portuondo v. Agard, 529 U.S. 61 (2000) (Ginsburg, J., dissenting, with whom Souter, J., joined) and conclude that it would be improper, under article I, section 14 of the Hawai'i Constitution for the prosecution to make generic accusations during closing argument that a defendant has tailored his or her testimony based solely on the defendant's exercise of his or her constitutional right to be present at trial. In the instant case, however, we conclude that the prosecutor's comments were based on specific evidence adduced at trial -- not solely on Mattson's exercise of his right to be present at trial -- and, thus, such comments were not improper under the Hawai'i Constitution. Consequently, we affirm the ICA's June 12, 2009

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judgment on appeal that, in turn, affirmed the trial court's April 22, 2008 judgment of conviction and sentence.

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