DISSENTING OPINION BY ACOBA, J.

I respectfully dissent on the ground that the deputy prosecuting attorney (DPA) inappropriately argued to the jury in rebuttal that the court had "the final word" on an "improper identification procedure" if the police "blow it." Coupled with the court's overruling of Defendant's objection, the effect of such argument would leave the jury with the erroneous impression that the identification procedure at issue in this case had been sanctioned by the court.

During the trial the prosecution voir dired Officer Frank Everett regarding Defense Exhibit L, General Order 81-1 dated 2/17/87 regarding a physical lineup or a photographic lineup:

> Q [DPA] . . . Now the rules in here that talk about how a field show-up is done -- are these rules written in stone? In other words, do you have to follow these each and every time a field show-up is done during the course of your career as a police officer?
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> A [OFFICER EVERETT] No, sir. Some things happen that I can't control on the scene . . . .
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> . . . .
>
> Q So let me ask you this. Based on your training, your experience, and your knowledge of these guidelines, do they allow you the flexibility to make some on-the-spot judgments about how to conduct things?
>
> A I believe so.
>
> Q All right. And if you don't follow any of these procedures to the "T," are you going to get in trouble with your sergeant or the chief of police?
>
> A I don't think so. There are guidelines. And in a perfect world, we -- you know, we try to the best of our ability to follow those guidelines.
>
> Q Okay. And is it your understanding that ultimately, whether there's been an improper identification or not, it's not even decided by the police, but by the Court; right?
>
> A Yes, sir.

(Emphasis added.) Defendant did not object to the foregoing testimony. The failure to object was plain error. See Hawai'i

Rules of Penal Procedure (HRPP) Rule 52(b) (1994) (stating that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court"); see also State v. Schroeder, 76 Hawai'i 517, 532, 880 P.2d 192, 207 (1994) (explaining that "where plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial court"). The foregoing testimony led to the following improper rebuttal argument which Defendant objects to on appeal:

> [DPA]: Well, [the defense] keep[s] talking about these guidelines. They're just guidelines. You'll see words in there like if practical, do this, if desirable, do that. Nothing is written in stone. But here's the bottom line on this whole I.D. guideline issue. I asked Officer Numasaki.[1] I said, Officer, if you do an improper I.D., isn't it true that the final word on that is with the judge? And he said yes. . . .
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> [DEFENSE COUNSEL]: I object, Judge.
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> [DPA]: That was the testimony.
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> COURT: Overruled.
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> [DEFENSE COUNSEL]: That doesn't mean that what the witness said was accurate.
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> COURT: Overruled.
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> [DPA]: That's what he said.
>
> Officer Numasaki is no stranger to this procedure. If they blow it, the police don't have the last word, we don't have the last word, the Court has the last word.
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> [DEFENSE COUNSEL] I object, Your Honor. That's incorrect.
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> [DPA]: That was the testimony.
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> COURT: You want to move on?
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> [DPA]: I'm moving on, Your Honor. . . .

(Emphases added.) Arguing to the jury that if the "police blow it" the "court has the last word" in the context of an identification dispute would leave the jurors with the misleading impression that the evidence had the imprimatur of the court's

[1] The DPA incorrectly stated that he had asked that question of Officer Numasaki. In fact, that question was asked of Officer Everett in the prosecutor's voir dire examination with respect to the introduction of Defense Exhibit L. See supra page 1.

approval. In view of the court's dual overruling of Defendant's objection, the prosecution's argument would erroneously suggest to the jury that the identification procedure had been approved by the court, in opposition to the Defendant's apparent argument that the police had not properly followed their own identification guidelines.

The rebuttal argument also was clearly improper because any judicial pretrial ruling with respect to identification was irrelevant and immaterial to the question of identification the jury had to decide. By stating that the officer had responded affirmatively that if the police "do an improper I.D. . . . the final word is with the judge," the prosecution indicated that the jurors would not have been allowed to consider a faulty identification, thus presenting inadmissible suppression hearing matters to the jury.

Because the foregoing took place in rebuttal argument, there was no opportunity for the defense to respond.

It is incorrect that there is "no basis in the record to suggest that the jury inferred from the [prosecution's] argument that it was the province of the court to determine [Defendant's] identity," summary disposition order at 2, as the majority states, inasmuch as the basis from which such an inference would be drawn is the prosecution's argument itself and the court rulings that allowed it to be made. Nor is it an answer that standard instructions were given regarding the jury's role as fact finder, see id., for there was no instruction with

respect to identification evidence itself which would have overborne the improper argument. Further, the majority's reliance on substantial evidence presumes that no reversible error was committed; the existence of substantial evidence would be the basis for requiring retrial without violating the double jeopardy clause, not for curing the error. Finally, the harmless error standard relied on by the majority "requires an examination of the record and a determination of 'whether there is a reasonable possibility that the error complained of might have contributed to the conviction.'" State v. Rogan, 91 Hawai'i 405, 412, 984 P.2d 1231, 1238 (1999) (quoting State v. Balisbisana, 83 Hawai'i 109, 114, 924 P.2d 1215, 1220 (1996) (quoting State v. Holbron, 80 Hawai'i 27, 32, 904 P.2d 912, 917, reconsideration denied, 80 Hawai'i 187, 907 P.2d 773 (1995))) (emphasis added). Manifestly there was a reasonable possibility that the error contributed to the conviction.