DISSENTING OPINION BY NAKAYAMA, J.

I dissent from the majority's decision.

The majority concludes sua sponte that the jury instructions were "[p]lainly [e]rroneous," see Majority op. at 15 (emphasis omitted) and also id. at 15-16. It is, of course, well-established that instructional error, assuming it exists, is presumptively harmful; but it is equally true, as the majority notes, that Frisbee failed to make any objections to the jury instructions as given at trial. See e.g., Majority op. at 5 n.5. Thus, plain error becomes a potential issue, as the majority recognizes. However, Frisbee made no contention of plain error on appeal to the ICA, instead posing the question, "[d]id the [circuit] court commit error by not instructing the jury on the question of a merger of the charges?" (Emphasis added.) (Frisbee's emphasis omitted.) (Capitalization omitted.) The following instructive excerpt from his argument is, I believe, a fair summary of Frisbee's contentions:

> As the facts of this case unfolded it should have been apparent to this Court that a possible question as to whether the counts I and II should have merged and been presented to the jury. Clearly where there is one event and either one or another act would have made the offense the jury should have been presented with the question of whether the two counts should have merged. In this case the instructions were incomplete as they gave the legal definition for Counts I and II but they failed to consider whether, under the state of the facts that were presented to them, [HRS §] 701-109 was applicable and should have been considered. All that would have been necessary in this case would have been an interrogatory asking the jury if the kidnapping was from a single act over a period of time, or two separate acts.

(Emphasis added.) Nowhere within the foregoing excerpt, or

anywhere else in his opening brief, does Frisbee assert that, or otherwise explain how, the circuit court committed plain error -- an error that impacted his substantial rights.

Further, in "basically reargu[ing] his direct appeal[]" on certiorari, see Majority op. at 7, Frisbee does not assert that the circuit court or ICA plainly erred on his appeal to this court. Granted, it is fairly obvious from the entire record what the gravamen of Frisbee's appeal is (that the circuit court's failure to issue a merger instruction or clarifying jury interrogatory led to his conviction for two separate kidnapping offenses when, in his view, he should only have been convicted of one), notwithstanding the "indirect[]" path by which he arrives there. See Majority op. at 8. Nonetheless, I do not believe that the majority should be going out of its way to notice plain error by essentially inferring a claim of plain error from Frisbee's arguments. This may be permissible under, for example, Hawai'i Rules of Appellate Procedure Rule 40.1(d) (2006) ("[t]he supreme court, at its option, may notice a plain error not presented[]"), and the inherent powers of this court, but as our jurisprudence clearly instructs, "[t]he plain error rule is a departure from the position usually presupposed by the adversary system that a party must look to his counsel to protect him and that he must bear the cost of the mistakes of his counsel."

State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 675 (1988) (quoting 3A Wright, Federal Practice and Procedure: Criminal 2d § 856 (1982) (footnote omitted)). As a result, "our power to deal with plain error is one to be exercised sparingly and with caution[,]" State v. Aplaca, 96 Hawai'i 17, 22, 25 P.3d 792, 797 (2001) (emphasis added).

Again, no plain error is being asserted here. Contrast e.g., State v. Matias, 102 Hawai'i 300, 305, 75 P.3d 1191, 1196 (2003) (defendant-appellant's specific assertion of plain error). Nor are we presented with a case where this court has elected to notice plain error sua sponte because of the particularly egregious and obviously harmful nature of the error. For example, in State v. Yamada, 99 Hawai'i 542, 57 P.3d 467 (2002), a special jury instruction, in pertinent part, directed the jury to return a guilty verdict for "EMED manslaughter" (manslaughter based upon extreme mental or emotional disturbance ("EMED")) if "one or more jurors believes or believe" that the prosecution had failed to disprove the EMED defense to first degree murder. See id. at 548, 57 P.3d at 473; see also HRS § 707-702(2) (1996 version) (EMED affirmative defense). This court noticed plain error sua sponte and vacated the defendant-appellant's manslaughter convictions because of the patently and prejudicially erroneous nature of the instruction, which excused

the jury of rendering a unanimous verdict as to EMED manslaughter and also "potentially allowed a single juror to highjack the proceedings and strong-arm the other eleven panel members into returning a verdict convicting Yamada of manslaughter." See id. at 551-52, 57 P.3d at 476-77; see also id. at 557-63, 57 P.3d at 482-88 (Acoba, J. concurring).

We do not have a Yamada-type situation here. As the majority notes, "Frisbee's proposed version of the instructions related to Counts I and II [(the separate kidnapping counts)] was materially identical to the version that was ultimately read to the jury." See Majority op. at 3 (emphases added) (footnote omitted). It was not until over two years after the jury found Frisbee guilty that Frisbee moved the circuit court to either dismiss his convictions of Counts I and II, or merge them into a single offense for purposes of sentencing. See Majority op. at 4. Inasmuch as Frisbee not only failed to object to the jury instructions as given, but also was fully cognizant of the two separate offenses inasmuch as he proposed materially identical jury instructions as to Counts I and II, I fail to see how the alleged error in this case rises to the extreme levels seen in Yamada or other cases in which this court has noticed plain error

sua sponte.[1] Therefore, I respectfully dissent.

I also write separately to reiterate my dissent in State v. Nichols, 111 Hawai'i 327, 342-48, 141 P.3d 974, 989-95 (2006) (Nakayama, J., concurring and dissenting, joined by Moon, C.J.), because I strongly disagree with the majority's statement that the trial courts have (sole) responsibility "for oversight of jury instructions regardless of attorneys' failure to object[.]" See majority op. at 15 (emphasis added).

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[1] See e.g., State v. Davia, 87 Hawai'i 249, 254, 953 P.2d 1347, 1352 (1998) (prosecution conceded, and this court held, that district court plainly erred by failing to ensure that defendant-appellant's no contest plea was knowingly and voluntarily made), and State v. Loa, 83 Hawai'i 335, 357-59, 926 P.2d 1258, 1280-82 (1996) (holding that circuit court plainly erred in allowing jury instruction for the nonexistent offense of "attempted reckless manslaughter" as a purported "lesser included offense" of attempted first degree murder, where defendant-appellant was convicted of the nonexistent offense).