DISSENTING OPINION BY NAKAYAMA, J.

I respectfully dissent. We have long held that argument by counsel is not evidence, and in this case, the prosecutor's rebuttal merely responded to defense counsel's closing argument.

The majority concludes that "the prosecutor's [closing] argument misstated the law" because "[i]t placed on Petitioner the burden of proving a special relationship between the Complainant and Petitioner and an immediacy in the event that the law did not require." Majority opinion at 34. The majority continues:

> Although the court did instruct the jury as to the elements of an attempted manslaughter defense, Respondent argued in effect that such a special relationship and immediacy were necessary to establish an extreme mental or emotional disturbance for which there was a reasonable explanation. Obviously such is not the case. The jury was not disabused of this error. Because Petitioner's counsel's objections to these arguments were overruled, the jury would reasonably perceive that the misstatement of the law was not incorrect.

Majority opinion at 34.

Because a determination of whether the prosecutor misstated the law requires an examination of the words used by the parties, I will begin by quoting the relevant portions of the trial proceedings. After reserving time for rebuttal, the prosecutor said the following in his closing argument:

> [PROSECUTION]: . . . [Jury] Instruction Number 22, this is where the law gets a little confusing, . . . because if you find that the defendant is guilty beyond a reasonable doubt of Attempted Murder, then you have to move onto this instruction here. If you find that he is not guilty of Attempted Murder, then you don't consider the Attempted Manslaughter. That's how the law is and I'll explain that in a moment here.
>
> If and only if you unanimously find that all of the elements of Attempted Murder in the Second Degree have been proven by the prosecution beyond a reasonable doubt, then you must consider whether at the time defendant attempted to cause the death of Christine E. Dietz he was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation.

> The reasonableness of the explanation shall be determined from the viewpoint of a person in defendant's situation under the circumstances of which defendant was aware, or as the defendant believed them to be. Again, that is a handful to try to break down and really understand what that means. I will try to explain it right now in as best terms as I can.
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> What that means is if you find that defendant is guilty, that the [prosecution] has proven him guilty of Attempted Murder in the Second Degree, then you need to ask yourself was he under the influence of extreme mental or emotional disturbance for which there's a reasonable explanation. You need to ask yourself that.
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> Again, if you don't find him guilty of attempted murder, then you don't ask yourself that. If you do, then you have to ask yourselves this. It gives you a definition of what reasonableness is. The reasonableness of the explanation shall be determined from the viewpoint of the person in the defendant's situation. In other words, you don't gauge how reasonable it is by what the defendant did. We know what he did. He shot her in the face. You have to put another person in the defendant's position and see what would another person under that circumstances, what would he do.
>
> How many jealous married husbands are there that's going after their ex-lovers and shooting them in the face? Is that a reasonable explanation? Is that reasonable to you? That is what you need to determine. If you find that's not reasonable, then the defendant is not entitled to the extreme mental emotional disturbance which there's a reasonable explanation. He's not entitled to this and you must find him guilty of Attempted Murder in the Second Degree.
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> Now, I need to tell you if you are unable to reach a unanimous agreement as to Attempted Murder in the Second Degree and you can't reach a unanimous agreement as to Manslaughter in the Second Degree, then you can't reach an agreement and you can find guilt or not guilty for either charge, but based upon the evidence that the [prosecution] has presented during this past week and a half, . . . I would argue to you that the evidence is overwhelming. I can't see--I can't give you my opinion, but based upon the evidence it is overwhelming and you must look at the evidence that was presented.

(Emphasis added.)

Subsequently, defense counsel said the following in his closing argument:

> [DEFENSE COUNSEL]: . . . [Extreme mental or emotional disturbance] basically requires that you find unanimously that the defendant was under extreme mental or emotional disturbance for which there's a reasonable explanation from the point of view of a person in [the defendant's] position.
>
> Now, [the defendant's] position was he walked in on

> his recent girlfriend's room and found her . . . screwing Derek Liburd. It is not that he was a jealous guy going back when he saw that happening that had a great effect on him. I ask you to look into your common sense. We're not talking about a video, movies or a magazine. When people walk in on someone that they still care about and they are having sex with someone else, it can be a very, very disturbing experience.
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> In order to find extreme emotional disturbance you will have to all agree . . . that the circumstances [the defendant] found himself in were for a person in his position would be understandable. Reasonable doesn't mean right. Reasonable doesn't mean it justifies it. Reasonable just means that you can understand it.
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> . . . What we're claiming is because of [the defendant's] state of mind upon coming upon these two having full-on sex, he lost it.
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> . . . .
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> . . . [S]o extreme mental emotional distress is not about losing control in the sense that you might go shishi in your pants or that you might fall on the floor because you can't walk anymore. That's physical control. We are talking about mental control. Was the stress or stimulus enough to reduce his culpability from murder to manslaughter?

(Emphases added.)

To illustrate the defendant's position that "he lost it" when he "[came] upon these two having full-on sex," defense counsel posited the following to the jury:

> [DEFENSE COUNSEL]: Let's look at what was really going on. What do guys trying to get a relationship going do? They help you know cook a few meals, go over to have a few meals, and if the person interested in likes champagne, they might bring some. If the person likes detective novels, they might bring some, and if the person likes cocaine, the guy might bring some. Doesn't make it right. Just what people do. Sending flowers, that's the kind of thing guys do when they're trying to get something going. Guys tend to think flowers are important to a woman. It is hard to say whether that is really true. Go to the hot tub, sure. Buy some groceries. Who wouldn't? This is the kind of thing a lot of guys do and there's nothing particular sinister about it.
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> You know, guys take the person they are trying to get together with to the Lodge at Koele even if it was just a kamaaina room. . . . I suppose guys take girls out on dates to movies and shows. I suppose they go to this and that, go out to dinner. In this case there might have been two dinners. . . . I think that shows what Miss Dietz was interested in.

(Emphasis added.)

Accordingly, defense counsel argued that the defendant was under EMED at the time of the shooting, as follows:

> [DEFENSE COUNSEL]: Now at this point I'd like to discuss the signs of extreme emotional or mental disturbance in [the defendant], the signs that could make you think that it actually is true, that you could understand it is true.
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> [The defendant] shouldn't have been walking into her apartment, but there's no evidence he thought they would be going at it on the bed like they were. Seeing people you care about actually having sex is very upsetting to many people.
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> The evidence that I saw indicates that [the defendant] shot Christy. . . . If [the defendant] had a cold-blooded plan, a cold-blooded plan, he had plenty of bullets to put a couple more in her and still shoot himself, but this wasn't planned as indicated[.]
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> [W]ouldn't you agree that for a person to shoot themselves as opposed to anyone else, that's a strong sign that person is under some kind of extreme emotional or mental disturbance. It is one thing to go somewhere and shoot a person or shoot them three times until they are dead and leave. That could be cold-blooded. Maybe yes, maybe no. It is a different case.
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> . . . Most people don't shoot themselves when they are feeling calm and cold and you can ask yourself from your experience whether that is right.
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> . . . .
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> You heard no testimony about any prior physical abuse of Miss Dietz. No fighting, no pushing her around. You did hear testimony about one verbal altercation that happened in November. That's all they could come up with because there hasn't been any. There hasn't been any physical abuse. There has not be any disorderly conduct. As Miss Dietz told you, there has not been any TRO. There hasn't been any anything, and sometimes in abusive relationships that culminate in violence you can see an escalating pattern, verbal abuse, physical abuse, . . . injury or death. This has happened on Maui a few times. That's not what we are looking at here. It didn't happen that way.
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> It seems very likely that . . . [the defendant] was under extreme emotional or mental disturbance at that time based upon where he was coming from. . . . Is it a reasonable explanation? Well, not if you are in a court of law trying to be found not guilty, but it is a reasonable explanation in terms of human behavior, hot blood crime of passion from the point of view of [the defendant] and the circumstances where he walks in on these two.
>
> Let's talk about Miss Dietz for a little bit. . . . Parts of her testimony were just simply not believable.
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> . . . .
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> Did [the defendant] bring the . . . beer during or after your intimate relationship? Don't recall[.]

> . . . .
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> What quality did you see in [the defendant] that made you want to change from friends to lovers? Well, no one quality. I like him. I thought he was a nice guy.
>
> . . . .
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> In order to continue to get drugs and the other benefits it is necessary for the person, the chump to think there's a relationship going on. I think you understand what I mean. If it is real clear that nothing is happening, people get discouraged. The fact is Christy had to lead [the defendant] on for him to continue taking care of her business for her. Now, that's fine, but again that's how [the defendant] . . . could think he had a relationship with this woman. Well, he did have a relationship. She's a user. He's a chump, but I don't think that's a relationship.
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> It is unlikely that's the relationship [the defendant] thought he was having back then. [The defendant] thought he had a girlfriend . . . . period.

(Emphases added.)

The majority quotes the prosecutor's rebuttal to the defendant's closing argument, majority opinion at 32-33, and points out that the defendant objected to the prosecutor's "'special relationship' and 'immediacy' argument," but was overruled and "[n]o curative instruction was given." Majority opinion at 36-37. In my view, no curative instruction was needed in light of defense counsel's portrayal of the facts of this case in his closing argument, as quoted above, and the prosecutor's rebuttal thereto.

With regard to the issue of whether there has been any misstatement of the law in the prosecutor's rebuttal, this court has indicated in State v. Rogan, 91 Hawai'i 405, 413, 984 P.2d 1231, 1239 (1999) that "[p]rosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities

presumably available to the office." However, this court has explained:

> With regard to the prosecution's closing argument, a prosecutor is "permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence. It is also within the bounds of legitimate argument for prosecutors to state, discuss, and comment on the evidence as well as to draw all reasonable inferences from the evidence." Quitoq, 85 Hawai'i at 145, 938 P.2d at 576 (quoting State v. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209, reconsideration denied, 83 Hawai'i 545, 928 P.2d 39 (1996) (citations omitted)). In other words, closing argument affords the prosecution (as well as the defense) the opportunity to persuade the jury that its theory of the case is valid, based upon the evidence adduced and all reasonable inferences that can be drawn therefrom. Quitoq, 85 Hawai'i at 145, 938 P.2d at 576.

Id. at 412-13, 984 P.2d at 1238-39. This court has also quoted with approval that the prosecutor may not only "base its closing argument on the evidence presented or reasonable inference[s] therefrom," but also "respond to comments by defense counsel which invite or provoke a response," as well as "denounce the activities of defendant and highlight the inconsistencies in defendant's argument." Clark, 83 Hawai'i at 305, 926 P.2d at 210 (quoting People v. Sutton, 631 N.E.2d 1326, 1335 (Ill. 1994)) (quotation marks omitted) (emphasis added); see State v. Mars, 116 Hawai'i 125, 142, 170 P.3d 861, 878 (App. 2007) ("Prosecutors have latitude to respond in rebuttal closing to arguments raised by defense counsel in their closing."). Accordingly, although "[a]rguments of counsel which misstate the law are subject to objection and to correction by the court[,]" State v. Mahoe, 89 Hawai'i 284, 290, 972 P.2d 287, 293 (1998) (citation, block format, and emphasis omitted), it has been said that "whenever the argument of defense counsel invites or provokes a response on the part of the prosecutor, defendant then cannot complain that

he has been prejudiced by such a response." People v. Reyes, 266 N.E.2d 539, 544 (Ill. App. Ct. 1970).

In the instant case, defense counsel's closing argument before the jury and the prosecutor's rebuttal thereto seem to dispute the reasonableness of a person's response to a given, but sudden, situation. As quoted above, defense counsel framed his closing argument around the issue of whether there exists "a reasonable explanation in terms of human behavior" sufficient to reduce attempted murder in the second degree to attempted manslaughter. (Emphasis added.) Defense counsel's closing argument in this case clearly and repeatedly emphasized the "relationship" that the defendant and Complainant shared. In so arguing, defense counsel attempted to paint a colorful picture for the jury that described an "intimate relationship" in order to emphasize that what the defendant did was a "hot blood crime of passion from the point of view of [the defendant]," and not simply a "cold-blooded plan." Consequently, the defendant's position appears to be that "because of [the defendant's] state of mind upon coming upon these two having full-on sex, he lost it."

The prosecutor responded to defense counsel's argument by drawing a hypothetical comparison between jealous lovers and a father who witnesses his own child being killed by a drunk driver. According to the prosecutor's hypothetical in his rebuttal, "[t]he killing by the drunk driver happened so instantly the father had no time to think. He reacted. He flipped out. He lost it." Comparatively, as the prosecutor

argued in its closing argument, "[h]ow many jealous married husbands are there that's going after their ex-lovers and shooting them in the face? Is that a reasonable explanation?"

In this regard, I would distinguish State v. Kupihea, 80 Hawai'i 307, 909 P.2d 1122 (1996), differently than the majority. See Majority opinion at 38-40. As the majority observes, "[i]n Kupihea, this court recognized that several courts considering this issue have ruled that hypothetical illustrations are 'arguably improper' but are not necessarily prejudicial." Majority opinion at 38. However, the majority distinguishes Kupihea from the instant case in the following ways: (1) "Respondent did not indicate that the special relationship and the immediate action were not necessary conditions or that they were unique and limited to the circumstances of that specific hypothetical, but in effect argued otherwise"; (2) unlike in this case, "the phrase 'complete loss of control' was only stated once by the prosecution" in Kupihea; and (3) the prosecutor misstated the law, "inasmuch as evidence of neither" a "special relationship" nor "an immediate violent reaction" was required. Majority opinion at 38-40.

As to the majority's first point, I do not read Kupihea to apply in the same way as the majority has applied it. This court stated in Kupihea that

> Kupihea argues that "it is error to say the mental or emotional disturbance must result in the total loss of self-control." However, taken in context, we do not believe that is what the prosecutor said. The prosecutor did not indicate that it was always necessary for the loss of control to be complete, but rather that, in the circumstance of the hypothetical, the loss happened to be complete.

80 Hawai'i at 317, 909 P.2d at 1132. Reading the excerpt[1] from the prosecutor's closing argument in Kupihea together with what this court stated reveals that this court did not impose upon the prosecution a requirement that it must "indicate that the special relationship and the immediate action were not necessary conditions or that they were unique and limited to the circumstances of that specific hypothetical[.]" Majority opinion at 38-39. Instead, this court simply addressed the defendant's argument that "it is error to say the mental or emotional disturbance must result in the total loss of self-control[,]" and ultimately concluded that the prosecutor's closing argument was construed by the court in a different way than what the defendant

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[1] The following is the excerpt of the prosecutor's closing argument in Kupihea:

> [The PROSECUTOR]: For example, this is just a hypothetical, but you maybe have a battered wife, repeatedly-
> [Defense objection, overruled]
> [The PROSECUTOR]: We have someone who is a battered wife, repeatedly abused. Say she gets abused one last time. Last straw. She gets beaten. And she lashes back. She is suffering from, in this particular instance, an extreme mental or emotional disturbance. There is [sic] extreme circumstances, she lashes back, grabs a knife in the kitchen, and she starts stabbing, boom, boom, boom, boom.
> [Defense objection.]
> THE COURT: Counsel, I believe in giving pretty much wide discretion with the attorneys during their closing arguments. Let's, of course, remind the jury that what the attorneys are saying is not evidence. Objection is overruled.
> [The PROSECUTOR]: In that instance, there may be a reasonable explanation for her state of mind, the extreme mental and emotional disturbance. In that instance, you might mitigate the murder. A complete loss of control, self-control.
> [DEFENSE COUNSEL]: Your Honor, I'll object. That misstates the law.

80 Hawai'i at 317, 909 P.2d at 1132 (emphasis and alterations in original).

was asserting. Kupihea, 80 Hawai'i at 317, 909 P.2d at 1132.

As to the majority's second and third points, it is clear from context that the prosecutor's hypothetical in this case was made in response to defense counsel's analogy between a "hot blood crime of passion" and a "cold-blooded plan," as well as his colorful description of the "intimate relationship" the defendant and Complainant shared. At the conclusion of the hypothetical, the prosecutor drew an analogy between its "example" and the case at bar to persuade the jury that defense counsel's comparison between a "hot blood crime of passion" and a "cold-blooded plan" was not a reasonable explanation.

Moreover, the prosecutor's "immediacy" argument that "[t]he killing by the drunk driver happened so instantly the father had no time to think[,]" was clearly made in response to the defendant's position that "because of [the defendant's] state of mind upon coming upon these two having full-on sex, he lost it." Finally, even though the prosecutor said the words "special relationship" several times in its rebuttal, defense counsel's closing argument largely focused on describing the "intimate relationship" that the defendant and Complainant shared. Therefore, taken in context with the analogy that defense counsel posited to the jury during his closing argument, I can find no statements in the prosecutor's rebuttal that substantially prejudiced the defendant's right to a fair trial.

I also note that immediately prior to closing arguments, the circuit court instructed the jury, as follows:

> [THE COURT]: . . . Again, ladies and gentlemen, what the attorneys say is not evidence in the case. That does not mean you should disregard what they are telling you.

> Obviously, they are presenting their summation of what they believe the facts are in this case and what those facts indicate to you in the light most favorable to each of their positions, and often what the attorneys say is helpful to the jury in helping them understand, in comprehending the evidence which they have seen so far.

The defendant made two objections during the prosecutor's rebuttal, which the circuit court overruled, as follows: "Counsel, it is argument[,]" and "Counsel, it is argument of counsel. He's entitled to make his argument." In my view, this is clearly consistent with the court's prior instruction to the jury. Having heard the closing arguments and rebuttal of both counsel, the trial court put everything logically in context and ruled correctly.

Accordingly, I would hold that the defendant's assertion is without merit because defense counsel invited such a response from the prosecutor. See Clark, 83 Hawai'i at 305, 926 P.2d at 210.

For the foregoing reasons, I would affirm the ICA's July 5, 2007 judgment, which affirms the second circuit court's May 18, 2005 amended judgment of conviction.

Paula A. Nakayama