

CONCURRING OPINION BY NAKAMURA, C.J.

I concur separately because I believe that the prosecutor's closing argument was a fair comment on the evidence and was not improper. Therefore, although I reach the same result as the majority on this issue, I do so based on a different analysis.

In discussing a prosecutor's entitlement to argue and comment on the evidence in closing argument, the Hawai'i Supreme Court has stated:

[A] prosecutor, during closing argument, is permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence. Apilando, 79 Hawai'i at 141-42, 900 P.2d at 148 (citing State v. Zamora, 247 Kan. 684, 803 P.2d 568 (1990)) (other citations omitted). 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. See, e.g., State v. Abeyta, 120 N.M. 233, 901 P.2d 164, 177-78 (1995) ("Where the evidence presents two conflicting versions of the same events, 'a party may reasonably infer, and thus, argue, that the other side is lying.' " (Citations omitted.)); Ex parte Waldrop, 459 So.2d 959, 961 (Ala.1984) ("During closing argument, the prosecutor as well as defense counsel has a right to present his [or her] impressions from the evidence, if reasonable[,] and may argue every legitimate inference."); People v. Sutton, 260 Ill.App.3d 949, 197 Ill.Dec. 867, 876, 631 N.E.2d 1326, 1335 (1994) ("The prosecution may base its closing argument on the evidence presented or reasonable inference therefrom, respond to comments by defense counsel which invite or provoke response, denounce the activities of defendant and highlight the inconsistencies in defendant's argument.").

State v. Clark, 83 Hawai'i 289, 304-05, 926 P.2d 194, 209-10 (1996) (some brackets in original).

Defendant-Appellant Douglas R.M. Kaleikini, Jr. (Kaleikini) and co-defendant Christopher Calibuso (Calibuso) were tried together, and so the prosecutor had to make arguments about both Kaleikini and Calibuso in closing argument. The jury was instructed to "give separate consideration to the evidence applicable to each defendant."

The prosecutor's argument in closing that is challenged as improper was:

There are many reasons to commit a robbery. In this case we're aware of two reasons. One, for money; and two, because these defendants believed that Iao Valley is their mountain and that white boy didn't belong there.

Isolate and outnumber. Four against one. It is the same thing that all predators do.

(Emphasis added.)

The trial evidence included the following:

1. William Blake Gilmore (Blake), the robbery victim, testified that he was robbed while hiking on a trail in 'Iao Valley State Park by a group of four males that included Kaleikini, Calibuso, a "juvenile male," and another person. The four males blocked Blake's path on the mountain trail, two above and two below Blake. Calibuso locked Blake's arms behind Blake's back, and the juvenile male punched Blake in the mouth and demanded his wallet, while the others, including Kaleikini, were snickering and giggling. Blake escaped and ran down the mountain to seek help. When Blake later confronted Calibuso at the bottom of the trail, Calibuso took off his shirt and challenged Blake to a fight, saying, "come fight me white boy, one-on-one." Calibuso also stated, "stay off my mountain. I don't know why you white people come and try and get on our mountain. We own this place. Go back to where you came from."

2. William Daniel Gilmore (Daniel), Blake's father, testified that after learning that his son had been attacked, Daniel encountered the four males, including Kaleikini, on the trail. Daniel asked the four males whether they were involved or knew who had been involved in the incident with his son. In response, Kaleikini appeared to be offended and said something to the effect of "who do you think you are accusing us of this; and you shouldn't even be up here on our mountain."

3. Weston Gilmore (Weston), Blake's brother, testified that when his father confronted the four males on the

trail, Kaleikini stated, "this is our mountain, you guys don't belong here and you shouldn't be up here."

The evidence showed that Kaleikini and Calibuso shared the same view that 'Īao Valley was their mountain and that Blake and the other members of the Gilmore family were intruders who should have stayed away. Both Kaleikini and Calibuso stated that 'Īao Valley is "our" mountain and that Blake and his family did not belong there. In this context, Calibuso referred to Blake as "white boy" and Blake's family as "you white people." The evidence further showed that Kaleikini and Calibuso were long-time friends who had engaged in a concerted action to rob Blake -- the "white boy" -- on the 'Īao Valley trail.

In my view, the prosecutor's argument that "these defendants believed that Iao Valley is their mountain and that white boy didn't belong there" fell within the wide latitude given to prosecutors to discuss the evidence. It was a fair comment on the evidence based on the prosecutor's impressions from the evidence and reasonable inferences from the evidence. Accordingly, I do not believe that the prosecutor's argument was improper or constituted misconduct. I join in the majority's decision in all other respects.

*Craig H. Nakamura*