CONCURRING AND DISSENTING OPINION BY REIFURTH, J.

I concur with the majority in its conclusions that the Circuit Court did not abuse its discretion in allowing Detective Stigerts to testify, and that the prosecutor did not commit misconduct in describing McKinley's conduct as "sex trafficking" or in comparing McKinley's actions to slavery. I respectfully dissent, however, as to the majority's conclusion that it nevertheless constituted misconduct that prejudiced McKinley's right to a fair trial in that context for the prosecutor to encourage the jurors to consider that CW was somebody's daughter, somebody's friend, a woman, and a person.

McKinley argues that the State's comment impermissibly "induced the jurors to render a verdict based on their sympathy or emotions[,]" instead of the evidence and the law. Based on the majority's own analysis of the "sex trafficking" and "slavery" comments, however, I believe that argument at this point to be without merit. Accordingly, I would affirm.

"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." *State v. Basham*, 132 Hawai‘i 97, 118, 319 P.3d 1105, 1126 (2014) (brackets omitted) (quoting *State v. Rogan*, 91 Hawai‘i 405, 413, 984 P.2d 1231, 1239 (1999)). Moreover, "the prosecution is given 'wide latitude' during *rebuttal* closing to respond to comments by defense counsel." *State v. Acker*, 133 Hawai‘i 253, 281, 327 P.3d 931, 959 (2014) (emphasis added) (citing *State v. Mars*, 116 Hawai‘i 125, 142, 170 P.3d 861, 878 (App. 2007)). "The prosecution may base its closing argument on the evidence presented or reasonable inferences therefrom, respond to comments by defense counsel which invite or provoke response, denounce the activities of the defendant and highlight inconsistencies in defendant's argument." *Id.* at 280, 327 P.3d at 958 (quoting *Mars*, 116 Hawai‘ at 142, 170 P.3d at 878). "Because the line between permissible and impermissible arguments will not always be clear, the inquiry is necessarily contextual." *State v. Conroy*, No. CAAP-12-0000537, 2016 WL 3524605, at *4 (Hawai‘i App.

June 27, 2016) (quoting *United States v. Moore*, 651 F.3d 30, 53 (D.C. Cir. 2011)).

Here, the State's closing argument regarding the fact that "[the CW is] somebody's daughter, she's somebody's friend, she's a mother, she's a woman, she is a person, and she deserves to be treated properly" follows logically from the State's previous statement regarding the use of the term "sex trafficking" in lieu of "prostitution," which the majority and I agree was not a reversible statement constituting plain error. As the majority acknowledges, however, the State's theory of the case was "that McKinley used the threat of violence to force CW to continue prostituting against her will and treated CW as his 'property,'" which was "a characterization that CW introduced herself,". In context, then, the State's argument does not attempt to appeal to emotions, but to show the following logical relationship, drawn from reasonable inferences in evidence: that prostitution is a form of sex trafficking; sex trafficking is a form of modern-day slavery, where people are treated as property instead of people; CW is not property, but is "somebody's daughter, she's somebody's friend, she's a mother, she's a woman, she is a person, and she deserves to be treated properly"; so McKinley's violent and demeaning treatment of CW as such was not something that CW deserved.

Moreover, I disagree with the majority's discussion likening the statement at issue here to the State's comments in *Rogan* referring to the defendant as "some black military guy" and characterizing the incident as "every mother's nightmare." *See id.* at 414, 984 P.2d at 1240. Indeed, *Rogan* is distinguishable from this case because, although the perpetrator's identity was not at issue, the State's comments "raised the issue of and cast attention to [defendant]'s race," which was intended to "stimulate racial prejudice" and "foster jury bias through racial stereotypes and group predilections, thereby promoting an atmosphere that is inimical to the consideration of the evidence adduced at trial." *Id.* In contrast, the record in this case reveals no reference to the race of either party. Additionally,

no analogy should be drawn between *Rogan*'s comment, "every mother's nightmare," and the comment at issue here, that "she's somebody's daughter, she's somebody's friend, she's a mother, she's a woman, she is a person," because there is no implied invitation for the jury to place themselves in the CW's position. Rather, the State merely demonstrates the connection between prostitution and the dehumanization of an individual, which is a theme that CW herself introduced at trial.

The record is replete with evidence that: CW is the mother of two children, a girl and a boy, had been pregnant at the time of her arrest, and claimed to have told the defendant about her suspicion before the pregnancy was confirmed; CW was born and raised in Alaska, her family still lives in Alaska, CW's mom helps to take care of CW's children in Alaska; and that CW had at least one friend, named Erica, who traveled with the CW to San Diego before they parted ways. As such, the statement that CW is "somebody's daughter, . . . somebody's friend, [and] a mother," are supported by evidence admitted at trial, and McKinley would have had an "opportunity to rebut the allegation[s] with evidence" had he chosen to do so. *State v. Marsh*, 68 Haw. 659, 660-61, 728 P.2d 1301, 1302 (1986); *see also Rogan*, 91 Hawai‘i at 414, 984 P.2d at 1240 (finding that the State's comment was improper where it "had the potential of distracting the jury from considering only the evidence presented at trial"); *State v. Schnabel*, 127 Hawai‘i 432, 452, 279 P.3d 1237, 1257 (2012) ("The [prosecutor]'s statement . . . improperly 'invite[d] the jury to base its verdict on considerations other than the evidence in the case'" (quoting *Mars*, 116 Hawai‘i at 143, 170 P.3d at 879)); *Acker*, 133 Hawai‘i at 280, 327 P.3d at 958 (finding no prosecutorial misconduct where "there was a basis in the evidence for the [prosecutor]'s argument"). And the facts that CW is "a woman" and "a person" are self-evident facts that are commonly understood by lay persons and therefore should not be the basis for a finding of harmful misconduct. *State v. Thompson*, 318 P.3d 1221, 1245 (Utah Ct. App. 2014) (stating that "self-evident propositions," such as the fact that a 16-year-old

victim of forcible sodomy crimes will experience long-term effects from the crime, "have been held to be either permissible, or harmless").

Accordingly, the State's closing statement encouraging the jurors to see the CW as "somebody's daughter, she's somebody's friend, she's a mother, she's a woman, she is a person, and she deserves to be treated properly" does not rise to the level of prosecutorial misconduct, and the majority's three-prong harmlessness analysis is unnecessary.[1] *State v. Wakisaka*, 102 Hawai‘i 504, 515, 78 P.3d 317, 328 (2003) ("Even if the prosecution [makes an improper statement], we will not overturn a defendant's conviction if the prosecution's misconduct was harmless beyond a reasonable doubt."); *State v. Carvalho*, 106 Hawai‘i 13, 16 n.7, 100 P.3d 607, 610 n.7 (App. 2004) ("Prosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a

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[1/] Even if the three-prong analysis was warranted, I would hold that the statement at issue was, in fact, harmless beyond a reasonable doubt.

The majority would hold that the State's comment was *not* harmless based on its three-part analysis. First, the majority concludes that the "nature of the conduct" weighs in favor of McKinley because the singular remark during the State's rebuttal closing argument "invited the jury to render a verdict based on facts irrelevant to whether McKinley was guilty or innocent of the offenses charged[.]" Second, the majority states that because "the circuit court overruled [McKinley's] objection and did not give a curative instruction[,]" the second factor "weighs heavily in favor of McKinley." And third, the majority asserts that it "cannot say that the State's evidence was so overwhelming as to outweigh the inflammatory effect of the States's comments during [rebuttal-]closing argument."

While I agree that the second factor weighs in McKinley's favor, for the reasons outlined above, I would not agree that the first and third factors weigh in McKinley's favor. Indeed, the "nature of the conduct" was not particularly egregious, *cf., e.g., Basham*, 132 Hawai‘i at 111, 319 P.3d at 1119 ("The prosecutor's misstatement of the law . . . 'bore directly' on [defendant]'s alleged accomplice liability." (citing *State v. Espiritu*, 117 Hawai‘i 127, 144, 176 P.3d 885, 902 (2008))); *Schnabel*, 127 Hawai‘i at 453, 279 P.3d at 1258 (explaining that misconduct is usually not harmless when it implicates the defendant's constitutional rights); *State v. Walsh*, 125 Hawai‘i 271, 296, 260 P.3d 350, 375 (2011) ("When the misconduct attacks the credibility of the *defendant*, this first factor has been weighed in favor of remanding for a new trial." (collecting cases in which the misconduct infringes upon a defendant's constitutional rights and was found not to be harmless)), and, despite the fact that the record contains witness testimony that contradicts portions of the CW's own testimony, there was ample evidence to support McKinley's conviction under HRS § 712-1201(1)(a).

fair trial." (quoting *State v. McGriff*, 76 Hawai‘i 148, 158, 871 P.2d 782, 792 (1994)).[2] Therefore, I would affirm.

[2/] *Compare Schnabel*, 127 Hawai‘i at 452, 279 P.3d at 1257 ("Having determined that the [prosecutor]'s statements amounted to misconduct, we must decide whether the misconduct warrants vacation."); *with State v. Mainaaupo*, 117 Hawai‘i 235, 258, 178 P.3d 1, 24 (2008) ("[W]e do not believe that the [prosecutor]'s comments . . . . were improper[,] and, consequently, we do not address whether they were harmless beyond a reasonable doubt.").