

**Electronically Filed
Supreme Court
SCMF-11-0000315
10-FEB-2012
12:48 PM**

SCMF-11-0000315

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the Publication and Distribution
of the
Hawai'i Pattern Jury Instructions - Criminal

ORDER APPROVING PUBLICATION AND DISTRIBUTION
OF HAWAI'I PATTERN JURY INSTRUCTIONS - CRIMINAL
(By: Recktenwald, C.J., Nakayama, Acoba, Duffy, and McKenna, JJ.)

Upon consideration of the request of the Standing
Committee on Pattern Criminal Jury Instructions to publish and
distribute the (1) addition of Criminal Instruction 5.07 and
(2) revision of Criminal Instructions 7.02A, 9.00, 9.21A, 10.00,
10.45, and 10.45A of the Hawai'i Pattern Jury Instructions -
Criminal,

IT IS HEREBY ORDERED, that the request is granted and
the attached criminal jury instructions 5.07, 7.02A, 9.00, 9.21A,
10.00, 10.45, and 10.45A are approved for publication and
distribution.

IT IS FURTHER ORDERED that this approval for publication and distribution is not and shall not be considered by this court or any other court to be an approval or judgment as to the validity or correctness of the substance of any instruction.

DATED: Honolulu, Hawai'i, February 10, 2012.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Simeon R. Acoba, Jr.

/s/ James E. Duffy, Jr.

/s/ Sabrina S. McKenna



5.07. Count Removed From Jury Consideration: Generic

The charge of (specify offense) in Count (count number) has been removed from your consideration and is no longer before you for decision.

Do not concern yourself with this development and do not speculate about it.

The removal of Count (count number) must not influence your consideration as to whether the Defendant is not guilty or guilty of [any of] the remaining count(s).

Note

This instruction is appropriate when a count has been removed from jury consideration prior to the commencement of deliberations.

7.02A. Defense Of Others When Deadly Force Is At Issue.

Section 1 - Defense; Issues; Burden of Proof

Defense of others is a defense to the charge(s) of (specify charge and its included offenses). Defense of others involves consideration of two issues. First, you must determine whether the defendant did or did not use “deadly force.” Second, you must determine whether the force used was justifiable. The burden is on the prosecution to prove beyond a reasonable doubt that the force used by the defendant was not justifiable. If the prosecution does not meet its burden, then you must find the defendant not guilty.

Section 2 - First Issue; Definitions

The first issue is: Did the defendant use “deadly force?”

“Deadly Force” means force which the defendant uses with the intent of causing, or which he/she knows to create a substantial risk of causing, death or serious bodily injury.

“Force” means any bodily impact, restraint, or confinement, or the threat thereof.

[“Serious bodily injury” means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.]

[Intentionally firing a firearm in the direction of another person or in the direction which the person is believed to be constitutes deadly force.]

[A threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor’s intent is limited to creating an apprehension that he/she will use deadly force if necessary, does not constitute deadly force.]

Section 3 - Transition to Second Issue

If you determine that the defendant used “deadly force,” then you are to proceed to the section in this instruction entitled “Deadly Force Used.” If you determine that the defendant did not use “deadly force,” then you are to proceed to the section in this instruction entitled “Deadly Force Not Used.” You must then follow the law in the applicable section to determine the second issue, which is whether the force used by the defendant was justifiable.

“Deadly Force” Used

Section 4 - When Deadly Force is Justifiable

The use of deadly force upon or toward another person is justifiable to protect a third person if, under the circumstances as the defendant reasonably believes them to be, the third person would be justified in using deadly force to protect himself/herself on the present occasion against [death] [serious bodily injury] [kidnapping] [rape] [forcible sodomy] and the defendant reasonably believes that his/her intervention is immediately necessary to protect the third person. The reasonableness of the defendant’s belief that the use of deadly force was immediately necessary shall be determined from the viewpoint of a reasonable person in the defendant’s position under the circumstances of which the defendant was aware or as the defendant reasonably believed them to be when the deadly force was used. [The defendant’s belief that the use of deadly force was immediately necessary may be mistaken, but reasonable.]

Section 5 - When Deadly Force is Not Justifiable: Third Person Provoked Use of Force

[The use of deadly force to protect a third person is not justifiable if the defendant reasonably believes that the third person, with the intent of causing death or serious bodily injury, provoked the use of force against himself/herself in the same encounter.]

Section 6 - When Deadly Force is Not Justifiable: Defendant’s Duty to Retreat, Surrender Possession, or Comply with Demand

(The next three paragraphs concern the defendant’s general duty to retreat and its two exceptions.)

[The use of deadly force to protect a third person is not justifiable if the defendant knows that, by retreating, he/she can: (1) avoid the necessity of using such force with complete safety; and (2) secure the complete safety of the third person.]

[The defendant is not required to retreat from [his/her own] [the third person’s] dwelling unless he/she was the initial aggressor. “Dwelling” means any building or structure, though movable or temporary, or a portion thereof, which is for the time being a home or place of lodging.]

[The defendant is not required to retreat from [his/her own] [the third person’s] place of work unless he/she was [the initial aggressor] [assailed in [his/her own] [the third person’s] place of work by another person whose place of work the defendant knows it to be].

(The next three paragraphs concern situations in which the defendant would be obligated to retreat while in his/her or the third person’s dwelling or place of work.)

[The use of deadly force to protect a third person is not justifiable if the defendant is the initial aggressor in [his/her own] [the third person's] dwelling and knows that, by retreating, he/she can: (1) avoid the necessity of using such force with complete safety; and (2) secure the complete safety of the third person. "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is for the time being a home or place of lodging.]

[The use of deadly force to protect a third person is not justifiable if the defendant is the initial aggressor in [his/her own] [the third person's] place of work and knows that, by retreating, he/she can: (1) avoid the necessity of using such force with complete safety; and (2) secure the complete safety of the third person.]

[The use of deadly force to protect a third person is not justifiable if the defendant is assailed in [his/her own] [the third person's] place of work by another person whose place of work the defendant knows it to be and the defendant knows that, by retreating, he/she can: (1) avoid the necessity of using such force with complete safety; and (2) secure the complete safety of the third person.]

[The use of deadly force to protect a third person is not justifiable if the defendant knows that, by surrendering possession of a thing to a person asserting a claim of right thereto he/she can: (1) avoid the necessity of using such force with complete safety; and (2) secure the complete safety of the third person.]

[The use of deadly force to protect a third person is not justifiable if the defendant knows that, by complying with a demand that he/she abstain from any action which he/she has no duty to take, he/she can: (1) avoid the necessity of using such force with complete safety; and (2) secure the complete safety of the third person.]

(The next paragraph states an exception that may be applicable under the circumstances described in either of the preceding two paragraphs.)

[If the defendant is a [public officer justified in using force in the performance of his/her duties or a person justified in using force in his/her assistance] [person justified in using force in making an arrest or preventing an escape] he/she is not obliged to desist from efforts to [perform his/her duty] [effect the arrest or prevent the escape] because of resistance or threatened resistance by or on behalf of the person against whom the action is directed.]

Section 7 - When Deadly Force is Not Justifiable:

Third Person's Duty to Retreat, Surrender Possession, or Comply with Demand

(The next three paragraphs concern the third person's general duty to retreat and its two exceptions.)

[The use of deadly force to protect a third person is not justifiable if the third person

knows that he/she can avoid the necessity of using such force with complete safety by retreating, the defendant knows that he/she can obtain the third person's complete safety by causing the third person to retreat, and the defendant does not try to cause the third person to retreat.]

[The third person is not required to retreat from [his/her own] [the defendant's] dwelling unless he/she was the initial aggressor. "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is for the time being a home or place of lodging.]

[The third person is not required to retreat from [his/her own] [the defendant's] place of work unless he/she was [the initial aggressor] [assailed in [his/her own] [the defendant's] place of work by another person whose place of work the ~~defendant~~ third person knows it to be].

(The next three paragraphs concern situations in which the third person would be obligated to retreat while in his/her or the defendant's dwelling or place of work.)

[The use of deadly force to protect a third person is not justifiable if the third person is the initial aggressor in [his/her own] [the defendant's] dwelling and knows that he/she can avoid the necessity of using such force with complete safety by retreating, the defendant knows that he/she can obtain the third person's complete safety by causing the third person to retreat, and the defendant does not try to cause the third person to retreat. "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is for the time being a home or place of lodging.]

[The use of deadly force to protect a third person is not justifiable if the third person is the initial aggressor in [his/her own] [the defendant's] place of work and knows that he/she can avoid the necessity of using such force with complete safety by retreating, the defendant knows that he/she can obtain the third person's complete safety by causing the third person to retreat, and the defendant does not try to cause the third person to retreat.]

[The use of deadly force to protect a third person is not justifiable if the third person is assailed in [his/her own] [the defendant's] place of work by another person whose place of work the third person knows it to be and the third person knows that he/she can avoid the necessity of using such force with complete safety by retreating, the defendant knows that he/she can obtain the third person's complete safety by causing the third person to retreat, and the defendant does not try to cause the third person to retreat.]

[The use of deadly force to protect a third person is not justifiable if the third person knows that he/she can avoid the necessity of using such force with complete safety by surrendering possession of a thing to a person asserting a claim of right thereto, the defendant knows that he/she can obtain the third person's complete safety by causing the third person to do so, and the defendant does not try to cause the third person to do so.]

[The use of deadly force to protect a third person is not justifiable if the third person

knows that he/she can avoid the necessity of using such force with complete safety by complying with a demand that he/she abstain from any action which he/she has no duty to take, the defendant knows that he/she can obtain the third person's complete safety by causing the third person to do so, and the defendant does not try to cause the third person to do so.]

(The next paragraph states an exception that may be applicable under the circumstances described in either of the preceding two paragraphs.)

[If the third person is a [public officer justified in using force in the performance of his/her duties or a person justified in using force in his/her assistance] [person justified in using force in making an arrest or preventing an escape] he/she is not obliged to desist from efforts to [perform his/her duty] [effect the arrest or prevent the escape] because of resistance or threatened resistance by or on behalf of the person against whom the action is directed.]

“Deadly Force” Not Used

Section 8 - When Force is Justifiable

The use of force upon or toward another person is justifiable to protect a third person if, under the circumstances as the defendant reasonably believes them to be, the third person would be justified in using force to protect himself/herself on the present occasion against the use of unlawful force by the other person and the defendant reasonably believes that his/her intervention is immediately necessary to protect the third person. The reasonableness of the defendant's belief that the use of force was immediately necessary shall be determined from the viewpoint of a reasonable person in the defendant's position under the circumstances of which the defendant was aware or as the defendant reasonably believed them to be. The defendant may estimate the necessity for the use of force under the circumstances as he/she reasonably believes them to be when the force is used, without [retreating] [surrendering possession] [doing any other act that he/she has no legal duty to do] [abstaining from any lawful action]. [The defendant's belief that the use of force was immediately necessary may be mistaken, but reasonable.]

Section 9 - When Force is Not Justifiable:

Third Person Resisting Arrest or Force Used Under Claim of Right

[The use of force to protect a third person is not justifiable if the defendant reasonably believes that the third person is resisting an arrest the third person knows is being made by a law enforcement officer, even if the arrest is unlawful, but is justifiable if the defendant reasonably believes that the officer is threatening to use or using unlawful force.]

[The use of force to protect a third person is not justifiable if the defendant reasonably believes that the third person is resisting force used by the occupier or possessor of property or by another person on his/her behalf, where the third person knows that the person using force is doing so under a claim of right to protect the property, but is justifiable if the defendant

reasonably believes that the third person [is a public officer acting in the performance of his/her duties or a person lawfully assisting him/her therein] [is a person making or assisting in a lawful arrest] [believes that such force is necessary to protect himself/herself against death or serious bodily injury.]

Section 10 - Confinement

[The use of confinement as force to protect a third person is justifiable only if the defendant takes all reasonable measures to terminate the confinement as soon as he/she knows that he/she safely can, unless the person confined has been arrested on a charge of crime.]

Section 11 - Definitions

"Force" means any bodily impact, restraint, or confinement, or the threat thereof.

"Unlawful force" means force which is used without the consent of the person against whom it is directed and the use of which would constitute an unjustifiable use of deadly force or force. A person cannot consent to the infliction of death, serious bodily injury, or substantial bodily injury.

"Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

"Substantial bodily injury" means bodily injury which causes: [A major avulsion, laceration, or penetration of the skin] [a burn of at least second degree severity] [a bone fracture] [a serious concussion] [a tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs].

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

Section 12 - Defense Not Available

[Defense of others is not available for the offense(s) of (specify any offense in which the requisite state of mind is either recklessness or negligence) if the prosecution proves that:

(1) the defendant was reckless in believing that he/she was justified in using deadly force or force to protect a third person against another person; or

(2) the defendant was reckless in acquiring or failing to acquire any knowledge or belief

which was material to the justifiability of his/her use of deadly force or force to protect a third person against another person.]

Notes

Instructions 7.02A & 7.02B incorporate the following Hawai'i decisions: State v. Van Dyke, 101 Hawai'i 377, 69 P.3d 88 (2003) (two-part inquiry required in cases where issues of "deadly force" or "force" are involved); State v. Augustin, 101 Hawai'i 127, 128, 63 P.3d 1097, 1098 (2002) (a defendant may have a mistaken, but reasonable, belief that the use of force is immediately necessary); and State v. Mark, 120 Hawai'i 499, 210 P.3d 22 (2009), *certiorari granted, affirmed* 123 Hawai'i 205, 231 P.3d 478 (2010) (portions of previous version of HAWJIC Instruction 7.02 involving "provocation" and "retreat" are incorrect statements of law).

The court may find it helpful to substitute the names of the complainant or decedent and the person sought to be protected for "another person" and "the third person," respectively, in the text of the instruction.

Commentary

H.R.S. § 703-305 provides for "use of force for the protection of other persons." "This section extends the defense of justification to include the use of physical force to protect another person on the same terms as the defense is available for the use of force in self-protection." Commentary to H.R.S. § 703-305 (1972). H.R.S. § 703-300 defines "believes," "force," "unlawful force" and "deadly force." H.R.S. § 703-305 follows Model Penal Code § 3.05 in allowing defense of others regardless of the relationship between the actor and the person protected. Commentary to H.R.S. § 703-305 (1972).

Thus, under H.R.S. § 703-305, the use of force upon another is justifiable to protect a third person if (1) under the circumstances known to the actor, the actor reasonably believes the third person would be justified in using self-protective force, and (2) the actor believes the actor's intervention is necessary to protect the third person. *State v. Pavao*, 81 Hawai'i 142, 913 P.2d 553 (App. 1996).

H.R.S. §§ 701-115 and 702-205 make clear that defense of others is an ordinary defense, and once the issue is raised, the prosecution has the burden of negating the defense beyond a reasonable doubt. The self defense cases requiring an instruction on the prosecutor's burden of disproving self-defense also apply to defense of others. *Raines v. State*, 79 Hawai'i 219, 900 P.2d 1286 (1995) (where jury has been given instructions on defense other than affirmative defense, but has not been instructed that prosecution bears burden of proof beyond reasonable doubt with respect to negating that defense, substantial rights of defendant may be affected and plain error may be noticed (overruling *State v.*

McNulty, 60 Haw. 259, 588 P.2d 438 (1978)); *State v. Inoue*, 3 Haw.App. 217, 646 P.2d 983 (1982); *State v. Carson*, 1 Haw.App. 214, 617 P.2d 573 (1980). The Commentary to HAWJIC 7.01 also discusses related justification principles.

Similarly, the cases entitling a defendant to an instruction on self-defense if there is any evidence before the jury "bearing on that issue, no matter how weak, unsatisfactory or inconclusive it might appear to the court," also apply to defense of others. See *State v. Unea*, 60 Haw. 504, 505, 591 P.2d 615, 616 (1979); *State v. Riveira*, 59 Haw. 148, 577 P.2d 793 (1978); *State v. Santiago*, 53 Haw. 254, 492 P.2d 657 (1971). The instruction should be given even if it is inconsistent with an alternate theory of defense, such as accident, *Santiago*, 53 Haw. 254, 492 P.2d 657, or that the defendant never struck the complainant. *Pavao*, 81 Hawai'i 142, 913 P.2d 553.

The use of force to resist the unlawful use of force by a police officer during an arrest may, in certain circumstances, require additional instruction, particularly on the issue of what constitutes "unlawful force" within the context of an arrest. See, e.g., H.R.S. §§ 703-307 (use of force in law enforcement) and 803-7 (use of force in effectuating an arrest); see also *Territory v. Machado*, 30 Haw. 487 (1928).

Reprinted herein is H.R.S. Commentary on § 703-310.

[The Proposed Draft of the Penal Code employed a subjective standard for justification. As mentioned previously and in the Supplemental Commentary hereafter, the Legislature introduced an objective or "reasonable man" standard. The following commentary is based on the Proposed Draft. The Supplemental Commentary indicates that § 703-310 may be contrary to the Legislature's actual intent.]

Subsection (1) states that, where the actor is reckless or negligent in forming a belief about the existence of facts which would establish a justification for his conduct, he does not have a defense of justification for any crime as to which recklessness or negligence suffices to establish culpability. This rule seems to be required in light of the Code's subjective standards of justification, which have led to the omission of the requirement that the actor's belief be reasonable.

Subsection (2) denies the defense of justification in cases which the actor negligently or recklessly injures or creates a risk of injury to innocent persons. In such cases the actor may be prosecuted for a crime involving negligence or recklessness as the case may be.

For Commentary and Supplemental Commentary on H.R.S. § 703-310, see HAWJIC 7.01.

7.02A. Defense Of Others When Deadly Force Is At Issue.

Section 1 - Defense; Issues; Burden of Proof

Defense of others is a defense to the charge(s) of (specify charge and its included offenses). Defense of others involves consideration of two issues. First, you must determine whether the defendant did or did not use “deadly force.” Second, you must determine whether the force used was justifiable. The burden is on the prosecution to prove beyond a reasonable doubt that the force used by the defendant was not justifiable. If the prosecution does not meet its burden, then you must find the defendant not guilty.

Section 2 - First Issue; Definitions

The first issue is: Did the defendant use “deadly force?”

“Deadly Force” means force which the defendant uses with the intent of causing, or which he/she knows to create a substantial risk of causing, death or serious bodily injury.

“Force” means any bodily impact, restraint, or confinement, or the threat thereof.

[“Serious bodily injury” means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.]

[Intentionally firing a firearm in the direction of another person or in the direction which the person is believed to be constitutes deadly force.]

[A threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor’s intent is limited to creating an apprehension that he/she will use deadly force if necessary, does not constitute deadly force.]

Section 3 - Transition to Second Issue

If you determine that the defendant used “deadly force,” then you are to proceed to the section in this instruction entitled “Deadly Force Used.” If you determine that the defendant did not use “deadly force,” then you are to proceed to the section in this instruction entitled “Deadly Force Not Used.” You must then follow the law in the applicable section to determine the second issue, which is whether the force used by the defendant was justifiable.

“Deadly Force” Used

Section 4 - When Deadly Force is Justifiable

The use of deadly force upon or toward another person is justifiable to protect a third person if, under the circumstances as the defendant reasonably believes them to be, the third person would be justified in using deadly force to protect himself/herself on the present occasion against [death] [serious bodily injury] [kidnapping] [rape] [forcible sodomy] and the defendant reasonably believes that his/her intervention is immediately necessary to protect the third person. The reasonableness of the defendant’s belief that the use of deadly force was immediately necessary shall be determined from the viewpoint of a reasonable person in the defendant’s position under the circumstances of which the defendant was aware or as the defendant reasonably believed them to be when the deadly force was used. [The defendant’s belief that the use of deadly force was immediately necessary may be mistaken, but reasonable.]

Section 5 - When Deadly Force is Not Justifiable: Third Person Provoked Use of Force

[The use of deadly force to protect a third person is not justifiable if the defendant reasonably believes that the third person, with the intent of causing death or serious bodily injury, provoked the use of force against himself/herself in the same encounter.]

Section 6 - When Deadly Force is Not Justifiable: Defendant’s Duty to Retreat, Surrender Possession, or Comply with Demand

(The next three paragraphs concern the defendant’s general duty to retreat and its two exceptions.)

[The use of deadly force to protect a third person is not justifiable if the defendant knows that, by retreating, he/she can: (1) avoid the necessity of using such force with complete safety; and (2) secure the complete safety of the third person.]

[The defendant is not required to retreat from [his/her own] [the third person’s] dwelling unless he/she was the initial aggressor. “Dwelling” means any building or structure, though movable or temporary, or a portion thereof, which is for the time being a home or place of lodging.]

[The defendant is not required to retreat from [his/her own] [the third person’s] place of work unless he/she was [the initial aggressor] [assailed in [his/her own] [the third person’s] place of work by another person whose place of work the defendant knows it to be].

(The next three paragraphs concern situations in which the defendant would be obligated to retreat while in his/her or the third person’s dwelling or place of work.)

[The use of deadly force to protect a third person is not justifiable if the defendant is the initial aggressor in [his/her own] [the third person's] dwelling and knows that, by retreating, he/she can: (1) avoid the necessity of using such force with complete safety; and (2) secure the complete safety of the third person. "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is for the time being a home or place of lodging.]

[The use of deadly force to protect a third person is not justifiable if the defendant is the initial aggressor in [his/her own] [the third person's] place of work and knows that, by retreating, he/she can: (1) avoid the necessity of using such force with complete safety; and (2) secure the complete safety of the third person.]

[The use of deadly force to protect a third person is not justifiable if the defendant is assailed in [his/her own] [the third person's] place of work by another person whose place of work the defendant knows it to be and the defendant knows that, by retreating, he/she can: (1) avoid the necessity of using such force with complete safety; and (2) secure the complete safety of the third person.]

[The use of deadly force to protect a third person is not justifiable if the defendant knows that, by surrendering possession of a thing to a person asserting a claim of right thereto he/she can: (1) avoid the necessity of using such force with complete safety; and (2) secure the complete safety of the third person.]

[The use of deadly force to protect a third person is not justifiable if the defendant knows that, by complying with a demand that he/she abstain from any action which he/she has no duty to take, he/she can: (1) avoid the necessity of using such force with complete safety; and (2) secure the complete safety of the third person.]

(The next paragraph states an exception that may be applicable under the circumstances described in either of the preceding two paragraphs.)

[If the defendant is a [public officer justified in using force in the performance of his/her duties or a person justified in using force in his/her assistance] [person justified in using force in making an arrest or preventing an escape] he/she is not obliged to desist from efforts to [perform his/her duty] [effect the arrest or prevent the escape] because of resistance or threatened resistance by or on behalf of the person against whom the action is directed.]

Section 7 - When Deadly Force is Not Justifiable:

Third Person's Duty to Retreat, Surrender Possession, or Comply with Demand

(The next three paragraphs concern the third person's general duty to retreat and its two exceptions.)

[The use of deadly force to protect a third person is not justifiable if the third person

knows that he/she can avoid the necessity of using such force with complete safety by retreating, the defendant knows that he/she can obtain the third person's complete safety by causing the third person to retreat, and the defendant does not try to cause the third person to retreat.]

[The third person is not required to retreat from [his/her own] [the defendant's] dwelling unless he/she was the initial aggressor. "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is for the time being a home or place of lodging.]

[The third person is not required to retreat from [his/her own] [the defendant's] place of work unless he/she was [the initial aggressor] [assailed in [his/her own] [the defendant's] place of work by another person whose place of work the third person knows it to be].

(The next three paragraphs concern situations in which the third person would be obligated to retreat while in his/her or the defendant's dwelling or place of work.)

[The use of deadly force to protect a third person is not justifiable if the third person is the initial aggressor in [his/her own] [the defendant's] dwelling and knows that he/she can avoid the necessity of using such force with complete safety by retreating, the defendant knows that he/she can obtain the third person's complete safety by causing the third person to retreat, and the defendant does not try to cause the third person to retreat. "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is for the time being a home or place of lodging.]

[The use of deadly force to protect a third person is not justifiable if the third person is the initial aggressor in [his/her own] [the defendant's] place of work and knows that he/she can avoid the necessity of using such force with complete safety by retreating, the defendant knows that he/she can obtain the third person's complete safety by causing the third person to retreat, and the defendant does not try to cause the third person to retreat.]

[The use of deadly force to protect a third person is not justifiable if the third person is assailed in [his/her own] [the defendant's] place of work by another person whose place of work the third person knows it to be and the third person knows that he/she can avoid the necessity of using such force with complete safety by retreating, the defendant knows that he/she can obtain the third person's complete safety by causing the third person to retreat, and the defendant does not try to cause the third person to retreat.]

[The use of deadly force to protect a third person is not justifiable if the third person knows that he/she can avoid the necessity of using such force with complete safety by surrendering possession of a thing to a person asserting a claim of right thereto, the defendant knows that he/she can obtain the third person's complete safety by causing the third person to do so, and the defendant does not try to cause the third person to do so.]

[The use of deadly force to protect a third person is not justifiable if the third person

knows that he/she can avoid the necessity of using such force with complete safety by complying with a demand that he/she abstain from any action which he/she has no duty to take, the defendant knows that he/she can obtain the third person's complete safety by causing the third person to do so, and the defendant does not try to cause the third person to do so.]

(The next paragraph states an exception that may be applicable under the circumstances described in either of the preceding two paragraphs.)

[If the third person is a [public officer justified in using force in the performance of his/her duties or a person justified in using force in his/her assistance] [person justified in using force in making an arrest or preventing an escape] he/she is not obliged to desist from efforts to [perform his/her duty] [effect the arrest or prevent the escape] because of resistance or threatened resistance by or on behalf of the person against whom the action is directed.]

“Deadly Force” Not Used

Section 8 - When Force is Justifiable

The use of force upon or toward another person is justifiable to protect a third person if, under the circumstances as the defendant reasonably believes them to be, the third person would be justified in using force to protect himself/herself on the present occasion against the use of unlawful force by the other person and the defendant reasonably believes that his/her intervention is immediately necessary to protect the third person. The reasonableness of the defendant's belief that the use of force was immediately necessary shall be determined from the viewpoint of a reasonable person in the defendant's position under the circumstances of which the defendant was aware or as the defendant reasonably believed them to be. The defendant may estimate the necessity for the use of force under the circumstances as he/she reasonably believes them to be when the force is used, without [retreating] [surrendering possession] [doing any other act that he/she has no legal duty to do] [abstaining from any lawful action]. [The defendant's belief that the use of force was immediately necessary may be mistaken, but reasonable.]

Section 9 - When Force is Not Justifiable:

Third Person Resisting Arrest or Force Used Under Claim of Right

[The use of force to protect a third person is not justifiable if the defendant reasonably believes that the third person is resisting an arrest the third person knows is being made by a law enforcement officer, even if the arrest is unlawful, but is justifiable if the defendant reasonably believes that the officer is threatening to use or using unlawful force.]

[The use of force to protect a third person is not justifiable if the defendant reasonably believes that the third person is resisting force used by the occupier or possessor of property or by another person on his/her behalf, where the third person knows that the person using force is doing so under a claim of right to protect the property, but is justifiable if the defendant

reasonably believes that the third person [is a public officer acting in the performance of his/her duties or a person lawfully assisting him/her therein] [is a person making or assisting in a lawful arrest] [believes that such force is necessary to protect himself/herself against death or serious bodily injury.]

Section 10 - Confinement

[The use of confinement as force to protect a third person is justifiable only if the defendant takes all reasonable measures to terminate the confinement as soon as he/she knows that he/she safely can, unless the person confined has been arrested on a charge of crime.]

Section 11 - Definitions

"Force" means any bodily impact, restraint, or confinement, or the threat thereof.

"Unlawful force" means force which is used without the consent of the person against whom it is directed and the use of which would constitute an unjustifiable use of deadly force or force. A person cannot consent to the infliction of death, serious bodily injury, or substantial bodily injury.

"Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

"Substantial bodily injury" means bodily injury which causes: [A major avulsion, laceration, or penetration of the skin] [a burn of at least second degree severity] [a bone fracture] [a serious concussion] [a tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs].

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

Section 12 - Defense Not Available

[Defense of others is not available for the offense(s) of (specify any offense in which the requisite state of mind is either recklessness or negligence) if the prosecution proves that:

(1) the defendant was reckless in believing that he/she was justified in using deadly force or force to protect a third person against another person; or

(2) the defendant was reckless in acquiring or failing to acquire any knowledge or belief

which was material to the justifiability of his/her use of deadly force or force to protect a third person against another person.]

Notes

Instructions 7.02A & 7.02B incorporate the following Hawai'i decisions: State v. Van Dyke, 101 Hawai'i 377, 69 P.3d 88 (2003) (two-part inquiry required in cases where issues of "deadly force" or "force" are involved); State v. Augustin, 101 Hawai'i 127, 128, 63 P.3d 1097, 1098 (2002) (a defendant may have a mistaken, but reasonable, belief that the use of force is immediately necessary); and State v. Mark, 120 Hawai'i 499, 210 P.3d 22 (2009), *certiorari granted, affirmed* 123 Hawai'i 205, 231 P.3d 478 (2010) (portions of previous version of HAWJIC Instruction 7.02 involving "provocation" and "retreat" are incorrect statements of law).

The court may find it helpful to substitute the names of the complainant or decedent and the person sought to be protected for "another person" and "the third person," respectively, in the text of the instruction.

Commentary

H.R.S. § 703-305 provides for "use of force for the protection of other persons." "This section extends the defense of justification to include the use of physical force to protect another person on the same terms as the defense is available for the use of force in self-protection." Commentary to H.R.S. § 703-305 (1972). H.R.S. § 703-300 defines "believes," "force," "unlawful force" and "deadly force." H.R.S. § 703-305 follows Model Penal Code § 3.05 in allowing defense of others regardless of the relationship between the actor and the person protected. Commentary to H.R.S. § 703-305 (1972).

Thus, under H.R.S. § 703-305, the use of force upon another is justifiable to protect a third person if (1) under the circumstances known to the actor, the actor reasonably believes the third person would be justified in using self-protective force, and (2) the actor believes the actor's intervention is necessary to protect the third person. *State v. Pavao*, 81 Hawai'i 142, 913 P.2d 553 (App. 1996).

H.R.S. §§ 701-115 and 702-205 make clear that defense of others is an ordinary defense, and once the issue is raised, the prosecution has the burden of negating the defense beyond a reasonable doubt. The self defense cases requiring an instruction on the prosecutor's burden of disproving self-defense also apply to defense of others. *Raines v. State*, 79 Hawai'i 219, 900 P.2d 1286 (1995) (where jury has been given instructions on defense other than affirmative defense, but has not been instructed that prosecution bears burden of proof beyond reasonable doubt with respect to negating that defense, substantial rights of defendant may be affected and plain error may be noticed (overruling *State v.*

McNulty, 60 Haw. 259, 588 P.2d 438 (1978)); *State v. Inoue*, 3 Haw.App. 217, 646 P.2d 983 (1982); *State v. Carson*, 1 Haw.App. 214, 617 P.2d 573 (1980). The Commentary to HAWJIC 7.01 also discusses related justification principles.

Similarly, the cases entitling a defendant to an instruction on self-defense if there is any evidence before the jury "bearing on that issue, no matter how weak, unsatisfactory or inconclusive it might appear to the court," also apply to defense of others. See *State v. Unea*, 60 Haw. 504, 505, 591 P.2d 615, 616 (1979); *State v. Riveira*, 59 Haw. 148, 577 P.2d 793 (1978); *State v. Santiago*, 53 Haw. 254, 492 P.2d 657 (1971). The instruction should be given even if it is inconsistent with an alternate theory of defense, such as accident, *Santiago*, 53 Haw. 254, 492 P.2d 657, or that the defendant never struck the complainant. *Pavao*, 81 Hawai'i 142, 913 P.2d 553.

The use of force to resist the unlawful use of force by a police officer during an arrest may, in certain circumstances, require additional instruction, particularly on the issue of what constitutes "unlawful force" within the context of an arrest. See, e.g., H.R.S. §§ 703-307 (use of force in law enforcement) and 803-7 (use of force in effectuating an arrest); see also *Territory v. Machado*, 30 Haw. 487 (1928).

Reprinted herein is H.R.S. Commentary on § 703-310.

[The Proposed Draft of the Penal Code employed a subjective standard for justification. As mentioned previously and in the Supplemental Commentary hereafter, the Legislature introduced an objective or "reasonable man" standard. The following commentary is based on the Proposed Draft. The Supplemental Commentary indicates that § 703-310 may be contrary to the Legislature's actual intent.]

Subsection (1) states that, where the actor is reckless or negligent in forming a belief about the existence of facts which would establish a justification for his conduct, he does not have a defense of justification for any crime as to which recklessness or negligence suffices to establish culpability. This rule seems to be required in light of the Code's subjective standards of justification, which have led to the omission of the requirement that the actor's belief be reasonable.

Subsection (2) denies the defense of justification in cases which the actor negligently or recklessly injures or creates a risk of injury to innocent persons. In such cases the actor may be prosecuted for a crime involving negligence or recklessness as the case may be.

For Commentary and Supplemental Commentary on H.R.S. § 703-310, see HAWJIC 7.01.

9.00. Definitions of Terms Used in Chapter 9, Pattern Jury Instructions

'Bodily injury' means physical pain, illness, or any impairment of physical condition.

'Compulsion' means absence of consent, or a threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss.

'Dangerous instrument' means any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

'Deviate sexual intercourse' means any act of sexual gratification between a person and an animal or a corpse, involving the sex organs of one and the mouth, anus, or sex organs of the other.

'Married' includes persons legally married, and a male and female living together as husband and wife regardless of their legal status, but does not include spouses living apart.

'Mentally defective' means a person suffering from a disease, disorder, or defect which renders the person incapable of appraising the nature of his/her conduct.

'Mentally incapacitated' means a person rendered temporarily incapable of appraising or controlling his/her conduct owing to the influence of a substance administered to him/her without his/her consent.

'Physically helpless' means a person who is unconscious or for any other reason physically unable to communicate unwillingness to an act.

'Relative' means parent, ancestor, brother, sister, uncle, or legal guardian.

'Restrain' means to restrict a person's movement in such a manner as to interfere substantially with his liberty:

(a) by means of force, threat, or deception; or

(b) if the person is under the age of eighteen or incompetent, without the consent of the relative, person, or institution having lawful custody of him.

'Serious bodily injury' means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

'Sexual contact' means any touching, other than acts of 'sexual penetration', of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.

'Sexual penetration' means:

(1) Vaginal intercourse, anal intercourse, fellatio, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight, but emission is not required. "Genital opening" includes the anterior surface of the vulva or labia majora*; or

(2) Cunnilingus or anilingus, whether or not actual penetration has occurred.

'Strong compulsion' means the use of or attempt to use one or more of the following to overcome a person:

(a) a threat, express or implied, that places a person in fear of bodily injury to the individual or another person, or in fear that the person or another person will be kidnapped;

(b) a dangerous instrument; or

(c) physical force.

'Substantial bodily injury' means:

(a) a major avulsion, laceration, or penetration of the skin; or

(b) a burn of at least second degree severity; or

(c) a bone fracture; or

(d) a serious concussion; or

(e) a tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs.

Notes

*Definition of "genital opening" applicable to offenses occurring on or after June 22, 2006.

9.00. Definitions of Terms Used in Chapter 9, Pattern Jury Instructions

'Bodily injury' means physical pain, illness, or any impairment of physical condition.

'Compulsion' means absence of consent, or a threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss.

'Dangerous instrument' means any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

'Deviate sexual intercourse' means any act of sexual gratification between a person and an animal or a corpse, involving the sex organs of one and the mouth, anus, or sex organs of the other.

'Married' includes persons legally married, and a male and female living together as husband and wife regardless of their legal status, but does not include spouses living apart.

'Mentally defective' means a person suffering from a disease, disorder, or defect which renders the person incapable of appraising the nature of his/her conduct.

'Mentally incapacitated' means a person rendered temporarily incapable of appraising or controlling his/her conduct owing to the influence of a substance administered to him/her without his/her consent.

'Physically helpless' means a person who is unconscious or for any other reason physically unable to communicate unwillingness to an act.

'Relative' means parent, ancestor, brother, sister, uncle, or legal guardian.

'Restrain' means to restrict a person's movement in such a manner as to interfere substantially with his liberty:

(a) by means of force, threat, or deception; or

(b) if the person is under the age of eighteen or incompetent, without the consent of the relative, person, or institution having lawful custody of him.

'Serious bodily injury' means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

'Sexual contact' means any touching, other than acts of 'sexual penetration', of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.

'Sexual penetration' means:

(1) Vaginal intercourse, anal intercourse, fellatio, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight, but emission is not required. "Genital opening" includes the anterior surface of the vulva or labia majora*; or

(2) Cunnilingus or anilingus, whether or not actual penetration has occurred.

'Strong compulsion' means the use of or attempt to use one or more of the following to overcome a person:

(a) a threat, express or implied, that places a person in fear of bodily injury to the individual or another person, or in fear that the person or another person will be kidnapped;

(b) a dangerous instrument; or

(c) physical force.

'Substantial bodily injury' means:

(a) a major avulsion, laceration, or penetration of the skin; or

(b) a burn of at least second degree severity; or

(c) a bone fracture; or

(d) a serious concussion; or

(e) a tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs.

Notes

*Definition of "genital opening" applicable to offenses occurring on or after June 22, 2006.

9.21A. Assault in the Third Degree--Mutual Affray*: H.R.S. § 707-712(1)(a)

If you find that the prosecution has proven the offense of Assault in the Third Degree beyond a reasonable doubt, then you must also ~~[determine]~~ consider whether [the prosecution has proven beyond a reasonable doubt that] the fight or scuffle was ~~[not]~~ entered into by mutual consent, whether expressly or by conduct.

You must determine whether the prosecution has proven beyond a reasonable doubt that the fight or scuffle was not entered into by mutual consent. This determination must be unanimous and is to be indicated by answering 'Yes' or 'No' on a special interrogatory ~~[which]~~ that will be provided to you.

Notes

H.R.S. § 707-712(1)(a).

[*] When an Assault in the Third Degree instruction is submitted to the jury, the court must also submit a mutual affray instruction and special interrogatory where there is any evidence that the fight or scuffle was entered into by mutual consent. See instructions 9.21B and 9.21C.

The jury's answer to an interrogatory of this type, whether affirmative or negative, must be unanimous. See *State v. Peralto*, 95 Hawai'i 1, 18 P.3d 203 (2001); see also *State v. Yamada*, 99 Hawai'i 542, 57 P.3d 467 (2002).

State v. Kikuta, 125 Hawai'i 78, 253 P.3d 639 (2011) ("plain reading" of H.R.S. § 707-712(1)(a) "denotes that mutual affray requires both parties to have approved of, or agreed to, a fight or scuffle, whether expressly or by conduct").

9.21A. Assault in the Third Degree--Mutual Affray*: H.R.S. § 707-712(1)(a)

If you find that the prosecution has proven the offense of Assault in the Third Degree beyond a reasonable doubt, then you must also consider whether the fight or scuffle was entered into by mutual consent, whether expressly or by conduct.

You must determine whether the prosecution has proven beyond a reasonable doubt that the fight or scuffle was not entered into by mutual consent. This determination must be unanimous and is to be indicated by answering 'Yes' or 'No' on a special interrogatory that will be provided to you.

Notes

H.R.S. § 707-712(1)(a).

[*] When an Assault in the Third Degree instruction is submitted to the jury, the court must also submit a mutual affray instruction and special interrogatory where there is any evidence that the fight or scuffle was entered into by mutual consent. See instructions 9.21B and 9.21C.

The jury's answer to an interrogatory of this type, whether affirmative or negative, must be unanimous. See *State v. Peralto*, 95 Hawai'i 1, 18 P.3d 203 (2001); see also *State v. Yamada*, 99 Hawai'i 542, 57 P.3d 467 (2002).

State v. Kikuta, 125 Hawai'i 78, 253 P.3d 639 (2011) ("plain reading" of H.R.S. § 707-712(1)(a) "denotes that mutual affray requires both parties to have approved of, or agreed to, a fight or scuffle, whether expressly or by conduct").

10.00. Definitions of Terms Used in Chapter 10, Pattern Jury Instructions

“Another” means any other person and includes, where relevant, the United States, this State and any of its political subdivisions, and any other state and any of its political subdivisions. (The definition of this term is taken from HRS § 701-118)

“Building” includes any structure, and the term also includes any vehicle, railway car, aircraft, or watercraft used for lodging of persons therein; each unit of a building consisting of two or more units separately secured or occupied is a separate building.

“Cable television service” means one-way transmission of programming provided by, or generally considered comparable to programming provided by, a television broadcast station or other information made available by a cable operator to all subscribers generally.

“Cable television service device” means any mechanical or electronic instrument, apparatus, equipment or device which can be used to obtain cable television services without payment of applicable charges therefor. A “cable television service device” does not include any instrument, apparatus, equipment, device, facility or any component thereof furnished by a cable operator in the ordinary course of its business.

“Cardholder” means the person or organization named on the face of a credit card to whom or for whose benefit the credit card is issued by an issuer.

“Control over the property” means the exercise of dominion over the property and includes, but is not limited to, taking, carrying away, or possessing the property, or selling, conveying, or transferring title to or an interest in the property.

“Credit card” means any instrument or device, whether known as a credit card, credit plate, debit card, electronic benefits transfer card, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services, or anything else of value.

“Deception” occurs when a person knowingly:

(a) creates or confirms another's impression which is false and which the defendant does not believe to be true; or

(b) fails to correct a false impression which he previously has created or confirmed; or

(c) prevents another from acquiring information pertinent to the disposition of the property involved; or

(d) sells or otherwise transfers or encumbers property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether that

impediment is or is not valid, or is or is not a matter of official record; or

(e) promises performance which he/she does not intend to perform or knows will not be performed, but a person's intention not to perform a promise shall not be inferred from the fact alone that he/she did not subsequently perform the promise.

The term "deception" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or services in communications addressed to the public or to a class or group.

"Deprive" means:

(a) to withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstance that a significant portion of its economic value, or of the use and benefit thereof, is lost to him; or

(b) to dispose of the property so as to make it unlikely that the owner will recover it; or

(c) to retain the property with intent to restore it to the owner only if the owner purchases or leases it back, or pays a reward or other compensation for its return; or

(d) to sell, give, pledge, or otherwise transfer any interest in the property; or

(e) to subject the property to the claim of a person other than the owner.

"Distributes" means to sell, transfer, give or deliver to another, or to leave, barter, or exchange with another, or to offer or agree to do the same.

"Dwelling" means a building which is used or usually used by a person for lodging.

~~"Enter" means to have any intrusion into a motor vehicle with the whole physical body, with any part of the body, or with any instrument in contact with the body introduced for the purpose of committing a crime against a person or against property rights.~~

"Enter or remain unlawfully" means person "enters or remains unlawfully" in or upon premises when he/she is not licensed, invited, or otherwise privileged to do so. A person who, regardless of his/her intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he/she defies a lawful order not to enter or remain, personally communicated to him/her by the owner of the premises or some other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public.

“Expired credit card” means a credit card which is no longer valid because the term shown on the credit card has elapsed.

“Government” means the United States, or any state, county, municipality, or other political unit within territory belonging to the United States, or any department, agency, or subdivision of any of the foregoing, or any corporation or other association carrying out the functions of government, or any corporation or agency formed pursuant to interstate compact or international treaty. As used in this definition “state” includes any state, territory or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

“Intent to defraud” means:

- (a) an intent to use deception to injure another's interest which has value; or
- (b) knowledge by the defendant that he is facilitating an injury to another's interest which has value.

“Issuer” means the business organization or financial institution which issues a credit card or its agent.

“Obtain” means when used in relation to property, to bring about a transfer of possession or other interest, whether to the obtainer or to another.

“Owner” means a person, other than the defendant, who has possession of or any other interest in, the property involved, even though that possession or interest is unlawful; however, a secured party is not an owner in relation to a defendant who is a debtor with respect to property in which the secured party has only a security interest.

“Person,” “he,” “him,” “actor,” and “defendant” include any natural person, including any natural person whose identity can be established by means of scientific analysis, including but not limited to scientific analysis of deoxyribonucleic acid and fingerprints, whether or not the natural person’s name is known, and, where relevant, a corporation or an unincorporated association. (The definition of these terms is from HRS § 701-118)

“Premises” includes any building and any real property.

“Property” means any money, personal property, real property, thing in action, evidence of debt or contract, or article of value of any kind. Commodities of a public utility nature such as gas, electricity, steam, and water constitute property, but the supplying of such a commodity to premises from an outside source by means of wires, pipes, conduits, or other equipment shall be deemed a rendition of a service rather than a sale or delivery of property.

“Property of another” means property which any person, other than the

defendant, has possession of or any other interest in, even though that possession or interest is unlawful.

“Receives” or “receiving” includes but is not limited to acquiring possession, control, or title, and taking a security interest in the property.

“Revoked credit card” means a credit card which is no longer valid because permission to use the credit card has been suspended or terminated by the issuer.

“Services” includes but is not limited to labor, professional services, transportation, telephone or other public services, accommodation in hotels, restaurants or elsewhere, admission to exhibitions, and the supplying of equipment for use.

“Stolen” means obtained by theft or robbery.

“Unauthorized control over property” means control over property of another which is not authorized by the owner.

“Widely dangerous means” includes explosion, flood, avalanche, collapse of building, poison gas, radioactive material, or any other material, substance, force, or means capable of causing potential widespread injury or damage.

10.00. Definitions of Terms Used in Chapter 10, Pattern Jury Instructions

“Another” means any other person and includes, where relevant, the United States, this State and any of its political subdivisions, and any other state and any of its political subdivisions. (The definition of this term is taken from HRS § 701-118)

“Building” includes any structure, and the term also includes any vehicle, railway car, aircraft, or watercraft used for lodging of persons therein; each unit of a building consisting of two or more units separately secured or occupied is a separate building.

“Cable television service” means one-way transmission of programming provided by, or generally considered comparable to programming provided by, a television broadcast station or other information made available by a cable operator to all subscribers generally.

“Cable television service device” means any mechanical or electronic instrument, apparatus, equipment or device which can be used to obtain cable television services without payment of applicable charges therefor. A “cable television service device” does not include any instrument, apparatus, equipment, device, facility or any component thereof furnished by a cable operator in the ordinary course of its business.

“Cardholder” means the person or organization named on the face of a credit card to whom or for whose benefit the credit card is issued by an issuer.

“Control over the property” means the exercise of dominion over the property and includes, but is not limited to, taking, carrying away, or possessing the property, or selling, conveying, or transferring title to or an interest in the property.

“Credit card” means any instrument or device, whether known as a credit card, credit plate, debit card, electronic benefits transfer card, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services, or anything else of value.

“Deception” occurs when a person knowingly:

(a) creates or confirms another's impression which is false and which the defendant does not believe to be true; or

(b) fails to correct a false impression which he previously has created or confirmed; or

(c) prevents another from acquiring information pertinent to the disposition of the property involved; or

(d) sells or otherwise transfers or encumbers property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether that

impediment is or is not valid, or is or is not a matter of official record; or

(e) promises performance which he/she does not intend to perform or knows will not be performed, but a person's intention not to perform a promise shall not be inferred from the fact alone that he/she did not subsequently perform the promise.

The term "deception" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or services in communications addressed to the public or to a class or group.

"Deprive" means:

(a) to withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstance that a significant portion of its economic value, or of the use and benefit thereof, is lost to him; or

(b) to dispose of the property so as to make it unlikely that the owner will recover it; or

(c) to retain the property with intent to restore it to the owner only if the owner purchases or leases it back, or pays a reward or other compensation for its return; or

(d) to sell, give, pledge, or otherwise transfer any interest in the property; or

(e) to subject the property to the claim of a person other than the owner.

"Distributes" means to sell, transfer, give or deliver to another, or to leave, barter, or exchange with another, or to offer or agree to do the same.

"Dwelling" means a building which is used or usually used by a person for lodging.

"Enter or remain unlawfully" means person "enters or remains unlawfully" in or upon premises when he/she is not licensed, invited, or otherwise privileged to do so. A person who, regardless of his/her intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he/she defies a lawful order not to enter or remain, personally communicated to him/her by the owner of the premises or some other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public.

"Expired credit card" means a credit card which is no longer valid because the term shown on the credit card has elapsed.

"Government" means the United States, or any state, county, municipality, or other political unit within territory belonging to the United States, or any department,

agency, or subdivision of any of the foregoing, or any corporation or other association carrying out the functions of government, or any corporation or agency formed pursuant to interstate compact or international treaty. As used in this definition “state” includes any state, territory or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

“Intent to defraud” means:

(a) an intent to use deception to injure another's interest which has value; or

(b) knowledge by the defendant that he is facilitating an injury to another's interest which has value.

“Issuer” means the business organization or financial institution which issues a credit card or its agent.

“Obtain” means when used in relation to property, to bring about a transfer of possession or other interest, whether to the obtainer or to another.

“Owner” means a person, other than the defendant, who has possession of or any other interest in, the property involved, even though that possession or interest is unlawful; however, a secured party is not an owner in relation to a defendant who is a debtor with respect to property in which the secured party has only a security interest.

“Person,” “he,” “him,” “actor,” and “defendant” include any natural person, including any natural person whose identity can be established by means of scientific analysis, including but not limited to scientific analysis of deoxyribonucleic acid and fingerprints, whether or not the natural person’s name is known, and, where relevant, a corporation or an unincorporated association. (The definition of these terms is from HRS § 701-118)

“Premises” includes any building and any real property.

“Property” means any money, personal property, real property, thing in action, evidence of debt or contract, or article of value of any kind. Commodities of a public utility nature such as gas, electricity, steam, and water constitute property, but the supplying of such a commodity to premises from an outside source by means of wires, pipes, conduits, or other equipment shall be deemed a rendition of a service rather than a sale or delivery of property.

“Property of another” means property which any person, other than the defendant, has possession of or any other interest in, even though that possession or interest is unlawful.

“Receives” or “receiving” includes but is not limited to acquiring possession, control, or title, and taking a security interest in the property.

“Revoked credit card” means a credit card which is no longer valid because permission to use the credit card has been suspended or terminated by the issuer.

“Services” includes but is not limited to labor, professional services, transportation, telephone or other public services, accommodation in hotels, restaurants or elsewhere, admission to exhibitions, and the supplying of equipment for use.

“Stolen” means obtained by theft or robbery.

“Unauthorized control over property” means control over property of another which is not authorized by the owner.

“Widely dangerous means” includes explosion, flood, avalanche, collapse of building, poison gas, radioactive material, or any other material, substance, force, or means capable of causing potential widespread injury or damage.

10.45. Unauthorized Entry Into Motor Vehicle in the First Degree: H.R.S. § 708-836.5

(Applicable to offenses occurring on or after June 22, 2006)

[In Count (count number) of the Indictment/Complaint/Information, the] [The] Defendant, (defendant's name), is charged with the offense of Unauthorized Entry Into Motor Vehicle in the First Degree.

A person commits the offense of Unauthorized Entry Into Motor Vehicle in the First Degree if the person intentionally or knowingly enters or remains unlawfully in a motor vehicle, without being invited, licensed, or otherwise authorized to enter or remain within the vehicle, with the intent to commit a crime against a person or ~~against~~ property rights.

There are four material elements of the offense of Unauthorized Entry Into Motor Vehicle in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These four elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant unlawfully [entered into a motor vehicle][remained in a motor vehicle]; and
2. That the Defendant did so without being invited, licensed, or otherwise authorized to enter or remain within the vehicle; and
3. That the Defendant acted intentionally or knowingly as to each of the foregoing elements; and
4. That, when the [Defendant unlawfully entered the motor vehicle,][Defendant's remaining in the motor vehicle became unlawful,] the Defendant, at that time, had the intent to commit therein a crime against a person or against property rights.

“Enter” means the least intrusion into a motor vehicle with the whole physical body, with any part of the body, or with any instrument appurtenant to the body.*

Notes

H.R.S. §§ 708-836.5, 702-206(1) and (2).

For definition of states of mind, see instructions:

6.02–“intentionally”

6.03–“knowingly”

**State v. Faria*, 100 Hawai`i 383, 60 P.3d 333 (2002).

10.45. Unauthorized Entry Into Motor Vehicle in the First Degree: H.R.S. § 708-836.5

(Applicable to offenses occurring on or after June 22, 2006)

[In Count (count number) of the Indictment/Complaint/Information, the] [The] Defendant, (defendant's name), is charged with the offense of Unauthorized Entry Into Motor Vehicle in the First Degree.

A person commits the offense of Unauthorized Entry Into Motor Vehicle in the First Degree if the person intentionally or knowingly enters or remains unlawfully in a motor vehicle, without being invited, licensed, or otherwise authorized to enter or remain within the vehicle, with the intent to commit a crime against a person or property rights.

There are four material elements of the offense of Unauthorized Entry Into Motor Vehicle in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These four elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant unlawfully [entered into a motor vehicle][remained in a motor vehicle]; and

2. That the Defendant did so without being invited, licensed, or otherwise authorized to enter or remain within the vehicle; and

3. That the Defendant acted intentionally or knowingly as to each of the foregoing elements; and

4. That, when the [Defendant unlawfully entered the motor vehicle,][Defendant's remaining in the motor vehicle became unlawful,] the Defendant, at that time, had the intent to commit therein a crime against a person or against property rights.

“Enter” means the least intrusion into a motor vehicle with the whole physical body, with any part of the body, or with any instrument appurtenant to the body.*

Notes

H.R.S. §§ 708-836.5, 702-206(1) and (2).

For definition of states of mind, see instructions:

6.02–“intentionally”

6.03–“knowingly”

**State v. Faria*, 100 Hawai`i 383, 60 P.3d 333 (2002).

10.45A. Unauthorized Entry Into Motor Vehicle in the Second Degree: H.R.S. § 708-836.6

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Unauthorized Entry Into Motor Vehicle in the Second Degree.

A person commits the offense of Unauthorized Entry Into Motor Vehicle in the Second Degree if the person intentionally or knowingly enters into a motor vehicle, without being invited, licensed, or otherwise authorized to do so.

There are three material elements of the offense of Unauthorized Entry Into Motor Vehicle in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt.

These three elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant unlawfully entered into a motor vehicle; and

2. That the Defendant did so without being invited, licensed, or otherwise authorized to enter into the motor vehicle; and

3. That the Defendant acted intentionally or knowingly as to each of the foregoing elements.

“Enter” means the least intrusion into a motor vehicle with the whole physical body, with any part of the body, or with any instrument appurtenant to the body.*

Notes

H.R.S. §§ 708-836.6, 702-206(1) and (2).

For definition of states of mind, see instructions:

6.02–“intentionally”

6.03–“knowingly”

*State v. Faria, 100 Hawai`i 383, 60 P.3d 333 (2002).

10.45A. Unauthorized Entry Into Motor Vehicle in the Second Degree: H.R.S. § 708-836.6

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Unauthorized Entry Into Motor Vehicle in the Second Degree.

A person commits the offense of Unauthorized Entry Into Motor Vehicle in the Second Degree if the person intentionally or knowingly enters into a motor vehicle, without being invited, licensed, or otherwise authorized to do so.

There are three material elements of the offense of Unauthorized Entry Into Motor Vehicle in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt.

These three elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant unlawfully entered into a motor vehicle; and

2. That the Defendant did so without being invited, licensed, or otherwise authorized to enter into the motor vehicle; and

3. That the Defendant acted intentionally or knowingly as to each of the foregoing elements.

“Enter” means the least intrusion into a motor vehicle with the whole physical body, with any part of the body, or with any instrument appurtenant to the body.*

Notes

H.R.S. §§ 708-836.6, 702-206(1) and (2).

For definition of states of mind, see instructions:

6.02–“intentionally”

6.03–“knowingly”

**State v. Faria*, 100 Hawai`i 383, 60 P.3d 333 (2002).