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IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII, Respondent/Plaintiff-Appellee,

vs.

PHILLIP DEJESUS DELEON, Petitioner/Defendant-Appellant.

SCWC-11-0000064

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000064; CR. NO. 09-1-1237)

January 15, 2014

CONCURRING AND DISSENTING OPINION BY ACOBA, J.,
IN WHICH POLLACK, J., JOINS

In my view, instructions on the defense of self-defense, raised by Petitioner/Defendant-Appellant Phillip DeLeon (DeLeon) were incomplete and therefore should be modified on remand to the Circuit Court of the First Circuit (the court). First, consistent with Hawaii's Revised Statutes (HRS) § 703-304(3) (Supp. 2012) and the current Hawaii Model Jury Instructions (HAWJIC) instruction 7.01B, the self-defense

instruction should inform the jury that DeLeon was permitted to estimate the necessity of using deadly force if he could not retreat safely.

Second, the instruction must "communicate the jury's duty to view the circumstances" surrounding DeLeon's alleged use of deadly force in self defense from DeLeon's "subjective understanding of the situation." State v. Augustin, 101 Hawai'i 127, 136, 63 P.3d 1097, 1106 (2002) (Acoba, J., dissenting, joined by Ramil, J.). Such an instruction would state that "[t]he reasonableness of the [d]efendant's belief shall be determined from the point of view of a reasonable person in the [d]efendant's position under the circumstances as he believed them to be." State v. Estrada, 69 Haw. 204, 224-25, 738 P.2d 812, 826 (1987). I therefore respectfully concur¹ and dissent.

I.

Chapter 703 of the Hawai'i Penal Code "provides for a defense based on the legal concept of justification."² Supplemental Commentary to HRS § 703-300 (1993). "In most cases, the critical factor in determining whether an actor's conduct is

¹ I agree that the judgment of conviction and sentence of the court must be vacated because DeLeon should have been allowed to introduce expert testimony demonstrating the presence of cocaine in the blood of Shaun Powell at the time of the shooting.

² "'Justification' is a '[j]ust, lawful excuse or reason for act or failing to act.'" Augustin, 101 Hawai'i at 131, 63 P.3d at 1101 (Acoba, J., dissenting) (quoting Black's Law Dictionary 865 (6th ed.1990)).

justified is the actor's state of mind or belief respecting facts and circumstances." Id. The Hawai'i "rules on [the] justification of the use of force in self-protection," see Commentary to HRS § 703-304, are set forth in HRS § 703-304, "Use of force in self-protection," which provides in relevant part as follows:

- (1) Subject to the provisions of this section . . . the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.³
- (2) The use of deadly force is justifiable under this section if the actor believes that deadly force is necessary to protect himself against death, serious bodily injury, kidnapping, rape, or forcible sodomy.
- (3) Except as otherwise provided in subsections (4) and (5) of this section, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used without retreating, surrendering possession, doing any other act which he has no legal duty to do, or abstaining from any lawful action.
- (4) The use of force is not justifiable under this section:
 - (a) To resist an arrest which the actor knows is being made by a law enforcement officer, although the arrest is unlawful; or
 - (b) To resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:
 - (i) The actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest; or
 - (ii) The actor believes that such force is necessary to protect himself against death or serious bodily injury.
- (5) The use of deadly force is not justifiable under this

³ In other words, subsection (1) "'requires a belief by the actor that the use of protective force is actually necessary, and that unlawful force is to be used by the assailant' 'on the present occasion.'" State v. Nupeiset, 90 Hawai'i 175, 181, 977 P.2d 183, 189 (App. 1999) (quoting Commentary to HRS § 703-304) (internal punctuation removed).

section if:

(a) The actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or

(b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating⁴ or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:

(i) The actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and

(ii) A public officer justified in using force in the performance of his duties, or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape, is not obliged to desist from efforts to perform his 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.

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(Emphases added.)

The definition section to chapter 703, HRS § 703-300, defines "believes" as "reasonably believes," "unless a different meaning is plainly required." The Supplemental Commentary to HRS § 703-300 explains that this definition "adopts the 'reasonable [person] standard with respect to justification for the use of force in self protection[.]'" (Quoting Conf. Com Rep. No. 2, in 1972 House Journal, at 1042.) This standard was adopted because it was the "'Committee's finding that the requirement that a person's belief be 'reasonable' . . . will prove an objective basis by which to gauge whether or not the use of force was

⁴ Therefore, a defendant is "legally prohibited from 'the use of deadly force when [he or she] can avoid it with complete safety by retreating.'" Nupeiset, 90 Hawai'i at 184, 977 P.2d at 192 (quoting Commentary to HRS § 703-304) (internal punctuation removed).

justified.'" Supplemental Commentary to HRS § 703-300 (quoting Conf. Com. Rep. No. 2, in 1972 House Journal, at 1042). However, "[i]n providing for the application of an objective gauge as to the defendant's actions, the legislature did not preclude the fact-finder's consideration of . . . the defendant's subjective circumstances." Augustin, 101 Hawai'i at 132, 63 P.3d at 1102 (Acoba, J., dissenting).

II.

At trial, the court's instruction on self-defense provided in relevant part as follows:

Justifiable use of force--commonly known as self-defense--is a defense to the charge of Attempted Murder in the First Degree in Count 1 and Murder in the Second Degree in Count 2 and the included offense in Count 2 of Manslaughter. 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.

The use of force upon or toward another person is justified when a person reasonably believes that such force is immediately necessary to protect himself on the present occasion against the use of unlawful force by the other person. The reasonableness of the defendant's belief that the use of such protective 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 use of deadly force upon or toward another person is justified when a person using such force reasonably believes that deadly force is immediately necessary to protect himself on the present occasion against death or serious bodily injury. The reasonableness of the defendant's belief that the use of such protective 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 use of deadly force is not justifiable if the defendant, with the intent of causing death or serious bodily injury,

provoked the use of force against himself in the same encounter, or if the defendant knows that he can avoid the necessity of using such force with complete safety by retreating.

"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 force or deadly force.

"Deadly force" means force which the actor uses with the intent of causing, or which he/she knows to create a substantial risk of causing, death or serious bodily injury. 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 will use deadly force if necessary, does not constitute deadly force.

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

"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.

If and only if you find that the defendant was reckless in having a belief that he was justified in using self-protective force against another person, or that the defendant was reckless in acquiring or failing to acquire any knowledge or belief which was material to the justifiability of his use of force against the other person, then the use of such self-protective force is unavailable as a defense to the offense of Manslaughter.

(Emphases added.) This instruction was based on the then-current Hawai'i Model Jury Instruction on Self-Defense, HAWJIC 7.01 (2005), which stated in relevant part as follows:

Justifiable use of force--commonly known as self-defense--is a defense to the charge of (specify charge and its included offenses except those involving a reckless state of mind). 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.

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[The use of deadly force upon or toward another person is justified when a person using such force reasonably believes that deadly force is immediately necessary to protect himself/herself on the present occasion against [death] [serious bodily injury] [kidnapping] [rape] [forcible sodomy]. The reasonableness of the defendant's belief that the use of such protective 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 use of deadly force is not justifiable if the defendant, with the intent of causing death or serious bodily injury, provoked the use of force against himself/herself in the same encounter, or if the defendant knows that he/she can avoid the necessity of using such force with complete safety by retreating.]⁵

Following DeLeon's trial, however, the Model Jury instructions on self-defense were updated and divided into two separate instructions, HAWJIC 7.01A (2011) and HAWJIC 7.01B (2011). HAWJIC 7.01B, "Self-Defense When Only Force Is At Issue," was revised to explain that a defendant may "estimate the necessity for the use of force":

The use of force upon or toward another person is justified if the defendant reasonably believes that force is immediately necessary to protect himself/herself on the present occasion against the use of unlawful force by the other person. The reasonableness of the defendant's belief that the use of protective 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].

(Emphasis added.) However, HAWJIC 7.01A, "Self-Defense When The

⁵ The model jury instructions indicate that the bracketed language "may or may not apply depending on the facts" of a particular case. HAWJIC 7.01 (2005).

Use of 'Deadly Force' Is At Issue," did not include the same language underscored above:

The use of deadly force upon or toward another person is justified if the defendant reasonably believes that deadly force is immediately necessary to protect himself/herself on the present occasion against [death] [serious bodily injury] [kidnapping] [rape] [forcible sodomy]. The reasonableness of the defendant's belief that the use of protective 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 language added to HAWJIC 7.01B regarding the defendant's ability to estimate the necessity of using force was drawn from HRS § 703-304(3), which, to reiterate, provides that "except as otherwise provided in subsections (4) and (5) of this section, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used without retreating, surrendering possession, doing any other act which he has no legal duty to do, or abstaining from any lawful action."

III.

In his Application, DeLeon argues that the jury instruction on the use of deadly force was incomplete because it did not include the language from the new HAWJIC 7.01B stating "that a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used." (Internal brackets omitted.) According to DeLeon, such an instruction would "apprise the jury

that a defendant [is] permitted to estimate the necessity for the use of [deadly force] . . . under the circumstances as he reasonably believed them to be without retreating or doing any act which he has no legal duty to do."

In its Answering Brief before the ICA, Respondent/Plaintiff-Appellee the State of Hawai'i (the State) responded that the jury instructions were not erroneous because "the plain language of HRS § 703-304 indicates that subsection (3) does not apply to actions involving deadly force." According to the State, "[s]ubsection (3) establishes no duty to retreat, surrender possessions, or do any other act that an actor has not legal duty to do, 'except as otherwise provided in subsections (4) and (5)[.]'" (Quoting HRS § 703-304(3).) "Subsection (5), on the other hand, establishes a duty to retreat where deadly force is employed." The State therefore contended that "if the actor uses deadly force, subsection (3) would not apply[.]" Hence, the State concluded that "the self-defense instruction to the jury was proper."

IV.

The majority concludes that the jury instructions were not erroneous because they were "based on [the] then-current HAWJIC 7.01,[] which the court [] upheld as 'fully consonant with the controlling statutory and case law of this state.'" Majority opinion at 59 (quoting Augustin, 101 Hawai'i at 127, 63 P.3d at

1097 (majority opinion)). First, as to DeLeon's contention that the jury instructions should have included language stating that "a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be," the majority concludes that the instruction was sufficient because it was "derived from" HRS § 703-304, and "conveys the legal basis for using protective force," even though it does not "referenc[e] HRS § 703-304(3) verbatim." Id. at 60. Second, the majority concludes that "insofar as DeLeon argues that the self-defense instruction should have included the remaining language in HRS § 703-304(3) regarding retreating and other acts"⁶ the jury instructions were sufficient to convey to the jury that "a defendant does not have to retreat if he or she knows that retreat can be done with complete safety." Id. at 60-61.

V.

Contrary to the position of the State, HRS § 703-304(3) is applicable in deadly force actions. To reiterate, HRS § 703-304(3) states in relevant part that "[e]xcept as otherwise provided in subsection[] . . . (5) of this section, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force

⁶ It does not appear that DeLeon actually argues that such language should have been included in the jury instructions. To reiterate, in his Application, DeLeon states that "the language [he] claimed should have been included" was "'that a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used[.]'"

is used without retreating[.]” HRS § 703-304(5) states that “[t]he use of deadly force is not justifiable under this section if,” inter alia, “[t]he actor knows that he can avoid the necessity of using such force with complete safety by retreating.”

Read together, HRS § 703-304(3) is not incompatible with HRS § 703-304(5). When the reference to HRS § 703-304(5) in HRS § 703-304(3) is replaced with the actual language of HRS § 703-304(5), HRS § 703-304(3) provides that “except [when the actor knows that he can avoid the necessity of using deadly force with complete safety by retreating], a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used without retreating.” In other words, the plain language of HRS § 703-304(3) states that, even in deadly force actions, a defendant may estimate the necessity of using force unless he or she can avoid the necessity of using deadly force by retreating.

This reading of HRS § 703-304(3) is consonant with the commentary to HRS § 703-304 and the comment to Model Penal Code (MPC) § 3.04. The commentary to HRS § 703-304 states that “subsection (3) states the generally applicable rule that the actor need not retreat or take any other evasive action before estimating the necessity for the use of force in self-protection.” (Emphases added.) Similarly, the comment to MPC §

3.04 states that “[s]ubsection 2(c) [the MPC equivalent of HRS § 703-304(3)] states the converse of the rules articulated in subsections 2(a) [the MPC equivalent of HRS § 703-304(4)] and 2(b) [the MPC equivalent of HRS § 703-304(5)].” Model Penal Code and Commentaries, Part I, at 60 (Emphasis added). In other words, HRS § 703-304(3) “provide[s] the general principles that govern the use of force in self protection,” and HRS § 703-304(5) “provide[s] the exceptions.” Id. at 61 (emphasis added).

Thus, as explained by the MPC comment, HRS § 703-304(3) sets forth the “general rule” that “except when [HRS § 703-304(4) or (5)] otherwise require, the actor need not retreat . . . and he [or she] may employ protective force according to his [or her] estimation of the necessity under the circumstances as he believes them to be when force is used.” Id. at 60-61. Hence, this “general rule” applies to actions involving both deadly force and non-deadly force, provided that the applicable statutory exceptions, such as the duty to retreat prior to using deadly force, do not apply. Because HRS § 703-304(3) sets forth a general rule governing the use of deadly force subject only to the exceptions in HRS § 703-304(5), the State incorrectly concludes that HRS § 703-304(3) is never applicable in deadly force actions. Nevertheless, neither the jury instruction used in this case nor the present model jury instruction on the use of

deadly force in self defense, HAWJIC 7.01A, includes the language of HRS § 703-304(3).

VI.

To reiterate, in 2011 the model jury instruction on the use of non-deadly force in self-defense, HAWJIC 7.01B, was updated to reflect the language of HRS § 703-304(3). That instruction now provides that "[t]he 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]." However, similar language was omitted from the model jury instruction on the use of deadly force in self-defense, HAWJIC 7.01A.

By more closely reflecting the language of the governing statute, the updated model jury instruction on the use of non-deadly force in self-defense in HAWJIC 7.01B allows the jury to be better informed when making a determination as to whether the use of force in self-defense was justified. The additional language is a more complete statement of the governing law and provides more clarity in explaining to a jury both that, under Hawai'i law, a defendant may estimate the necessity of using force in self-protection, and that an actor is not required to abstain from lawful action before using force in self defense.

There is no reason for these benefits to be confined to cases involving the use of non-deadly force. As explained supra, the language in HRS § 703-304(3) applies to actions involving both deadly force and non-deadly force. Inasmuch as the updated language of HAWJIC 7.01B is evidently a more accurate and complete statement of the law, it is incongruous that similar language is not also included in HAWJIC 7.01A, thereby depriving the fact-finder of the more comprehensive statement of the law in cases involving the use of deadly force. Because the new model jury instructions may be utilized after the case is remanded, I would instruct the court to include the language from HAWJIC 7.01B stating that a defendant may estimate the necessity of using force in its self-defense instruction on remand.

VII.

I would also hold that the court's self-defense instruction was incomplete because it did not adequately reflect the jury's duty to consider DeLeon's subjective view of the circumstances surrounding the use of deadly force, in addition to the jury's duty to ensure that the use of force was objectively reasonable. Augustin, 101 Hawai'i at 132, 63 P.3d at 1102 (Acoba, J., dissenting). A self-defense instruction is incomplete if it does not "instruct [the jury] to consider the situation from [the defendant's] position." State v. Pond, 118 Hawai'i 452, 492, 193 P.3d 368, 408 (2008) (Acoba, J., concurring

and dissenting). This proposition was also approved by Justice Duffy's concurring and dissenting opinion in Pond, 118 Hawai'i at 492, 193 P.3d at 408 (Duffy, J., concurring and dissenting) ("In my view, the jury instruction was improper . . . for the reasons stated by Justice Acoba in his Concurring and Dissenting Opinion, whose analysis I agree with on this point.").

A.

Under Hawai'i law, determining whether the use of force in self-defense was justified requires "a combined subjective and objective test." Augustin, 101 Hawai'i at 132, 63 P.3d at 1102 (Acoba, J., dissenting). The subjective prong of the analysis requires the finder of fact to "consider the circumstances surrounding the use of force as the defendant subjectively viewed them." Id.; see also State v. Kupihea, 80 Hawai'i 307, 316, 909 P.2d 1122, 1131 (1996); State v. Pemberton, 71 Haw. 466, 477, 796 P.2d 80, 85 (1990); State v. Faafiti, 54 Haw. 637, 645, 513 P.2d 697, 703 (1973); Nupeiset, 90 Hawai'i at 186, 977 P.2d at 194; State v. Straub, 9 Haw. App. 435, 445, 843 P.2d 1389, 1394 (1993). In other words, "the focus is on the circumstances known to the defendant, thus directing the jury to consider the actions of a 'reasonable person in the defendant's position under the circumstances as he [or she] believed them to be.'" Pond, 188 Hawai'i at 491, 193 P.3d at 407 (Acoba, J., concurring and

dissenting) (emphasis in original) (quoting Estrada, 69 Haw. at 224-25, 738 P.2d at 826 (1987)).

"The objective prong of the analysis requires jurors to determine whether a reasonable person, considering the circumstances as [the defendant] subjectively did, would deem the use of force necessary." Augustin, 101 Hawai'i at 132, 63 P.3d at 1102 (Acoba, J., dissenting); see also Kupihea, 80 Hawai'i at 316, 909 P.2d at 1131; Pemberton, 71 Haw. at 477, 796 P.2d at 85; Faafiti, 54 Haw. at 645, 513 P.2d at 703; Nupeiset, 90 Hawai'i at 186, 977 P.2d at 194; State v. Pavao, 81 Hawai'i 142, 145, 913 P.2d 553, 556 (App. 1996); State v. Lubong, 77 Hawai'i 429, 433, 886 P.2d 766, 770 (App. 1994); Straub, 9 Haw. App. at 444, 843 P.2d at 1394. Thus, "emphasis is placed on the reasonable person standard so the defendant's use of force must be 'determined from the point of view of a reasonable person.'" Pond, 188 Hawai'i at 491, 193 P.3d at 407 (Acoba, J., concurring and dissenting) (quoting Estrada, 69 Haw. at 225, 738 P.2d at 826).

B.

The combined subjective and objective test serves to remedy the injustice that would be caused by either a wholly subjective or wholly objective test. Augustin, 101 Hawai'i at 133, 63 P.3d at 1103 (Acoba, J., dissenting). "[A] wholly subjective test would result in lawlessness because self-defense would be premised only on the actor's 'internal beliefs,' the

effect of which would be to sanction unreasonable conduct[.]”

Id. In other words, “self-defense would always justify homicide so long as the defendant was true to his or her own internal beliefs.” Id. (quoting State v. Janes, 850 P.2d 495, 505 (Wash. 1993)) (emphasis omitted). An objective aspect to the test prevents such a result by “establish[ing] a standard against which the defendant’s belief can be measured[.]” Augustin, 101 Hawai‘i at 133, 63 P.3d at 1103 (Acoba, J., dissenting).

On the other hand, under a wholly objective test, the jury may not consider “factors such as [the defendant’s] interaction with [the complainant or decedent] and the facts known to [the defendant].” Pond, 188 Hawai‘i at 492, 193 P.3d at 408 (Acoba, J., concurring and dissenting). Thus, an objective test “might strip an actor who mistakenly believes that force is necessary in his or her defense of any defensive claim, thus permitting conviction of an [intentional] offense, even murder.” Augustin, 101 Hawai‘i at 133, 63 P.3d at 1103 (Acoba, J., dissenting) (internal brackets, citations, and quotation marks omitted). In other words, “a strictly objective standard results in culpability where the mens rea requirement of intent may not have been met.” Id. Thus, the subjective aspect to the self-defense test avoids this possibility by compelling the jurors to consider the circumstances as the defendant believed them to be.

VIII.

The jury instructions in the instant case stated in relevant part that "[t]he reasonableness of the defendant's belief that the use of such protective 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." (Emphases added.) The instructions thus indicated to the jury that "[DeLeon's] actual understanding of the circumstances must be subjected to a reasonable person standard." Augustin, 101 Hawai'i at 136, 63 P.3d at 1106 (Acoba, J., dissenting).⁷ This is a wholly objective test that precludes the jury's consideration of the circumstances as the defendant, in this case DeLeon, subjectively believed them to be. The jury's consideration of subjective belief is plainly required.⁸

⁷ The self-defense instruction at issue in Augustin also stated that "[t]he reasonableness of the defendant's belief that the use of such protective 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." Augustin, 101 Hawai'i at 130, 63 P.3d at 1100 (Acoba, J., dissenting).

⁸ It is well-established that Hawai'i's self-defense test requires a defendant to demonstrate that he or she subjectively believed the use of self-defense was necessary. In Faafiti, this court approved jury instructions that stated that "[u]nder the law of self-defense, it is lawful for a person who is being assaulted to defend himself from attack if, as a reasonable person, he has grounds for believing and does believe that bodily injury is about to be inflicted upon him." Id. at 645, 513 P.2d at 703 (emphasis added); see also Lubong, 77 Hawai'i at 433, 886 P.2d at 770 (stating that the first prong of the self-defense test "requires a determination of whether the defendant had the requisite belief that deadly force was necessary" (emphasis added)). In other words "[t]he fact-finder is required to place itself in the shoes of the defendant." Lubong, 77 Hawai'i at 433, 886 P.2d at 770; see also Pemberton,

Additionally, the phrase "was aware" was insufficient to convey to the jurors the necessity of evaluating the use of force in self defense from DeLeon's subjective viewpoint. Augustin, 101 Hawai'i at 136, 63 P.3d at 1106 (Acoba, J., dissenting).

A.

In contrast to the instructions used in this case, the jury instructions approved by this court in Estrada explains to the jury both their duty to consider the defendant's subjective viewpoint and the necessity of evaluating that viewpoint from the perspective of a reasonable person:

A person is justified in using force upon or toward another when the person using the force reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.

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The reasonableness of the [d]efendant's belief shall be determined from the point of view of a reasonable person in the [d]efendant's position under the circumstances as he believed them to be.

Estrada, 69 Haw. at 224-25, 78 P.2d at 826 (emphases added); see also Pond, 118 Hawai'i at 489, 492, 193 P.3d at 405, 408 (Acoba, J., concurring and dissenting) (citing the instruction used in Estrada with approval); Pond, 118 Hawai'i at 492, 193 P.3d at 408

71 Haw. at 477, 796 P.2d at 85 (holding that, in a self-defense case, the jury "must consider the circumstances as the [d]efendant subjectively believed them to be at the time he tried to defend himself" (emphasis added)).

This requirement of "[e]valuating the evidence from a subjective point of view ensures that the fact-finder fully understands the totality of the defendant's actions from the defendant's own perspective." Lubong, 77 Hawai'i at 433, 886 P.2d at 770 (internal quotation marks removed). Hence, including a subjective element in the self-defense test insures that the outcome is fair to a defendant by requiring the jury to initially view the facts from the defendant's perspective. See discussion supra.

(Duffy, J., agreeing with the analysis in Justice Acoba's concurring and dissenting opinion). This language conveys to the jury all necessary aspects of the self-defense test.

First, the phrase "in the defendant's position under the circumstances as he believed them to be" illustrates the necessity of evaluating the defendant's subjective belief that the circumstances require the use of force in self defense. See Augustin, 101 Hawai'i at 135, 63 P.3d at 1105. Second, the requirement that the defendant's belief be evaluated from the point of view of a reasonable person in the defendant's position explains that the jury must consider "whether the defendant's view of the circumstances" was reasonable. Third, the requirement that the defendant's use of force was "immediately necessary for the purpose of protecting himself" conveys to the jury that it must determine whether "a reasonable person" under those circumstances would believe the force used was necessary.

Based on the foregoing, on remand I would require the court to replace the language in the jury instruction stating that "[t]he reasonableness of the defendant's belief [would be] . . . determined from the viewpoint of a reasonable person . . . under the circumstances of which the defendant was aware or as the defendant reasonably believed them to be," with the referenced language from the jury instruction in Estrada. The Estrada formulation properly reflects the jury's obligation to

consider both the defendant's subjective point of view and the circumstances from an objective point of view in evaluating a defendant's use of force in self-defense.

B.

Moreover, the term "aware" in the phrase "under the circumstances of which the defendant was aware" was manifestly a misstatement of the law. "Aware" is defined as "having or showing realization, perception, or knowledge." Webster's Collegiate Dictionary 81 (10th ed. 1993). However, "believe" means "to accept as true, genuine, or real." Id. at 104. Thus, "awareness of certain circumstances is not necessarily congruent with a belief in those circumstances." Augustin, 101 Hawai'i at 136, 63 P.3d at 1106 (Acoba, J., dissenting). The words "was aware," therefore, would not communicate to the jurors the necessity of evaluating whether DeLeon believed that the circumstances required the use of deadly force in self-defense. Id.

Moreover, to reiterate, the instruction stated that the necessity of the use of force shall be evaluated "under the circumstances of which the defendant was aware or as the defendant reasonably believed them to be." (Emphasis added.) The use of the term "or" "permitted the jury to rest its decision on [that] part of the instruction" related to the DeLeon's subjective awareness of the circumstances surrounding his use of

force in self-defense. Augustin, 101 Hawai'i at 136, 63 P.3d at 1106 (Acoba, J., dissenting). Hence, this part of the instruction also was not a correct statement of the law because it did not inform the jury that the defendant's subjective understanding, i.e. awareness (assuming its correct use), of the situation must be evaluated from a reasonable person's perspective. Id.

IX.

For the foregoing reasons, I respectfully concur in part and dissent in part.

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack

