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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., for the court¹)

Upon consideration of the request of the Standing Committee on Pattern Criminal Jury Instructions to publish and distribute the (1) repeal of Criminal Instruction 7.02, (2) addition of Criminal Instructions 5.03B, 5.03C, 5.06A, 5.06B, 7.02A, 7.02B, and (3) revision of Criminal Instruction 9.22 of the Hawai'i Pattern Jury Instructions - Criminal,

IT IS HEREBY ORDERED, that the request is granted and the attached criminal jury instructions 5.03B, 5.03C, 5.06A, 5.06B, 7.02A, 7.02B, and 9.22 are approved for publication and distribution.

¹ Considered by: Recktenwald, C.J., Nakayama, Acoba, Duffy, and McKenna, JJ.

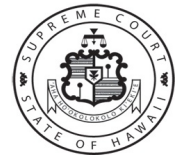
IT IS FURTHER ORDERED that this approval for publication and distribution is not and shall not be considered by this court or any other court to be an approval or judgment as to the validity or correctness of the substance of any instruction.

DATED: Honolulu, Hawai'i, August 26, 2011.

FOR THE COURT:

/s/ Mark E. Recktenwald

Chief Justice



**5.03B INCLUDED OFFENSE WHEN GREATER OFFENSE IS ALTERNATIVELY
CHARGED IN A SINGLE COUNT: GENERIC**

If and only if you find the Defendant, (defendant's name), not guilty of both of the alternatives of (charged offense) in Count (count number), or you are unable to reach a unanimous verdict as to both of the alternatives, or you find the Defendant not guilty of one of the alternatives and are unable to reach a unanimous verdict as to the other alternative, then you must consider whether the Defendant is guilty or not guilty of the included offense of (included offense).

**5.03C INCLUDED OFFENSE WHEN GREATER OFFENSE IS ALTERNATIVELY
CHARGED IN SEPARATE COUNTS: GENERIC**

If and only if you find the Defendant, (defendant's name), not guilty of both of the alternatives of (charged offense) in Counts (count numbers), or you are unable to reach a unanimous verdict as to Counts (count numbers), or you find the Defendant not guilty of one of the alternatives in Counts (count numbers) and are unable to reach a unanimous verdict as to the other alternative, then you must consider whether the Defendant is guilty or not guilty of the included offense of (included offense).

**5.06A ALTERNATIVE FORMS OF ASSAULT IN THE SECOND DEGREE IN THE SAME COUNT (SUBSTANTIAL BODILY INJURY AND DANGEROUS INSTRUMENT):
H.R.S. § 707-711(1)(a), (b), (d)**

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

This offense can be committed in either of two ways: Assault in the Second Degree (Substantial Bodily Injury) or Assault in the Second Degree (Dangerous Instrument).

As to the first alternative, a person commits the offense of Assault in the Second Degree (Substantial Bodily Injury) if he/she intentionally, knowingly, or recklessly causes substantial bodily injury to another person.

There are two material elements of the offense of Assault in the Second Degree (Substantial Bodily Injury), each of which the prosecution must prove beyond a reasonable doubt.

These two elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant caused substantial bodily injury to another person; and
2. That the Defendant did so intentionally, knowingly, or recklessly.

As to the second alternative, a person commits the offense of Assault in the Second Degree (Dangerous Instrument) if he/she intentionally or knowingly causes bodily injury to another person with a dangerous instrument.

There are three material elements of the offense of Assault in the Second Degree (Dangerous Instrument), 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 caused bodily injury to another person; and
2. That the Defendant did so with a dangerous instrument; and
3. That the Defendant acted intentionally or knowingly as to elements 1 and 2.

You are to consider each alternative of Assault in the Second Degree separately. The fact you may find that one of the alternatives has or has not been proved beyond a reasonable doubt does not mean that you must reach the same decision with respect to the other alternative. In order to find that the offense of Assault in the Second Degree has been proved, you must unanimously agree that the same alternative or both of the alternatives have been proved beyond a reasonable doubt. Proof beyond a reasonable doubt of one or both of the alternatives will result in the conviction of only one offense of Assault in the Second Degree.

Notes

H.R.S. §§ 707-711(1)(a), (b), (d); 702-206(1) and (2).

For definition of states of mind, see instructions:

6.02—"intentionally"

6.03—"knowingly"

6.04—"recklessly"

For definition of terms defined by H.R.S. Chapter 707, see instruction:

9.00—"bodily injury"

9.00—"dangerous instrument"

9.00—"substantial bodily injury"

Each alternative of Assault in the Second Degree should be separately set forth on the verdict form.

5.06B ALTERNATIVE FORMS OF ASSAULT IN THE SECOND DEGREE IN SEPARATE COUNTS (SUBSTANTIAL BODILY INJURY AND DANGEROUS INSTRUMENT): H.R.S. § 707-711(1)(a), (b), (d)

[The] Defendant, (defendant's name), is charged in two separate counts with a single offense of Assault in the Second Degree. This offense can be proven by the prosecution in either of two ways. These alternatives have been designated in the Indictment/Complaint/Information as Count (count number), Assault in the Second Degree (Substantial Bodily Injury), and Count (count number), Assault in the Second Degree (Dangerous Instrument).

As to the first alternative charged in Count (count number), a person commits the offense of Assault in the Second Degree (Substantial Bodily Injury) if he/she intentionally, knowingly, or recklessly causes substantial bodily injury to another person.

There are two material elements of the offense of Assault in the Second Degree (Substantial Bodily Injury), each of which the prosecution must prove beyond a reasonable doubt.

These two elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant caused substantial bodily injury to another person; and
2. That the Defendant did so intentionally, knowingly, or recklessly.

As to the second alternative charged in Count (count number), a person commits the offense of Assault in the Second Degree (Dangerous Instrument) if he/she intentionally or knowingly causes bodily injury to another person with a dangerous instrument.

There are three material elements of the offense of Assault in the Second Degree (Dangerous Instrument), 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 caused bodily injury to another person; and
2. That the Defendant did so with a dangerous instrument; and
3. That the Defendant acted intentionally or knowingly as to elements 1 and 2.

You are to consider each alternative of Assault in the Second Degree separately. The fact you may find that one of the counts has or has not been proved beyond a reasonable doubt does not mean that you must reach the same decision with respect to the other count. In order to find that the offense of Assault in the Second Degree has been proved, you must unanimously agree that the same count or both of the counts have been proved beyond a reasonable doubt. Proof beyond a reasonable doubt of one or both of the counts will result in the conviction of only one offense of Assault in the Second Degree.

Notes

H.R.S. §§ 707-711(1)(a), (b), (d); 702-206(1) and (2).

For definition of states of mind, see instructions:

6.02—"intentionally"

6.03—"knowingly"

6.04—"recklessly"

For definition of terms defined by H.R.S. Chapter 707, see instruction:

9.00—"bodily injury"

9.00—"dangerous instrument"

9.00—"substantial bodily injury"

Each count of Assault in the Second Degree should be separately set forth on the verdict form.

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 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.

7.02B Defense Of Others When Deadly Force Is Not At Issue.

Section 1 - Defense; Burden of Proof

Defense of others is a defense to the charge(s) of (specify charge and its included offenses). 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 - 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 3 - 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 4 - 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 5 - 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 6 - 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 Hawaii'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 7.01B.

9.22. Assault in the Third Degree--Dangerous Instrument: H.R.S. § 707-712(1)(b)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Assault in the Third Degree.

A person commits the offense of Assault in the Third Degree if he/she negligently causes bodily injury to another person with a dangerous instrument.

There are three material elements of the offense of Assault in the Third 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 caused bodily injury to another person; and
2. That the Defendant did so with a dangerous instrument; and
3. That the Defendant acted negligently as to elements 1 and 2.

Notes

H.R.S. §§ 707-712(1)(b), 702-206(4).

For definition of states of mind, see instruction:

6.05 – “negligently”

For definition of terms defined by H.R.S. Chapter 707, see instructions:

9.00 – “bodily injury”

9.00 – “dangerous instrument”

For circumstances when a mutual affray instruction is appropriate, see note to 9.21A. In such event, instruction 9.21A, verdict form 9.21B, and special interrogatory 9.21C should be submitted to the jury.