

CONCURRING OPINION BY NAKAYAMA, J.,
WITH WHOM RAMIL, J., JOINS

I agree with this court's holding that the circuit court did not err in failing to instruct the jury that the "victim" of the theft -- whether the owner of the property taken or the person against whom the defendant allegedly used force -- must be "aware of the theft." Hawai'i Revised Statutes (HRS) § 708-840(1)(b)(i) provides that a person commits robbery in the first degree if, while committing a theft, "[t]he person is armed with a dangerous instrument and [] the person uses force against the person of anyone present with intent to overcome that person's physical resistance or physical power of resistance." HRS § 708-840(1)(b)(ii) (1993) (emphasis added). According to the plain language of HRS § 708-840(1)(b)(i), actual overcoming of the victim's physical resistance or physical power of resistance is not required. Rather, the prosecution must prove intent to overcome the victim's physical resistance or physical power of resistance. Thus, I agree with this court's reasoning that HRS § 708-840(1)(b)(i) does not require the victim's awareness of the theft.

However, I would like to reiterate my disagreement with this court's holding in State v. Mitsuda, 86 Hawai'i 37, 947 P.2d 349 (1997). In Mitsuda, this court held that the victim's awareness of the theft is a necessary element according to HRS § 708-840(1)(b)(ii). Mitsuda, 86 Hawai'i at 46, 947 P.2d at 358.

In my dissent, I explained that the intent to compel acquiescence is an element of HRS § 708-840(1)(b)(ii), rather than the victim's awareness of the theft.

HRS § 708-840(1)(b)(ii) provides that a person commits robbery in the first degree if while committing a theft, "[t]he person is armed with a dangerous instrument and [] the person threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property." HRS § 708-840(1)(b)(ii) (1993) (emphasis added). Similar to HRS § 708-840(1)(b)(i), HRS § 708-840(1)(b)(ii) uses the word "intent." The prosecution must prove the perpetrator's intent to compel acquiescence, rather than actual acquiescence of the victim. Thus, the victim's awareness is not a required element in both HRS § 708-840(1)(b)(i) and HRS § 708-840(1)(b)(ii).