

NO. 25237

IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII, Plaintiff-Appellee,

vs.

MARK DUERING, Defendant-Appellant.

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APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 96-0220)

ORDER GRANTING MOTION FOR RECONSIDERATION AND  
ORDER OF AMENDMENT

(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.,  
and Circuit Judge Nakamura, in place of Acoba, J., recused)

The motion for reconsideration filed on January 3, 2005 by the defendant-appellant Mark Duering, requesting that this court review its summary disposition order (SDO) filed on December 22, 2004, is hereby granted.

The SDO of this court filed on December 22, 2004 is hereby amended as follows (deleted material is bracketed and new material is double underscored):

**Line 7 from the bottom of page 2:**

(2) the circuit court's [did not err in  
instructing the jury because]:

(a) [the circuit court correctly omitted]  
omission of instructions for a  
justification defense was correct  
because affirmative defenses were not  
necessary to exclude situations where

HRS § 710-1071 (1993) infringed on constitutionally protected speech because as stated supra, HRS § 710-1071 is not unconstitutionally overbroad. Therefore, an affirmative defense instruction is unnecessary;

- (b) inclusion of tampering with a witness pursuant to HRS § 710-1072 [is] as a lesser included offense of intimidating a witness pursuant to HRS § 710-1071 was erroneous. HRS § 701-109(4) (a) and c (1993). Pursuant to HRS § 701-109(4) (a), "an offense is included if it is impossible to commit the greater without also committing the lesser." [See also] State v. Friedman, 93 Hawai'i 63, 72, 996 P.2d 268, 277 (2000) (quoting State v. Burdett, 70 Haw. 85, 87-88, 762 P.2d 164, 166 (1988)). It is possible to commit the greater offense of intimidating a witness without committing the lesser offense of tampering with a witness. For example, a person commits the offense of

intimidating a witness when a person uses a threat or force to influence a witness to testify truthfully, but such conduct does not constitute the offense of tampering with a witness. Pursuant to HRS § 701-109(4)(c), tampering with a witness is not a lesser included offense of intimidating a witness because it requires the same state of mind and has a greater risk of injury. See State v. Kinnane, 79 Hawai'i 46, 55, 897 P.2d 973, 983 (1995). The error of including tampering with a witness as a lesser included offense was not harmless beyond a reasonable doubt because there is a reasonable possibility that the error contributed to Duering's conviction; therefore Duering's conviction must be set aside. See State v. Arceo, 84 Hawai'i 1, 11-12, 928 P.2d 843, 853-54 (1996).

- (c) [the] omission of the definition of "testimony" was not erroneous because the word has a commonplace meaning. See State v.

Faria, 100 Hawai'i 383, 389, 60 P.3d 333, 339 (2002); and

(d) substitution of the word "evidence" for the word "testimony" on the verdict form was error but was harmless because there was no evidence (other than Coulibaly's testimony) which could have been withheld; therefore, there was no reasonable possibility that the error might have contributed to Duering's conviction. See [State v.] Arceo, 84 Hawai'i [1,] at 11-12, 928 P.2d [843,] at 853-54 [(1996)]; and

**Line 3 from the top of page 5:**

IT IS HEREBY ORDERED that the circuit court's final judgment filed June 17, 2002 is [affirmed] reversed.

An amended SDO is being filed concurrently with this order, incorporating the foregoing amendments. The Clerk of the Court is directed to provide a copy of this order and a copy of the amended SDO to the parties. The Clerk of the Court is

further instructed to distribute copies of this order of amendment to those who received the previously filed SDO.

DATED: Honolulu, Hawai'i, February 3, 2005.

Robert G. Klein  
and Philip Miyoshi  
for defendant-appellant  
on the motion