DISSENTING OPINION BY ACOBA, J.

I would grant the application for certiorari because the instructions as to the jury's application of a "true threat" requirement on the terroristic threatening in the first degree charges were prejudicially insufficient and misleading. Thus in my view the Intermediate Court of Appeals (the ICA) committed grave error in affirming the conviction of Petitioner/Defendant-Appellant Stephen Bradley Baker (Petitioner) on Counts II and III, terroristic threatening in the first degree, Hawai'i Revised Statutes (HRS) § 707-716 (1993),[1] of Thanh Van Dang (Dang) and Randy Pham (Pham), respectively, on the indictment herein.

In his application for certiorari, Petitioner argues first, on plain error grounds, that "although the jury was given a definition of the term 'true threat', [COL 1(b)], the jury was not properly instructed that the prosecution must prove beyond a reasonable doubt that [Petitioner's] words or conduct constituted a 'true threat' [COL 1(c)]" (emphasis and brackets in original), and second, that "there was insufficient evidence to establish that [Petitioner's] words or conduct rose to the level of a 'true threat.'"

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[1] HRS § 707-716 provides in relevant part:

> **Terroristic threatening in the first degree.** (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:
> . . . .
> (d) With the use of a dangerous instrument.
> (2) Terorristic threatening in the first degree is a class C felony.

Pursuant to HRS § 602-59 (1993 & Supp. 2003),[2] a party may appeal the decision of the ICA only by an application to this court for a writ of certiorari. See HRS § 602-59(a). In determining whether to accept or reject the application for writ of certiorari, this court reviews the ICA decision for:

> (1) grave errors of law or of fact, or (2) obvious inconsistencies in the decision of the intermediate appellate court with that of the supreme court, federal decisions, or its own decision, and the magnitude of such errors or inconsistencies dictating the need for further appeal.

HRS § 602-59(b). The grant or denial of a petition for certiorari is discretionary with this court. See HRS § 602-59(a). I believe there is merit to Petitioner's first point.

In State v. Valdivia, 95 Hawai'i 465, 476, 24 P.3d 661, 672 (2001), this court said that

> in a terroristic threatening prosecution, the prosecution must prove beyond a reasonable doubt that a remark threatening bodily injury is a "true threat," such that it conveyed to the person to whom it was directed a gravity of purpose and imminent prospect of execution. In other words,

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[2] Hawai'i Revised Statutes (HRS) § 602-59 (1993 & Supp. 2003), in relevant part, provides:

> (a) After issuance of a decision by the intermediate appellate court, a party may appeal such decision only by application to the supreme court for a writ of certiorari, the acceptance or rejection of which shall be discretionary upon the supreme court.
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> (b) The application for writ of certiorari shall tersely state its grounds which must include (1) grave errors of law or of fact, or (2) obvious inconsistencies in the decision of the intermediate appellate court with that of the supreme court, federal decisions, or its own decision, and the magnitude of such errors or inconsistencies dictating the need for further appeal.
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> (c) An application for writ of certiorari may be filed with the supreme court no later than thirty days after the filing of the decision of the intermediate appellate court; the supreme court shall determine to accept the application within ten days of its filing. The failure of the supreme court to accept within ten days shall constitute a rejection of the application. . . .

> the prosecution must prove beyond a reasonable doubt that the alleged threat was objectively capable of inducing a reasonable fear of bodily injury in the person at whom the threat was directed and who was aware of the circumstances under which the remarks were uttered.

(Emphasis added.)

The jury was provided with instructions outlining the elements of first degree terroristic threatening as follows:

> A person commits the offense of terroristic threatening in the first degree if, in reckless disregard of the risk of terrorizing another person, he threatens by word or conduct to cause bodily injury to another person with the use of a dangerous instrument.
>
> There are four material elements of the offense of terroristic threatening in the first degree, each of which the prosecution must prove beyond a reasonable doubt. These four elements are:
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> 1. That on or about June 30, 2002, in the City and County of Honolulu, State of Hawaii, the defendant threatened by word or conduct to cause bodily injury to [Complainant]; and
> 2. That the defendant did so with the use of a dangerous instrument;
> 3. That the force used by the defendant was not justifiable as self-defense; and
> 4. That the defendant did so in reckless disregard of the risk of terrorizing [Complainant].

(Emphases added.) The jury was given separate definitions for a "threat" and a "true threat" as follows:

> A threat is a communicated intent to inflict physical or other harm on any person or on property.
>
> It is a declaration by word or conduct of an intention or a determination to inflict punishment, loss or pain on another, or to injure another by the commission of some unlawful act.
>
> In order for an utterance to constitute a true threat, it must be objectively susceptible to inducing fear of bodily injury in a reasonable person at whom the threat is directed and who is familiar with the circumstances under which the threat is uttered.
>
> One means of proving a threat is a true threat; or - let me reread.
>
> One means of proving a threat is a true threat would be to establish that the threat was uttered under circumstances that rendered it so unequivocal, unconditional immediate and specific as to the person threatened as to convey a gravity of purpose and imminent prospect of execution.

> Another would be to establish that the defendant possessed the apparent ability to carry out the threat such that the threat would reasonably tend to induce fear of bodily injury in the person at whom the threat is directed.

There was no defense objection to this instruction.

Petitioner argues that (1) "[a]ll of the instructions simply defined the offense in terms of whether a person 'threatens by word or conduct to cause bodily injury . . .' or whether 'the defendant threatened by word or by conduct to cause bodily injury[,]'" (emphases in original), (2) because the "true threat" attendant circumstance was not included as one of the "material elements" of the offense, the jury was never told that the burden of proof beyond a reasonable doubt applied to the "true threat" element, and (3) the separate definitions of "threat" and "true threat" were presented to the jury without instructions as to which definition it was to apply to the facts.

"'In reviewing jury instructions, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading.'" State v. Maelega, 80 Hawai'i 172, 177, 907 P.2d 758, 762 (1995) (quoting State v. Hoey, 77 Hawai'i 17, 38, 881 P.2d 504, 525 (1994)). Although no objection was made to the instructions, plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court. State v. Thomas, 72 Haw. 48, 805 P.2d 15 (1990); State v. Rodrigues, 6 Haw. App. 580, 733 P.2d 1222 (1987).

In its answering brief, Respondent/Plaintiff-Appellee State of Hawai‘i (the prosecution) states that because "the jury was instructed as to the two "'***means of proving a threat is a "true threat***[,]"'" (emphasis in original), it was made "clear to the jury that the prosecution was required to prove that a threat was a 'true threat' in order to find a person guilty[.]"[3] However, as the defense points out, there is no directive instructing the jury that Petitioner's conduct must have amounted to a "true threat." The instructions were prejudicially insufficient for failing to inform the jury that it was required to find that a true threat was proved beyond a reasonable doubt and misleading because the jury could have read the instructions as only requiring that a "threat" be proven. The instructions as a whole thus could have misled the jury to believe that proof of a threat alone was sufficient for conviction. Petitioner's substantial rights were thus affected and such error was not harmless beyond a reasonable doubt. See Valdivia, 95 Hawai‘i at 478, 24 P.2d at 674 (holding that a reasonable possibility that the error may have contributed to a conviction of terroristic threatening in the first degree warrants a remand for a new trial).

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[3] The prosecution also maintains that "the instructions accurately defined the term 'true threat[,]'" and "the court's instructions . . . informed the jury that the prosecution was required to prove all four material elements of the offense beyond a reasonable doubt--one of the elements being that the defendant '***threatened*** . . . [,]'" (emphasis in original) but these arguments are not disputed and do not support a conclusion that the instructions directed the jury to consider only the definition of "true threat."

For the foregoing reasons, I believe that the August 6, 2004 summary disposition order of the ICA should be reversed, the court's December 2, 2002 judgment should be vacated, and the case remanded to the court for retrial.