DISSENTING OPINION OF LIM, J.

I respectfully dissent for the reasons set forth in Justice Nakayama's concurring and dissenting opinion in Tachibana v. State, 79 Hawai'i 226, 241, 900 P.2d 1293, 1308 (1995):

> The right not to testify is among the fundamental and personal rights recognized by the Constitution. If anything, one would expect the right not to testify to be more zealously guarded than the right to testify. An uninformed defendant probably expects to testify and may be unaware how strongly the Constitution protects his [or her] right not to testify. Yet the trial court has no duty to make a sua sponte inquiry to advise the defendant of his [or her] right not to testify and to ensure that its waiver was knowing and intelligent. Rather, the defendant by taking the stand waives this significant right even though the record gives no explicit assurance that this waiver was knowing and intelligent.

(quoting United States v. Martinez, 883 F.2d 750, 756-57 (9th Cir. 1989)) (citations omitted).

Hence I would require a "Tachibana colloquy" where the defendant chooses to testify, as well as where the defendant chooses not to testify. Also analogously, I would find a violation of the right to remain silent based solely on the lack of such a colloquy. Cf. Tachibana, 79 Hawai'i at 237-38, 900 P.2d at 1304-5 ("[i]f our holding in this case were to apply retrospectively, we would be compelled to affirm the circuit court's conclusion that Tachibana's right to testify was violated based solely on the lack of such a colloquy").

In this case, we have no real way of knowing the result

had Lewis chosen to remain silent as a result of a personal colloquy with the trial court regarding his right to remain silent. We do know, however, that he testified to hitting the complaining witness, thus conceding the *actus reus* of the offense, albeit in the context of a claim of self-defense. Under the circumstances, I cannot conclude that the lack of such a colloquy was harmless beyond a reasonable doubt, cf. Tachibana, 79 Hawai‘i at 240, 900 P.2d at 1307 ("[o]nce a violation of the constitutional right to testify is established, the conviction must be vacated unless the State can prove that the violation was harmless beyond a reasonable doubt") (citations omitted), and hence would vacate the family court's judgment and remand for a new trial.

Associate Judge