

NO. 24316

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
MARK T. TANELE, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-1-2375)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Mark T. Tanele (Tanele) appeals from the Judgment entered in the Circuit Court of the First Circuit (circuit court) on May 30, 2001. Following a jury trial,¹ Tanele was convicted of Assault in the Third Degree in violation of Hawaii Revised Statutes (HRS) § 707-712(1)(a) (1993).

On appeal, Tanele contends the circuit court plainly erred when it (1) communicated to the jury that the justification of self-defense did not extend to others, (2) refused Tanele's request to instruct the jury on defense of others, and (3) instructed the jury to rely on the instructions previously given. Tanele's points of error are duplicative, so we review the court's refusal to give an instruction on defense of others.

¹The Honorable Dexter D. Del Rosario presided.

Upon careful review of the record of the proceedings, we disagree with Tanele's contentions and affirm the Judgment.

Rule 30(f) of the Hawai'i Rules of Penal Procedure (HRPP) governs the timing of objections to jury instructions. It provides in relevant part:

Rule 30. Instructions to the jury.

. . . .
(f) *Instructions and objections.* . . . No party may assign as error the giving or the refusal to give, or the modification of, an instruction, whether settled pursuant to subdivision (b) or subdivision (c), of this rule, unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection.

(Emphasis added.)

Although an appellant may not normally raise such an objection for the first time on appeal, where the erroneous instruction affected the substantial rights of the defendant, we may notice the error as "plain error." State v. Pinero, 75 Haw. 282, 292, 859 P.2d 1369, 1374 (1993). As the objection was made after the jury had retired for deliberations, we review for plain error.

Tanele appeals his conviction for Assault in the Third Degree in violation of HRS § 707-712(1)(a), which provides:

§707-712 Assault in the third degree. (1) A person commits the offense of assault in the third degree if the person:

- (a) Intentionally, knowingly, or recklessly causes bodily injury to another person[.]

Tanele contends there was evidence in the record meriting a defense of others instruction. Hawaii Revised Statutes § 703-305(1) (1993) sets forth the defense:

§703-305 Use of force for the protection of other persons. (1) Subject to the provisions of this section and of section 703-310, the use of force upon or toward the person of another is justifiable to protect a third person when:

- (a) Under the circumstances as the actor believes them to be, the person whom the actor seeks to protect would be justified in using such protective force; and
- (b) The actor believes that the actor's intervention is necessary for the protection of the other person.

The justification of defense of others is an extension of the defense of self-protection under HRS § 703-304 (1993)² and must be viewed in its context. State v. Nupeiset, 90 Hawai'i 175, 180, 977 P.2d 183, 188 (App. 1999). In State v. Pavao, 81 Hawai'i 142, 913 P.2d 553 (App. 1996), the Hawai'i Supreme Court stated:

[T]he trier of fact must determine whether, from the objective point of view of a reasonable person, the defendant's use of force was necessary for the protection of a person who would be justified in using such force, under the circumstances as the defendant subjectively believes them to be.

Id. at 145, 913 P.2d at 556. Once the defense is raised, the State must prove facts which negative the defense beyond a

²HRS § 703-304 states in relevant part:

§703-304 Use of force in self-protection.

(2) . . . The use of deadly force is justifiable under this section if the actor believes that deadly force is necessary to protect himself against death, serious bodily injury, kidnapping, rape, or forcible sodomy.

reasonable doubt. Id. at 146, 913 P.2d at 557; see State v. Jhun, 83 Hawai'i 472, 482, 927 P.2d 1355, 1365 (1996).

The jury was instructed on self-defense, as merited by Tanele's testimony that he punched the victim, Pan Vagai (Pan), in reaction to Pan's moving to strike him. However, as no evidence indicated that Tanele attempted to protect anyone other than himself,³ the instruction on self-defense fully addressed

³At trial, Tanele testified about how the fight began:

[Tanele's attorney] Q: By the time you arrived to the guest parking lot, was Pan already out in front of the house now?

[Tanele] A: Oh, yes.

Q: Okay. What happened next when you got there?

A: And just before I got there, I heard Pan tell my wife, go home, and he had his left hand on top of her shoulders.

Q: Okay. What happened next?

A: And then next thing I know, I see Willy coming towards my wife, and then saying something, but I never understand what he was saying. And then Mark turned around and told him, You touch my mom, I kick your ass. So Mark came between Willy and his mom.

Q: Did you ever see Willy at this point in time with his hand up in the air?

A: Well, just as I got there, Willy and Mark's hands went up after Mark told him, You touch my mom, I kick your ass. That's when I just got there, both of their hands went up.

Q: As if they were in a fighting stance?

A: Yeah.

Q: What happened next?

A: Okay. Next thing, they both had their hands up like they going to fight, and Pan turned around and tells me, What, you too? Grabs my neck with his left hand, and he had a bottle of beer in his right hand. He had my neck with his left hand, bottle of beer in the right hand, was up in the air like this. As I turned my head to watch Mark and Willy, Pan swung the bottle at me.

Tanele's claimed justification. State v. Smith, 91 Hawai'i 450, 464, 984 P.2d 1276, 1290 (App.), cert. denied, 92 Hawai'i 632, 994 P.2d 564 (1999); see State v. Sawyer, 88 Hawai'i 325, 331, 966 P.2d 637, 643 (1998).

Assuming, *arguendo*, that the circuit court erred in refusing to instruct the jury on defense of others, we conclude the error was not prejudicial. State v. Aganon, 97 Hawai'i 299, 302, 36 P.3d 1269, 1272 (2002); see State v. Moore, 82 Hawai'i 202, 210, 921 P.2d 122, 130 (1996). At trial, Tanele gave only generalized testimony about his concern for the welfare of his family, never referring to specific instances in which he acted to protect a family member. Aganon, 97 Hawai'i at 304, 36 P.3d at 1274. Tanele never alleged that these concerns entered into his mind when he struck Pan.

In conclusion, viewing the record as a whole, it appears that the circuit court's jury instructions were not prejudicially insufficient, erroneous, inconsistent, or misleading in a manner that affected the substantial rights of the defendant. Aganon, 97 Hawai'i at 302, 36 P.3d at 1272; Pinero, 75 Haw. at 292, 859 P.2d at 1374. Assuming error occurred, the error was not prejudicial. Aganon, 97 Hawai'i at 302, 36 P.3d at 1272.

For the aforementioned reasons, we affirm the Judgment filed May 30, 2001, in the Circuit Court of the First Circuit.

DATED: Honolulu, Hawai'i, December 20, 2002.

On the briefs:

Daniel T. Pagliarini
for defendant-appellant.

Chief Judge

Daniel H. Shimizu,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge