CONCURRING AND DISSENTING OPINION BY NAKAMURA, J.

Defendant-Appellant David William Kawika Auld (Auld) was charged in Counts 1 and 5 with first degree terroristic threatening. I agree with the majority's conclusion that the jury instructions regarding Count 1 did not adequately require unanimity as to the person threatened and therefore the conviction on that count must be vacated.[1] I disagree, however, that the trial court's failure to give a self-defense instruction not requested by the defense on the terroristic threatening charges requires vacating the conviction on Count 5. Accordingly, I respectfully dissent from the majority's decision to vacate the conviction on Count 5.

I.

Auld requested and the trial court gave a self-defense instruction with respect to the third degree assault charges. Auld apparently made a strategic choice not to request a self-defense instruction as to the terroristic threatening charges. Nevertheless, he argues on appeal that the trial court committed plain error in failing to *sua sponte* give a self-defense instruction as to the terroristic threatening charges.

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[1] Unlike Count 1, Count 5 only alleged that one person had been threatened. Thus, Court 5 did not present a jury unanimity issue as to the person threatened.

As the majority correctly notes, after State v. Nichols, 111 Hawai'i 327, 141 P.3d 974 (2006), plain error is no longer the question when it comes to erroneous jury instructions to which no objection was made. In Nichols, the Hawai'i Supreme Court held that

> although as a general matter forfeited assignments of error are to be reviewed under the [Hawai'i Rules of Penal Procedure] HRPP Rule 52(b) plain error standard of review, in the case of erroneous jury instructions, that standard of review is effectively merged[2] with the HRPP Rule 52(a) harmless error standard of review because it is the duty of the trial court to properly instruct the jury. As a result, once instructional error is demonstrated, we will vacate, without regard to whether timely objection was made, if there is a reasonable possibility that the error contributed to the defendant's conviction, *i.e.*, that the erroneous jury instruction was not harmless beyond a reasonable doubt.

Id. at 337, 141 P.3d at 984 (footnote supplied).

However, even under Nichols, the threshold question of whether the trial court committed instructional error remains. Obviously, the court does not breach its duty to properly instruct the jury if it omits an instruction that is not required. Nichols therefore still demands a determination of whether the giving or omission of an instruction to which no objection was raised constitutes error. The harmless beyond a reasonable doubt inquiry only comes into play once instructional error is demonstrated.

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[2] In State v. Nichols, 111 Hawai'i 327, 141 P.3d 974 (2006), the Hawai'i Supreme Court noted that a remaining distinction between the plain error and the harmless error standards of review for jury instructions is that there is "a presumption that unobjected-to jury instructions are correct[.]" Id. at 337 n.6, 141 P.3d at 984 n.6. Accordingly, "the appellate court is under no duty to scour the record for [instructional] error *sua sponte*." Id.

Hawai'i law is clear that when requested by a defendant, the trial court is required to give a self-defense instruction if the evidence fairly raises the issue of self-defense, regardless of "how weak, unsatisfactory, or inconclusive the testimony might have appeared to the court." State v. Irvin, 53 Haw. 119, 120, 488 P.2d 327, 328 (1971). This is true even if the requested self-defense instruction is inconsistent with the defendant's main theory of defense. Id. It is less apparent, however, whether Hawai'i law requires the trial court to instruct the jury on self-defense when the defendant for strategic reasons decides he or she does not want the instruction.

Neither party provides much helpful guidance on this issue. Both believe that there was sufficient evidence to support a self-defense instruction and assume that because Auld was entitled to request a self-defense instruction, the circuit court erred in failing to give one. Neither party offers any analysis on what effect a strategic choice by Auld not to assert self-defense and not to request a self-defense instruction with respect to the terroristic threatening charges would have on the trial court's duty to instruct.

The record supports the view that Auld made a strategic choice not to seek a self-defense instruction on the terroristic threatening charges. Prior to trial, Auld requested that the court give the Hawaii Standard Jury Instruction-Criminal (HAWJIC)

Instruction No. 7.01 for self-defense.[3] The HAWJIC Instruction

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[3] The Hawaii Standard Jury Instruction-Criminal (HAWJIC) Instruction No. 7.01 (2000) for self-defense provides as follows:

> Justifiable use of force--commonly known as self-defense--is a defense to the charge of (specify charge and its included offense except those involving a reckless state of mind). The burden is on the prosecution to prove beyond a reasonable doubt that the force used by the defendant was not justifiable. If the prosecution, [sic] does not meet its burden then you must find the defendant not guilty.
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> [The use of force upon or toward another person is justified when a person reasonably believes that such force is immediately necessary to protect himself/herself on the present occasion against the use of unlawful force by the other person. The reasonableness of the defendant's belief that the use of such protective force was immediately necessary shall be determined from the viewpoint of a reasonable person in the defendant's position under the circumstances of which the defendant was aware or as the defendant reasonably believed them to be.]
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> [The use of deadly force upon or toward another person is justified when a person using such force reasonably believes that deadly force is immediately necessary to protect himself/herself on the present occasion against [death] [serious bodily injury] [kidnapping] [rape] [forcible sodomy]. The reasonableness of the defendant's belief that the use of such protective force was immediately necessary shall be determined from the viewpoint of a reasonable person in the defendant's position under the circumstances of which the defendant was aware or as the defendant reasonably believed them to be.]
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> [The use of deadly force is not justified if the defendant, with the intent of causing death or serious bodily injury, provoked the use of force against himself/herself in the same encounter, or if the defendant knows that he/she can avoid the necessity of using such force with complete safety by retreating.]
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> "Force" means any bodily impact, restraint, or confinement, or the threat thereof.
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> "Unlawful force" means force which is used without the consent of the person against whom it is directed and the use of which would constitute an unjustifiable use of force [or deadly force.]
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> ["Deadly force" means force which the actor uses with the intent of causing, or which he/she knows to create a substantial risk of causing, death or serious bodily injury.]
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> [Intentionally firing a firearm in the direction of another person or in the direction which the person is believed to be constitutes deadly force.]

No. 7.01 contains blanks in two places for the parties to specify the charges to which the self-defense instruction will apply. The trial court modified the standard instruction by filling in these blanks with "Assault in the Third Degree." The modified instruction was given by agreement of the parties.[4] It is

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> [A threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor's intent is limited to creating an apprehension that he/she will use deadly force if necessary, does not constitute deadly force.]
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> ["Bodily injury" means physical pain, illness, or any impairment of physical condition.]
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> ["Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.]
>
> [If and only if you find that the defendant was reckless in having a belief that he/she was justified in using self-protective force against another person, or that the defendant was reckless in acquiring or failing to acquire any knowledge or belief which was material to the justifiability of his/her use of force against the other person, then the use of such self-protective force is unavailable as a defense to the offense of (<u>any offense the requisite mental state of which is either reckless or negligent conduct</u>).]
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> [The use of force is not justifiable to resist an arrest that the defendant knows is being made by a police officer, even if the arrest is unlawful. On the other hand, if the police officer threatens to use or uses unlawful force, the law regarding use of protective force would apply.]

The HAWJIC self-defense instruction appears to be incorrect in suggesting, in the first paragraph, that offenses involving a reckless state of mind should not be listed as being subject to the defense. The trial court obviously did not heed this suggestion because it identified third degree assault, an offense which can be committed recklessly, <u>see</u> Hawaii Revised Statutes (HRS) § 707-712 (1)(a) (1993), as the charge to which the defense applied.

[4] The trial court, with the agreement of the parties, also modified the HAWJIC Instruction No. 7.01 for self-defense to exclude the provisions relating to the use of deadly force and made other changes not material to this appeal. The modified instruction given by the trial court provided as follows:

> Justifiable use of force -- commonly known as self-defense -- is a defense to the charge of <u>Assault in the Third Degree</u>. The

inconceivable that Auld would have somehow forgotten that he was charged with both first degree terroristic threatening and third degree assault. Auld's agreement to modify the self-defense instruction so that it applied only to the third degree assault charges provides compelling evidence that he made a strategic choice to exclude the terroristic threatening charges from the self-defense instruction.

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burden is on the prosecution to prove beyond a reasonable doubt that the force used by the defendant was not justifiable. If the prosecution does not meet its burden, then you must find the defendant not guilty.

The use of force upon or toward another person is justified when a person reasonably believes that such force is immediately necessary to protect himself on the present occasion against the use of unlawful force by the other person or other persons.

The reasonableness of the defendant's belief that the use of such protective force was immediately necessary shall be determined from the viewpoint of a reasonable person in the defendant's position under the circumstances of which the defendant was aware or as the defendant reasonably believed them to be.

Force means any bodily impact, restraint, or confinement, or the threat thereof.

Unlawful force means force which is used without the consent of the person against whom it is directed and the use of which would constitute an unjustifiable use of force.

Bodily injury means physical pain, illness, or any impairment of physical condition.

If and only if you find that the defendant was reckless in having a belief that he was justified in using self-protective force against another person, or that the defendant was reckless in acquiring or failing to acquire any knowledge or belief which was material to the justifiability of his use of force against the other person, then the use of such self-protective force is unavailable as a defense to the offense of Assault in the Third Degree.

(Emphasis added).

There are sound reasons why a trial court should not be required to give a self-defense instruction that a defendant, for strategic reasons, does not want. The defendant and his counsel are in a better position than the trial court to know how to most effectively defend against the charges. Our adversary system depends upon vigorous advocacy from each side to produce the fairest results. Forcing an unwanted self-defense instruction on a defendant would take control of the defense away from the defendant and impair the defendant's ability to present his or her defense.

In this case, the evidence supporting a claim of self-defense as to the terroristic threatening charges was tenuous at best. Auld was the aggressor in barging into another person's house, without permission, to confront Kiana Kalima, who Auld knew had no desire to speak to him. Auld took out a hunting knife with a six-inch blade and cut the phone line because he saw Adam Anglin talking on the phone. Although Auld claimed that the number of people around him made him feel uncomfortable, even by his own testimony, he took the knife out before anyone threatened or laid a hand on him. Moreover, Auld denied brandishing the knife as demonstrated by the prosecutor or swinging the knife at anyone. He testified that he put the knife away when asked to do so.

Given the slim evidence of self-defense on the terroristic threatening charges, Auld may have concluded that a self-defense instruction would hurt his chances for acquittal on those charges. For example, Auld may have been concerned that the jury would attribute the self-defense instruction to him and that this would hurt his credibility in light of the weak evidence of self-defense on the terroristic threatening charges. Auld may have felt that a self-defense instruction on the terroristic threatening charges would distract the jury's attention from his best defense, which was that he did not threaten anyone with the knife. See United States v. Applegate, 424 F.2d 1042, 1043 (9th Cir. 1970). Because self-defense involves a defendant's actual or threatened use of force, Auld may also have felt a self-defense instruction on the terroristic threatening charges would undermine his defense that he did not use the knife in a threatening manner.

At its core, a trial is the search for the truth. See Nix v. Whiteside, 475 U.S. 157, 166 (1986). The defendant knows whether he or she acted in self-defense. For the defense of self-defense to apply, the defendant must "believe[ ] that [the use of force against another person] is immediately necessary for the purpose of protecting himself [or herself] against the use of unlawful force by the other person on the present occasion." Hawaii Revised Statutes (HRS) § 703-304 (1993 & Supp. 2006). A

defendant's choice not to assert self-defense may be based on the defendant's knowledge of why he or she acted or what really happened. The trial court should not be forced to override a defendant's decision not to assert this defense, particularly where the evidence of self-defense, while sufficient to raise the defense, is marginal.

A rule requiring the court to give a self-defense instruction even if deliberately not requested by the defense would put the trial court in a difficult position and create the potential for manipulation. Under Hawai'i law, the basis for a self-defense instruction is established by evidence that fairly raises the defense no matter "how weak, unsatisfactory, or inconclusive" the testimony supporting the defense might be. Irvin, 53 Haw. at 120, 488 P.2d at 328. It is not always apparent that sufficient evidence for a self-defense instruction has been introduced, especially where self-defense is not asserted as a theory of defense. The defense of self-defense is subject to several conditions and exceptions that, depending on the circumstances, may make it difficult for a court to determine whether sufficient evidence has been presented to invoke the defense. See HRS § 703-304. An unconditional rule requiring the court to always give a self-defense instruction, whether requested or not, would create a trap for the unwary.

Such a rule would also create opportunities and incentives for manipulation. In cases where weak but sufficient evidence for a self-defense instruction had been presented, a defendant who had plausible defenses on other grounds would have an incentive to induce the trial court to omit a self-defense instruction. The defendant would then have two bites at the apple. The defendant could seek acquittal based on the plausible defenses and, if convicted, could demand a new trial based on the "erroneous" omission of the self-defense instruction. It seems odd to reward a defendant with a new trial based on a defense not asserted by the defendant because the jury, with the defendant's agreement, was not instructed on the unwanted defense. That, however, is the result urged by Auld in this appeal.

The Hawai'i appellate courts have not decided the precise issue presented by this appeal. In State v. Haanio, 94 Hawai'i 405, 16 P.3d 246 (2001), the Hawai'i Supreme Court held that a trial court must instruct the jury on included offenses rationally supported by the evidence regardless of the parties wishes. Id. at 413-15, 16 P.3d at 254-56. The court noted that allowing the parties to pursue an "all or nothing" strategy by foregoing instructions on provable lesser-included offenses "forecloses the determination of criminal liability where it may in fact exist" and "impairs the truth seeking function of the judicial system." Id. at 414-15, 16 P.3d at 255-56.

> Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged. To permit this would force the jury to make an "all or nothing" choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence.

Id. at 415, 16 P.3d at 256 (quoting People v. Barton, 906 P.2d 531, 536 (Cal. 1995)).

However, the question of whether the defendant should have a say in how to defend against the charges presented to the jury by forgoing a self-defense instruction is different from the question decided in Haanio of whether the defendant can prevent the jury from considering his or her guilt on lesser included offenses. Permitting a defendant to exercise a measure of strategic control over whether the jury is instructed on self-defense would not deprive the jury of the opportunity to consider the defendant's guilt on provable included offenses. It would simply allow the defendant to focus the jury's attention on the defense or defenses the defendant wants to assert in circumstances where the defendant believes a self-defense instruction would be detrimental to his or her case. Accordingly, Haanio is not dispositive of the issue presented in Auld's appeal.

In the context of ineffective assistance of counsel claims, the Hawai'i Supreme Court has recognized the authority of defense counsel to make strategic choices and has refrained from

second-guessing those choices. See Briones v State, 74 Haw. 442 463, 848 P.2d 966, 976 (1993) (stating that actions or omissions of counsel that had "an obvious tactical basis for *benefitting* the defendant's case will not be subject to further scrutiny"); State v. Richie, 88 Hawai'i 19, 39-40, 960 P.2d 1227, 1247-48 (1988) ("[M]atters presumably within the judgment of counsel, like *trial strategy*, will rarely be second-guessed by judicial hindsight." (internal quotation marks omitted)). The United States Court of Appeals for the Seventh Circuit has similarly held that "counsel's strategic choice to pursue one line [of defense] to the exclusion of others is rarely second-guessed on appeal." United States v. Adamo, 882 F.2d 1218, 1227 (7th Cir. 1989).

The defendant and his or her counsel should be allowed to make strategic choices as to what defenses to pursue. I would hold, under the circumstances of this case, that the trial court had no duty to give and did not err in failing to give a self-defense instruction on the terroristic threatening charges which Auld did not request and apparently for strategic reasons did not want.

II.

In any event, even assuming, *arguendo*, that the trial court erred in not giving the unrequested self-defense instruction as to the terroristic threatening charges, any such

error was harmless beyond a reasonable doubt as to Count 5.[5] Auld was charged in Count 5 with terroristically threatening Adam Anglin (Adam) with a hunting kife.

As previously noted, the evidence that Auld pulled out the hunting knife in self-defense was very tenuous. Auld was trespassing when he entered the house and was clearly the aggressor. There was no evidence that Adam or anyone else at the house had assaulted or threatened to assault Auld before Auld took out the knife. The evidence, to the extent it existed, that Auld's threatened use of the knife was immediately necessary to protect himself against the unlawful use of force by Adam was weak. Adam denied threatening Auld or doing anything aggressive toward Auld. Adam testified, without contradiction, that he moved away from Auld and fled out the back door in response to Auld's pulling out the knife.

The trial court did give a self-defense instruction as to the third degree assault charges. Auld was charged with and found guilty of assaulting Salina Skylark Kansana (Count 2), Kiana Kalima (Count 3), and Liane Kalima (Count 4). The jury's rejection of Auld's self-defense claim as to the assault charges[6]

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[5] Since I agree with the majority that Count 1 must be vacated due to the inadequacy of the unanimity instruction as applied to Count 1, the discussion of harmless error will be confined to Count 5.

[6] In special interrogatories, the jury also rejected Defendant-Appellant David William Kawika Auld's alternative contention that any assault he committed against the three women occurred during a mutual affray.

demonstrates that any error in failing to include the terroristic threatening charges in the self-defense instruction did not contribute to Auld's terroristic threatening conviction on Count 5. Auld's brandishing of the knife and his assault of the three women were part of the same episode. Auld had a much stronger evidentiary basis for a self-defense claim with respect to the assault charges since he testified that after he put away the knife, the three women attacked him first and that he responded by defending himself with his bare hands. The jury's rejection of Auld's stronger self-defense claim with respect to the assault charges shows that the jury would necessarily have rejected a self-defense claim as to the terroristic threatening charges. The jury's guilty verdicts on the assault charges also demonstrate that the jury rejected Auld's version of what happened. Under these circumstances, there is no reasonable possibility that any error in failing to instruct on self-defense as to the terroristic threatening charges might have contributed to Auld's terroristic threatening conviction on Count 5. See State v. White, 92 Hawai'i 192, 198, 205, 990 P.2d 90, 96, 103 (1999).

III.

For the foregoing reasons, I would affirm Auld's conviction on Count 5 and therefore respectfully dissent from the majority's decision to vacate the conviction on Count 5. I agree

with the majority's decision to 1) vacate Auld's conviction on Count 1 and 2) affirm Auld's convictions on Counts 2, 3, and 4, which Auld does not challenge on appeal.

Craig H. Nakamura