

NO. 27988

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
JASON M. LAKMAN, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(CR. NO. 05-1-0329(1))

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SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Foley and Nakamura, JJ.)

Defendant-Appellant Jason M. Lakman (Lakman) appeals from the Amended Judgment entered on May 10, 2006, by the Circuit Court of the Second Circuit (circuit court).<sup>1</sup> Lakman was charged with Assault in the Third Degree in violation of Hawaii Revised Statutes (HRS) § 707-712(1)(a) (1993) for allegedly assaulting Wesley Godon (Godon) on June 4, 2005 (Count One), and Assault in the Second Degree in violation of HRS § 707-711(1)(a) (1993) for allegedly assaulting Dominic Cattadoris (Cattadoris) on the same date (Count Two). A jury convicted Lakman on both counts, and he was sentenced to one year of probation on Count One and five years of probation on Count Two, with the terms to run concurrently.

Lakman raises the following points on appeal:

(1) "The lower court's Instruction No. 27 defining defense of others under HRS § 703-305 [(1993)] was prejudicially erroneous, misleading, insufficient, and not harmless beyond a reasonable doubt."

(2) "Even if this Court deems Instruction No. 27 was not erroneous, the lower court still plainly erred, because the instructions as given suggested that a finding of 'lawful' force

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<sup>1</sup> The Honorable Joel E. August presided.

automatically negated Lakman's self-defense beyond a reasonable doubt."

(3) "There was insufficient evidence to support Count II (against Cattadoris) because the State did not disprove Lakman's self-defense beyond a reasonable doubt, where the witnesses' testimonies were undisputed that Lakman struck Cattadoris as Cattadoris was about to tackle him."

After a careful review of the record and briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised, we resolve Lakman's points of error as follows:

(1) The jury instructions, "when read and considered as a whole," were not "prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Gonsalves, 108 Hawai'i 289, 292-93, 119 P.3d 597, 600-01 (2005).

Lakman first argues that Instruction No. 27 was erroneously given because "under HRS § 703-301 [(1993)], it is [a] defense for defendants, not for witnesses like Cattadoris." Instruction No. 27 read:

The use of force upon another is justifiable to protect a third person when:

(1) under the circumstances as the actor reasonably believes them to be, the person whom the actor seeks to protect would be justified in using self-protective force, and

(2) the actor reasonably believes that the actor's intervention is immediately necessary for the protection of the other person.

The circuit court's decision to give Instruction No. 27 must be viewed in light of Instruction No. 26, which set forth the principles of self-defense applicable to Count Two, and provided in part:

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. 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.

. . . .

"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.

Under the circumstances of this case, it was not error for the circuit court to instruct the jury on how to assess whether Cattadoris's use of force against Lakman was "justifiable" and hence "[l]awful." Absent such an instruction, the jury would have been left to speculate on whether Lakman's use of force against Cattadoris was justified in light of Cattadoris's actions. Additionally, we believe that the circuit court did not err in using HRS § 703-305 to identify the applicable principles for assessing Cattadoris's conduct, since that section defines when the use of force to protect others is "justifiable." Moreover, there is nothing in that section or HRS § 703-301 which suggests that the Legislature intended to preclude the use of that definition for the purposes of determining whether conduct is "unlawful" within the meaning of HRS § 703-304 (Supp. 2005), which provided the basis for Lakman's use of self-protective force justification.

We reject Lakman's suggestion that Instruction No. 27 erroneously "directed the jury to evaluate the circumstances from Cattadoris's perspective rather than from Lakman's subjective belief as case law requires." Instruction No. 26 clearly directed the jury to evaluate Lakman's use of force against Cattadoris 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." Thus, "when read and considered as a whole," Gonsalves, 108 Hawai'i at 292-93, 119 P.3d at 600-01, the instructions

directed the jury to consider the basis for Lakman's use of force -- including his belief as to whether Cattadoris's use of force against him was "unlawful" -- from Lakman's perspective. See State v. Pemberton, 71 Haw. 466, 477, 796 P.2d 80, 85 (1990).

Finally, to the extent that the Deputy Prosecuting Attorney emphasized in closing argument that Cattadoris's actions were justified from Cattadoris's point of view, we note that the circuit court instructed the jury that "[s]tatements or remarks made by counsel are not evidence. You should consider their arguments to you, but you are not bound by their recollections or interpretations of the evidence." The circuit court further instructed the jury that "[t]he court will instruct you now concerning the law which you must follow in arriving at your verdict. . . . [Y]ou must follow these instructions even though you may have opinions to the contrary." The jury is presumed to have followed the circuit court's instructions. State v. Jhun, 83 Hawai'i 472, 482, 927 P.2d 1355, 1365 (1996); State v. Knight, 80 Hawai'i 318, 327, 909 P.2d 1133, 1142 (1996).

(2) We reject Lakman's suggestion that Instruction No. 27 "suggested that a finding of 'lawful' force automatically negated Lakman's self-defense beyond a reasonable doubt." When read as a whole, the instructions do not require such a result. Rather, Instruction No. 26 clearly requires that the evidence be evaluated from Lakman's perspective. Thus, the instructions did not suggest to the jury that it must "automatically" reject self-defense if it believed that Cattadoris's actions were justified from Cattadoris's perspective. Rather, Instruction No. 26 required the jury to assess Cattadoris's actions "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."

Finally, Lakman contends that "[i]mposing a requirement that force must actually be 'unlawful' before the defendant can

exercise self-defense, leads to absurd results which the legislature could not have intended." However, we do not read the instructions as a whole as imposing such a requirement, and thus reject this argument.

(3) Viewing the evidence in the light most favorable to the prosecution, State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998), there was sufficient evidence to support Lakman's conviction on Count Two. There was evidence that Lakman initiated the assault on Godon, continued it even after Cattadoris had tried to restrain him, tore off his shirt, and chased after Godon. Then, Lakman walked up to Godon after he had fallen and stood next to Godon's head while Godon was, by Lakman's admission, "essentially defenseless." Given these circumstances, there was sufficient evidence to support a finding by the jury that a reasonable person in Lakman's position would have believed that Cattadoris's attempt to tackle him was a lawful use of force. Moreover, there was sufficient evidence for the jury to conclude that the amount of force used by Lakman was disproportionate to the threat posed by Cattadoris, and that, accordingly, a reasonable person in Lakman's position would have known that "such force [was not] immediately necessary to protect himself" within the meaning of Instruction No. 26.

Therefore,

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

IT IS HEREBY ORDERED that the Amended Judgment entered on May 10, 2006 by the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, November 21, 2007.

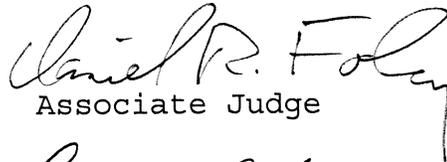
On the briefs:

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Chief Judge



Associate Judge



Associate Judge