DISSENTING OPINION OF ACOBA, J.

I do not agree that the statement, "A person employing protective force may estimate the necessity thereof under the circumstances as he reasonably believed them to be when the force is used without retreating," deleted from the court's instructions, "merely echoes the principle that the jury must gauge the necessity of protective force from the point of view of a reasonable person under the instant circumstances,"[1] and thus was not reversible error as the majority asserts. Majority Opinion at 2 (some emphasis added, some emphasis omitted).

Hawai'i Revised Statutes (HRS) § 703-304(3) (1993), states the general principle that one need not retreat before employing force for self protection -- subject to the qualifications under HRS § 703-304 (1993) relevant here -- that with respect to the use of deadly force, the person (a) provoked force against him or herself, or (b) knows that he or she may retreat with complete safety.

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[1] With all due respect, the majority errs because plainly, action based on the reasonable belief rule and the retreat rule are not interwoven. As the commentary to Hawai'i Revised Statutes (HRS) § 703-304 (1993) indicates, the reasonable belief that the use of immediate protective force is justified is superceded if retreat with complete safety is possible:

> [HRS § 703-304(1)] requires a belief by the actor that the use of protective force is actually necessary, and that unlawful force (defined in § 703-300) is to be used by the assailant. . . .
>
> . . . [But t]he use of deadly force is also denied when the actor can avoid using it with complete safety by retreating . . . .

To imply to the jury that the rules are one and the same is to impair two separate theories of defense prescribed by HRS § 703-304.

HRS § 703-304(3) states as follows:

> Except as otherwise provided in subsections (4) and (5) of this section, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used without retreating, surrendering possession, doing any other act which he has no legal duty to do, or abstaining from any lawful action.

(Emphasis added.) According to the Commentary to HRS § 703-304(3), this subsection "states the generally applicable rule that the actor need not retreat or take any other evasive action before estimating the necessity for the use of force in self-protection."

HRS § 703-304(5)(a)-(b), which pertains to use of deadly force, states as follows:

> (5) The use of deadly force is not justifiable under this section if:
> (a) The actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating . . . .

(Emphases added.)

Defendant-Appellant Rudy Vinigas (Defendant) recounts his version of the incident as follows:

> Mr. McMurtrie exited the car and started running ahead of [Defendant] to cut [Defendant] off across on the other side of the street. Mr. McMurtrie then took out a weapon that [Defendant] was familiar with, as Mr. McMurtrie had showed it to [Defendant] before - a long black leather cord with a blade attached to the end of it. Mr. McMurtrie said, "You wanna f--- with me?" and began swinging the leather cord and advancing towards [Defendant]. [Defendant] testified that he did not run at that point or turn his back, because he was well aware that the cord could wrap around his neck or head from behind. [Defendant] pulled out a knife from his pocket and, as Mr. McMurtrie rushed him with the cord whipping, [Defendant] ducked down and turned his face, covering it with his left hand, in an attempt to deflect the cord. At the same time, [Defendant] jabbed forward with his right hand which held the knife. [Defendant] felt the leather cord whip around his hand. The cord unwound, and Mr. McMurtrie

> began to swing the weapon again towards [Defendant] who ducked and jabbed forward again with the knife.

(Emphases added.) That version implicates the question of whether Defendant was justified in using deadly force and not retreating.

Instructing the jury only as to the exception in HRS § 703-304(5)(b) without also enunciating the general rule in HRS § 703-304(3) to which the exception applied, made the instructions misleading.[2] In pertinent part, HRS § 703-304(5)(b) indicates that if the Defendant knew he could retreat with complete safety, he was not legally permitted to employ deadly force, even if otherwise justified in doing so. The court so instructed the jury. However, the court failed to inform the jury that under HRS § 703-304(3), if the exception does not apply, then Defendant was privileged to stand his ground and employ deadly force in self defense. It would be poor policy and poor law to rely on the jury to draw the appropriate negative inference that in the absence of exceptions to the use of deadly force in self-defense, such as in HRS § 703-304(3)(a) or (b),

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[2] We are not concerned with Defendant's proposed instruction, but whether the trial court met its responsibility of properly instructing the jury when it omitted from its instructions a statement of the acknowledged rule. Even Plaintiff-Appellee State of Hawai'i states as much in its brief:

> [T]he remaining matter is whether it was error for the trial court to refuse the defense's proposed instruction, which included the clause from HRS § 703-304(3), stating the generally applicable rule that the actor need not retreat or take any other evasive action before estimating the necessity for the use of protective force.

(Some emphases added and some omitted.) See State v. Haanio, 94 Hawai'i 405, 415, 16 P.3d 246, 256 (2001) (holding that "in our judicial system, the trial courts, not the parties, have the duty and ultimate responsibility to insure that juries are properly instructed on issues of criminal liability").

there was otherwise no duty to retreat. When the appropriate directive can be recited in a positive sense, as expressly contained in the statute itself, that is how it should be set forth in the instruction. What the statute does not leave to negative inference should not be omitted, but stated in the instruction to insure that the jury is accurately apprised of the law.

Therefore, I believe that, when read and considered as a whole, the instructions given were prejudicially insufficient, erroneous, inconsistent or misleading, as Defendant maintains. See State v. Kinnane, 79 Hawai'i 46, 49, 897 P.2d 973, 976 (1995). Defendant correctly maintains that "[e]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial." State v. Cabrera, 90 Hawai'i 359, 365, 978 P.2d 797, 803 (1999).

Hence, I would remand for a new trial. I do not reach the question raised by Defendant with respect to whether the court should have given lesser included instructions, see State v. Haanio, 94 Hawai'i 405, 415, 16 P.3d 246, 256 (2001) (holding that "trial courts are duty bound to instruct juries 'sua sponte . . . regarding lesser included offenses,' having a rational basis in the evidence" (internal citation omitted)), inasmuch as the evidence offered at a retrial cannot be presaged.