

DISSENTING OPINION BY DUFFY, J.,
WITH WHOM ACOBA, J. JOINS

I respectfully dissent. This case presents an issue of first impression in Hawai'i: whether the prosecution is entitled to a jury instruction on defense-of-others to justify the complainant's use of force as "lawful" to disprove the "unlawful force" element of self-defense set forth in Hawai'i Revised Statutes (HRS) § 703-304 (Supp. 2006).

In my view, the Intermediate Court of Appeals (ICA) erred when it affirmed the circuit court's giving of such an instruction for the following reasons: (1) the defense-of-others instruction allowed the jury to substitute the complainant's subjective belief for the defendant's subjective belief when evaluating the defendant's defense of self-defense, contrary to the statutory language of HRS § 703-304 and our case law set forth in State v. Augustin, 101 Hawai'i 127, 63 P.3d 1097 (2002) and State v. Pemberton, 71 Haw. 466, 796 P.2d 80 (1990); (2) the defense-of-others instruction given to justify the complainant's use of force as "lawful" wrongfully suggested to the jury that a finding of "lawful" force used by the complainant negated the defendant's claim of self-defense, a proposition expressly argued by the prosecution in both its closing and rebuttal arguments to the jury; (3) in oral argument before this court, the prosecution admitted that its argument in closing and rebuttal arguments that a finding of "lawful" force used by the complainant negated the

defendant's claim of self-defense was legally incorrect; and (4) "unlawful force" is defined in HRS § 703-300 and that definition was given to the jury as the last paragraph of the jury instruction on self-defense, thus rendering the subsequent "defense-of-others" instruction pertaining to the conduct of the complaining witness unnecessary, confusing to the jury, and enabling the prosecution to make the legally incorrect argument that a jury finding of "lawful" force used by the complainant negated the defendant's claim of self-defense.

In summary, the "defense-of-others" jury instruction is a justification defense applicable to a defendant who asserts the defense, not to the conduct of a complaining witness. Because the "defense-of-others" jury instruction was wrongfully given in this case, I would vacate the December 13, 2007 judgment of the ICA that affirmed the circuit court's May 10, 2006 amended judgment convicting Petitioner of assault in the second degree, and remand for a new trial.

Because the judgment of the ICA was issued pursuant to its Summary Disposition Order (SDO), it must be noted that it has no precedential value. Moreover, pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 35(c)(1) (2008), because the SDO was issued prior to July 1, 2008, it can be cited in only the limited circumstances when it "(i) establishes the law of the pending case, or (ii) has res judicata or collateral estoppel

effect, or (iii) in a criminal action or proceeding, involves the same respondent." Moreover, because the SDO was issued before July 1, 2008, it cannot be accorded persuasive value.¹



Kama E. Dubois Jr.

¹ After July 1, 2008,

Memorandum opinions and unpublished dispositional orders are not precedent, but may be cited for persuasive value; provided that a memorandum opinion or unpublished dispositional order that establishes the law of the pending case or that has res judicata or collateral estoppel effect shall be honored. . . .

HRAP Rule 35(c) (1) (emphasis added).