DISSENTING OPINION BY FOLEY, J.

I respectfully dissent.

Loesch argues that the district court erred by denying his motion to dismiss the charge on the basis that it failed to set forth the requisite state of mind, an essential element of the offense, and the court consequently lacked jurisdiction. He maintains that "[w]hile state of mind is not strictly an element of the offense, [HRS] Section 701-114(1) requires proof beyond a reasonable doubt as to . . . the state of mind required to establish each element of the offense." He argues that because the charge did not include the requisite mens rea, he was not given fair notice. He cites to State v. Wheeler, 121 Hawaiʻi 383, 219 P.3d 1170 (2009), to support this point.

The statute at issue in this case is Hawaii Revised Statutes (HRS) § 291C-13 (2007), which provides in relevant part:

> **§291C-13 Accidents involving damage to vehicle or property.**
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> The driver of any vehicle involved in an accident resulting only in damage to a vehicle . . . that is driven . . . by any person shall immediately stop such vehicle at the scene of the accident or as close thereto as possible, but shall forthwith return to, and in every event shall remain at, the scene of the accident until the driver has fulfilled the requirements of section 291C-14.

HRS § 291C-13 sets forth no mens rea. HRS § 702-204 (1993) provides in relevant part, "When the state of mind required to establish an element of an offense is not specified by the law, that element is established if, with respect thereto, a person acts intentionally, knowingly, or recklessly." To convict Loesch of violating HRS § 291C-13, leaving the scene of an accident, the State had to prove beyond a reasonable doubt that Loesch committed each essential element of the offense intentionally, knowingly or recklessly. HRS § 701-114 (1993).

In Wheeler, Wheeler was charged with operating a vehicle under the influence of an intoxicant (OVUII), in violation of HRS § 291E-61(a)(1) (2007). Wheeler, 121 Hawaiʻi at 385, 219 2.3d at 1172. A person who violated HRS § 291E-61(a)(1)

had to either drive or assume actual physical control of a vehicle under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty. Id. at 391, 219 P.3d at 1178. HRS § 291E-61(a)(1) did not define "operate"; but "HRS § 291E-1 provided that 'to operate' meant 'to drive or assume actual physical control of vehicle upon a public way, street, road, or highway[.]'" Id.

In Wheeler, the Hawaiʻi Supreme Court held that "[a]lthough the oral charge here tracked the language of HRS § 291E-61, the failure of the charge to allege that Wheeler was driving his vehicle upon a public way, street, road, or highway at the time of the offense rendered the charge deficient." Id. at 393, 219 P.3d at 1180. The supreme court stated that "operate" had been defined in HRS § 291E-61 in a manner that did not comport with its commonly understood definition. Id. at 394, 219 P.3d at 1181. Compared to the dictionary definition, the statutory definition of "operate" contained a "geographical limit" that was "neither unmistakable nor readily comprehensible to persons of common understanding" and, thus, did not provide fair notice. Id. at 394-95, 219 P.3d at 1181-82.

In State v. Nesmith, 127 Hawaiʻi 48, 50, 276 P.3d 617, 619 (2012), Nesmith and Yamamoto (collectively, Defendants) were each charged with OVUII under HRS § 291E-61(a)(1) and/or (a)(3) (2007). HRS § 291E-61(a)(1) did not set forth a state of mind, and the charges did not provide any. Nesmith, at 53, 276 P.3d at 621. Prior to trial in each case, Defendants moved to dismiss their respective charges based on the argument that the State failed to allege the requisite mens rea, which was an essential element of the offense. Id. at 51, 276 P.3d at 620. The district court denied the motions to dismiss. Id.

The Hawaiʻi Supreme Court held the district court erred in denying the motions to dismiss. Id. at 61, 276 P.3d at 630. The supreme court stated that "a charge alleging a violation of

HRS § 291E-61(a)(1) that omits the statutorily incorporated culpable states of mind from HRS § 702-204 is not readily comprehensible to persons of common understanding" and, therefore, was "deficient for failing to provide fair notice to the accused." Id. at 54-55, 276 P.3d at 623-24. The supreme court stated that:

> "intentional, knowing, or reckless" state of mind requirements, though not an "element of an offense" under HRS § 702-205, needed to be charged in an HRS § 291E-61(a)(1) Complaint to alert the defendants of precisely what they needed to defend against to avoid a conviction. A charge omitting the mens rea requirements would not alert the Petitioners that negligently operating a vehicle under the influence of an intoxicant in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty, for instance, is not an offense recognized under HRS § 291E-61(a)(1). In short, mens rea must be alleged in an HRS § 291E-61(a)(1) charge.

Id. at 56, 276 P.3d at 625.

In State v. Mita, 124 Hawaiʻi 385, 245 P.3d 458 (2010), Mita was charged and convicted of violating Revise Ordinances of Honolulu (ROH) § 7-2.3 which provides:

> **Sec. 7-2.3 Animal nuisance--Prohibited.**
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> It is unlawful to be the owner of an animal, farm animal or poultry engaged in animal nuisance as defined in Section 7-2.2; provided, however, that it shall not be deemed to be animal nuisance for purposes of this article if, at the time the animal, farm animal or poultry is making any noise, biting or stinging, a person is trespassing or threatening trespass upon private property in or upon which the animal, farm animal or poultry is situated, or for any other legitimate cause which teased or provoked said animal, farm animal or poultry.

ROH § 7-2.2 defines "animal nuisance" as follows:

> **Sec. 7-2.2 Definitions.**
> . . . .
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> "Animal nuisance," for the purposes of this section, shall include but not be limited to any animal, farm animal or poultry which:
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> (a) Makes noise continuously and/or incessantly for a period of 10 minutes or intermittently for one-half hour or more to the disturbance of any person at any time of day or night and regardless of whether the animal, farm animal or

> poultry is physically situated in or upon private property;
>
> (b) Barks, whines, howls, crows, cries or makes any other unreasonable noise as described in Section 7-2.4(c)[1] of this article; or
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> (c) Notwithstanding the provisions of HRS Section 142-75 or any other applicable law, bites or stings a person.

Mita was issued an "Animal License & Regulation – Complaint & Summons" (citation). The citation, signed "Wanda Mita[,]" stated that Mita "[d]id on/or about this 3[rd] day of June Yr 08 at about 1940-2050 did own, harbour or keep (animal description): Boxers Name Roxy/Obie Color Brown . . . at (location): [Mita's residence address] and did commit the offense of: . . . animal nuisance-Sec.: 7–2.3 Barking Dog [.]" Additionally, the citation had a section entitled "Officer's Report" which stated that "Mita was issued a Barking 3rd [sic] citation. She was already issued a previous Barking 2 warning citation." Mita, 124 Hawaiʻi at 386, 245 P.3d at 459.

At the start of trial, the Deputy Prosecuting Attorney read the following charge to Mita: "On or about June 3rd, 2008, in the city and county of Honolulu, state of Hawaii, you as the owner of an animal, farm animal, or poultry engaged in animal nuisance as defined in section 7–2.2, thereby violating section 7–2.3 of the Revised Ordinances of Honolulu." Id. at 386, 245 P.3d at 459.

The supreme court found the charge against Mita "distinguishable from *Wheeler* because unlike the term 'operate,'

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[1] ROH § 7-2.4(c) (1990 & Supp. No. 6, 2-05) provides:

> **Sec. 7.2-4 General Requirements.**
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> (c) Noise is unreasonable within the meaning of this article if considering the nature and the circumstances surrounding the animal nuisance, including the nature of the location and the time of the day or night, it interferes with reasonable individual or group activities such as, but not limited to, communication, work, rest, recreation or sleep; or the failure to heed the admonition of a police officer or a special officer of the animal control contractor that the noise is unreasonable and should be stopped or reduced.

the definition of the term 'animal nuisance' does not create any additional attendant circumstances or other essential elements of the offense of animal nuisance." Id. at 391, 245 P.3d at 464. The supreme court also distinguished the charge in Mita from Wheeler in that the term "animal nuisance" is "consistent with its commonly-understood meaning and provides a defendant with notice of what is being charged." Id. at 392, 245 P.3d at 465.

I find the charge in this case more akin to the charge in Mita, than the charges in Wheeler and Nesmith. The charge in this case was consistent with the commonly understood meaning of leaving the scene of an accident and provided Loesch with notice of what was being charged. Unlike Nesmith, the intentional, knowing, or reckless state of mind requirement did not need to be charged to alert Loesch what he needed to defend against to avoid conviction. Loesch's defense, if any, was clear: he was not or did not know he was in an accident resulting in damage to another vehicle; he was not the driver of that vehicle; or he did or could not immediately stop his vehicle at the scene of the accident or as close thereto as possible, return to, and remain at the scene of the accident until he fulfilled the requirements of HRS § 291C-14.

Loesch's defense was in fact that he did not know he had been in an accident resulting in damage to another vehicle. He testified he thought he ran over a water bottle. The notice of the charge to Loesch was certainly as clear, if not more so, as the notice of the charge to Mita.