CONCURRING OPINION BY NAKAMURA, C.J.

I concur in the result reached by the majority, but write separately to explain my analysis.

I.

In my concurring opinion in State v. Codiamat, I stated my view that existing Hawai'i Supreme Court precedent "-- which concludes that disjunctive pleading of alternative ways to commit an offense renders the charge defective -- is wrong, conflicts with the rationale cited to support it, and is illogical." State v. Codiamat, No. CAAP-11-0000540, 2012 WL 3113898, *3 (Hawai'i App. Jul. 31, 2012) (Nakamura, C.J., concurring), cert. granted, No. SCWC-11-0000540, 2012 WL 5231822 (Hawai'i Oct. 22, 2012). I therefore recommended that the existing precedent which precludes disjunctive pleading of alternative means be "re-examined and overturned." Id.

In this case, Plaintiff-Appellee State of Hawai'i (State) charged Defendant-Appellant Alexander H. Li (Li) with operating a vehicle under the influence of an intoxicant (OVUII). The OVUII charge, which repeatedly uses the disjunctive term "or," states as follows:

> On or about the 5th day of February, 2012, in the City and County of Honolulu, State of Hawaii, ALEXANDER H. LI, did intentionally, knowingly, or recklessly operate or assume actual physical control of a vehicle upon a public way, street, road, or highway while under the influence of alcohol in an amount sufficient to impair his normal mental faculties or ability to care for himself and guard against casualty; and/or did operate or assume actual physical control of a vehicle upon a public way, street, road, or highway with .08 or more grams of alcohol per two hundred ten liters of breath, thereby committing the offense of Operating a Vehicle Under the Influence of an Intoxicant, in violation of Section 291E-61(a)(1) and/or (a)(3) of the Hawaii Revised Statutes. ALEXANDER H. LI is subject to sentencing as a first offender in accordance with Section 291E-61(b)(1) of the Hawaii Revised Statutes.

(Emphasis regarding "or" added.) This case reinforces my belief that the precedent prohibiting disjunctive pleading should be reconsidered.

Prior to trial, Li moved to dismiss both the HRS § 291E-61(a)(1) and HRS § 291E-61(a)(3) prongs of the OVUII charge because the charge was "completely pled in the disjunctive." The District Court denied the motion.

The OVUII charge in this case illustrates the unsoundness of a rule prohibiting disjunctive pleading of alternative means of committing an offense. If disjunctive pleading of alternative means is prohibited on the theory that it leaves "the defendant uncertain as to which of the acts charged was being relied upon as the basis for the accusation against him[,]" State v. Jendrush, 58 Haw. 279, 283 n.4, 567 P.2d 1242, 1245 n.4 (1977), that theory would also logically extend to other aspects of a charge, such as alternative states of mind by which a crime can be committed. If charging alternative means disjunctively, when those alternatively means can be proved disjunctively, fails to give a defendant fair notice of the charge, then it would appear that charging alternative mental states disjunctively, when the mental states can be proved disjunctively, would also fail to give a defendant fair notice.

However, based on my review of prior Hawai'i cases, it appears that as in this case, alternative states of mind -- intentionally, knowingly, or recklessly -- have routinely been charged in the disjunctive, and I am not aware of any Hawai'i case that has held that such disjunctive pleading is improper. I believe the reason is clear. The alternative mental states can be proved in the disjunctive. For example, the requisite mental state for an HRS § 291E-61(a)(1) violation can be proved by showing that the defendant acted intentionally or knowingly or recklessly. The State is not required to prove that the defendant acted with all three mental states. Therefore, charging the mental states disjunctively, in a way that they actually can be proved, gives the defendant fair notice, and indeed better notice than charging the mental states conjunctively. See Codiamat, 2012 WL 3113898, at *4 (Nakamura, C.J., concurring).

This same logic applies to disjunctive pleading of alternative means. Disjunctive pleading of alternative means gives the defendant more effective notice of what the defendant must be prepared to meet. Conjunctive pleading provides inferior notice because it erroneously suggests that the State must prove both alternative means, when proof of either means will suffice. See id at *4-5.

II.

Nevertheless, until the existing precedent which prohibits disjunctive pleading of alternative means is overruled, we must address arguments based on this precedent. On appeal, Li only challenges the disjunctive pleading in the HRS § 291E-61(a)(3) prong of the charge because he was found guilty of violating HRS § 291E-61(a)(3), but not guilty of violating HRS § 291E-61(a)(1).

The OVUII charge for violating HRS § 291E-61(a)(3) used disjunctive pleading in three instances in alleging that Li: "[1] did operate **or** assume physical control of a vehicle [2] upon a public way, street, road, **or** highway [3] with .08 **or** more grams of alcohol per two hundred ten liters of breath . . . ." (Emphasis added.) There is a recognized exception to the existing precedent prohibiting disjunctive charging of alternative means where the conduct proscribed by the alternative means is factually synonymous. See State v. Lemalu, 72 Haw. 130, 134, 809 P.2d 442, 444 (1991), overruled on other grounds by State v. Spearman, 129 Hawai'i 146, 296 P.3d 359 (2013). Li concedes that the terms "public way, street, road, or highway" as used in the applicable statute are synonymous and therefore does not challenge the disjunctive pleading of those terms. Li does, however, challenge the disjunctive pleading of (1) "operate **or** assume actual physical control of a vehicle" and (2) ".08 **or** more grams of alcohol per two hundred ten liters of breath."

I agree with the majority that for purposes of providing fair notice, the terms "operate [a vehicle]" and "assume actual physical control of a vehicle" are synonymous.

Under the common understanding of these terms, a person generally cannot operate a vehicle without also assuming actual physical control of the vehicle. Accordingly, the disjunctive pleading of "operate [a vehicle]" and "assume actual physical control of a vehicle" falls within the exception to the prohibition against disjunctive pleading for proscribed conduct that is synonymous.

I disagree with the majority that Li did not preserve his claim that the phrase ".08 **or** more grams of alcohol per two hundred ten liters of breath" was improperly pled in the disjunctive. Read in context, I believe that Li's motion to dismiss the charge because it was "completely pled in the disjunctive" was sufficient to preserve the issue for appeal. However, I conclude that Li's argument regarding ".08 or more grams" is without merit. The phrase ".08 or more grams" does not refer to alternative means of committing the offense, but rather describes a unitary standard for measuring whether a person's alcohol breath content is excessive. In other words, any person whose breath has at least .08 grams of alcohol per two hundred ten liters of breath has exceeded the statutory limit. Because the "or" in ".08 or more grams" is not used disjunctively and does not signify alternative means of committing the offense, the phrase ".08 or more grams" does not fall within the prohibition against disjunctive pleading.

With respect to the State's Exhibits 2 and 5, which showed that the intoxilyzer had been properly calibrated and tested for accuracy, I agree that the admission of these exhibits did not violate Li's rights under the confrontation clause. See State v. Marshall, 114 Hawai'i 396, 400-02, 163 P.3d 199, 203-05 (App. 2007).

III.

For these reasons, I agree with the majority that the Judgment of the District Court should be affirmed.

Craig H. Nakamura